



ADMINISTRATIVE LAW

WEEK ONE – Tues., Aug. 24, 2021
Professor Julia M. Glencer

AGENDA

6:00 to 6:30

Introductions – To Me, This Course & You

6:30 to 7:20

Laying Some Background for Admin Law Basics

-----Break-----

7:30 to 8:00

A Little More on Admin Law Basics

8:00 to 9:00

Juicier Stuff: A Taste of Separation of Powers & Presidential Direction of the Admin State



LET ME TELL YOU ABOUT ME ...

Duckle.



LET ME TELL YOU ABOUT ME ...



K&L GATES



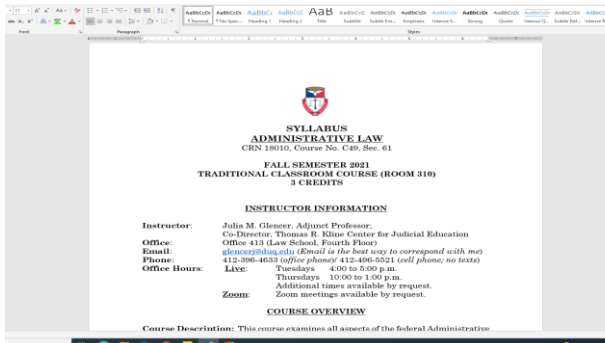
LET ME TELL YOU ABOUT ME ...

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MY CLASSROOM POLICIES

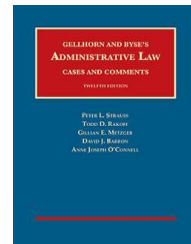
- PowerPoint for Lectures – I use, I don't post in advance.
- Class Participation & Speaking – SPEAK!! (No passing)
- Attendance – Please be here; I cover a lot each week.
- Lateness to class
 - Please always warn me in advance if you think you might be late.
 - Chronic lateness will be a problem . . .
- Asking Questions – Ask! Just ask.



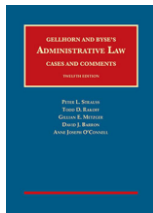
MY E-MAIL POLICY

- You may e-mail me anytime about anything; I will respond promptly.
 - Your emergency is not necessarily my emergency.
 - I go to bed early.
- The *writing* in an e-mail always counts!
 - I insist on proper e-mail etiquette.
 - Beware e-mail rudeness/cuteness/over-familiarity.
- For complex questions (lengthy, multi-part, etc.) or for genuine problems, best to talk to me.
 - And remember, I was an LRW Professor for a long time. (Free counseling!)

OUR TEXTBOOK



WHAT KIND OF A COURSE IS THIS?



- Leg/Reg
- Basic Admin Law
- Advanced Admin. Law

WHAT KIND OF A COURSE IS THIS?

Statutory Construction



Constitutional Law





SUMMARY OF CONTENTS

- ✓ Part 1 : Overview
- ➔ Part 2: Understanding Statutes
- Part 3: The Agency at Work (Ch. III, IV, V, VI)
- Part 4: The Agency and the Constitution (Ch. VII)
- Part 5: Judging the Work of Agencies (Ch. VIII, IX)

ASSIGNMENTS & GRADING

Assignment	Time/Date	Word Count	Grading
Writing Exercise 1	Assigned after class on Wed, Aug 26, 10:00 am (Week 1)	500 words min/100 words max	20 possible points
Writing Exercise 2	Assigned after class on Wed, Aug 26, 10:00 am (Week 1)	500 words min/100 words max	20 possible points
Writing Exercise 3	Assigned after class on Wed, Aug 26, 10:00 am (Week 1)	500 words min/100 words max	20 possible points
Writing Exercise 4	Assigned after class on Wed, Aug 26, 10:00 am (Week 1)	500 words min/100 words max	20 possible points
Final Exam	Scheduled for Friday, Dec 10	10 Multiple Choice 10 Essay Questions (1000 words) 100 points	100 possible points

ANY QUESTIONS?



NOW TELL US ABOUT YOU . . .

1. Your name & status (2L, 3L, 2E, 3E, 4E)
2. Do you have any connection(s) to Admin Law?
 - ❖ Any Admin Law before law school? Military maybe?
 - ❖ Running into Admin Law in your current job?
 - ❖ Future job (job already "in the can," or one you may seek)?
 - ❖ Just want to understand this important topic?

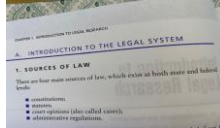
LAYING SOME BACKGROUND FOR ADMINISTRATIVE LAW BASICS



FOUR MAIN SOURCES OF LAW

- (1) Constitutions
- (2) Statutes
- (3) Cases [*a.k.a. court opinions, decisions*]
- (4) Administrative regulations

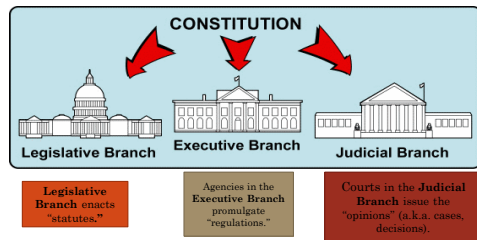
SLOAN!



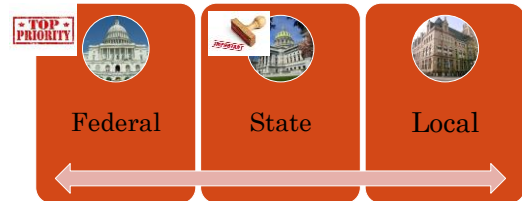
"We the People of the United States in Order to form a more perfect Union, to establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, **do ordain and establish the Constitution of the United States of America."**



BRANCHES OF GOVERNMENT



SYSTEMS OF GOVERNMENT



FOUR MAIN SOURCES OF LAW

- (1) Constitutions
- (2) Statutes
- (3) Cases [*a.k.a. court opinions, decisions*]
- (4) Administrative regulations



FEDERAL CONSTITUTION?

- Where can you find a copy of the U.S. Constitution?
- Are there annotations available to constitutional provisions?
- Did you see the U.S. Constitution in the back of our textbook? [*make asterisks*]

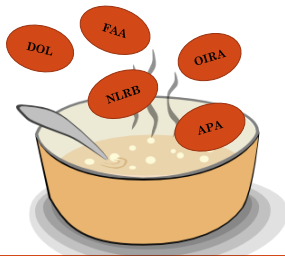


FEDERAL STATUTES?

- Where can you find copies of United States statutes?
- Annotations?
- Statute(s) in the back of our textbook?
 - Administrative Procedure Act (APA)
 - Freedom of Information Act (FOIA)
 - Government in the Sunshine Act (Sunshine Act)



READY FOR ACRONYM SOUP?

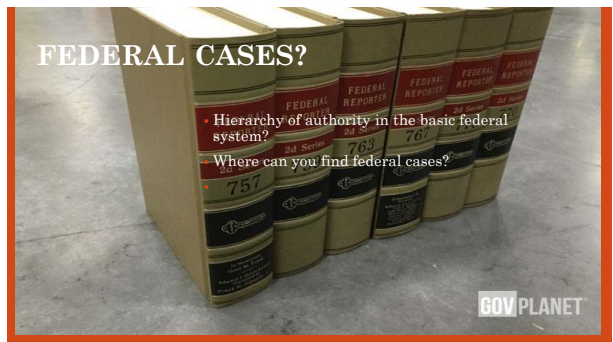


Guidance on When to Use Acronyms?

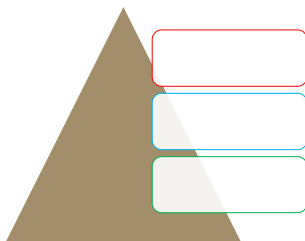


FEDERAL CASES?

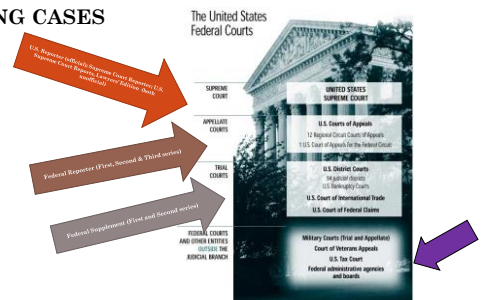
- Hierarchy of authority in the basic federal system?
- Where can you find federal cases?

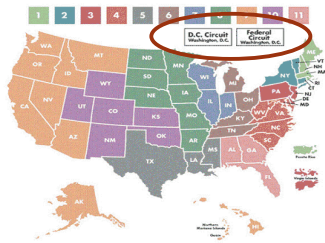


FEDERAL COURT SYSTEM



FINDING CASES





The Thirteen Federal Judicial Circuits

FOUR MAIN SOURCES OF LAW

- ✓ (1) Constitutions
- ✓ (2) Statutes
- ✓ (3) Cases (*a.k.a. court opinions, decisions*)
- ✓ (4) Administrative regulations

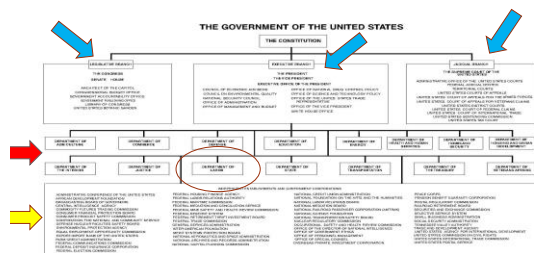


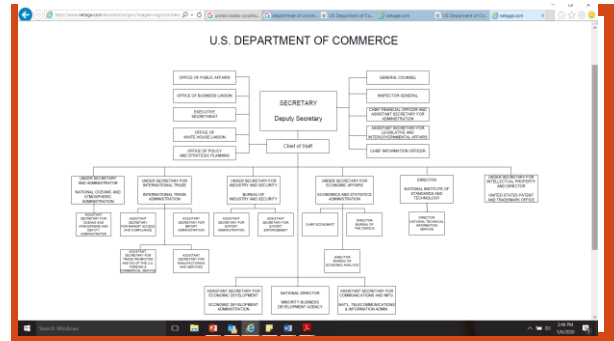
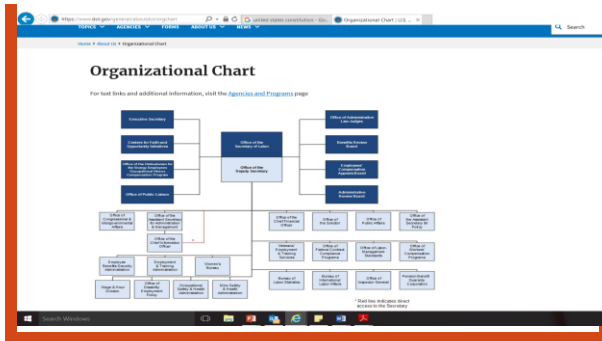
WHAT IS AN ADMIN AGENCY?

- “[A]ll of the **authorities** and **operating units of the [federal] government** **except for** the constitutionally-established entities in the first three articles” – i.e., Congress, the President & Vice President and the U.S. Supreme Court.
- ADMIN. LAW at 22.
- Often called: **agencies**, but sometimes also (depending on their structure), **departments**, **boards**, **commissions**, etc.
- **Agencies** is used because these entities are “**agents**” of the constitutionally-established “**principals**.” As **agents**, they carry out tasks for their **principals**.
- But **administrative agency** is the better term (because this course is “administrative law” – not “agency law.”)

WHAT IS AN ADMIN. AGENCY?

- | | |
|---|------------------------------------|
| 1. White House Agencies | • Example: OMB (houses OIRA) |
| 2. Cabinet Departments (15) | • Example: DOL |
| 3. Executive Agencies
(other within cabinet department or free-standing) | • Examples: FAA, EPA |
| 4. Independent Regulatory Commissions & Boards | • Examples: NTSB, FERC |
| 5. Admin agencies only partly federal in nature | • Government corporation like USPS |





THINGS THAT COMPLICATE ADMIN LAW



- Unknown admin agencies (their structure, their purpose, etc.)
- Acronym overload
- Unfamiliar/technical context given the admin agency's specialty
- Unfamiliar documents being referred to/cited in cases
- Unfamiliar citation formats encountered
- New research resources and tools for you to use
- Importance of surrounding history
- Cases wrapped in unfamiliar procedural history
- **AND** things are *in flux* which means you need to know admin law past, present & future

WHERE DO ADMIN AGENCIES COME FROM?

Administrative agencies are **NOT** created by the federal Constitution (like the three branches of government).

Administrative agencies are created ("born") and/or organized by:

- statute enacted by the legislative ("organic" statute or "organic acts")
- executive/presidential directive

In fact, *the Constitution says VERY little about them*, although it does come into play when we consider the relationships of the other three branches to the admin agencies.

EXAMPLES

Ex. 1: Birth of Admin Agency by Organic Statute/Act

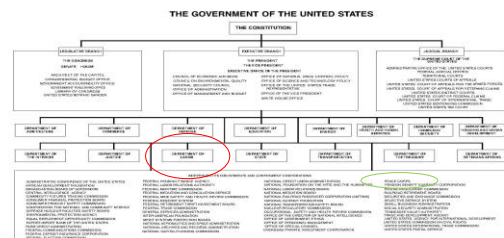
- Birth of DOL
- 29 U.S.C. § 551

Ex. 2 & 3: Birth of Admin Agency by Presidential Directive

- Birth of Peace Corps
- Exec. Orders
- E.O. 10924 (birth)
- E.O. 11041 (funding/power)

Ex. 4: Giving Existing Admin Agency New Task

- DOL Exists
- Armed with new tasks vis-à-vis WARN Act in 1989 thru 29 U.S.C. § 2107



EXAMPLES

Ex. 1: Birth of Admin Agency by Organic Statute/Act	Ex. 2 & 3: Birth of Admin Agency by Presidential Directive	Ex. 4: Giving Existing Admin Agency New Task
<ul style="list-style-type: none"> • Birth of DOL • 29 U.S.C. § 551 	<ul style="list-style-type: none"> • Birth of Peace Corps • Exec. Orders • E.O. 10924 (birth) • E.O. 11041 (funding/power) 	<ul style="list-style-type: none"> • DOL Exists • Armed with new tasks vis-à-vis WARN Act in 1989 thru 29 U.S.C. § 2107

“Enabling statute”

OH, THE DOL HAS LABOR EXPERTISE

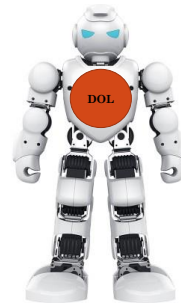
- Black Lung Benefits Act (BLBA)
 - Contract Work Hours and Safety Standards Act (CWHSSA)
 - Davis-Bacon and Related Acts (DBRA)
 - Employee Polygraph Protection Act (EPPA)
 - Employee Retirement Income Security Act (ERISA)
 - Fair Labor Standards Act (FLSA)
 - Family and Medical Leave Act (FMLA)
 - Federal Employees' Compensation Act (FECA)
 - Federal Mine Safety and Health Act (Mine Act)
 - Labor-Management Reporting and Disclosure Act (LMRDA)
 - Longshore and Harbor Workers' Compensation Act (LHWCA)
 - Migrant and Seasonal Agricultural Workers Protection Act (MSPA)
 - Occupational Safety and Health Act (OSHA)
 - Rehabilitation Act of 1973, Section 503
 - Worker Adjustment and Retraining Notification Act (WARN)...
- [And this only about 1/3 the list]



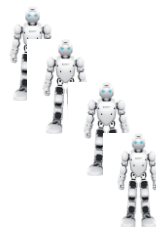
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“Enabling statute”



OURS IS A VAST, DIVERSE LAND IN AN INCREASINGLY COMPLEX WORLD



BREAK TO 7:30 p.m.



THE MOST IMPORTANT THING YOU WILL LEARN IN THIS COURSE!

- Admin agencies have no independent existence; they are created and enabled/empowered by the legislature and to a lesser extent by the executive.
- You must ALWAYS look for an admin agency's source of authority *to exist* and *to act*.

CONGRESS OFTEN CREATES SKELETAL ACTS



TOPICAL AREAS FOR ADMIN AGENCIES

- Economic intervention
- Social programs
- “Quality of life” programs

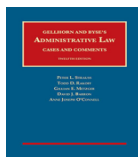
WHAT IS ADMIN LAW?

- “Administrative law comprises **the body of general rules and principles** governing administrative agencies –governing both how they do their own work and how the results of that work will be viewed, or reviewed, by the President, Congress, and the federal courts.”

- ADMIN. LAW at 22.

WHAT IS ADMIN LAW?

- Admin law as a **body of general principles** as distinguished from the particular substantive law that a specific admin agency deals with.



v

OH, THE DOL HAS LABOR EXPERTISE

- **Black Lung Benefits Act (BLBA)**
- **Contract Work Hours and Safety Standards Act (CWHSSA)**
- **Two-Weeks and Related Acts (COWA)**
- **Employee Polygraph Protection Act (EPPA)**
- **Employee Retirement Income Security Act (ERISA)**
- **Fair Labor Standards Act (FLSA)**
- **Family and Medical Leave Act (FMLA)**
- **Federal Employees' Compensation Act (FECA)**
- **Federal Mine Safety and Health Act (Mine Act)**
- **Labor Management Reporting and Disclosure Act (LMRDA)**
- **Longshore and Harbor Workers' Compensation Act (LHWCA)**
- **Majorant and Related Agreements/ Worker Protection Act (SOPFA)**
- **Occupational Safety and Health Act (OSHA)**
- **Rehabilitation Act of 1973, Section 504**
- **Worker Adjustment and Retraining Notification Act (WARN)...**



WHERE DO YOU FIND ADMIN LAW?

- U.S. Constitution
- Federal statutes
- Federal court decisions
- Executive orders

All of the materials developed/issued by the admin agencies themselves.

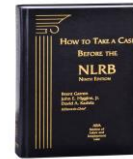
[Like what?]

All of the materials developed/issued by the admin agencies themselves.

[Like what?]

Regulations
Guidance Memos
Statements of Policy
Licenses
Permits
Rates
Board decisions
Commission rulings
Sanctions & penalties
Advice letters, etc.

- Just as each admin agency exists in its own substantive law orbit, admin agencies also usually have their own "internal law of administration."
- That's NOT what *this* course covers, but know it exists.

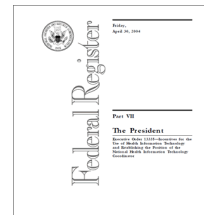


FOUR MAIN SOURCES OF LAW

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20 C.F.R. § 639.3(a)(4) (2019).



54 Fed. Reg. 16,042 (Apr. 20, 1989).

ADMIN AGENCY STRUCTURES

- “Congress has broad authority to structure the agency as it sees fit, subject to constitutional limitations[.]”
- ADMIN. LAW at 215.

• There are a few *common* structures. *What are they?*

ADMIN AGENCY STRUCTURES



- Single agency head nominated by President with Senate consent, removable by President at will



- Independent regulatory commission headed by collegial body with members nominated by President, confirmed by Senate, for staggered, fixed terms, removable only for cause



- Independent agency with single head with term tenure and for-cause removal protection

ADMIN AGENCY STRUCTURES



- Independent commission inside an executive agency; members have term appoints & removal for cause protection (like FERC inside the Dept. of Energy)



- “Private corporations” to serve policy goals for the government



- Use of state agencies subject to federal administrative oversight

ADMIN AGENCY STRUCTURES

Seila Law Majority, by C.J. Roberts

- “In organizing the CFPB, Congress **deviated** from the structure of nearly every other independent administrative agency in our history.”
- “CFPB’s single-director configuration is **incompatible** with our constitutional structure.”
- CFPB’s configuration is a “historical **anomaly**.”

Seila Law, Kagan, J., Dissenting in Part

- “Throughout the Nation’s history, this Court has **left most decisions** about how to structure the Executive Branch [and its admin agencies] to Congress and the President, acting through legislation they both agree to.”
- “[I]n creating the CFPB, those branches must have thought they had done a good day’s work. **Relying on their experience and knowledge of administration, they had built an agency in the best way suited to carry out its functions.**”

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
- Setting rates
- Manage their own internal operations
- Gather certain info*

ADMIN LAW & INFO

- A LOT of government activity relevant to admin agency action occurs *before* rule-making and adjudication; this kind of activity is less studied and rarely challenged (so few court cases address this).
- The *gathering of info* and the *making of general policy* generally occurs more behind-the-scenes.
- Info gathering is the admin agency activity that affects most individuals.*
- Info is raw material; used to inform policy decisions.
- Info gathering can itself be a form of government regulation & disclosure.

ADMIN LAW & INFO

- Many regulatory regimes include *obligations* to disclose/routinely file info with failure punishable by sanctions (agency imposed) or criminal penalties (court-assisted).
- How is the info gathered?
 - Inspections (*think coal mine inspection*)
 - Required filings (*think tax returns, chemical emission reports*)
 - Subpoenas (*think investigation of health care fraud*)
- Info gathering raises many related concerns: how to collect it, how to use it efficiently, how to store it, how to respect privacy within it, etc.
- Admin agencies (as government) must respect 4th & 5th Amendments.



ADMIN LAW & INFO



“Any effort at control[ling the paperwork aspect] quickly confronts the reality that much of the government’s curiosity is firmly rooted in the programs it seeks to administer. Information is required to assure that the rules of government programs are being respected, to permit intelligent decisions about the future course of policy, to understand the workings and needs of [regulated entities], and to inform the public about matters of common concern.”

- ADMIN LAW, at 269.

ADMIN AGENCY ACTIVITIES

- “For most prominent federal agencies, the *combination* of rulemaking, executing, and the adjudicating functions is a key feature of their responsibilities.”

- ADMIN LAW at 217 (emphasis added).

- “Congress frequently entrusts agencies with extensive policy-setting powers, subject only to *broad limitations*, such as that they must regulate ‘in the public interest’ or set emission standards ‘requisite to protect the public health.’”

- ADMIN LAW at 217 (emphasis added).



Seila Law Syllabus

In the wake of the 2008 financial crisis, Congress [in the Dodd-Frank Wall Street Reform and Consumer Protection Act] established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency **tasked with ensuring that consumer debt products are safe and transparent. . . . Congress transferred the administration of 18 existing federal statutes to the CFPB**, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act; and Congress enacted a new prohibition on unfair and deceptive practices in the consumer-finance sector. . . . In doing so, Congress gave the CFPB **extensive rulemaking, enforcement, and adjudicatory powers, including the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, prosecute civil actions in federal court, and issue binding decisions in administrative proceedings. The CFPB may seek restitution, disgorgement, injunctive relief, and significant civil penalties** for violations of the 19 federal statutes under its purview. So far, the agency has obtained over \$11 billion in relief for more than 25 million consumers.

WHAT IS THIS THING???



- “The CFPB Director has **no boss, peers, or voters** to report to. Yet the Director **wields vast** rulemaking, enforcement, and adjudicatory authority over a **significant portion** of the U.S. economy.”
- “The Director is **neither elected** by the people **nor meaningfully controlled** (through the threat of removal) by someone who is. The Director does **not even depend on Congress for annual appropriations. . . .**”
- “Yet the **Director may unilaterally**, without meaningful supervision, issue final regulations, **oversee** adjudications, set enforcement priorities, **initiate** prosecutions, and determine what **penalties to impose on private parties.**”
- “With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may **dictate and ENFORCE POLICY FOR A VITAL SEGMENT OF THE ECONOMY AFFECTING MILLIONS OF AMERICANS.**”

YIKES! RUN!



- “[T]he CFPB emerged out of disaster. The collapse of the subprime mortgage market “precipitat[ed] a financial crisis that wiped out over \$10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes.”
- “Congress and the President came together to create an agency with an important mission. It would protect consumers from the reckless financial practices that had caused the then-ongoing economic collapse. . . .”
- “The two political branches, acting together, gave the CFPB Director the same job protection that innumerable other agency heads possess. All in all, those branches must have thought, they had done a good day’s work. Relying on their experience and knowledge of administration, they had built an agency in the way best suited to carry out its functions. They had protected the public from financial chicanery and crisis. They had governed.”

AH. So calming . . .



“And now consider how the dispute *ends—with five unelected judges rejecting the result of that democratic process.* . . .

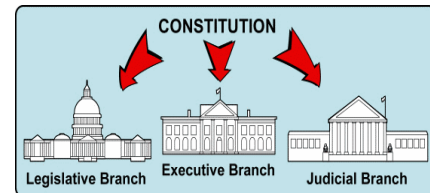
[T]he majority on constitutionality jettisons a measure Congress and the President viewed as integral to the way the agency should operate. The majority does so even though the Constitution grants to Congress, acting with the President’s approval, the authority to create and shape administrative bodies. And *even though those branches, as compared to courts, have far greater understanding of political control mechanisms and agency design.*”



THE JUICY STUFF

*Small Taste of Two of the Major
Issues in the Admin Law World
Separation of Powers
Presidential Direction*

SEPARATION OF POWERS . . .



SEPARATION OF POWERS – What are you? Do you *even* know?



Formalist?

- Typically insist on a firm textual basis in the Constitution for any exercise of government power
- Tend to understand the structuralist features of our government in terms of literal language and original intent
- Usually committed to strong “separation” between branches

Functionalist?

- Tend to ask whether the action of one branch interferes with the core functions of another
- Sharing of powers & alliances not repugnant so long as basic separation not impaired
- Usually willing to consider changed circumstances and broad objectives like efficiency

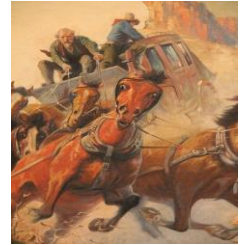


Seila Law, Kagan, J., dissenting in part

“The majority offers the civics class version of separation of powers — call it the **Schoolhouse Rock definition** of the phrase. See *Schoolhouse Rock! Three Ring Government* (Mar. 13, 1979), <http://www.youtube.com/watch?v=pKSGyiT-o3o> (“Ring one, Executive. Two is Legislative, that’s Congress. Ring three, Judiciary”). The Constitution’s first three articles, the majority recounts, “split the atom of sovereignty” among Congress, the President, and the courts. . . . And by that mechanism, the Framers provided a “simple” fix “to governmental power and its perils.” . . . There is nothing wrong with that as a beginning (except the adjective “simple”).”

"[The] important fact is that an [admin] agency is neither Congress nor President nor Court, but *an inferior part of government*. Each agency is **subject to control relationships** with some or all of the three constitutionally named branches, and those relationships give an assurance – functionally similar to that provided by the separation-of-powers notion for the constitutionally named bodies – that they will not pass out of control. . . . **What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions to which parts of the authority of each may be lent. The three must share the reins of control; means must be found of assuring that no one of them becomes dominant.** But it is not terribly important to number or allocate **the horses that pull the carriage of government.**

Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 579–80 (1984).



Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).



"[H]e shall *take Care* that the laws be *faithfully executed*."

U.S. Const., Art II, § 3 (wildly amorphous language emphasized).

SPOT THE ADMIN AGENCY?

- President acted by issuing a directive, via Executive Order, to the **Secretary of Commerce**.
- And the **Secretary of Commerce** acted on it, by issuing his own orders taking possession of most of the steel mills and directing the presidents of the companies to maintain their operations."



- **Justice Black, majority opinion**
 - Congress had refused to adopt seizure method of settling labor disputes
 - The "take care/faithful execution" clause does not alter the fact that *execution* is NOT law-making; only Congress can make law (unless that power is delegated and it wasn't here)
 - Pretty rigid conceptualization of the meaning of separation of powers vis-à-vis the branches

• Justice Jackson, concurring in judgment & opinion

- Lack of useful/unambiguous constitutional authority to guide exercise of executive power
- The idea that the Constitution envisions “separateness but interdependence, autonomy but reciprocity” [*I might note whether I agree with that or not*]
- Notes on the tri-partite method of categorizing the exercise of Presidential power to test its legality (and that this seizure was said to fail under the 3rd category)
- Recognition of how a President fills the public eye
- His caution about Congress losing power if it didn’t use its lawmaking tools.
 - [*I’d make a note to myself about how prescient the last two paragraphs in the Justice Jackson opinion truly were.*]

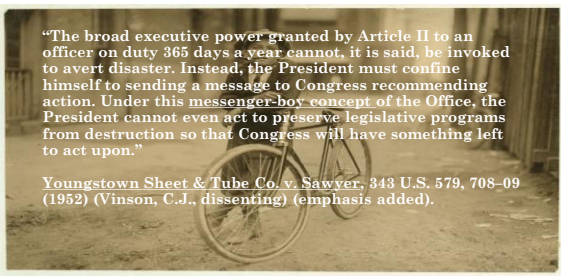
• Justice Frankfurter, concurring

- Hits Justice Jackson hard for creating a tri-partite test when unnecessary
- Viewed LMRA as reflecting Congress withholding seizure power from President
- Line about the judiciary having to be “wary & humble” when dealing with separation of powers
- His idea that “It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life had put on them.” [*I might note whether I agree with that or not*]

• Chief Justice Vinson, dissenting

- Highlights the statutes providing Korean War support; cautions that the case involves STEEL
- Accuses the other Justices of dealing in strawmen
- Offers *the most direct language* about the difference between power executed by the executive vs. power exercised by the admin agencies:
 - *Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head to a department when administering a particular statute, the President is a constitutional officer charged with taking care that a ‘mass of legislation’ be executed. Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. This practical construction of the ‘Take Care’ clause, advocated by John Marshall, was adopted by this Court in [listing cases].*

And finally, the “messenger” boy concept . . .



“The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon.”

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 708–09 (1952) (Vinson, C.J., dissenting) (emphasis added).

PRESIDENTIAL DIRECTION

“[M]odern regulatory statutes typically delegate decisional authority to some named Federal official – a Cabinet Secretary, an Administrator, or members of an independent commission.”

- ADMIN. LAW at 950.

“[W]hat is the scope of the President’s power to direct particular regulatory outcomes if the statutory delegation to a named official is silent as to the President’s role?”

- *Id.*

PRESIDENTIAL DIRECTION

- “That presidents regularly assert such directive authority is beyond dispute. But administrative law has not kept up with the increasing centrality of the president’s in the executive branch decision-making.”

- ADMIN. LAW at 950.

- “The primacy that administrative law places on congressional mandates [*because it does and I will stress that all semester long*] . . . diverges from the realities of modern agency action, where presidential directives and have equal importance with statutes to agencies.”

- *Id.* (citing Daniel A. Farber & Anne J. O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1156 (2014)).

PRESIDENTIAL DIRECTION

- Forms of “Presidential directives”
- Executive orders
- Presidential memos
- Signing statements



PRESIDENTIAL DIRECTION

- Read **President Biden's Executive Order on Strengthening American Leadership in Clean Cars and Trucks** (Aug. 5, 2021).
- Circle or **highlight** words/phrases that leap out at you.
- Circle or **highlight** words/phrases that you might want to do some research on to better understand.
- Jot down any *questions* that occur to you as you read.



I AM OBJECTIVE . . .



PRESIDENTIAL DIRECTION

- **Language** of Presidential directives –
- *Who* is this Executive Order directed to (and why)?
- What *type of activity* is directed?
- What *directory verbs* are used?
- What kind of language is used to *suggest respect* for Congress or for the authority of the admin agenc(ies)?
- What kind of language is used to create *common cause*? And common cause with who?
- What is *carved out*?
- Overarching sense? Does this language create *power* or *theatre*?

PRESIDENTIAL DIRECTION

- What is the nature of a Presidential directive?
 - To influence? To persuade? To dictate?
 - To allow the public to see the President taking action?
- If the agency is also “politicized” by having appointees, that *will* affect the impact of the Presidential directive, right?
- Why *would* an agency follow/accede to a Presidential directive?
 - Commitment to the policy being directed?
 - Loyalty to the President/the President's party?
 - Needs assistance with budget, appointments, other matters?
 - Respect for the President or fear of removal by the President?
- Overall change in psychology of government? (Do admin agencies just expect to be “directed” nowadays?)

PRESIDENTIAL DIRECTION

- Presidential direction is thought to have reached an all-time high under President Obama.
- Scholars tracing his use of the tools of presidential direction established/used by his predecessors (namely by Presidents Clinton and Bush) suggest he was seeking to “turn the administrative state into an extension of the White House.”
- *Why would he do that?*

PRESIDENTIAL DIRECTION

- Was he a President seizing “unparalleled executive power”?
- Or was he engaged in a “constitutionally defensible form of self-help, in the face of a polarized and recalcitrant Congress?”

- ADMIN. LAW at 966-967.

"I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that **"The tools belong to the man who can use them."** We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."

Youngstown, 343 U.S. at 654 (Jackson, J., concurring) (footnote omitted).



<https://www.youtube.com/watch?v=SHYX5r3y7iA>



LOOKING AHEAD TO NEXT WEEK

- Heavy reading on statutory interpretation, but not so heavy if approached with the right mindset:
 - Strive to pick up and retain the TOOLS, not all of the heavy case details.
 - Appreciate how much it will help you to possess these TOOLS.
 - We'll use these TOOLS for the rest of the semester.
 - We'll read a snippet of *Chevron*, THE most important case in all of Admin Law next week.
 - I'll release Writing Exercise 1 after next week.