

## **Administrative Law chronology, Fall 2005. Professor Seamon.**

### **Introduction to Administrative Law**

What is administrative law?

Why do we have administrative agencies?

What is an administrative agency?

Executive authority—"Take care that the laws be faithfully executed"

Legislative authority—The framing and enactment of laws

Judicial authority—The right to hear and determine questions in controversy

Relevance of the APA

Separation of Powers

Separation of powers analysis: formalism and functionalism

Outline of types of power and related separation-of-powers issues

Selected provisions of the Idaho constitution

The executive power

In general

Congressional power to remove executive officers

Presidential exercise of legislative power

*Clinton v. City of New York*

Executive appointment and removal powers

The Appointments Clause of the U.S. Constitution (art. II, § 2)

*Morrison v. Olson*

Other means for executive control of agencies

Practice questions on removal

The legislative power

Introduction

The legislative veto

The non-delegation doctrine

*Whitman v. American Trucking Associations, Inc.*

The judicial power

Introduction

Early cases

Modern cases

*Mistretta v. United States*

*Morrison v. Olson* (Part IV)

### **Introduction to Agency "Organic" Legislation and to APAs**

Creating an agency

The range of legislative design choices

The legislative process for creating an agency

The headless "fourth branch" of government

Agency organic statutes—In context

Organic statute of the Idaho Board of Medicine

Practice problems

Introduction to the APA

- Relevance of APAs
- History of APAs
  - Federal APA
  - State APAs
- The purposes and structure of the federal APA
- General analysis under APA
  - Definitional section
  - Applicability of APA to a problem
    - Does the APA (federal or state) apply to this agency?
    - Does the APA apply to the agency action involved in the problem?
    - Does the APA complement the agency legislation on the problem?
- The Idaho APA
  - General provisions
    - § 67-5201: definitions
      - “Agency”
      - “Agency head”
      - “A. action,” “order,” “rule,” “contested case,” “rulemaking”
      - “Party” and “person”
      - “Provision of law”
  - The fundamental distinction between rule making and adjudication
  - The role of APAs in administrative law

## **Agency Rulemaking**

- Agency legislation
- Federal rulemaking—Framework for procedural analysis
- The APA
  - § 553(a): subject matter exemptions
  - § 553(b): general exemptions and good cause exemption
    - Introduction
    - Difficulty and importance of rules that fall within § 553(b)(A) exemptions
    - Interpretative rules
      - The legal effect of the rulemaking
      - The formal approach
      - The functional approach
      - Factors applied in the analysis
    - Substantial impact analysis
    - Case law distinguishing substantive rules from interpretative rules
      - Alaska v. Department of Transportation*
    - General statements of policy
    - Procedural rules
    - Good cause exemption
  - Notice of proposed rulemaking
  - The required proceeding
    - Opportunity to participate
      - Vermont Yankee v. NRDC*

Consideration of materials submitted and statements of basis and purpose

Formal rulemaking proceedings: “trigger language”

*United States v. Florida East Coast Railway Co.*

Practice problems on APA triggers

Publication requirements

Substantive (legislative) rules

General policy statements and general interpretations

Publication by reference

Publication of substantive rule before its effective date

Delay period

Retroactive rules

The right to petition the agency for a rule

Other procedural requirements for federal rulemaking

Procedural requirements for rulemaking: state and local

Agency legislation

The state APA

Agency procedural rules

Local APA

Preemption of state law by federal regulations

*Fidelity Federal Savings and Loan Association v. Cuesta*

*Norfolk Southern Railway Co. v. Shanklin*

The Idaho APA

General provisions

§§ 67-5202 to 67-5205: publication of agency rules

§ 67-5206: promulgation of rules implementing the APA

Decisionmaking procedures

Rules and rulemaking

§ 67-5220: negotiated rulemaking

§ 67-5221 to 67-5225 and § 67-5227: mandatory notice-and-comment rulemaking procedures

§ 67-5223: legislative notification of proposed rulemaking

§ 67-5222: opportunity for comment on proposed rules

§ 67-5224: publication of final rules

§ 67-5227: variance between proposed and final rules

§ 67-5225: rulemaking record

§ 67-5224: effective dates

§§ 67-5226 and 67-5228: temporary rules and exemptions

§ 67-5229: incorporation by reference

§ 67-5230 and 67-5231: initiating agency

§ 67-5231: penalty for noncompliance with procedural requirements

### **Agency choice between ruemaking and adjudication**

The choice: a matter of degree

*SEC v. Chenery Corp.*

## The Idaho APA

### Rules versus orders

Predecisional notice

Hearings and the opportunity to participate

Post-decisional notice

Scope of judicial review

Stare decisis: orders versus rules

Exercise on agency choice between rulemaking and adjudication

## Agency adjudication

### Initiating the adjudicatory process

#### Regulatory agencies

Nonenforcement

*Heckler v. Chaney*

Discussion questions about *Heckler v. Chaney*

Selective enforcement

*FTC v. Universal-Rundle Corp.*

Private enforcement

Explicit provisions

Implied causes of action

*Alexander v. Sandoval*

#### Benefits agencies

Application for benefits

Termination of benefits

#### Licensing agencies

Application for a license

License suspension or revocation

### Adjudication procedures: agency legislation

### Adjudication procedures: APA

Federal adjudication—Framework for procedural analysis

Practice problems on APA triggers

Formal adjudication required by statute

Exemptions from § 554

A matter subject to a subsequent trial de novo

The selection or tenure of an employee

Decisions based solely on inspections, tests, or elections

The conduct of military or foreign affairs functions

Where an agency is acting as an agent for a court

The certification of worker representatives

Notice of hearing

Private moving parties

Time and place for hearing

Compromise and settlement

Hearing pursuant to §§ 556 and 557

The recommended or initial decision

- ALJ consultation prohibited
- Separation of functions
- Participation in decision, recommended decision or agency review
  - Grolier Inc. v. FTC*
- Exceptions to separation of functions provisions
  - Applications for initial licenses
  - Rates, facilities or practices of public utilities or carriers
  - The agency and agency members
    - Withrow v. Larkin*

#### The Idaho APA

- Orders and contested cases
  - § 67-5240: introducing the contested cases
  - § 67-5241: informal disposition of disputes
  - §§ 67-5242 and 67-5251: procedure at the evidentiary hearing
    - § 67-5242: notice and prehearing procedure
    - § 67-5242: procedure at the evidentiary hearing
    - § 67-5251: evidence and official notice
    - § 67-5242: procedures on default of a party
  - §§ 67-5252 and 67-5253: securing and unbiased hearing
    - § 67-5252: disqualification of the presiding officer
    - § 67-5253: ex parte contacts
  - §§ 67-5243 to 67-5247: the variety of orders
    - § 67-5244: recommended orders
    - § 67-5245: preliminary orders
    - § 67-5246: final orders
    - §§ 67-5243 and 67-5246: petitions for reconsideration
    - § 67-5246: effective dates
    - § 67-5247: emergency orders
  - § 67-5254: actions against licenses
  - § 67-5248: required contents of orders
  - § 67-5249: contested case record
  - § 67-5250: indexing precedential agency orders and guidance documents
  - § 67-5255: declaratory rulings

#### **Due Process Limits on Agency Action**

- Outline of due process analysis
- Asserting agency authority—Implementing the choice
  - Constitutional requirements—Rulemaking and adjudication
    - Londoner v. City and County of Denver*
    - Bi-Metallic Investment Co. v. State Board of Equalization*
  - Distinguishing between legislating and adjudicating
- Does due process apply?
  - Board of Regents v. Roth*
  - Perry v. Sindermann*
- What process is due?

- Recurring issues in determining what process is due
  - The hearing—Timing
    - The general rule
    - Extraordinary situations
  - The hearing type
  - Substitute for a hearing
  - Bifurcated proceedings
- Caselaw on what process is due
  - North American Cold Storage Co. v. City of Chicago*
  - Goldberg v. Kelley*
  - Goss v. Lopez*
  - Mathews v. Eldridge*
  - Ingraham v. Wright*
  - Cleveland Board of Education v. Loudermill*

### **Availability of Judicial Review of Agency Action**

- FAPA §§ 701 to 706
- Presumption of reviewability
- Jurisdiction to provide review
  - Special statutory review
  - General jurisdiction statutes
- The APA
- Preclusion of review
  - The APA
  - Statutory preclusion
    - Implied preclusion
      - Bowen v. Michigan Academy of Family Physicians*
    - Express preclusion
  - Preclusion of constitutional claims
  - Limiting the scope of review
- Committed to agency discretion
  - No law to apply
  - Decisions traditionally committed to agency discretion
    - Lincoln v. Vigil*
    - Heckler v. Chaney*
- Form of proceeding; venue; review in enforcement proceedings
  - Form and venue of proceeding
  - Venue
  - Review in enforcement proceedings
- Standing
  - Lujan v. Defenders of Wildlife*
  - Bennett v. Spear*
- Timing of judicial review and relief pending review
  - Finality and ripeness
    - Finality of administrative action: pre-APA

- Finality and the APA
  - Agency action made reviewable by statute
  - Final agency action
- Ripeness
  - Legislative rules
    - Abbott Laboratories v. Gardner*
  - Interpretative rules and informal rulings
    - Ciba-Geigy Corp. v. EPA*
  - Preliminary, procedural or intermediate action
  - Statutory modification of ripeness doctrine
- Exhaustion of administrative remedies
  - The court-developed doctrine
    - McCarthy v. Madigan*
  - Selection illustrations of the effect of the exhaustion doctrine
    - Waiver of an issue for failure to raise it before the agency
      - Issue exhaustion in agency adjudications
      - Issue exhaustion in rulemaking
    - Where the complainant alleges irreparable damage if required to exhaust remedies
    - Use of federal courts to restrain state agency action
    - Asserting questions of law
      - Constitutional questions
      - Lack of jurisdiction
      - Agency violation of a “clear right”
      - No properly authorized procedure to exhaust
      - Solely a question of statutory interpretation
- Futility
  - Exhaustion doctrine and the APA
- The Idaho APA
  - Judicial review
    - The right to judicial review
      - A constitutional note
      - § 67-5270: the right of judicial review under the APA
    - Threshold requirements for judicial review of agency actions
      - § 67-5270 and “standing” to obtain judicial review
    - Timing
      - Primary jurisdiction
      - § 67-5271 and exhaustion of remedies
      - §§ 67-5270, 5271, and finality
      - § 67-5278: ripeness and the availability of declaratory judgments on rules
    - The how, when, where, and what of judicial review
      - § 67-5272: form of review
      - §§ 67-5273 and 67-5274: time for filing petition for judicial review and stays of agency action

- § 67-5272: venue
- §§ 67-5225, 67-5249, 67-5275, and 67-5276: agency record for judicial review
- §§ 67-5225 and 67-5275: the record for judicial review of rulemaking
- §§ 67-5249 and 67-5275: the record for judicial review of contested cases
- § 67-5275: the agency record for judicial review of other agency actions
- § 67-5276: supplementing the agency record

### **Scope of Judicial Review of Agency Action**

- Outline of judicial review of federal agency action
- Legislative rules and agency adjudications—Judicial review since the 1980s
  - Chevron, U.S.A Inc. v. NRDC*
- Other types of agency interpretations of legislation—Judicial review since the 1980s
  - United States v. Mead Corp.*
- Findings of fact
  - Developed from evidence introduced in a formal proceeding
    - The on-the-record hearing
    - The genesis of the substantial evidence standard
    - Substantial evidence and the APA
      - Universal Camera Corp. v. NLRB*
  - Developed from data accumulated in informal proceedings
    - Informal adjudication
      - Citizens to Preserve Overton Park, Inc. v. Volpe*
    - Informal rulemaking
      - Promulgation of rules
      - Judicial review of factual basis for rules
      - Substantial evidence—Arbitrary, capricious: a reconciliation
      - Agency amendment or repeal of a legislative rule
        - Motor Vehicle Manufacturers v. State Farm*
  - Review of legal facts
    - Constitutional facts
    - Jurisdictional facts
- A summary statement on judicial review
- Scope of judicial review in the states
  - The Idaho APA
    - Scope of review: §§ 67-5277 to 67-5279
      - Judicial review and the law-declaring function
      - Judicial review of factfinding
      - Judicial review of judgment and discretion
    - Type of relief: § 67-5279
    - Legislative review of final agency rules