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Chapter 1: Introduction

A. OVERVIEW OF THE WORK AND PLACE OF ADMINISTRATIVE AGENCIES IN OUR SYSTEM OF GOVERNMENT

Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.

Congress could have done three things to fix abuses in the railroad system:

1. Directly regulated rates.
2. Create a subordinate tribunal to regulate rates.
3. Do nothing other than say rates have to be reasonable.

Issue: Did Congress give the ICC the power to fix rates?

Rule: The grant of a “vast and comprehensive power” should never be implied.

Held: The ICC does not have the power to fix rates.

Rat: Even though the ICC charter requires them to ensure charges are fair and reasonable, which would kind of imply they have the power to determine what fair and reasonable means, the court doesn’t buy this argument. The court makes a distinction between legislative power (the power to determine WHAT is fair) and adjudicative power (the power to determine if a particular rate is fair). Congress only gave the ICC adjudicative power.

Pennsylvania v. West Virginia (Brandeis dissent)

The Court should decline to exercise jurisdiction over cases where there are complex matters requiring both expertise and elaborate monitoring.

The court can’t lend it’s imprimatur to West Virginia corporations discriminating against WV consumers to benefit OH and PA consumers. The Court can’t go any further than compel WV to share production equitably with other states. To do so, you’d have to figure out what all six states produce and need. To do so:

- (a) Would need to ascertain potential and actual production in each state.
- (b) Would need to determine actual and potential demand in each state.
- (c) Would have to constantly monitor, because factors would not remain constant.
- (d) The decisions would require a panel of experts.

Since the court would be powerless to frame a decree and provide a mechanism for enforcement, the court should decline jurisdiction.

National Broadcasting Co. v. United States

Facts: The FCC established the Chain Broadcasting Regulations governing the licensing and content of chain broadcasting stations. The FCC’s organic statute, the Communications Act of 1934, provided the authority to maintain control of the U.S. over all the channels of interstate and foreign radio transmission, and provide for the use of those channels by license. The criterion governing the exercise of this power was public interest, convenience, or necessity.

Issue: Did the FCC have the authority to regulate the content of broadcasts, or was it limited to technical aspects?

Rule: When Congress grants an agency the power to maintain and regulate an area guided by the public interest, convenience, or necessity, that regulation can include areas not explicit in the organic statute, as long as that regulation is in the scope and purpose of the organic statute.

Held: The FCC isn’t just limited to technical requirements, they can regulate content under the touchstone of “public interest, convenience, or necessity”.

Why: Although NBC said the guidelines were unconstitutionally vague, the Court held that they were as concrete as circumstances allowed, particularly for a dynamic and changing field.

While Congress didn’t give a comprehensive mandate, it would have frustrated Congressional purpose to simply make a laundry list of specific powers in this type of field.

When creating a new government agency, it’s always a useful question to ask if the market would provide as good (or better) solutions.

Regulation is effective when there are externality problems: radio station bleed, pollution, etc.

To protect the commons, must rely on “mutual coercion mutually agreed upon.”

United States v. Southwestern Cable Co.

Facts: FCC established regulations over CATV service (CATV is a large antenna serving a community to bring signals in from distant stations). Southwestern Cable argued that the Communications Act didn’t give the FCC regulatory power over CATV.

Issue:	Does the FCC asking Congress for specific legislation giving them CATV regulatory power show they didn't have this power?
Rule:	Administrative agencies uncertain about the scope of their authority should ask Congress for clarification.
Held:	Just asking Congress for specific authority and then being denied doesn't mean the authority didn't already exist.
Issue:	Does § 152(a) ("provisions of the Act shall apply to all interstate and foreign communication by wire or radio") independently confer regulatory authority or prescribe forms of communication to which other provisions may apply?
Rule:	§ 152(a) shows that Congress meant the FCC's regulatory powers to be broad.
Why:	The grant of power was broad because Congress knew that to maintain control over a dynamic field like radio transmission it would have to be broad. The field is "new and dynamic" and the Commission was given a "comprehensive mandate" with "expansive powers."
Rule:	Where an agency reasonably finds that the successful performance of its duties requires regulation, the court will not overrule that decision without compelling evidence that Congress did not intend to grant the power to regulate in that way.

FDA v. Brown & Williamson Tobacco Corp.

Facts:	The FDA asserted authority to regulate tobacco in 1996. Previously, the FDA said it had no authority over tobacco at all. The FDA bases this on determining that tobacco is a drug within the meaning of 21 U.S.C. § 301 <i>et seq.</i>
Issue:	Does the FDA have the power to determine that it has the authority to regulate a large segment of the economy over which it has previously disavowed authority?
Rule:	Where Congress has spoken directly as to agency regulatory power, the Court must defer to Congress.
Rule:	An administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.
Held:	Congress spoke directly on whether the FDA can regulate tobacco: they've created a distinct regulatory scheme. Creation of that scheme precludes another agency (the FDA in this case) from exercising power by interpreting their organic statute.

B. ADJUDICATION AND RULEMAKING

There's two types of agency action:

1. Rulemaking
2. Adjudication

The line between the two can blur.

Londoner v. City and County of Denver

Facts:	The City of Denver assessed a tax under their charter. Under the Denver city charter, the city may assess against property fronting a road to pay for paving the road. In order to do that, the majority of the frontage owners must petition the board of public works. To order the paving, the board must adopt specifications, mark out the district of assessment, make a map and estimate the cost with the approximate amount each landowner is to be assessed. Once this is done, the board transmits a resolution ordering the work to be done to the city council, who issues it as an ordinance. Once the ordinance is issued, the cost is assessed to the landowners after due notice and opportunity for hearing. In the instant case, some landowners allege that no petition was filed. However, the city council determined that a proper petition was filed, and the CO SC determined that was conclusive.
Issue:	Does a charter provision authorizing the city council to find a proper petition was filed without notice to the landowners deny them due process of law?
Rule:	All the preliminary work towards an assessment can be done without hearing so long as a hearing on the assessment itself is provided
Held:	No denial of due process there.
Issue:	Does the statute itself comport with due process by providing for a lien on adjoining property?
Held:	Since the statute, as constructed by the CO SC, requires the city council sitting as a board of equalization to hear any and all complaints or testimony regarding the assessment, there is no constitutional defect.
Issue:	Was the assessment made without fair notice and opportunity for hearing?
Rule:	Where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon who it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.
Held:	Proper notice wasn't given.
Why?	The city council sat in a special session to pass the ordinance. No notice of the special session was given, only a thirty day notice that a new assessment was about to be passed. The landowners never got a chance to bring their objections.

Bi-metallic Investment Co. v. State Board of Equalization

Facts:	The Colorado State Equalization Board and the Colorado Tax Commission ordered that all real estate in Denver would be assessed at a 40% higher rate. The State Equalization Board gave Bi-Metallic no opportunity for a hearing before making its ruling.
Issue:	Do all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned?
Rule:	Where a rule of conduct applies to more than a few people it is impracticable that every one shall have a direct voice in its adoption. Their rights are protected in the only way that they can be in a complex society by their power over those who make the rule.
Held:	Bi-Metallic had no right to a hearing.
Why?	You can't just let government grind to a halt when a legislative body does something. If you say that it's unjust because one particular person was already at the full assessment, then they should have protested because their assessment was out of line with general assessment in the district.

The last two cases are examples of quasi-judicial and quasi-legislative action, respectively.

Davis:

Legislative vs. Adjudicative facts.

Adjudicative facts: Who, what, when, where, why?

Legislative facts: General facts which help a tribunal decide questions of law and policy and discretion.

This doesn't boil the right to a hearing down to a numbers game.

Chapter 2: Adjudication

A. CONSTITUTIONAL RIGHT TO A HEARING.

In order to demand due process of law, you must be able to claim a liberty or property interest.

This is more than just a unilateral expectation, but a legitimate claim of entitlement.

Two questions to answer in PDP cases:

1. Is process due?
2. How much process is due?

PDP is always a floor, but not a ceiling. The APA invariably provide more procedure than the 5th Amendment would provide.

Goldberg v. Kelley

Facts:	NY Dept of Social Services has certain regulations for terminating public assistance. First, a caseworker with doubts about eligibility discusses with the recipient. The caseworker then submits his doubts to his supervisor. If the supervisor agrees, the caseworker sends a letter with reasons for termination. The recipient has 7 days to request a superior officer to review, and can support that request with written statements of why the recipient shouldn't be terminated. If the reviewing official concurs, aid is immediately terminated. The procedures include no personal appearance by the recipient before the reviewing officer. There is no presentation of evidence. There is no confrontation or re-examination of adverse witnesses. However, the recipient can get a post-termination "fair hearing."
Issue:	Does a State that terminates public assistance payments to a particular recipient without a pre-deprivation evidentiary hearing deny procedural due process under the Fourteenth Amendment?
Rule:	Constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation or to denial of a tax exemption or to discharge from public employment. The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.
Held:	Some benefits may be terminated administratively, but not welfare.
Why?	Welfare provides the means to obtain essential food, clothing, housing, and medical care. Termination of aid deprives the recipient of the means to live. It also adversely affects the recipient's ability to seek redress. Important government interests are also advanced by pre-termination hearings: welfare brings opportunities for betterment within the reach of the poor. Although the public fisc is harmed by pre-termination process, this can be minimized by holding them in a prompt manner.
Issue:	What form does a pre-termination hearing need to take?
Rule:	The fundamental requisite of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner.
Held:	Although it doesn't need to be a judicial or quasi-judicial hearing, with a complete record and opinion, New York's procedure is deficient.
Why?	The "fair hearing" requirement promises a full administrative review. However, for the pre-termination hearing, there needs to be some oral presentation of evidence and confrontation of witnesses. Written submission is unrealistic: many welfare recipients are too uneducated to write. Also doesn't allow the recipient to mold his arguments to what the decisionmaker is finding important. Submission to the caseworker to do it isn't feasible: the caseworker is the one who got the facts about ineligibility. Where government action seriously injures an individual and rests on fact findings, the evidence must be disclosed so the individual has the opportunity to show the evidence untrue.

Board of Regents v. Roth

Facts:	Oshkosk State hired Roth as an assistant professor. His contract specified his employment would run from 9/1-6/30. At then end of that term, OSU told him to get lost. Roth had no tenure rights under Wisconsin law—WI says you only get that after four years. No statutory or administrative standards for eligibility for rehire. The decision to rehire (under state law) is clearly within the unfettered discretion of the university officials.
Issue:	Did the University's decision to not rehire Roth deprive him of a property or liberty interest under the Due Process Clause of the 14th Amendment?
Issue:	Did the University's decision deprive Roth of a liberty interest?
Rule:	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. Some sort of stigma or disability that prevents him from seeking employment elsewhere can also implicate liberty interests.
Held:	None of that here.

Why? He can find another job. All they did was just not rehire him, not cast aspersions on him.
 Issue: Did the University's decision deprive Roth of a property interest?
 Rule: To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
 Held: Roth had no legitimate claim of entitlement.
 Why? Property isn't created by the Constitution, it's a creature of state law. Here, the state defined the contract as year to year, giving Roth no vested property interest in re-appointment.

Perry v. Sindermann

Facts: S was a teacher in the Texas state college system from 1959-1969. Taught at UT for two years, four years at SAJC, started at Odessa JC in 1965. In 1969, S was elected President of the TJC Teachers Association and took some unpopular (with the school) positions. His contract was not renewed at the end of the 1968/9 school year. The Regents gave no official reason for the nonrenewal, though they released a statement saying his positions as president were insubordinate. S received no hearing about the termination.
 Issue1: Does a lack of a contractual tenure right to re-employment defeat a claim that nonrenewal of a contract violates the First and Fourteenth Amendments?
 Rule: A teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may be an impermissible basis for termination of employment.
 Held: The DC's grant of summary judgment on the basis of lack of tenure was improper.
 Issue2: Does S have a procedural due process property interest in his teaching job?
 Rule: The constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract unless he can show the decision not to rehire him somehow deprived him of an interest in liberty or that he had a property interest in continued employment, despite the lack of tenure or a formal contract. **A person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at his hearing.**
 Held: S DOES have a property interest and was entitled to a hearing.
 Why? The teacher's guide at Odessa JC said that teachers should feel like they have permanent tenure as long as his teaching is satisfactory and has a cooperative attitude. Also, guidelines from the Coordinating Board of the Texas College and University System provide that someone with 7 years experience has some sort of tenure. You can use extrinsic evidence to show that there were agreements implied by the promisor's words and conduct. There also may be a common law of a particular university that some employees have tenure.

NOTES

Brotherton v. Cleveland.

Although the existence of a property interest is state law, whether it rises to the level of a protected claim is a matter of federal law. This determination is a matter of substance, not labels.

American Manufacturers Mutual Insurance Co. v. Sullivan.

Procedural due process is not extended to applicants for benefits, just recipients.

Wisconsin v. Constantineau

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.

Paul v. Davis

Facts: Paul and McDaniel are Chiefs of Police in Louisville and Jefferson County. They distributed several flyers to local merchants over the Christmas season to alert them to potential shoplifters. Davis was one of the potential shoplifters so identified. LPD arrested Davis on 6/14/71 for shoplifting. However, the charge was filed away with leave to reinstate: the charge was still outstanding but wasn't being prosecuted. Shortly after P and M distributed the flyer, the LPD court dismissed the charge.
 D's supervisor found out about this and got upset. Heard D's side of things and warned him if it happened again he'd be fired.
 Issue1: Does a claim by a law enforcement official that a person is a shoplifter without a trial deprive that person of a due process right?
 Rule: While such a claim may be defamatory under state law, it is not a deprivation of due process.
 Held: No due process claim.
 Why? Otherwise, law enforcement couldn't even announce that someone was a suspect.
 Issuea: Does the due process clause and § 1983 make state law tort claims actionable against government employees?
 Rule: Violation of local law does not necessarily mean that federal rights have been invaded.
 Held: As above, a defamatory statement isn't an invasion of federal rights.

Why?	The 14th Amendment is not a font of federal tort law. Such a reading would conflict with the design of the Constitution.
Issue:	Is the infliction by a state official of a stigma to one's reputation different in kind from infliction by a state official of harm to other interests protected by state law?
Rule:	Reputation alone isn't liberty or property when uncoupled from some tangible interest such as employment.
Held:	No due process claim.
Why?	The language of the 14th Amendment doesn't single out reputation for special protection. The Court differentiates the line of cases where there has been a due process violation by showing that each involved a government employee branded disloyal and losing a job. The Court then distinguishes <i>Constantineau</i> by showing that the government practice of "posting" deprived the plaintiff of the right to buy alcohol. In each of the cases where a property or liberty interest was recognized, there was a right or status which the government, by their actions, extinguished.

National Council of Resistance of Iran v. Dep't of State

D.C. Circuit holds that labeling a group a "foreign terrorist organization" without a hearing deprives them of due process. *Inter alia*, the designation deprives the group (under OFACS regs) of right to hold bank accounts or receive material support or resources from those under the jurisdiction of the United States.

Owen v. City of Independence

A city council released an investigatory report on the city police department and told the city manager to take action against people the report named as involved in illegal, wrongful, or inefficient activities. The next day, the city manager fired the police chief, an at-will employee, without stating reasons. The Court held that the release of the (allegedly) false statement impugning the police chief's honesty and integrity coupled with the immediate termination without an opportunity for him to clear his name deprived the police chief of a liberty interest.

B. HOW MUCH PROCESS IS DUE?

Mathews v. Eldridge

Facts:	SSDIB provides cash benefits when workers are permanently disabled. Eldridge received a benefit award in 6/68. 3/72, Eldridge received and completed a questionnaire, indicating that his condition had not changed and giving doctor's names who had treated him. SSA got reports from the physicians and determined Eldridge's disability was over. SSA sent him a letter informing of their tentative decision and the reasons for it. They also gave him time to submit additional information. Eldridge disputed the characterization of his condition in writing. SSA then terminated his disability payments.
Issue:	Does the Due Process Clause of the Fifth Amendment require an evidentiary hearing prior to the termination of Social Security benefits?
Rule:	Due Process is flexible and calls for protections as the situation demands. The identification of the specific dictates of due process requires:
	<ol style="list-style-type: none"> 1. The private interest that will be affected by the official action; 2. The risk of an erroneous deprivation of such interest through the procedures used; 3. The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
Issue1:	What's the private interest affected by the official action?
Held:	Since SSA procedures provide for retroactivity of overturned terminations, the sole interest is in uninterrupted receipt. This might be a significant hardship, but still less than <i>Goldberg</i> .
Why?	SSDIB isn't based on financial need, distinguishing from <i>Goldberg</i> . While the review process can take up to a year, and someone erroneously deprived likely can't find work, there's government benefits available for someone in this situation.
Issue2:	What is the risk of an erroneous deprivation with the current procedures?
Held:	The risk of an erroneous deprivation is low.
Why?	Again distinguishing from <i>Goldberg</i> , the court discusses how the determination here depends on impartial reports from physicians. Also, the questionnaire here is sufficient because it identifies what factors the board finds significant, while in <i>Goldberg</i> the written dispute method was inadequate due to lack of education and inability to determine what is important. Further, the recipient here has full access to all of the evidence relied on.
Issue3:	What's the government interest here?
Held:	The cost of having an individual hearing for each recipient would be very high here.
Why?	Not really why, but the Court talks about the government interest in the scheme requires low-cost resolution: there's limited funds and additional process would come out of deserving pockets. Substantial weight has to be given to the good-faith judgment of the people Congress charged with administration.

Cleveland Board of Education v. Loudermill

Facts:	1979: CBoE hired Loudermill as a security guard. L stated on job application that he'd never been convicted of a felony. CBoE discovered this was false 11 months later. CBoE terminated L 11/3/80 by letter with no pretermination opportunity to respond to the charge of dishonesty or challenge dismissal. L appealed with Civil Service Commission, got hearing, was denied. OH law provides Loudermill could only be terminated for cause. 1977: PBoE hired Donnelly as a bus mechanic. PBoE fired Donnelly for a failed eye exam with no pretermination hearing. Donnelly also could only be fired for cause. Donnelly won his appeal, but did not receive back pay for the time he was unemployed. The districts argue that the statute providing they could only be fired for cause also provided for termination without a hearing, so the property right was conditioned by the grant.
Issue1:	Did L and D have a property right in continued employment unconditioned by the statute granting the right?
Rule:	While property is a creature of state law, a property right once conferred upon a person may not be deprived by the state without constitutionally appropriate procedural safeguards. Property cannot be defined by procedures for its deprivation.
Held:	L and D had a property right in their continued employment unconditioned by the statute.
Why?	The "bitter with the sweet" approach misconceives the nature of constitutional guarantees. The categories of substance and procedure are distinct.
Issue2:	What sort of pre-termination process is due for employees who may only be fired for cause?
Rule:	The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process right. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.
Held:	So long as there is an opportunity for a full post-termination review, all that is needed is an initial check against mistaken decisions: a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. All the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures.

Why? The *Mathews* three-prong balancing test. The private interest in retaining employment is very strong. The opportunity for the employee to present his side of the case is of “obvious value” in reaching an accurate decision. The government interest is actually aligned here with providing process: not a significant burden, and the government would continue to get the benefit of the employee’s services.

Ingraham v. Wright

Facts: 1970-1, Dade County Schools was using corporal punishment. The statute limited corporal punishment to not “degrading or unduly severe” or inflicted without prior consultation with the principal. DCS regulations had explicit directions and limitations. However, contrary to the statute and regulations, teachers at DCS often paddled students without consultation with the principal. At DJHS, Ingraham and Andrews were both paddled. Ingraham was paddled so severely he had a hematoma. Andrews was struck so hard he couldn’t use his arm for a week.

Issue1: Does corporal punishment implicate any Due Process concerns?

Rule: The liberty preserved from deprivation without due process includes the right generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Among the historic liberties so protected was a right to be free from unjustified intrusions on personal security. **It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.**

Held: Where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that 14th Amendment liberty interests are implicated.

Issue2: What process is due?

Rule: *Mathews v. Eldridge* balancing again.

Issuea: What is the child’s liberty interest in avoiding corporal punishment?

Rule: A liberty interest is constrained by traditional common-law conceptions of that liberty interest.

Held: There can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege.

Why? Go back to the first rule above. Children aren’t traditionally protected from corporal punishment.

Issueb: Are the current procedural safeguards sufficient?

Rule: Where the State has preserved what has always been the law of the land, the case for administrative safeguards is significantly less compelling.

Held: The procedural safeguards are adequate.

Why? Hey, this is what they’ve always done, the statute specifically protects against excessive punishment. If the punishment is excessive, sue in tort. (BLEAH).

Issuec: What’s the burden on the state of additional safeguards?

Held: Additional safeguards would substantially burden the use of corporal punishment. You’d have to have a hearing before ANY paddling, no matter how trivial.

Goss v. Lopez

The Court found that a suspension merited pre-deprivation process, because the children have a property right in a free education. Further, there was a liberty interest involved because the childrens’ “good name, reputation, honor, or integrity” was at stake, which could interfere with later prospects for higher education. The Court holds that in order to suspend, a school district give the child oral or written notice of the charges, an explanation of the evidence (if the child denies the charges), and an opportunity to present his side of the story.

United States v. James Daniel Good Real Property

A magistrate judge found ex parte that, pursuant to 21 USC § 881(a)(7), the government had established probable cause that Good’s property was subject to seizure. The Government seized the property without prior notice or hearing. The Court held this violated due process. Rejected a Fourth Amendment argument (since a criminal proceeding, the seizure only required probable cause) and found that a property interest was implicated. Using *Mathews v. Eldridge*:

1. Strong private interest (ownership of a home!)
2. Ex parte proceedings include a high risk of error. The government doesn’t have to present evidence on innocent ownership or other potential defenses.
3. There was no pressing need for prompt action. The house wasn’t going anywhere.

Can get around with exigent circumstances. To get exigent circumstances the Government must show that less restrictive measures would not suffice to protect the Government’s interest.

C. STATUTORY HEARING RIGHTS: TRIGGERING APA REQUIREMENTS

Note on the Federal APA

An “adjudication” is the agency process for the formulation of an order.

5 U.S.C. § 551(7)	“adjudication” means agency process for the formulation of an order;
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A “rule making” is the agency process for formulating, amending, or repealing a rule.

5 U.S.C. § 551(5)	“rule making” means agency process for formulating, amending, or repealing a rule;
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A rule:

5 U.S.C. § 551(4)	“rule” means the whole or a part of an agency statement 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
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An order:

5 U.S.C. § 551(6)	“order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
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The Attorney General Manual on the APA

Rulemaking is forward-looking

Adjudication is the determination of past or present rights.

The APA prescribes certain procedures for engaging in rulemaking or adjudication:

5 U.S.C. § 553	<p>(a) This section applies, according to the provisions thereof, except to the extent that there is involved--</p> <p>(1) a military or foreign affairs function of the United States; or</p> <p>(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.</p> <p>(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--</p> <p>(1) a statement of the time, place, and nature of public rule making proceedings;</p> <p>(2) reference to the legal authority under which the rule is proposed; and</p> <p>(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply--</p> <p>(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or</p> <p>(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.</p> <p>(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.</p> <p>(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--</p> <p>(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;</p> <p>(2) interpretative rules and statements of policy; or</p> <p>(3) as otherwise provided by the agency for good cause found and published with the rule.</p> <p>(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.</p>
5 USC § 554	<p>(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--</p> <p>(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;</p>

	<p>(2) the selection or tenure of an employee, except a¹ administrative law judge appointed under section 3105 of this title;</p> <p>(3) proceedings in which decisions rest solely on inspections, tests, or elections;</p> <p>(4) the conduct of military or foreign affairs functions;</p> <p>(5) cases in which an agency is acting as an agent for a court; or</p> <p>(6) the certification of worker representatives.</p> <p>(b) Persons entitled to notice of an agency hearing shall be timely informed of--</p> <p>(1) the time, place, and nature of the hearing;</p> <p>(2) the legal authority and jurisdiction under which the hearing is to be held; and</p> <p>(3) the matters of fact and law asserted.</p> <p>When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.</p> <p>(c) The agency shall give all interested parties opportunity for--</p> <p>(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and</p> <p>(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.</p> <p>(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--</p> <p>(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or</p> <p>(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.</p> <p>An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--</p> <p>(A) in determining applications for initial licenses;</p> <p>(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or</p> <p>(C) to the agency or a member or members of the body comprising the agency.</p>
5 USC § 556	<p>(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.</p> <p>(b) There shall preside at the taking of evidence--</p> <p>(1) the agency;</p> <p>(2) one or more members of the body which comprises the agency; or</p> <p>(3) one or more administrative law judges appointed under section 3105 of this title.</p> <p>This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.</p> <p>(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may--</p> <p>(1) administer oaths and affirmations;</p> <p>(2) issue subpoenas authorized by law;</p> <p>(3) rule on offers of proof and receive relevant evidence;</p> <p>(4) take depositions or have depositions taken when the ends of justice would be served;</p> <p>(5) regulate the course of the hearing;</p> <p>(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;</p> <p>(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;</p> <p>(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;</p> <p>(9) dispose of procedural requests or similar matters;</p> <p>(10) make or recommend decisions in accordance with section 557 of this title; and</p> <p>(11) take other action authorized by agency rule consistent with this subchapter.</p>

	<p>(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.</p> <p>(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.</p>
5 USC § 557	<p>(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.</p> <p>(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses--</p> <p>(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or</p> <p>(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.</p> <p>(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions--</p> <p>(1) proposed findings and conclusions; or</p> <p>(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and</p> <p>(3) supporting reasons for the exceptions or proposed findings or conclusions.</p> <p>The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--</p> <p>(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and</p> <p>(B) the appropriate rule, order, sanction, relief, or denial thereof.</p> <p>(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law--</p> <p>(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;</p> <p>(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;</p> <p>(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:</p> <p>(i) all such written communications;</p> <p>(ii) memoranda stating the substance of all such oral communications; and</p>

	<p>(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;</p> <p>(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and</p> <p>(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.</p> <p>(2) This subsection does not constitute authority to withhold information from Congress.</p>
5 USC §706(2)(E)	To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--hold unlawful and set aside agency action, findings, and conclusions found to be-- unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

The APA distinguishes between informal and formal adjudications, but only defines requirements for formal adjudications.

Seacoast Anti-Pollution League v. Costle (1st Cir.)

Facts:	PSCO filed an application with the EPA to discharge heated water. PSCO’s cooling system doesn’t meet EPA standards, but they filed for an exemption. The Regional Administrator for the EPA held a public adjudicatory hearing in front of an ALJ. The ALJ certified the record to the Regional Administrator, who denied PSCO’s application. PSCO appealed to the Administrator of the EPA. Administrator appointed a panel of six in-house advisors to assist in technical review. The panel found that PSCO had met their burden of proof on five of six issues, and asked PSCO to submit more info on #6. The Administrator said that he would hold a new hearing if any party requested and satisfied threshold requirements. SAPL requested a hearing, but the Administrator denied. The Administrator followed the panel’s recommendations, and using the additional information reversed the RA decision and granted the exception to PSCO.
I 1:	Does the APA apply?
Rule:	Determinations of the APA’s coverage may well be approached through consideration of its purposes as disclosed by the background.
Held:	The formal adjudication procedures of the APA apply here.
Why?	Although the FWPCA provides for just “public hearings” and not “public hearings on the record” the circuit court rejects a magic words approach. The Administrator must make specific factual findings about the effects of discharges. Only the rights of a specific applicant are affected. The proceedings were conducted to adjudicate disputed facts, not to promulgate policy. If determinations like this one were not on the record, then the determination could be made on the basis of evidence that a court would never see or could be sure existed. The Attorney General’s Manual is given great persuasive weight in interpreting the APA, and the AGM says that a specific statutory requirement for an adjudicatory hearing presumes that it will be on record, while such a requirement for a rulemaking does not.
I 2:	Did the procedures comply with the APA?
I 2a:	Did the post-hearing submissions and request for information comply with the APA?
I 2ai:	Is the post-hearing submission part of the record upon which the Administrator could rely?
Rule:	§ 556(e): The transcript of the testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record.
Held:	The submission was part of the record.
Why?	§ 556(e) doesn’t limit the time frame, and the information was filed “in the proceeding.”
I 2aii:	Could the Administrator request information without a hearing on the facts?
Rule:	The APA does not excuse procedures compelled by the governing statute or impose procedures excused by the governing statute.
Held:	While the administrator could require the information be submitted in written form, he could not accept the information without a public hearing.
Why?	APA § 556(d) allows submission in written form, but FWPCA § 316(a) requires an opportunity for public hearing.
I 2b:	Was the participation of the Technical Review Panel in compliance with the APA?
I 2bi:	Was it improper for the Administrator to seek the help of the Technical Review Panel?
Rule:	When a decision is committed to a particular individual that individual must be the one who reviews the evidence on which the decision is made, but it does not follow that all other individuals are shut out of the decision process.
Held:	Totally OK for the Administrator to seek help from expert staff.
I 2bii:	Is it proper for the Administrator to rely on the panel’s report if it includes information not in the administrative record?
Rule:	APA §556(e) does not allow an expert panel to add to the record.

Held: The panel added to the record, and the Administrator's decision was not supported until supplemented by the panel.

NOTE: The First Circuit has since abandoned the *Seacoast* presumption that a hearing requirement presumptively triggers formal adjudication.

The Supreme Court has not issued a definitive ruling on when a statute requires formal adjudication. *Steadman v. SEC* seems to presume that a public hearing requirement presupposes a formal hearing, but the statute in question clearly required formal adjudication in certain circumstances. Also, the Court relied on the provision of judicial review on a "substantial evidence" standard, presupposing a formal record.

D.C. Circuit squarely rejected *Seacoast* in *Chemical Waste Management, Inc. v. U.S. EPA*. The D.C. Circuit relied on *Chevron* deference to say that an agency's own interpretation, so long as reasonable, would control.

This is a case-by-case determination in the DC Circuit.

Absent a clearly expressed congressional intent, a statutory requirement for a public hearing does not automatically trigger formal adjudication procedures.

Only the 9th Circuit still uses the *Seacoast* approach.

Although it's a minority view, it's not a bad one: why have a hearing if you're not bound to base your decision on it? Plus, more formal procedures probably give you better facts. Further, the AG Manual takes this position, and is generally considered authoritative.

Friends of the Earth v. Reilly (D.C. Cir.)

Look to the nature of the facts to be adjudicated to determine if you need a formal adjudication under § 554.

Adjudicative facts require a formal hearing, while legislative facts don't. Parties don't have much to contribute to the development of legislative facts.

D. PARTIES AND INTERVENTION

<p>MSAPA § 4-209</p>	<p>(a) The presiding officer shall grant a petition for intervention if:</p> <ol style="list-style-type: none"> (1) the petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least [3] days before the hearing; (2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and (3) the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention. <p>(b) The presiding officer may grant a petition for intervention at any time, upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.</p> <p>(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:</p> <ol style="list-style-type: none"> (1) limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; (2) limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and (3) requiring 2 or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings. <p>(d) The presiding officer, at least [24 hours] before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.</p>
<p>CA Govt. Code 11440.50</p>	<p>(a) This section applies in adjudicative proceedings of an agency if the agency by regulation provides that this section is applicable in the proceedings.</p> <p>(b) The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:</p> <ol style="list-style-type: none"> (1) The motion is submitted in writing, with copies served on all parties named in the agency's pleading. (2) The motion is made as early as practicable in advance of the hearing. If there is a prehearing conference, the motion shall be made in advance of the prehearing conference and shall be resolved at the prehearing conference. (3) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation. (4) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention. <p>(c) If an applicant qualifies for intervention, the presiding officer may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a subsequent time. Conditions may include the following:</p> <ol style="list-style-type: none"> (1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion. (2) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding. (3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding. (4) Limiting or excluding the intervenor's participation in settlement negotiations. <p>(d) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying the motion for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant and to all parties.</p> <p>(e) Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made in the sole discretion, and based on the knowledge and judgment at that time, of the presiding officer. The determination is not subject to administrative or judicial review.</p> <p>(f) Nothing in this section precludes an agency from adopting a regulation that permits participation by a person short of intervention as a party, subject to Article 7 (commencing with Section 11430.10) of Chapter</p>

	4.5.
5 USC § 551(3)	“party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;
5 USC § 554(c)	The agency shall give all interested parties opportunity for-- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.
5 USC § 555(b)	A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

E. EVIDENCE AND PROOF ISSUES

Richardson v. Perales

Facts:	<p>P claims he became disabled 9/29/1965. Dr. Munslow and Dr. Lampert could find no objective reason for his complaints and Munslow told him to get back to work. P consulted Dr. Morales, who diagnosed a back sprain. P then filed for SSDIB. The claim was referred to the state agency. Agency got hospital records and a report from Morales. The report had no physical findings or lab studies, but Morales again said back sprain, moderately severe. Agency arranged no-cost examination by Dr. Langston. Langston's report called P a lazy sack of shit who should exercise. As a result, the state agency denied the SSDIB claim. P argued and the state agency arranged for Dr. Bailey to look at it. Bailey said he's an asshole, but not disabled. The agency reviewed the file and denied the claim again. P requested a hearing. Agency referred him to Dr. Langston and Dr. Mattson. They found he's got a weak back because he doesn't exercise. State board set the hearing, and written notice given to P. The notice gave a definition of disability, advised he should bring all documentary evidence on file, and told him he could bring his own physician, witnesses, and lawyer. P objected on several grounds to the inclusion of the physician's reports who weren't there. P presented lots of oral testimony regarding his supposed disability. The Board also took testimony from Dr. Leavitt, a medical adviser who doesn't examine the claimant but hears and reviews the evidence and offers an opinion. He said there's a mild disability, but not one that keeps him from work. The hearing examiner said that P's disability was mild and he wasn't entitled to SSDIB.</p> <p>P then asked for an Appeals Council review. He submitted additional evidence, including a letter from Dr. Williams saying he has a 15% permanent partial disability. The Appeals Board denied the claim. P now appeals to the courts. The SS Act provides that judicial review will be on a substantial evidence basis: if the findings of the Administrator are supported by substantial evidence, they are conclusive.</p>
Issue:	May medical evidence in report form be substantial evidence when it stands alone and is opposed by live medical evidence and the client's own contrary testimony?
Rule:	Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. <i>Consolidated Edison Co. v. NLRB</i> .
Held:	A written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.
Why?	This isn't <i>Goldberg</i> , no change in status. There's no question of veracity or credibility with the reports. Even though it's technically hearsay, it has rational probative force. Usage of a medical advisor is also great: it allows the agency to get some expert input and make technical determinations. Hearsay is admissible under the SS Act and the APA to the point of relevancy: it comes down to integrity and fairness.

Residuum Rule:

A rule that requires at least SOME evidence that would be admissible in a court of law to support an order. APA doesn't have this, MSAPA § 4-215(d) does.

Steadman v. Securities and Exchange Commission

Facts:	6/72, SEC brought disciplinary proceeding against S. SEC alleged S violated securities laws in managing several mutual funds. The SEC held under a preponderance of evidence standard that S had violated various provisions of securities law. SEC ordered S permanently barred from associating with investment adviser or affiliating with any investment company. The SEC also suspended him from associating with any broker or dealer in securities for one year.
Issue:	What standard of proof is required for an administrative hearing?
Rule:	Where Congress does not prescribe a degree of proof, the Court is free to prescribe the standard, as this is the kind of question courts traditionally resolve. However, where Congress has spoken, the courts must defer to Congress.
Held:	Congress has spoken here and provided for a preponderance-of-evidence standard of review.
Why?	§ 7 of the APA establishes a minimum amount of proof—substantial evidence, and that the ruling must be in accordance with that substantial evidence. This implies a weighing of the evidence. While the statutory language isn't clear, the legislative history shows that the weighing was to be the preponderance of the evidence. Further, the SEC has a longstanding tradition of applying a preponderance standard which Congress hasn't corrected.

Difference between burden of going forward, the burden of persuasion, and the scope of review:

1. Burden of going forward is the burden of producing evidence to show a cause of action or an affirmative defense.
2. Burden of proof is the burden to convince the fact finder that something actually happened.
3. Scope of review is the ability of an appellate body to review the findings of fact.

Formal adjudications require findings:

5 USC § 557(c)	<p>Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions--</p> <p>(1) proposed findings and conclusions; or</p> <p>(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and</p> <p>(3) supporting reasons for the exceptions or proposed findings or conclusions.</p> <p>The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--</p> <p>(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and</p> <p>(B) the appropriate rule, order, sanction, relief, or denial thereof.</p>
MSAPA § 4-215(c)	<p>A final order or initial order must include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. If a party has submitted proposed findings of fact, the order must include a ruling on the proposed findings. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order must include a statement of any circumstances under which the initial order, without further notice, may become a final order.</p>

However, there's no explicit requirement in the federal APA for findings in informal adjudications.

In order to permit judicial review required by statute, findings may be necessary. *Camp v. Pitts*.

Agencies generally have to explain *inconsistent* determinations. *UAW v. NLRB* (7th Cir.)

F. COMBINATIONS OF FUNCTIONS

<i>Withrow v. Larkin</i>	
Facts:	Wisconsin doesn't allow practice of medicine without a license granted by an Examining Board. The Examining Board can warn, reprimand, temporarily suspend a license, or institute criminal action or action to revoke a license when it finds probable cause. L is a resident of MI who obtained a WI license through reciprocity. L's practice in WI is an abortion clinic. Board sent notice of an investigatory hearing to determine if L was engaged in illegal acts. The hearing was closed to the public, but L and his attorney could be present. They could not cross-examine witnesses. Based on the evidence, the Board would decide whether to warn, reprimand, institute criminal action or institute revocation of license. The Board conducted the hearing with L's attorney there. The Board then told the attorney L could appear if he wished to explain any of the evidence. Board sent L notice that they would hold a contested hearing to determine whether he had engaged in bad acts and that based on the evidence at that hearing, they would determine whether they would temporarily suspend his license. A DC enjoined the contested hearing. Instead, it noticed and held a "final hearing", issuing "Findings of Fact", "Conclusions of Law", and a "Decision" finding L had engaged in the bad acts and recommending criminal charges against L.
Issue:	Does it violate Due Process for the same tribunal to investigate and adjudicate a claim?
Rule:	Without a showing to the contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Someone alleging that a combination of functions violates Due Process must overcome a strong presumption of honesty and integrity in those serving as adjudicators.
Held:	The combination of functions here does not violate Due Process.
Why?	It's typical practice for members of agencies to receive the results of investigations, to approve filing of charges, etc then participate in the hearing. This doesn't violate the APA or the due process clause. Further, judges can make the determination before hand that certain types of conduct violate the law: they adjudicate the same types of cases several times and make these determinations.
Note:	If the initial view of the facts based on the evidence from a nonadversarial process foreclosed fair and effective consideration at a subsequent adversarial proceeding, that would likely violate due process. If someone has a will to win then it is inappropriate to sit as an adjudicator.

NOTE

MSPA § 4-214	(a) A person who has served as investigator, prosecutor or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding. (b) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding. (c) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding, unless a party demonstrates grounds for disqualification in accordance with Section 4-202. (d) A person may serve as presiding officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification in accordance with Section 4-202.
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The MSAPA appears to foreclose the procedures used in *Withrow v. Larkin*.

Note on "Total Quality Assurance" and the ALJ

The upshot here is that courts typically uphold TQA programs unless they compel a result. Kroto went into a long discussion about incentives here, where setting target grant rates gives courts an incentive to throw cases.

G. BIAS

Antoniu v. SEC

Facts:	Antoniu pleaded guilty to securities violations. The next year, he took a job with a securities firm. Due to the criminal conviction, he had to get approval from NASD, which granted it. However, SEC vetoed his employment in <i>Antoniu I</i> . Cox was a commissioner involved in <i>Antoniu I</i> . The SEC instituted <i>Antoniu II</i> . Cox also participated in this decision. <i>Antoniu II</i> was to determine if Antoniu should be subject to sanctions as a result of his conviction. During pendency of <i>Antoniu II</i> , Cox gave a speech in Denver that identified Antoniu as a “violation” of securities laws and that Antoniu’s bar from association with a broker-dealer is permanent. After this public denouncement, Antoniu several times requested to develop the record on the issue of Cox’ bias. In the final <i>Antoniu II</i> opinion, the SEC barred Antoniu from any association with a broker-dealer ever.
SoL:	Principles of due process apply to agency adjudications. <i>Amos Treat & Co. v. SEC</i> . A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. <i>In re Murchison</i> . Justice must satisfy the appearance of justice. <i>In re Murchison</i> .
Issue:	Did Commissioner Cox’ post-speech participation in <i>Antoniu II</i> comport with the appearance of justice?
Rule:	The 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.
Held:	Commissioner Cox should have recused.
Why?	He’d clearly adjudged the facts of the case. Even though he’d recused before the final filing, he should not have participated in the deliberations at all. The court nullifies anything that happened in the proceedings after the speech and directed the SEC to make a de novo review of the evidence.

Notes:

This is different from *Withrow* because statements on a fact pattern aren’t a finding of particular facts.

If this were a formal adjudication (the Court did not pass on this issue) APA § 556(b) would apply. Under § 556(b), the SEC would have had to have hearings on the record about the issue of bias.

The fact that one commissioner was biased out of a group is irrelevant, because you don’t know how much sway they had. *McClure v. Independent School Dist. No. 16* (10th Cir.)

H. EX PARTE CONTACTS

First Savings & Loan Assn. v. Vandygriff (Tx. Civ. App.)

Facts:	Texas law prohibits ex parte contacts between employees of an agency assigned to render a decision and any agency, person, party, or their representatives except on notice and opportunity to respond. The organizers of a proposed S&L submitted an application for charter to the Texas S&L commissioner. The commissioner denied the application and overruled a motion for rehearing. Five of the organizers went to Austin and visited with the Commissioner to give him information on the economic condition of the town. The organizers then filed their application again, using the same capital funds on deposit and using the stock subscription forms from the first application. Orman (an organizer) said he viewed it as just one application. The Commissioner approved the re-filed application. The Commissioner stated on the record that there were contacts, but the application wasn’t pending at the time and the determination of the case was based only on information on the record.
Issue:	Was the meeting between the Commissioner and the applicants impermissible as an ex parte contact?
Rule:	An administrative order must be grounded upon evidence taken at the hearing and upon facts officially noticed by the hearings officer in the record of such hearing. Recognition of this fundamental rule necessarily means that ex parte communications may not be a basis for such an order. It is presumed that a separate meeting resulted in findings that precipitate an executive order.
Held:	The order of the Commissioner is set aside as a result of ex parte contacts.

Vandygrif v. First Savings & Loan Assn. (Tex.)

Facts:	Same as above.
Issue:	Same as above.
Rule:	§ 17 only prohibits ex parte contacts during the pendency of the contested case. Until an application is filed, there is no contested case.
Held:	No impermissible ex parte contacts.
Why?	The applications were similar, but not the same. There was a new filing fee and a new notice of hearing. There were different organizers and stockholders.

I. ESTOPPEL AGAINST THE GOVERNMENT

Schweiker v. Hansen

Facts:	Hansen met with Connelly for about 15 minutes, asking if Hansen was eligible for mother's insurance benefits. Connelly told her (wrongly) that she was not and Hansen left without filing an application. Mother's insurance benefits are only available to people who have filed an application, and only written applications satisfy the "filed application" requirement. The SSA Claims Manual tells field reps to try to get applicants to file a written application if they're uncertain about their eligibility. Hansen eventually filed an application after learning she was eligible. She also received retroactive benefits for the 12 months prior to her application, the maximum amount. However, had she filed when she was talking with Connelly, she would have received 10 more months of benefits.
Issue:	Did Connelly's erroneous statement and neglect of the Claims Manual estop SSA and the Secretary of Health and Human Services from denying retroactive benefits to Hansen for the time that she was eligible but had not filed an application?
Rule:	The Court has never decided what type of conduct by a Government employee will estop the Government from insisting on compliance with valid regulations governing the distribution of welfare benefits. Courts have a duty to observe the conditions Congress defines for charging the public treasury. A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.
Held:	Sec H&HS is not estopped from denying retroactive benefits.
Why?	Connelly could have screwed up for any number of minor reasons. Hansen could have taken remedial action at any time. The Claims Manual isn't a regulation, the writing requirement is. If such a minor breach of a manual is sufficient to estop, then every alleged failure by an agent to follow every detail of an instruction would deprive SSA of the written application requirement.

J. DOCUMENT DISCLOSURE AND OPEN MEETINGS

The Freedom of Information Act

5 USC § 552

Allows anyone to obtain reasonably identifiable records or other information from Federal Agencies. Decisions to withhold information may be challenged in federal court, and the burden of proof is usually on the Government.

Nine exceptions:

1. Materials to be kept secret in the interest of national defense or foreign policy. § 552(b)(1), *EPA v. Mink*.
2. Materials related solely to the internal personnel rules and practices of an agency. § 552(b)(2), *Dep't of Air Force v. Rose*.
3. Materials specifically exempted from disclosure by statute. § 552(b)(3), *Students Against Genocide v. Dep't of State*
4. Certain trade-secret and commercial information. § 552(b)(4); *Center for Auto Safety v. National Highway Traffic Safety Admin.*
5. Certain "inter-agency or intra-agency memorandums or letters". § 552(b)(5); *Klamath Water Users Protective Ass'n*
6. Certain "personnel and medical files and similar files § 552(b)(6).
7. Certain records or information compiled for law enforcement purposes. § 552(b)(7).

Note: 4 and 5 contain two exceptions each, making nine.

EPA v. Mink

Facts:	An article in a DC newspaper stated that the President received conflicting recommendations on continuing underground nuclear testing. Congresswoman Mink sent a telegram to the President requesting immediate release of the recommendations. The President refused the request. Mink filed a FOIA action.
Issue:	Was the president required to release the recommendations under the FOIA, 5 USC § 552?
Rule:	The nine exceptions under the FOIA § 552(b) are exclusive. However, 552(b)(1) provides that materials designated as secret by the President are one of these exceptions.
Held:	The President was not compelled to turn these materials over.
Why?	The Act is meant to balance competing interests, and the scheme of § 552(b) is to protect the government's interest.

Notes

Even though J. White describes the FOIA as a strengthening of prior protections, once the government pleads the exemptions, the courts usually side with the government. However:

Dep't of the Air Force v. Rose

The basic point of the FOIA is disclosure not secrecy. The exemptions are exclusive and narrowly construed.

The language of § 552(b)(7) doesn't require a high likelihood of an invasion of privacy, only that there be a reasonable expectation that disclosure would be an invasion of privacy.

Department of Justice v. Reporters Committee for Freedom of the Press

A third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy. The type of interest the FOIA recognizes is in official information about an agency, not data the agency stores about a person.

National Archives and Records Administration v. Favish

No requirement to release photographs of Vince Foster's death scene. Traditionally, burial rites and other death-related images are under the control of the family, and release is presumptively an invasion of privacy. The statute can't be construed to give lesser protections than the common law in this case, when the Court has consistently construed it to give greater protections than the common law.

Note on the Government in the Sunshine Act

5 USC §552b: Every meeting of every agency is open to public observation with 10 specific exceptions.

"Agency": Any agency headed by a collegial body composed of two or more members and any subdivision thereof authorized to act on behalf of the agency. § 552b(a)(1)

"Meeting": The deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business. § 552b(a)(2)

Federal Communications Commission v. ITT World Communications, Inc.

Informal background discussions don't fall under the purview of the Act. Even when a quorum is present, if they're not conducting or disposing of official agency business the Act doesn't apply.

Chapter 3: Rulemaking

A. INTRODUCTION TO RULEMAKING

National Petroleum Refiners Ass’n v. FTC (D.C. Cir, cert. denied)

Facts:	FTC issued a rule that gas stations have to post octane ratings on their pumps. NPRA sued to enjoin the rule on the theory that the FTC didn’t have the authority to make such rules. § 45 of the FTC’s enabling act states that it is to accomplish their goals by issuance of complaint, a hearing, findings of facts, and issuance of cease and desist order (an adjudication).
Issue:	May the FTC regulate by rulemaking?
Rule:	The plain language of § 45 is not limiting, so although the FTC MAY use adjudication, they may also use rulemaking.
Held:	The FTC may use rulemakings.
Why?	This case is mainly important for the discussion of why rulemaking is beneficial. Rulemaking gives people notice of what conduct is required or prohibited instead of dragging them into an adjudication. Further, adjudication is <i>ad hoc</i> and massively inefficient. The Circuit Court here also talks about how the statutory language of the organic act isn’t limiting, giving the agency a broad mandate to either rulemake or adjudicate.

NOTES

Three policies in favor of substantive rule promulgation:

1. Rulemaking is fair to everyone: everyone gets to comment, not just the parties to the adjudication.
2. Adjudication is ad hoc and incremental in nature.
3. Rulemaking gives notice.

Under the 1981 MSAPA, state agency rulemaking is treated with suspicion, but MSAPA § 2-104(3) allows rulemaking to the extent practicable.

MSAPA § 2-104(3)	
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Kentucky, on the other hand, limits rulemaking to situations where they are statutorily authorized only.

Agencies don’t always use rulemaking authority when they have it: The NLRB didn’t for 50 years.

For an agency to adopt legislative rules, it must have some plausible claim to delegated authority to do so. An agency may not issue legislative rules without a proper grant of authority in its organic act or some other statute. *EEOC v. Arabian American Oil Company*. The statutory authority must extend to the *particular* rulemaking. *Gonzales v. Oregon*.

Note on APA Requirements for Rulemaking

§§ 554, 556, and 557 only apply to FORMAL adjudications “on the record after opportunity for an agency hearing.” Since the APA doesn’t set out any requirements for informal adjudications, they only have to comport with due process requirements. However, there are procedural requirements for informal rulemakings.

Kroto Handout	Informal	Formal
Rulemaking	§ 553(b) § 553(c) Notice Opportunity for Comment Concise general statement	§ 553(c) § 556 § 557 “On the record” or similar words in the organic statute <u>Florida East Coast Ry.</u>
Adjudication	No specific APA provision on point. § 555(e) <u>LTV Corp</u> case. Due Process under 5th or 14th Amendment	§ 554 § 556 § 557 Either “after hearing” or “on the record”. <u>Costle / CMA</u>

The vast majority of rulemaking is informal.

Bowen v. Georgetown Univ. Hospital

Facts:	The Secretary of Health and Human Services (Secretary) issued a cost-limit schedule including changes in the methods for calculating the wage index. The new wage index excluded wages paid by Federal Government hospitals, bringing the wage index down. Various hospitals challenged the rulemaking, and the DC District Court struck it down because there was no notice and comment. The Secretary then published a notice for public comment on a proposed rulemaking
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to put in the new wage index retroactive to the date of the original rulemaking. The Secretary then issued the proposed rule and tried to recoup the sums paid out under the old wage index after the original rule was promulgated.

Issue: May the Secretary issue an informal rulemaking with retroactive effect?

Rule: A statutory grant of legislative authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

I 1: Does a grant of power to make corrective adjustments give the Secretary the power to regulate retrospectively?

Held: No. Simply allowing the Secretary to adjust payments when the regulations get the wrong result is a grant of adjudicatory power, not rulemaking power.

Held: The Secretary may not promulgate retroactive rules.

Why? There's no specific authorization to promulgate retroactive rules. Where Congress wanted the Secretary to act retrospectively, it made an express provision. The House and Senate Reports on the Act said that rulemaking was supposed to be prospective. The Secretary's past practice has been prospective. The Court blasts the Secretary's reasoning that the fact the original rule was struck down gives them the ability to N&C "curative" regs: this would create bad incentives to promulgate rules that would be struck down: they may not get challenged, and if they are, you can fix it.

Notes: Scalia's concurrence talks about the APA having nothing in it about rules with both prospective and retrospective effect. Justice Kennedy responds and points out that the common-law tradition is that rules may not have retrospective effect.

B. NOTICE AND COMMENT: "INFORMAL" RULEMAKING

Chocolate Manufacturers Ass'n v. Block (4th Cir.)

Facts:	USDA administers a variety of nutrition programs, including WIC. Congress revised the WIC program and defined "supplemental foods" which the program was to provide. USDA promulgated new regulations to specify the contents of WIC packages. The regs said flavored milk was an acceptable substitute for whole milk in packages for women and children, but not infants. Congress redefined "supplemental foods" again, stating that the Secretary had to assure that the fat, sugar, and salt content of the foods is appropriate. To comply, USDA held hearings in seven cities and elicited testimony from several interested persons. USDA also got reports from various panels. USDA then published a proposed rule for comment. USDA also published a preamble discussing the general purpose of the rule and the Congressional directive, talking about how expensive sugary cereal is and how bad it is for people but not sugary milk. The proposed rule allowed for the inclusion of flavored milk in food packages for women and children. In the 60 days allowed for comment, 78 commenters (mostly WIC administrators) recommended deletion of flavored milk. In response, USDA deleted flavored milk. CMA, claiming they were misled, petitioned USDA to reopen the rulemaking to comment. USDA declined to reopen the rulemaking.
Issue:	Did the Department's notice provide interested persons with the fair opportunity to be heard?
Rule:	§ 4 of the APA requires that the notice in the Federal Register of a proposed rulemaking contain either the terms or substance of the proposed rule or a description of the subjects and issues involved. § 552(b)(3). There are two factors of primary importance in determining whether a substantially revised rule is promulgated in accordance with the APA: 1. The changes must be in character with the original scheme and; 2. The changes must be a logical outgrowth of the notice and comment already given.
Held:	The proposed rulemaking did not provide adequate notice that they might delete flavored milk.
Why?	The final rule was an outgrowth, but it wasn't really logical. Each case will turn on how well the notice given puts the party on notice. The public and the CMA could not have guessed from the proposed rule that flavored milk was on the table.
Notes:	Strategic move by CMA to file in the 4th Circuit instead of the DC Circuit. DC Circuit would have been less impressed by CMA not making any comments when all these people were.

United States v. Nova Scotia Food Products Corp. (2d Cir.)

This case doesn't really promulgate any new rules, it's just a good statement of the law. The fact pattern is a mess, talking about whitefish and brining. Something to note here is that the statute didn't place a timeline on challenges to a regulation here. Most modern statutes do.

The record to determine whether a rule is arbitrary and capricious is whatever the record is when the agency votes. No ex post justification. However, if an industry withholds data from the Agency, it cannot later complain of an inadequate record.

An agency has a duty to let the public comment on data relied upon in a rulemaking.

An agency can use internal staff to synthesize or interpret data in the record, but not to generate data.

-FDA, concerned a/b botulism in fish & established stds for prep of smoked fish b/c of illness reports caused by failure of the smoking process to eliminate bacteria

-Interested industries, like Bureau of Commercial Fisheries, show it'd be best to make rules specific to kind of fish at issue (for some, best to cook at lower temp & increase salinity content of water); Producers of a particular species of fish submitted scientific data indicating their particular fish is safe w/o FDA's process & the economic viability of their product is destroyed if they're req'd to use the preferred process

-BCF got no reply to their comments & FDA made uniform rule applicable to all species of fish w/o explaining why it rejected data offered by producers of that fish; Nova Scotia then refused to comply with relevant regulations (why U.S. is a party rather than FDA); Relevant statute does NOT require pre-enforcement review challenge, so Nova Scotia IS entitled to challenge the regulation by not complying with it; they do look blameworthy though b/c they apparently w/held at least some data a/b ideal T-T-S req's for whitefish from FDA).

-RULE: Agencies req'd to disclose for pub comment any studies, data, or other material that the agency relies upon in making final rule. This req'ment is a notice req'ment & element of a meaningful opp to participate through comments. Participation would not be meaningful if the agency bases its final rule on info not available to the public.

- "to suppress meaningful comment by failing to disclose data relied upon is akin to rejecting COMMENT altogether" (Admin Law Nutshell book, p. 319)

-RULE: If Industry withholds information from the relevant Agency BEFORE the rule is passed, it cannot then challenge the adequacy of the record that has been used by the Agency (the "record" being the data that the Agency used to make a rule, which CANNOT be added to/subtracted from before it is presented to the District Court).

-RULE: Agency had duty to disclose b/c clearly not relying on own expertise in making the rule in question -- It was relying on its own refusal to address probs brought up by BCF & other parties - "not in keeping w/ rational process" envisioned by APA in regards to RMing.

-Outcome: RMIing procedure at issue here was so irrational that the case can't even be remanded for a re-hearing/re-RMIing;
 -Grant of injunction against Nova Scotia is reversed and complaint against them is dismissed
 -Reg at issue "was promulgated in an arbitrary manner and is invalid."

Note--prudent idea is to seek pre-enforcement review of regulations (not all regs, and probably pretty few, are going to be as "arbitrary and capricious" as this one).

Note on the Concise Explanatory Statement Requirement

§ 553(c) requires a concise general statement of the basis and purpose of new rules.

5 USC § 553(c)	After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection. 5 U.S.C.A. § 553 (West)
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§ 555(e) creates an obligation to provide reasons in support of an agency action (not only a rulemaking)

5 USC § 555(e)	Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial. 5 U.S.C.A. § 555 (West)
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The requirement to provide a concise general statement demands more than the brief statement requirement in 555(e)

The question is what does 553(c) require beyond 555(e)?

Automotive Parts and Accessories Ass'n v. Boyd (D.C. Cir.)

The adjectives "concise" and "general" must be accommodated to the realities of judicial scrutiny. The concise general statement of basis and purpose of APA § 553 should enable a court to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted as it did. The agency has to make rules in such a way as to negate the dangers of arbitrariness and irrationality in the formation of rules for general application.

Independent U.S. Tankers Owners Committee v. Dole (D.C. Cir.) BORK!

Concise general statement provides the major policy issues brought up in the proceedings. As long as the Agency includes its basic replies to these concerns, and as long as the Agency proves how the rule serves the objectives of the organic statute, the concise general statement will survive scrutiny.

Practice tip: curing the procedural defect of an inadequate CGS will require curing defects in the rule, so the lawyer should bring that up.

Note on Bias in Rulemaking

A less-stringent standard applies to bias in rulemaking than in adjudication. The person challenging the rulemaking must show by clear and convincing evidence that the agency member has an "unalterably closed mind."

C. EXCEPTIONS TO INFORMAL RULEMAKING REQUIREMENTS

Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

During the 1970s and 80s, courts interpreted § 553 to require significant procedural requirements.

Agencies got around the requirements for informal rulemaking by issuing “nonrule rulemaking” such as policy statements, interpretive rules, manuals, and other informal devices. This makes the exceptions to § 553 really important.

Mada-Luna v. Fitzpatrick (9th Cir.)

Facts:	Mada was convicted for a narcotics violation. On his release from prison, the INS started deportation proceedings. He was ordered deported, and applied to Fitzpatrick for deferred action status under the 1978 version of Operating Instruction 103.1(a)(1)(ii). Fitzpatrick denied the application and a supplemental action. Mada claims that Fitzpatrick improperly used the 1981 version of OI 103.1(a)(1)(ii), which was promulgated without notice and comment.
Issue:	Does OI 103.1(a)(1)(ii) qualify under the exception under APA §§ 553(b)(A) and (d)(2) for general statements of policy?
Rule:	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, or its implementing official, free to exercise discretion to follow, or not to follow the policy in an individual case.”
1.	To the extent the directive provides guidance to agency officials in exercising their discretionary power while preserving flexibility and opportunity to make individualized determinations, it’s a general statement of policy.
2.	To the extent that it narrowly limits administrative discretion or creates a binding norm that so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule’s criterion, it replaces discretion with a binding rule of substantive law and requires notice-and-comment.
Held:	The 1978 Operating Instruction was a general statement of policy: it operated only prospectively and did not establish a “binding norm”. It expressly authorized the district director to consider any individual facts. It also allowed the DD to consider unconscionability or undue hardship: this allows for great latitude. Therefore, it could be repealed without N&C. The 1981 Operating Instructions are even more clearly a general statement of policy. Still leaves the DD free to consider individual facts and gives him more things to think about.
Issue:	Is the 1981 OI invalid because the INS failed to publish it in the Federal Register as required by FOIA § 552(a)(1)(D) and (E)?
Rule:	An individual may not raise an FOIA claim based on an agency’s failure to publish a rule or regulation unless he makes an initial showing that he was adversely affected by the lack of publication or he would have been able to pursue an alternate course of conduct had the publication occurred.
Held:	Can’t bring this challenge. It’s not like he would have been able to reverse his conviction if the OI had been published.
Note:	General statements of policy are directed internally. We like them because they provide a roadmap to the public of how the agency intends to enforce.

Notes

Even though statements of general policy, interpretative rules, and rules of agency procedure are exempt from N&C, they are still subject to publication under § 552(a)(1) FOIA.

This is a rule of substance, not procedure. Just calling something a general statement of policy doesn’t make it so: if it’s binding on the agency, it’s a rule.

Also note that if a general statement of policy was subjected to N&C, you have to go through N&C to amend it or repeal it.

Warder v. Shalala (1st Cir.)

Facts:	OrthoConcepts informed an HCA office that they would start marketing their Seating System nationwide and inquired about the Medicare billing status of the SS. They also asked that HCA establish a billing code for “orthotics” that would allow reimbursement as a brace. The regional office said “orthotics” my ass, they’re DME and get reimbursed at the DME rate (lower than the rate for braces, of course). OrthoConcepts appealed. In Region A, an ALJ found that the SS was orthotics. In Region B and C, a hearing officer said they were orthotics. HCFA then issued HCFAR 96-1, providing guidance and clarification regarding the meaning of orthotics and DME, excluding the SS from orthotics and expressly saying the SS was DME.
Iss. 1:	Did the adoption of HCFAR 96-1 violate notice and comment procedures under APA § 553 and the similar statute under Medicare (42 USC § 1395hh)? Restated: Is HCFAR an interpretative rule or is it a substantive rule?
Rules:	An Agency can bind its employees through interpretive rules. Whether the rule is binding on the agency employees is not the test for whether notice/comment are required. If the Agency had promulgated a new regulation or changed an existing one, then N&C was required. If a rule’s function is to “alert the public” to the standards the agency uses to adjudicate, then it is an interpretative rule. The only kinds of rules that are substantive are the ones that create rights or effect a substantive change in the regulations—are they binding on the <u>courts</u> .

Held:	This rule is interpretive.
Why?	This wasn't a new rule, it resolved an ambiguity in an existing rule. The agency is telling its own employees how to interpret a rule. It's not inconsistent with an existing regulation. Interpretive rules <u>explain</u> existing law, they don't contradict what the regulations require.

Notes

The D.C. Circuit criticizes a tendency to lump together interpretive rules with policy statements, contrasting with substantive rules. This is the *incorrect* approach. *Syncor International Corp. v. Shalala*.

Community Nutrition Inst. v. Young (D.C. Cir.)

An agency **policy statement** does not seek to impose or elaborate a legal norm. It merely represents the agency position on how they will treat the existing legal norm.

The agency retains its discretion to change its position in any specific case because a change in policy does not constitute a change in a legal norm.

The question is whether the agency intends to bind the agency to a particular legal position.

An **interpretive rule** is an agency's construction of a statute entrusted to the agency to administer. Congress devised the legal norm, the agency isn't modifying it. The difference between an interpretive rule and a substantive rule turns on how tightly the agency's interpretation is drawn linguistically from the actual language. If the statute itself is very general, it is likely that the interpretation is a substantive regulation giving content to the legal norm. An interpretive rule can also construe a substantive regulation.

A **substantive rule** modifies or adds to a legal norm based on the agency's own authority, flowing from a congressional delegation to promulgate substantive rules.

Dismas Charities v. U.S. Dep't of Justice (6th Cir.)

The Attorney General's Manual on the APA describes an interpretive rule as one issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. The difference between legislative rules and interpretive rules has to do with whether the agency is engaged in law-making or law-interpreting. The purpose of notice and comment is not served when the question is "what is the law" rather than "what's the best rule." If a rule does not bind a court but only the agency, then it's interpretive.

Two approaches on the permissible scope of interpretive rules and general statements of policy:

1. *Mada-Luna* and Judge Starr in *CNI*
 Strong bias in favor of using N&C whenever there's a binding norm, whether it binds the courts or not.
 -A less demanding standard gives an incentive to make bad policy choices through IR and GSP.
 -This view means that *Dismas* and *Warder* are wrong.
 -In *Warder*, wouldn't it be good to give OrthoConcepts SOME input?
2. *Warder* and *Dismas* approach
 -*Mada-Luna* limits the ability of the agency to clarify how existing laws and regulations apply to fact patterns.
 -Adverse parties can still challenge in court since the norm isn't binding on the court.

Some fact patterns it doesn't matter what approach you use:

1. Action levels where the agency will bring enforcement proceedings is clearly a GSP or IS.
2. Authorization of a new broadcasting service by the FCC clearly requires N&C, because the "public interest" standard does not of its own force require or prohibit licensing of new services.

Note on Other APA Exceptions from the Requirements for Notice and Comment Rulemaking

Subject-matter Exemptions:

1. Military or foreign affairs function of the United States. § 553(a)
Independent Guard Ass'n of Nevada, Local No. 1 v. O'Leary (9th Cir.)
 The military exception can only be invoked where the activities regulated directly involve a military function. The military has to exercise direct supervisory control over the activities.
International Broth. of Teamsters v. Pena (D.C. Cir.)
 If a regulation is implemented as part of an international agreement, then it is not subject to N&C.
2. Matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. § 553(a)(2).
 Reflects the view that public involvement isn't needed in the dispensation of government benefits.
 This could be read quite broadly.
Vigil v. Andrus (10th Cir.)
 Many government agencies submit to notice and comment anyhow as a matter of good public policy.

Rules of Agency Organization, Procedure, or Practice. § 553

Aulenback, Inc. v. Federal Highway Administration (D.C. Cir.)

The primary purpose of this exemption is to ensure agencies retain latitude in organizing their internal operations.

The “Good Cause” Exception. § 553(b)(3)(B).

Only applies when compliance with notice and comment is impracticable, unnecessary, or contrary to the public interest.

Hawaii Helicopter Operators Association v. Federal Aviation Administration (9th Cir.)

Notice and comment should be waived only when the delay would do real harm.

The Agency should give specific facts why haste is needed.

Zhang v. Slattery (2nd Cir.)

It can’t just be a conclusory statement that immediate promulgation is necessary.

D. BEYOND NOTICE AND COMMENT: “FORMAL”, “HYBRID”, AND NEGOTIATED RULEMAKING

Robert W. Hamilton, “Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking”, 60 CAL. L. REV. 1267 (1972).

Formal rulemakings have a length of about four years. The record produced is drawn out, repetitious, and unproductive. Formal rulemaking is undesirable: it’s inefficient and doesn’t really protect against arbitrary action more than it makes rulemaking impossible.

United States v. Florida East Coast Ry. Co.

Facts:	There was a shortage of freight-cars on US railroads. To address the shortage, Congress amended the Interstate Commerce Act to allow the ICC to prescribe per diem charges for using freight cars owned by other railroads. The ICC investigated whether the information available warranted establishing interim per diem charges to incentivize prompt return of rail cars. The ICC discontinued the proceedings, saying they would investigate further. The ICC then initiated a rulemaking procedure directing line-haul railroads to compile and report information regarding supply and demand of freight cars. The ICC held an informal conference regarding this rule, where 20 railroads were represented. The ICC presented all the information to the Subcommittee on Surface Transportation, which expressed dissatisfaction with the slow pace. The ICC general counsel told the subcommittee they needed more hearings. However, the ICC then decided to tentatively adopt incentive per diem charges and promulgated a proposed rule with a 60 day comment period. § 1(14)(a) of the ICA authorizes the ICC to act “after hearing” and consideration of various factors.
Iss. 1:	Does a requirement for a public hearing trigger a requirement for a formal rulemaking?
Rule:	A hearing requirement must contain “on the record” to require a formal rulemaking.
Held:	No requirement for a formal rulemaking here.
Why?	The rule is derived from the AG’s Manual, which says that the magic words are required.
Iss. 2:	Does the word “hearing” trigger an obligation to use § 556?
Rule:	No.
Held:	The ICC was able to use notice and comment rulemaking under APA §§ 553(b) and 553(c).
Note:	The words “after hearing” does not require an adjudication with the right to present evidence orally or to cross-examine witnesses, or the right to present oral arguments.
Rule:	The words “public hearing” triggers a hearing on the record, even in a rulemaking.
Rule:	If a statute doesn’t say “formal hearing on the record”, then a formal rulemaking isn’t required. There is a STRONG presumption against formal rulemaking.
Why?	This isn’t a trial, it’s the formulation of a prospective rule. If there’s some unfairness, it can be resolved in an adjudication later.

Notes

Stephen M. Johnson, “The Internet Changes Everything: Revolutionizing Pubic Participation and Access to Government Information through the Internet”

The judicial elaboration of notice-and-comment in *FEC* has kind of undone the efficiency gains of informal rulemaking. It takes an average of three years to get through the informal APA procedures.

Agencies have begun to develop voluntary “best practices” standards to get around notice-and-comment rulemaking.

David Zaring, “Best Practices”, 81 NYU L. REV. 294 (2006)

Agencies use best practices where coordination is more important than a particular outcome. The central administration provides advise and disseminates information. These best practices proceed without judicial supervision. They are outside the APA’s framework.

§559 of the APA deals with “hybrid” rulemaking, where the organic statute requires procedures beyond notice and comment but not full formal rulemaking.

Vermont Yankee Nuclear Power Corp. v. NRDC

Facts:	§ 553 requires notice in the federal register and opportunity to comment on a proposed rulemaking. Generally, these are the maximum procedural requirements courts can impose on agencies: courts are generally not free to impose additional procedural rights. Even apart from the APA, SCOTUS emphasizes that the formulation of procedures is within the discretion of the agency. Under the AEA, the AEC has broad regulatory authority over the development of nuclear energy. Under the AEA, a utility wanting to build and operate a nuclear facility has to apply for two separate permits: construction and operation.
Case 1:	12/67, the AEC granted Vermont Yankee a permit to build a plant. VY then applied for an operating license. NRDC objected to granting the license. AEC held a hearing on 8/10/71, excluding consideration of the environmental effect of fuel reprocessing or waste disposal.

	11/72, the AEC instituted a rulemaking dealing with consideration of these environmental effects. The AEC held a rulemaking hearing where cross-examination or discovery were not utilized. However, all interested parties were given a chance to present their views. After the hearing, AEC adopted a rule that specified numerical values for the environmental impact of the fuel cycle and incorporate the values into a cost benefit analysis.
Case 2:	Consumers Power Co applied for construction permit for two plants. AEC issued reports saying CPC would have to fix some problems. Saginaw and Mapleton intervened and opposed the applications. Saginaw made itself a real pain in the ass, trying to get a bunch of discovery. The Licensing Board denied the requests. The Commission issued a draft environmental statement, which Saginaw commented on extensively. The Commission revised the statement and issued a final statement. They held further hearings, but Saginaw chose not to appear.
Proc:	The Courts of Appeals invalidated the fuel cycle rule used in the granting of the permits, holding that the rulemaking proceedings were inadequate.
Iss. 1:	May a court strike down a rulemaking that follows § 553 procedures without something more in the agency’s organic act?
Rule:	Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.
Held:	Since the rulemaking procedures were adequate under § 553, the rule should not be struck down.
Why?	§ 553 is not a procedural “minimum” that courts may routinely supplement. The legislative history does not bear this out. Further, the 1947 AG’s Manual states that procedures are in the discretion of the agencies, not the courts. An opposite rule would render procedures completely unpredictable unless agencies just used the full adjudicatory procedures, which surely wasn’t congressional intent. The Courts of Appeals were basing their decision on what procedures were necessary ex post the hearing itself, when the Board could only make that decision ex ante.

Does this overturn *Nova Scotia*?

Can you really separate the adequacy of the record from the adequacy of the procedure?

This case resolved a dispute on the DC Circuit between Bazelon and Leventhal (referenced later). Bazelon wanted courts to encourage agencies to adopt and follow procedures that would reliably produce rational regulations and policies (rejected) whereas Leventhal wanted a “hard look” standard to ensure that the agencies’ findings weren’t arbitrary and capricious.

Note on Hybrid Rulemaking

Vermont Yankee establishes clear rule: reviewing courts should not attempt to impose procedural requirements on agencies over and above those Congress sets forth in the APA or the organic statute.

Of course, agencies have to obey congressional commands re: procedures.

Hybrid Rulemaking is when Congress mandates extra procedures going beyond § 553 but short of formal rulemakings.

Ex: Toxic Substances Control Act, requiring oral presentation of data, views, or arguments.
Clean Air Act.

The review standard of “substantial evidence on the record” presupposes a paper record and review on the paper record—a hybrid rulemaking. *AFL-CIO v. Marshall*.

Note on Additional Generic Requirements for Rulemaking

Congress imposes two important generic requirements for agency rulemaking:

1. Regulatory Flexibility Act, 5 USC § 601 et seq.
 - Requires an agency to publish an initial regulatory flexibility analysis when it publishes a proposed rulemaking.
 - Requires a final regulatory flexibility analysis when it publishes the final rule.
 - Succinct statement of the need for and objectives of the rule.
 - Significant issues raised by the public comments and the agency assessment and any changes as a result.
 - Description of and estimate of the number of small entities affected.
 - Description of projected reporting, recordkeeping, and other compliance requirements and the professional skills needed for such.
 - Description of the steps the agency has taken to minimize the economic impact on small entities.

OR a statement certifying that the head of the agency believes that there will be no significant economic impact on a substantial number of small entities.

Agency only needs to consider entities directly regulated. *Mid-Tex Electric Cooperative, Inc. v. FERC* (D.C. Cir, BORK!)

Judicial review of whether the statement is adequate is deferential. *Allied Local and Regional Manufacturers Caucus v. U.S. EPA*.

2. Unfunded Mandates Reform Act of 1995 2 U.S.C. §1501 et seq.
Agencies must assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector.

Also need to generally adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. § 1535.

Does not apply to regulations that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability. § 1503(2).

Judicial review provision:

1. May review only to the extent whether the agency unlawfully withheld or delayed the issuance of the statement § 1571(b)(1).
2. The inadequacy or failure to prepare a statement isn't a basis to enjoin or invalidate a rule. § 1571(a)(3).
3. NO review of whether the regulation is actually the least burdensome, etc.

NOTE ON ALTERNATIVE DISPUTE RESOLUTION

Proponents of ADR:

Quicker, cheaper, and more predictable than public court litigation.
Permits the creation of specialized areas of law.

The Negotiated Rulemaking Act

Authorizes federal administrative agencies to establish a framework for the conduct of negotiated rulemaking, consistent with § 553, to encourage agencies when it enhances the informal rulemaking process. 5 U.S.C. § 561.

An agency may convene a Negotiated Rulemaking Committee

- Includes representatives from all interested groups.
- Drafts a consensus proposal that all members of the group agree to support.
- Each member has an equal vote.
- Kroto: this sucks. The agency, which Congress delegated to deal with the issue, gets one vote?
- The negotiated rule receives no greater deference than any other rule.
- This does allow interested groups to negotiate directly with each other.

Problems:

1. The agency only gets one vote.
2. Agency capture
3. If an industry consensus exists, this doesn't really speed anything up. If there's no consensus, negotiation isn't going to get us anywhere.

ADR CAN work in adjudications, though, just like it does in litigation.

Administrative Dispute Resolution Act authorizes ADR for agency adjudications. § 572(a)

Specifically allows for binding mediation and removes review of awards from the APA, instead bringing under the FAA (highly deferential standard).

E. MUST AN AGENCY PROMULGATE RULES?

SEC v. Chenery Corp (Chenery II) (Talk to Kroto)

Facts:	In <i>Chenery I</i> , the Court held that if an agency gave one rationale for its action, the Court could not substitute their own rationale. A reviewing court must judge the propriety of agency action solely by the grounds invoked by the agency. In that case, the Court found the SEC's grounds for action against Chenery inadequate and remanded. Federal Water submitted an application for approval of a plan to issue common stock to distribute to management on the basis of their old positions, putting them back where they were pre-merger. The SEC denied the application. The SEC determined that the proposed transaction was inconsistent with § 7 and § 11 of the Act versus reliance on judicial precedents that was not justified like in <i>Chenery I</i> .
Issue:	Did the Court's opinion in <i>Chenery I</i> that the SEC could not rely on judicial precedent foreclose the SEC from announcing a rule in an adjudication?
Rule:	In performing its important functions, an administrative agency must be equipped to act either by general rule or by individual order. To insist on one form of action to the exclusion of another is to exalt form over necessity
Held:	The SEC wasn't barred from using an adjudicatory proceeding for announcing and applying a new rule. When an agency announces a new rule with retroactive effect, it must be balanced against the mischief of producing a result which is contrary to a statutory design or legal or equitable principles. If the mischief outweighs the ill effect of the retroactive application of a new standard, it is not the type of retroactivity condemned by law.
Why?	Just because the SEC hadn't promulgated a rule doesn't mean they're foreclosed from performing their clear statutory duty. The SEC's order's retroactivity might be outweighed by the dangers of Federal Water's plan.
Issue:	Can the SEC's order be justified on the basis upon which it rests?
Rule:	The scope of our review of an administrative order wherein a new principle is announced and applied is not different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. Our duty is at an end when it becomes evident that the Commission's action is based on substantial evidence and is consistent with the authority granted by Congress.
Held:	The SEC's order is justified.
Why?	Completely possible that a stock purchase program like this one will be detrimental to the public and they're held to a fiduciary standard.

NOTE ON NLRB V. WYMAN-GORDON

A majority of the Supreme Court *seemed* to accept the proposition that an agency may not avoid procedural requirements for rulemaking by announcing a standard of conduct in an adjudication unless it applied to the parties being adjudicated. No majority opinion, though.

NLRB v. Bell Aerospace

Facts:	7/30/1970, Union petitioned NLRB for a determination on certification of Union to represent 25 buyers in Bell's procurement department. Bell says buyers are managers. 5/20/71 Board issued a decision that buyers were an appropriate bargaining unit. Relying on its own decision, even though buyers are managerial employees, they are covered by the NLRA and could claim its protections. 6/16/71, there was a representation election, which Union won. 8/12/71, NLRB certified Union. On the same day, the 8th Circuit held that managerial employees could not be covered under the act. Bell moved to reconsider, NLRB denied, saying the 8th Circuit was wrong and the correct standard was whether an employee was associated with formulation and implementation of labor relations policies. The 2nd Circuit denied enforcement of the order in this case. The 2nd Circuit reasoned that the NLRB's order wasn't based on a factual determination rather than the new rule, and that a new rule that contradicts longstanding practice should be made with a rulemaking, not an adjudication.
Iss. 1:	Are all managerial employees excluded from the protections of the Act?
Rule:	In addition to legislative history, a court may accord great weight to the consistent interpretation placed on a statute by an agency, particularly when Congress has re-enacted the statute without change.
Held:	The Board isn't free to just free to read a new meaning into the act now.
Why?	The Board's early decisions (closer to enactment), the purpose and legislative history of the Act, and the subsequent and consistent interpretation of the Act leads to a reading that Congress intended all managerial employees to be covered. The agency can't just disregard this.
Iss. 2:	Is a rulemaking required for an agency to make a finding contrary to its prior decisions?
Rule:	An agency is not precluded from announcing new principles in an adjudicative proceeding, and the choice between a rulemaking and an adjudication lies with the agency.
Held:	Even though the NLRB can't just say managerial employees aren't covered, they can make a determination that a particular type of employee isn't managerial, and they can do so in a rulemaking or an adjudication. Congress leaves this in the agency's discretion.

Why?	The Court says that Bell doesn't take any action in reliance on the old interpretation and won't be subjected to any fines or anything, so applying a new standard here doesn't hurt them.
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Notes

MSAPA §2-104 gives less discretion than the APA. MSAPA requires that agencies promulgate rules to overturn old interpretations.

What about a case where a new liability will be imposed for good-faith reliance on past interpretations?

NLRB v. Majestic Weaving Co. (2d Cir., Friendly)

A decision branding as "unfair" conduct stamped "fair" at the time a party acted raises judicial hackles.

Even worse when there's a financial penalty associated with the unknown change in position.

But you can't just adjudicate prospectively (at least *Wyman-Gordon* seems to say so). Looks like you've got to rulemake here.

F. AVOIDING ADJUDICATION THROUGH RULEMAKING

Heckler v. Campbell

Facts:	SSA defines “disability” in terms of effect of a physical or mental disability has on ability to function in the workplace. Disability benefits only provided to persons unable to engage in any substantial gainful activity. Can’t be able to engage in any substantial gainful work that exists in the national economy. In 1978, Secretary H&HS promulgated regulations recognizing certain impairments as so severe you can’t work at all with them. If an applicant doesn’t have one of these impairments, there’s a two-step process: 1. Can you do your former job? 2. If you can’t, can you do something less demanding? That last is also two step: 1. Consider physical ability, age, education, and work experience 2. Consider whether a job exists in the national economy that a person having the claimant’s qualifications can perform. Prior to 1978, Secretary relied on testimony from vocational experts to establish the existence of jobs in the national economy. To improve uniformity and efficiency, Secretary medical-vocational guidelines as part of the 1978 regulation. If a claimant’s qualifications correspond to the job requirements identified by the rule, the guideline direct a conclusion that work exists. 1979, Campbell applied for SSDIB. SSA denied the application, she appealed to an ALJ. The ALJ concluded she could still do light work, and by the regulation was qualified for several jobs.
Issue:	Where an agency’s organic statute requires a hearing, may the agency adopt regulations that control outcomes?
Rule:	Even where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its rule-making authority to determine issues that do not require case-by-case consideration. A contrary holding would require an agency to continually relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.
Held:	The Secretary’s rulemaking was valid.
Why?	General factual issues can be resolved fairly by rule-making, and you get better uniformity. Regulations provide an opportunity to show the guidelines don’t apply to them, so they get their day in “court”. In this case, nothing the rule addressed required case-by-case litigation: the types and numbers of jobs in the national economy doesn’t need litigation every time. The Court of Appeals erroneously held that the SSA had to give specific jobs the respondent could do under a principle of notice and opportunity (when an agency takes official notice of facts, a litigant must have the opportunity to respond). This doesn’t apply when an agency has promulgated a valid rule.

Notes

What about a case where an agency is specifically granted “discretion” to decide certain matters?

Two views:

1. *Fook Hong Mak v. Immigration and Naturalization Service* (Judge Friendly, 2d Cir)
Why shouldn’t an agency be able to make a rule if they have discretion? Sure, an adjudication is an exercise in discretion, but it’s also discretion when you determine that some conduct is so inimical to the statutory scheme that anyone who engages in it is ineligible. Something is so terrible you’ll never be able to overcome it. This doesn’t offend any notion that like cases should be decided similarly, just that one factor always has dispositive effect.
2. *Asimakopoulos v. Immigration and Naturalization Service* (Judge Hufstedler, 9th Cir)
Triggering the exercise of discretion means that you have to adjudicate case by case. Reliance on a attest that prevents the exercise of discretion is reversible error.

It’s always useful to remember that efficiency is a legitimate agency goal.

Barnhart v. Thomas

Use of a proxy rule is permissible to promote efficiency. In this case, analyzing whether someone could do their previous job is a good stand-in for determining whether they could do ANY job: saves time, and is good evidence. Even though a proxy rule could come up with the wrong result sometimes, every legal rule comes to bad results on bad facts.

Lopez v. Davis

Even if a statutory scheme requires case-by-case determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress CLEARLY expresses an intent to withhold that authority.

-treating similar cases a similar way is fair.

G. MUST AN AGENCY ADHERE TO ITS RULES?

Sameena, Inc. v. U.S. Air Force (9th Cir.)

Facts:	<p>2/1992, SSA solicited bids for computers. USI submitted a proposal, which was deemed competitive. Mirza Ali was USI's CEO. During an investigation around the bid, two USI officers submitted a fraudulent letter to SSA. SSA eliminated USI from consideration. HHS commenced debarment proceedings against USI and four officers, including Mizra Ali. Ali was debarred until 2/18/1996.</p> <p>Sameena Ali, Mizra's wife, is president and director of SI. Sameena sometimes goes as Sameena Iqbal. Mizra sometimes goes by Zulfiqar Iqbal. SI sometimes goes by Samtech.</p> <p>The Air Force issued a solicitation for purchase of computers, with buyer listed as V. Carol Moore. Samtech submitted a proposal 7/1995, certifying that Samtech and principals had ever been debarred or proposed for debarment. Samtech also provided a list of Government Contract Awards, including a contract with DoE obtained through novation from USI. Moore discovered that Samtech only got the contract in 1994, not 1992 as Samtech said (USI got it in 1992). Moore also found bank documents showing that Mizra was authorized to make withdrawals on Samtech account as Vice-president. On this bases, Samtech was disqualified and recommended for debarment.</p> <p>12/26/1995 Samtech, SI, Sameena and Mizra received notice of debarment proceedings and memoranda setting forth grounds. They responded that the bank signature card was wrong and they had corrected it. They requested an evidentiary hearing on whether on Mizra's role at Samtech. Air Force debarred all of them without an evidentiary hearing.</p>
Iss. 1:	Did Air Force act arbitrarily and capriciously with respect to Samtech's claim that the novation imputed USI's experience to Samtech?
Held:	No.
Why?	Samtech earlier represented the statement was a mistake, which contradicts their position that they thought they had "imputed" experience.
Iss 2:	Was Samtech entitled to an evidentiary hearing on Mizra's role at Samtech?
Rule:	Where a prescribed procedure is intended to protect the interests of a party before the agency, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.
Held:	Samtech was entitled to an evidentiary hearing.
Why?	The Federal Acquisition Regulation sets out procedures. Those procedures require an evidentiary hearing if there's a genuine issue of material fact. Mizra and Samtech presented evidence that calls Mizra's role into question.

Notes

Contrast *Sameena* with *American Farm Lines v. Black Ball Freight Service*.

American Farm Lines

It is always within the discretion of a court or an administrative agency to relax its procedural rules adopted for the orderly of transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.

In AFL, the rules in question were for the development of information. The challenging party wasn't harmed by the relaxation of the rules: they were a third party challenging the grant of a license, not a regulated party losing something.

Chapter 3: Role of Agencies in Three-Branch Government

A. HISTORICAL INTRODUCTION

Jay S. Bybee, *AGENCY EXPERTISE, ALJ INDEPENDENCE, AND ADMINISTRATIVE COURTS: THE RECENT CHANGES IN LOUISIANA'S ADMINISTRATIVE PROCEDURE ACT*, 59 *Louisiana Law Review* 431.

Congress is a collegial body: no one member is accountable.

There's no mechanism for just throwing everyone out.

SCOTUS also collegial

Even less accountable than Congress

The President is NOT collegial, and is directly politically accountable.

The Founders decided that a unitary executive would be more efficient.

The first hundred years of US History: single-head agencies.

Reform Period

States tried to regulate railroads and used commissions on an ad hoc and advisory basis.

SCOTUS said states couldn't do that, Congress stepped in and created ICC.

Question whether the ICC was judicial or executive or legislative in nature.

It exercised executive power, but it was collegial in nature. Relatively free of political reprisal: did not serve at pleasure of President.

Congress created many multi-head agencies to take on problems.

The New Reform

Agency Capture Theory argues for accountability.

Return to single-headed agencies with accountability to the President.

The Modern Trend: Independent Accountability

Independent, Single-head agencies

SSA

Accountable to Congress only, with a six year term.

President may only remove for neglect of duty or malfeasance in office.

Office of Independent Counsel

Only congress can remove

OSHA and OSHRC

OSHA: promulgates rulemakings and brings enforcement actions

OSHRC: Adjudicates

Courts defer to OSHA, not OSHRC.

B. CONFORMING TO AGENCY ACTION

Crowell v. Benson

Facts:	US Employees' Compensation Commission made an award to Knudsen against Benson, resting decision on finding of deputy commissioner that Knudsen was injured while in Benson's employ and performing service upon the navigable waters of the US, as required by the Harbor Workers' Compensation Act.
Issue:	Is it constitutionally permissible to allow a commissioner to make findings of fact entitled to judicial deference?
Rule:	1. Due process with respect to questions of law is provided by <i>de novo</i> review in Article III courts, including "jurisdictional facts." 2. The use of the administrative method for the purpose of determining facts, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily ... under the due process clauses of the Fifth and Fourteenth Amendments.

Northern Pipeline Const. Co. v. Marathon Pipe Line Co.

The judicial power of the United States must be exercised by judges who have the Article III protections of life tenure and compensation that cannot be diminished, with three exceptions:	
	1. Territorial Courts 2. Courts martial 3. Public rights: rights that arise between the government and others.
1.	It is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right is adjudicated – including the assignment to an adjunct of some functions historically performed by judges.
2.	The functions of the adjunct must be limited in such a way that the essential attributes of judicial power are retained in the Art. III courts.
3.	If Congress creates a statutory right, it can create courts to adjudicate that right. It cannot create courts to adjudicate matters that are creatures of common law or state law.

CFTC v. Schor

Facts:	§ 111 of the CEA allows a person harmed by a broker violation to apply for reparations through the CFTC. The CFTC promulgated a rule allowing it to hear counterclaims. Schor invoked the CFTC's reparations against Conti. Schor had a debit balance in his account at Conti. Conti sued on the deficiency in District Court. Schor tried to dismiss the DC action. Although the DC didn't dismiss, Conti voluntarily dismissed and filed a counterclaim in front of CFTC. The ALJ ruled for Conti, and Schor challenged the CFTC's jurisdiction over the counterclaim.
Issue:	Does CFTC's assumption of jurisdiction over common law counterclaims violate Article III of the Constitution?
Rule:	Article II does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. As a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver.
Held:	This was not a violation of Article III.
Why?	Schor obviously waived: he's the one who wanted the DC action dismissed.
Issue:	When does a Congressional grant of authority to adjudicate in a non-Article III court intrude on Article III?
Rule:	Totality of the circumstances test. 1. Extent to which the essential attributes of judicial power are reserved to Article III courts and the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts. 2. The origins and importance of the right to be adjudicated 3. The concerns that drove Congress to depart from the requirements of Article III.
Held:	This scheme does not intrude on Article III.
Why?	1. Pendent jurisdiction may be too much, but in this case it's pretty limited and we're not going to ban it entirely. 2. CFTC only deals with a particularized part of the law. 3. The CFTC order must be enforced by a district court: not self-executing! 4. Just because something is a private right isn't determinative of whether it can be assigned to administrative court. 5. Congress didn't withdraw these claims from Art. III courts, the decision to adjudicate is with the plaintiff. 6. CFTC's counterclaim jurisdiction is very limited to what is necessary to make the reparations scheme workable.
Issue:	Does the adjudication of state law claims by non Art. III federal courts implicate federalism concerns?
Held:	No. No historical support for such a contention.

Notes on the Seventh Amendment

The court appeared to hold that the seventh amendment does not apply to administrative actions.

NLRB v. Jones & Laughlin Steel Corp.

The 7th Amendment doesn't apply to cases where the award of money damages is incident to equitable relief, or where the proceeding is not in the nature of a suit at law. A proceeding to reinstate an employee and award damages is a statutory creature, unknown to common law.

Curtis v. Laughlin

Jones & Laughlin stands for the proposition that jury trials are generally inapplicable in administrative action. Where there is a statutory right enforced by a civil action in a district court, then the right to a jury trial applies. § 1983 actions are analogous to common law tort actions and the remedies sought are money damages at law, so the right to a jury trial inheres.

Atlas Roofing Co. v. Occupational Safety and Health Review Commn.

When Congress creates new statutory "public rights" it may assign their adjudication to an administrative agency with which a jury trial would be incompatible. This is true even if a jury trial would be required if the case were assigned to district court.

It's both the nature of the issue (public/private) and the forum (Art. III court/admin agency).

Granfinanciera, S.A. v. Nordberg

If a statutory cause of action is legal in nature, Congress can't assign it to tribunals without juries. It must assign it to an Article III court. If Congress can assign it to a non-Article III court, then the Seventh Amendment is no bar to no juries. If the case does not involve the federal government, the crucial question is whether Congress has created a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III courts.

1. Is the right closely intertwined with a federal regulatory program?
2. If no, does the right belong to or is it enforceable against the Federal Government?
3. If no, then must be adjudicated by an Article III court.

C. THE NONDELEGATION DOCTRINE

A.L.A. Schechter Poultry Corp. v. United States

Facts:	Schechter purchases live poultry from commission men in NY, occasionally in Philadelphia. They do not sell in interstate commerce at all. The “Live Poultry Code” was promulgated under § 3 of the National Industrial Recovery Act. § 3 allows the President to approve codes of fair competition. Codes may be approved upon submission by a trade association or group if the President makes certain findings.
Issue:	Has Congress overstepped its limitations by transferring the function of establishing legal standards to others?
Rule:	The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested.
Held:	Congress has impermissibly delegated its power to the President.
Why?	The Act was just a broad statement of purpose. It didn’t define “fair competition”. It just tells the President to make sure its out there and enact regulations that tend to promote it. By way of contrast, the ICC roots out unfair competition, a well-established and limited common law doctrine.

Industrial Union Dept. v. American Petroleum Inst.

Facts:	OSHA was enacted to ensure safe and healthful working conditions. The Secretary has taken the position that there is no safe exposure level to a carcinogen, so he must set an exposure limit at the lowest level technologically feasible. In the case of benzene, the Secretary set the exposure limit at 1 ppm, without showing that 10ppm was a proven hazard.
Issue:	Was the Congressional delegation to OSHA sufficiently broad that they could set an exposure limit without any threshold showing that such a low limit is necessary?
Rule:	The statute should be read to avoid a sweeping grant of authority of the sort found impermissible in A.L.A. Schechter.
Held:	OSHA had to make a preliminary showing that the regulation met the intelligible principle found in the reading of the statute. The intelligible principle is found in § 3(8) (“reasonably necessary”) and § 6(b)(5) (consistency with economic and technological feasibility). Since they didn’t, the regulation was invalid.
Why?	Policy-wise, the Court’s trying to save OSHA. The grant really was too vague, but if the Court strikes it down entirely, Congress won’t provide a more intelligible principle or they’ll take a beating at the polls. The Court will look to find an intelligible principle where maybe Congress didn’t intend one.

Note on Mistretta v. United States

Sentencing guidelines case. Court held that setting up sentencing guidelines is exactly the kind of thing that agencies are good at, and that Congress isn’t required to delegate the minimum possible authority. Simply because Congress delegated significant discretion to the Commission didn’t mean the delegation was impermissible.

Scalia Dissent: The power to make law cannot be exercised by anyone but Congress, except in conjunction with the lawful exercise of executive or judicial power.

1. No responsibility for execution of the law: not subject to executive control and by statute not part of the executive branch.
2. Not an exercise of judicial authority, as the commission has now adjudicatory powers nor is it subject to any judicial body.

Whitman v. American Trucking Ass’n

Facts:	CAA § 109 requires the Administrator to promulgate “NAAQS” for each air pollutant for which air quality criteria have been issued. The Administrator must review the NAAQS once every five years. In 1997, the Administrator revised the NAAQS for particulate matter and ozone.
Issue:	May the EPA consider costs in setting NAAQS?
Rule:	Section 109(b)(1) instructs the EPA to set primary air quality standards the attainment and maintenance of which are requisite to protect the public health with an adequate margin of safety.
Held:	The EPA may not consider costs when setting a standard.
Why?	The language of the statute tells the EPA to get to certain standards based on what humans can breathe safely, not based on what it costs.
Note:	This is important, because the EPA thinks it needs this to make their standard an intelligible principle.
Issue:	Has the statute delegated legislative authority to the EPA?
Rule:	When Congress confers decisionmaking authority upon agencies, Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform. An agency can’t cure an unlawful delegation by adopting in its discretion a limiting construction.
Held:	This wasn’t a delegation of legislative authority.
WTF?	This case is important for the rule above, but Scalia explains that an intelligible principle is not a determinate criterion. You don’t have to say how much is too much, you just have to give some guidance. How much guidance is based on the scope of the power granted.

D. THE LEGISLATIVE VETO

INS v. Chadha

Facts:	The Attorney General has the ability to suspend the deportation of an alien. However, Congress has the ability to veto such a deportation on the vote of either house. Only one house has to pass a veto, and the President is not required to sign.
Issue:	Is such a legislative veto constitutional?
Rule:	Legislative vetos violate both bicameralism and presentment.
Held:	No
Why?	
Art I, §1:	All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
Art I, § 7, cl. 2:	Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States.
Art. I, §7 cl. 3:	Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives...
	The Founders were very concerned Congress would attempt to get around the presentment requirement by calling a bill something else, so stuck in cl. 3. The presentment requirement ensures a national perspective on legislation.
Issue:	When is bicameralism and presentment required?
Rule:	Bicameralism and presentment is required when congress acts in a legislative manner. Action that alters the legal rights, duties, and relations of persons outside the legislative branch is legislative in nature.
Held:	In this kind of action, bicameralism and presentment required.
Why?	This alters rights, duties, and relations. Plus, this used to always be a legislative deal: private bills. Congress just got tired of doing those so set it up more efficiently. However, efficient doesn't mean constitutional. The Founders knew how to set up something that wouldn't require bicameralism and presentment, and they didn't do it for this.

Note on Statutorily Mandated Congressional Review

1996, Congress enacted the Contract With America. Added some stuff to the APA. Biggest is 801.

5 U.S.C. § 801(a)(1)(A)	(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing-- (i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.
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Also, there's additional information must provide with the report to Congress.

5 U.S.C. § 801(a)(1)(B)	(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress-- (i) a complete copy of the cost-benefit analysis of the rule, if any; (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609; (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.
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If a rule is "major" (annual effect on the economy of \$100mm or more), 5 U.S.C. § 804(2), then the GAO has to give Congress a report within 15 days that includes an assessment of the agency's compliance. Then § 801(a)(3) governs the effective date.

5 U.S.C. § 801(a)(3)	(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of-- (A) the later of the date occurring 60 days after the date on which-- (i) the Congress receives the report submitted under paragraph (1); or
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	<p>(ii) the rule is published in the Federal Register, if so published;</p> <p>(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date--</p> <p>(i) on which either House of Congress votes and fails to override the veto of the President; or</p> <p>(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or</p> <p>(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).</p>
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The joint resolution of disapproval: must be passed by both houses AND signed by the President.

Notes

Legislative review under 1981 MSAPA

§ 3-203	<p>There is created the ["administrative rules review committee"] of the [legislature]. The committee must be [bipartisan] and composed of [3] senators appointed by the [president of the senate] and [3] representatives appointed by the [speaker of the house]. Committee members must be appointed within [30] days after the convening of a regular legislative session. The term of office is [2] years while a member of the [legislature] and begins on the date of appointment to the committee. While a member of the [legislature], a member of the committee whose term has expired shall serve until a successor is appointed. A vacancy on the committee may be filled at any time by the original appointing authority for the remainder of the term. The committee shall choose a chairman from its membership for a [2]-year term and may employ staff it considers advisable.]</p>
§ 3-204	<p>(a) The [administrative rules review committee] shall selectively review possible, proposed, or adopted rules and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and hold public proceedings on those complaints.</p> <p>(b) Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible, proposed, or adopted rule and require the agency to respond to them in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the [administrative bulletin].</p> <p>(c) The committee may recommend enactment of a statute to improve the operation of an agency. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The [speaker of the house and the president of the senate] shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the legislature from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.</p> <p>[(d)(1) If the committee objects to all or some portion of a rule because the committee considers it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of the [secretary of state]. The filed objection must contain a concise statement of the committee's reasons for its action.]</p> <p>(2) The [secretary of state] shall affix to each objection a certification of the date and time of its filing and as soon thereafter as practicable shall transmit a certified copy thereof to the agency issuing the rule in question, the [administrative rules editor, and the administrative rules counsel]. The [secretary of state] shall also maintain a permanent register open to public inspection of all objections by the committee.</p> <p>(3) The [administrative rules editor] shall publish and index an objection filed pursuant to this subsection in the next issue of the [administrative bulletin] and indicate its existence adjacent to the rule in question when that rule is published in the [administrative code]. In case of a filed objection by the committee to a rule that is subject to the requirements of Section 2-101(g), the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection.</p> <p>(4) Within [14] days after the filing of an objection by the committee to a rule, the issuing agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.</p> <p>[(5) After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency.]</p> <p>(6) The failure of the [administrative rules review committee] to object to a rule is not an implied legislative authorization of its procedural or substantive validity.]</p> <p>(e) The committee may recommend to an agency that it adopt a rule. [The committee may also require an agency to publish notice of the committee's recommendation as a proposed rule of the agency and to allow public participation thereon, according to the provisions of Sections 3-103 through 3-104. An agency is not required to adopt the proposed rule.]</p>

(f) The committee shall file an annual report with the [presiding officer] of each house and the governor.
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Alternate ways for Congress to exercise control over the execution of the laws:

1. Sunsets
2. Narrower delegation
3. Budget controls
4. Informal contact (talk to the relevant subcommittee)
5. Report and wait (delay actions until Congress can pass legislation)
6. Statutory Hammers (an agency must promulgate regulations by a certain date or the activity is banned)
7. Oversight hearings.

Note: Congress keeps putting in legislative veto provisions.

E. EXECUTIVE POWER TO APPOINT

Buckley v. Valeo

Facts:	The FEC administers the Act. The Commission receives all the campaign reports required under the Act. The Commission also had broad rulemaking and adjudicatory powers. There are eight members to the Commission. The Secretary of the Senate and the Clerk of the House are non-voting members. Two members are appointed by the president pro tem of the Senate. Two members are appointed by the Speaker of the House. Two members are appointed by the President. Each of the six voting members must be confirmed by both houses, and the person appointing must appoint at least one from the opposition party.
Issue:	Is Congress precluded under separation of powers from vesting in itself the ability to appoint those with enforcement powers?
<u>The Separation of Powers Argument</u>	
The Founders didn't intend a total separation of powers. Even though Montesquieu argued that allowing the branches mix leads to oppression, and the Founders bought this argument, hermetic sealing off of the branches of government would make a national government impossible.	
<u>The Appointments Clause</u>	
Art. I § 6: No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office. [The ineligibility and incompatibility clause]	
Art. II, § 2, cl. 2: The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. [The Appointments Clause]	
The appointments clause divides officers into two classes:	
1. Ones requiring advise and consent.	
2. Ones vested in President, courts of law, or heads of departments alone.	
Rule:	The fair import of the term Officers of the United States is that any appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States and must be appointed in the manner prescribed by Article II, §2, cl. 2.
Held:	The President Pro Tem and the Speaker of the House cannot appoint Officers of the United States.
Why?	Language matters. They aren't heads of departments, they aren't judiciary, they aren't the President, there's no advise and consent, etc. There's nothing in the Constitution authorizing this method. The co-equal argument doesn't fly: the Founders were really worried about Congress aggrandizing itself. There was a deliberate choice by the Founders to not let Congress appoint officers.
Issue:	What kind of "officers" (not "Officers") may Congress appoint?
Rule:	Investigative and informative powers can be exercised by persons Congress appoints, as these are powers Congress holds itself. Congress cannot appoint persons with judicial or executive powers.

Note on Freytag v. Commissioner

Freytag v. Commissioner

Federal statute authorized creation of the Tax Court as an Article I court. Congress gave the Chief Judge of the Tax Court the power to appoint and assign "Special Trial Judges".

Majority: The Tax Court, although not Article III, was a Court of Law, and Congress could vest appointment of inferior officers. The Chief Judge was NOT a "Head of a Department", since was not a Cabinet-level department head. Cabinet Department heads are subject to political oversight and share the President's political accountability.

Scalia: Not an Article III court, so not a "Court of Law" due to the lack of political independence. However, Scalia's down with the Chief Judge being a "Head of Department."

Note on Landry v. FDIC

Landry v. FDIC (D.C. Cir.)

FDIC appointment of ALJs OK, even though the FDIC is not a department, because an ALJ is not an officer, rather only an employee. Distinguishes from *Freytag* because an ALJ's decision is not final without more agency action.

F. EXECUTIVE POWER TO REMOVE

Myers v. United States

Facts:	The President appointed Myers as a postmaster first class for a term of four years on 7/21/1917. On 2/2/1920, he was fired at the direction of the President. The statute under which Myers was appointed provided that he could only be fired with the consent of the Senate. The Senate did not consent to the firing.
Issue:	Can Congress condition removal of a presidential appointment on Senate consent?
Rule:	Art. II, § 2: appointment of all officers by the President is subject to the advice and consent of the Senate. In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal.
Held:	Congress cannot condition removal on Senate consent.
Why?	The President is solely responsible for enforcement of the laws. He must have the power to remove appointees who refuse to enforce the laws or who enforce them in a way inconsistent with the President's commands. Even though Congress can invest heads of departments with the power to appoint and the power to remove, it may not arrogate that power to itself.

Humphrey's Executor v. United States

Facts:	Hoover nominated Humphrey as a member of FTC 12/10/1931. His term was to expire 9/25/1938. Roosevelt removed him 10/7/1933. § 1 of the FTCA provides that a commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.
Issue:	Does an enumeration of causes for removal limit the power of the President to remove except for in those circumstances?
Held:	Yes. Such an enumeration shows Congressional intent that removal should be limited to one of those causes.
Issue:	Is placing limitations on the President's power of removal of federal trade commissioners a violation of the separation of powers under <i>Myers</i> ?
Rule:	Illimitable power of removal is not possessed by the president in respect to an officer who does not exercise the executive power. Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend on the character of the office. The <i>Myers</i> decision is confined to purely executive officers. For officers that exercise solely legislative or adjudicatory functions, Congress can condition their removal.
Held:	Congress may place limits on the power of removal of FTC commissioners.
Why?	The concerns that underlie <i>Myers</i> don't exist here. Instead of enforcing laws on the books through lawsuits, the FTC acts in a quasi-legislative/quasi-adjudicative capacity. The FTC is intended to be an independent agency, and independence is compromised when a commissioner serves at the President's pleasure.

Note on Bowsher v. Synar

Bowsher v. Synar

Under Gramm-Rudman-Hollings, Congress created the Comptroller General, and gave itself the power to remove him. The Comptroller General was charged with enforcing deficit control measures. The Court held that Congress can't reserve the power of removal over an officer charged with enforcing the law. The Comptroller General enforced the law by determining what budget cuts should be made.

Morrison v. Olson

Facts:	Tit. VI of the Act allows appointment of independent counsel. The AG conducts an initial investigation, then reports to the Special Division ¹ . If the AG finds no reasonable grounds to appoint a special prosecutor. If the AG does find reasonable grounds, he applies to the Special Division for appointment of an independent counsel. The Special Division appoints an independent counsel and defines his prosecutorial jurisdiction. With respect to all matters within the IC's jurisdiction, the Act gives the IC full powers and independent authority to exercise the investigatory and prosecutorial powers of the AG and the DoJ. The IC may only be removed by the AG for good cause, physical & mental capacity, or any other condition that substantially impairs the IC. If the AG wants to remove, he has to submit a report to the Special Division and the House and Senate Judiciary Committee. The Act provides for judicial review of removal. The IC may also terminate an investigation, on its own or the special division. The Special Division may terminate on its own or at suggestion of the AG.
Issue:	Is an independent counsel an inferior officer?
Rule:	The Court uses a multi-factor analysis.
1.	The IC is subject to removal by an executive branch officer.

¹ The Special Division is a division of the D.C. Circuit. Three circuit court judges appointed by the Chief Justice, appointed for 2-year terms.

2.	The IC can only perform certain, limited duties. He has no authority to form policy and performs no administrative duties other than hiring staff.
3.	The IC's jurisdiction is very limited.
4.	The IC's tenure is only temporary (no time limit, but expires at the end of the investigation.)
Held:	IC is an inferior officer, so may be appointed by someone other than the President.
Issue:	Does the conditioning of removal of the IC by the AG on "good cause" violate separation of powers by impermissibly interfering with the President's exercise of his constitutional functions?
Rule:	Under <i>Bowsher</i> , Congress can't reserve for itself the power of removal of an officer charged with the execution of the law. Under <i>Myers</i> , the problem is when Congress draws to itself the power to remove or the right to participate in that power. When Congress does not attempt to draw this power to itself, there is no violation of separation of powers.
Held:	No violation.
Why?	Congress squarely placed the power to remove with the executive branch: the AG. There's no requirement that Congress approve the removal. The analysis does not rest on who can or can't be removed at will by the President, but on whether or not Congress is drawing power to itself. The Court doesn't see how the IC's exercise of discretion is so central to the functioning of the Executive Branch that the Constitution requires he be terminable at will by the President. The "Good Cause" requirement doesn't violate the separation of powers because the very purpose of an IC requires that they have a degree of independence. The President DOES still retain significant control through the AG, so the limitation doesn't really deprive the President of much control.
Issue:	Does the Act violate the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the IC?
Rule:	Separation of powers is not violated unless Congress attempts to draw power to itself.
Held:	No violation of separation of powers.
Why?	No attempt by Congress to increase its own powers: no supervisory or control powers over the IC. No usurpation of executive power by the judicial: the appointments clause specifically allows appointment of inferior officers by judges. Even if it didn't, the Special Division doesn't appoint sua sponte, but at the request of the Executive Branch. The Act doesn't undermine the powers of the executive branch impermissibly. While the Act reduces the amount of control by the AG and President, it still gives the AG significant control: no IC appointed if the AG determines no need, and the AG can remove for good cause.

G. THE ROLE OF THE PRESIDENT IN IMPLEMENTING STATUTES

1. *Presidential Signing Statements*

Presidents have been using since Monroe, but the usage is much more common now.

DoJ OLC defense of signing statements:

1. They explain what the President thinks the likely effects of a bill are.
2. They direct Presidential subordinates how to interpret.
3. They inform Congress and the public that the President thinks parts of a bill are unconstitutional.
 - a. That's dumb. The President should just veto a bill he thinks is unconstitutional.

HOWEVER, signing statements should not be used to create legislative history that the courts are supposed to give weight or effect to.

The House of Delegates of the ABA oppose signing statements as contrary to the rule of law and separation of powers. If the President disagrees with the language Congress used, the President should veto.

2. *Presidential Review of Agency Rulemaking*

Did we cover this?

H. EXECUTIVE POWER AND THE WAR ON TERROR

The Prize Cases

The Court addressed the issue of whether a blockade of Southern powers without a congressional declaration of war was constitutional. The Court took a very broad view: the President must be able to determine on his own without judicial review whether he has encountered hostilities.

United States v. Curtiss-Wright Corp.

Question of whether Congressional delegation of authority to President to declare arms sales in particular regions violated separation of powers. Since the delegation dealt with external affairs, not internal matters, the delegation did not violate separation of powers: the President traditionally has broad discretion in foreign policy and is the representative of the nation as a whole.

Ex parte Quirin

The Constitution invests the President as CinC with the power to wage war which Congress has declared, to carry out laws passed by Congress for conduct of war, government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those pertaining to conduct of war.

Duncan v. Kahanmoku

Hawai'i's Organic Act provided for "martial law". What is the limit of martial law?

The US system of governance is antithetical to total military rule. The Founders would not be OK with total military rule of a territory unless it was recently conquered. They were opposed to governments that put all control in the hands of one person. The Court has always been concerned about the potential evil of summary criminal trials. While "martial law" is intended to authorize the military to act vigorously for the maintenance of civil order, it cannot supplant courts with military tribunals.

Youngstown Sheet & Tube Co. v. Sawyer

Justice Jackson Concurrence—the relationship between legislative and executive action.

While the Constitution diffuses power the better to secure liberty, it contemplates that practice will integrate the dispersed powers into a workable government. Separateness but interdependence, autonomy but reciprocity.

Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at a maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. If his act is held unconstitutional under these circumstances, then it usually means the Federal Government as a whole lacks this power.
2. When the President acts in absence of either congressional grant or denial, he can rely on his own powers, even in the zone of twilight where they have concurrent powers. The actual test of power will depend on the imperatives of events and contemporary imponderables.
3. When the President takes action contrary to the express or implied will of Congress, his power is at its lowest ebb. Presidential Powers-Congressional powers. Sustaining the Presidential act disables Congress.

Hamdi v. Rumsfeld

Congress delegated the power to detain "enemy combatants" to the President. However, the judiciary has a role to play in ensuring that authority is exercised in a manner consistent with due process. A state of war is not a blank check for the president when it comes to citizens. Whatever power the Constitution envisions for the Executive in its exchanges with other nations or enemy organizations in times of conflict, it envisions a role for all three branches when individual liberties are at stake. Absent a suspension of the Writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Hamdan v. Rumsfeld

Several statutes at most acknowledge a general presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war. Without a specific congressional authorization, the task is to determine whether the military tribunal was so justified. The Court held the tribunal violated the UCMJ.

Kennedy concurrence: This isn't Youngstown one or two, it's three: Congress set limits with the UCMJ, in a proper exercise of its power and in light of long experience in matters of military justice. Trial by military tribunal raises separation of powers concerns of the highest order. Tribunals are wholly within the executive branch, and carry the risk that offenses will be defined, prosecuted, and adjudicated without independent review.

Chapter 5: Judicial Review

A. SCOPE OF REVIEW OF FACT

NLRB v. Universal Camera Corp. - 179 F.2d 749 (2d Cir. 1950) - 2nd Circuit misapp'ed ev std

i. Background

- A) Petition to enforce order of the NLRB is brought before the ct
- B) Request is to reinstate 1 Chairman w/ back pay; he alleges he was fired by Respondent for testifying that "maintenance EEs" at his place of work should be considered a collective bargaining unit for the purposes of the NLRA.
- C) According to facts at hand, either one of two things could have happened. First, Vice President Kende could've become angry over Chairman's arg on behalf of maintenance EEs and wanted to get rid of Chairman. He then could've made up the Communist accusation (made against Chairman) to stir up trouble b/twn Weintraub & Chairman, cause a fight, & then prompt Politzer to tell Chairman he should resign (which Chairman ultimately refused to do). Politzer's assurance to Weintraub that Chairman would resign would be a reas assum for Politzer to make, & it'd also put big time gap b/twn bd hearing & Chairman's eventual firing. Firing based on complaint made by Weintraub a/b quarrel he & Chairman had.
- D) On other hand, it's possible Kende didn't actively plot Chairman's eventual demise, but just waited for a quarrel with another worker to give him a pretext for firing Chairman.
- E) At any rate, Hearing Examiner didn't believe Chairman's representation on behalf of the maintenance employees was what caused him to get fired. Examiner finds for Company.
- F) NLRB rev'd Hearing Examiner, holding in favor of Chairman. 1st of all, they didn't believe Politzer told Weintraub that Chairman was going to resign soon, but did believe that Kende & Weintraub conspired to get rid of Chairman. Also thought Weintraub's complaint was a pretext for doing so. Their opinion makes it appear as if Politzer had nothing to do w/ alleged conspiracy to bring down Chairman (but nothing indicates this did or didn't happen).
- G) Case is now before the 2nd Circuit Court of Appeals.

ii. Issues

- A) Were findings of Bd supported by "substantial ev on the record CONSIDERED AS A WHOLE"? NLRB purported to decide who was lying based on a paper record (or rather parts thereof) & ALJ actually got chance to decide whether witness looked credible or not
- B) To answer, Ct must know if Bd's reversal in & of itself can be part of record Ct considers.
- C) Finally, to answer ?, Ct needs to know what kind of deference is to be given to the fact-finding of a Hearing Examiner. Is he supposed to be treated like a Special Master (to whom deference is given where fact-finding is concerned)? Or like an ALJ/Special Trial Judge?

iii. Rules - A) New "record as a whole req'ment" HASN'T broadened scope of ct's review; it's just made it more definite; B) New Act isn't much clearer than Old NLRA as to how much deference is to be given to Examiner/Officer. Sec 8(a) makes it clear just how much power it has in making its own decision, but not how much weight the Examiner's judgment is to be accorded in the making of that decision; C) Ct ends up deviating from what its Sister Circs have done by NOT permitting Bd's reversal to be a factor in Ct's decision. To do so, 2nd Circ thinks (at least in the case of a reversal) it'd be like saying that the NLRB/Agency didn't give Examiner enough deference---and he doesn't even deserve the kind of deference that a Special Master gets, according to Congressional intent as seen in the New Act.

iv. Outcome

- A) Ct accordingly decides to disregard Examiner's belief a/b what Politzer told Weintraub a/b resigning, b/c it doesn't appear from record itself that Politzer's testimony would have to be believed for Weintraub to be seemngly slow in filing his complaint about Chairman.
- B) Bd's order, on the other hand, is to be enforced, because of the possibility that either of the scenarios detailed above could have happened.
- C) So long as reas person could conclude that Kende & Weintraub conspired, or that Kende used Weintraub's complaint as pretext for firing Chairman, Bd's decision will be upheld.

Univ. Camera Corp. v. NLRB

Remanded; Subst'l ev on whole record can't be app'ed in a strategic way & doesn't have to mean a reas doubt. 20% probability (says Prof) is probably definition of subst'l ev.

1. **Supply test against the entire record, not just ev supporting agency's decision**
2. **Subst'l ev doesn't mean prepon of ev (or directed verdict std); means it has to be "such relev ev as reas mind might accept as adeq to support conclusion"**

-Rules

- A) Answer to the first question is a definite yes, but SCOTUS makes it clear that "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Examiner's report is part of the record to be considered, b/c of the importance that the APA and Taft-Hartley apparently seek to confer upon examiners.
- B) The second question, the Court thinks, is easy to answer. They believe that the fact that the Crt of Appeals' holding reflects the fact that witness testimony was inconsistent is an indicator that the Court of Appeals DID consider the "record as a

whole."

-Holding/Outcome

A) Case is remanded to the Court of Appeals, which is supposed to "accord the findings of the trial examiner the relevance they reasonably command in answering the comprehensive question" of whether evidence supporting Board's decision was actually substantial.

B) The effect of this case is basically that courts are not permitted to review a record, "cherry-pick" the facts that favor the decision it wants to reach, and then claim that "substantial evidence" upholds their rulings.

B. SCOPE OF REVIEW OF LAW

Cabinet for Human Resources v. Jewish Hospital Healthcare Services (Ky. App.)

Facts:	Jewish Hospital filed an application for a Certificate of Need to add a sixth cardiac catheterization lab and requested expedited review. The IOHP denied the application for expedited review. Jewish Hospital then withdrew its application, saying it didn't need a CoN due to a decision of the Franklin County Circuit Court. IOHP told Jewish that they maintained their position that Jewish needed a CoN, and that case was on appeal to the Ct. of App. Jewish told IOHP to pound sand. IOHP issued a C&D and ordered Jewish to pay \$10k in fines. KRS 216B.061(1) states a CoN is required when "Unless otherwise provided in this chapter, no person shall do any of the following without first obtaining a certificate of need...make a substantial change in a health service." KRS 216B.015(20)(a) defines "substantial change in a health service" as "The addition of a health service for which there are review criteria and standards in the state health plan."
Issue:	Did the district court err in holding that a sixth catheterization lab wasn't an addition of a health service?
Rule:	While matters of fact are only subject to substantial basis review, matters of law and statutory construction are the province of the courts.
Held:	The lower court's interpretation was proper.

Skidmore v. Swift & Co.

Facts:	Swift & Co. employed seven people in a fire-control capacity. As part of their duties, they had to stick around the fire-hall, even when they weren't technically working. The plaintiffs were paid on a by-alarm basis, and no alarms occurred during the disputed time. The plaintiffs wanted this to count as working time.
Issue:	Does any principle of law state that working time cannot be waiting time?
Held:	No. The law doesn't impose an arrangement on the parties, it imposes a duty on the courts to find what the arrangement was.
Issue:	What deference should courts give agency determinations?
Rule:	The rulings, interpretations and opinions of [agencies] under [their organic act] while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its considerations, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control.

Chevron U.S.A. v. NRDC

Facts:	The Clean Air Act established certain requirements on states that hadn't met air quality standards established by the EPA. These states had to establish a permitting program regulating "new or modified major stationary sources" of air pollution. The EPA regulation implementing this requirement said that states could adopt a "plantwide" definition of "stationary source". That is, if total emissions of a plant are unaffected or reduced by a modification, then no permit needed.
Issue:	What deference should courts give to an agency's interpretations of its own enabling/organic statute?
Rule:	The Court adopts a two-step process for <i>Chevron</i> deference.
1.	Has Congress directly spoken to the precise question at issue? If the intent of Congress is clear, that is the end of the matter. The court and the agency must give effect to the unambiguously expressed intent of Congress.
2.	If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. The Court's reasoning here is that an ambiguous statute is an implicit grant of authority to the agency to construe the statute in a reasonable manner.
Held:	The EPA's construction was a reasonable interpretation of an ambiguous statute.
Why?	The Court looks to the plain language of the statute and the legislative history and can't find anything where Congress actually addresses the bubble concept.

Questions

1. Note that this is a matter of legal interpretation—it's statutory construction.
2. Agencies don't necessarily have to be consistent. The *Chevron* court said this can reflect a change in policy as more information or experience comes to light.
3. Statutory ambiguity means delegation. Why? Because 1) Congress legislates against the backdrop of *Chevron* and knows an ambiguity will mean delegation; 2) Congress can legislate to correct misinterpretation and 3) It would violate separation of powers for the courts to presume to interpret the statute if they are mistaken and Congress actually intended the agency to promulgate rules fleshing it out.
4. *I.N.S. v. Cardoza-Fonseca*: Although the Court in *Chevron* uses legislative history to determine whether Congress spoke, Scalia in a concurrence here takes great issue with that. Scalia, Roberts, and Thomas are all on this side of the divide now.

MCI Telecommunications Corp. v. AT&T Co.

Facts: § 203 of the FCA says in subsection (a) that “Every common carrier...shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges.” Subsection (b)(1) states “The Commission may, in its discretion and for good cause shown, modify any requirement made by or under authority of this section...by general order..”
The FCC promulgated a rule saying that smaller carriers don’t have to file tariff schedules.

Issue: Is the FCC’s rule interpreting § 203 of the FCA entitled to deference?

Rule: Step one of *Chevron*: if Congress has directly spoken to the issue, the Courts and the Agency must comply.

Held: The FCC’s rule is entitled to no deference. This is not a “modification” but a fundamental revision to the statute.

Why? The FCC relied on “modify” to mean “make a basic or important change in” as listed in Webster’s Third. Scalia points out that the more common definition is to make an incremental change, a definition Webster ALSO contains, and to say that it encompasses both “basic or important change” and “incremental change” means that it just means “change” and some new adverb will need to be invented. Further, Scalia points out that Webster’s definition was NOT a definition when the statute was written.
Beyond the plain language, the statutory scheme is inconsistent with this definition of modify. Scalia points out that the statute explicitly does not allow modification of the 120 day notice period, and it doesn’t make sense that the Commission could eliminate the requirement to publish a tariff entirely while not being able to extend a notice period for changing tariffs.

Questions

1. Scalia’s reliance on the dictionary is proper, I think. The dictionary reflects common meanings of words. This still allows deference: ambiguity arises when words actually may be construed differently in context.
2. Stevens in the dissent thinks agencies should be able to update antiquated statutes. However, I think he’s wrong here: this would violate the non-delegation doctrine.
3. Scalia has the better argument here. Allowing the Courts and Agencies to revise statutes when the social and economic costs outweigh their benefits trenches on the role of Congress. These are political questions and should be left to Congress as a politically-accountable branch. Although the Agency is technically politically-accountable, this would still violate non-delegation doctrine: if the agency can redefine the statute, where’s the intelligible principle?

Sierra Club v. Johnson (11th Cir.)

Facts: Title V of the Clean Air Act requires stationary sources of air pollution to obtain permits including emission limitations and other conditions. When state permitting authorities issue these permits, they must comply with the EPA approved state plans. First, they must give 30 days for public comment on the proposed permit. That notice must be in a newspaper of general circulation and to persons on a mailing list including people who requested inclusion on the list. After the notice and comment period, the state permitting authority submits the permit to the EPA. The EPA has 45 days to object to the permit. If the EPA doesn’t object, any person can challenge the non-objection within 60 days after the 45 day period. If the objector shows that the permit didn’t comply with the CAA, then the EPA must object.

King Finishing applied for a Title V permit for a new facility. GaEPA published a notice in a local newspaper establishing a 30-day comment period. They didn’t create a mailing list until after the 30-day comment period. The Sierra Club objected (even though they had actual notice) based on the lack of a mailing list. The EPA answered that a mailing list wouldn’t have done anything substantive, so they waived the requirement. EPA regs implementing Title V unambiguously require that state permitting authorities must notify the public of opportunity to comment on Title V permits, and one of those requirements is a mailing list.

Issue: Is the EPA’s interpretation of its own regulation to not require a mailing list entitled to *Chevron* deference?

Rule: First, we must determine whether Congress has directly spoken to the precise question at issue. If Congress’ intent is clear from the statutory language we must give effect to it. If the statute is silent or ambiguous with respect to the specific issue, we must decide whether the agency based its interpretation on a permissible construction of the statute. An agency’s interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation. This deferential standard applies as long as the agency does not promulgate a parroting regulation that does nothing more than paraphrase the statutory language it should be implementing. We will uphold the agency’s interpretation of its regulations so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations. We apply this deferential standard of review even if the agency’s interpretation is not the best or most natural one by grammatical or other standards.

Held: The agency’s action is not entitled to deference.

Why? The agency’s action was directly contradictory to its own regulation and the CAA. Even though you give a lot of deference, their interpretation isn’t controlling: the courts still have a duty to review.

Issue: Is the EPA’s decision to not object to the permits because they only included data showing permit deviations entitled to deference, when the decision was based on the EPA’s interpretation of its own regulation?

Rule: When an agency has regularly advocated a uniform interpretation of its regulation, the interpretation is deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation.

Held: The EPA’s decision was entitled to deference. Note: THE INTERPRETATION OF THE REGULATION MUST BE CONSISTENT!

Why? The statute only said reports of results of required monitoring and didn't define "results". The regulation itself was a reasonable interpretation, only requiring that deviations be clearly marked. Interpreting this regulation to mean that only deviations had to be included was reasonable. The regulation emphasizes deviations, and EPA's interpretation reflects that.

United States v. Mead Corp.

Facts: 19 USC § 1500(b) provides that Customs shall under rules and regulations prescribed by SecTreas fix final classification and rate of duty applicable to merchandise. § 1502 says that SecTreas shall establish and promulgate rules. In 19 CFR § 177.8, SecTreas authorizes "ruling letters" setting tariff classifications for particular goods. These represent the official position of the Customs Service. Ruling letters are only to be applied with respect to identical articles, and ruling letters may be modified at any time without notice except to the person to whom it was initially addressed. Regulations say that no person other than the one named in the letter should ever rely on a ruling letter. Ruling letters aren't subject to notice and comment, since they only respond to the transaction of the moment. Mead Corp. imports day planners. The tariff schedule for day planners falls under one of two subcategories. One is subject to a 4% tariff, one is subject to no tariff. From 1989-1993, Customs treated day planners as falling under the 0% tariff group. In 1993, Customs changed their position and said they were part of the 4% group.

Issue: Should the Customs Ruling Letters be given Chevron deference?

Rule: 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 that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Rule: When Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

Rule: We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.

Rule: HOWEVER, the Court will sometimes find reasons for *Chevron* deference even when no such administrative formality is required or afforded. Ex: The Comptroller of the Currency is given personal authority to enforce banking laws, and his decisions without formalities are given deference.

Held: No *Chevron* deference here.

Why? The terms of the congressional delegation don't give any reason to think Congress intended Customs to issue classification rulings with the force of law. Although they have some precedential value, precedential value isn't *Chevron*. The agency's own practice shows these letters aren't really meant to bind third parties, only Customs and the person to whom issued. Not even binding then if Customs gives notice. Further, every Customs office (46 of them) issue these things, up to 15,000 per year. Just no way that's plausibly lawmaking. This really looks more like interpretations in policy statements, agency manuals, and enforcement guidelines, and thus outside *Chevron*.

Issue: Are the Ruling Letters entitled to any deference?

Rule: *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency and given the value of uniformity in its administrative and judicial understandings of what a national law requires.

Held: A classification ruling in this situation is entitled to *Skidmore* deference proportional to its power to persuade: the writer's thoroughness, logic and expertness, fit with prior interpretations, and other sources of weight.

Why? It's just implausible that Congress intended a broad range of statutory authority to either get deference or not. This allows for a spectrum.

Scalia: HATES THIS. Thinks that if an agency's interpretation is authoritative, then it gets *Chevron*. Otherwise, no.

Questions

1. Yes, *Chevron* appears to be a canon of construction. That is, *Chevron* requires that an ambiguous statute will be construed in favor of an interpreting expert agency.
2. Congress wants the *Chevron* doctrine because it advances the goal of expert agencies determining the best course of action when they have greater access to information than Congress. It allows Congress to regulate in broad strokes while allowing the agency to fine-tune.
3. The best indicator of whether *Chevron* applies is the amount of formal procedures followed by the agency or whether Congress has vested a discretionary right in an individual to enforce.
4. Yes?
5. The Court does not want ultra-informal agency action to receive *Chevron* deference because there's no guarantee that either issues will be brought out in an adversarial process (adjudication) or that interested parties will have an opportunity for input (rulemaking).

NOTE ON MEAD CORP. AND THE OSSIFICATION OF ADMINISTRATIVE LAW

Scalia in *Mead Corp* (Dissent):

The worst part of *Mead* is that it removes flexibility from the agencies. Under *Chevron*, the agency is free to reinterpret the statute as it sees fit. Under *Skidmore*, though, once a court rules on a particular statute, the meaning of the statute is fixed by *stare decisis*. If the agency then readopts the regulation using *Mead* approved procedures, the exercise of *Chevron* deference will allow the executive to tell the courts what the law is, a violation of the separation of powers and an abdication of the judicial role.

National Cable & Telecommunications Ass'n v. Brand X Internet Services

A court's prior judicial construction of a statute trumps agency construction entitled to *Chevron* deference **only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.**

Allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute would allow a courts interpretation to override the agency's. *Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. The logic here is that the court determines the *best* reading as a matter of law, but the *best* reading isn't the *correct* reading under *Chevron*. Analogous to a state court adopting a construction of state law conflicting with the federal court (I don't buy that last, seems glib).

Scalia, being an asshole, disagrees.

Questions

- 1.
2. Possibly. *Marbury* says that the law interpretation power lies with the Courts, not the executive. However, is this really law interpretation, or is it law-making? Congress is free to override the Courts' interpretation of a statute, why would they not be able to delegate that power?

Gonzales v. Oregon

Facts:	Oregon passed a law legalizing assisted suicide. Under ODWDA, physicians are exempted from liability for giving lethal doses of drugs to terminal patients. The drugs the physicians use are regulated by the CSA. The AG issued an Interpretive Rule under the CSA saying that PA suicide isn't a legitimate medical purpose and prescribing or dispensing these drugs was unlawful under the CSA.
Issue:	Does the AG's Interpretive Rule receive <i>Auer</i> deference?
Rule:	An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation. However, <i>Auer</i> deference is not afforded to interpretations of regulations which only "parrot" an ambiguous statute.
Held:	The regulation merely parrots the statutory language. No <i>Auer</i> deference.
Issue:	Does the Interpretive Rule receive <i>Chevron</i> deference?
Rule:	<i>Chevron</i> deference is not accorded merely because the statute is ambiguous and an administrative official is involved. The rule must be promulgated pursuant to authority Congress has delegated to the official.
Held:	No <i>Chevron</i> deference.
Why?	
Chev. I:	Congress hasn't addressed the issue here whether the AG can interpret the CSA this way. "Legitimate medical purpose" is a generality, susceptible to more than one reasonable interpretation.
Chev. II:	Is the AG's interpretation reasonable? No: the statute says that he is not allowed to make a rule declaring a medical standard specifically authorized under state law illegitimate.
	There's really no delegation of authority to do what the AG wants to do here. Under the CSA, the AG has the power to add drugs to the controlled substance list and make it a crime for a non-licensed person to dispense, but he can't make it a crime to dispense then yank someone's license for dispensing. The AG can promulgate rules for registration of dispensers, but to do so he has to go through a five-factor analysis under the CSA. The AG didn't. Even though the statute does say that it's the AG's job to decide compliance with the law, it doesn't get to say what the law IS. The AG can promulgate regulations to execute his functions, but he doesn't get to add new functions. When Congress wants to give someone that great authority, it just gives him authority over the provisions he's supposed to interpret, not by referring to his functions.
Issue:	Is the AG's determination entitled to deference under <i>Skidmore</i> ?
Rule:	<i>Skidmore</i> requires that courts give deference to agency determinations based on their persuasive power.
Held:	No deference under <i>Skidmore</i> .
Why?	The AG is not an expert in medical care, and the statutory scheme requires him to make drug determinations in concert with the FDA. Obviously, Congress did not intend the AG to make these kinds of determinations, and thus his opinion, taken without any expert help and just on his say-so, is entitled to no deference.

Questions

1. There's a relationship between Step I of *Chevron* and whether Congress delegated authority to an agency. *Chevron* Step I presupposes that an ambiguous statute is an implicit grant of authority.
Adams Fruit Co. v. Barrett
Agencies can't bootstrap themselves into areas where they have no authority by promulgating regulations giving them that authority. To get judicial deference, you have to be acting within your statutory authority.
2. While this purports to be an interpretive rule, instead of the AG saying "this is what we'll prosecute" it was the AG saying "this is illegal", thus a rulemaking.

Note on Agency Non-Acquiescence in Court of Appeals Decisions

Inter-circuit non-acquiescence

Not controversial: the First Circuit decides one way, but you keep pressing the claim in the Second Circuit and going on your merry way there. *United States v. Mendoza*: SCOTUS approves of this practice.

Intra-circuit non-acquiescence

More controversial. Justifiable if the organic statute allows review in multiple Circuit Courts: the agency has no idea where a potential plaintiff might file an appeal.

Social Security gets kind of crazy here: they won't even abide by decisions of the same circuit when they know it'll be appealed to the circuit. Why? Because they have to provide uniform benefits around the country, and the First Circuit can't tell SSA in Texas how to run its business. SSA can still litigate the claim in the Fifth, after all.

C. DISTINGUISHING ISSUES OF FACT AND LAW

Campbell v. Merit Systems Protection Board (Fed. Cir.)

Facts:	Campbell ran for City Council while working for the FHLB. While nominally independent, he advertised he had been endorsed by the Alexandria Democratic Committee. He also identified himself as a member of the Democratic ticket. The Office of Special Counsel told him to knock that shit off and if he kept it up he could be fired. In 1989, he started preparing to run again. At the time, he was working at the Office of Regulatory Affairs and not subject to the Hatch Act. He planned to get the Democratic nomination. However, he then went to work at OTS, which brought him back under the Hatch Act. Campbell sought guidance from an OTS attorney, Morris. Morris told him that he could “passively” receive an endorsement, then modified her position after learning that someone else had actively sought an endorsement. Meanwhile, Campbell set up a new procedure with the ADC so that he could get their endorsement while still nominally an independent. Morris said that he could follow the new procedures and advertise his endorsement without violating 5 C.F.R. § 733.124(c)(1), the regulation implementing the Hatch Act. Campbell did all this, and the Office of Special Counsel filed a complaint with the Board. The Board referred to an ALJ for adjudication. OSC argued that Campbell was a <i>de facto</i> Democrat. Campbell argued that while he was <i>de facto</i> , he wasn’t <i>de jure</i> , and as long as he filed and registered as an Independent, he had at least a rebuttable presumption of compliance. The ALJ told Campbell he was full of shit: it’s not the label, it’s the substance, and Campbell actively sought the Democratic endorsement. Campbell appealed to the Board, who affirmed the ALJ.
Issue:	Is the determination of whether someone is an “independent candidate” an issue of law or of fact?
Rule:	Congress has directed the courts to set aside agency actions found to be 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) obtained without procedures required by law, rule, or regulation having been followed; or 3) unsupported by substantial evidence. Which of these standards applies depends on both the nature of the agency action and the question presented.
Rule:	Questions of fact in agency adjudications are generally governed by the substantial evidence test. Courts must defer as long as the record contains evidence from which one could reasonably draw the challenged inference.
Rule:	Conclusions of law are reviewed <i>de novo</i> , it being the province and duty of the judicial department to say what the law is.
Issue:	Again, is the Board’s determination a finding of fact or of law?
Rule:	No bright line rule. Somewhere along the “fact-law spectrum” fact shades to law. A question may pose normative questions (thus be law) while still being very case-specific. In these cases, it will come down to a balancing test.
Test:	Courts balance considerations of judicial economy, comparative institutional advantage (e.g. the relative expertise of agencies and the relative non-expertise of juries vis-à-vis judges), and constitutional concerns (e.g. the separation of powers in administrative appeals, and the right to trial by jury in actions at law against the effect of appellate deference on consistency and uniformity in the law.
Held:	The mixed question of “independent candidate” is in the category of fact for purposes of judicial review.
Why?	These determinations are likely to be highly case-specific, so little value to precedent. Further, in cases like this, demeanor evidence is important: the fact finder can see and hear those giving evidence. The Board has a lot of experience with both federal and state agency employees: the Court doesn’t handle review of the state agency employees. There’s no constitutional problem here: Congress is within its rights to say no running for office at all.
Issue:	Does the record contain “such relevant evidence as a reasonable might accept as adequate to support the Board’s conclusion that Campbell was not really independent?”
Held:	Yes.
Why?	There’s evidence all over the record here. The plain language of the regulation shows that the agency’s interpretation of independent is reasonable and permissible. The Court can’t choose the definition it likes best, it has to go with the reasonable interpretation of the agency.
Issue:	Does the fact that the Board relied on impermissible considerations merit reversal?
Rule:	It is not always sufficient for an appellate court simply to identify a minimum quantum of evidence from which the challenged inference reasonably could be drawn. If it appears that the ultimate conclusion is premised to some extent on erroneous or irrelevant subsidiary findings, the reviewer must ask not only whether the agency official <i>could</i> have reached the same conclusion, but whether he <i>would</i> have.
Held:	The Board did not rely on the mistake enough to alter the outcome. This is a “harmless error” doctrine.
What?	There was an incident where the Kelloms held an event for Democratic Party candidates and put Campbell’s name out there as a Democratic candidate. Campbell had no role in this, but he also didn’t correct the issue. The Board shouldn’t have held him responsible for the Kelloms’ actions. Campbell didn’t really have an opportunity before the event to repudiate, but did at the time.

Question

1. Note that Campbell is the one pushing for issue of law because he gets more favorable review.

D. SCOPE OF REVIEW OF EXERCISES OF DISCRETION

Citizens to Preserve Overton Park v. Volpe

Facts:	§ 4(f) of the Department of Transportation Act and § 18(a) of the Federal-Aid Highway Act (23 U.S.C. § 138) prohibit SecTrans from authorizing the use of federal funds to finance the construction of highways through public parks if “feasible and prudent” alternative routes exist. If no such route exists, he can authorize construction through the park if there has been “all possible planning to minimize harm.” Overton Park is in the middle of Memphis. A segment of I-40 was to go through the park, but § 4(f)’s enactment got in the way. The rest of the project got underway, and in 1968 SecTrans announced that he agreed the road should go through the park. SecTreas then gave final approval in November of 1969. Neither the announcement nor the final approval were accompanied by a statement of factual findings: no reason he thought there were no feasible and prudent alternative routes or why design changes to reduce harm to the park could not be made.
Issue:	Are petitioners entitled to any judicial review?
Rule:	§ 701 of the APA provides that the action of each authority of the Government of the United States (including the Dept of Transportation) is subject to judicial review except where there is a statutory prohibition or where the agency action is committed to discretion.
Held:	No showing of clear and convincing evidence that Congress intended no review, and the “committed to agency discretion” rule only applies when statutes are drawn in such broad terms that there’s no law to apply.
Why?	§ 4(f) and § 138 give clear and specific directives. The language is a clear and explicit bar to usage of federal funds to build highways in parks—only very unusual situations are exempt.
Issue:	What is the standard of review to apply here?
Rule:	§ 706 of the APA: A reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found not to meet six separate standards. In all cases agency action must be set aside if the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action failed to meet statutory, procedural, or constitutional requirements. In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by “substantial evidence”. In other equally narrow circumstances the reviewing court is to engage in a de novo review of the action and set it aside if it was unwarranted by the facts.
Rule:	Review under the substantial evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the APA itself or when the agency action is based on a public adjudicatory hearing.
Rule:	De novo review of a decision was unwarranted by the facts is authorized in only two circumstances: 1. The action is adjudicatory in nature and the agency factfinding procedures are inadequate. 2. There may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudication.
Held:	No review on substantial evidence test, this wasn’t a rulemaking or an adjudication.
Held:	No de novo review, this isn’t an adjudication.
Issue:	Again, what standard of review, if any?
Rule:	Although no de novo and no substantial evidence, the generally applicable standards of § 706 require the reviewing court to engage in substantial inquiry. HARD LOOK REVIEW.
Rule:	Step One: determine if the agency acted within the scope of its authority. Step Two: Was the actual choice made “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?” Step Three: Did the agency follow the necessary procedural requirements?

NOTE ON JUDICIAL SUPPLEMENTATION OF THE AGENCY RECORD

Camp v. Pitts

When a court applies the APA arbitrary and capricious standard, the focal point is the administrative record in existence, not the new record made in the reviewing court.

However, under special circumstances, challengers may supplement the administrative record.

IMS, P.C., v. Alvarez (D.C. Cir.)

It is a widely accepted principle of administrative law that the courts base their review of an agency’s actions on the materials that were before the agency at the time its decision was made. It is not necessary that the agency hold a formal hearing in compiling its record, for the APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred.

IMS wanted affidavits included in the official record. The Circuit Court denied:

1. The affidavits couldn’t be considered because they contain significant new information.
2. No showing that the agency failed to consider all relevant factors or to adequately explain its grounds for decision.
3. No showing that the agency acted in bad faith or in improper behavior.
4. The agency has not failed to explain administrative action so as to frustrate effective judicial review.

The affidavits should have been introduced below. Ex post supplementation of the record is inconsistent with the standards of agency review.

Questions

1. Policy behind no ex-post supplementation: no second bites at the apple and holding things in reserve for appeals.
2. District and appellate courts can get expert testimony to help them understand the issues.

NOTE ON THE ARBITRARY AND CAPRICIOUS STANDARD AND THE “HARD LOOK” REVIEW

Greater Boston Television Corp. v. FCC (D.C. Circuit)—Famous formulation of Hard Look (before *Overton Park*)
Judge Leventhal.

The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency’s policies effectuate general standards, applied without unreasonable discrimination.

It’s supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or by bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a “**hard look**” at the salient problems, and has not genuinely engaged in reasoned decision-making.

The courts will not overturn for harmless error.

If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency’s path may reasonably be discerned, though of course the court must not be left to guess as to the agency’s findings or reasons.

In other words, per Leventhal, the purpose was to ensure the AGENCY took a hard look.

However, later cases held that the arbitrary and capricious standard behooved the COURTS to take a hard look.

National Lime Assn. v. EPA (D.C. Cir.)

The phrase “hard look” evolved to connote the rigorous standard of judicial review applied to increasingly utilized informal rulemaking proceedings or to other decisions made upon less than a full trial-type record.

The court traces the development of informal rulemaking to the rise of hard look.

Bazelon disagrees with Leventhal on the use of “Hard Look”. Bazelon lost this argument with *Vermont Yankee*, but he thinks judges should engraft procedures that ensure a reasoned decision.

Questions

1. Judges ARE better suited to procedure than the highly technical substance of agency action, but they can supplement the record with expert testimony.
2. There may be a problem with judges not giving scientific evidence enough weight or too much weight or whatever.
3. Congress knows about generalist judges. If they know the problems and still fail to set up procedures, that’s their problem, not the Court’s.

Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.

Facts: Congress enacted the Act for the purpose of reducing traffic accidents and deaths and injuries to persons resulting from traffic accidents. The Act directs SecTrans or his delegate to promulgate vehicle safety standards that “shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms. The Secretary must consider “relevant available motor vehicle safety data”, whether the standard is “reasonable, practicable, and appropriate”, and the “extent to which such standards will contribute to carrying out” the purposes of the Act. The Act provides for review under § 706 of the APA.

The Department promulgated Standard 208 in 1967. 208 only initially required seatbelts. The Department then started to consider passive restraints, such as automatic seatbelts and airbag systems. The Department proposed a standard in 1969 that would require some kind of passive restraint. 1970, Dept revised to include passive protection requirements. 1972, Dept amended to require full passive protection for all front seat occupants of vehicles manufactured after 1975. All vehicles manufactured to that point would have to have either passive restraints or an ignition interlock that would keep the car from starting without seatbelts engaged.

Congress amended the Act to provide compliance by either an interlock or a buzzer. They also amended the Act to say that any safety standard that could be satisfied by something other than seatbelts would have to be passed by both Houses.

The effective date for mandatory passive restraint was extended to 1976. Before the Standard went into effect, SecTrans initiated a new rulemaking extending the optional alternatives and discontinuing passive restraint requirements, saying that people would resist passive restraints.

	<p>Brock Adams took over as SecTreas and disagreed, and promulgated Modified Standard 208, with a new mandatory passive restraint system. Two types of restraint would satisfy: airbags or passive seatbelts.</p> <p>Andrew Lewis took over from Brock Adams and reopened the rulemaking, saying that this rule would be economically hard on the auto industry. After comment and public hearings, NHTSA rescinded the passive restraint requirement. NHTSA gave as a reason that auto manufacturers were going to just install the passive belts, which were easily detachable: nobody would use them, so there was no basis to believe the new regulation would actually lead to more use of restraints.</p>
Issue:	What is the appropriate scope of judicial review of the NHTSA's actions?
Rule:	Standards are to be promulgated under § 553 of the APA, therefore standards may be set aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. § 706. Reissuance or modification of a standard is subject to the same test.
Why?	Revocation of a standard isn't the same thing as just not promulgating a standard. A revocation constitutes a reversal of prior views. A settled course of behavior embodies the agency's informed judgment that, by carrying out that course, it will carry out the policies committed to it by congress. This leads to a presumption that the Congressional policy will best be carried out by carrying out that course. While rules of conduct don't last forever, and agencies must be able to modify their courses of action. However, there is no presumption in favor of deregulation: there is a presumption in favor of staying the course of action. Whether an agency chooses to deregulate or regulate more does not change the standard of review.
Issue:	Does the "arbitrary and capricious" standard mean that a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by Congress?
Rule:	The rationality here is not the same as rational-basis review under Due Process claim.
Rule:	The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. However, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. We must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.
Rule:	Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which 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 before the agency, or is so implausible that it could not be ascribed to a difference of view or the product of agency expertise. We may not supply a reasoned basis for the agency's action that the agency has not itself given. (<i>Chenery I</i>). We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. <i>Camp v. Pitts</i> . It is also relevant that Congress (in this case) required a record of the rulemaking proceedings and intended that the agency findings under the Act would be supported by substantial evidence on the record considered as a whole.
Issue:	Was NHTSA rescission of the passive restraint requirement of Standard 208 arbitrary and capricious?
Held:	It was arbitrary and capricious.
Why?	NHTSA gave no consideration to modifying the Standard to require airbags. Just because the detachable automatic seatbelts won't work, that doesn't mean the entire Standard had to be repealed. The logical response would have been to mandate airbags in light of the agency's mandate to improve traffic safety. Further, there was no evidence that detachable seatbelts won't save SOME lives: the evidence in the record shows that passive seatbelts led to a doubling in usage rates. The Agency also failed to consider mandating an alternate seatbelt design that couldn't be detached.

Questions

- The scope of review here is the "Hard Look" from *Overton Park*. In particular, the court was looking at whether the agency decision was arbitrary and capricious because they did not look at all relevant factors mandated by Congress.
- An agency action will normally be arbitrary and capricious if the agency:
 - Relied on factors Congress did not intend 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 before it
 - Offered an explanation so implausible that it could not be ascribed to a difference of view or agency expertise

Note that all these factors lead to a supposition that the agency relied on invalid or inappropriate reasons.
- Remember from *Brand X* that inconsistency is not a reason to not apply *Chevron* deference. However, it may relate to the question of whether the action was arbitrary and capricious. If the agency adequately explains the change of position, the new rule survives 706 and gets *Chevron*.

NOTE ON THE RELATIONSHIP BETWEEN ARBITRARY OR CAPRICIOUS REVIEW AND CHEVRON STEP II ANALYSIS

Chevron Step II may be thought of as an arbitrary or capricious review.

National Association of Regulatory Commissioners v. Interstate Commerce Commission (D.C. Circuit)

The inquiry under *Chevron* Step II overlaps analytically with the court’s task under APA § 706 for arbitrary or capricious review.

Whether an agency action is to be judged as reasonable, in accordance with the APA’s general arbitrary and capricious standard, or whether it is to be examined as a permissible interpretation of the statute *vel non*² depends, at least theoretically on the scope of the specific congressional delegation implicated.

The more Congress gave a detailed instruction in the statutory scheme, the more it’s likely that the analysis will be under *Chevron* as statutory interpretation. The more general the grant of authority, the more likely it will be reviewed under § 706.

Questions

1. It appears that the Supreme Court endorsed the view that *Chevron* Step II is the same as arbitrary and capricious review in *Mead*.

AFL-CIO v. Marshall (D.C. Cir.)

Facts:	OSHA promulgated a cotton standard to reduce the health risks to cotton workers. The standards set a permissible exposure limit (PEL). OSHA established a four-year implementation period. If an employer can’t meet the standards in four years, they can get a variance so long as he provides respirators.
Issue:	What’s the scope of review under the Occupational Health and Safety Act?
Rule:	Regulations promulgated under the Act are to be upheld on review if supported by “substantial evidence on the record considered as a whole.” This is more rigorous than “arbitrary or capricious.” The Court’s task is to provide a careful check on the agency’s determinations without substituting its judgment for the agency’s.
Rule:	The tasks of the reviewing court are thus to ensure that the agency has:
	<ol style="list-style-type: none">1. Acted within the scope of its authority;2. Followed the procedures required by the statute and by its own regulations;3. Explicated the bases for its decision;4. Adduced substantial evidence in the record to support its determinations.
Rule:	Since Congress enabled OSHA to act under a “best available evidence” standard, the substantial evidence review has to include review of not only the facts, but the judgment calls and reasoning used. Otherwise, OSHA could just say “we don’t know” on relevant evidence and escape scrutiny.
Rule:	The reviewing court must examine both factual evidence and the agency’s policy considerations set forth in the record. To facilitate this review of the record, the agency must pinpoint the factual evidence and the policy considerations upon which it relied.

NOTE ON HARMLESS ERROR IN THE ADMINISTRATIVE PROCESS

Greater Boston Television Corp. v. FCC (D.C. Cir.) (Leventhal)

A court will not upset an administrative agency decision because of errors that are not material, there being room for the doctrine of harmless error.

APA § 706 provides that due account shall be taken of the doctrine of prejudicial error.

National Ass’n of Home Builders v. Defenders of Wildlife

An erroneous statement in the Federal Register that couldn’t have had any effect on the underlying agency action challenged did not constitute prejudicial error.

Z

² *Vel non* means “whether or not.” Read this as “whether or not an action is a permissible interpretation of a statute”.

E. DISTINGUISHING AMONG ISSUES OF FACT, LAW, AND DISCRETION

Allentown Mack Sales & Service v. NLRB

Agencies are not allowed to manipulate the standard of review in order to make policy: they can't just decide that some evidence will be ignored, they have to make a rule saying so.

Courts are the ones who get to say what the standard of review is, not the agency.

An agency attempting to define the scope of its own jurisdiction does not get *Chevron* deference.

However, an Agency MAY have a counter-factual policy regarding a change in employer structure: ie that there is a presumption in favor of union acceptance.

They just can't tell the courts what the standard of review is.

F. CAUSE OF ACTION, REVIEWABILITY, JURISDICTION, IMMUNITY

Note on Judicial Review as a Civil Action

Is there a cause of action/Is it reviewable?

Does the court have jurisdiction?

Does an immunity doctrine apply?

Reviewable

To find a cause of action, §§ 703 & 704 are your go-tos.

1. If an organic statute provides for review, resort to common-law writs is unnecessary. § 703.
2. If the organic statute does not provide for review, can still use all the common-law writs. § 703.
 1. Mandamus (only for ministerial duties).
 2. Habeas Corpus (only for detention)
 3. Injunctions (but must meet equitable doctrines ie clean hands, etc.)
3. Agency action is subject to judicial review in civil or criminal proceedings to enforce the action. § 703.
 - a. Can't get review if there's prior, adequate, and exclusive opportunity for pre-enforcement review.
4. If there's no adequate remedy in a court, **final** agency action is reviewable. § 704. Agency action is presumed to be reviewable.
5. However, two exceptions: § 701
 - a. Statutory preclusion
 - b. Action is committed to agency discretion by law.

Jurisdiction

State Courts

Jurisdiction provided in MSAPA § 5-104, but state courts are courts of general jurisdiction anyhow.

Federal Courts

Not courts of general jurisdiction, and the APA doesn't grant jurisdiction.

However, since the agencies are established by federal law or there's some kind of constitutional claim, federal courts generally have federal question jurisdiction.

Sovereign Immunity

Sovereign immunity of the US is waived with respect to suits not for money damages. § 702.

However, § 702 does not waive other limitations on judicial review:

1. Equitable relief should not be granted because of hardship to the defendant or the public or because the plaintiff has an adequate remedy at law.
2. Actions committed to agency discretion.
3. Express or implied preclusion of judicial review
4. Standing
5. Ripeness
6. Failure to exhaust
7. Exclusive alternative remedy.

Can't grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief. § 702.

e.g. The Tucker Act forbids specific performance.

Johnson v. Robison

Facts:	Robison served as a conscientious objector at Brigham Hospital. The VA by regulation classifies such a person as not a veteran who served on active duty and therefore not an eligible veteran for purposes of the GI Bill. Robison applied for GI Bill benefits and the VA denied them. § 211(a) of the Act precludes judicial review of decisions of the Administrator.
Issue:	Does § 211(a) bar federal courts from deciding the Constitutionality of veteran's benefits legislation?
Rule:	Courts will first ascertain whether a fair construction of the statute that avoids constitutional questions.
Held:	§ 211(a) does not bar review of the constitutionality of benefits legislation.
Why?	The statute says that decisions of the Administrator under any law administered by the VA shall be final and conclusive. The Constitution is not a law administered by the VA. This construction of the statute is also supported by the VA's past position: the VA has disclaimed even having the ability to adjudicate constitutional claims, and the Court gives deference to that position. Further, the purposes of § 211(a) are to first make sure that veterans' claims don't overwhelm the courts and to ensure consistent application of the complex determinations required by VA policy. These concerns aren't implicated: federal courts are well-suited to adjudicate constitutional claims.

Bowen v. Michigan Academy of Family Physicians

Issue:	Has Congress barred judicial review of regulations promulgated under Part B of Medicare in either 42 USC § 1395ff or § 1395ii?
Rule:	There is a strong presumption of judicial review of administrative action. To cut off judicial review, there must be a persuasive reason to believe that such was the purpose of Congress. The very essence of civil liberty consists in the right of every individual to claim the protection of the laws. "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to the debtor no remedy, no appeal to the laws of his country, if he believes the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the U.S." <i>United States v. Nourse</i> . The legislative history of the APA creates a strong presumption of judicial review, and says that there must be clear and convincing evidence on the face of a statute to preclude judicial review. Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review. <i>Abbott Labs v. Gardner</i> This is a presumption, and may be overcome by specific language or specific legislative history that is a reliable indicator of Congressional intent.
Issue:	Does § 1395ff, by authorizing appeals by individuals, implicitly foreclose review of any action taken under Part B by failing to authorize such review while authorizing it under Part A?
Rule:	The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion.
Held:	Review of the procedures to award Medicare awards are not precluded by § 1395ff.
Why?	Although the court DID hold that review of the awards themselves were precluded by § 1395ff in <i>Erika</i> , the Court distinguishes here. In <i>Erika</i> , there was a clear legislative history that showed that Medicare Part B awards were not to be reviewed. However, this case goes to the procedures, not the awards themselves.

Webster v. Doe

Facts:	§ 102(c) of the NSA provides that the Director of the CIA may, in his discretion, terminate the employment of any officer or employee of the Agency when he shall deem such termination necessary or advisable in the interests of the United States. The CIA hired Doe in 1973. Doe came out in 1983. He took several polygraph tests to show that he had not divulged any secrets. However, he was asked to resign his post. When he refused, the Director terminated him under § 102(c)
Issue:	To what extent are termination decisions of the Director under § 102(c) judicially reviewable?
Issue:	Is review available under § 701 of the APA?
Rule:	§701 is limited to situations in which judicial review is not precluded by statute and is not committed to agency discretion by law. Under § 701(a)(2), even when Congress has not affirmatively precluded judicial oversight, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. § 701(a)(2) requires careful examination of the statute on which the claim of illegality is based.
Held:	§ 102(c) shows that Congress intended this decision to be committed to agency discretion.
Why?	Language of the statute: "in his discretion...deem". Not "is in the best interests of the United States." The overall structure of the NSA also reflects a great deal of leeway in dealing with personnel issues with respect to protecting intelligence sources.
Issue:	Does § 102(c) preclude review of constitutional claims arising out of terminations?
Rule:	Where Congress intends to preclude judicial review of constitutional claims, its intent must be clear. "Unmistakable intent."
Held:	§ 102(c) does not preclude constitutional review.
Why?	Although subjecting these claims to review allows the court to go rummaging around in the Agency's affairs, they already can under Title VII claims. There's a principle of constitutional avoidance as well: removing review of constitutional issues from the courts raises an issue that we don't want to reach. Note that the courts are still fairly deferential to the operation of national security, so you're not going to get the same Constitutional review if we're talking about a DMV employee.
Dissent:	Scalia and O'Connor both dissent from the view that the CIA shouldn't be open to review of constitutional claims because it defeats their national security purpose.

Note on Heckler v. Chaney

Issue of commitment to agency discretion usually arises where the executive branch traditionally has broad discretion.

1. Military
2. Diplomacy
3. National Security
4. Prosecution.

Heckler v. Chaney is a prosecution case.

Chaney sought FDA enforcement action against the unapproved use of drugs to administer capital punishment. The FDA denied jurisdiction and in the alternative said they wouldn't pursue anyhow.

Rehnquist pointed out the inherent tension between § 706(2)(A) providing for review of agency action that is arbitrary and capricious and § 701(a)(1) and (2) exempting action committed to agency discretion. Since §706(a)(2) applies when there's no standard against which to judge, §706(2)(A) doesn't apply: you can't say there's an abuse of discretion when there's no standard by which to judge.

Enforcement decisions should be presumed to be non-reviewable:

1. The decision involves a complex weighing of factors.
2. When an agency decides not to act, liberty and property interests are typically not harmed.

The APA requires agencies to give notice when they deny a formal request for action 5 USC § 555(e).

The notice has to contain a brief statement of the grounds.

A short letter thanking the citizen for their concern probably suffices.

G. STANDING

1. Injury in Fact

Lujan v Defenders of Wildlife

Important to note:	Scalia is in the majority for only part of the opinion. Kennedy is the majority for the other part.
Facts:	The Endangered Species Act requires federal agencies to prepare impact statements and ensure that their actions will not jeopardize the continued existence of any endangered species or the habitat of any such species. In 1978, the Fish and Wildlife Service interpreted the Act to cover actions overseas and on the high seas. In 1986, F&W reconsidered, and interpreted the Act to only cover actions in the United States. Defenders of Wildlife wants a declaratory judgment that this interpretation is wrong. The Act provides for “citizen suits”, enabling regular citizens to sue the Agency for violations of the Act.
Issue:	Does Defenders of Wildlife have standing?
Rule:	The irreducible constitutional minimum of standing contains three elements: <ol style="list-style-type: none">1. The plaintiff must have an “injury in fact”: an invasion of a legally protected interest.<ol style="list-style-type: none">a. Concrete and particularized;b. Actual and imminent, not conjectural or hypothetical.2. There must be a causal connection between the conduct complained of and the injury3. It must be <u>likely</u> that the injury will be redressed by a favorable decision. To survive summary judgment, the plaintiff must set forth specific facts showing standing.
Issue:	Does Defenders of Wildlife have an injury in fact?
Rule:	The injury in fact test requires more than an injury to a cognizable interest, it requires that the party seeking review be himself among the injured.
Held:	The DoW do not have standing.
Why?	The claim fails on the standard of actual and imminent. The members of DoW have no plans other than a stated desire to one day go and see these animals again.
Issue:	Can DoW assert “ecosystem nexus” to show they will be injured?
Rule:	A plaintiff claiming injury from environmental damage must use the area affected and not an area in the vicinity.
Held:	To say the Act protects ecosystems is not to say the Act creates rights of actions in persons who have not been injured in fact.
Why?	Standing is not an ingenious academic exercise in the conceivable but requires a factual showing of perceptible harm. A person who actually works with animals or has concrete plans to go see them can show an injury in fact. It’s beyond reason to say that just because someone likes or works with animals that extinction of other animals harms him.
Issue:	Does the “citizen suit” provision of the Act allow standing on a “procedural injury”?
Rule:	A plaintiff raising only a generally available grievance about government, claiming an interest in proper application of the Constitution and the laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large, does not state an Article III case or controversy. The party who invokes the power of judicial review must be able to show not only that the statute is invalid but that he has sustained or is in immediate danger of sustaining some direct injury as the result of its enforcement. The province of the court is solely to decide on the rights of individuals. Vindicating the public interest is the function of the Congress and the Chief Executive.
Issue:	Can the public interest in proper administration of the laws be converted into an individual right by a statute that denominates it as such, and that permits all citizens to sue?
Rule:	To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an individual right vindicable in the courts is to permit Congress to transfer from the President to the Courts the Chief Executive’s most important constitutional duty (the Take Care clause)
Held:	Can’t manufacture standing in this way.
Why?	Congress CAN create judicially cognizable rights, but those rights still have to involve an actual injury to the person and not an amorphous individual right against the government.

Federal Elections Committee v. Akins

Facts:	The Act imposes recordkeeping and disclosure requirements on political committees. The Act states a “political committee” is any committee or club which receives more than \$1,000 in contributions or makes more than \$1,000 in expenditures per year. Contributions and expenditures are defined as those which are made for the purpose of influencing any election. The FEC classified AIPAC as not a political committee, freeing them from the disclosure requirements. The group of which Akins is a member sued to get the FEC to declare AIPAC a political committee.
Issue:	Has Akins shown an injury in fact?
Rule:	A plaintiff has shown an injury in fact when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute. A plaintiff may seek to vindicate a generalized grievance if he has suffered concrete and particularized injury.

Held:	Injury in fact is met. The informational injury here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.
Why?	Akins is unable to obtain information that the statute requires be made public. This information would help them become more informed voters, which makes it concrete and particular to them. The Court distinguishes <i>Richardson</i> , as <i>Richardson</i> dealt with the Accounts Clause, which had no logical nexus with the <i>Richardson</i> plaintiff's status as a taxpayer. This statute is specifically for the protection of voters. The Court also distinguishes from <i>Lujan</i> . While this is a generalized grievance, <i>Lujan</i> involved an abstract and indefinite injury.
Issue:	Is the harm suffered fairly traceable to the FEC's conduct?
Rule:	Even when an agency could have exercised prosecutorial discretion, plaintiffs generally have standing to challenge their decision based their decision on an improper legal ground
Held:	The injury in fact is directly traceable to the FEC's conduct, even though the FEC could come to the same result in the exercise of discretion.
Issue:	Is this injury redressible?
Rule:	Generally, decisions committed to agency discretion are not reviewable.
Held:	Yeah, but the statute here makes this one reviewable.

Note on Taxpayer Standing

Divergence on the court about injury in fact.

Scalia View: The bar on standing based on a generalized grievance is broad.

Breyer View: The bar on standing based on a generalized grievance is narrow, and the *Richardson* result was dictated by *Flast v. Cohen*.

Hein v. Freedom from Religion Foundation NO MAJORITY VIEW.

Plurality (Alito, Roberts, Kennedy)

Generally no taxpayer standing. Exception: collection of unconstitutional tax.

Flast carves out a narrow exception with a two-part test:

1. There must be a logical link between taxpayer status and the legislative enactment.
i.e. only things enacted under the Taxing and Spending Clause.
2. The taxpayer must show that the enactment exceeds specific constitutional limitations imposed on the exercise of the congressional taxing and spending power, not simply that it's in excess of Congress' Art. I § 8 powers.

Cannot use taxpayer standing to challenge incidental expenditures of tax dollars in the administration of a regulatory statute.

Flast doesn't need to be carried to its logical extremes, and this is not a principle of *stare decisis*.

Concurrence (Scalia and Thomas)

Flast should be overturned. Psychological displeasure that funds are being spent in an allegedly unlawful manner isn't concrete and particularized enough.

Note on Standing in Qui Tam Actions

In *Lujan*, the court distinguished the citizen suit from cash bounty suits. The most typical cash-bounty suit is the *qui tam* action.

Vermont Agency of Natural Resources v. United States

Issue: Does a private claimant have standing under Article III to bring an action claiming a defendant had violated federal law and claiming a bounty under the False Claims Act?

The court's discussion:

A claimant in a *qui tam* action has a concrete private interest. However, the interest necessary for Article III standing must consist of obtaining compensation for or preventing a legally protected right. A *qui tam* relator has no such invasion: in fact, his right doesn't arise until he wins at trial. An interest that is merely a byproduct of the suit cannot give rise to a cognizable injury in fact for Article III.

The relator gets standing on the doctrine that an assignee has the right to assert the injury in fact of the assignor.

There is a long tradition of considering assignee actions as cases and controversies, woven into the fabric of the constitution.

Questions

In *Lujan*, Scalia talked about the danger of removing prosecution from the executive branch. Does *qui tam* undercut this?

No for two reasons:

1. The executive can still prosecute these actions if it so chooses, this just gives an incentive to people who have better information than the government to prosecute.
2. It's not giving someone the right to vindicate an undifferentiated interest, it's giving someone a particularized interest which they vindicate and vindicate the undifferentiated interest separately.

Note on Redressability

Steel Co. v. Citizens for a Better Env't

If civil penalties will be paid to the government instead of to the plaintiff, the plaintiff is not seeking remediation of his own injury, but rather the vindication of the rule of law. Gratification is not enough to satisfy redressability.

Friends of the Earth, Inc. v. Laidlaw Evtl. Services (TOC), Inc.

However, if there is a likelihood of future injuries from the defendant's conduct, a civil fine will provide standing because the deterrence redresses the future injuries.

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress.

2. Zone of Interests

The Chicago Junction Case

Facts:	There's two independent terminal railroads in Chicago. The New York Central wanted to control the terminals, so applied to the ICC for a permit to buy them. The ICC approved the purchase. The B&O railroad sued to have the order declared void and unwind the sale.
Issue:	Does the B&O have a legal interest that entitles them to challenge the order?
Rule:	A legal interest exists where revenues may be affected.
Held:	B&O has a legal interest.
Why?	Before the sale, all railroads were able to use the terminals equally. NYC has been operating the terminals in such a way that B&O has lost \$100,000. What's really important here is that the Interstate Commerce Act prohibits the acquisition of a railroad by another railroad unless authorized by the ICC and made provisions for joint use of terminals. The Act made this more than just competition in the market, it's a denial of equal treatment.

The statute here creates a legally protected interest.

Alabama Power Co. v. Ickes

Facts:	The Federal Emergency Administrator of Public Works entered into various loan and grant agreements with four Alabama municipalities. The loans were made to construct an electrical grid—the municipalities issued bonds purchased by the Administrator. The municipality secured the bonds with revenue from the power grid constructed with the bond funds. Alabama Power is pissed because they're already selling power in the market and this new power grid will compete with theirs. Alabama Power claims that Title II, the provision empowering the Administrator to make these loans, is unconstitutional.
Issue 1:	Does Alabama Power have a legal interest that will suffer a legal injury from the Administrator's actions?
Rule:	The courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense does not lay the foundation of an action. The converse is equally true, that where there is damage but no violation of a right, no action can be maintained.
Issue 2:	What enforceable legal right of Alabama Power do the allegedly wrongful agreements invade or threaten?
Held:	This is a clear case of injury without right. The Administrator owes no legal duty to Alabama Power to keep them free of competition. The municipalities don't owe Alabama Power any duty to not compete with them. All we have here is Alabama Power's business being hurt.

Chicago Junction involved a statute that provided for "any party" while here the statute doesn't protect the party bringing suit.

FCC v. Sanders Bros. Radio Station

Facts:	The Telegraph Herald applied for a broadcast license for Dubuque, IA. At the same time, Sanders Bros. applied to move across the Mississippi to Dubuque from East Dubuque. Sanders Bros. says there's not enough ad revenue for both in Dubuque, there's not enough talent to make shows in Dubuque, and the Dubuque market didn't need another
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	radio station. Therefore, granting a license to the Telegraph Herald didn't serve the public interest, convenience, or necessity. However, the Broadcasting Division granted both licenses. Sanders Brothers appeals claiming the grant of the license was arbitrary and capricious, because the FCC did not consider economic injury to Sanders Bros.
Issue:	Is economic injury to a rival station, apart from considerations of public convenience, interest, or necessity, an element the FCC must weigh in passing on an application for a broadcasting license?
Rule:	§ 307(a) of the Communications Act: The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefore a station license provided for by this Act. The Act contains no express command that in passing upon an application the Commission must consider the effect of competition on other stations.
Held:	Economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission.
Disc.:	However, the public interest standard clearly encompasses what Sanders Bros. is saying: there's not enough to go around, so we're not going to get GOOD radio stations.
Issue:	Does the fact that economic injury is not a separate element that the FCC should consider preclude standing for an injured station owner?
Rule:	§ 402(b) gives an appeal to the DC Circuit by any person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.
Held:	Sanders Bros. still has standing.
Why?	Congress had some purpose in enacting 402(b)(2). Congress can confer standing in this instance because a person injured may be the only one who can present the legal issues sharply. This is important: zone of interests is prudential: Congress can waive it, and has done so here.

ADPSO v. Camp ("Data Processing")

Facts:	The Office of the Comptroller promulgates a rule that, incident to their banking services, banks may make data processing services available. A data processing service sues to block the rule because they will lose business. The Bank Service Corporation Act § 4 provides "No bank service corporation may engage in any activity other than the performance of bank services for banks."
Misc:	This is a <i>competitor's</i> suit, not a <i>taxpayer</i> suit, distinguishing from <i>Flast</i> .
Issue:	Does the plaintiff allege the challenged action caused him injury-in-fact?
Rule:	The legal interest test (see <i>Alabama Power</i> and <i>Sanders Bros.</i>) goes to the merits, not to standing. Standing, apart from the case or controversy requirement, the question whether the interest sought to be protected by the complainant is arguably within the <i>zone of interests</i> to be protected or regulated by the statute or constitutional guarantee in question.
Held:	There is injury-in-fact
Why:	Again, the legal interest test goes to merits, not standing. They likely don't have a legal interest, but they do have injury in fact.
Issue:	Is the interest the plaintiffs seeks to protect within the zone of interests the statute seeks to protect?
Held:	§ 4 arguably brings a competitor suit within the zone of interests.
Why?	The House Report to § 701 states that to preclude judicial review under the APA there must be clear and convincing evidence that Congress intended such preclusion. Also see <i>Abbott Labs</i> : no presumption in favor of judicial absolutism. The Court discusses a Circuit Court ruling discussing the legislative history behind § 4, but says the Circuit Court uses the wrong justification: their discussion goes to the merits of whether the statute prohibits such a regulation, not whether the competitor has standing. When you create risk-loving behavior by subsidizing risk, competitors may be in the zone of interests.

Note on Agency Capture and the Availability of Judicial Review

Thomas Merrill, *Capture Theory and the Courts: 1967-1983*, Chi-Kent L. Rev. 1039, 1076 (1997).

Data Processing was an acceptance by the Court of "capture theory" and a recognition that the Court needed to provide greater checks on agencies dominated by their industries. No textual support in *Data Processing*, but Justice Douglas (dissenting) explicitly talked about Capture Theory in *Sierra Club v. Morton*.

There's too much pressure on agencies for favorable action towards their industries.

The Forest Service is notorious for caving in to what the lumber companies want.

It's rare that members of the public serve on agency boards etc, it's almost always members of the regulated industry.

Air Courier Conference v. Postal Workers

Facts:	The USPS has a monopoly on mail delivery granted by Congress in the PES. The Postal Service may suspend the PES in "the public interest." The Postal Service suspended the PES for international remailing. The Postal Workers challenge this ruling, stating that it will cost them jobs.
Issue:	Are postal employees within the zone of interests of the PES so that they may challenge the action of the Postal Service?

Rule:	To establish standing to sue under the APA, plaintiffs must establish that they have suffered a legal wrong because of the challenged agency action, or are adversely affected or aggrieved by agency action within the meaning of a relevant statute. APA § 702. Once they have shown that they are adversely affected, i.e. have suffered an “injury in fact,” the plaintiffs must show they are within the zone of interests sought to be protected by the statute. Specifically, the plaintiff must establish that the injury he complains of falls within the “zone of interests” sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. Just because someone suffers an injury doesn’t mean they fall within the zone of interests.
Held:	The Postal Workers don’t fall within the zone of interests.
Why?	The intent of the PES was not to protect the jobs of postal workers. The PES had two purposes: 1. Curtail the use of faster services only available on the East Coast and 2. Ensure service to outlying areas even if it had to be below cost. The PES was a means to achieve national integration. The PES had nothing to do with protecting postal workers. The only relation between the PES and labor management is that they are codified in the same general codification over 65 pages in the US Code.

NCUA v. First Nat’l & Trust Co.

Facts:	§ 109 of the FCUA provides that “federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district. Starting in 1982, the NCUA interprets § 109 to permit FCUs to be composed of multiple unrelated employer groups. Until 1982, the NCUA interpreted § 109 to mean that occupationally-defined credit unions could only serve employer groups with bonds common among each other. Under the new interpretation, so long as they were with in the same geographic area, they could be SEGs. ATTF expanded operations to serve several new unrelated employer groups. NCUA approved amendments to ATTF’s charter allowing the new SEGs. Plaintiffs challenge the NCUA’s acts under 5 USC § 702 (APA § 10(a)).
Issue:	Does plaintiff’s claim fall within the “zone of interests” protected by § 109?
Rule:	The Court does not look to Congressional intent. Rather, the Court looks to whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute. In applying the zone of interests test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead we first discern the interests arguably to be protected by the statutory provision at issue; we then inquire whether the plaintiff’s interest affected by the agency action in question are among them.
Held:	The plaintiff’s interests are squarely within the zone of interests of § 109.
Why?	The purpose of § 109 was to confine credit union membership to definable groups. One of the interests arguably to be protected is in limiting CU markets. That’s what the plaintiff is trying to do. As competitors, they certainly have an interest in limiting CU markets. Although there’s no evidence of Congressional intent, that’s totally irrelevant to the analysis.
Issue:	Is the NCUA’s interpretation entitled to <i>Chevron</i> deference?
Rule:	We first ask whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.
Held:	Congress spoke clearly here, and the NCUA’s interpretation is impermissible.
Why?	Canons of construction. First, you must interpret to give every word effect, and NCUA’s interpretation makes the phrase “common bond” surplusage. NCUA says that “common bond” only applies to each group, but by definition a group will have a common bond. Second, similar language in a statute must be construed a similar way. The provision limiting to a geographic area could be construed under NCUA’s ruling to allow unlimited geographic areas.

Kroto thinks that NCUA is irreconcilable with Postal Employees and doesn’t like the majority in NCUA. Likes the O’Connor dissent.

3. Review of Standing Law

Bennett v. Spear

Note:	Kroto hates this case, thinks it screws up Article III standing.
Facts:	The ESA requires the Secretary to promulgate regs listing species that are threatened or endangered according to set criteria. 16 U.S.C. § 1533. Further, the ESA mandates that federal agencies insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of a habitat critical to that species. 16 U.S.C. § 1536(a)(2). If an agency action may adversely affect a listed species, it has to engage in formal consultation with the F&WS. The F&WS will issue a Biological Opinion saying how the proposed action will affect the species or habitat. The Biological Opinion must lay out reasonable and prudent alternatives that will prevent the consequences. § 1536(b)(3)(A). F&WS

must also provide an Incidental Take Statement setting out how the agency can take measures to avoid harm to the species or habitat.

The Klamath Project is a wetlands reclamation project. The Secretary of the Interior determined it might affect two endangered species: the Lost River Sucker and the Shortnose Sucker. F&WS agreed, and gave a Biological Opinion. As part of the BO, F&WS required maintenance of minimum water levels on the Clear Lake and Gerber reservoirs. BLM said they'd comply. The suit arises from two Oregon irrigation districts and two cattle ranchers in those districts who assert that the action will affect the amount of water available for irrigation.

Issue: Do the plaintiffs lack standing by virtue of the zone-of-interests test under the ESA?

Note: The Court looks at the ESA first because it provides for attorney costs and because the APA is meant as a catch-all.

Rule: A plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. The breadth of the zone of interests varies according to the provisions of law at issue, so what comes within the zone of interests of a statute for purposes of obtaining judicial review of agency action under the generous review provisions of the APA may not do so for other purposes. Congress legislates against the background of prudential standing doctrine, which applies unless specifically negated.

Issue: Does the ESA's citizen-suit provision expand the zone-of-interests test to encompass the plaintiff's claim?

Held: Yes, it does.

Why? The statutory language "any person may commence a civil suit." Congress knows how to limit the zone of interest and has done so in other statutes. The overall subject matter here is the environment: everyone has an interest in the environment. Congress wanted to encourage private attorneys general: they didn't provide an amount in controversy requirement or a diversity requirement, they allow recovery of attorney costs and costs of litigation, and they reserved a right of first refusal to prosecute. This expands the zone of interests to the full Article III standing. It doesn't matter that the plaintiffs are trying to prevent implementation of a regulation instead of enforcement: it says "any person."

Issue: Does the plaintiff's complaint satisfy the "case or controversy" Article III standing requirement?

Rule: The irreducible constitutional minimum of standing requires that: 1. The plaintiff have suffered an "injury in fact" – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) that there is a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Issue: Has the plaintiff alleged an injury in fact even though they have not demonstrated that they will individually receive less water as a result of the ruling?

Rule: At the summary judgment stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim."—How do you reconcile this with *Lyons*? This looks like Scalia just trying to get to the merits because he doesn't like environmental regs. Kroto thinks this isn't even ripe yet.

Held: Injury-in-fact alleged.

Why? Plaintiffs alleged that the amount of water will be reduced and they will be harmed by that reduction. From there, it's easy to presume specific facts where they'll be injured.

Issue: Is the injury fairly traceable to the agency action and is it redressable when the BLM will bear the ultimate responsibility for the decision, not F&WS?

Rule: It does not suffice if the injury complained of is the result of the independent action of some third party before the court. That does not exclude injury produced by determinative or coercive effect upon the action of someone else.

Held: The injury is both fairly traceable to the agency action and redressable.

Why? The F&WS decision is highly coercive. If the Agency decides to go against the Biological Opinion, it runs the risk of severe consequences. The Incidental Take Statement amounts to a permit to do the work in a way that relieves the agency of liability.

Issue: Is judicial review available under § 1540(C)?

Rule: The clear and unambiguous language of § 1540(C) is that it covers only violations of § 1533.

Held: No judicial review of violations of § 1536 under § 1540(C). However, one claim alleges a violation of § 1533(b)(2), and that would be reviewable under § 1540(C).

Issue: Are plaintiff's claims under § 1536 reviewable under subsection (A)?

Rule: Subsection A authorizes injunctive action against any person who is alleged to be in violation of the ESA or implementing regulations.

Held: Violation of the ESA does not include maladministration of the Act. No review under Subsection A.

Issue: Are the two claims reviewable under the APA's authorization to set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law? (5 U.S.C. § 706).

Rule: The APA by its terms provides a right to judicial review of all final agency action for which there is no other adequate remedy in a court (§ 704) and applies universally except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. (§ 701(a).)

Held: Reviewable under the APA

Why? Nothing in the ESA's citizen-suit provision precludes review under the APA, nor is there anything in the statutory scheme suggesting a purpose to do so. § 1536 is obviously not discretionary because it uses the language "shall".

Issue:	Do the plaintiffs have standing under the zone-of-interest test under to bring an APA claim?
Rule:	Whether a plaintiff's interest is arguably protected by the statute within the meaning of the zone of interests test is to be determined not by reference to the overall purpose of the Act in question, but by reference to the particular provision of law upon which the plaintiff relies.
Held:	Plaintiff's claim is within the zone of interests protected by the ESA's "best scientific and commercial data provision.
Why?	The purpose of that provision is to at least in part prevent uneconomic jeopardy determinations made because of bad scientific data. The obvious purpose is that the ESA not be implemented on the basis of speculation or surmise. Another objective is to prevent economic dislocation produced by agency officials zealously but unintelligently pursuing their objectives.

THEORY APPLIED PROBLEM pg 682

Bureau of Prisons redefines what it means to operate a jail.

CCC operates halfway houses that don't meet the new standards.

1. Does CCC have Article III standing?
Of course. BoP is breaching contracts, so they've suffered harm as a result. It's fairly traceable to the new regulation. It's redressable: likely, the BoP will start placing prisoners again since they have before.
2. Does CCC have zone-of-interest?
The statute's purpose is to protect prisoners. Under *Air Couriers*, no. Under *NCUA*, you argue that arguably the purpose of the statute is to provide guidance how to set up private prisons to get into the market.

H. RIPENESS

Abbott Laboratories v. Gardner

Facts:	Congress amended the Food, Drug, and Cosmetic Act. The Act requires manufacturers to print the generic name of a drug anywhere it uses a proprietary name in the same type and size. The purpose of the Act was to ensure consumers and doctors knew they were getting the same thing as a generic. The Commissioner of Food and Drugs promulgated a regulation to implement the act, saying that the generic name has to appear on any packaging or advertisement with the trade name. 37 drug manufacturers challenge the regulation, saying the Commissioner exceeded his authority. The government moved to dismiss based on ripeness.
Issue:	Did Congress intend to forbid pre-enforcement review in regulations promulgated under the Food, Drug, and Cosmetic Act?
Rule:	Judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress. The APA provides specifically not only for review of agency action made reviewable by statute but also for review of final agency action for which there is no other adequate remedy in a court.
Held:	We are wholly unpersuaded that the statutory scheme in the food and drug area excludes pre-enforcement review.
Why?	Government says that there's enumerated review provisions for certain types of regulations, so other types of regulations (like this one) were meant to be excluded from pre-enforcement review. However, the principle of exclusion doesn't apply here. The Act itself says the remedies aren't exclusive.
Issue:	Is the question of whether the Commissioner exceeded his authority ripe for judicial review?
Rule:	The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.
Issue:	Are the issues fit for judicial decision?
Held:	Yes.
Why?	1. The parties agree that this is purely a legal decision, with no further factual issues to develop: the regulation will be applied every time someone uses a proprietary name. 2. The regulations were "final agency action". Final agency action includes any rule. A rule is an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. The Court generally takes a broad view of finality for review purposes.
Issue:	Will there be hardship to the parties from withholding court consideration?
Held:	Yes.
Why?	The government says "mere financial expense" isn't enough to merit pre-enforcement review. That's not correct: a POSSIBLE financial loss isn't enough, but in this case there's sunk costs and the litigants have to either comply and lose the sunk costs or not comply or be faced with criminal sanctions.
Held:	The issue is fit for judicial resolution: the case is ripe.

Toilet Goods Ass'n v. Gardner (Companion Case to Abbott Labs)

Facts:	The Commissioner of Food and Drugs promulgated certain regulations. The regulations require that allow the Commissioner to suspend certification service to cosmetics companies that refuse to let FDA officials have free access to manufacturing facilities, processes, and formulae. The cosmetic companies challenge the regulation based on it being an impermissible exercise of authority, because the FDA has looked for Congressional authorization for such access and has always been denied except for prescription drugs.
Issue:	Is pre-enforcement review of this regulation ripe for judicial review?
Rule:	<i>Abbott Labs</i> test. In determining whether a challenge to an administrative regulation is ripe for review a twofold inquiry must be made: first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage.
Issue:	Are the issues tendered appropriate for judicial resolution?
Held:	No.
Why?	Although this is final agency action, and only presents a legal question (like <i>Abbott Labs</i>), it is still not appropriate for judicial resolution. In <i>Abbott Labs</i> , the regulation WOULD be applied, and the pharma companies had to comply or face criminal sanctions. In this case, the regulation only says the Commissioner <i>may</i> inspect factories and if refused full access <i>may</i> suspend certification services, not that he <i>will</i> . The Court needs more factual development before determining if the Commissioner is acting outside of Congressional authority.
Issue:	What is the hardship on he parties if judicial relief is denied?
Held:	No real hardship on the cosmetics manufacturers.
Why?	Primary conduct is unaffected: no advance action is required. If the Commissioner demands an inspection, then the decision has to be made, but until then, carry on your merry way. There's also no irredeemable consequences flowing from a later challenge. In <i>Abbott Labs</i> , you'd have confiscation and destruction of offending goods and a hit to reputation. Here, you just get a delay in certification processes until you get judicial review.

Questions

1. Two factors with two considerations in the first factor:
 - I. Is this appropriate for judicial resolution?
 - a. Final agency action
 - b. The court would not benefit from more factual development.
 - II. What's the hardship to the parties of not resolving?
2. Is there a legal basis for this doctrine? It appears to be a prudential requirement, though you COULD tie it to injury-in-fact. The fact that Congress may abrogate this requirement seems to make it prudential.
3. In both, the Court hold that there's agency action. However, while in *Abbott Labs* the Court holds that no factual development is required and that the regulation regulates the primary conduct of the litigants, in *Gardner* the Court finds that they don't know how the regulation will be applied, so they need more facts. Also in *Gardner*, the Court says that the manufacturers don't have to change anything they're doing or face irredeemable consequence.

I. FINALITY

FTC v. Standard Oil Company

Facts:	The FTC served eight oil companies with complaints, stating the Commission had “reason to believe” the companies were violating § 5 of the FTCA. Socal (one of the companies) filed a complaint in ND-Cal. arguing that the FTC did not have “reason to believe”. The complaint has not been resolved by the ALJ.
Issue:	Is the averment that the FTC acted without reason to believe subject to judicial review before the conclusion of administrative adjudication?
Rule:	Such an averment is subject to judicial review before the conclusion of administrative adjudication only if the issuance of the complaint was “final agency action” or otherwise was “directly reviewable” under § 10(c) of the APA (5 U.S.C. § 704).
Issue:	Was the issuance of the complaint “final agency action”?
Rule:	For an administrative action to be final, it must be a definitive statement of the agency’s position, it must have a direct and immediate effect on the day to day business of the complaining party, and immediate compliance with its terms must be expected.
Held:	The averment of reason to believe is a prerequisite to a definitive agency position on the question whether Socal violated the Act, but itself is a determination only that adjudication will commence. It is not final agency action. It had no legal force or practical effect on Socal’s daily business (other than litigation). Immediate judicial review would serve neither efficiency nor enforcement. These pragmatic considerations counsel against the conclusion that the issuance of the complaint was final agency action.
Why?	This was not a definitive statement of position. It was a threshold determination that further inquiry was warranted and that a complaint should initiate proceedings. A complaint has to contain a notice of a hearing, at which the respondent may present evidence and testimony to an ALJ. If the ALJ doesn’t rule the way he wants, the decision may be appealed to the full Board. The complaint doesn’t really interfere with day to day operations. Socal can still operate until the adjudication. Further, the review sought would really interfere a lot with the agency. The agency should be allowed to correct its own mistakes and apply its expertise.

Question

1. Judicial review depends on finality under the APA § 10(c).
2. MSAPA bullshit
3. What policies support the finality requirement?
 - a. Allows the agency to correct their errors and apply their expertise.
 - b. Avoids piecemeal judicial intervention.

Note on Bennett v. Spear

To be final, an agency action must:

1. Be a consummation of a decisionmaking process.
2. Determine rights or obligations OR be an action from which legal consequences will flow.

Note on the Finality of Agency Inaction

Cobell v. Norton (D.C. Cir.) Sometimes agency inaction can amount to final agency action.

Facts:	1994, Congress enacted the Indian Trust Fund Management Reform Act, recognizing the Government’s pre-existing trust responsibilities. The Act also identified duties of the Interior Secretary to ensure proper discharge of the trust duties of the United States, including providing systems for accounting of trust fund balances, controls over receipts and disbursements, timely reconciliations, statements of account performance, and establishing written policies and procedures for trust fund management. The Act also created the Office of the Special Trustee. A group of injuns sued to compel performance of trust obligations under the Act.
Issue:	Does a district court have jurisdiction to hear a complaint of delay?
Rule:	Where an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers final agency action. As a general rule § 706 of the APA leaves in the courts the discretion to decide whether agency delay is unreasonable.
Rule:	Whether an agency delay is unreasonable is a four factor analysis: <ol style="list-style-type: none">1. The court should ascertain the length of time that has elapsed since the agency came under a duty to act.2. The reasonableness of the delay must be judged in the context of the statute which authorizes the agency’s action.3. The court must examine the consequences of the agency’s delay.4. The court should give due consideration in the balance to any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources.

Rule:	An agency's own timetable for performing its duties in the absence of a statutory deadline is due considerable deference.
Held:	Unreasonable delay here.

Questions

1. The relevance of congressionally-mandated deadlines: if there's a deadline, a failure to act means the agency wasn't acting within their congressional mandate.
2. *Heckler v. Chaney*: A refusal to take enforcement action is presumed immune from judicial review.
Dunlop v. Bukowski: That presumption may be overcome by statutory language providing guidelines for the exercise of agency power.

Note on Statutory Time Limits for Judicial Review of Agency Action

The APA only addresses untimeliness by negative inference:

Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil and criminal proceedings for agency enforcement. § 703.

The APA allows you to hold off on a challenge to the lawfulness of an action until the party is subjected to an enforcement action UNLESS the organic statute says you have to bring the challenge within a certain period of time.

Ex: The Clean Air Act

Courts typically hold that time limits bar further judicial review so long as:

1. The agency action put the party whose claim is barred on notice. *RCA Global Communications, Inc. v. FCC*
2. Judicial review was actually ripe during the review period. *Baltimore Gas & Elec. Co. v. ICC*
The review period only starts running once the issue is ripe.

Exceptions:

1. Agency reopened consideration of the matter that gave rise to the claim of illegality. *National Ass'n. of Mnfrs. V. U.S. Dep't of the Interior*. (D.C. Cir.)
 - New notice and comment on the challenged provision.
 - Can't "bootstrap" by commenting on something else entirely, goading the agency into a reply.
2. Changed circumstances not present at the time of the statutory time period. *RSR Copr. V. EPA* (D.C. Cir.)
 - Events occur or information becomes available that basically create a challenge that didn't previously exist.
 - Can't be just a new study.

How do you get around?

Petition for a new rulemaking, then challenge the final agency action

Questions

1. Looks to me like you could litigate each and every objection to an agency action in a civil or criminal proceeding for judicial enforcement. Vermont Yankee and Nova Scotia seem in accord.
2. *Yakus v. United States* suggests that even if the time limit has run, agency action may still be challenged as unconstitutional. This decision is criticized, but why? While an organic act could strip the federal courts of jurisdiction to hear the claim, couldn't SCOTUS hear it on appeal from state courts?

J. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Myers v. Bethlehem Shipbuilding Corp.

Facts:	The NLRA purports to diminish the causes of labor disputes in industries engaged in interstate commerce. To that goal, it seeks to promote collective bargaining, confers on employees the right to form and join labor unions, forbids unfair labor practices, and gives the NLRB limited powers to prevent unfair labor practices. If a labor union tells the Board a person is engaging in unfair labor practices, and it appears that a proceeding should be instituted, the Board files a complaint and holds a hearing on notice to the person charged. IUMSWA made a charge that Bethlehem was engaging in unfair labor practices. The Board filed a complaint, notified Bethlehem, and set a hearing. Bethlehem filed in DC-Mass. for an injunction to prevent the hearing and to declare the NLRA unconstitutional.
Issue:	Did the district court have the power to enjoin the proceedings?
Rule:	Where the statutory provisions and rules for procedure for an agency hearing are adequate, where there is adequate judicial review, Congress may provide for exclusive jurisdiction in the agency and the Circuit Courts of Appeal.
Issue:	Does the assertion of a constitutional claim serve to vest jurisdiction in the District Courts to enjoin agency adjudication?
Rule:	No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. The rule is repeatedly acted on in cases where the contention is made that the administrative body lacked power over the subject matter.
Held:	No, the District Court could not hear the matter until the administrative process was exhausted.
Why?	You can't just say the claims against me are meritless and having to defend would be irreparable harm to take the power of adjudication away. Many suits are meritless, but courts still hear them.

Questions

1. The policies of judicial efficiency and promotion of agency authority are served by requiring exhaustion.
2. The legal basis for exhaustion according to the Court is that where Congress prescribes certain procedures for review, it is outside the court's competence to outside them.

McCarthy v. Madigan

Rule:	If Congress mandates that exhaustion is required, then it's required. However, if Congress has not said exhaustion is required, then courts are free to use discretion.
Rule:	There is a general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. <ol style="list-style-type: none">a. Twin purposes of promoting agency authority and<ol style="list-style-type: none">i. Agencies, not courts, ought to have primary responsibility for the programs Congress charged.<ol style="list-style-type: none">a. Particular force when action is discretionary or involves expertise.ii. Agency should have opp to correct its mistakes<ol style="list-style-type: none">b. PF when flouting of administrative processes weakens effectivenessb. Promoting judicial efficiency<ol style="list-style-type: none">i. if agency can correct own errors, disputes may be mooted and piecemeal avoided.ii. Administrative procedure may produce a useful record.
Rule:	In counterpoint, courts have an unflagging duty to exercise their jurisdiction. "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."
Rule:	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 institution interests favoring exhaustion.
Rule:	The Court's precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion: <ol style="list-style-type: none">1. Requiring resort to the administrative remedy may occasion undue prejudice to a subsequent assertion of court action.<ol style="list-style-type: none">a. Unreasonable or indefinite timeframe for administrative actionb. Plaintiff suffers irreparable harm if unable to secure immediate judicial considerationc. Individual's failure to exhaust may preclude a defense to criminal liability.2. Some doubt as to whether the agency was empowered to grant effective relief.<ol style="list-style-type: none">a. Agency may not be able to pass on the constitutionality of a statute.b. The challenge is to the adequacy of the agency procedurec. Competent to adjudicate, but unable to grant relief.3. The administrative agency is shown to be biased or otherwise has predetermined the issue.

Darby v. Cisneros

Facts:	Darby is a real estate developer. Darby and Garvin worked together: Garvin has a plan to get multifamily developments single family PMI. The plan is to avoid the Rule of 7, the details aren't really important to the case. Garvin talked to HUD employees and they said this was hunky-dory. Of course, Darby and Garvin default on the mortgages, and the HUD PMI has to kick in. At the end of all this, a HUD ALJ debarred Darby and Garvin for 18 months. HUD regulations state that ALJ determinations are final unless the Secretary as a matter committed to his discretion agrees to hear an appeal. Any party may request such an appeal within 15 days, but again, whether to have it is within the Secretary's discretion. Darby and Garvin did not seek such a discretionary review. Darby and Garvin now appeal the ALJ decision.
Issue:	May the federal courts review a decision of an administrative agency where the petitioners have not exhausted all agency procedures when neither the statute nor the agency rules specifically mandate exhaustion as a prerequisite?
Rule:	APA § 10(c): Judicial review is available for final agency action for which there is no other adequate remedy in a court. Preliminary, procedural, or intermediate action is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.
Ps:	This means that a person seeking judicial review of agency action doesn't need to exhaust unless specifically required by statute.
Ds:	§ 10(c) is only talking about when an action becomes final. Congress didn't mean to interfere with the courts' ability to impose conditions on the timing of the exercise of their jurisdiction. They concede it's final, but federal courts remain free to impose exhaustion requirements.
Rule:	Finality is NOT exhaustion. The finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.
Rule:	Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise, for of paramount importance to any exhaustion inquiry is congressional intent.
Issue:	Did §10(c), by providing the conditions under which agency action becomes "final for the purposes" of judicial review, limit the authority of courts to impose additional exhaustion requirements as a prerequisite to judicial review?
Rule:	When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is final for the purposes of this section and therefore subject to judicial review. § 10(c), by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates.
Held:	Courts cannot impose additional exhaustion requirements.
Why?	The last sentence of §10(c) would make no sense. Judicial review is available for final agency action. It's final unless the agency requires an appeal to a superior agency authority. The statute here doesn't require this, by the way, it's an optional appeal. The Court talks about the AG's letter, even though the plain language argument is what they used. The AG says the doctrine of exhaustion is only intended to be applied when expressly required by statute or where agency rules say that subordinate officer decisions must be appealed before final. Nothing in the pre-APA history suggests that final agency actions weren't reviewable unless there was an agency appeal.
Held:	The purpose of 10(c) was to <i>permit</i> agencies to require an appeal to superior agency authority before the examiner's decision became final. Otherwise, under §8(a), initial decisions could become final in the absence of such an appeal. Agencies can avoid the finality of an initial decision first by adopting a rule that an agency appeal be taken before judicial review is available and second by providing that the initial decision would be inoperative pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.
Held:	Appropriate deference to Congress requires the recognition that with respect to actions brought under the APA, Congress codified the doctrine of exhaustion in § 10(c). The doctrine of exhaustion continues to apply as a matter of judicial discretion in cases not governed by the APA.
Rule:	Where the APA applies, an appeal to "superior agency authority" is a prerequisite to judicial review only when expressly required by statute OR when an agency rule requires appeal before review and the action is made inoperative pending that review.