ADMINISTRATIVE LAW

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ADMINISTRATIVE LAW AND PRACTICE

- **1) Introduction to Administrative Law**
  - Admin law:
    - Deals with laws and standards that constrain agency action
    - Governed in part by the Administrative Procedure Act (APA)
  - Agency tasks similar to:
    - Legislation- prospective, general applicability
    - Adjudication- retrospective, discrete application
    - Law enforcement- investigation
  - Reoccurring themes
    - Accountability to the political process
    - Rule by experts
    - Legitimating through quasi-judicial process
      - Due process and imposing formality because there are no elections
    - Micro-political participation
      - Let interested parties be heard
  - Most lawyering in admin done before getting to court
  - If you have to go to court you will probably lose
    - Courts are highly deferential to agencies (especially on substantive matters)
    - Most effective to challenge procedure or fight at the agency level
  - Agencies provide notice through the Federal Register
    - Regulations codified in the CFR
  - Types of agencies
    - Departments
      - High status
      - Head of department called secretary
      - President can fire head of agency at any time
    - Independent agencies
      - President has less control over head
      - Can appoint people into fixed terms
      - Usually a group with staggered terms and restrictions on removal
  - Agencies are in charge of regulating private conduct by:
    - Rulemaking
    - Adjudicating
    - Investigating
    - Some administer money
  - Agency's will have statutes that enact and govern them
    - Often statute will just advert to APA

        - Sometimes statute may have something different than APA and then statute controls

RULEMAKING

- **2) "Where Do Rules Come From?": Sources of Rules; Lobbying; and Petitions**
    - When determining the constrains facing actions of the agency
        - Start analysis with the agency's statute (then to APA if necessary)
    - 3 processes for rulemaking
        - Formal rulemaking (FR)
        - Informal rulemaking (IRM)
            - Default if statute does not specify which process to use
            - Uses Sec. 553 only
        - Hybrid rulemaking (HR)
    - APA is the baseline for rulemaking
        - Statute may add more or less
    - Models for rulemaking inside an agency (not mutually exclusive)
        - 1) Bottom-up- technical staff consults literature, data, and experts and makes recommendations
        - 2) Top-down- political reasons for making a new rule come from the head, Congress, cabinet, or President
        - impetus for either can also come from outside the agency (individuals, corporations, interest groups, etc.)
        - individuals can also petition for rulemaking
    - Impetus for either rulemaking can come from outside of agency
        - Individuals, corps, or interest groups may feed either process by applying political pressure or making connections
    - tips for lobbying
        - 1) agency is not a court room
        - 2) be honest about your side, you want the rule to change because it hurts you but best to make an argument that action is good for public, agency, and consistent with agency mandate
        - 3) be technical- use science, bottom-up approach can be useful
    - APA 553(e)- any interested person can petition for rulemaking
        - Requires agency to allow petitions for rulemaking (but this may seem like going over agency's head; maybe use in emergency)
        - 555(b) agency must promptly respond
            - courts don't give teeth to promptness requirement
            - delays usually accepted
            - when court does respond, court only guarantees that petition is answered not granted
        - 555(e) if petition is denied, agency must give explanation
            - even if a party does not get their petition granted, forces agency to put their cards on the table
    - Congress may direct agency promulgate rules on a certain subject
        - May provide time limit but courts do not always enforce strongly

- **3) Denial of Petitions**
  - DC Circuit most important court in admin
    - So many agencies in DC, not binding on other courts, but accorded extra weight
  - If petition for rulemaking denied can seek review in Article III court
    - Reviewed under "arbitrary and capricious" standard
    - 706(2) use de novo SOR if the agency does not follow procedure
  - Art III court will ask whether agency
    - 1) gave a satisfactory explanation for its action; and
    - 2) rational connection between the decision and the facts
  - Art III court does not generally grant petition
    - Remedy is usually for petition to be remanded for proper explanation
- **Exceptions to the APA Rulemaking Process**
  - IRM Sec 553 contains several procedural requirements
    - (b) notice of proposed rulemaking
    - (c) public comment
    - (d) publication of the final rule
    - (e) openness to petitions
  - Exempt from all Sec 553 reqs
    - military and foreign affairs matters
    - matters relating to "agency management or personnel or to public property, loans, grants, benefits, or contracts"
      - congress or agencies usually req these things anyway through specific statutes that supersedes APA or via self-imposed procedural rules
  - Exempt from notice and comment reqs (still need publication)
    - interpretive rules
    - policy statements
    - procedural rules
      - only deemed procedural if rules do not "substantially alter the rights or interests of the regulated party"
  - procedural rules v. substantive rules (not exempt)
    - the more the rule affects the "primary conduct" of the regulated entity, opposed to merely affecting how the entity presents its conduct, the more likely the rule is substantive
      - JEM -look at the extent of the rules affect on the party's rights
- **4) Typical APA Rulemaking I (Overview; Notice; Introduction to Comment)**
  - Good cause exception 553(b)(3)(B)
    - There are instances where an agency can show that it would be "impracticable, unnecessary, or contrary to public interest" may be exempt from notice and comment

        - Not read broadly because this would give incentive to overuse this exception and swallow rule
        - Congress may say in statute that N & C not necessary but otherwise implies necessary
- If agency statute says magic words that rules are made "on the record after the opportunity for an agency hearing"
    - Use FRM (556-57)
    - "on the record" means trial type hearing that forms exclusive basis for decision
- If statute makes other specifications for procedures
    - Use HRM (agency's own statute)
- IRM (553) is default if no other procedure is specified
    - Agency can add procedures as long as statute does not preclude it
    - APA 553:
        - (a) exceptions
        - (b) notice
        - (c) comment
        - (d) publication of final rule
        - (e) petition
- Courts should not add more mandatory agency procedures "absent constitutional restraints or extremely compelling circumstances" Vermont Yankee
    - Procedures mandated in agency statute usually the limit
    - IRM would end because agencies would just do FRM if there was the possibility that court could impose additional procedures
- APA notice requirements for IRM:
    - Notice must include notice of proposed rulemaking (NPRM) in Federal Register
        - Contains data and methodology underlying proposal
        - This requirement comes from case law not APA despite Vermont Yankee
    - Notice of statutory basis for rulemaking
    - Time, place, nature, etc. of public proceedings
    - Either gist of proposal or full text (unless agency specifies it should be separately)
- Main conflict over notice
    - When rule changes so much between proposal and final that interested party effectively had no notice
    - Logical outgrowth test
        - Used by some courts but only good to show outgrowth is from the proposed rule and any other materials interest party had opportunity to comment on
        - Some agencies publish comments some do not
    - Better test (7th Cir.)

- Ask whether the issues or interests of party where "on the table"
- Should the party have known interests were affected by proposed rule?

- **5) Typical APA Rulemaking II (comment; statement of basis and purpose)**
  - Comment (553(c))
    - Typically written
    - APA does not give min or max for length of comment period (many agencies say 60 days)
      - Agencies often extend the deadline for comment period
  - Ex parte communications
    - FRM does not allow
    - No explicit restriction in APA for IRM but 3 questions:
      - 1) What contacts can take place?
        - Generally ex parte com legal
        - Constitution (via Due Process) restricts ex parte in rare IRM cases that involve parties competing adversely for a limited privilege
        - Agencies might be restricted from ex parte by Congress (agency statute) or themselves (procedural rules)
      - 2) Which contacts must be formally disclosed?
        - Comments after formal comment period, off record meetings with lobbyists and politicians, and off record meetings with Exec branch officials, White House officials, or President and don't have to be on record unless that info of central relevance to rulemaking (Sierra Club)
      - 3) Should others be given time to make comments in reaction to the disclosed communication?
    - Some courts have required disclosure of ex parte (Home Box Office) so some agencies follow this
      - This is suspect under Vermont Yankee
    - Ex parte only an issue in IRM when they shape substantive decision by agency
      - Courts wants grounds (data and technical basis) for decision to be in record
      - If technical info is in ex parte, then most courts will require disclosure and possibly time for comment
      - If technical data is already in record, then political pressure to favor one technical argument over another does not need to be docketed or commented on
  - When determining whether there are limits on ex parte consider:
    - Type of rulemaking (no ex parte for FR)
    - The agency's statute

        - Agency's procedural rules
        - Due process (2 adverse parties competing for limited resource)
        - Case law
    - APA requires final rule to have a statement of basis and purpose in preamble
        - Many statutes also require preamble to include response to comments
        - Court uses preamble for review so many agencies err on side of comprehensiveness and make preambles lengthy
- **Tweaking the APA; Hybrid Rulemaking**
    - National Environmental Protection Agency (NEPA)
        - Requires agencies to make Environmental Impact Statements (EIS) before engaging in activities (including rulemaking) that may have a significant effect on human environment
        - Procedural not substantive req. because agencies do not take or not take action based on EIS
        - Agencies are subject to judicial review concerning compliance
    - Regulatory Flexibility Act (RFA)
        - Requires agency to make a Regulatory Flexibility Analysis when they propose a rule that may have a significant economic impact on a substantial number of small businesses, orgs, or govs (courts say only applies to entities that are regulated by rule)
    - Paperwork Reduction Act (PRA)
        - Requires agency to engage in notice and comment prior to imposing any reporting or recordkeeping req. on a person
        - Does not apply to government demands on private person to supply information to public (ex. product labeling req.)
        - Agency must determine that collection of info is:
            - Necessary to proper performance of function of agency
            - Not unnecessarily duplicative of available info
            - Takes into account of particular problems of small entities
            - Is written in plain language
            - Uses info technology to reduce burden
        - Must send proposed req. to Office of Information and Regulatory Affairs (OIRA)
    - Executive Order 12866
        - Required agency to do cost v. benefit analysis for "major rule" (Reagan version) or "significant act" (Clinton version)
        - OIRA in charge of compliance
- **6) ADR In Administrative Law: Negotiated Rulemaking**
    - supplemental rulemaking requirement statutes (ex. NEPA, RFA, and PRA) require agencies to consider impact of rule of things
        - don't amount to much if they do not have strong judicial-review or institutional teeth
    - Negotiated Rulemaking (NR)
        - ADR-like supplement to traditional notice-and-comment

        - Produces consensus-based NPRMs
        - Works best if:
            - interest groups can compromise without giving up their fundamental beliefs
            - adequate representatives of the important interests
            - not too many interests (ordinarily 15 or less)
        - issues raised should be mature and ripe for decision
        - process value- you may loose, but you feel as though you have been heard
        - problem with NR
            - treats the agency as neutral facilitator rather than accountable advocate for public interest
- **Getting Into a "Real" Court: Judicial Review and the Chevron Principle**
    - Sec. 706
        - Directs reviewing court to hold unlawful any agency action "not in accordance with law"
    - Chevron (most important case in modern admin law!)
        - When court is reviewing agency rulemaking it should defer to the way the agency interpreted the statutes in its rule
        - Such agency interpretations usually get de novo review
            - Chevron adds deference to that
    - Questions of fact (a&c review) v. questions of law (de novo review)
    - Chevron Test:
        - 1) ask whether statute is ambiguous
            - if not then court gives no deference to agency interpretation- statute can have only one meaning
                - if rule shares that meaning then it is approved if not rule is struck down
                - some courts only look at the plain meaning of the statute to gauge if ambiguous, others use canons of interpretation or look at spirit of statute or legislative intent and history
            - if statute is ambiguous on to step 2
        - 2) ask whether agency's interpretation of statute was reasonable
            - if there was intentional gap or statute is ambiguous, then there is a range of reasonable interpretations
                - as long as agency's interpretation is within range then it will be upheld (even if court would have gone another way)
            - rare for agency to lose at step 2
    - courts collapse Chevron test and may say the agency is unambiguously wrong
    - classic legal process question
        - Who decides?

- If Congress has given agency authority (explicitly by granting interpreting powers, or implicitly by being vague) then it wants agency not court to resolve ambiguities
- Court should defend against unreasonable interpretations, but leave agency to choose among reasonable range

- **7) More "Real" Court: Substantive Judicial Review**
  - Chevron requires that the statute is this agency's statute to interpret
    - Does not apply when:
      - agency interprets another agency's statute
      - an agency is interpreting a statute that applies to multiple agencies
      - in statute that Congress has withheld that interpretive authority from agency
    - if not agency's statute to interpret then use de novo SOR
    - courts reluctant to use Chevron deference when part of the statute that the agency is interpreting concerns the extent of its own jurisdiction
  - Standard of review for Article III review of agency action (Sec. 706)
    - IRM- arbitrary and capricious standard (a&c)
    - FRM (and other instances where with formal record- substantial evidence standard**)**
    - HRM- whatever statute specifies
  - Both standards of review are functionally the same- looking for reasonableness
    - Substantial evidence is seen as being a signal for slightly more searching review
  - "Record" for IRM consists of:
    - noticed of proposed rule making (NPRM)
    - final rule (including preamble)
    - any other materials used by agency to reach its conclusion (such as comments and other docketed input)
  - Substantive review (not questions of law/ Chevron)
    - Questions about substance are questions of fact
    - Questions of fact regarding actual outcome of rule
    - Court looks to see if agency gave "adequate explanation" for decision
      - If agency loses, remedy is a remand for adequate explanation
      - Reviewing court will not itself rewrite rule
- **Practical Considerations for Judicial Review**
  - When court reviews rule passed via IRM, (substantive review) it will determine rule was a&c if agency:
    - A) relied on factors that Congress did not want them to consider
    - B) left out crucial issue (either one Congress wanted addressed or that logic suggests should be considered)

        - C) offered an inadequate explanation (either does not adequately treat data on both sides or explanation simply does not add up)
        - D) made really stupid decision
    - Agency can bolster substantive choices by:
        - Finding data to support them
        - Undermining data that oppose it
        - Or in absence of sufficient data, relying on its expertise (to extent that doing so is plausible)
    - When repealing a rule
        - Agency must be reasonable based not only on original record, but also on original rule too
            - Record for second rule will include first rule

ADJUDICATION

- **8) Administrative Adjudications: An Overview**
    - when complaining about an agency must say that they either:
        - misinterpreted statute or
        - violated statute
    - When deciding whether to challenge a rule in court consider:
        - 1) Are there alternatives to litigation?
            - Ex lobbying agency for reconsideration or interpretive rule or lobbying Congress for statutory fix
        - 2) What are the chances of winning?
        - 3) What would you win if you did win?
            - Remember-only likely victory is procedural; remand may just forestall the inevitable
        - 4) What will the cost be?
            - Both in terms of litigation and good will between agency and client (who may be dealing with agency in the future maybe as a regulated entity)
    - An appeal causing a beneficial delay may not be unethical
        - Poor chance of success does not mean position is necessarily indefensible or that suing is automatically in bad faith
        - As long as there are good faith reasons to proceed, the fact that delay is beneficial to client will not be sufficient grounds for sanctions
        - But no court (or agency) is likely to stay implementation of the rule unless there is a good chance of success on the merits
    - Adjudication- process for producing an order
        - Order- a final agency disposition of an issue, other than rulemaking
- **Adjudication Procedures**
    - APA provides formal procedures for adjudication (554, 556, 557)
    - Informal adjudication also possible (“non-APA adjudication”)
        - Still quite formal

        - Minor parts of APA apply particularly provisions is Sec. 555 that relate to due process
    - Agency will generally promulgate (via procedural rulemaking) its own specific procedures for adjudication (whether or not it follows APA's formal procedure)
        - APA procedures are specific but not comprehensive
    - Constitutional due process requirements always apply
        - Formal APA reqs. cover this
        - Due process concerns seem to come up only in context of informal adjudication
    - Congress can indicate that agency should use formal adjudication (FA) with magic words "on the record after opportunity for an agency hearing" (like FRM)
        - If agency neither requires or forbids FA, they can choose either FA or IA
            - Court cannot interpret as FA if not required (would violate Chevron)
        - This choice is reviewable under a&c review
    - APA requirements for FA:
        - Notice 544(b)- time, place, and manner of the hearing, the legal authority for it, and the matters of fact and law asserted by instigator of proceeding
        - Third-party participation- broad, but subject to restriction for practicality
            - Issue not only if one can participate but also to what extent
        - Administrative Law Judge (ALJ) presides over adjudication if formal and will have most powers of Art. III judge but cannot strike down:
            - Statutes
            - Agency's regulations
            - Agency's interpretation of regulations or statutes
        - ALJ can administer oaths, issue subpoenas, rule on offers of proof, take depositions, hold settlement conference
        - No one represents agency in proceedings
- **9) Applying Adjudication Procedures**
    - APA guarantees that burden of proof rests on proponent
        - Unless underlying statute provides otherwise
        - Only Congress not agency can move burden
            - Only applies to burden of persuasion, not burden or production
                - Agency can shift burden of production through construction of more detailed procedures
        - Ex. of burden of proof proponent- when person applies for SSI burden on them, but when agency wants to impose sanction, burden on agency

- Adjudication (and final agency order) done by ALJ or head of agency, or some combination
  - Statute will choose or agency can if statute leaves choice
- ALJ employed by agency but must be isolated from:
  - hierarchal control
  - part of agency that advocates the agency position before them
  - ex parte communications in adversarial cases in a way that head of agency is not
- agency use of ALJs:
  - in FA, some agencies use ALJ to compile the record an propose a disposition for head of agency(HOA) to review de novo and produce a final order
  - in some agencies displeased parties can appeal ALJ decision to HOA or let ALJ decision be final and appeal directly to Art III court
  - other agencies make ALJ decision final
  - others don't use ALJs at all (HOA may adjudicate)
- Why use ALJ if HOA can review de novo?
  - ALJ can build record
  - HOA can only see record but ALJ can see demeanor of witness
- FA SOR used by finder of fact and reviewing court is "substantial evidence" (556(d))
  - Different from SE standard used by courts to review formal agency action (there SE refers to quantity of evidence the deferential court must find before affirming- amount for reasonable decision maker to reach same result)
  - 556(d) SE means ALJ must rely on evidence of sufficient quality
    - SE for action (706) = quantity; SE for adjudication (556) = quality
    - under qualitative standard rules of evidence don't apply
      - even hearsay may qualify as substantial evidence, but only to extent that it is otherwise reliable and opponent had chance to cross-examine
- must demonstrate **prejudice** to successfully allege one has not received notice required by the APA for an adjudication
  - purpose of APA notice requirement satisfied if party proceeded against understood the issue and was afforded full opportunity to justify his conduct

- **Keeping Your Mouth Shut: Adjudication and Ex Parte Communications**
  - Strict limits in APA on ex parte communication for FA (554(d) and 557(d))
    - No restriction on ex parte for IA
      - Many agencies have restrictions in their statutes or procedural rules

- 557(d)- ex parte between interested person **outside** agency and the agency adjudicators, relevant to merits of the adjudication, are forbidden
- remedies for ex parte in FA:
  - most common remedy is to disclose communications
  - when appropriate more severe remedy available- agency may require a show cause hearing where improper communicator is given burden of showing why the tainted adjudication should not be altered to his detriment
    - only appropriate when the improper communicator is a **party** not just an interested person
  - third remedy not mentioned in 557(d)
    - when Art. III is reviewing the matter to vacate result of adjudication and remand for new adjudication
    - here question is whether the decision process was so **irrevocably tainted** that resulting judgment was unfair
      - consider:
        - 1) the gravity of the contacts
        - 2) whether they influenced the decision
        - 3) whether improper communicator benefited
        - 4) whether adverse parties knew about it
        - 5) whether remand would serve a useful purpose
- 554(d)- limits the contacts from interested parties **inside** the agency
  - ALJ insulated from contacts with agency advocates but this does not apply to heads of agency because they run agency and can't be insulated from anyone

- **10) Adjudication and Constitutional Process I (Individualization)**
  - In non-APA adjudication limit on ex parte is Constitutional
    - Key aspect of due process here is that interested parties have right to notice and an opportunity to be heard
  - Information must be new and material to deciding official
    - What is new is arguable because what is duplicative to one side may be a "powerful and effective reiteration" on the other
  - No violation of due process if:
    - Info merely duplicative
    - Other party had a chance to respond
    - Info had no effect on the decision maker
  - Due process rights only attach in certain contexts
    - 1) individualized decision making
    - 2) liberty or property interest
  - individualized assessment:
    - Right to notice and hearing differ greatly depending on context
      - Ex. assessment of home's value for property taxes is personal and sufficiently individualized but issues like

changing the mileage are based on mass, legislative facts and no due-process right to be heard
        - Resolution of mass issues is achieved politically, and participation is achieved through representation and the 1st Am not the 5th
    - Virtually any challenge to procedures in adjudication will involve individualized decision making, so not much of an issue for us here
- **Adjudication and Constitutional Process II (Property, Liberty, and Procedure)**
    - To have due process argument must also have liberty or property interest at stake in underlying case
    - Property interest can come from entitlement or legitimate, non-unilateral expectation of a guaranteed benefit
        - Can be (among other things) the interest in pursuing a certain profession
        - Can be infringed by (among other things) a reputational harm that impedes that pursuit
            - So long as the harm is accompanied by some other agency action (like formally disciplining you), reptational harm alone not enough
        - More simply could be harm to something you own (property interest) or bodily restraint (liberty interest)
- **Adjudication and Constitutional Process III (What Process Is Due?)**
    - Once you decide due process rights apply, must determine what process is due
    - Mathews- we look generally at the type of procedure that the plaintiff is claiming should have been used- benefit v. burden:
        - Balance on one side the burden to the government that this additional procedure would represent
        - On the other side look at interest at stake for people in the plaintiff's position
            - Discounted according to the probability adding the procedure in question will prevent erroneous deprivation of that interest
    - Examples:
        - No right to hearing before the termination of disability benefit from social security
            - But there is a right to a hearing before the termination of welfare (Mathews)
        - Due process does not guarantee a hearing before the dismissal of a student for failure to meet academic standards (Horowitz)
            - Also does not guarantee the right to counsel in student disciplinary proceedings (Osteen)
- **11) Adjudication and Constitutional Due Process IV (Neutrality)**
    - another due process right is the right to a **neutral decision maker**

        - can't have any personal or financial interest in the case that would sway his consideration of the facts
        - also look for prejudgment of facts (would not present due-process problem)
            - combining investigation and decision making role may not necessarily create a problem either
            - instigator of the litigation being the same as the investigator is a worse conflict
- **Judicial Review by the Substantial Evidence Standard**
    - Question of fact in FA is substantial evidence (was there enough evidence that a reasonable decision maker could have made the same result)
    - when reviewing formal agency action, using the substantial evidence standard (706) means that the court looks to see that a reasonable person could have found enough evidence in the record that they would have reached the same conclusions the agency did
        - reviewing body must consider the evidence in the record as a whole
        - even though record is viewed in the light most favorable to the agency or ALJ, the light shines on all the evidence in the record
        - appellate court reviewing trial court uses "clearly erroneous" standard
            - that standard is less deferential than standard here
    - when agency adjudication procedure involves both the ALJ and the head of the agency:
        - ALJ findings of demeanor of witness ("testimonial inferences"), receive weight from agency head
        - Inferences that can be derived from the cold record ("derivative inferences"), do not receive any weight (although they become part of the record with all the other conclusions of the ALJ
    - When Art. III court is reviewing a case (with ALJ and HOA) it will review the head's decision under the appropriate deferential standard for reviewing facts and it too will give weight to the ALJ's first-hand testimonial inferences
        - If head wants to differ with the ALJ (but survive Art. III) then the head should separate demeanor and derivative evidence and rely on sufficient derivative inferences to constitute Sec 706 substantial evidence
        - Or head of agency should give a very good reason for rejecting ALJ testimonial inferences (beyond just second guessing the ALJ's first hand assessment of demeanor)
- **A Difficult Line to Draw: Standards of Review for Law, Fact, and Mixed Questions**
    - In formal adjudication:
        - Questions of fact are reviewed under the substantial evidence standard

        - Questions of law are reviewed de novo (but perhaps with deference added on)
    - Hearst line of cases suggest that deference may be appropriate of questions of law
    - Chevron suggests that deference obtained only when:
        - 1) the statute is the one that the agency is in charge of applying; and
        - 2) the statute is ambiguous and leaves in to the agency to resolve the ambiguity
        - if agency gets Chevron deference, the court should accept any interpretation that is reasonable
    - if Hearst deference does not apply, review of questions of law stays at de novo (unless other forms of deference apply)
    - complicated issue arises over mixed questions of fact and law
        - questions may require of the agency both a factual assessments of what happened and a legal assessment of the significance of what happened
            - can apply precedent set there to future analogous cases
        - issue less complicated when Hearst deference applies
            - both fact and law questions are deferential to the same degree
        - if Hearst does not apply, mixed questions may not be reviewed with as much deference
            - underlying factual findings will be, but not the application of law to those facts
            - a helpful way to approach these issues is to ask:
                - 1) whether the agency used an acceptable legal standard (a question that may or may not be answered deferentially)
                - 2) whether there is substantial evidence to support the factual finding plugged into it
- **12) Judicial Review by the "Arbitrary and Capricious" Standard**
    - de novo SOR for questions of fact in 706(2)(F) is used in the review of adjudications only when the agency's fact-finding ability in inherently inadequate (or when issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action)
        - if agency simply failed to execute as to fact-finding, the reviewing court will just remand the case back to the agency to do it right
    - some agency statutes specifically direct that actions begin at Art III
        - apart from 706(2)(F) the agency's statute might supersede the APA and provide directly for de novo review
    - one way that an agency can be a&c in adjudication is to give an inadequate explanation of the basis of its decision
        - while courts are deferentially wary of second guessing the thought process of an agency, they do not hesitate to remand a

case when insufficient information has been conveyed to even express what the agency was thinking
    - a&c review is pervasive in admin law
        - always includes an adequate explanation req.
        - how much is "adequate" varies by context, and in some places very little is required
    - another version of a&c by an agency is inconsistency
        - deferential review allows for a range of outcomes at the agency level, but at some point the agency is supposed to speak with one voice
    - agency cannot be unreasonably inconsistent from one case to the next
        - other than in cases of first impression, the agency must justify an adjudicatory decision in terms of established agency precedent
            - this leaves room for the evolution that occurs in the common law, but not for unreasonable or unexplained changes in policy
            - so agency can have a major shift, but at very least such a shift requires confronting and satisfactorily explaining the departure
    - for agency to not be considered a&c, they must be within the circle of reasonableness and adequately explained

CHOICE OF PROCEDURES AND NON-LEGISLATIVE RULES

- **13) Choice of Procedures (Adjudication Versus Rulemaking)**
    - sometimes agency's statute will leave room for it to choose to develop standards through either rulemaking or adjudication
        - advantages of rulemaking:
            - provides clear, broad notice
            - as for enforcement, it can tell everyone what to do instead of creating standards around individual violation
            - comment process provides helpful insight
        - advantages of adjudication:
            - faster and cheaper
            - allows standards to develop case by case with hindsight, and in a more flexible, nuanced, and contextualized manner
            - allows handpicking the adverse party
        - adjudication is faster and cheaper because no comment period and because adjudicatory notice is (as a practical matter) less effective
            - participation in a formal adjudication can be just as wide as in rulemaking, but Sec. 555 allows the agency to limit participation based on the need for "orderly conduct" of business
    - choice of procedure (btw RM or A) is reviewable, but only for a&c
        - a&c looking for

        - reasonableness; and
        - adequate explanation
- adjudication can present a problem regarding retroactivity if it imposes a standard on a party that was too difficult for the party to anticipate
- the party in the adjudication must be subject to some consequences under the new rule
    - otherwise the adjudication would be non-adversarial, purely prospective, and amount to rulemaking without all of rulemaking's constraints
    - if a rule is good enough to apply prospectively, it must be good enough to apply to the party in the adjudication
    - third parties whose conduct occurred before the new rule was announced are more likely to be exempted from retroactive effect when their cases come up before the agency
    - the party in the original case might merit a weaker remedy, so long as it faces some sanction, and so long as the weaker remedy is applied consistently to similarly situated parties
- standard for determining whether a standard announced in an adjudication should apply retroactively are:
    - 1) the extent to which the rule is new/different and thus unexpected and upsetting to substantial reliance interests
    - 2) the countervailing interest that the agency has in imposing the standard retroactively
- this applies both to applying the particular sanction in the first case in which the new standard appears, and to applying the sanction or any sanction at all in subsequent cases
- an agency's decision to apply a standard retroactively in adjudication is reviewed de novo by the Art III court
    - an agency's decision not to apply a standard retroactively in subsequent adjudications would probably only be reviewed under a&c though
- to choose rulemaking, an agency must be authorized by statute to do so
- a definitive rule can moot a statutory right to receive a formal adjudication
    - a rule may be so clear that there are no material facts left to adjudicate (in which case the regulated entity no longer has a right to FA)
- some agencies have waiver provisions by which entities can argue that they should be exempt from a rule
    - agencies generally not required to do so, and tend to be sparing in their use of such procedures when they do have them
- to choose to make rules apply retroactively, an agency must be explicitly authorized by Congress in the agency's statute
    - a court may refuse to enforce an agency's retroactive adjudicatory orders if retroactivity is unfair

- a court will defer to an agency's interpretation of its own vague rule as long as it is reasonable (GE, Seminole Rock, or Auer deference)
    - this is Chevron like deference; usually ambiguity is construed against the drafter, but here the opposite is true; incentive to be ambiguous and interpret later and it is ok as long as they are reasonable
- an entity may claim that even if the court accepts the agency's interpretation, it should not be applied in the entity's case because it had no notice of the agency's interpretation (due process concern)**;** this will only succeed if several factors are in place:
    - 1) there must really have been no notice
        - there are a few ways to give notice:
            - agency can provide direct pre-enforcement notice to the entity
            - agency can publish their interpretation as a non-legislative rule
            - a case might not be one of first impression
    - 2) it must be reasonable for the entity not to have anticipated that the agency might choose the interpretation they did (under "fairly obvious" standard)
        - if agency's is one of a number of apparent possible interpretations, that is good enough for the agency to win under this standard
    - 3) the entity will have a hard time prevailing unless the penalty leveled against it is substantial and retrospective (ex. a big fine as opposed to a cease and desist order)

- **14) "When is a Rule Not a Rule?" (Non-Legislative Rules)**
    - non-legislative rulemaking (NLR) is a third choice (1 rulemaking and 2 adjudication) for an agency to use to implement standards from a statute (if statute gives it a choice)
    - 3 types of non-legislative rules
        - interpretive rules
        - policy statements
        - procedural rules
    - advantage of NLR:
        - does not require n&c or any other complications of legislative rulemaking
            - so can provide structure and relative certainty quickly and cheaply
    - disadvantage of NLR:
        - do not have deference or have binding force of law that regular rules or FA does
        - also n & c are not all bad
    - FOIA requires that NLRs be published in the Federal Register
        - Weak req because the consequence of a violation is that an agency can't use an unpublished NLR to someone's detriment

            - But since NLRs are not formally binding, that rarely happens anyway
    - Policy statements- one category of NLR
        - Distinguished by their failure to bind the agency (let alone the regulated entity)
        - These set for the agency's desires using hedged terms like "should" or "may" as opposed to setting forth requirements and using mandatory terms like "must" or "will"
        - "general statements of policy" exempt form n&c if:
            - do not presently impose any rights/obligation; and
            - leave agency free to exercise discretion (AHA v. Bowen)
    - Interpretive rules are binding in one sense- once an agency promulgates one, it is bound to use it until it comes out with a new interpretation
        - As a result regulated entities are bound to it too in the sense that they must follow the agency's interpretation or face the likely (if not official) consequences
    - In another sense interpretive rules are not binding because they do not create a new duty
        - Because they focus and clarify the duty imposed by a vague statute or legislative rule, it can be said that they actually reduce the potential duties of a regulated entity
    - How to determine if something is an interpretive rule (as opposed to legislative):
        - 1) how does the agency characterize it?
            - Obviously not dispositive
        - 2) what is the source of the duty placed on the regulated entity?
            - If the rule really is an interpretive rule, the actual duty will come from the statute or legislative rule being interpreted
            - Creating a duty is different from adding detailed focus where there was none before
    - If congress did not grant an agency the authority to make legally binding rules, any rule issued by that agency is necessarily interpretive
    - If there is a new duty in the rule then n&c is necessary
- **15) How to Get Whipsawed by the Government: Estoppel**
    - generally agency can change and interpretive rule without going through n&c (just like it can pass it in the first place)
    - some courts might require notice and comment for a new interpretive rule if:
        - 1) the interpretive rule interprets a legislative rule (as opposed to interpreting a statute- don't need n&c for that)
        - 2) the change in interpretation produces substantial modification in the duties or rights of regulated entities
        - 3) the old interpretation was formalized and official
        - 4) reliance on the old interpretation was substantial

- very rare for a federal court (less rare for state court) to find that the government is estopped from using as interpretation against a regulated entity on the grounds that the entity had been told something different, unofficially, by an agency employee
    - in private law, such estoppel requires reasonable, detrimental reliance
    - when gov action is at issue, courts find it difficult to conclude that relying on agency communications is reasonable
        - especially true if the communication is informal (ex. oral- need official written notice with agency insignia to rely)
    - gov treated differently b/c they act according to law, which anyone can find for themselves and that estoppel amounts to a rogue employee and a court applying different law to the regulated entity that that which Congress passed
        - this is especially problematic (and unconstitutional) when the estoppel decision requires expenditure of gov funds
            - estoppel cannot force gov to make payments not authorized by statute (Richmond)
    - estoppel may succeed if criminal sanctions are at stake
    - even if estoppel does not work can try to make other arguments:
        - due process
        - consistency
        - notice

- **Deference by Courts to Agencies I: Mead**
    - Mead says that an agency might get Skidmore if it does not get Chevron (this is the old rule but learning it because Kalt thinks the new rule is shaky and with go back to old rule)
    - Skidmore provides for a form of weak deference that applies in cases where Chevron deference does not (only things with the force of law get Chevron deference)
        - Looks at factors such as:
            - Expertise of the agency
            - The care with which the issue was considered etc.
    - Skidmore deference is quite indeterminate and its effect can range from no real deference to essentially giving the agency the benefit of the doubt
- **16) Deference by Courts to Agencies II: Walton**
    - Chevron like deference does not apply to every agency interpretation of a statute (when it does is not clear right now)
    - Interpretations from RM or FA are not problematic but from IA or NLR fall into a gray area
    - Under Walton, the Court examines:
        - The centrality of the gap in the statute
        - The expertise of the agency
        - The amount of attention the agency gave the issue (etc.)
    - Walton tells us whether to use Chevron or Skidmore

- In some cases (Walton itself) using this sort of analysis may mean giving Chevron like deference to policy statements or interpretive rules interpreting statutes
- Agency interpretation of vague rules (as opposed to vague statutes) is still accorded something much like Chevron deference under GE
  - GE deference- was legislative rule vague or ambiguous, then was the agency's position reasonable.
- Under Gonzales, the court will apparently not apply GE deference in situations where the legislative rule just parrots a vague statute (and will treat it as the interpretation of the statute rather than the rule)
  - but with Walton, the agency might end up with Chevron like deference any way

	Statute	**Rule**
LR	**Chevron**	**X**
FA	**Walton**	**GE**
NLR	**Walton**	**GE (Gonzales exception)**
IA	**Walton**	**GE**
OS	**Walton**	**GE**

- **Introduction to Reviewability**
  - To be able to review an agency action in an Art III court, you must have:
    - Jurisdiction (generally available from 42 usc sec. 1331); and
    - A cause of action (generally available from the APA Sec. 702, subject to the limits of sec. 701 and the requirements of finality, exhaustion, and ripeness
  - Individual states may expand, contract, or change jurisdiction or the cause of action
  - Doctrine of primary jurisdiction may require that a case btw two parties be sent to an agency for determination of an issue that is within the agency's purview
- **Introduction to Standing**
  - Constitutional requirements of standing:
    - Injury in fact
    - Causation
    - Redressibility

REVIEWABILITY

- **17) Standing**
  - standing has two components
    - constitutional reqs that apply regardless of congressional action
    - prudential reqs that can be reduced or eliminated in particular situations by statute
  - Constitutional requirements of standing:
    - Injury in fact

                - Means Plaintiff has suffered or is about to suffer a concrete and particularized injury
                - can include economic or physical injuries, and things such as aesthetic or recreational injuries
                - does not include speculative future injuries, generalized abstract injuries (like violating an interest in seeing the law properly followed or tax dollars well spent)
            - Causation
                - Means injury is fairly traceable to defendant
                - Pleadings must be specific in linking defendant's action to plaintiff's injuries (locations must be precise and effects clear rather than speculative (ex. gov wants to allow strip mining and I go to the exact piece of land regularly and enjoy the view which will be spoiled)
            - Redressibility
                - Requires that the relief that the plaintiff has requested would likely, not just possibly, redress the injury
    - Prudential requirements
        - include:
            - Strengthened requirement of non-generalization and
            - Notion that the plaintiff is not litigating issue that is really in the interest of a third party
            - Must be in zone of interest (**only one to worry about for 702 claim)
        - Can be eliminated by statute, such as APA's broad grant of standing to any interested party, or, if APA does not apply by specific broadening in a particular statute (generally are)
    - An association can have standing without itself suffering an injury in fact and despite limit on 3rd party standing if:
        - 1) one of the members of the group has standing to bring the suit
        - 2) the organization's purpose is related to the subject of the litigation
        - 3) suit must be for declaratory or injunctive relief rather than damages (any 702 case is)
    - state as plaintiff gets special solicitude (Massachusetts)
    - procedural injuries
        - if an agency has failed to fulfill a procedural requirement this will probably be enough of an injury without more
        - Supreme Court has said that procedural injuries are an exception to the causation and redressability reqs
    - Standing does not require a nexus between the injury and the issue to be litigated
- **18) Cause of Action**
    - APA wants broad 3rd party participation
        - ZOI limits this

- zone of interest test- prudential standing req that applies to 3rd parties
  - requires plaintiff to be in the ZOI of the statute he claims has been violated (from sec. 702)
  - plaintiffs who are regulated directly by the government in a way they do not like do not have to conform to ZOI req
  - ZOI req can also be mooted if statute has a very broad cause of action, which would amount to an announcement from Congress that no prudential limits should apply
- In determining the ZOI of a statute, one must examine the particular provision alleged to be violated but in the context of the entire statutory scheme
  - Don't have to show that Congress specifically intended the plaintiff to be protected
  - Need only show that Congress intended to deal with the interests plaintiff is dealing with
  - Look for what not who
  - Only need to show Congress arguably intended to protect interest in question

- **Agency Action and Failure to Act**
  - Hard to get review of failure to act because judicial review requires agency action
  - Plaintiff must show that agency:
    - 1) failed to take a discrete action like making a rule, issuing an order, granting relief, or leveling a sanction; and
    - 2) that the agency was required by law to take that action
  - agency's failure to exercise its discretion in a certain way is actionable
- **Unreviewability Under the APA I (Statutory Preclusion)**
  - APA provides for broad Art III review of agency action
    - Sec 701(a) provides 2 exceptions:
      - 1) when statute precludes reviewablity
      - 2) matters committed to agency discretion
  - preclusion can be express or implied
    - express preclusion is rare and generally not total (total preclusion might be unconstitutional especially when agency being challenged on constitutional grounds)
      - courts will read preclusive language narrowly the presumption is for reviewability
    - implicit preclusion is more complicated
      - in the absence of express preclusion, a court will find that Congress has precluded judicial review only when congressional intent to do so is fairly discernable from the structure of the statute and/or the legislative history
        - court may speak of "clear and convincing evidence" standard, but not a strict practice (not easy to show)
- **19) Unreviewability Under the APA II (Committed to Agency Discretion)**

- second exception to reviewability are matters committed to agency discretion
  - resemble the political question doctrine from con law
  - question is not whether the agency is given discretion (that would eliminate almost all reveiwability) the issue is whether the matter is wholly within agency discretion
  - may be because of traditional limits of courts (ex when agency is given "prosecutorial discretion") or simply because statute gives no external standards to guide agency (ex agency required to act not when certain criteria are met but when they believe certain criteria are met)
- committed to agency discretion test:
  - ask whether statute gives the reviewing court any law to apply
    - if there is no law (no external standards that constrain the agency and that the court could apply in reviewing) then the matter is committed to agency discretion and not revewiable
    - constitutional claims are usually reviewable because they generally represent external standards, and are rarely left up to someone other than courts to apply

- **Fancy Legal Terminology For Red Tape I (Finality)**
  - Three timing doctrines:
    - Finality
    - Exhaustion
    - Ripeness
  - They overlap and blend into each other a lot
  - Finality- asks whether the agency completed the action
    - Only completed actions are supposed to be reviewable
    - Two parts to this req:
      - 1) is the agency action the consummation of the agency's involvement?
        - Definitive of the agency's position?
      - 2) do legal consequences flow from the action?
        - Would violating the action result in a penalty?
        - Does it affect the legal status of the plaintiff?
        - Is immediate compliance expected?
    - Agency characterization of its own action is not dispositive
    - NLRs reviewable if they are effectively final and binding
- **20) Fancy Legal Terminology For Red Tape II (Exhaustion)**
  - Exhaustion (though it predates the APA) is required by Sec. 704 too
    - Exhaustion doctrine- plaintiff must go through all mandatory agency procedures (required by statute or rule) before bringing a case in an Art III court for review
      - Individual issues must be exhausted too
  - Exceptions to exhaustion in cases where:
    - Exhaustion would cause unreasonable and prejudicial delay

        - Agency procedures do not provide for the type of relief sought (ex. monetary damages)
        - Rare case where agency is so biased that it is futile to bother with exhaustion
- **Ripeness**
    - Ripeness requires that a case is developed enough for a court to consider it
        - That it concerns either a legal or factual issue that is developed enough for judicial review
    - Must balance that hardship that delay would cause the plaintiff v. the interference that immediate review would present to the agency
        - The less the net hardship on the plaintiff, the more the case is ready for judicial review
    - Ripeness overlaps with finality (3rd element of ripeness) exhaustion, and standing
    - Consider not just whether a case is ripe for review, but whether the agency action will be stayed pending review

AGENCY STRUCTURE

- **21) Separation of Powers, Shmeparation of Powers**
    - formalist views of separation of powers are strong views that require strict and technical separation
    - functionalist views are more moderate (have prevailed)
        - they look more forgivingly at whether the core power of a branch is being encroached upon unduly, and allow encroachments that formalists would not
    - Congress can delegate quasi-legislative power to executive agencies
        - As long as delegation contains an "intelligible principle" that constrains the agency's discretion and provides a reviewing court with a way to know if agency is acting consistently with Congress's desires
            - The more power delegated, the more guidance necessary, up to "substantial guidance" for economy-wide legislation
            - Even there the bar is pretty low as we saw in Whitman (where Congress gave EPA power to promulgate air quality standards and "requisite to public health" was a sufficient intelligible principal)
    - Court has not struck anything down with the non-delegation doctrine since the 1930's
        - But this doctrine is still strong and leads Court to narrowly interpret statutes to avoid constitutional problems (even if that means rejecting the more intuitive interpretation of a statute)
    - To find an "intelligible principle," that constrains agency discretion and renders a statute constitutional, a court may have to look to external sources such as statutory structure and legislative intent

- Delegation of final judicial authority to non Art III decision makers is potentially a violation of the separation of powers
    - This is an issue when such entities get the last word on matters of law and fact
    - Art III review, even if deferential, is generally enough to save the constitutionality of the structure
    - Earlier cases concentrated on the distinction of public rights (not requiring Art III participation) and private rights (requiring Art III) but the best approach is from Schor
- Schor- court distinguished between the personal rights to have an Art III tribunal adjudicate one's rights, and the general structural interest in maintaining the separation of powers
    - The personal right can be waived if a person voluntarily enters into a legal relationship knowing that a non Art III tribunal will resolve; they cannot later challenge tribunal's legitimacy
    - Even when not waived, the personal interest is functionalist: it is for an "impartial and independent federal adjudication" (which formal adjudication by an ALJ will generally provide) and not an Art III tribunal as such
- The structural interest cannot be waived but is subject to the court's functionalist approach to the separation of powers
    - To be constitutional, the role of a non Art. III tribunal must not encroach on the core function of an Art. III court (ex deciding constitutional claims) then this is a problem
    - If the non Art III tribunal is only hearing minor disputes that are only incidentally within the Art. III's purview, then there is no problem
    - *keep in mind, this is only an issue when the agency adjudicator gets the last word

- **22) The Legislative Veto**
    - bicameralism and presentment req is viewed strictly (formalistically) by the court
        - if action is "legislative" in nature, it must be approved in identical form by both houses and signed by the President (or vetoed but then approved by 2/3 majorities in each house)
            - if not legislative then does not need b&p
        - to be "legislative" in nature the action must have "the purpose and effect of altering…legal rights, duties and relations"
            - executive action that seemingly meets this definition, but is pursuant to congressionally delegated power (as discussed under non-del doctrine) is still OK though
    - laws that give Congress the ability to efficiently review (and overturn) rules are constitutional as long as they require b&p to overturn
        - the same is true about a rule that would require Congress to affirm before the rule takes effect

        - allowing some subset of Congress to temporarily delay the passage is probably OK too because mere delay does not count as a legislative act
    - giving the White House or OMB (all major rules have to go through OMB) the ability to kill a rule before it can take effect is probably not a problem
        - because that can be considered just another part of the RM process which is OK because it stays solely in the executive branch
    - Corrections Day
        - Established to expedite review of agency order and rules
            - Must pass by 60% on corrections day
            - Expedited in 3 ways
                - 1) limited time for debate
                - 2) only chair of committee with jurisdiction over the bill can move to amend it
                - 3) opponents are limited to one motion to recommit the bill
    - a major rule cannot take effect until 60 days after info submitted to Congress
        - info:
            - new rule
            - copies of cost-benefit analysis
            - regulatory flexibility analysis
            - and unfunded mandate reform act analysis

INSPECTIONS, REPORTS & SUBPOENAS

- **The Power to Demand Information I (Inspections)**
    - Agencies have two main limits on their ability to perform searches and inspections:
        - 1) Congress must authorize the agency to do so (usually limits and specifically defines the bounds of an agency's search powers)
        - 2) the 4th Am. requires that searches be reasonable and that warrants (when required) be specific and based on probable cause and issued by a neutral magistrate
            - 4th Am does not apply when:
                - exigent circumstances
                - consent
                - good faith (thought there was a warrant)
                - no expectation of privacy
    - warrants are not required where:
        - there is no expectation of privacy
        - where there is consent to search and seizure
        - where entities are "pervasively regulated"
            - if the search has an important gov purpose and the agency's process offers other protections

- a general warrant authorizing a general search may seem to violate the 4th Am. it may be enforced in some situations
  - but even here search must be neutrally applied based on a general and prospective plan to limit the scope of such searches
  - test to meet Barlow's administrative plan:
    - 1) plan pursuant to which warrant was issues must be based on specific, neutral criteria; and
    - 2) warrant application must adequately establish that the particular company was selected for inspection based on the neutral criteria
- for a more specific search (such as one arising out of a specific complaint) an agency must generally meet the 4th Am's probable cause and specificity reqs and the search will be limited to what is authorized by the warrant
- remedies for unlawful search and seizure by an agency are the same as in other context:
  - Bivens actions or the application of the exclusionary rule
    - Bivens allows for fed official to be sued in a specific manner for state officials violating constitutional rights under color of state law
    - Rare for exclusionary rule to be used in the administrative context (as opposed to criminal)
  - To get use of exclusion:
    - It must be an effective deterrent
      - Ex not effective deterrent if a different agency is using the evidence than the one that wrongfully obtained it (Janis)
    - Violation must be quite egregious
      - If Lopez-Mendoza is not egregious enough, then no case is (deportation case)

- **23) The Power to Demand Information II (Recordkeeping and Reporting Requirements)**
  - recordkeeping and reporting requirements are another tool of admin agencies
  - some statutes establish such reqs directly and leave it to the agency to provide more detail others just authorize the agency to establish reqs
    - authorization may or may not require that reporting requirements be established by RM
      - if by RM must follow
  - agencies can also issue subpoenas
    - but only if they are expressly given that power by statute
  - Paper Work Reduction Act 44 USC Sec. 3501
    - Applies to any reporting requirement does not apply to:
      - Federal criminal investigations
      - Civil discovery
      - If it affects less than 10 people

        - Requires the agency to subject a new reporting requirement to notice and comment and require agency to analyze the req to make sure:
            - It is necessary
            - Compatible with existing reqs
            - Makes allowances for small businesses
            - Not confusing etc.
        - OMB must sign off on it and assign a control number to the reporting/record req
    - Steps to recordkeeping/ reporting rule:
        - Have to set up office to review info collection and reporting reqs
        - If by RM then put notice in FR and do n&c
            - If not by RM still need n&c
        - Send for OMB review
            - Do cost benefit analysis b/c EO 12866 applies for reporting reqs
- **The Power to Demand Information III (Constitutional Limits)**
    - Subpoenas (power to issue coming from statute) may implicate 4th Am, when issued by an agency they must:
        - Be relevant to agency's purpose authorized by the statutory grant of subpoena
        - Be reasonable
        - Follow statutorily mandated procedures and limitations

PUBLIC ACCESS

- **24) From the Ironically-Named Statute Department…:Freedom of Information Act**
    - Freedom of Information Act FOIA 5 USC Sec 552 of APA
        - Represents a strong statement on the side of openness in the balance btw the needs for accountability and confidentiality
        - Gives anyone the ability to obtain public records from an agency
            - But it can be slow working and is subject to many exemptions
        - Purpose to protect system against the lack of accountability
            - stop wrongdoing because they are being watched
    - Anyone can make a FOIA request
        - Don't have to be a citizen or resident
        - Don't need a reason
    - Agencies are subject to FOIA
        - President not an agency but his office is
    - FOIA is highly bureaucratized and those seeking info do better going through informal channels
        - Formally agencies must have their own rules (promulgated pursuant to FOIA) telling would be FOIA requesters the who, what, and where of the agency's records
    - FOIA requires agency to respond in 20 days (time limit widely violated) and grant request or not

        - Courts allow judicial review for denial
            - Court will treat failure to respond w/in 20 days as denial
        - Agency's ability to collect fees is affected if they violate the time limit (but can ask for more time if exceptional circumstances)
        - But most requesters just decide to wait rather than alienate the gov and spend money on litigation
            - Some agencies just deny any complicated req and see if they are serious enough to litigate
    - It costs agencies to review requests, find documents, and copy and ship them; type of requester determines cost:
        - 1) Educational/scholarly/ news Requesters must pay for:
            - Copies after 100 pgs
        - 2) Non-educational/ non-scholarly/ non news requests (not 1 or 3) must pay for:
            - Copies after 100 pgs
            - Search cost after 2 hours
        - 3) Commercial requestors (most FOIA reqs) must pay for all of this
            - Copies after 100 pgs
            - Search cost after 2 hours
            - Review costs
    - FOIA has its own judicial review provisions 3 advantages:
        - Unlike APA default provision, the burden of proof on the agency instead of the proponent
        - Review is do novo and not limited to the record
        - Agency has to pay fees and costs if it loses
    - FOIA requests must be reasonable in its specificity
        - Not just in clarity, but must reference an agency index
            - Agencies have indexes on what records they have and where
            - The request must track the index to make it reasonable for the agency to be able to find the documents
    - Agencies only have to turn over "agency record"; to determine if something is an agency record balance if the agency does this to the document:
        - Created
        - Stored
        - Controls
        - Uses
    - Material created solely for personal convenience not used for agency purposes are not agency records (Bureau of National Affairs)
    - Agencies need to have a system to keep records from being destroyed after a request for them comes in
    - Exemptions to FOIA:
        - National security
            - Glomar denial (may or may not exist)

        - Internal personnel rules or agency practices
        - Explicit statutory exemption
        - Trade secret and confidential business information
        - Privileged material (atty client)
        - Privacy-sensitive material (unauthorized invasion of privacy)
        - Law enforcement materials
        - Oil well
        - Financial institutions
    - Confidential business information is the most complicated FOIA exemption; something is exempt under this if:
        - Voluntarily given to the government but is not of a sort ordinarily disclosed to the public; or
        - Required to be given to the government but its release would cause substantial competitive harm to the submitter
    - DOJ will represent an agency to defend a FOIA denial if:
        - Agency reasonably foresees that the disclosure would harm an interest protected by one of the statutory exemptions
        - Disclosure is prohibited by law
- **25) Freedom *from* Information: Reverse FOIA**
    - FOIA exemptions mean that the agency is not required to release the document to the requester
        - But it can release if it chooses to
    - In deciding whether to release a document:
        - EO 12600 requires that the agency set up a process to (in some cases) notify and get the views of the entity that originally submitted the document
    - "reverse FOIA" suits allow the submitter of information to sue the gov to prevent disclosure
        - FOIA only provides for when disclosure is required, not when it is forbidden, so agencies may disclose information that falls within FOIA exceptions, so it is never the basis of a reverse FOIA suit
        - If submitter has some other basis for requiring non-disclosure (ex. Trade Secrets Act) he can use Sec 702 as a cause of action to prevent disclosure
- **Sunshine, Openness, and How Agencies Avoid Them I (FACA)**
    - Federal Advisory Committee Act (FACA) 5 USC App. 2 sec. 1
        - FACA purpose:
            - Efficiency
            - Balance
            - Accountability
            - Transparency
        - Requires that advisory committees including non-governmental employees be created only after:
            - A showing that the public interest requires it
            - With a charter setting forth its organizing principles

            - With a sunset date (usually will disband after 2 years but can be extended)
        - Can't meet or take action until charter is filed
        - Other FACA reqs for advisory committees:
            - Membership must be balanced and inclusive
            - Must be agency oversight and control of the committee
            - Meetings must be noticed and open
        - FACA exemptions:
            - Advice from individuals
                - If non fed employee just give advice (not vote) then committee not w/in FACA
            - Advice from bona fide fed gov employees
                - Can't just make people gov employees to escape FACA
            - Communications regarding facts instead of opinion
        - No real consequences for violation
    - Why would a committee want to get out of FACA?
        - Don't want to have open meetings
        - Don't want to do all the junk required
- **26) Sunshine, Openness, and How Agencies Avoid Them II (Sunshine Act)**
    - Government in the Sunshine Act 5 USC Sec 552b
        - Founded under the proposition that government should conduct their business in public
        - Requires agencies to be open
            - Have to give 7 days notice of a meeting with time, place, subject matter, and whether it will be open or closed (notice must be published in FR)
        - "Agency" for this purpose is:
            - A collegial decision making body (multi member)
            - Usually an independent agency
            - Appointed by the President and confirmed by the Senate
        - Ex FCC, SEC, FTC, or NLRB would be subject to Sunshine Act but Attorney General meeting with his subordinates would not be
        - "Meeting" for this purpose means:
            - official decision making occurs
            - where there is a quorum
        - specific exceptions made for instances where secrecy is more warranted
            - similar to FOIA exceptions plus 3 new exceptions:
                - accusing a person of a crime, or formally censuring someone
                - agencies regulating currencies, securities, or commodities

        - info related to agency issuing a subpoena, participation in civil action, or conduct of FA
    - burden on the government to prove something does not have to be public
    - if members are meeting to discuss matters that are under Sunshine Act but not voting we look to see if they have developed reasonably firm opinions
    - weak remedies:
        - don't overturn actions
        - usually don't force agency to turn over record

ATTORNEYS FEES

- **Getting Paid to Sue the Government I (EAJA; Prevailing Parties)**
    - Several statutes allow a party who prevails in a case (or part of a case) against the government to get the gov to pay their legal fees
    - 2 effects of fee shifting:
        - lawyers get paid
        - easier to settle
            - sometimes settle to avoid paying attorney fee
    - Equal Access to Justice Act (EAJA) provides a general cause of action
        - Applies to any non-tort action against the US and some agency adjudications
        - Individual plaintiffs worth less than 2 million
        - Business less than 7 million and less than 500 employees
    - Under EAJA one can only win fees if:
        - They prevail; and
        - The gov is unable to establish that its position was substantially justified
            - Probably substantially justified if they have precedent
            - Was it reasonable to litigate this?
            - Was agency reasonable to claim reasonableness?
    - "prevailing party" requires some judicial imprimatur be placed on the victory (a judgment, consent decree, or even a settlement in which the court retains jurisdiction to enforce (Barrios))
        - a plain settlement, private settlement, or a voluntary cessation of the complained-of conduct do not suffice (although Congress just broadened FOIA's fee-shifting provision to allow victories here)
        - catalyst theory (Buckhannon)- when plaintiff gets essentially what it wanted because defendant changed as a result of litigation (argued to be enough to be prevailing party in past cases but not enough; treated as dicta)
    - FOIA gives the government an incentive to ignore you until you sue, fee shifting eliminates this incentive
- **27) Getting Paid to Sue the Government II (Substantial Justification; Calculating Awards)**

- under EAJA, gov will have an easier time avoiding paying fees if it can show that its position was supported by a lower court or by one side of a body of conflicting case law
    - not necessarily enough to amount to "substantial justification" but it will help
- EAJA allows attorney's fees in the amount of $125 per hour ($75 until '96 adjusted for inflation so now around $175-$200)
    - Additional amounts are available for if:
        - Supply of qualified lawyer is severely limited; or
        - Where lawyer has special non-legal qualification
    - Some courts will allow higher fee for special legal qualifications if arcane reqs are met:
        - Lawyer has special skill (not just generally deep experience)
        - Case requires special skill
        - Special skill not attainable at statutory rate
    - Practice specialty is social security alone not enough
        - Special expertise does not have to be technical (IP), but has to be something that a competent attorney could not get through a study of governing legal principles

ADMIN. LAW PRACTICE

- **Professional Responsibility Issues for Agency Lawyers**
    - Government lawyers owe their client the same duty that private lawyers owe their client
        - The client is the agency so "client interest" is infused with distinctive considerations because client for agency lawyer:
            - Is more concerned with the public interest than a typical private client
            - Appear in court a lot
            - Have an interest in taking more credible (less "out there") positions
        - Leadership changes a lot for agency lawyer
            - But real client of agency lawyer is the agency not the guy telling him what to do
        - In the interest of an organization (agency) an attorney can release info he would not normally be able to