


# *Introduction to Administrative Law and Practice*

Prof. Tracy Hester  
University of Houston Law Center

---

Statutory Interpretation and Regulatory Practice  
March 30, 2020



# Comments and Feedback – A Judicial Perspective on Statutory Interpretation

---



## Quick look back

- Last class – Llewellyn’s challenge – the canon conundrum and “picking your friends in a crowded room”
- *Coherence Canons*
  - Presumption on Use of Common Law Terms
  - Reenactment Canon
  - Borrowed Statute Canon
  - Presumption against Implied Repeals
  - Presumption against Rejected Proposals
- *Bob Jones University v. U.S.* (1983)
  - Meaning of “charitable”
  - Notions of Elemental Justice
  - Legislative Acquiescence



# Welcome to Administrative Law

- The fundamental question – how to translate law into action?
- Quick reminder: what, exactly, is an “agency”?



# Welcome to Administrative Law

- The fundamental question – how to translate law into action?
- Quick reminder: what, exactly, is an “agency”?

**“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency”**



# Welcome to Administrative Law

- The fundamental question – how to translate law into action?
- Quick reminder: what, exactly, is an “agency”?

“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency”

- NOT
  - Congress
  - Courts
  - D.C. gov’t or territories



# Welcome to Administrative Law

- The fundamental question – how to translate law into action?
- Quick reminder: what, exactly, is an “agency”? (APA 551)

“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency”

- NOT
  - Congress
  - Courts
  - D.C. gov’t or territories
- So what about czars?



# Welcome to Administrative Law

- The fundamental question – how to translate law into action?
- Quick reminder: what, exactly, is an “agency”? (APA 551)

“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency”

- NOT
  - Congress
  - Courts
  - D.C. gov’t or territories
- So what about czars?





# Welcome to Administrative Law

- The fundamental question – how to translate law into action?
- Quick reminder: what, exactly, is an “agency”? (APA 551)

“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency”

- NOT
  - Congress
  - Courts
  - D.C. gov’t or territories
- So what about czars?



# Administrative Law Building Blocks

- Legally, it's where the action is at
- Administrative Procedure Act – “The Magna Carta of Administrative Law”
- Sets out requirements for both *rules* and *orders*
- Also specifies how courts review administrative actions
  - Section 706 – “arbitrary and capricious” (much more details later)
  - Beware: “mini-APAs” hidden in substantive statutes
- NOTE – we’ll cover *ultra vires* and *agency appointment* later

# Agency Rulemaking Processes

	Rules	Orders (or Adjudications)
Formal		
Informal		

# Agency Rulemaking Processes

	Rules	Orders (or Adjudications)
Formal	<b>Rule by trial – APA section 556-557</b>  <b>Limited to parties; rarely used</b>	
Informal		

# Agency Rulemaking Processes

	Rules	Orders (or Adjudications)
Formal	Rule by trial – APA section 556-557  Limited to parties; rarely used	<b>Developing rules via case-by-case decisions in common law fashion</b>  <b>FERC, FCC</b>
Informal		<b>Agencies can choose how much process to give for informal orders, but Due Process Applies (<i>Matthews v. Eldridge</i>)</b>

# Agency Rulemaking Processes

	Rules	Orders (or Adjudications)
Formal	Rule by trial – APA section 556-557  Limited to parties; rarely used	Developing rules via case-by-case decisions in common law fashion  FERC, FCC
Informal	<b>Notice-and-comment process</b>  <b>Vast majority of agency rulemaking activity</b>	Agencies can choose how much process to give for informal orders, but Due Process Applies ( <i>Matthews v. Eldrige</i> )

# Agency Rulemaking Processes

Notice of Data Availability	Notice of Proposed Rulemaking	Proposed Rule	Notice-and-Comment Period
-----------------------------	-------------------------------	---------------	---------------------------

Close of Period, and Agency Internal Review	Revised Proposed Rule	Executive Review of draft Final Rule (OIRA and OMB)	Final Rule	Judicial Review
---	-----------------------	---	------------	-----------------

# Additional Procedural Steps for Agency Rulemaking

- Regulatory Flexibility Act of 1980
- Unfunded Mandates Reform Act of 1995
- Paperwork Act
- Congressional Review Act of 1995
  - 60 days to report new rule to Congress
  - Congress can pass resolution to disapprove
  - NO FILIBUSTER
  - Resolution subject to veto



# Executive Oversight of Rulemaking Process

- Fundamental question – is it appropriate for President to intervene?  
How much is too much?
- Executive Order 12,866 (1993)
  - Planning + Review
  - Include independent agencies now
  - No rulemaking can commence w/o regulatory political officer assent
  - Disputes resolved by Vice-President and/or President
- Touchstone – “significantly regulatory action” allowed “only upon a reasoned determination that the benefits of the intended regulation justify its costs”

# OIRA

- Office of Information and Regulatory Affairs, within Office of Management and Budget
- Tools:
  - Cost-benefit assessments
  - Return letters
  - Prompt letters
  - Review letters
- The endless do-loop



# The Zoonotic Disease Prevention Initiative





Tracy Hester  
University of Houston Law Center

[tdheste2@central.uh.edu](mailto:tdheste2@central.uh.edu)  
713-743-1152 (office)