Contents

[**I.** **What is Administrative Power?** 1](#_Toc277675621)

[**a.** Constitution 1](#_Toc277675622)

[**b.** Introduction to Agencies 1](#_Toc277675623)

[**c.** Introduction to Separation of Powers 2](#_Toc277675624)

[**d.** Agencies & Article I: Congress’s Relationship to the Administrative Agency 2](#_Toc277675625)

[**e.** Controlling Delegations; Appointment of Agency Officials 3](#_Toc277675626)

[**f.** Agencies and Article II: The President’s Relationship to the Administrative Agency 3](#_Toc277675627)

[**g.** Removal of Agency Officials 4](#_Toc277675628)

[**II.** **Statutory Constraints on Agency Procedure** 4](#_Toc277675629)

[**a.** Introduction 4](#_Toc277675630)

[**b.** Introduction to the Administrative Procedure Act (APA), Formal Rulemaking 4](#_Toc277675631)

[**c.** Formal Adjudication: On-the-Record or Not? 5](#_Toc277675632)

[**d.** Informal (Notice & Comment) Rulemaking and the APA as a Procedural Floor and Ceiling 5](#_Toc277675633)

[**e.** Informal Rulemaking & Adjudication 5](#_Toc277675634)

[**f.** Exemptions From Rulemaking Procedures 6](#_Toc277675635)

[**g.** Choice Between Rulemaking and Adjudication 7](#_Toc277675636)

[**III.** **Scope of Review of Agency Action** 8](#_Toc277675637)

[**a.** Introduction 8](#_Toc277675638)

[**b.** Review of Findings of Fact in Formal Proceedings 8](#_Toc277675639)

[**c.** Review of Findings of Fact in Informal Proceedings and Review of Agency Legal Conclusions 9](#_Toc277675640)

[**d.** *Chevron* and the Modern Doctrine of Judicial Deference 9](#_Toc277675641)

[**e.** *Chevron* Wrinkles 9](#_Toc277675642)

[**f.** *Mead* and the erosion of *Chevron* 10](#_Toc277675643)

[**g.** Discretion and Policymaking 10](#_Toc277675644)

[**h.** Hard-look review and *Chevron* 11](#_Toc277675645)

[**i.** If *Chevron* does not apply under step-zero, *Skidmore* may still apply. 11](#_Toc277675646)

[**IV.** **Due Process** 11](#_Toc277675647)

[**a.** Life, Liberty, or Property 11](#_Toc277675648)

[**b.** The Rise of Entitlement Theory 12](#_Toc277675649)

[**c.** What Process is Due 12](#_Toc277675650)

[**V.** **Timing and Availability of Judicial Review** 13](#_Toc277675651)

[**a.** Standing – determines whether particular litigant is entitled to hearing of a particular claim 13](#_Toc277675652)

1. **What is Administrative Power?**
   1. Constitution
      1. Article I – Legislative Power vested in Congress
      2. Article II – Executive Power vested in President
      3. Article III – Judicial power vested in Supreme Court and other federal courts
   2. Introduction to Agencies
      1. Shapiro Article
         1. (10) Pieces of the Puzzle are Missing
         2. (9) Administrative Law Has Statutes
         3. (8) If Administrative Law is so Important, Why Isn't it on the Bar Exam?
         4. (7) Too Many Perspectives, Too Little Time
         5. (6) Every Student Previously Had Civil Procedure
         6. (5) Washington, D.C is a Long Way Away
         7. (4) In Administrative Law, Indeterminacy Has Bright Future
         8. (3) We Are All Realists Now.
         9. (2) If I Wanted to Take Political Science, I Wouldn't Have Gone to Law School
         10. (1) If Administrative Law Is the Instrument, What is the Tune?
      2. Theories of Agency Behavior
         1. **Organic statutes – Congress “creates, empowers, defines and limits” an agency**
         2. Administrative law – “the law governing the forms, functions and activities of government agencies.”
         3. Agency – “a unit of the United States government is an “agency” for the purposes of the federal APA if the unit is sufficiently important to be called an agency.
         4. Lebron v. Nat’l R.R. Passenger Corp. – “it is not for Congress to make the final determination of Amtrak’s status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions.”
         5. Executive agency – “heads are subject to unlimited presidential removal authority” (political accountability)
         6. Independent agency – “headed by persons who the President cannot remove at will” (scientific governmental management)
         7. Nonbinding agency action – analyzing, investigating, synthesizing, deliberating, planning, and studying.
         8. Rulemaking and Adjudication – “affect the rights and obligations of people”
            1. Rulemaking – “looks very much like a legislature passing a law”
            2. Adjudication – “looks very much like a court deciding a case”
            3. Dickinson – “What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity
            4. Fuchs – “[Rulemaking] is the function of laying down general regulations as distinguished from orders that apply to named persons or to specific situations.
      3. *Londoner* 210 US 373 (1908)
         1. Facts: CO landowners taxed for road improvements; not afforded the opportunity to be heard
         2. Issue: Violation of due process?
         3. Holding: Yes
         4. Reasoning: Although the board had the right to make a final determination, the law in question (and, therefore, due process) required an opportunity to be heard.
      4. *Bi-Metallic* 239 US 441 (1915)
         1. Facts: Board raised value of all property in Denver 40%; plaintiff never heard
         2. Issue: Due Process
         3. Holding: Not violated
         4. Reasoning: When large numbers of people are affected they cannot all be heard. They are empowered through the political process (either directly or indirectly).
      5. *Yesler Terrace* 37 F.3d 442 (9th Cir 1994)
         1. Facts: HUD determined that WA’s state-court eviction procedure met HUD’s due process requirements w/out public hearing; plaintiff evicted after being accused of illegal activity; HUD claimed no hearing necessary because determination (re: procedure) was adjudication, not a rule.
         2. Issue: Rule or Adjudication?
         3. Holding: Rule.
         4. Reasoning: Adjudication is specific and immediate. Rules are prospective and only has effect after subsequently applied. “The form of the proceeding is not dispositive; what counts is its effect. … An agency cannot avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication.”
      6. From Notes: Shell 238 F.3d 622 (5th Cir 2001)
         1. Interior Department changed opinion regarding transportation costs associated with pipelines
         2. “Interior’s new policy was the basis for the adjudication rather than the facts of the particular adjudication causing Interior to modify or rei-interpret its rule. Interior did not apply a general regulation to the specific facts of Shell’s case. Rather, it established a new policy and then applied that new policy to several OCS producers, including Shell.”
   3. Introduction to Separation of Powers
      1. Glicksman

|  |  |  |  |
| --- | --- | --- | --- |
| **Power** | **Legislative** | **Executive** | **Judicial** |
| **Nature** | Make law | Implement law | Interpret and apply law |
| **Body** | Congress | President & Executive Officers | Supreme Court and Article III lower courts |
| **Selection** | Elected by state or district | Electoral College & Appointment | Presidential appointment w/ Senate consent |
| **Character** | Bicameral / representative | Unitary / national constituency | Independent (life tenure and salary protection) |
| **Rationale** | Political accountability | Prompt, coordinated action | Fair, deliberative judgment |
| **Checks** | Veto & prosecutorial discretion (Executive); Judicial review and interpretation (Judicial) | Impeachment, override & rule of law (Leg.); Judicial review & rule of law (Judicial) | Impeachment, amendment, & jurisdiction (Leg.); Appointment & prosecutorial discretion (Executive) |

* + 1. *ALA Schecter Poultry* (“Sick Chickens”)295 US 495 (1935)
       1. Facts: Congress passed Nat’l Industrial recovery Act giving the President sweeping powers to promote fair competition; “Live Poultry Code” approved by President
       2. Issue: Is law within Congressional power to delegate?
       3. Holding: No.
       4. Reasoning: There were no guidelines to define the President’s power in conjunction with the law (e.g. “fair competition” not defined); lacked “intelligible principle”
       5. ***Still good law as a canon of construction*** – if a statute can be read so that there is not a broad delegation of Congressional power, then it is a legal delegation
  1. Agencies & Article I: Congress’s Relationship to the Administrative Agency
     1. “Intelligible principle” from Schecter is strengthened.
     2. Congress Delegates (“vest in”) power to an agency through organic statute
     3. *Mistretta* 488 US 361 (1989)
        1. Facts: Sentencing Guidelines challenged
        2. Issue: Constitutionality
        3. Holding: Upheld
        4. Reasoning: Congress’s delegation to the Commission provided sufficient guidelines, quoting *Yakus* , “Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.”
        5. Scalia dissent – Commission can make law; “Strictly speaking, there is *no* acceptable delegation of legislative power”
     4. *American Trucking* 531 US 457 (2001)
        1. Facts: EPA promulgated revised air standards (NAAQS) for ozone; challenged because of lack of “intelligible principle”
        2. Issue: Constitutionality of delegation under Clean Air Act
        3. Holding: Remanded to EPA to adopt construction of CAA that would not be unconstitutional
        4. Reasoning: Although an intelligible principle was lacking, a “determinate criterion” is not necessary; constitutional issue may be avoided through appropriate interpretation by EPA
  2. Controlling Delegations; Appointment of Agency Officials
     1. *Chadha* 462 US 919 (1983)
        1. Facts: Immigration judge suspended Chadha’s deportation. House overrode Attorney General’s recommendation to suspend deportation by a house vote.
        2. Issue: Can Congress retain control over Agency through a House vote?
        3. Holding: Unconstitutional for one House of Congress to hold “veto” power.
        4. Reasoning: This is effectively legislation and must be passed as such.
     2. Appointment of Agency Officials
        1. All federal positions not created by the Constitution are created by Congress under Necessary and Proper Cluase
        2. “’Officers’ refers to some class of especially important government workers”
        3. *Buckley v. Valeo* 424 US 1 (1976)
           1. Facts: Federal Election Campaign Act of 1971 amended in 1974 to create the Federal Election Commission; board consists of Sec. of the Senate, Clerk of the House, two members appointed by the President *pro tempore* of the Senate, two appointed by the Speaker, and two appointed by the President.
           2. Issue: Constitutionality of the FEC
           3. Holding: Board composition (only) unconstitutional
           4. Reasoning: “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of [Article II].”
  3. Agencies and Article II: The President’s Relationship to the Administrative Agency
     1. Administrative Law Judges (ALJ)
     2. *Freytag v. CIR* 501 US 868 (1991)
        1. Facts: Freytag charged with using tax shelter to avoid taxes. Special trial judge determined that they had violated the tax code. Freytag claimed that appointment of special trial judge violated the appointments clause of the Constitution (Art. II Sec. 2)
        2. Issue: Does assignment of complex case to special trial judge violate appointments clause.
        3. Holding: No
        4. Reasoning: The statute allowed the statute allowed for the appointment. Article I courts are courts of law just like Article III courts. Therefore, they are separate and does not violate appointment clause.
     3. *Morrison v. Olson* 487 US 654 (1988)
        1. Facts: Ethics in Government Act authorizes “appointment of independent counsel to investigate and, if appropriate, prosecute certain high-ranking Government officials”.
        2. Issue: Is the independent counsel an **inferior officer** or **principal officer**?
        3. Holding: Inferior
        4. Reasoning: (a) subject to removal by higher Executive Branch official, (b) empowered to perform only certain, limited duties, (c) limited jurisdiction, and (d) limited tenure.
        5. Dissent: More difficult to remove than most principal officers.
     4. *Free Enterprise Fund v. PCAOB* (2010)
        1. Facts: PCAOB investigated the Fund after finding its auditing procedures insufficient.
        2. Issue: Does the Board, authorized by Sarbanes-Oxley, violate the Appointments Clause.
        3. Holding: “The dual for-cause limitations on removal of Board members contravene the Constitution’s separation of powers.”
        4. Reasoning: Act prevents removal except for good cause and does not allow President to determine if good cause exists.
     5. See *Buckley v. Valeo*; relatively unclear what determines violation of Appointments Clause.
     6. Recent ambiguity
  4. Removal of Agency Officials
     1. *Morrison v. Olson* (1988) (another issue)
        1. Issue: Does limiting ability to remove independent counsel (for good cause only) violate separation of powers.
        2. Holding: No
        3. Reasoning: Power to remove need not be unlimited in order to exercise control
     2. *Myers v. US*, 272 US 52 (1926)
        1. Facts: Postmaster removed by President Wilson without consent of the Senate.
        2. Issue: Does restriction of ability to remove violate separation of powers.
        3. Holding: Yes
        4. Reasoning: President must have the power to remove in order to exercise control
     3. *Humphrey’s Executor v. US*, 295 US 602 (1935)
        1. Facts: President Roosevelt sought to remove Commissioner Humphrey from the FTC. Humphrey was appointed by President Hoover for a term of seven years.
        2. Issue: Can President remove Commissioner even though no provision was allowed for this in the organic statute?
        3. Holding: No
        4. Reasoning: FTC was meant to be independent. Since appointment was for a term, President cannot seek to remove.
     4. *Bowsher v. Synar*, 478 US 714 (1986)
        1. Facts: Comptroller Genreal to be appointed from a list of individuals recommended by the Speaker of the House and Senate President pro tempore. Must be confirmed by Senate. Congress reserves power of removal.
        2. Issue: “whether Congress may constitutionally delegate to the comptroller general the power to review estimates of likely budget deficits, to determine whether the estimated deficit will exceed a specified amount, and if so, to determine program by program, according to statutorily specified rules, how much appropriated money the president must ‘sequester’ (that is, not spend).”
        3. Holding: Congress cannot retain power of removal.
        4. Reasoning: Comptroller was to perform executive function; President cannot exercise control.
     5. *Free Entreprise v. PCAOB*
        1. Issue: Does the Board, authorized by Sarbanes-Oxley, violate the Appointments Clause.
        2. Holding: “The dual for-cause limitations on removal of Board members contravene the Constitution’s separation of powers.” President was limited in removal of principal officer; principal officer had limited power to remove inferior officer.
        3. Reasoning: Act prevents removal except for good cause and does not allow President to determine if good cause exists.

1. **Statutory Constraints on Agency Procedure**
   1. Introduction
      1. Adjudications – generally deal with present parties, apply existing rules
      2. Rulemakings – generally widely applicable, proscriptive in nature
      3. Hearing requirement
         1. “Magic words” – on the record
         2. Other language clearly indicating requirement in organic statute
         3. Informal or formal may meet requirement
   2. Introduction to the Administrative Procedure Act (APA), Formal Rulemaking
      1. Esch Car Service Act & the APA - *United States v. Florida East Coast Ry*., 410 US 224 (1973)
         1. Facts: Railroad companies complained that the Interstate Commerce Commission failed to adhere to the APA by only allowing written comments during period for hearings.
         2. Issue: Hearing requirement
         3. Holding: APA had no formal hearing requirement; writings were sufficient hearings
         4. Reasoning: Rulemaking does not provide individual due process requirements, limited resources, agency allowed to determine in absence of Congressional intent
      2. Since *FECR*, no statute without the words “on the record” found to require formal rulemaking
      3. § 553 – Rule Making p. 945
      4. § 556 – Hearings; presiding employees, powers and duties; burden of proof; evidence; record as basis of decision p. 948
      5. § 557 – Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record p. 950
      6. “Triggering” the APA
   3. Formal Adjudication: On-the-Record or Not?
      1. *City of W. Chicago, Illinois v. NRC,* 701 F.2d 632 (1983)
         1. Facts: KM was granted authorization to demolish buildings and for on site storage of contaminated soil from off site facilities.
         2. Issue: Notice and hearing requirement
         3. Holding: NRC not required to hold hearing
         4. Reasoning: NRC interpreted AEA to only require automatic hearings for regulations; the amended permits were similar to other existing permits already deemed safe, no public interest in play; “Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA.
      2. “Hearing” v. “Formal Adjudication”
      3. § 554 – Adjudications p. 946
   4. Informal (Notice & Comment) Rulemaking and the APA as a Procedural Floor and Ceiling
      1. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*., 435 US 519 (1978)
         1. Facts: Organic statute did not require any additional procedure beyond APA; following an adjudication NRC drafted a rule for future cases. Used informal process to review the rule. DC Circuit determined hearing was necessary.
         2. Issue: Was hearing required/met?
         3. Holding: NRC procedures were adequate
         4. Reasoning: The NRC published a supplement following comments. Requiring an additional hearing would make a perpetual rulemaking procedure, since every change would require an additional hearing. “absent extraordinary circumstances it is improper for a reviewing court to prescribe the procedural format an agency must follow”;
      2. *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525
         1. Facts: Fire protection rule for nuclear power plants after a fire.
         2. Issue: Did NRC comply with hearing requirement?
         3. Holding: Yes (barely).
         4. Reasoning: Rulemaking requires (1) Meaningful participation by interested parties and (2) the agency’s rationale for the adopted rule; “agency need not renotice changes that follow logically from or that reasonably develop the rules it proposed originally.” Court cannot require more process than § 553 requires.
      3. Importance of D.C. Circuit – generally, most important court for Admin law due to case loads.
   5. Informal Rulemaking & Adjudication
      1. *American Radio Relay League v. Ambient Corp.*, 524 F.3d 227
         1. Facts: Amateur radio operators challenge FCC rules regarding broadband over power lines.
         2. Issue: Did FCC fail to satisfy notice and comment requirement by redacting studies on which it relied and failing to provide a reasoned explanation
         3. Holding: Yes.
         4. Reasoning: Agency must make studies it relies on available
      2. *Citizens to Preserve Overton Park v. Volpe*, 401 US 402 (1971)
         1. Facts: Highway planned through park; plaintiffs wanted to re-route through neighboring black community
         2. Issue: Did Secretary of Transportation meet statutory requirement to approve route through public park in absence of a feasible alternative?
         3. Holding: No.
         4. Reasoning: No finding of fact conducted; however judicial review could not be conducted because of lack of factual grounds (Court punted to avoid underlying race issue). Affidavits regarding decision process were post hoc rationalizations.
      3. Court must conduct legal review (authority given in statute), factual review, and substantive review.
      4. *Pension Benefit Guaranty Corp. v. LTV*, 496 US 633 (1990)
         1. Facts: Pensions restored after being assumed by government insurance pursuant to bankruptcy. Decision was based upon estimation of financial factors including state of steel industry. LTV Steel sought to avoid restoration of pensions.
         2. Issue: Was PBGC’s review sufficient?
         3. Holding: Yes.
         4. Reasoning: Court cannot require process but can require record (even though that will dictate additional process); quotes Florida Power & Light v. Lorion 470 US 729, “If the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances is to remand to the agency for additional investigation or explanation”
   6. Exemptions From Rulemaking Procedures
      1. Legislative Rules
         1. § 553 – does not apply to “(1) a military or foreign affairs function … or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.”
         2. Difficult to distinguish between admin rules and substantive rules
      2. Non-legislative rules (interpretive rules and policy statements)
         1. Legal effects test – focuses on legal effect of rule
         2. Substantial impact test (discarded after Vermont Yankee)
         3. Impact on agencies test – effect on regulators (a interpretive rule is announced in adjudication that is not supposed to be binding, but agency punishes all who violate after decision
      3. *United States Telephone Ass’n v. FCC*, 28 F.3d 1232 (DC Cir. 1994)
         1. Facts:FCC issued penalty schedule without notice and comment.
         2. Issue: Did this violate APA?
         3. Holding: Yes
         4. Reasoning: The Communications Act authorized fines. FCC had adjudicated fines individually, then set standards for future violation; the standard bound future action and was, therefore, not simply a policy statement and should have been submitted for notice and comment.
      4. *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995)
         1. Facts: FDA promulgated Compliance Policy Guide to deal with manufacture of drugs by retail pharmacists.
         2. Issue: Was CPG a substantive rule or policy?
         3. Holding: Policy.
         4. Reasoning: FDA policy provides factors to determine violation of act; “a ‘general statement of policy’ is one that does not impose any rights and obligations” (quoting *Comm. Nutrition Inst.*); policies are obviously referenced for guidance, otherwise they would be useless; violations were of the applicable act, not the policy; note: if policy removes discretion it is a substantive rule (not found in this case).
      5. *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (DC Cir. 1993)
         1. Facts: Policy that “certain x-ray readings qualify a ‘diagnose[s]’ of lung disease”
         2. Issue: Is the a interpretive rule?
         3. Holding: Yes.
         4. Reasoning: “on the basis of whether the purported interpretive rule has ‘legal effect’, which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.” (1. Necessary for enforcement, 2. Published in CFR, 3. Intent to legislate, 4. Alters a prior legislative rule)
            1. “*Substantive rules*—rules, other than organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute:
            2. “*Interpretive rules*—rules or statements issued by an agency to advise the public of the agency’s construction of the statutes [sic] and rules which it administers…”
      6. *Syncor International Corp. v. Shalala*, 127 F.3d 90 (DC Cir. 1997)
         1. Facts: FDA issued 1995 notice: “Regulation of Positron Emission Tomography Radiopharmaceutical Drug Products; Guidance; Public Workshop” which announced that PET should be regulated under drug provisions of Federal Food, Drug, and Cosmetic Act.
         2. Issue: Interpretive rule, substantive rule or policy statement?
         3. Holding: Substantive rule.
         4. Reasoning: New regulation.
            1. “An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm. By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change In its policy does not affect the legal norm.”
            2. “An interpretive rule, on the other hand, typically reflects and agency’s construction of a statute that has been entrusted to the agency to administer. The legal norm is one that Congress has devised; the agency does not purport to modify that norm, in other words, to engage in lawmaking”
            3. “A substantive rule has characteristics of both the policy statement and the interpretive rule; it is certainly in part an exercise of policy, and it is a rule. But the crucial distinction between it and the other two techniques is that a substantive rule *modifies* or *adds* to a legal norm based on the agency’s *own authority*. That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking. And, it is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment.”
   7. Choice Between Rulemaking and Adjudication
      1. *SEC v. Chenery Corp*., 318 US 80 (1943)
         1. Facts: Officers purchased stock on open market during reorganization. As a result of the reorganization, their preferred stock would become common stock and amount to a 10% stake in the new company (water company was reorganized under Public Utility Act)
         2. Issue: Did officers violate fiduciary duty? (SEC found that they had).
         3. Holding: SEC decision overturned.
         4. Reasoning: Although the SEC did not feel there was any nefarious intent and the officers did not attempt to defraud anyone or conceal their purchases.
            1. The Chenery I Principle: Legitimate basis, “The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”
            2. The Chenery II Principle: Rule of law – before an agency action, there must exist some ascertainable standard beyond a broad statute; “Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different.”
            3. “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”
      2. Commission again rejected the plan without promulgating a rule “The Supreme Court indicated the advisability of promulgating a general rule, though we do not understand its opinion to hold that the absence of a preexisting rule is fatal to the decision we have reached.”
      3. *Chenery Corp. v. SEC*, 154 F.2d 6 (DC Cir. 1946)
         1. Holding: SEC decision overturned
         2. Reasoning: “In practical effect the Commission now insists upon doing precisely what the Supreme Court said it could not do; that is to say, in applying to this specific case a standard which has never been promulgated, either by the Commission in its regulations or by legislative act, and which the Commission says can not fairly be generally applied.”
      4. *SEC v. Chenery Corp.*, 332 US 194 (1947) (shift in justices)
         1. Holding: SEC decision upheld
         2. Reasoning:
            1. “We held no more and no less than that the Commission’s first order was unsupportable for the reasons supplied by that agency.”
            2. An agency must be able to give an order on matters of first impression
            3. Agencies can make law
            4. Decision was in an area of the agency’s expertise and should, therefore, be given “the greatest amount of weight by appellate courts.”
      5. Results of Chenery
         1. Chenery I – “Agency decisions, however, can be sustained only on the grounds specifically relied upon by the agencies. …courts ‘may not accept appellate counsel’s post-hoc rationalizations for agency action.’”
         2. Chenery II:
            1. Too much adjudication? “Rulemaking is generally viewed as a fairer, more efficient process than adjudication for the formulation of new legal standards.”
            2. Too much rulemaking? Agencies have discretion in determining manner to proceed. Rules are appropriate where not preempted to handle generally applicable standards.

1. **Scope of Review of Agency Action**
   1. Introduction
      1. Specialized knowledge – agencies are given deference due to their special knowledge
      2. Judicial review (agency decisions v. lower court decisions)
         1. Normal appellate review
            1. Clearly erroneous – not defined specifically, but “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”
            2. Abuse of discretion – “Trial courts make numerous legal decisions concerning the propriety of preliminary injections, the admissibility of evidence, and the permissible structure of proof at trial that are reviewed by appellate courts only for *abuse of discretion*—a highly deferential standard that is more similar to the jury standard than to the clearly erroneous standard.”
         2. Administrative law
            1. “Agency legal conclusions are generally reviewed deferentially rather than de novo”.
            2. “Agency factual conclusions have generally been reviewed deferentially”.
            3. “Agency exercises of discretion are reviewed deferentially”.
      3. Standards of review
         1. **Substantial** **Evidence** – less deferential than the jury standard but more deferential than clearly erroneous.
         2. **Without procedures required by law, rule or regulation having been followed**
         3. **Arbitrary and Capricious**
   2. Review of Findings of Fact in Formal Proceedings
      1. *Universal Camera Corp. v. NLRB*, 340 US 474 (1951)
         1. Facts: Chairman claimed he was fired for testimony given to NLRB, company claimed Chairman was fired for accusing the personnel manager of drunkenness. The ALJ found for the company, but the Board found for Chairman.
         2. Issue: Deference to agency, meaning of substantial evidence.
         3. Holding: Substantial evidence can be based upon the whole record, including the ALJ’s findings; they are not limited to determining whether the NLRB’s case is supported by the record or the evidence it reviewed.
         4. Reasoning: Taft-Hartley standard of review is the same as APA. The court may look at the whole record and determine whether the evidence substantially supports a conclusion despite evidence against it. ALJ’s findings must be taken account of.
      2. *Kimm v. Department of the Treasury*, (Fed. Cir. 1995)
         1. Facts: ATF suspends Kimm for misuse of gov’t vehicle (dropping son off on his way to work while wife was sick). Kimm believed he was not misusing vehicle since he was on call 24 hours/day and the diversion of driving to the school, then back home to change vehicles would be counterproductive. Admin Judge (AJ) found for Kimm. Agency board reverses AJ’s decision and suspends Kimm.
         2. Issue: Deference
         3. Holding: Suspension reversed.
         4. Reasoning:
            1. Deference given to AJ regarding the credibility of witnesses since AJ was actually present at interviews
            2. Board stated “a reasonable person in [Kimm’s] position could not have determined that the presence of his 3-year old son in the GOV was essential to the completion of an official mission.” Court found Kimm was not acting recklessly and was attempting to complete his duties to the best of his ability.
      3. *Dickinson v. Zurko*, 527 US 150 (1999)
         1. Facts: Patent denied.
         2. Issue: Standard of review.
         3. Holding: Clearly erroneous.
         4. Reasoning: Area of expertise.
      4. § 706 – Scope of Review p. 954

* 1. Review of Findings of Fact in Informal Proceedings and Review of Agency Legal Conclusions
     1. *Assoc. of Data Processing Svd. Orgs., Inc. v. Bd. Of Govs. Of Fed. Rsrv. System*, 745 F.2d 677 (DC 1984)
        1. Facts: Citicorp approved to create Citishare data processing and transmission services. ALJ ruled intended activities were closely related to banking and could be performed by Citicorp subsidiary.
        2. Issue: Scope of review.
        3. Holding: Substantial review test applies to all Board actions.
        4. Note: Dictum, “that in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same” is settled law in D.C. Cir.
     2. *NLRB v. Hearst Publications, Inc.*, 322 US 111 (1944)
        1. Facts: Newsboy case.
        2. Issue: Were newsboys employees or private contractors.
        3. Holding: Employees.
        4. Reasoning: Because of the control the papers exercised over the newsboys’ income and execution of their sales.
     3. *O’Leary v. Brown-Pacific-Mixon*, Inc., 340 US 504 (1951)
        1. Facts: Employee in Guam dies trying to save someone in the water. Just left employer’s recreation area.
        2. Isssue: Was this in course of employment?
        3. Holding: Yes.
        4. Reasoning: The only reason he was in Guam was his employment and the recreation area was supplied by his employer.
        5. Dissent: There was no showing that he was even at the recreation area (only near it). The attempted rescue was in no way related to his employment and he was off duty at the time.
     4. *Packard Motor Car Co. v. NLRB*, 330 US 485 (1947)
        1. Facts: Foremen sought to organize as employees.
        2. Issue: Are foremen employees?
        3. Holding: Yes.
        4. Reasoning: Although they represent the company in relation to other employees, they still fit the definition are employees, not employers.
     5. *Skidmore v. Swift & Co.*, 323 US 134 (1944)
        1. Facts: Firemen sought payment of overtime for “off-duty” time spent at firehouse.
        2. Issue: During “off-duty” times, when required to be at or near the firehouse, where the employees still working?
        3. Holding: Remanded to determine appropriate award;
        4. Reasoning: When their movements were restricted and they were not eating, sleeping, or otherwise engaged as they would have been had they not been required to be at the firehouse, they were working.
  2. *Chevron* and the Modern Doctrine of Judicial Deference
     1. *Chevron U.S.A. v. Natural Resources Defence Council, Inc.*, 467 US 837 (1984).
        1. Facts: Congress passed “Clean Air Act [which] required “nonattainment” States to establish a permit program regulating ‘new or modified major stationary sources’ of air pollution.” EPA promulgated a regulation using a “bubble” for an entire plant to consider it a “stationary source.” Chevron received a permit for one of its plants.
        2. Issue: Could EPA promulgate this “bubble” regulation.
        3. Holding: Yes.
        4. Reasoning: Two step process:
           1. Congressional intent controls; if no clear intent then
           2. Agency interpretation controls (so long as it is reasonable).
     2. *INS v. Cardoza-Fonseca*, 480 US 421 (1987)
        1. Facts: Nicaraguan sought refuge.
        2. Issue: Standard of review.
        3. Holding: For alien.
        4. Reasoning: INS interpretation was in conflict with Congressional intent.
  3. *Chevron* Wrinkles
     1. “Step zero” – when does *Chevron* apply? (other agency interprets statute; *Mead*)
        1. Does the interpretation have the “force of law” or is it a “rule” mad in the exercise of authority
        2. “Chevron calls for deference to ‘an agency’s construction of the statute which it administers’…agencies are said to ‘administer’ statutes for which they have some special responsibility.”
     2. Does not extend to agency interpretations of court opinions.
     3. State agencies do not receive *Chevron* deference, even when interpreting federal law.
     4. *Chevron* does not apply to statutes establishing judicial review.
     5. No deference given to Justice Department’s interpretation of federal criminal statutes.
     6. *Rapaport v. US Dept. of Treasury, Office of Thrift Supervision*, 59 F.3d 212 (DC Cir 1995)
        1. Facts: OTS sought to recover from Rapaport based on a theory of unjust enrichment. Sought *Chevron* defference.
        2. Issue: *Chevron* defference?
        3. Holding: No.
        4. Reasoning: OTS was one of three agencies that administered the statute in question. “The alternative [(to defer to OTS’s interpretation)] would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all.”
     7. *Christensen v. Harris County*, 529 US 576 (2000)
        1. Facts: Employees sought to prevent force use of comp time (in order to be paid for the time).
        2. Issue: Does the Fair Labor Standards act of 1938 (FLSA) prevent this?
        3. Holding: No.
        4. Reasoning: Opinion letter from Dept. of Labor, Wage and Hour Div. given no deference.
  4. *Mead* and the erosion of *Chevron*
     1. *United States v. Mead*, 533 US 218 (2001)
        1. Facts: Tariff imposed on day planners. (Changed status from “others” to “diaries”)
        2. Issue: Could Customs change the treatment of planners without notice?
        3. Holding: *Chevron* deference not applicable, but *Skidmore* deference may be.
        4. Reasoning: “In sum, classification rulings are best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines.’” The statute does not indicate that Customs rulings regarding classification were intended to be given the force of law.
     2. *Negusie v. Holder*, (No. 07-499, 2009)
        1. Facts: Negusie participated in mistreatment of prisoners in Eritea under threat of execution. Claimed asylum in United States to avoid deportation.
        2. Issue: Board of Immigration Appeals (BIA) & 5th Cir. assumed that whether or not the act was voluntary was immaterial under the statute.
        3. Holding: Erred in failing to interpret the statute.
        4. Reasoning: The BIA has *Chevron* discretion, and must execute it to alleviate ambiguity. Since the issue was not addressed in the statute, BIA must promulgate an interpretation.
  5. Discretion and Policymaking
     1. Arbitrary and Capricious
     2. *Industrial Union Dep’t, AFL-CIO v. Hodgson*, 499 F.2d 467 (DC Cir. 1974)
        1. Facts: OSHA regulation of asbestos dust in workplaces. Unions petitioned standards and timetable.
        2. Issue: Unions felt standards were inadequate.
        3. Holding: For OSHA.
        4. Reasoning: The legislature left the rulemaking to OSHA. Issues remanded to the Secretary had insufficient justification.
     3. *Motor Vehicle Manufacturers Ass’n of The United States v. State Farm*, 463 US 29 (1983)
        1. Facts: Insurance companies petitioned NTHSA’s recission of passive restraint standard (allowing use of passive seat belts instead of airbags or active seat belts).
        2. Issue: Can agency change an existing regulation? (Is there a different standard once the regulation is in place?)
        3. Holding: Yes. (No, abuse of discretion still applies.)
        4. Reasoning: “A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulation.”
     4. *Puerto Rico Sun Oil Co. v. United States EPA*, 8 F.3d 73 (1st Cir. 1993)
        1. Facts: Company needed a permit for discharging into water. If mixing zone requirements were not used, the permit might not be issued or compliance could be impossible.
        2. Issue: EPA’s decision process.
        3. Holding: Arbitrary.
        4. Reasoning: The EPA’s decision did not follow any appreciable logic. They accepted the EQB’s certification but refused to await their reconsideration, with no justification.
  6. Hard-look review and *Chevron*
     1. United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2nd Cir. 1977)
        1. Facts: Whitefish standard. The time-temperature-salinity standards were implemented without regard to type of fish, or possibility of botulism bacteria. FDA did not release data it had prior to notice and comment period.
        2. Issue: Exercise of discretion.
        3. Holding: Abuse.
        4. Reasoning: There was no reason to withhold facts. The FDA refused to evaluate other data.
     2. Step Two of *Chevron* Analysis
        1. “the inquiry at the second step of *Chevron* overlaps analytically with a court’s task under the Administrative Procedure Act (APA) in determining whether agency action is arbitrary and capricious (unreasonable).”
        2. Some argue the two tests should be merged.
        3. However “’Arbitrary and capricious’ review under the APA differs from *Chevron* step-two review, because it focuses on the reasonability of the agency’s decision-making processes rather than on the reasonability of its interpretation”
     3. *United States Telecom Ass’n v. FCC*, 227 F.3d 450 (DC Cir. 2000)
        1. Facts: FCC expanded “call-identifying information” to include cell tower locations, signaling information and packet data. FCC released standards to facilitate.
        2. Issue: *Chevron* Deference.
        3. Holding: Split (for regarding location information, against regarding FBI’s punch list).
        4. Reasoning: The statute was not unambiguous as to what type of information is call-identifying. Location information was a reasonable inference. Regarding the punch list, the FCC did not explain reasoning behind modified standards. (Incorporates hard look review into step two—the court looks for a rational connection to the decision)
     4. Supreme Court has not yet incorporated hard look review into *Chevron* step two.
  7. If *Chevron* does not apply under step-zero, *Skidmore* may still apply.

1. **Due Process**
   1. Life, Liberty, or Property
      1. *Bailey v. Richardson*, 182 F.2d 46 (DC Cir. 1950)
         1. Facts: Bailey was fired for being disloyal to the US.
         2. Issue: Due process rights.
         3. Holding: Not violated.
         4. Reasoning: Employment is not a property right subject to due process. The government, as employer, must be able to fire its employees.
      2. *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 US 886 (1961)
         1. Facts: Cook’s right to enter Naval facility revoked by installation security officer.
         2. Issue: Due process rights (claimed badge of infamy).
         3. Holding: Not violated.
         4. Reasoning: The government has a right to control entry to secure facilities. Ms. Brawner was free to exercise her profession at any location not requiring a clearance. Brawner did not show any “badge of infamy” resulted from the revocation of clearance.
      3. *Goldberg v. Kelly*, 397 US 254 (1970).
         1. Facts: New York terminated public assistance before a hearing.
         2. Issue: Due process.
         3. Holding: Violated,
         4. Reasoning: Once given, an entitlement is property subject to due process. If wrongly awarded, the aid can be recovered. If wrongly revoked, the citizen is deprived of ability to provide for themselves.
      4. *Wisconsin v. Constantineau*, 400 US 433 (1970)
         1. Facts: Statute forbade sale of alcohol for persons cited for certain offenses.
         2. Issue: Property in good name.
         3. Holding: Violated.
         4. Reasoning: “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.
      5. *Bell v. Burson,* 402 US 535 (1971)
         1. Facts: Georgia suspended license of those involved in an accident who cannot cover costs. Fault was not considered.
         2. Issue: Property in license once held.
         3. Holding: Violated.
         4. Reasoning: Once awarded a license, it can become essential to one’s livelihood. It cannot be revoked without due process. Fault is relevant.
   2. The Rise of Entitlement Theory
      1. *Board of Regents of State Colleges v. Roth*, 408 US 564 (1972)
         1. Facts: Teacher fired after one year contract ended.
         2. Issue: Property and due process.
         3. Holding: No property interest.
         4. Reasoning: The **nature of the interest** was not of the protected type. No property in employment (for teacher without tenure). There was no harm to reputation or future employment prospects.
      2. *Perry v. Sinderman*, 408 US 593 (1972)
         1. Facts: Teacher fired after statements critical of Board of Regents.
         2. Issue: Due process.
         3. Holding: Possibly violated, remanded (only a motion to dismiss)
         4. Reasoning: **Protected rights are not a “property” interest**. There was not a tenure program, the faculty guide essentially implicated that faculty should feel as though they were tenured if they are happy and cooperative and acting in a satisfactory manner.
      3. *Town of Castle Rock, Colorado v. Gonazles*, 545 US 748 (2005)
         1. Facts: Police failed to respond to repeated reports of violation of a restraining order. Kidnaps and kills kids. **42 U.S.C. § 1983**
         2. Issue: Violation of due process.
         3. Holding: Not violated.
         4. Reasoning: Not every benefit is a right or property. If a state official has discretion, no right is created. The police have discretion in allocation of their forces.
         5. Dissent: State mandated arrest of domestic violence offenders. (Apparently fails to consider that anyone can sue for failure to arrest.)
      4. Property right created when government act creates belief that an individual can expect to keep
   3. What Process is Due
      1. *Mathews v. Eldridge*, 424 US 319 (1976)
         1. Facts: Disability payments were terminated after finding Eldridge no longer diabled.
         2. Issue: Due process rights.
         3. Holding: Not violated.
         4. Reasoning: Disability compensation is not equivalent to welfare, it is not need based and not necessarily required for sustenance. There is an elaborate appeal process in place, with retroactive awards if terminated improperly. The only issue is temporary loss of benefit. The potential cost outweighs the benefit.
         5. Three-part due process test for both pre- and post-termination hearing
            1. Degree of potential deprivation
            2. Fairness and reliability of existing pre-termination procedures
            3. Public interest
      2. *Cleveland Board of Education v. Loudermill*, 470 US 532 (1985)
         1. Facts: Loudermill lied on his application regarding felony conviction history.
         2. Issue: Process for public employee who can only be discharged for cause.
         3. Holding: Violated
         4. Reasoning: Ohio provided for notice but no opportunity to respond as well as a post-termination hearing. Loudermill claimed the post-termination hearing took too long but the delay was not sufficient to sustain his claim.
            1. Pre-termination appropriate to the nature of the interest involved
            2. Can take into account nature of subsequent proceeding
            3. Mentions “bitter with sweet” from *Arnett*.
      3. *Gilbert v. Homar*, 520 US 924 (1997)
         1. Facts: University police officer busted in drug raid. Claimed violation of due process for lack of hearing regarding his suspension and demotion.
         2. Issue: Due process.
         3. Holding: Not violated.
         4. Reasoning: State’s interest in removing persons charged with felonies from positions of great trust outweighs private interest in receipt of paycheck. After charges were dropped, the University Police promptly held a hearing (pre-termination hearing) and afforded him a more formal hearing afterwards. This met the *Loudermill* requirement.
            1. Suspension – degree of deprivation is low
            2. Fairness and reliability - ?
            3. Public Interest – high
            4. For suspension just apply *Eldridge*
2. **Timing and Availability of Judicial Review**
   1. Standing – determines whether particular litigant is entitled to hearing of a particular claim
      1. Legal violation not sufficient
      2. “plaintiff must demonstrate that he or she has suffered some injury beyond mere distress at the thought of lawbreakers going unpunished”
      3. *Frothingham v. Mellon* – taxpayer cannot sue based on increased tax burden
      4. *Lujan v. Defenders of Wildlife*, 504 US 555 (1992) Constitutional Standing
         1. Facts: Environmentalists sued Sec. of Interior because new regulations were deficient (only extended to US and high seas, not foreign areas). Claimed that they were going to visit.
         2. Issue: Standing.
         3. Holding: Not sufficient.
         4. Reasoning: Minimum requirements
            1. **Injury in fact** (lack of consultation insufficient; must be directly affected beyond their special interest in the subject); concrete and particular; actual; imminent
            2. **Causal Connection** (without injury no causal connection)
            3. **May be redressed** (sought to change rules for consultation instead of changing specific regulation)
      5. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 US 167 (2000)
         1. Facts: Water treatment plant issued permit to discharge. Organic statute authorizing any “citizen” with “an interest which is or may be adversely affected” to bring suit to limit permits. Laidlaw exceeded permit allowances. No environmental damage was found.
         2. Issue: Standing.
         3. Holding: Standing found.
         4. Reasoning:
            1. Injury in fact: Injury to person not environment, aversion to use, lower property values, etc.
            2. Causal connection: due to pollution in river
            3. Redressability: stop discharging & civil penalty
         5. Dissent:
            1. No injury to environment, therefore injury to person did not exist; concern of damage is not sufficient
            2. Without injury, no causal connection
            3. Civil penalties are not appropriate redress for an individual suit. There is no measurable benefit to the plaintiff in the speculative deterrent effect of a civil penalty. EPA should bring suit if civil penalty is appropriate, not an individual.
      6. *Association of Data Processing Services Organizations, Inc. v. Camp*, 397 US 150 (1970)
         1. Facts: Comptroller of Currency ruled that American National Bank & Trust Company could perform data processing incident to banking services.
         2. Issue: Standing.
         3. Holding: Standing found.
         4. Reasoning: Case or controversy, introduces zones of interest
            1. Standing may extend from economic or noneconomic
            2. Potential competitors in zone of interest
            3. Congressional intent to limit the business of banks
      7. *Clarke v. Securities Industry Ass’n*, 479 US 388 (1987)
         1. Facts: Two banks applied to offer brokerage services. Comptroller determined that brokerage offices will not constitute branches – no banking done. Union sued.
         2. Issue: Standing.
         3. Holding: Standing found.
         4. Reasoning: Zones of interest test
            1. Not demanding, no need that Congress intended to benefit would-be plaintiff
            2. “In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”
            3. Competitors who would be injured are “very reasonable candidates to seek review”
      8. *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 US 517 (1991)
         1. Facts: Postal Service determined that remailing was not within the urgent letter exception. Then suspended the PES for international remailing (allowing couriers to engage in the practice). Union sued claiming rulemaking record inadequate. Union claimed employment interest. Injury in fact not challenged (probably would have been overruled)
         2. Issue: Standing.
         3. Holding: No standing.
         4. Reasoning: Zones of interest
            1. Is employment interest within the zones of interest test?
            2. Congressional intent was not to protect postal workers’ employment
      9. *Bennett v. Spear* - Commercial users of water have standing to challenge decision under Endangered Species Act that would affect access to water.
      10. *National Credit Union Administration v*. *First National Bank & Trust Co.,* 522 US 479 (1998)
          1. Facts: Banks challenge ruling allowing unrelated federal employees to form credit unions.
          2. Issue: Standing.
          3. Holding: Standing found.
          4. Reasoning: “The proper inquiry I simply ‘whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected … by the statute.” One intent of § 109 was to limit federal credit unions.