Administrative Law outline, Fall 2005. Richard Seamon.

I. SEPARATION OF POWERS

Comment: Separation of powers is seldom used to strike down agencies, but rather is used to construe statutes to avoid separation of powers problems.

Also keep in mind that separation of powers can be very important at the state level.

A. EXECUTIVE POWER

1. Congressional Removal of Executive Officers

a) *Bowsher* (1986) (p23): taking a formalist approach, the Court said that the Constitution provides only for removal of executive officers by impeachment-- not by congressionally retained power to remove. Otherwise, Congress could control the execution of the laws, which is not its job. Thus, even though Congress could remove the Comptroller General for specific reasons and by bicameral action and presentment (but was not removable by the president), this was unconstitutional.

2. Executive Exercise of Legislative Power

a) *Clinton v. City of New York* (1998) (p25): taking a formalist approach, the Court says that the Constitution provides for bill passage and enactment only through bicameral action and presentment (A1s7c2)-- the "finely wrought procedure." Thus, the line item veto was unconstitutional. The Court specifically noted that it rested its decision only on bicameralism and presentment-- not on general separation of powers grounds.

3. Executive Appointment and Removal

a) *Myers* (1926) (p34x): Congress could not restrict the president's power to remove a "purely executive" officer-- a postmaster-- the Court says, taking a formalist approach.

b) *Humphrey's Executor* (1935) (p34x): Congress *could* limit presidential removal of the head of a quasi-judicial/quasi-legislative agency (the FTC).

c) *Wiener* (1958) (p39c): Congress *could* limit the president's power to remove a War Claims Commission member.

d) *Morrison v. Olson* (1988) (p34): the Court considers separation of powers challenges to the Independent Counsel, analyzing them functionally for the most part.

(1) Appointment: to determine whether an executive officer is a principal or "inferior" officer (see A2s2c2), the Court looks at four factors, and determines that the Independent Counsel is an inferior officer and so Congress can assign the appointment of the IC to the A3 courts:

(a) Whether the officer is subject to removal by a higher executive branch official

(b) Whether the officer has only certain, limited duties

(c) Whether the officer has limited jurisdiction

(d) Whether the officer has limited tenure

(2) Removal: the Court takes a new tack from *Myers*/*Humphrey's*/*Wiener*, no longer formalistically looking at whether the officer is "purely" executive or not, but asking "whether the removal restrictions are of such a nature that they

impede the president's ability to perform his constitutional duty" (mainly the faithful execution of the laws). Here, the restrictions on IC removal were okay, because the president still had some removal powers (for good cause) and the AG had control over the IC to some extent in any case.

(3) Scalia, dissenting, argues that the Court should stick to a formalist approach here.

4. Congressional Control of Agencies

a) Budgeting

b) Legislative clearance process

c) Cost-benefit analysis of proposed regulations

d) Control over agency access to the courts

B. LEGISLATIVE POWER

1. Legislative Veto

a) *INS v. Chadha* (1983) (p46x): the Court says that Congress cannot reserve power to overrule deportation suspension decisions made by the AG simply by House resolution unsigned by the president. Rather, like it said in *Clinton*, the Court says that Congress must follow the "finely wrought process" spelled out in the presentment clause (a1s7c2).

(1) The Court doesn't say that Congress can't *delegate* what it did to the AG-- it just can't legislate on a case-by-case basis after delegation.

2. Non-Delegation Doctrine: "So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta*.

a) *Field v. Clark* (1892) (p47x): the Court says that Congress can *not* delegate legislative power. But this language was never followed. Rather, federal courts employed four rationales for justifying delegation:

(1) Contingency: no delegation violation because delegate couldn't act until a contingency-- specified by Congress, had occurred.

(2) Fill the gap: no violation because congress gave the basic standards and so limited the authority of the delegate.

(3) Ultra vires: no violation because a reviewing court could contain the delegate to its delegated role.

(4) Intelligible principle: no violation as long as Congress specified an "intelligible principle" by which the courts could contain the delegate to its delegated role.

b) *Panama Refining Co.* (1935) (p49x): delegation violation where Congress stated no policy or standard by which the courts could evaluate the delegates administration-- there was, rather, no limit on the executive's discretion.

c) *Schechter Poultry* (1935) (p49x): delegation violation where Congress give the president "unfettered discretion" to make law.

d) *Whitman v. ATA* (2001) (p49): no delegation violation-- i.e., an intelligible principle set out-- where Congress charged EPA with "establishing uniform national standards at a level requisite to protect public health from adverse effects

of pollutants," where "requisite" meant "sufficient, but not more than necessary." The Court says that a "determinate criterion" isn't necessary, and that it will generally defer to Congress on the appropriate degree of policy judgment that agencies can be left with.

C. JUDICIAL POWER

1. Non-Article III Adjudication

a) *Schor* (1986) (p60x): Congress could allow an agency to adjudicate *state* law compulsory counterclaims, the Court said, analyzing the question functionally by asking whether it threatened the integrity of the Judicial Branch and looking at four factors:

(1) Extent to which essential attributes of judicial power are reserved to A3 courts

(2) Extent to which the non-A3 forum exercised the jurisdiction and powers normally vested only in A3 courts

(3) The origins and importance of the right to be adjudicated

(a) Where private, common law rights are at stake, the Court will take a closer look

(4) The concerns that led Congress to depart from A3's requirements

2. Non-Judicial Duties

a) *Mistretta v. U.S.* (1989) (p61): the Court takes a functional approach in analyzing whether the sentencing commission was constitutional. First, it wasn't a delegation violation because there was an intelligible principle-- specific goals, purposes, and factors to consider. Second, it didn't violate A3 (separation of powers generally) because the "practical consequences" of the commission posed "no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds."

b) *Morrison v. Olson* Part IV (1988) (p34): the Court narrowly interprets the Independent Counsel statute so that A3 judges aren't given non-judicial powers to define the IC's jurisdiction (saying the definition is limited to specific issues established by the AG) and terminate the IC position. The Court here takes a functional approach, looking for intrusion into the judicial and executive branches.

II. AGENCY CREATION

A. Organic Statutes

1. Idaho Medical Practice Act, I.C. 54-1801 *et seq.*

a) 54-1802: pupose

b) 54-1803: definitions:

(1) (1) "practice of medicine":

(a) (a) investigations, diagnosis, treatment, correction, prescription for human disease, etc.

(b) (b) application of principles and techniques of medical science

(c) (c) offering and holding out as able to do (a) or (b)

(2) (2) "board": the state board of medicine

(3) (3) "physician": anyone holding a license to practice medicine, surgery, osteopathic medicine and surgery, or osteopathic medicine; authorization to

practice any healing arts aren't physicians

(4) (4) "license to practice medicine and surgery": one issued by the board to a person who has graduated from an okay med school and fulfilled the licensing requirements

(5) (5) "license to practice osteopathic medicine and surgery"

(6) (6) "license to practice osteopathic medicine"

(7) (7) "person": natural person

(8) (8) "acceptable school of medicine": meets the standards of a national med school accreditor acceptable to the board

(9) (9) "extern": student enrolled in an okay med school

(10) (10) "intern" "resident": med school graduate in post-grad training program

(11) (11) "physician assistant": graduate of an okay training program and qualified to render patient services under a physician.

c) 54-1804: unlicensed practice

(1) (1) people who can practice medicine without an Idaho license

(2) (2) felony to practice without a license (except for (1))

(3) (3) penalty for holding out as licensed

(4) (4) recovery by people treated by unlicensed doctors

(5) (5) the board must refer all violations to prosecutors and can help the prosecutor in prosecution

d) 54-1805: state board of medicine established

(1) (1) Establishment:

(a) Self-governing agency

(b) Composed of 10 members.

(2) (2)

(a) (a) Composition: 10 members

i) Director of the Idaho State Police

ii) 7 members: physicians who are residents of the state and in active practice

a. (b) Term: 6 years

b. 6 members: licensed to practice medicine and surgery

1) Term expiry/vacancies: Idaho medical association must nominate 3 to the governor, who appoints 1.

c. 1 member: licensed to practice osteopathic medicine or osteopathic medicine and surgery

1) Term expiry/vacancy: Idaho osteopathic association must nominate 3 to the governor, who appoints 1.

iii) 2 members: public members

a. (c) Term: 3 years

b. Must reside in the state and have lived here for 5+ years immediately preceding appointment.

c. Must never have been authorized to practice a healing art of have a

connection with healing arts or with medical education or health care facility, except as patients.

(3) (3): governor can remove any member for cause: malfeasance, misfeasance, nonfeasance.

(4) (4):

(a) The board must elect a chairman from its number.

(b) Members who aren't state employees are compensated.

(c) Quorum: 5 members

i) Board can act with majority of those present.

e) 54-1806: powers and duties

(1) (1) Authority to hire/appoint employees, including exec. dir., investigators, attorneys, consultants, and independent hearing examiners.

(2) (2)

(a) Authority to establish, *pursuant to APA*, rules for administration of this chapter, including rules for physician's assistants.

(b) Must adopt rules *pursuant to APA* establishing procedures for receipt of complaints and investigation and disposition of them.

i) These rules *must* provide for:

a. Notice to a person when the board has authorized the committee to investigate them.

b. Opportunity for person under investigation to meet with the committee or its staff before initiation of formal disciplinary proceedings by the board.

(3) (3) Authority to conduct investigations and examinations and hold hearings as authorized by 54-1806 (powers and duties) and 54-1806A (medical disciplinary enforcement).

(4) (4) Disciplinary proceedings:

(a) Authority to:

i) Administer oaths

ii) Take depositions of witnesses *in manner consistent with rules adopted by the board pursuant to APA*

iii) Upon a determination of good cause, to require attendance of witnesses and production of records at any hearing.

a. May issue subpoenas and subpoenas duces tecum to compel production of records, directed to the sheriff of any county in Idaho (which must be served as a criminal subpoena).

b. Fees and mileage for witnesses must be the same as in dist. ct. for crim. cases.

c. Can apply to district court to compel compliance with subpoeanas by contempt proceedings just as with court-issued subpoenas.

iv) *Licensees accused* in proceedings have the same right of subpoena if they apply to the board for it.

(5) (5) Authority to seek injunctive relief prohibiting unlawful practice of

medicine.

(6) (6) Authority to make and enter contracts.

(7) (7) Authority to operate, manage, superintend, and control physician licensure.

(8) (8) Authority to make and submit a proposed budget.

(9) (9) Authority to perform other duties set forth in state law.

(10) (10) Authority to provide other services and perform other functions *necessary* to fulfill its duties.

(11) (11) Authority to provide for reasonable fees *through rules* or administrative costs, and to assess those costs when a licensee has been found in violation.

(12) (12) Authority to prepare an annual report.

f) 54-1806A: medical disciplinary enforcement

(1) The board *must create a* "committee on professional discipline."

(a) Has the authority, under direct supervision of the board to:

i) Conduct professional disciplinary enforcement investigations under this chapter (esp. 1810 (license by exam) and 1814 (grounds for discipline).

ii) To recommend appropriate action to the board with respect to its investigations.

(b) Does *not* have authority to impose sanctions of limit or condition licenses-- it can only make recommendations to the board.

(2) The board *must provide* for these things wrt. the committee:

(a) (1) Membership:

i) 5 members, appointed by the board.

a. Initially, it's the members of the Idaho board of professional discipline.

b. Then:

1) 4 members licensed to practice medicine and surgery in Idaho

2) 1 member an adult Idaho citizen not licensed to practice medicine and surgery in Idaho

ii) Term: 3 years, and no member can serve more than 2 terms.

(b) (2) Chairman: the board must designate 1 member of the cmte. as chairman, who serves for 1 year or until another is appointed.

(c) (3) cmte. composition:

i) Quorum: 3 members

ii) Notice of meetings: at least 3 days to all members

a. Can be given by chairman or any 3 members

b. Can be waived unanimously, else must be in writing and state time, place, and purpose.

(d) (4) Compensation: cmte. members are compensated.

(e) (5) Conflicts: cmte. (and **board**?) members must disqualify, or *on motion of interested party on proper showing* be disqualified when:

i) They have an actual conflict of interest

ii) Or bias which interferes with their fair and impartial service

(f) (6) Powers of committee: (see also (1806A initial graf)

i) (a) Authorized to recommend to the board that the board authorize it to:

a. Initiate/commence proceedings, studies, or investigations

b. Investigate/inquire into misconduct or unprofessional behavior.

c. Recommend that the board take action with respect to its proceedings, studies, investigations, and inquiries.

d. Obtain assistance of staff and legal counsel hired by the board.

ii) (b) Authorized to recommend to the board that the board authorize it to:

a. Appoint hearing officers or hearing cmtes. to take evidence, conduct hearings, and make recommended findings and conclusions to the cmte. in any matter assigned to the cmte.

1) Hearing cmtes.:
- size as board directs
- composed of physicians in Idaho
  - serve without pay
  - term as board specifies, but not more than 1 year or the length of matters if longer

b. *All investigations of the cmte. and any hearing officers or cmtes. must be conducted by rules adopted by the board pursuant to APA.*

iii) (c)

a. Authorized to recommend findings on matters before it or any hearing ofcr./cmte.

b. Authorized to recommend conclusions and orders for consideration of the board.

c. **Board**: authorized to enter appropriate orders and take appropriate action, including:

1) Disciplinary orders wrt. any licensed physician and surgeon
- And, for good cause, includes power to:
  - suspend
  - restrict
  - condition
  - limit
  - revoke

license or present or future right or privilege to practice medicine of any licensed physician/surgeon or any person purporting to be authorized to practice in Idaho.

iv) (d) Authorized to recommend that the board reprimand informally where it finds minor misconduct. (Informal reprimand subject to disclosure under 9-301 et seq.)

v) (e) Authorized to recommend that the board accept a resignation/surrender of license, and that it impose terms and

conditions in connection with that.

vi) (f) Authorized to recommend that the board order nondisciplinary suspension or transfer to inactive status (for good cause) where physician is incapacitated by illness, senility, disability, drug addiction, and that it provide terms and conditions for that.

vii) (g) Authorized to recommend that the board provide by order for reciprocal discipline-- *but the licensee/applicant is entitled to appear and show cause*.

viii) (h) Authorized to recommend that the board adopt rules to let the cmte. conduct informal proceedings.

(g) (7) Openness:

i) All formal hearing by the **board** or by the cmte. must be open to the public.

ii) Formal dispositions/actions by the **board** under 1806 (board powers) and 1806A (discipline) must be public.

iii) Other proceedings/studies/investigations that don't result in formal hearings/dispositions/actions must be private and remain confidential.

(h) (8) Voluntary restriction of license:

i) A physician can request in writing to the **board** or cmte. that his license be restricted.

ii) **Board** is authorized to grant the request, and to attach conditions to his license.

iii) **Board** is authorized to waive commencement of proceedings if it determines so.

iv) Removal of restriction: subject to the procedures for reinstatement (elsewhere in act or in **board** rule) and subject to any conditions specially imposed.

(i) (9) Adjudication:

i) **Board** must make a determination of the merits of all proceedings/studies/investigations.

a. If grounds exist, can *order*:

1) Revocation

2) Suspension or restriction

3) Imposition of conditions or probation

4) Imposition of administrative fine (up to $10K for each count)

5) Assessment of costs and fees

b. If not grounds exist, *must order* stating as much and dismiss the proceedings and give the complainant/petitioner, if any, copies of the order.

(j) (10) Temporary suspension or restriction *pending final order*:

i) **Board** can temporarily suspend or restrict a license or temporarily place on probation *ex parte, without prior hearing*-- but *only if it finds on a responsible, verified showing or other reliable proof* that the physician is causing *great harm* to the public or any patient or is

imminently likely to cause such harm.

a. After that, the physician can request dissolution or amendment of the temporary order by petitioning the **board**. The **board** must have a prompt hearing on the petition, before the **board** or the committee or a hearing officer or a special committee-- the latter three reporting to the board with recommendations.

1) The **board** must rule on the petition *pursuant to APA and due process* with the least amount of delay reasonably possible.

2) The record of this proceeding and any orders here can't be used against the physician in any other legal proceeding except on judicial review.

(k) (11) Judicial review: all final decisions by the **board** are subject to judicial review *pursuant to APA.*

(l) (12) liability limitation: no liability for members of the **board**, cmte., their staff and officials for actions within the scope of the **board** or cmte. when acting without malice and in reasonable belief that such action is warranted. Or for anyone providing information or testimony without malice and with reasonable belief that the info is accurate.

g) 54-1807: registration with the **board**

h) 54-1808: **board** to issue licenses

(1) (1) license issuance

(2) (2) renewal on inactive basis

(3) (3) denial of license: board must notify applicant by certified mail and give reasons for denial.

i) 54-1809: state board of medicine fund

j) 54-1810: licensure by written examination

k) 54-1811: licensure by endorsement

l) 54-1812: graduates of medical schools outside of U.S. and Canada

m) 54-1813: temporary license and registration

n) 54-1814: grounds for medical discipline

o) 54-1815: violation of act

(1) Whenever anyone is found violating, the department or the **board** can maintain an action in the name of the state of Idaho to enjoin the person.

(a) Action to be brought in the county where the acts are/were done.

(b) Judge at chambers *must* issue a temporary injunction upon filing of a verified petition.

i) The injunction must be served on the defendant.

ii) After that, it's a regular civil case.

p) 54-1817: post mortem exams

q) 54-1818: reporting of violations by physicians: required for 1814 violations, subject to disciplinary action.

r) 54-1819: definition of death

s) 54-1820: **board** records shall be open to the public except as otherwise provided.

III. AGENCY ACTIONS

A. APA APPLICABILITY

1. The initial three-step analysis:

a) Is the agency in question an "agency" within the APA?

b) If so, is the agency's action in question subject to the APA?

c) How do the APA and other statutes (e.g., organic and crosscutting) and rules (e.g., the agency's own procedural rules) interact?

B. CHOICE OF ACTION

1. Differences between rulemaking and adjudication

a) Pre-participation notice: rulemaking notice is general, adjudication notice is just to parties.

b) Participation: rulemaking comment is open to all, adjudication participation is limited to parties and by evidentiary rules (relaxed) including witnesses.

c) Post-decision notice: rulemaking notice is general, adjudication notice is through decision indexing only.

d) Scope of review: A&C for rulemaking (unless formal), substantial evidence for adjudication (unless informal).

e) Binding effect: rules have the force of law, adjudications have the force of precedent.

f) Generally, choosing adjudication is good for fact-intensive and complex situations and/or where flexibility is needed.

2. The *Chenery* principle

a) *Chenery* (1947) (p125): "the choice between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the agency."

(1) Here, the SEC (under its authority to administer the Public Utility Holding Act of 1935), rejected a reorganization. The first time, it relied on caselaw, and the Court said it misread the caselaw. The second time, it relied on (pretty vague) statutes to craft a "rule" that it would announce in an order. The Court says this is okay.

(2) Note *Bell Aerospace* (1974) (n5p132): the Court extends the broad *Chenery* discretion to agencies that change longstanding policy set out in past orders.

b) Exceptions

(1) Abuse of discretion in making the choice (see 706(2)(A)).

(2) Contrary to law (e.g., a statutory mandate to address a topic by rulemaking only) (see 706(2)(C)).

3. Idaho

C. RULEMAKING

1. FAPA

a) Applicability

(1) "Rule"

(2) Exemptions

(a) Subject Matter Exemptions (553(a)): these exempt subject matter from

FAPA rulemaking procedures *altogether*.

i) Military and foreign affairs functions (553(a)(1))

ii) Agency management and personnel (553(a)(2))

iii) Public property, loans, grants, benefits, and contracts (553(a)(2))

a. However, many benefits agencies subject themselves to some form of APA rulemaking, because of trouble in the courts.

(b) General Exemptions (553(b)): these exemptions merely exempt certain rules from the notice (553(b)) and comment and explanation (553(c)) procedures.

i) Interpretative Rules (553(b)(A)): interpretative rules explain, clarify, and provide guidance, whereas substantive rules actually implement legislation.

a. N.b.: Substantial impact test: this rule is out of favor in the federal courts, and will not be covered in this course.

b. Legal effect test: this test has subapproaches-- formal and functional

1) Formal subapproach:

- Is there a grant of substantive rulemaking power?
- Did the agency follow the procedures for a substantive rule?
- Did the agency label the rule as substantive?

2) Functional subapproach: this approach, which is probably the majority approach, looks to agency intent, recognizing the possibility that rules labeled as interpretatie may actually be substantive.

3) *Alaska v. DOT* (D.C. Cir. 1989) (p198):

4) *Community Nutrition Institute* (D.C. Cir. 1987) (p200x): factors for determining whether you've got an interpretative or a substantive rule:

- Whether there are any exceptions granted (if so, more substantive)
- Whether the rule is published (if so, more substantive)
- Whether the rule is mandatory (if so, more substantive)
- The language of the rule
- Whether the rule is "classic"ly legislative (if so, more substantive)

ii) General Statements of Policy (553(b)(A)): statements of policy explain how an agency is going to go about it's enforcement duties (e.g., "we're going to be really strict this weekend"); the AGM says they are statements that "advise the public prospectively of the manner in which the agency proposed to exercise a discretionary power."

a. *Lincoln v. Vigil* (1993) (p203x): the discontinuance of a discretionary allocation was a "general statement of policy" within the exemption.

iii) Procedural Rules ("rules of agency organization, procedure, or

practice) (553(b)(A))

a. *ATAA* (D.C. Cir. 1990) (p204x)

iv) Good Cause Exemption (553(b)(B))

a. Courts tend not to defer to agencies' good cause justifications when they're challenged.

b) Procedures

(1) Procedural requirements for all (unexempted) rulemaking

Comment: See also 555, which sets out procedural requirements for all FAPA agencies (unless excepted within FAPA).

(a) Petition for rulemaking (553(e)): agencies must give "interested person [s]" the right to petition "for the issuance, amendment, or repeal of a rule." Note that this right can be buttressed by the am1 right to petition for redress of grievances.

i) Under 555(e), the agency must give a prompt notice of denial of petitions, generally with a "brief statement of the grounds."

(b) Notice of Proposed Rulemaking (NPRM (553(b)):

i) To whom: to the Federal register unless all the people who are subject to the rule are personally served or have actual notice.

ii) Content:

a. Statement of the time, place, and nature of public rulemaking proceedings (553(b)(1))

b. Reference to the legal authority for the proposed rule (553(b)(2))

c. Either (a) terms/substance of the proposed rule or (b) a description of the subjects and issues involved in it (553(b)(3))

d. Courts have required that agencies must publish any underlying data, reports, etc., that they are relying on for the proposed rule-- but this is not technically required by FAPA (and so see *Vermont Yankee*).

iii) Changes:

a. *Chocolate Manufacturers* (4th Cir. 1985) (p209x): the logical outgrowth test-- parties must have notice before an agency make a significant change to a proposed rule.

(c) Publication (552(a)(1)): generally, rules must be published in the Federal Register.

i) *Merrill* (1947) (p228x): even a farmer who was misled by a federal official was still held to (constructive) knowledge of a rule published in the Federal Register. This is dictated by the Federal Register Act (44 USC 1507).

(d) Effective date of substantive rules (553(d)): substantive rules must be published (or served) at least 30 days before they take effect.

i) Retroactivity

a. *Georgetown University Hospital* (1998) (p231x): establishing a presumption against agency authority to issue retroactive rules. Thus, an agency cannot promulgate retroactive rules unless

Congress has granted the agency retroactive rulemaking authority in express terms.

ii) Exceptions

a. Substantive rules granting exemptions or relieving restrictions (553(d)(1))

b. Interpretative rules and statements of policy (553(d)(2))

c. Good cause (553(d)(3))

(2) Specific procedural requirements for rulemaking

Comment: Note that agency organic (and other) statutory procedures trump. Also, keep in mind agency procedural rules, which trump if valid.

(a) Whether formal or informal: trigger language: trigger language is required due to 553(c): "sections 556 and 557 apply instead of this subsection" "when rules are required by statute to be made on the record after opportunity for an agency hearing."

i) *U.S. v. Florida East Coast Railway* (1973) (p221): the mere words "after hearing" in the Interstate Commerce Act don't trigger 556 and 557.

a. *Allegheny-Ludlum* (1972) (p223-24c): in *Florida East Coast*, the Court recognized that itc. held that "the actual words 'on the record' and 'after hearing' in 553(c) are not words of art and that other statutory language having the same meaning could trigger 556 and 557."

ii) Note that some courts have applied *Chevron* deference to an agency's interpretation of trigger language.

iii) Note the different analysis for when formal adjudication is triggered (see *Seacoast Anti-Pollution League*).

(b) Informal (notice and comment rulemaking) (553(c))

i) Step one: NPRM (553(b))

ii) Step two: "opportunity to participate" (553(c))-- "through the submission of written data, views, or arguments with or without opportunity for oral presentation."

iii) Step three: consideration (553(c))-- "of the relevant matter presented"

iv) Step four: publication (552, 553(c))-- with a "concise general statement of [the rules'] basis and purpose."

v) Step five: effectiveness (553(d))-- after (at least) 30 days unless an exception applies.

(c) Formal (556 and 557)

i) *Florida East Coast Railway* (1973) (p221): even where 556 is triggered, hearings may sometimes still be just paper hearings (unless otherwise required by other statute), because 556(d) allows paper submissions if a party will not be "prejudiced thereby (p225).

(d) Hybrid

(3) Non-FAPA procedural requirements for rulemaking (crosscutting statutes) (p234-36):

(a) NEPA: required preparation of Environmental Impact Statements where actions will significantly affect the environment.

(b) Congressional Review Act: agencies must present "major" rules to Congress 60 days before effect.

i) See also EO 12866, requiring agencies send significant regulatory actions to OIRA for review.

(c) RegFlex: requires agencies to prepare regulatory agenda semiannually.

(d) Paperwork Reduction Act

2. IAPA

a) Applicability: IAPA rulemaking procedures only apply to "rules" (and "proposed rules" and "pending rules").

(1) "Rule"

(a) "Rules" are agency statements of general applicability that implement, interpret, or prescribe either (1) law or policy or (2) procedure and practice requirements of an agency and *have been promulgated in compliance with IAPA.*

(b) "Proposed rules" are rules published in the Administrative Bulletin under 5221.

(c) "Pending rules" are rule adopted by the agency but still subject to legislative review.

(d) "Final rules" are rules in effect.

(e) "Temporary rules" are rules under 5226.

(2) Exemptions:

(a) Agency management and personnel (5201(19)(b)(i))-- if they don't affect private rights of the public or procedures available to the public.

(b) Agency declaratory rulings (5201(19)(b)(ii))-- under 5232.

(c) Intra-agency memoranda (5201(19)(b)(iii))

(d) Interpretative rules (5201(19)(b)(iv))

(e) Documentation of compliance with a rule (5201(19)(b)(iv))

(f) Temporary (emergency) rules (5226): these require specific findings by the governor.

b) Procedures

(1) Petition for rulemaking (5230): any person can petition an agency to adopt, amend, or repeal a rule. The agency must either initiate rulemaking proceedings (5230(1)(b)) or deny the petition in writing with reasons (5230(1)(a)), generally within 28 days of receiving the petition (5230(1)).

(a) Denial of a petition is a final agency action (5230(2)).

(2) Agency rulemaking process

(a) Optional step zero: Notice of Intent to Promulgate a Rule (5220): this is intended to facilitate negotiated rulemaking, but it doesn't have to be for that.

(b) Step one: NPRM (5221):

i) To whom:

a. To the Administrative Bulletin (5221(1))

b. To the newspapers of each county (5221(2))

c. To the director of legislative services (5223(1)) (who must refer it to the germane joint subcmte.)

1) If requested, the agency must also prepare and submit an economic impact statement (5223(2))

ii) Content (5221(1)):

a. Specific statutory authority (5221(1)(a))

b. Nontechnical statement of the substance of the proposed rule (5221(1)(b))

c. Text of the proposed rule (5221(1)(c))

d. Location, date, and time of any public hearings (5221(1)(d))

e. How people can make written comments (5221(1)(e))

f. How people can request oral participation (5221(1)(f))

g. Deadline for public comments (5221(1)(g))

iii) Changes (5227): the "logical outgrowth" test is statutory in IAPA-- an agency can adopt a changed rule if:

a. The subject matter is the same

b. The rule is a logical outgrowth of the proposed rule

c. The NPRM gave the public reasonable notice from which people could determine whether their interests could be affected

(c) Step two: public participation (5222): this is by written comment only (5222(1) (the "shall . . . orally" isn't true), for at least 21 days (5222(1), unless 25 people, a local government, or an agency requests an oral hearing within 14 days after the NPRM or within 14 days before the comment deadline (5222(2)).

i) Exceptions to oral hearing by petition (5222(2)): oral hearings aren't required "when the agency has no discretion over the substantive content of the rule because of certain reasons:

a. The rule is just to comply with a court decision or order (5222(2)(a))

b. The rule is just to comply with a statute or federal rule that has been amended (5222(2)(b))

(d) Step three: consideration (5224(1)): agencies must consider "fully all written and oral submissions."

(e) Step four: publication of pending rule (5224(2)):

i) To whom:

a. To the Administrative bulletin.

b. If a rule imposing or increasing a fee, also to the administrative rules coordinator, who must pass this on to the legislature (5224(6)).

ii) Contents: a "concise explanatory statement," whose contents are specified (unlike in FAPA):

a. Reasons for adopting the rule (5224(2)(a))

b. Statement of any changes with an explanation of why (5224(2)(b))

c. Effective date (5224(2)(c))

d. Statement that the pending rule could be rejected (5224(2)(c))

e. Identification of any parts of the pending rule that impose or increase a fee (5224(2)(d))

1) If so, also a statement that the pending rule must be affirmatively approved by the legislature (5224(2)(d)).

iii) Exception: agencies don't have to publish a pending rule if there haven't been any significant changes from the proposed rule (but still must publish (1) a citation to the volume where the proposed rule is and (2) a list of all changes made).

(f) Step five: fix typos (5228): agencies can fix typos in pending rules with the approval of the administrative coordinator.

i) Note that there is no analogous provision in FAPA.

(g) Step six: legislative review (5291): the legislature can approve, reject, amend, or modify pending rules by concurrent resolution if it determines that the rule violates the legislative intent of the statute under which the rule was made.

(h) Step seven: effectiveness (5224(5)(a)):

i) Pending rules not proposing fees:

a. If the legislature doesn't do anything, these become final at the end of the legislative session when they were submitted for review, or later if the rule says so (5224(5)(a)).

b. If the legislature does approve, amend, or modify a pending rule, the rule becomes final upon adoption of the concurrent resolution, or later if the resolution says so (5224(5)(b)).

ii) Pending rules proposing fees: these become final when the legislature approves, amends, or modifies them by concurrent resolution-- upon adoption of the resolution or later if the resolution says so (5224(5)(c), (b)).

iii) Retroactivity: rules may be retroactive if the rule says so (5224(5)(a)). Seamon expects, however, that Idaho caselaw probably requires express statutory authority for retroactivity, just as federal caselaw does.

(i) Step eight: notice of effectiveness (5224(7)): at the end of the legislative session, the administrative coordinator must publish a list of rules and their effective dates.

(j) Step nine: legislative oversight of final rules:

i) The legislature can review final rules and approve, reject, amend, or modify them by concurrent resolution if it determines that the rule violates the legislative intent of the statute under which the rule was made; if it does this, the rule must be republished (5291).

a. This (5291) has been challenged on separation of powers grounds

and has survived.

ii) All rules expire on July 1 of each year unless extended by statute (5292(2)).

(3) Procedural challenges to rules (5231)

(4) Agency declaratory rulings (5232): any person can petition an agency for a declaratory ruling on any statute or rule that the agency administers (5232(1)).

(a) Agency declaratory rulings are final agency actions (5232(3)).

3. Preemption of State Law by Federal Regulations

a) Express preemption

(1) *Norfolk Southern Railway v. Shanklin* (2000) (p48p): FRSA contains an express preemption provision-- states may adopt rules "until the Secretary of Transportation prescribes a regulation covering the subject matter of the State requirement" (p48p).

(a) Note that the Court rejects the agency's interpretation of its own regulations-- this is rare. but here the agency changed its position *after* an earlier Court decision accepting its earlier interpretation. See p50p.

b) Implied preemption: an agency can promulgate rules with preemptive effect *even if* it does not have express authority to do so.

(1) Field preemption

(a) "Absent explicit preemptive language, Congress' intent to supersede state law altogether may be inferred because the scheme of federal regulation may be *so pervasive* as to make reasonable the inference that Congress left room for the States to supplement it." *Fidelity Federal S&L v. Cuesta* (1982) (p39p at p42p).

(2) Conflict preemption

(a) "Physical impossibility" conflicts: where it would be physically impossible to comply with both federal and state law.

(b) "Obstacle" conflicts: state law is an obstacle to fulfillment of Congress's purposes and objectives.

i) *Fidelity Federal S&L v. Cuesta* (1982) (p39p): here, the S&L raises the admin law (preemption) issue as a defense, saying that a federal regulation allows their acceleration clauses (even though a state court decision limited the enforceability of such clauses). The Court determines that this is obstacle preemption (it is not impossibility preemption because the federal regulation merely *permits* acceleration clauses-- it does not require them).

c) Preemptive effect: for substantive federal regulations, "federal regulations have no less preemptive effect than federal statutes" (*Fidelity Federal* (1982) (p39p at p42p)). For interpretative rules, it is an open question what preemptive effect they may have (because they do not have the force of law as substantive rules do).

d) Application of federal procedural requirements to state agencies:

(1) FAPA doesn't apply to state agencies (unless they are subjected to it by state law for some reason).

(2) Provisions in the U.S. Constitution (e.g., DPC, am4) do apply to state

agencies.

(3) Some federal statutes (if valid) apply to state agencies (e.g. Medicaid, OSHA, SSD).

D. ADJUDICATION

1. Enforcement

a) Nonenforcement: this is where there is absolute failure to enforce.

(1) *Heckler v. Chaney* (1985) (p242): because the FDCA puts no limits of the FDA's discretion in regulating branding of drugs, and therefore no judicial review can be had of the agency's failure to act due to 701(a)(2), which exempts agency action from FAPA judicial review provisions if the agency action is "committed to agency discretion by law."

Comment: Note that the Heckler principle does not apply to failure to do rulemaking-- but the agency has plenty of discretion there, anyway.

(a) The Court distinguishes *Dunlop* (1975) (p247c) because there, statute limited the agency's discretion (plus, Seamon notes, in *Dunlop* the avenue for relief was to petition the secretary to act).

(2) IAPA: agencies can decline to initiate a contested case under IAPA (5241(1)(a)), but must provide a brief statement of the reasons to everyone involved (5241(3)). Also, agencies can request additional information when deciding whether to initiate a contested case (5241(2)).

b) Selective Enforcement: this is the "why me" (i.e., why are you singling out me for enforcement) situation.

(1) *FTC v. Universal-Rundle Corp.* (1967) (p249): agencies have broad discretion in determining enforcement policies-- the bottom line, Seamon says, is that selective enforcement claims will not succeed without a showing of invidiousness.

c) Private Enforcement

(1) Express provisions: e.g., in the Clean Air Act (see p253).

(a) Even with an express right of action, you still need constitutional standing (see *Lujan*).

(2) Implied private rights of action

(a) *Alexander v. Sandoval* (2001) (h/o): a regulation cannot create a cause of action-- if Congress doesn't do it, the agency can't do it on its own. "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."

i) Seamon asks, though, how creating a cause of action really differs all that much from the ordinary substantive interpretation that agencies do.

ii) Note also that the plaintiff itc. can't really do anything-- he can't get the agency to enforce (*Heckler*) and can't do it on his own (itc.).

(3) General civil rights actions: e.g., 42 USC 1983.

2. FAPA

a) Whether informal or formal

(1) Trigger language: trigger language is required due to 554(a): "This section

applies in every case of adjudication *required by statute to be determined on the record after opportunity for an agency hearing*."

(a) *Seacoast Anti-Pollution League* (1st Cir. 1978) (p266x): a statute that merely provided for decision "after opportunity for a public hearing" triggered formal adjudication, *given evidence in the legislative history* that Congress intended a formal hearing.

i) The AGM reaches the same conclusion-- that "on the record" isn't necessary.

ii) Legislative history may, however, contradict the presumption suggested in *Seacoast* (see *St. Louis Fuel and Supply* (D.C. Cir. 1989) (p266x)).

(b) *Wong Yang Sung* (1950) (p267x): DPC, not trigger language, effectively "triggers" formal adjudication where earlier cases had imposed a fair hearing requirement in deportation proceedings.

(2) Waiver: even if formal adjudication is triggered, it may be waived.

(a) Failure to comply with agency time limits may constitute waiver.

(b) If there are no disputed fact issues, formal adjudication is not required (*ALPA v. CAB* (D.C. Cir. 1974) (p268x)).

(3) Exemptions (554(a))

(a) Matters subject to subsequent de novo trial (554(a)(1))

(b) Selection and tenure of employees (554(a)(2))

(c) Decisions that rest solely on inspections, tests, or elections (554(a)(3))

(d) Military or foreign affairs functions (554(a)(4))

(e) Agency acting as agent for a court (554(a)(5))

(f) Certification of worker representatives (554(a)(6))

(4) About 90% (!!) of federal adjudications are informal. Even though *Seacoast* sets the threshold low for triggering formal adjudication, not many statutes have this language. It is likely to be more common in licensing provisions and *not* likely to be in granting of individual benefits provisions (because these folks weren't at the table (like industry was) when FAPA was being formulated).

b) Informal: here, look to (1) agency legislation, (2) agency procedural rules, (3) 555, and (4) due process requirements.

(1) Examples

(a) *Overton Park* (1971) (p266x)

(b) *Sierra Club v. Peterson* (5th Cir. 1999) (p266x)

c) Formal (554, 556, 557, 558)

(1) Notice (554(b))

(a) To whom: to "persons entitled to notice of an agency hearing" (554(b))-- FAPA doesn't say who this is, so you have to look at other statutes, agency procedural rules, and procedural due process (p273x).

(b) Content (554(b)):

i) Time, place, and nature of the hearing (554(b)(1))

a. Due regard for convenience and necessity of the parties must be given when setting the time and place (554(b))

ii) Legal authority and jurisdiction (554(b)(2))

iii) Matters of fact and law asserted (554(b)(3))

a. And, when private parties are the moving parties, the other parties have to give notice of fact and law issues controverted (554(b)). And the agency can require responsive pleading otherwise, by rule (554(b)).

(2) Prehearing (554(c)): when time, public interest, and the nature of the hearing permit it, the agency has to allow for a prehearing exchange for the exploration of settlement and similar things (554(c)(1))-- and if that doesn't work, you move on to 556 and 557 (554(c)(2)).

(3) Hearing (556, 557): see FAPA formal hearings section.

(4) Decision

(a) By whom: the initial or recommended decision (see 557) must be made by the agency employee (usually an ALJ) who presided over the 556 reception of evidence (unless that employee becomes unavailable) (554 (d)).

(b) Ex parte communications and separation of functions (554(d))

i) Exceptions (554(d))

a. The "agency" (554(d)(C)): either the agency head or the multimember commission that heads the agency; this means that agency heads can get involved in all aspects of a proceeding.

1) *Withrow v. Larkin* (1975) (p287): the Court recognizes a presumption of honest decisionmakers, and so a state commission that both investigated and decided a case did not violate due process. Thus, itc. suggests that the FAPA agency head exemption is constitutional.

Showing bias: the Court suggests that bias may arise when the decisionmaker has a pecuniary interest in the outcome or when the decisionmaker has been the target of personal abuse or criticism for a party before him (p289).

b. Initial license applications (554(d)(A))

c. Public utilities and carriers (in certain situations) (554(d)(B))

ii) Ex parte communications (554(d)(1)): the employee (usually an ALJ) who makes the initial or recommended decision (see 554(d)), can't consult anyone (person or party) on a fact in issue unless he gives notice and participation to all parties.

Comment: See also 557(d)(1) (in Formal Hearings section).

iii) Separation of functions (554(d)(2), (d)): the employee (usually an ALJ) who makes the initial or recommended decision (see 554(d)), can't be supervised or directed by anybody in the agency who's investigating or prosecuting the case (554(d)(2)); and anybody in the agency who's investigating or prosecuting the case (or even a factually

related case) can't participate in the decisionmaking except as a witness or proceedings counsel (554(d)).

a. *Grolier* (9th Cir. 1980) (p280): the Court remands for a determination of just how involved an ALJ was when formerly serving as an attorney-advisor to an FTC Commissioner. Thus, simply serving as an attorney-advisor was not per se a violation of 554(d)-- rather, it prevents participation only when the ALJ *actually* performed investigative an prosecuting functions (p284).

1) The concerns itc. are with the ALJ's exposure to ex parte information and with the possibility that the ALJ developed a "will to win."

d) License removal (558(c)): all license withdrawals, suspensions, revocations, and annulments have to be noticed in writing with the facts that warrant removal (558 (c)(1)) and the licensee has to have an opportunity to show or achieve compliance with the requirements (558(c)(2))-- *unless* there's wilfulness or public interest concerns.

e) Hybrid

3. IAPA ("contested cases")

a) Applicability (5240): IAPA contested case procedures apply only to proceedings that may result in issuance of an "order."

(1) "Order" (5201(12)): agency actions of particular applicability that determine the legal rights, duties, privileges, immunities, or other legal interests of at least one specific person.

(2) Exceptions: the PUC and the industrial commission aren't subject to IAPA contested case procedures

b) Procedures

(1) Notice (5242(1))

(a) To whom: all parties.

(b) Contents:

i) Time, place, and nature of the hearing

ii) Legal authority

iii) "Short and plain statement" of the matters asserted or issues involved

(2) Prehearing (5241)

(a) Informal settlement (5241, (c)): informal settlement is allowed and encouraged.

(b) Fact stipulation (5241(d)): the parties can stipulate to facts.

(c) According to the AG's rules (but not clear in IAPA), the agency head supervises and oversees prehearing procedures.

(3) Hearing

(a) Who presides (5241(2)): either the agency, a member of the agency, or a hearing officer. The agency head gets to pick.

i) Disqualification (5252):

a. One free no-cause disqualification (5252(1))

b. For-cause disqualification (5252(1), (2))

1) Cause includes that the presiding officer is an employee of the agency (5252(1))

(b) Electronic hearings (5242(3)(e))

(c) Evidence (5242(3))

i) Admissibility:

a. All evidence that is "of a type commonly relied upon by prudent persons in the conduct of their affairs" can be admitted (5251(1)).

b. The presiding officer *may* exclude irrelevant, unduly repetitious, constitutionally/statutorily excludable, or privileged evidence (5251(1)).

c. Originals: copies are admissible if the original is not readily available (5251(3)).

ii) Right to present and rebut (5242(3)(b))

iii) Right to cross-examine (5242(3)(a))

iv) Official notice (5251(4)):

a. Agencies can take official notice of facts judicially noticable (5251(4)(a)) and generally recognized technical or scientific facts within the agency's specialized knowledge (5251(4)(b)).

b. The parties must be notified of the facts noticed and their source, and have to have a meaningful opportunity to contest them.

c. If official notice is proposed of staff memoranda or reports, the parties can request (and must get) a responsible staff member to cross-examine.

v) Paper hearing only (5241(1)(b), 5251(2)): if it will expedite the case and won't prejudice the parties, contested cases can be done by paper only.

vi) Nonparty participation (5242(3)(c))

(d) Record (5242(3)(d))

(4) Decision

(a) Types of orders

i) Recommended order (5243(1)(a)): not issued by agency head, become final only after review by the agency head under 5244.

a. Contents:

1) Must specify that it's a recommended order (5243(2))

2) Must include a schedule for review (5244(1))

b. Review: the agency head must review (with all the power he'd have had if he'd been the initial presiding officer (5244(3)) and either:

1) Issue a final order within 56 days (5244(2)(a))

2) Remand for more hearings (5244(2)(b))

3) Hold additional hearings (5244(2)(c))

ii) Preliminary order (5243(1)(b)): not issued by agency head, become final unless reviewed by agency head under 5245.

a. Contents:

1) Must specify that it's a recommended order (5243(2))

2) Statement that it will be final without further notice (5245(1)(a))

3) Actions necessary to get agency review (5245(1)(b))

b. Review:

1) By agency or party motion (5245(2)

2) Must be filed within 14 days (5245(3))

3) Basis for review must be stated (5245(4))

4) If reviewed, the agency head has all the power he'd hae if he'd een the initial presiding officer (5245(7)) and must either:

- Issue a final order within 56 days (5245(6)(a))
- Remand for more hearings ((6)(b))
- Hold more hearings ((6)(c))

iii) Final orders (5246): if the agency head is the presiding officer, the order is a final order (5246(1)).

(b) Ex parte communications (5253): no direct or indirect communication between presiding officer and any party, except on notice and opportunity for participation.

i) There's an exception for commissions authorized by statute.

(c) Default (5242(4))

(d) Effective date (5246(5))

(e) Final agency action (5241(4)): disposition of a contested case is a final agency action, even if done informally.

(5) Agency appeals

(a) Motion for reconsideration (5243(3), 5246(4))

(6) License removal (5254)

E. FAPA FORMAL HEARINGS (556 and 557)

1. Who presides (556(b)): either the agency, one of its members, or ALJ(s).

a) Disqualifiation (556(b)):

(1) Presiding employees must be conduct their functions impartially.

(2) Presiding employees can disqualify themselves, or

(3) People (everyone?) can file a good faith and timely affidavit of personal bias or other disqualification reason-- and the agency must determine whether to disqualify as part of the case.

b) Powers (556(c)):

(1) Oaths

(2) Subpoenas

(3) Evidence rulings

(4) Depositions

(5) Regulate the course of the proceeding

(6) Settlement conferences

(7) Suggest ADR

(8) Require attendance of parties

(9) Handle procedural requests

(10) Make or recommend decisions

2. **Evidence**

a) Burden of proof (556(d)): the proponent of the rule or order shoulders it.

b) Admissibility (556(d)): anything oral or documentary, but agencies must provide for exclusion of "irreleant, imaterial, or unduly repetitious evidence."

c) Right to present and rebut (556(d)): parties have a right to present their case through oral and documentary evidence, including rebuttal evidence.

d) Right to cross-examine (556(d)): parties have a right to cross-examine "as may be required for a full and true disclosure of the facts."

e) Paper hearing only (556(d)): in rulemaking and in adjudications about money, benefits, or initial license applications, agencies can by rule provide for paper hearings only when the parties won't be prejudiced.

f) Official notice (556(e)): when agencies take official notice of a material fact not in evidence, the parties must be given a opportunity to show the contrary (if they make a request).

3. **Ex parte communications** (557(d))

Comment: For formal adjudications, see also 556(d) (in Adjudications section).

a) Timeframe of application (557(d)(1)(E)): the 557(d) prohibitions begin whenever the agency designates, but at least by the time the proceeding is noticed or the person involved knows that it will be noticed.

b) Prohibitions (557(d))

(1) Inward ex parte communications (557(d)(1)(A)): interested persons outside the agency can't communicate ex parte with the agency, the ALJ, or anybody in the agency expected to be involved in decisionmaking.

(2) Outward ex parte communications (557(d)(1)(B)): the agency, ALJ, and anybody in the agency expected to be involved in decisionmaking can't communicate ex parte with any interested person outside the agency.

c) Disclosure (557(d)): any agency, ALJ, or person in the agency expected to be involved in decisionmaking who receives or makes a 557(d) ex parte communication must disclose on the record:

(1) All written communications

(2) A memo on the substance of all oral communications

(3) Responses to the communications

d) Exception (557(d)): 557(d) doesn't apply "to the extent required for the disposition of ex parte matters *authorized by law*.

e) Sanctions:

(1) Agencies can punish knowing 557(d) violations by deciding against the violating party (556(d)), and once the agency, ALJ, or decisionmaking employee receives a 557(d) ex parte communication from a party, they can require the party to show cause why the party shouldn't be sanctioned (557(d)(1)(D)).

4. **Decision**
   - **a)** Who first decides (557(b)):
     - **(1)** Formal adjudications: the decisionmaker must be the same employee (usually an ALJ) who presided over the hearing (554(d)).
     - **(2)** Formal rulemaking: the decisionmaker can be any employee qualified to preside over formal hearings (i.e., the agency, a member of the agency, or an ALJ (556(b))).
   - **b)** Basis of decision (556(d)): agencies can't do a rule, order, or sanction without considering the whole record or at least the parts cited by the parties and supported by reliable, probative, and substantial evidence.
   - **c)** Types of decisions
     - **(1)** Whether initial, recommended, or tentative (557(b))
       - **(a)** Formal adjudications: if the presiding employee makes the decision, without an agency review requirement, it's an initial decision which becomes the final decisions unless there's further review. Otherwise, it's a recommended decision (and must be made by the presiding employee (554 (d))).
       - **(b)** Formal rulemaking (and initial license applications): same as for formal adjudications, except that:
       - **(c)** Any qualified employee (see 556(b)) can make a recommended decision
       - **(d)** The agency can issue a tentative decision (556(b)(1))
       - **(e)** The agency can skip 557(b) for good cause recorded as specified in 557(b) (2)
     - **(2)** Party participation (557(c)): before an initial, recommended, tentative, or agency review decision, that parties can submit (and the agency must show in the record its finding for each):
       - **(a)** Proposed findings and conclusions (557(c)(1)) with supporting reasons (557(c)(3))
       - **(b)** Or exceptions to initial, recommended, or tentative decisions (557(c)(2)) with supporting reasons (557(c)(3))
   - **d)** Contents of decisions (557(c)): all decisions (final, initial, recommended, and tentative) are part of the record and must include statements of:
     - **(1)** The findings and conclusions, and the reasons for them, for all material issues presented
     - **(2)** The actual rule, order, sanction, relief, or denial
   - **e)** Agency appeals (557(b))
5. **Record**
   - **a)** Contents (556(e)):
     - **(1)** Transcript of testimony
     - **(2)** Exhibits
     - **(3)** All papers and requests filed
   - **b)** Availability: the parties must be able to get the record (but may be required to pay for it).

F. FAPA PROCEDURAL RULES ALWAYS APPLICABLE (555)

1. Agencies must act within a reasonable time (555(b)): "with due regard for the convenience and necessity of the parties," agencies must "proceed to conclude a matter presented to it" "within a reasonable time."

2. Prompt notice of denials (555(e)): agencies must give "prompt notice" of denials of written applications, petitions, and other requests and generally must be accompanied with a "brief statement of the grounds."

3. Right to bring counsel (555(b)):

a) Any *party* can bring counsel or a non-lawyer representative to any agency proceeding

b) Any *person compelled* to appear in person before an agency can bring counsel (or a non-lawyer if the agency gives permission

4. Right of interested persons to appear (555(b)): interested persons can appear before an agency in a proceeding "so far as the orderly conduct of public business permits."

5. Agencies can require anything except as authorized by law (555(c))

6. Persons compelled to submit stuff to an agency can keep or get a copy or transcript of it (555(c))

7. Agency subpoenas must be issued on request when required (555(d))

IV. DUE PROCESS

A. APPLICABILITY

1. Prerequisites

a) State action

b) Adjudication (mostly)

(1) *Londoner* : [adjudicative]

(2) *Bi-Metallic* : [legislative]

(a) [legislative generally only requires notice and (usually) no retroactivity

(3) *Wong Yang Sung* (1950) (p267x): DPC effectively "triggers" APA formal adjudication.

c) Deprivation

(1) Intentional: negligence isn't enough

(2) Direct: e.g., a suit by residents of a nursing home put out of business as a result of Medicare denial was not direct enough for them to invoke DPC.

d) Protected interest

(1) Property: these interests generally come from outside the Constitution.

(a) Employment

i) *Roth* : if the contract had said that renewal was expected, then there would be a property interest.

a. *Perry* : the property interest could be found outside a contract's four corners.

ii) *Goss* (1975) (p383): the right to go to school is a property interest because of an Ohio statute that creates it.

(b) Granted benefits

(c) Licenses

(2) Liberty: these interests generally come from within the Constitution.

(a) Bill of Rights interests: e.g., speech, cruel and unusual punishment

(b) Unenumerated personal-autonomy rights: e.g.s, freedom from corporal punishment

(c) Reputational interests

i) *Roth* (at p353): liberty interest in reputation with refusal to rehire.

ii) *Goss* (1975) (p383): liberty interest in reputation with school suspension.

iii) *Paul* (n4p365): reputational injury alone is not enough.

(3) Life

B. PROCESS DUE

1. *Mathews v. Eldridge* (1976) (p391): the Court establishes a three-scale balance for determining what process is due.

a) *Mathews* balancing test:

(1) Private interest affected

(2) Risk of erroneous deprivation and probable value of more or different procedural safeguards

(3) Government's interest

b) The Court's attitudinal change itc.:

(1) It begins to consider procedural costs.

(2) It recognizes that judicial procedures aren't always appropriate.

(3) It defers to agencies on what process is due (i.e., on Constitutional law!!).

2. *North American Cold Storage* (1908) (p372): no predeprivation process due in emergency where the government's interest is strong (here, possibly contaminated chicken).

3. *Goldberg v. Kelley* (1970) (p377): elaborate, nearly judicial, predeprivation process due in loss of welfare payments.

a) Later Courts have cut back on itc.

4. *Goss v. Lopez* (1975) (p383): at least an "informal give and take" required in school suspension.

a) *Ingraham v. Wright* (1977) (p400): no predeprivation process due in corporal punishment, distinguishable from *Goss* mainly (if not only) on tradition and history (of corporal punishment).

5. *Cleveland Board of Education v. Loudermill* (1985) (p409): predeprivation process due before termination of government employment.

6. leftover

a) hearing timing; hrg type; hrg substitute; bifurcated procs

V. JUDICIAL REVIEW

A. CHALLENGES TO AGENCY ACTION TAXONOMY

1. Procedural challenges

a) Constitutional

(1) Mainly DPC

(a) See *Perry* (p358): procedural due process.

b) Statutory

(1) Mainly APA

(a) See *Alaska* (p198): substantive vs. interpretative rules.

c) Idaho procedural challenges to rules (5231)

d) Regulatory

(1) See *Nixon v. U.S.* (p833x): the executive was bound by a regulation promulgated by the AG.

2. Substantive challenges

a) Constitutional

(1) See *Perry* Part I (p358): am1 challenge.

(2) Delegation challenges.

b) Statutory

(1) Has the agency acted within its scope of authority?

(2) See *Chenery* (p125) and *Chevron* (p796).

c) Regulatory

d) Evidential

(1) Is the agency's action not supported by the evidence that was before it? (And this applies to both adjudication and rulemaking.)

(2) See *State Farm* (p861).

e) Logical

(1) See *State Farm* (p861): the Court finds fault with the agency's *reasoning*.

B. AVAILABILITY

1. Checklist: to get into court, you'll need:

a) Personal jurisdiction over the agency

b) Venue: see 28 USC 1391(e)

c) Process: FRCP 4(i) (service on the U.S.)

d) ***Subject matter jurisdiction

e) ***Standing

f) ***Cause of Action

g) Ability to meet timing defenses:

(1) Finality

(2) Ripeness

(3) Exhaustion

2. Presumption

a) Pre-APA (and non-APA, possibly)

(1) *Stark v. Wickard* (1944) (p537x): 28 USC 1337 provides SMJ to challenge administrative actions where Congress hasn't provided specifically for judicial review of that agency's actions.

(2) Causes of action

(a) Mandamus

(b) Tort

(c) Some "specialized" statutes

b) APA

(1) 701(a) + 702 + 704 = a presumption of judicial review of agencies.

(2) *Michigan Academy of Family Physicians* (1986) (p544): the Court notes a "strong presumption" that Congress intends judicial review of agency action, and that "only upon a showing of 'clear and convincing evidence' of contrary legislative intent should the courts restrict access to judicial review."

(3) Preclusion

(a) Statutory Preclusion (701(a)(1))

i) Express

a. *Shalala* (2000) (p552x)

b. *Johnson v. Robison* (1974) (p553x):

c. Preclusion of review of constitutional claims requires a "heightened showing" and a "clear expression of intent" to preclude.

ii) Implied

a. *Michigan Academy of Family Physicians* (1986) (p544): the Court narrowly reads provisions of the Medicare statutes to not preclude judicial review, noting the strong presumption of judicial review.

1) "The mere fact that some acts are made reviewable" doesn't "suffice to support an implication of exclusion as to others."

(b) Committed to Agency Discretion (701(a)(2))

i) No law to apply

a. *Overton Park* (1971) (p554x): the Court says that 701(a)(2) is "a very narrow exception," and finds that there was "law to apply" here because the agency had a federal statute that provided standards.

b. *Webster v. Doe* (1988) (p560x): where the director of the CIA "may, in his discretion, terminate employment whenever he shall deem it necessary," gave "no law to apply."

1) Scalia, dissenting, argued against the "no law to apply" standard in favor of the more plain-language faithful "committed to agency discretion," and said the Court shouldn't have even considered the constitutional claims in the case.

c. Agency rules can apparently provide "law to apply" (*Yueh-Shaoi Yang* (1996) (p555x).

d. *Heckler v. Chaney* (1985) (p242): an agency's decision to refuse enforcement is an action "commited to agency discretion by law" under 701(a)(2).

1) "Review is not to be had where the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."

ii) Decisions traditionally committed to agency discretion: i.e., some agency actions are not appropriate for judicial review.

a. *Lincoln v. Vigil* (1993) (p555): where two federal acts clearly

provided "law to apply," the Court nevertheless said 701(a)(2) precluded review because an agency's allocation of lump-sum appropriations was traditionally within agency discretion.

1) The agency still must allocate the funds "to meet permissible statutory objectives," though. *See Dunlop v. Bachowski* (1975) (p561x, p241) (Court found statutory language limiting the agency's enforcement discretion).

3. Jurisdiction

a) Sources

(1) 28 USC 1331 (federal question jurisdiction): but this may be precluded by more specific statutes.

(2) Special review statutes: these may give jurisdiction (and often a cause of action, too), but may designate review in a federal Court of Appeals or District Court or otherwise.

(3) *Not* the APA (*Califano v. Sanders* (1977) (p541x)).

4. Cause of Action

a) Sources

(1) Specialized statutes: these may create a cause of action, and if so, trump the APA fallback COA (see 704: "final agency action for which there is no other adequate remedy").

(2) APA: the APA creates a "fallback" cause of action for review of most final agency actions that aren't made reviewable by some other special statutory review provision. *See* 704.

(a) For whom (702):

i) Persons suffering a “legal wrong”because of agency action”: i.e., where the agency has violated individual rights recognized by the Constitution, common law, or statute (other than the APA); e.g., racial discrimination, ADA.

ii) Persons “adversely affected or aggrieved”: i.e., where someone suffers an injury that a statute was arguably enacted to prevent, even if that statute doesn’t expressly recognize rights.

a. *Overton Park* (1971) (p266x): citizen users of a park suffered no “legal wrong” when an agency proposed to build a highway through a park despite a statute that instructed the agency not to build highways through public parks if there’s a reasonable alternative, but were “adversely affected” because the statute must have been intended to protect them.

(b) For what agency actions (704):

i) Actions made reviewable by statute

ii) Final agency actions for which there is no other adequate remedy in a court

5. Form of Action (703)

a) Look first to any specialized statute.

b) If the specialized statute(s) don't provide the form or provide an inadequate form,

then 703 says the action can take "any applicable form of legal action" including declaratory judgment, writ of prohibition, injunction, habeas. Venue is then in any court with jurisdiction, and the action is to be brought against either the U.S., the agency, or an officer.

c) Enforcement proceedings (704 last sent.): you can get judicial review of agency action if the agency brings an enforcement action against you, *unless* there's "prior, adequate, and exclusive opportunity opportunity for judicial review provided by law."

(1) *Adamo Wrecking* (1978) (p564): even though Congress said no review could be had in later criminal and civil proceedings of CAA "emissions standards," the Court said a df. could get review at least to the extent of whether the regulation in question was actually an "emissions standard."

6. Justiciability

a) Standing

(1) Prudential component

(a) *Bennett v. Spear* (1997) (p667): the Court says that Congress can dispense with prudential standing requirements-- namely the zone-of-interests requirement (which is preserved in the APA at 702 ("within the meaning of a relevant statute"))-- here, through the ESA citizen suit provision that lets "*any person*" commence a civil suit. As the pfs. here on the ESA citizen suit-supported claim also met the A3 standing requirements, they had standing.

i) On another of the pfs. claims, however, the Court held that the ESA citizen suit provision could not be used, and so the pfs. had to fall back on the APA COA. Here, then, because of the 702 language, the zone-of-interests requirement had to be satisfied. Looking to the "particular provision" that the pfs. relied on, the Court said pfs. satisfied the ZOI test.

a. ZOI test (p675c): "whether the interest sought to be protected by the pf. is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." The Court says it won't look to the statute's overall purpose but rather to the "particular provision upon which the pf. relies."

(2) Constitutional component

(a) *Lujan* (1992) (p642): the Court recites the three constitutional standing components and then finds no injury in fact (and a plurality further finds no redressability).

i) Constitutional standing requirements (arising from A3s2: "the judicial power shall extend to "Cases" and "Controversies" only):

a. Injury in fact: "an invasion of a legally protected interest which is both:

1) Concrete and 'particularized' (affects the pf. in a personal and individual way)

2) And actual or imminent, not conjectural or hypothetical.

b. Traceability: a causal connection between the injury and the

conduct complained of, such that it's "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."

c. Redressability: "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

ii) Here, the Court said there was no "injury in fact" because the the organization's individual members had no concrete plan to visit the areas that would be effected by the new ESA regulation-- specifically, they had no plane ticket.

a. The Court rejected the pfs. various "nexus" arguments-- these fail because they don't relate to a *perceptible* harm.

iii) A plurality further said that there was the redressability requirement wasn't satisfied, because the agencies that were involved in construction overseas weren't DOI agencies (which were the only ones subject to the new rule), so there would be no guarantee that the projects would not proceed anyway even with a favorable decision.

iv) The Court rejected the pfs.' "procedural injury" argument-- that the ESA citizen suit provision gave pfs. standing to insist on ESA consultation, because no consultation is thus an injury. Although the citizen suit provision provides a COA, the Court said the procedural injury didn't satisfy the A3 injury in fact requirement, because pfs. could not point to any concrete harm that they, individually, would suffer.

b) Timing doctrines

(1) Policy: these are judicially created doctrines, some of them codified in the APA. They:

(a) Conserve judicial resources

(b) Allow agencies to apply their expertise and processes without judicial interference

(c) Respect Congress's decision to entrust matters to agencies

(2) Taxonomy

(a) Finality

i) Pre-APA: before the APA, a functional approach was used, but then courts reverted to a formal requirement.

ii) APA (704)

a. Made reviewable by statute: if an action is made reviewable by special statute, it doesn't matter how final it is (ripeness may still apply, though).

b. Final agency action for which there is no other adequate remedy in a court

1) Adequate remedy outside APA: if a pf. can bring suit against the responsible federal agencies through a citizen suit provision, that opportunity precludes a suit under the APA (see *Bennett*).

2) Final

Rules: these are final when published in the Federal Register as a final rule (but see *Toilet Goods* (1967) (n1p689), where ripeness still barred review).

Adjudications: these are final when a "final" or unreviewed decision is made.

Other:

Ciba-Geigy (D.C. Cir. 1986) (p693): an example of "other" agency actions (letters from the agency).

Dalton (1994) (p699x): a submission to the President of recommendations for military base closures was not a "final agency action" because they weren't binding on the president.

Note that finality doesn't always coincide with exhaustion-- e.g., if you don't take advantage of all intra-agency appeal opportunities, you haven't exhausted all your remedies.

(b) Ripeness

i) APA

Comment: The APA arguably codifies/allows the ripeness doctrine's continued existence in administrative law because of the last sentence of 702: "Nothing herein affects other limitations on judicial review"

a. The overall ripeness analysis

1) Fit for review?

- Final?
- Purely legal question?
- Would review benefit from a more concrete factual setting?

Note that satisfying less than all of these may not be enough. See *Toilet Goods* (1967) (n1p689), where the Court

2) Hardship to parties of delaying review?

- Direct effect on a party's day-to-day operation ("primary conduct")?
- Choice between costly compliance and significant sanctions?
- Weight of the interest of the government
  - See *Abbot Labs* at g4p688, where the Court said review wouldn't delay agency enforcement and at g1p689 where it said that there was no motion for stay of enforcement.

b. Rules

1) *Abbot Laboratories* (1967) (p684): the Court says that a pre-enforcement challenge to an FDA rule changing labelling requirements was ripe:

- It was a purely legal question-- whether the statute was properly interepreted.
- It was final-- it was promulgated in the FedReg and not informal or tentative.
- There was substantial hardship to the pf., including impact

to its day-to-day business, put the pfs. in a dilemma, and didn't prevent the FDA from enforcing the rule as there was no stay requested.

c. Other

1) *Ciba-Geigy* (D.C. Cir. 1986): here, the Court analyzes the ripeness of informal rulings from an agency-- namely a mailgram to an entire industry and a letter to a particular alleged violator (the pf.).

- The Court looked for:
  - Definitiveness: whether it looked like the agency was done or had made up its mind.
  - Direct and immediate effect: both practical and legal.

2) *National Automatic Laundry* (D.C. Cir. 1971) (n2p698): a response to a letter from pf. to agency regarding whether they were in compliance was ripe for review because the question was purely legal and there was hardship to the pfs.

d. Interlocutory review (704)

1) 704 says that "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.": although this suggests the possibility of interlocutory review of something, at least, it's unlikely that a court will do this.

ii) Statutory modification: the Court has suggested that a case could still be unripe even where Congress has specifically provided for review-- *see Whitman* (2001) (p702x).

(c) Exhaustion

i) Non-APA

a. *McCarthy* (1992) (p703): in a *Bivens* action by a federal prisoner, the Court says exhaustion of administrative remedies was not required, employing a balancing test (individual interests versus government (agency and courts) interests) to reach that result.

1) The purposes of the exhaustion doctrine:

- Protect agency primary authority
- Judicial efficiency
  - avoid piecemeal appeals
  - produce a useful record

2) Individual versus institutional balancing test: "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."

Three sets of circumstances generally suggest that the individual interests are great enough to not require exhaustion:

- undue prejudice to subsequent assertion of a court action (e.g., indefinite agency timeframe, irreperable harm if unable to secure immediate judicial consideration)

- doubt as to whether the agency is empowered to grant effective relief

- agency is biased or has predetermined the issue

3) Here, the Court said that the individual burdens were high-- short deadlines for agency filings, money damages not available within agency and that's all pf. wanted-- and agency interests were low-- just a medical issue, would be no factual record even if exhaustion required.

b. Issue exhaustion: you usually can't bring up issues on judicial review that you didn't bring up (or not properly) with the agency.

1) Agencies must generally play by the same rules (see *Chenery*, requiring that the agency give its reasons for the court to review).

c. Irreparable injury

d. Federal courts and state agencies

e. Questions of law

1) Constitutional questions

2) Lack of jurisdiction

3) "Clear rights"

4) No properly authorized procedure to exhaust

5) Solely a question of statutory interpretation

ii) APA (704)

a. 704 says that "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."

1) *Darby v. Cisneros* (1993) (p721x): the Court says that this language means that federal courts can't apply exhaustion principles where judicial review is sought under the APA. Thus, when the agency makes a final decision, you don't have to appeal it within the agency before seeking judicial review.

2) Exceptions (704):

- If the agency requires appeal *by rule* and *provides that pending exhaustion the decision is inoperative*, then you must exhaust.

- If a statute requires exhaustion, you must exhaust.

(d) Primary jurisdiction

7. Stays (705): agencies and reviewing courts can stay actions pending judicial review.

8. Idaho

a) Availability

(1) Presumption: there is a presumption of judicial review in Idaho.

(a) Sources

i) Idaho const. DPC: "injury to a legal right"

a. Note that this is a "legal wrong," which provides a COA for judicial review under FAPA (although some pre-FAPA cases suggest a right to judicial review under the federal DPC).

ii) IAPA 67-5270: right of review

a. This is displaceable by other statute, just like FAPA, though.

b. For whom:

1) Orders in contested cases (5270(3)): parties aggrieved only.
- Thus, all potential intervenors ought to consider doing so (and 5271(2) provides an avenue for immediate review if intervention is denied).

2) Everything else (5270(2)): all persons aggrieved. Thus, IAPA doesn't impose a zone-of-interests test.

c. Of what: "final agency action" (5270(2)) and "final orders" (5270 (3)).

(b) Non-IAPA review: IAPA does not displace common law remedies, such as mandamus. You may need to go here since IAPA only authorizes a court to set aside agency action (5279). To compel action, you probably need to seek a common law remedy.

(2) Justiciability

(a) Finality: this is unsettled in Idaho.

(b) Ripeness: this is not significant in Idaho

i) **Declaratory judgments** (5278): this allows pre-enforcement review of rules in all cases (unlike FAPA, where sometimes things are ripe (*Abbott Labs*) and sometimes they aren't (*Toilet Goods*)).

a. But you probably can't avoid the finality requirement

(c) Exhaustion (5271): this codifies the common law exhaustion doctrine, basically-- you must exhaust all administrative remedies.

i) Exceptions

a. Preliminary, procedural, and intermediate agency actions where later review wouldn't provide an adequate remedy (5271(2)).

b. Facial constitutional challenges to the agency (p30G)

c. Resort to administrative procedures would be futile (p30G)

d. Challenges to constitutionality of agency's actions (p30G)

e. No notice of initial administrative decision (p30G)

f. No opportunity to exercise administrative review procedures (p30G)

(d) Primary jurisdiction: this is where the courts will defer to agencies when both the agency and the courts have jurisdiction.

(3) Stays (5274): same as the federal rule-- no automatic stay, but the agency or reviewing court can grant a stay.

(4) Record (5275)

(a) Also note supplementation of record (5276).

C. SCOPE

1. Questions of Law

a) *Chevron* (1984) (p796): the Court articulates why it gives deference to agencies and sets out a two step process for determining if deference is appropriate.

(1) The two-step analysis: for both steps, the Court will look at all traditional sources (plain language, legislative history, etc.)

(a) Did Congress provide a specific answer to the specific question at issue? (Has Congress spoken?)

(b) If not, is the agency interepretation based on a permissible/reasonable construction of the statute?

i) Congress needn't have expressly left a gap for the agency to fill-- the gap can be implicit.

ii) The agency interpretation doesn't have to be the only possible interpretation or even the one the Court would have reached.

(2) Justification for deference (p804c): agencies get deference because Congress either consciously desired the agency to fill the gap with its expertise, or maybe didn't consider the question, or maybe no side in Congress could build a coalition and figured they'd take their chances.

(3) Agency flip-flop: the Court itc. says that agencies can change their interpretation and still get deference.

(a) *Norfolk Southern Railway v. Shanklin* (2000) (p48p): the Court rejects an agency's interpretations of its own regulations where it had changed its position *after* the Court had accepted its position in an earlier case.

b) *Mead* (2001) (p818): the Court limits the applicability of *Chevron* to situations where (1) Congress delegated authority to the agency to interpret with the force of law and (2) the agency actually promulgated the interpretation in question pursuant to that authority. Otherwise, the Court will give only *Skidmore* respect/deference to the interpretation.

(1) Here, the Court looks at agency "ruling letters" and determines from the face of the authorizing statute and agency practice that the ruling letters weren't intended to have the force of law (by either Congress or the agency).

(2) When *Chevron* applies (see p822c):

(a) To notice and comment rulemade rules

(b) To formal rulemade rules

(c) To interpretations from formal adjudications

(d) *Sometimes* to interpretations from informal adjudications

i) *Mead* is an example of where *Chevron* does not apply to these.

(3) *Skidmore* respect/deference: this "depends on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." So, it's a sliding scale.

(a) Factors:

i) Agency's specialized experience and broader investigations and

information

ii) Value of uniformity in agency's understandings of what a national law requires

c) Idaho

(1) *Simplot* (Idaho): the court articulates a four part test for determining the degree of deference to be given to an agency interpretation.

(a) Four-part deference analysis:

i) Has the agency been entrusted with the responsibility to interpret the statute in question?

ii) If so, is the agency's interpretation reasonable?

iii) Does the statutory language expressly treat the precise question at issue?

iv) If not, are the rationales for deference present?

a. Reliance of public on agency interpretation

b. Interpretation by agency is "practical"

c. Legislature must have intended gap

d. Interpretations formed contemporaneously with statute are given extra weight

e. Agency expertise

2. Findings of Fact

a) *Chenery*-- courts to judge agency action solely on ground invoked by the agency; basis for agency action must be set forth with clarity (at p126).

b) Formal proceedings (and hybrid proceedings that are reviewed on the record of an agency hearing)

(1) Substantial Evidence standard (706(2)(E)): the review is based on the whole record and the action must be logical and reasonable. But this is less than a preponderance of the evidence.

(a) *Universal Camera* (1951) (p837): "substantial evidence is more than a mere scintilla. It means such releant evidence as a reasonable mind might accept as adequate to support a conclusion." "It must do more than create a suspicion of the existence of the fact to be established, it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." The agency action must be set aside where "the record clearly precludes the decision from being justified by a fair estimate of the worth of the testimony of witnesses or [the court's] informed judgment on matters within its special competence, or both."

c) Informal proceedings

(1) Arbitrary & capricious and abuse of discretion

(a) Informal adjudication

i) *Overton Park* (1971) (p845): "to make the a&c/aod finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error judgment." But "the court is not empowered to substitute its judgment

for that of the agency."

(b) Informal rulemaking

i) *State Farm* (1983) (p861): "Normally, an agency rule would be a&c if the agency has:

a. Relied on factors which Congress has not intended it to consider

b. Entirely failed to consider an important aspect of the problem

c. Offered an explanation for its decision that runs counter to the evidence before the agency

d. Or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

3. Harmless error (706 last sent.)