

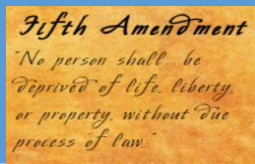
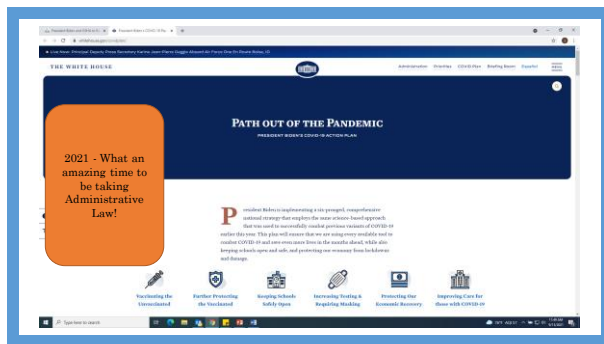


# ADMINISTRATIVE LAW

WEEK FOUR  
Tuesday, Sept. 14, 2021  
Professor Julia M. Glencer

## AGENDA

- 6:00 to 7:10 Basic Procedural Framework of Admin Action: *Rulemaking & Adjudication*
- Break ---
- 7:20 to 8:15 APA History & Definitions plus Black Letter Rules from *Chenery*
- 8:15 to 9:00 *Donovan* as Glimpse into "Other Activities" Implicating Constitutional Considerations



## The Basic Procedural Framework of Admin Law

## ADMIN AGENCY ACTIVITIES

“Congress generally assigns agencies a wide array of roles and responsibilities.” ADMIN LAW at 216.

### Two General Activities

- Rule-making
- Adjudication

### More Specific Activities

- Provide benefits
- Generate information
- Issue & monitor licenses
- Award grants
- Manage their own internal operations
- Gathering certain info

Rulemaking

Adjudication

Constitutional distinction based on “procedural due process” underlies this categorization and was fed into the Administrative Procedure Act (APA).

*Fifth Amendment*  
 “No person shall be  
 deprived of life, liberty  
 or property, without due  
 process of law.”

*14th Amendment*  
 ...nor shall any state deprive any  
 person of life, liberty, or property,  
 without due process of law; nor  
 deny to any person within its jurisdic-  
 tion the equal protection of the  
 laws.

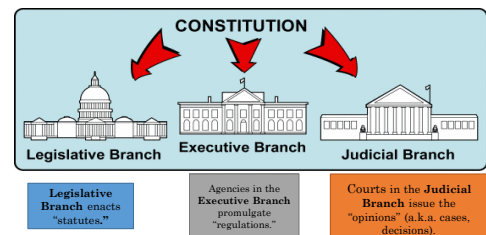
Procedural due process means . . . What?  
 For right now, let’s just say “notice & a *some kind of hearing*”  
 (What *kind* of a hearing is something we will study in Ch. 5)



### The *Londoner/Bi-Metallic* distinction:

- comes from a pair of cases that *predate* the APA and are always read together.
- is very important; you must be able to “work” with it.
- is not hard to grasp but often hard to articulate and may be more debatable than you might think.
- is based more on *attributes* than on any rigid distinction or easily-assigned label.
- will be on our Final Exam in some form . . .

### BRANCHES OF GOVERNMENT



## THE KEY QUOTE . . .

In *Bi-Metallic*, the Court distinguished *Londoner* with this KEY QUOTE:

**"A relatively small number of persons was concerned, who were exceptionally affected in each case upon individual grounds and it was held that they had a right to a hearing."**

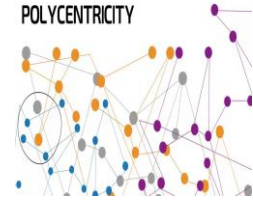
239 U.S. 441, 446.

Adversarial: Bi-Polar



Legislative: Polycentric

POLYCENTRICITY



To assess whether an exercise of authority is *legislative* or *adjudicative* in nature:

- **Number of persons/entities affected** (many v. "relatively small number"?)
- **Degree of affect** ("Exceptional" affect on few? Or are all "equally concerned"?)
- **Whether the affect is individualized in terms of "facts"**
  - Are the facts *legislative* in nature and linked to larger policy considerations?
  - Are the facts *adjudicatory* in nature (party-specific or largely independent of the parties?)
- **Are there political avenues for relief via our representative government?**
  - Small number of persons/entities affected? Politically disadvantaged group?
- **Is the impact prospective or retrospective?**
- **Is the underlying situation a bi-polar or a poly-centric dispute?**



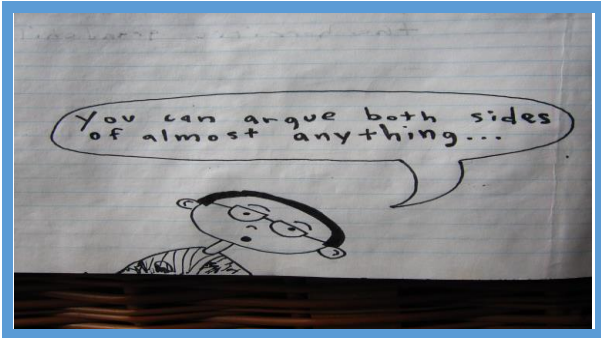
## Using the *Londoner*/*Bi-Metallic* Distinction

**Key quotes** to consider peppering into your analysis:

- Does a "subordinate body" have "a duty" of whether, in what amount, and upon whom, to make a levy, assessment, or apportionment? (*Londoner*)
- Would it "impractical" to afford a direct voice in the decision-making process?
- "General statutes can be validly passed that affect the personal property of individuals *sometimes to the point of ruin*, without giving them a chance to be heard." (*Bi-Metallic*) 🤪
- "There must be a limit to individual argument in such matters if government is to go on." (*Bi-Metallic*)

## Using the *Londoner*/*Bi-Metallic* Distinction

- Representative form of government necessarily limits direct participation in governmental policy-making.
- Even those ostensibly subject to a "new rule" may have some idea that it is coming. (So . . . should they have participated somehow?)
- Know that various parties may *feel* the impact differently; what may seem more legislative to one may seem very adjudicatory to another (think *carrier v. shipper*).
- Courts treat this analysis as *pragmatic*, not formalistic.
- It is futile to try to characterize a particular exercise of delegated power as either wholly legislative or wholly adjudicative in nature.
  - But it will push towards one end of the spectrum or the other.



## HYPOS – ATTRIBUTION

We worked through Hypos 1 and 2 in class. They were built on these two cases, albeit with some strategic changes & some poetic license . . . )

- *Hotel & Motel, Assoc. of Oakland v. City of Oakland*, 344 F.3d 959 (9th Cir. 2003)
- *Nat'l Small Shipments Traffic Conference, Inc. v. Interstate Commerce Comm'n.*, 725 F.2d 1442 (D.C. Cir. 1984).

## BREAK TO 7:20 p.m.



## Getting Started with the Administrative Procedure Act

## THE APA CAN BE HARD AT FIRST

- Expect for APA-related discussions to be a little “over your head” for awhile.
  - It's an act with sections that are all meant to work together.
  - It will get easier week-by-week.
  - Tab up/write on a hardcopy APA.

## THE APA CAN BE HARD AT FIRST

- Don't be confused when courts call it just “Act” and/or cite to section numbers vs. original bill numbers

We come, then, to examination of the text of the Act to determine whether the Government is right in its contentions: first, that the general scope of § 5 of the Act does not cover deportation proceedings; and, second, that even if it does, the proceedings are excluded from the requirements of the Act by virtue of § 7.

Wong Yang Sung v. McGrath, 339 U.S. 33, 48 (1950)

## ORIGINAL BILL SECTIONS OF APA

- |                         |                              |
|-------------------------|------------------------------|
| • § 1 Title             | • § 7 Hearings               |
| • § 2 Definitions       | • § 8 Decisions              |
| • § 3 Public Info       | • § 9 Sanctions - Powers     |
| • § 4 Rule-Making       | • § 10 Judicial Review       |
| • § 5 Adjudication      | • § 11 Examiners             |
| • § 6 Auxiliary Matters | • § 12 Construction & Effect |



## THE APA CAN BE HARD AT FIRST

- There are a lot of cross-references built into the APA to its other sections. *Tame them!*
  - Example:
    - (c) After notice required by this section, . . . when rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 [hearings] and 557 [initial decisions/records] of this title apply instead of this subsection.
- 5 U.S.C.A. § 553(c)

## THE APA CAN BE HARD AT FIRST

- The definitions can be *ghastly!*
- But they are key to understanding the APA's structure. For right now, spend your time on these:
  - "agency" (§ 551(1))
  - "rule" (§ 551(4))
  - "rule-making" (§ 551(5))
  - "order" (§ 551(6))
  - "adjudication" (§ 551(7))
  - "licensing" (§ 551(9))

## THE APA CAN BE HARD AT FIRST

- The *amount* of case law that has grown up around the APA is staggeringly HUGE.
  - 5 volumes in Title 5 U.S.C.A. (hardbound)
- Why? (*If you understand that, the sheer volume of cases will seem a little less daunting*).

## KEY HISTORY POINTS TO REMEMBER

*Wong Yang Sung v. McGrath*, 339 U.S. 33, 48 (1950).

Why is this case important?

\*But remember, it was immediately rejected by Congress on the merits!

## KEY HISTORY POINTS TO REMEMBER

As articulated by Justice Jackson in *Wong Yang Sung*:

- Concern over multiplication of admin agencies and expansion of their functions, especially with adjudication.
- Timeline:
  - 1939 Pres. Roosevelt directed AG to create Committee to study admin state
  - Congress acted too, passing Walter-Logan Bill (to prescribe standard procedures for admin agencies) but this act was VETOED by President Roosevelt
  - 1945 brought the McCarran-Sumner's bill, which evolved into APA; final bill signed into law by Pres. Truman in 1946

## WALTER GELLHORN!



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## KEY HISTORY POINTS TO REMEMBER

- Key quote from Justice Jackson in *Wong Yang Sung*:

"The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects."

*Wong Yang Sung v. McGrath*, 339 U.S. 33, 40-41 (1950).

## KEY HISTORY POINTS TO REMEMBER

- Two major purposes of the APA as articulated by Justice Jackson in *Wong Yang Sung*:
  - To introduce "greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."
  - To "curtail and change the practice of embodying in one person or agency to duties of prosecutor and judge." (Or at least to ameliorate the "evils" thought to come from such commingling.)

## APA & STATUTORY INTERPRETATION

- Plain language (*we'll look at some in a moment . . .*)
- Precedent articulating:
  - APA's purposes
  - The evils APA was intended to address
  - APA's basic structural imperatives
- Handful of key legislative history materials often used
  - Senate & House *Judiciary Committee Reports*
  - Attorney General's *Manual* on the APA (1947)

## APA & STATUTORY INTERPRETATION

- Should interpretation of the APA be *static* or *evolving*?
- Peter Strauss has diagnosed change in the USSC's approach to interpreting the APA over time:
  - **Phase 1: Early years** saw input by witnesses to its drafting; willingness to use legislative history.
  - **Phase 2: Middle years** saw procedural & paradigm shifts tied to efforts to move beyond debates of the 1940's and reinterpret text for contemporary developments (1960's-1970's).
  - **Phase 3: Recent years** saw move towards textual formalism; return to focus on word usage in 1940's) (1990's- now).

## APA & STATUTORY INTERPRETATION

- Is the APA a "super-statute"?
- This characterization is used to give support to the idea that certain statutory interpretation theories (*the more dynamic kind*) should be used to interpret it, because the APA should evolve.
- You decide what this means to you.
- It's a *theory* (albeit one that many accept).



## APA & STATUTORY INTERPRETATION

- A super-statute is “a law . . . that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law-- including an effect beyond the four corners of the statute. Super-statutes . . . must also prove robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture. . . . Super-statutes are applied in accord with a pragmatic methodology that is a hybrid of standard precepts of statutory, common law, and constitutional interpretation.

-William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

## APA & STATUTORY INTERPRETATION

Some of Eskridge & Ferejohn’s contenders for “super-statute” status:

- ❖ APA of 1946
- ❖ Sherman Anti-Trust Act of 1890
- ❖ The Civil Rights Act of 1964
- ❖ The Endangered Species Act of 1973



## APA & STATUTORY INTERPRETATION

- *Director, Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

*Why is this case important?*

## APA & STATUTORY INTERPRETATION

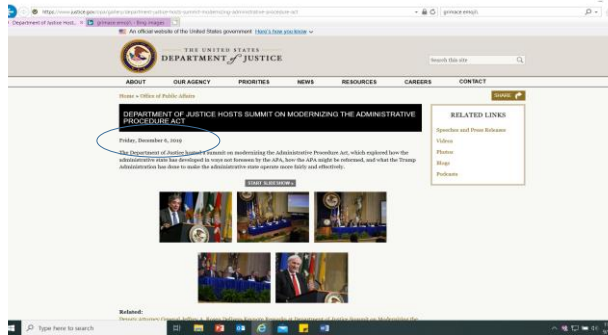
- APA remains in almost its original form from 1946; rarely amended.
- Rather, what we see is a LOT of court decisions impacting (expanding, changing, etc.) its meaning
- Freedom of Information Act (FOIA) was a major addition to the APA in 1967.
  - Different Congress (legislators with potentially very different mindset towards the admin state)
  - Some have argued that FOIA’s commitment to disclosure should impact *other* disclosure-related issues under the APA.

## APA & STATUTORY INTERPRETATION

- Many now believe the APA needs to be re-evaluated and/or *modernized*.
- *No longer a good fit* for today’s complex society/complex admin agency tasks.
- *Unforeseen developments* such as the rise of informal rule-making (while APA itself focused on formal adjudication which has diminished).
- Encrusted with many *judicial decisions* that have changed its focus from original intent or created additional concerns that now need to be addressed.



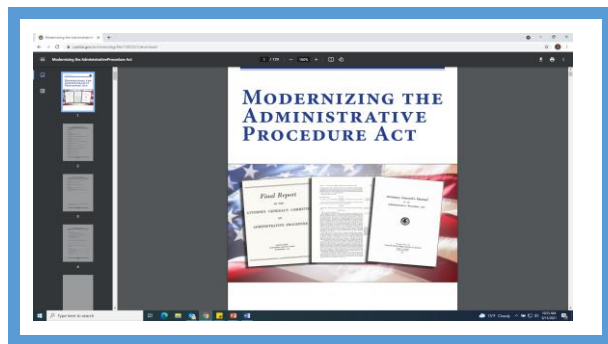




"... The APA has been described as the 'fundamental charter' of the 'Fourth Branch' of the government, and even as 'the constitution of the administrative state.' That last description, ... goes too far. **The Constitution of the administrative state is the Constitution of the United States.**

And the APA is celebrated largely because it advances the values of that fundamental charter by making administrative procedure more consistent with principles of due process and the rule of law."

Deputy AG, Jeff Rosen, *Keynote Speech at Summit* (Dec. 6, 2019).



## UNDERSTANDING THE APA

- APA is built on two sets of KEY distinctions:
  - **Rule-making & adjudication (activities)**
  - **Formal v. informal (descriptors)**
    - *Formal* tends to mean trial-like
- These concepts combine to create 4 models of admin agency activity:
 

Formal rule-making	Formal adjudication
Informal rule-making	Informal adjudication

## UNDERSTANDING THE APA

"The system based on these four models may seem abstract at first but it establishes a necessary analytical foundation. ... Approaching an administrative law question *begins* with classifying the process according to these models."

1 ADMIN L. & PRAC. § 2:10 ("A System of Four Basic Procedural Categories")

## UNDERSTANDING THE APA

- (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
- (5) "rule making" means agency process for formulating, amending, or repealing a rule;
- (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
- (7) "adjudication" means agency process for the formulation of an order.



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## UNDERSTANDING THE APA

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) “adjudication” means agency process for the formulation of an order;

## UNDERSTANDING THE APA



Just remember: Rate-making is a form of rule-making & licensing is a form of adjudication.

- This is significant because:
  - The public is affected by rate-making and licensing
  - The *Londoner/Bi-Metallic* analysis can fool you into forgetting the distinction between them.
  - The APA drafters aligned rate-making with rule-making and licensing with adjudication *by choice*, knowing the attributes of both activities.

Rulemaking  
APA § 553

Adjudication  
APA § 554

## UNDERSTANDING THE APA

- Formal v. informal
  - Easiest way to remember *this* is to know that the phrasing “*required by statute*” and “on the record” work together to indicate **formality**.
  - That language appears in § 553(c) for rule-making.
  - That language appears in § 554(a) for adjudication.
  - Recall that “formality” in this sense takes the form of “trial-like procedures.” (*Just realize that “trial-like” is not full-blown trial identical procedures.*)

## FORMALITY . . .

That language appears in § 553(c) for rule-making:

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. **When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.**

## FORMALITY . . .

That language appears in § 554(a) for adjudication:

(a) This section applies, according to the provisions thereof, in every case of adjudication **required by statute** to be determined **on the record** after opportunity for an agency hearing, except . . .

## UNDERSTANDING THE APA

The two we will study the MOST are starred:

Formal rule-making      Formal adjudication\*  
 Informal rule-making\*      Informal adjudication

## UNDERSTANDING THE APA

- **Slow Boil:** We have *all semester* to learn about the APA.
- We will build up that understanding slowly at first, more rapidly at the end (because the end involves courts).
- For right now, strive to understand:
  - the 2 sets of key distinctions (rule-making v. adjudication, formal & informal),
  - how we detect them in the language of the APA, and
  - how they work to impose a BIG PICTURE structure that is loosely based on the *Londoner/Bi-Metallic* distinction.

## SOME KEY BLACK-LETTER RULES OF ADMIN LAW

A “Peculiar Mix of Powers” Constrained By Certain Established Principles . . .

## BACKDROP

- Administrative agencies can, **if authorized by Congress**, select from a “**menu of policymaking tools**” in order to carry out their delegated task(s).
- Congress is constitutionally permitted to bestow upon administrative agencies a “peculiar mix of powers: partly legislative, partly executive, and partly judicial.”
- The choice of which policymaking tool to rely upon is usually **within the discretion of the agency as informed by its expertise and experience** [and . . . by what else?].



- By these kinds of considerations:

- *Londoner/Bi-Metallic* distinction (i.e., the Constitution)
- Basic “rule of law” values
- How sure the admin agency is about the policy it wishes to adopt
- How frequently the issue is expected to arise
- What other issues are entangled with it
- What other issues are pressing for attention
- Obstacles to each form of activity
- Political influence
- Anticipated judicial reaction

- *The Chenery Cases (Chenery I & Chenery II)* are foundational.
- They contain **black letter rules of Admin Law** that you must commit to memory.
- They impact almost *everything* we will now be reading.



### FROM *CHENERY I*

- **Rule:** “A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action **solely on the grounds invoked by the agency.**” [Why?]
- **Rule:** “If those grounds are inadequate or improper, the court is **powerless to affirm** the administrative action by substituting what it considers to be any more adequate or proper basis.” [Why?]

### FROM *CHENERY I*

- **Rule:** “If the administrative action is to be tested by the basis upon which it purports to rest, **that basis must be set forth with such clarity as to be understandable.**” [Why?]

### FROM *CHENERY I*

- The three rules from *Chenery I* are inter-related and thought to create an *imperative* for the admin agency.
- The admin agency must clearly explain and justify its actions which, in turn:
  - bolsters its political accountability;
  - prevents post hoc rationalization and arbitrariness;
  - ensures exercise of judgment by the admin agency decision-makers (not just by lawyers & judges after the fact).

### *CHENERY II*



## CHENERY II

“This time, after a thorough reexamination of the problem in light of the purposes and standards of the . . . [Act], the Commission has concluded that the proposed transaction is inconsistent with the . . . Act. It has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order.”

*Chenery II*, excerpt at 251.

• “We held no more and no less than that the Commission’s first order was unsupportable for the reasons supplied by that agency.”

• “But when the case left this court, the problem *whether Federal’s management should be treated equally with other preferred stockholders* still lacked a final and complete the answer.”

• “It was clear that the Commission could not . . .”

*Chenery II*, excerpt at 252.

• “Still unsettled, however, was the answer the Commission might give were it to bring to bear on the facts the proper administrative and statutory considerations, a function which belongs exclusively to the Commission in the first instance.”

• “The administrative process had taken an erroneous rather than a final turn. . . .”

• “After the remand. . . , the Commission was bound to deal with the problem afresh performing the function delegated to it by Congress.”

*Chenery II*, excerpt at 252.

“Since the Commission, . . . [has] the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct within the framework of the [Act].”

“The function of filling in the interstices of the Act *should be performed*, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.” [Why?]

*Chenery II*, excerpt at 253.

*“But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . .”*

Not every principle essential to the effective administration of a statute can or should be cast immediately into . . . a general rule.

Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.

In performing its important functions . . . therefore, an administrative agency must be equipped to act *either* by general rule or by individual order.”

*Chenery II*, excerpt at 253.

“The agency must retain power to deal with the problems *on a case-by-case basis* if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.”

“And the choice made between proceeding by general rule or by individual, ad hoc litigation is one then lies primarily in the informed discretion of the administrative agency.”

*Chenery II*, excerpt at 253.

"The scope of our review of administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. **The wisdom of the principle adopted as none of our concern.** Our duty is at an end when it becomes evident that the Commission's action is based on substantial evidence and is consistent with the authority granted by Congress . . ."

*Chenery II*, excerpt at 254.

"The Commission's conclusion here rests **squarely in the area** where administrative judgments are entitled to the greatest amount of weight by appellate courts."

"It is the product of **administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts.**"

"It is the **type of judgment** which administrative agencies are best equipped to make . . . Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb."

*Chenery II*, excerpt at 254.

"This is administrative authoritarianism, this power to decide without law. . . This seems to me to undervalue and to belittle the place of law[.]"

*Chenery II*, excerpt at 256 (Jackson, J., dissenting).



## QUESTIONS OF RETROACTIVITY?

- *My advice?*
- Be sure you understand the basic considerations.
  - Preference for *legislative-type activity* to be *prospective*.
  - *Adjudicative-type activity* is typically *retrospective* (because it reviews actions have already occurred).
  - If the adjudication actually involves the imposition of a new rule, should it be applied prospectively for fairness?
  - *Chenery* (which emphasized expertise/choice) fits here.
  - There are many difficult nuances in between so . . .
    - DO RESEARCH! (*No one memorizes this stuff!*)

## REMAND without VACATUR

**REMAND without VACATUR**

Home / Projects / Remand Without Vacatur

**Remand Without Vacatur**

Recommendation **enact 4 - Remand Without Vacatur** requires judicial review of an agency decision for further consideration while allowing the decision to remain in place. It examines the agency and legislative process that may justify its application. The recommendations office guidance for courts that remand agency actions and for agencies responding to judicial orders.

**Contacts**

House: [email address]  
 Senate: [email address]  
 Committee: Judicial Review

**Featured Documents**

The Unusual Remedy of Remand Without Vacatur Final Report

Recommendations Assembly Projects Office of the Chairman Office of the Chairman Working Groups

Rulemaking

APA § 553

Adjudication

APA § 554

## ADMIN AGENCY ACTIVITIES

“Congress generally assigns agencies a wide array of roles and responsibilities.” ADMIN LAW at 216.

### Two General Activities

- Rule-making
- Adjudication

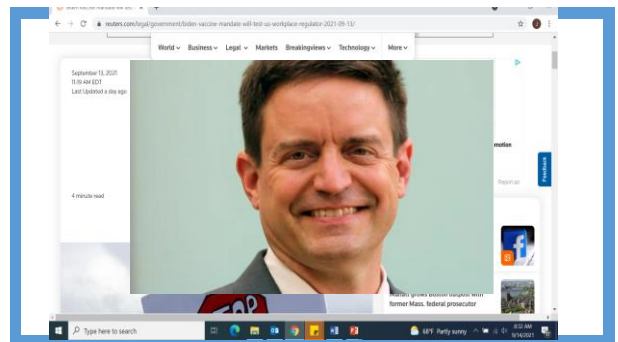
### More Specific Activities

- Provide benefits
- Generate information
- Issue & monitor licenses
- Award grants
- Manage their own internal operations
- Gathering certain info

## A GLIMPSE INTO “OTHER ACTIVITIES”

## OTHER ACTIVITIES . . .

- Info gathering can be time-consuming, costly & burdensome
- Paperwork Reduction Act = effort to centralize oversight by Office of Information & Regulatory Affairs (OIRA)
- Much info gathering through **record-keeping & inspection**
  - Both tied to admin agency's budget
  - As budgets decline, admin agencies use more cooperative methods (v. police-style methods) of info-gathering & inspection



## OTHER ACTIVITIES . . .

- Does the U.S. Constitution protect the regulated public vis-à-vis these info-gathering/inspection activities?
  - Yes, but **MINIMALLY***
- 4<sup>th</sup> Amendment protects against unreasonable search & seizure but warrants rarely required and not required in pervasively regulated industries.
  - The concern is with unbridled discretion of the inspectors . . .
  - Look to the organic/enabling act for parameters
- 5<sup>th</sup> Amendment protects against self-incrimination but corporate entities are not “persons.”
  - Protection for self-incrimination in crim. context, not regulatory enforcement



"Congress has broad authority to regulate commercial enterprises engaged in or affecting interstate commerce, **and an inspection program may be in some cases be a necessary component of federal regulation.**"

"[T]he Fourth Amendment protects the interests of the [property] owner in being free from **unreasonable** intrusions onto his property by agents of the government. Inspections . . . may be unreasonable if [1] they are not authorized by law or [2] are unnecessary for the furtherance of Federal interests. . . . [But] the assurance of regularity provided by a warrant may be **unnecessary under certain inspections schemes.**"

*Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

"[A] warrant *may not* be constitutionally required when [1] *Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme* **and** [2] *the federal regulatory presence is sufficiently comprehensive and defined* that the owner of commercial property cannot help but **be aware** that his property will be subject to periodic inspections undertaken for specific purposes."

*Donovan*, 452 U.S. at 600 (emphasis added).

- Courts do NOT allow "unbridled discretion" by admin officers.
- Either the warrant requirement or the statutory scheme needs to protect the subject of the investigation.
- *Colonnade-Biswell* exception for the **pervasively regulated industry**. [*Two examples?*]
- Test used by Majority in *Donovan*:
  - "[T]he only real issue before us is whether the statute's inspection program, *in terms of the certainty and regularity of its application*, provides a constitutionally adequate substitute for a warrant. We believe that it does." 452 U.S. at 603 (emphasis added).
- Role for "history"? (Majority v. Dissent)

## PERVASIVELY REGULATED INDUSTRY?

**WARNING:** "Congress after today can define any industry as dangerous, regulate it substantially, and provide for warrantless inspections of its members. But, because I do not believe that Congress can, by legislative fiat, rob the members of any industry of their constitutional protection, I dissent from the opinion and judgment of the Court."

- *Donovan*, 452 U.S. at 613-14 (Stewart, J., dissenting).

## PERVASIVELY REGULATED INDUSTRY?

- *Validity Of Warrantless Administrative Inspections Of Business That Is Allegedly Closely Or Pervasively Regulated: Cases Decided Since Colonnade*, 182 A.L.R. Fed. 467 (2002 with 2021 Supp.)
- **HUGE** 146 page ALR
  - What do you think might be such an industry?



- "It Can Happen to You," MSHA Training Video, <https://www.youtube.com/watch?v=kExUEnceEi0> (12:36 min.)
- "Part 100, MSHA Fines," Mine Safety Center, <https://www.youtube.com/watch?v=sdth5ZyoOEIw> (5:23 min.)
- "How to Talk with MSHA Inspector," Kim Redding, Mine Safety Center <https://www.youtube.com/watch?v=Cxe-Un76Ge4> (2:09 min.)





