

ADMINISTRATIVE LAW

Law School Legends

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I. Introduction

- A. Nature of Agencies
 - 1. Definition: governmental bodies other than courts or the legislature that affect the rights and duties of persons or entities
 - 2. Created by legislation (enabling or “organic” act)
 - 3. Exist at all levels of government
- B. The Administrative Procedure Act (APA)
 - 1. Like a code of civil procedure
 - 2. §551(1): Defines agency as "each authority" of the government of US but excludes:
 - a. Congress
 - b. Courts
 - c. Governments of territories or possessions
 - d. Government of the District of Columbia
 - e. Military Courts
 - f. President (established by case law: Franklin v. Mass (US 1992))
- C. Agencies Simulate All Branches
 - 1. Rulemaking
 - 2. Adjudication

3. Investigations and Other Executive Action

D. Types of agencies

1. Executive agency
2. Independent agency

II. Procedural Due Process

A. Relevance to Administrative Law

B. Four Step Test

1. Governmental Action
2. Individualization
3. Protected interest
4. How much process is due?

C. Step One: Governmental Action

1. Hardly ever a problem in Administrative Law

D. Step Two: Individualized Action

1. Action directed at a small number of people or entities for particular reasons
 - a. **Hypothetical # 1:** Social Security Administration decides to stop paying disability benefits to Pat because the medical evidence indicates that he is now able to work.

b. **Hypothetical # 2:** Congress decides to reduce benefits across-the-board by 20%, and Pat wants to challenge his reduction in benefits in court on a procedural due process theory.

E. Comparison with APA distinction Between Adjudication and Rulemaking

1. §551(5): "rulemaking" is the agency process for formulating, amending, repealing a rule
2. §551(4): "agency statement of general or particular applicability and future effect designed to implement, interpret or proscribe law or policy . . ." specifically includes ratemaking
3. §551(7): "adjudication" is the "agency process for formulation of an order"
4. §551(6): "order" is the disposition in a matter other than rulemaking, including licensing
5. Two differences between rulemaking and adjudication
 - a. Rulemaking looks forward, adjudication looks back
 - b. Rules apply to an open class of persons/entities; orders apply to

named persons

6. **Hypothetical # 3:** The EPA brings an administrative action against Dump Co. to require it to pay a penalty for having discharged TCE into the town's aquifer.

7. **Hypothetical # 4:** The EPA adopts a policy that the maximum amount of TCE allowed in any aquifer is 10 parts per billion.

8. Relationship of Rulemaking/Adjudication Distinction to Procedural Due Process

F. Step Three: Protected Property or Liberty Interest

1. Property
 - a. "Old" property
 - b. "New" property: Entitlements such as welfare benefits, certain government jobs, etc.

2. Famous cases
 - a. Board of Regents v. Roth (U.S. Sup. Ct. 1972)
 - b. Perry v. Sindermann (U.S. Sup. Ct. 1972)
 - c. **Hypothetical # 5:** Lucy is a probationary sanitation worker for the County. Under the county ordinance, a probationary worker's employment is terminable at will. Lucy is doing an excellent job, but one of the other workers on her truck has the habit of banging the trash cans too loudly. Lucy's supervisor mistakenly thinks it is Lucy, and Lucy is fired without a hearing.

 - d. **Hypothetical # 6:** Assume the same facts as #5, except that Lucy is now a "permanent" employee. Under the county ordinance,

permanent employees can be fired only "for just and sufficient cause."

3. Liberty

a. Fundamental liberty interests

1. Speech, voting, privacy, etc.

2. Those that necessarily involve a massive deprivation

a. Such as transfer to a mental hospital

b. But not solitary confinement if already in prison

3. Important distinction with property

a. no fundamental property interests

b. Non-fundamental (state-created) liberty interests

1. Like the test for property

2. New test in prison setting

a. Sandin v Connor (U.S. Sup. Court 1995) holds that

liberty interests now require an "atypical and

significant" hardship. However, *Wilkinson v. Austin* (U.S. Sup. Ct. 2005) holds that extreme isolation in a "supermax" facility involves a liberty interest.

b. **Hypothetical # 7:** Earl is a prisoner in a maximum security prison. Because of good behavior, he has accumulated "good time" credits that will allow him to be released three months earlier. The prison regulations state that a prisoner "shall" have a right to good time credits. The warden believes that Earl was involved in a riot, and revokes Earl's credits without a hearing.

c. **Hypothetical # 8:** Prison regulations state that prisoners in the general population "shall" have access to the basketball court on weekdays. Because the warden believes that Earl was involved in a fight, he revokes Earl's basketball privileges for a month without a hearing.

c. Reputational Injuries: Special case

1. The "Stigma-Plus" Test

G. Step Four: Amount of Process Due

1. Only if first three steps are fulfilled

2. Goldberg v. Kelly (U.S. Sup. Ct. 1970)

a. Normally a pre-termination hearing

b. Notice

c. Cross-examination

d. Counsel (paid for privately)

e. Oral presentation

f. Neutral decision maker

3. Mathews v. Eldridge (U.S. Sup. Ct. 1976)

a. Post-termination hearing is sometimes sufficient

b. Flexible three-part balancing test

1. Value to private party

2. Risk of error without additional procedure
3. Cost to the Government of providing the additional procedure

III. Administrative Adjudication

A. Basic Divide Between Formal and Informal Adjudication

1. Formal adjudication requires all the procedures contained in §§554, 556 & 557
2. Informal Adjudication
 - a. Anytime an agency decides something and it is not rulemaking or formal adjudication
 1. Recall basic distinction between rulemaking and adjudication
 - b. **Hypothetical # 9:** Park ranger tells a camper to put out a fire because the camper doesn't have a fire permit. There are no specific statutes or regulations that cover a park ranger's authority in such matters.

3. Almost nothing in the APA that covers informal adjudication, except:
 - a. §§555:
 1. Private party can have a lawyer at own expense
 2. "Interested" persons can appear
 3. A witness who is compelled to testify can review transcript
 4. Private party can get prompt notice of any denial along with "a brief statement of grounds for denial" unless it is "self-explanatory"
 - b. §558
 1. Sanctions can only be imposed "within the jurisdiction delegated to the agency."
 4. Other sources of procedural fairness is informal adjudication
 - a. due process
 - b. agency hearing regulations
 - c. other statutes
 - d. administrative common law
 5. The notion of "hybrid adjudication"
- B. Distinguish formal from informal adjudication
1. §554: "every case of an adjudication required by statute to be determined on the record after opportunity for an agency hearing"
 2. **Hypothetical # 10:** The EPA is considering imposing a fine on DumpCo for alleged illegal dumping activities. The relevant statute provides that the

EPA must hold a "public hearing" before it imposes any such fines.

3. **Hypothetical # 11:** Same as hypothetical # 10, except the statute provides that the EPA must conduct a hearing "on the record."

C. The Nature of Formal Adjudication

1. Overview: All the procedural protections contained in §§554, 556-7.
 - a. Some important features in summary:
 1. timely notice of any hearing
 2. notice of issues contested, perhaps by responsive pleadings
 3. all interested persons to make submissions
 4. a recommended decision by the agency employee (ALJ)
 5. restrictions on internal ex parte communications
 6. The agency employee who decides (usually called an

"Administrative Law Judge" or "ALJ") cannot be supervised by any agency employee who prosecutes/investigates

7. person conducting the hearing must either be:
 - a. agency or member
 - b. "Real" Administrative Law Judge
8. Powers of Agency Employee presiding at formal adjudication:
 - a. administer oaths
 - b. issue subpoenas
 - c. make rulings on offers of proof and evidence
 - d. allow for depositions to be taken
 - e. regulate course of hearing
 - f. hold pre-hearing & other conferences
 - g. rule on procedural matters
9. Any non-privileged evidence is admissible, but can keep out irrelevant or repetitive evidence
10. No sanction without reliable, probative and substantial evidence
11. Any oral or documentary evidence, and cross-examination as necessary
12. Allow for rebuttal if official notice is taken
13. Plenary intra-agency review

14. Opportunity for parties to submit
 - a. proposed findings
 - b. "exceptions" to ALJ's decision, which must be ruled on
 15. Written statement of "findings and conclusions, and reasons therefor."
 16. Limitations on external ex parte contacts
2. Nature of the decisionmaker
 - a. Use of agency employees as decision makers
 - b. Combination of functions is clearly constitutional
 - c. Administrative Law Judges (ALJs) versus Administrative Judges (AJs)
 - d. Challenging agency decisionmaker for bias
 1. Employment relationship not enough
 2. Traditional grounds
 - a. pecuniary interest
 - b. family relationship
 3. "Background" bias not sufficient
 - a. **Hypothetical # 12:** Before Jill became an ALJ with the NLRB, she had worked for 20 years as an attorney representing management in labor disputes. A union is being charged in an administrative

proceeding before NLRB with having engaged in an illegal secondary boycott, and Jill is assigned to hear the case. Jill has no familial relationship with any of the parties, nor does she have any pecuniary interest in the outcome. The Union challenges Jill's ability to fairly hear the case.

- 4. Prior statements indicating significant prejudgment
- e. Morgan Cases: Personal responsibility of decisionmaker
- 3. Limitations on Ex Parte Contacts
 - a. Internal ex parte contacts: §554(d)
 - 1. Generally allows internal contacts on legal issues, but prevents internal contacts on factual issues
 - a. Rationale
 - 2. exceptions

- a. application for initial licenses
 - b. rates of public utilities
 - 1. redundant because ratemaking is rulemaking anyway
 - c. Agency heads
 - 1. Confusing exception: only applies in rare cases in which agency head acts as "trial judge"
- b. External ex parte contacts: §557(d)
 - 1. Anyone "outside" the agency, even the president
 - 2. applies to "interested" persons
 - 3. Communication only need be "relevant to subject matter"
 - 4. Covers both decisionmakers and persons expected to be in decision process (i.e. law clerks)
 - 5. §554(d) exceptions don't apply
 - 6. Variable remedies
 - 7. §557(d) also applies in formal rulemaking
 - a. unlike §554(d): which applies only to formal adjudication
- 4. Notice of the hearing & issues
 - a. Required by statute for formal adjudication
 - b. Due Process Requirement for informal adjudication

5. Discovery generally only as allowed by Agency
6. Parties to the hearing
 - a. Private party most affected
 - b. Intervenors
7. Agency duty to explain decision
 - a. §557(c): "findings and conclusions, and reasons or basis therefor"
 - b. §555(e) "brief statement" unless denial self-explanatory
 - c. Common law duty even in informal adjudication
8. Intra-agency review
 1. Essentially plenary review of ALJ decision
9. Limitation to record
 - a. Proved at the hearing
 - b. Properly made the subject of official notice
10. Alternative Dispute Resolution in Agencies

IV. Rulemaking

- A. Delegation and distinction between formal and informal rulemaking
 1. Delegation doctrine
 2. "On the record" language
 3. Language such as "public hearing" or "full hearing" will not suffice
- B. Formal rulemaking
 1. All the procedures in set forth in §556-7
 - a. very significant procedural rights:

1. ALJ or agency head presides
2. witnesses under oath
3. oral presentations with cross-examination
4. preparation of transcript & decision on the record
5. limits on external ex parte contacts

C. Informal, notice-and-comment rulemaking

1. name highly suggestive: §553
2. notice
 - a. "general notice" in the Federal Register §553(a)
 1. time, place, nature
 2. legal authority
 3. terms or substance or a description of the subject and I
ssues
 4. exceptions from §553 for military or foreign affairs,
management or personnel, or public property, loans, grants or
contracts.
 - b. must be published in Federal Register
 - i. "Federal Register Modernization Act"
 - ii. "Regulations.gov"
 - c. "actual notice" standard
3. Formulation of proposed rule
 - a. usually an intra-agency process

- b. Negotiated rulemaking
4. Comments
- a. Reasonable period of time to comment
 - 1. Periods as short as 15 days have been approved
 - b. Written comments all that need be allowed
5. Changing the proposed rule before issuing the final rule
- a. logical outgrowth test
 - b. **Hypothetical # 14:** A federal agency has noticed a proposed rule that would limit the amount of certain toxins in corn. The rule drew extensive comments from corn farmers (who were opposed to the rule) and environmental groups who favored it. Looking at the comments, but without noticing a new proposed rule, the agency decides to adopt a rule that limits the toxins in corn, as well as several other crops. Farmers who grow those crops did not comment on the proposed rule because the proposed rule did not purport to apply to their crops.

6. disclosure of underlying scientific data
 - a. some courts imply duty to reveal so that comment period will be meaningful
 7. adoption of final rule
 - a. normally delayed effective date of 30 days
 - b. exceptions
 1. relieves a restriction
 2. is merely interpretive or states general policy
 3. good cause
 8. Statement of purpose
 - a. §553(c) "concise general statement of . . . basis and purpose"
 - b. some courts have implied quite a large duty
 1. clear, however, that does not require a response to each and every comment
 9. Limitation to record
- D. Hybrid rulemaking
1. Name given to informal rulemaking with additional procedures
 - a. most common is probably oral testimony with or without cross-examination
 2. Sources
 - a. enabling statutes

- b. agency regulations
- c. agency decision in that case

3. Courts

- a. Vermont Yankee Nuclear Power Corp. v. NRDC (U.S. Sup. Ct. 1978)
 - 1. Courts may not impose additional procedures unless constitution requires or "extremely rare" circumstances
 - 2. APA is statutory minimum
 - a. up to agencies or Congress to go higher
 - 3. Constitution
 - a. usually not relevant because generalized action
 - b. perhaps a narrow ratemaking
 - 4. "Extremely rare"
 - a. perhaps unjustified departure from past practice

E. **Hypothetical # 15:** TimberCo has an exclusive 10-year contract to log in the Big Timbers forest. The EPA issues a notice of proposed rulemaking that would ban all logging in the Big Timbers forest because that forest is the last known habitat of the Spotted Owl. The relevant statute provides that the EPA must conduct a "hearing" before it issues a rule that bans logging operations. The EPA, over the objection of TimberCo, accepts only written comments. TimberCo's scientists claim that logging could continue without endangering the Spotted Owl. Relying on the reports of its own scientists that logging would threaten the Spotted Owl, the

EPA issues a final rule banning all logging in the Big Timbers forest. TimberCo seeks judicial review to overturn the EPA decision because the EPA did not allow for oral testimony and cross-examination of the EPA scientists.

F. Categorical Exceptions From Rulemaking Proceedings

1. Still defined as "rules" under §551(4)
2. Exempt Rules
 - a. military or foreign affairs function of U.S.
 - b. relating to agency management as personnel or to public property, loans, grants, benefits or contracts
 - c. interpretive rules
 - i. these are rules that do not create new duties by rather explain duties that were fairly encompassed by earlier pronouncements
 - d. general policy statement
 - e. Good cause "emergency" rules

- G. External, non-judicial review of rules
 - 1. Executive Branch
 - a. Executive Order 12291 (Reagan Era)
 - b. Executive Orders (12886 and 13563) (Obama Era)
 - i. OMB/OIRA role
 - 2. Congress
 - a. legislative veto unconstitutional INS. V. Chadha (U.S. 1983)
 - b. Regulatory Flexibility Act (“regflex”)
 - c. Small Business Regulatory Enforcement Fairness Act
- H. Bias and Ex Parte Contacts in Rulemaking
 - 1. bias standard much, much harder to show than in adjudication
 - a. "unalterably closed mind" standard
 - 2. ex parte contacts
 - a. Very little regulation in informal rulemaking
 - b. §557(d) applies in formal rulemaking
- J. Discretion to Choose Between Rulemaking and Adjudication
 - 1. Nearly unlimited discretion to choose
 - 2. Upsetting of settled expectations might be arbitrary, though

V. Agency Information Gathering

- A. Clash between desire for privacy and accomplishment of regulatory objectives
- B. Three important devices
 - 1. Searches or inspections

2. Recordkeeping or reporting requirements
 3. Subpoenas
 - a. testifying
 - b. for production of documents or tangible things
- C. Searches or Inspections
1. Statutory Authority
 - a. extremely common
 2. Must comply with the Fourth Amendment
 - a. Fourth Amendment limits agency officials
 - b. Warrant Requirement
 1. Normally a warrant is required; must be issued by a neutral magistrate
 2. Warrantless searches are allowed if certain conditions are met:
 - a. Pervasively regulated industry
 1. Alcohol, Tobacco, Firearms, others with long history
 2. Others of more recently regulated, such as auto junkyards (single industry regulations)
 - b. Statute providing notice that search may occur
 - c. True administrative purpose
 1. However, "mixed" motive approved

- c. Warrantless searches do not require individualized suspicion
 - 1. Neutral scheme
- d. Exclusion of evidence
 - 1. Normally the rule in criminal cases
 - a. but subject to good faith limitation
 - 2. Generally no exclusion in administrative matters
- e. **Hypothetical # 16:** Bob owns a gun repair business. A federal statute allows ATF agents to make unannounced inspections at random to ensure that gun dealers and repair shops are keeping proper records of their transactions. The name of Bob's store is selected at random; there is no particular reason to believe that Bob is violating the law. While in the store inspecting the records, the ATF agents see several illegal assault weapons leaning in the corner. The assault weapons are seized, and Bob is prosecuted. He attempts to suppress the guns as the fruit of an illegal search.

- D. Recordkeeping and Reporting
 - 1. Statutory Authority
 - 2. Bare showing of relevance
 - a. "official curiosity" can suffice
 - 3. Not outrageously burdensome
- E. Subpoenas
 - 1. Testifying
 - a. Generally must object to specific questions
 - 2. Subpoenas Duces Tecum
 - a. Command witnesses to bring records and tangible things
 - b. Requirements
 - 1. Statutory authorization
 - a. Agency or party to agency proceedings
 - 2. Bare showing of relevance
 - 3. Reasonable specificity
 - 4. Not outrageously burdensome
- F. Privilege Limitations
 - 1. Ordinary evidentiary privileges such as attorney-client apply
 - 2. Fifth amendment
 - a. Privilege does not apply simply because documents incriminate
 - b. Act of producing documents must incriminate

1. Authentication, possession, existence
2. Testimonial component must be more than a "foregone conclusion"
- c. Other reasons Fifth Amendment is a slight limitation:
 1. Corporations have no privilege
 2. Agencies can draw negative inferences from invocation of Fifth Amendment
 3. Immunity can be obtained
 - a. "use" and derivative use from testimonial component only
 4. Required Records Doctrine
 - a. Nearly absolute
 - b. Only if no way to comply and avoid incrimination

VI. External Controls on Agencies

- A. Generally
- B. Delegation
 1. Delegation of Legislative Power
 - a. Delegation of legislative authority struck down twice in the 1930s
 - b. Modern test: "intelligible principle"
 1. Delegations as vague as "public necessity and convenience" have been upheld

2. Whitman v. American Trucking Ass'ns, Inc. (U.S. 2001)
 - a. Air quality standards “requisite to protect public health with an adequate margin of safety” upheld as constitutional
2. Delegation of Judicial Power
 - a. Article III of the Constitution
 - b. Northern Pipeline Constr. Co. v. Marathon Pipe Line (U.S. 1982)
 1. Three historical exceptions
 - a. military courts
 - b. territorial courts
 - c. "public rights" matters
 - C. CFTC v. Schor (U.S. 1986)
 1. Multi-factor test:
 - a. particularized area of the law
 - b. searching judicial review
 - c. private rights versus public rights
 - d. efficiency (ancillary jurisdiction)
 - e. status as independent agency
 - f. consent of party
 - D. Jury Trial Issue
 1. No jury trial right in public rights matters
 - a. Atlas Roofing v. OSHRC (U.S. 1977)
 - E. **Hypothetical # 17:** The EPA discovers that DumpCo is dumping

TCE into a town's aquifer. The EPA brings an administrative enforcement action before an EPA Administrative Law Judge seeking to impose a \$50,000.00 penalty. DumpCo objects because the Administrative Law Judge is not an Article III judge, and because there will be no jury trial.

F. Criminal Matters

1. Article III court must impose any criminal penalties
2. But, Congress can by statute make a violation of a regulation a crime

C. Estoppel

1. Promissory or Equitable Estoppel
 - a. Apparently not ever available against the federal government, although Supreme Court has never completely ruled it out.
2. Res judicata and collateral estoppel
 - a. allowed on much same basis as court adjudication
 - b. not allowed if a statute precludes it, as with Title VII

D. Freedom of Information Act

1. Three tiers
 - a. Records that must be published in the Federal Register automatically
 - b. Records that must be automatically made available
 - c. Records available upon demand
2. Records that must be published
 - a. §552(a)(1)(d)
 1. "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability"
3. Records that must be automatically made available
 - a. §552(a)(2)
 1. Final opinions in the adjudication of cases
 2. Statements of policy not published in the Federal Register
 3. Staff manuals
4. Records that must be produced on demand
 - a. Agency records must be produced in response to "any request which reasonably describes the records and is made in accordance with published rules" as to time, place fees, etc. §552(a)(3)
 - b. FOIA exemptions:
 1. Exemption 1: national defense or foreign policy

2. Exemption 2: internal personnel rules and practices
3. Exemption 3: specifically exempted by some other statute
4. Exemption 4: trade secrets and commercial or financial information
5. Exemption 5: Inter-agency or intra-agency memos or letters not available by law
 - i. traditional privileges such as attorney client
 - ii. NLRB v. Sears (U.S. Sup. Ct.1975): pre-decisional
 - v. post decisional
 - a. Rationale: free exchange of ideas within agency
 - iii. However, exemption 5 does *not* cover documents generated outside the agency and submitted to the agency. So in Department of the Interior v. Klamath Water Users (U.S. 2001), the Supreme Court held that documents prepared by an Indian tribe and submitted to the agency relating to a water dispute were not covered, because they were neither “inter” nor “intra” agency documents.
- f. Exemption 6: personnel, medical files of which release would be "clearly unwarranted invasion of personal privacy" (redaction to avoid identifiers that would allow member of the general public to identify person)

- g. Exemption 7: law enforcement records that would have negative effects such as revealing a confidential informant or deprive the accused of a fair trial
 - h. Exemption 8: financial institution regulation documents
 - i. Exemption 9: geological info. relating to wells
5. "Reverse" FOIA
- a. generally not available
 - b. but, implied right found in *Chrysler v. Brown* (U.S. Sup. Ct. 1979).
6. Government in the Sunshine Act
- a. Theoretically requires agency open meetings
 - b. But huge exception for open meetings that would be “likely to significantly frustrate the implementation of proposed agency action.”
- E. Executive Controls
1. Appointments
- A. Three levels: "officer," "inferior officer," "employee"
- 1. Officers must be appointed by the president and are subject to Senate confirmation
 - a. e.g., Cabinet level, agency heads
 - i. *Buckley v. Valeo* (U.S. Sup. Ct. 1976): FEC heads are "officers"

ii. Morrison v. Olson (U.S. Sup. Ct.1988): special prosecutors are "inferior officers"

2. Inferior officers

a. can be vested in "the President alone, in the Courts of Law, or in the Heads of Departments"

i. e.g., subcabinet level (undersecretaries)

2. Removal

a. Old distinction

i. Myers v. U.S. (U.S. Sup. Ct. 1926): Officers exercising "purely" executive functions must be removable at will of president

ii. Humphrey's Executor v. U.S. (U.S. Sup. Ct.1935): persons exercising quasi-judicial and quasi-legislative authority can be given tenure protection

iii. This distinction is what makes independent agencies possible

b. New test under Morrison v. Olson

i. do the "removal restrictions impede the President's ability to perform his constitutional duty"

F. Legislative Controls

1. Legislative held veto unconstitutional in INS v. Chadha

2. But "report and wait" constitutional

- a. Congressional Review Act (1996)
 - 3. "Informal" controls such as budget hearings
- G. Venue: Generally determined by enabling act
 - 1. SEC: Federal District Ct.
 - 2. FERC: Regional Circuits
 - 3. FCC: D.C. Circuit
- H. Form of Challenge
 - 1. Old writ distinctions abolished
 - 2. Liberally allowed under 5 U.S.C. §703
 - 3. Injunction or declaratory relief most common

VII. Preconditions of Judicial Review

- A. Standing
 - 1. Injury in fact
 - a. generally means an interest significantly above that suffered by the general public
 - b. Lujan v. Defenders of Wildlife: vague plans to visit an area where wildlife affected is insufficient
 - 2. Zone of interest
 - a. Air Courier Conf. of Am. v. American Postal Workers Union (U.S. 1991): Postal employees not within "zone" on suit to prevent private couriers from delivering overnight mail; postal job loss not a "zone" injury

3. Fairly traceable
4. Taxpayer standing
5. Citizen-suit standing
 - a. *Friends of the Earth v. Laidlaw Env'tl Services* (U.S. Sup. Ct. 2000) upholds the concept of "citizen-suit" standing, in which citizens or citizen groups are allowed by certain environmental statutes to bring suit against polluters. Standing is allowed even though the only remedy available to plaintiffs is that a fine will be paid to the government; the deterrent effect of such a fine gives the plaintiffs a sufficient stake in the outcome. The plaintiff, however, must show a specific injury to them; in the *Friends of the Earth* case this was satisfied because group members were potentially affected by the defendant's illegal discharges of mercury.
6. **Hypothetical # 18:** A statute provides that a proceeding to revoke a dumping permit must be conducted as a "hearing on the record." An agency, in violation of this statute, conducts a hearing that does not involve preparation of a record. The court reporting company that was supposed to compile the record seeks judicial review to require a new hearing that is conducted on the record.

B. Final Order rule

1. Like final judgment requirement in federal court
2. **Hypothetical # 19:** A statute requires the FTC to find "reasonable cause" of a violation of trade regulations before it institutes an enforcement action against the alleged violator. The FTC makes this finding, and commences an enforcement action, which is required by statute to be an "on the record" proceeding. The alleged violator seeks immediate judicial review of the FTC's finding of reasonable cause to commence the enforcement proceeding

C. Ripeness

1. Usually arises in context of pre-enforcement challenges to rules
2. Three factor test:
 - a. "purely legal" question?

- b. would court or agency benefit from delaying challenge?
 - c. private party's interest in challenging
- D. Exhaustion of Administrative Remedies
 - 1. Requires party to invoke and complete administrative process
 - 2. Difference with final order rule
 - 3. Exceptions
 - a. futility
 - b. inadequate remedy
- E. Primary Jurisdiction
 - 1. Concurrent jurisdiction between agency and court
 - 2. Stay while agency is consulted
- F. "Committed to Agency Discretion by Law"
 - 1. "no law to apply"
 - 2. Heckler v. Chaney (U.S. Sup. Ct. 1985)
 - 3. United States v. Bean (U.S. Sup. Ct. 2002) inaction because of lack of resources to act is not reviewable by courts
- G. Statutory Preclusion of Review
 - 1. Statutes read with a heavy presumption that they do not preclude
 - 2. Potential constitutional issue

VIII. Judicial Review

- A. Four questions
 - 1. Law

2. Historical fact
 3. Policy
 4. Discretion
- B. Law
1. Can arise in any kind of agency determination
 2. "Mixed" questions of law and fact
 3. *Chevron v. NRDC* (U.S. Sup. Ct. 1984)
 - a. Two step test
 - i. clear answer provided by law?
 - ii. agency's resolution reasonable
 1. *Mayo Foundation v. U.S.* (U.S. Sup. Ct. 2011)
 2. *City of Arlington v. FCC* (U.S. Sup. Ct. 2013)
 - b. "Split model" agencies
 - i. *Martin v. OSHRC* (U.S. Sup. Ct. 1991): "enforcement" end gets the deference, at least where the issue is ambiguous regulation
 - c. formality, duration, consistency can all affect the amount of deference; informal agency pronouncements may not be within the scope of *Chevron*. *Christensen v. Harris County* (U.S. Sup. Ct. 2000)(plurality opn.)(Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of

law -- do not warrant *Chevron*-style deference.).

d. rationale and contrast with trial courts

4. Skidmore Deference

C. Historical fact

1. who, what, when, why, how, etc.
2. "mixed" questions of law and fact
3. Usually arise in adjudications
 - a. If informal adjudication, arbitrary and capricious test applies
 - b. If formal adjudication, "substantial evidence" test applies
4. "Arbitrary and capricious"
 - a. large amount of deference to agency
 - b. can rely on matters outside the "record" if reliable
 - c. *Citizens to Preserve Overton Park v. Volpe* (U.S. Sup. Ct. 1971)
 1. within the zone of permissible decisions
 2. not irrational choice made within the zone
5. "Substantial evidence"
 - a. strong deference to agency
 - i. like the standard to direct a verdict
 - ii. "whole record" approach
 - b. must be limited to record and matters officially noticed
 - c. agency gets the deference, not the ALJ
 - i. *Universal Camera v. NLRB*: (U.S. Sup. Ct. 1951)

D. Policy

1. Usually arises in rulemaking
2. "Legislative" facts
3. "hard look" at facts and policy implications
 - a. quasi-procedural: were alternatives explored?
 - b. quasi-substantive: is it based on unreasonable policy inferences

E. Discretion

1. Not obviously factual or legal, but calling for judgment
2. Common circumstances
 - a. admission of evidence
 - b. penalty imposed
3. "Arbitrary and capricious, abuse of discretion" standard
 - a. wide latitude
 - b. in case of penalty, must be shocking or disproportionate

F. Damage Actions as a method of judicial review

1. Sometimes the only practical route to relief
2. §1983 actions
 - a. color of state law
 - b. "persons"
 - i. doesn't include states themselves or their instrumentalities
 - c. no vicarious liability
 - i. policy requirement

- d. immunities
 - i. qualified
 - ii. absolute

3. *Bivens* actions

- a. federal officials individually
- b. lack of "special factors counseling hesitation"
- c. immunities

4. Federal Tort Claims Actions

IX. Exam Approach

- A. Look for key words
- B. Classify the agency action: adjudication, rulemaking or information gathering
- C. Identify statutory limitations on agency's actions (principally APA)
- D. Identify constitutional limitations on agency's actions
- E. Identify any important pre-conditions of judicial review (e.g., exhaustion, standing)
- F. Classify the nature of the challenge: legal, factual, policy or discretion
- G. Apply the appropriate standard of review (e.g., Chevron, substantial evidence, arbitrary and capricious).