ADMIN LAW OUTLINE

I. The APA
   A. Administrative law deals with the laws and standards that constrain agency action.
   B. Agencies perform actions that closely resemble legislation (Rulemaking-prospective, general applicability) and adjudication (retrospective, discrete application).
   C. There are three recurring themes:
      1) Accountability to the political process;
      2) Rule by experts;
      3) Legitimation through process.
   D. While there is the APA, there are other statutes out there. Always start with the agency specific statute.

II. Rulemaking Basics
   A. Legislative rules have the force of law.
   B. Three ways to get a legislative rule
      1) Required by the statute to make a rule;
      2) Statute authorized the agency to make a rule, and the agency decides that it wants to do it;
         (i) Staff, civil service employees consulting various sources (bottom-up approach);
         (ii) Come in with an agenda, take to the head (top-down approach).
      3) Statute authorizes agency to, agency doesn't, but someone else wants them to.
         (i) Members of the public, interest groups, politicians.
   C. Petitioning for Rulemaking
      1) § 552 allows any interested party to petition
      2) § 555(e) requires there to be prompt notice of the denial and the reason for the denial.
         (i) Courts are reluctant to enforce.
         (ii) When the court does enforce, it only requires the petition to be answered, not granted.
      3) Factors for promptness
         (i) The time the agency takes to respond is governed by the "rule of reason;"
         (ii) Whether a congressional timetable has provided a time period;
         (iii) Delays related to economic regulation might be reasonable, delays when human health or welfare is at stake is less so;
         (iv) Higher or competing priority;
         (v) Nature and extent of the interests prejudiced by the delay; and
         (vi) No impropriety is needed for the delay to be unreasonable.
      4) Can seek review of a denial of a petition or failure to respond;
         (i) "Arbitrary and capricious" standard applies:
            (a) Did the agency give an adequate explanation for its actions; and
            (b) Was the explanation a rational connection between the agency's decision and the facts in the administrative record?
   D. Procedures for rulemaking
      1) Notice of the proposed rulemaking;
      2) Public comment period;
      3) Publication of the final rule; and
      4) Openness to petitions.
   E. Exceptions to Notice, Comment, and Publication requirement:

1) Military of foreign affairs;
2) A matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
   (i) Congress or the agency might allow these.
3) Nonlegislative rules (interpretative rules and policy statements) are also exempt from the notice, comment, and publication requirement.
4) Procedural rules are exempt from notice and comment, but not from publication.
   (i) Procedural v. Substantive: what is the extent to which the rule affects the "primary conduct" of the regulated entity as opposed to merely affecting how the entity presents its conduct?
   (ii) Look at whether the primary, substantive criteria has been changed. If it has, it is substantive and requires notice and comment.
5) Instances in which the agency, for **good cause**, finds notice, comment, and publication to be "impracticable, unnecessary, or contrary to the public interest.
   (i) Not read broadly.

F. Types of rulemaking
   1) Formal Rulemaking-requires trial type procedures.
      (i) Magic words are rulemaking "on the record" after an "agency hearing."
      (ii) Consider the evidence presented at the trial type hearing and nothing else.
   2) Hybrid-Statute specifies another procedure to use.
   3) Informal-most common.

G. *Vermont Yankee* Rule
   1) Courts should not add more mandatory procedures absent constitutional restraints or extremely compelling circumstances.

H. APA notice requirements for formal and informal rulemaking:
   1) Notice must include a notice of proposed rulemaking (NPRM) in the Federal Registrar which contains the time, place, nature, etc., of any public proceedings;
   2) The substance or description of the subjects and issues of the rule; and
   3) The data or methodology of any scientific evidence (Court created).

I. When there are conflicts over the proposed rule and the final rule an interested party can claim they had no notice of the final rule.
   1) Was the final rule a "logical outgrowth" of the proposed rule? Did the materials suggest the issue was "on the table?"
   2) If they proposed to do X, then proper notice has been given of doing X or not doing X or any magnitude of X.
   3) Did the final rule do something different in kind from the proposal?

III. Comment

A. Under § 553(c), the public must be given an opportunity for comment.
   1) No time requirement.
   2) Some agencies allow it to be public.
   3) Nearly costless to submit a comment.
   4) Agencies respond to comments.

B. Ex parte communications
   1) Not allowed in formal rulemaking under the APA.
   2) No explicit restrictions in informal rulemaking.
      (i) Generally ex parte communications are legal.

(a) One exception is that the Constitution restricts, via the Due Process Clause, ex parte communications in those rare cases that involve parties competing adversarially for a limited privilege.

(ii) Some courts have require disclosure and comment, suspect under *Vermont Yankee*.

3) Ex parte communications are only an issue with informal rulemaking when they actually sharped the substantive decision of the agency.

IV. Statement of Basis and Purpose

A. Short statement of the final rule and the agency's reasoning.

B. This is where the response to the comments will be.

V. Hybrid Rulemaking

A. Statute specific requirements that require agencies, as part of the rulemaking process, to consider the impact the rule has on certain things.

1) NEPA-Environmental impact.

2) RFA-Small Organizations.

3) PRA (paperwork)

B. E.O. 12,866

1) Applies only to "significant regulatory action" or a "major rule," defined as an annual effect of $100M or more.

2) Agencies need to do a cost/benefit analysis.

(i) If the cost exceeds the benefit, the agency is not supposed to do it unless required to by statute.

(ii) Then send it to OIRA, who can kill it with questions.

VI. *Chevron* deference/Questions of Law

A. Applies to when agencies are interpreting their own statute (step 0) with an informal rule.

1) If not its own statute, subject to arbitrary and capricious review.

B. Subject to de novo review but with significant deference.

C. *Chevron* test:

1) Did Congress speak on the issue or is it ambiguous or does it contain a gap that needs to be filled?

(i) If not, then no deference is given to the agency's interpretation if it does not do what Congress said.

(ii) If yes, go to step 2.

2) Is the agency's interpretation a permissible construction of the statute? Is it reasonable?

D. Congress intended the agency, not the court, to have deference.

E. Courts use cannons of statutory interpretation, such as plain meaning or legislative history, to determine if it is ambiguous.

F. Applies to determinations of agency jurisdiction.

VII. Substantive Decisions/Questions of Fact

A. Not an interpretation, but the rule itself.

B. For informal rulemaking, we use the "arbitrary and capricious" standard of reasonableness (§ 706(2)(A)).

1) Did the agency provide an adequate explanation?

2) Was the result grounded in the record? Was it reasonable?

(i) The "record" in this case consists of the NPRM, the final rule and its preamble, and any other materials used by the agency, such as comments and other docketed input.

C. Formal Rulemaking (and formal adjudication) uses the § 556(d) "Substantial Evidence" standard of reasonableness for questions of fact.
   1) Based off of the quantity.

D. "Arbitrary and Capricious" reasonableness test:
   1) Relied on factors that Congress did not want considered;
   2) Ignored factors Congress wanted considered or that logic suggested should be considered;
   3) Offered an inadequate explanation, in that it did not adequately treat the data on both sides, or the explanation does not add up;
   4) Agency's action was so implausible that it was stupid;

E. When repealing a rule, the agency must act reasonably based not only on the original record, but also on the original rule. The record for the new rule (the repeal) will include the original rule and the reasons for adopting it.

VIII. Adjudication Basics

A. An adjudication is defined as a process for producing an order, and an order is defined as a final agency disposition of an issue, other than a rulemaking.

B. When APA adjudication is used, it is called "formal adjudication." "Informal adjudication" is non-APA adjudication.
   1) Magic words for formal adjudication is that it is "on the record after an agency hearing."

C. APA requirements
   1) Notice (time, place, and nature; the legal authority for it; and the matters of fact and law asserted);
   2) Broad third-participation; and
   3) Administrative Law Judges (ALJs).
      (i) Most of the same procedural powers of an Article III judge, but cannot strike down statutes, agency rules, or the agency's interpretation of either.
      (ii) Protected from the agency by insulation
         (a) Cannot be evaluated based off of performance;
         (b) Administrators cannot influence;
         (c) Keep "prosecutorial" side separate.
         (d) Appointed through the Civil Service, usually.

D. In formal adjudication, the burden of proof rests on the proponent or instigator of the proceedings, unless the statute requires something else.
   1) Burden of persuasion is on the proponent,
      (i) Agency cannot shift this burden by procedural rule.
   2) Burden of production
      (i) On the opponent.
      (ii) Agency can shift by its rules.

E. The "Substantial Evidence" standard of § 556(d):
   1) Qualitative standard
   2) Rules of evidence do not apply.
   3) Typically de novo review.

(i) Some agencies use ALJs to produce the record and propose a disposition, and then pass it up to the head(s) of the agency, who review it de novo to produce a final order.
(ii) Cross-examination may be required.

F. Ex parte communications
1) Ex parte communications between interested persons outside the agency and the agency adjudicators, relevant to the merits of the adjudication, are forbidden.
2) Remedies are:
(i) Disclosure;
(ii) The agency may require a show cause hearing in which the burden to show cause why the tainted adjudication should not be altered. Only available when the improper communicator is a party.
(iii)Article III court reviewing to vacate the result because the decision making process was so irrevocably tainted and the resulting judgment is unfair. Consider:
(a) The gravity of the contacts;
(b) Whether they influenced the decision;
(c) Whether the improper communicator benefited;
(d) Whether adverse parties knew about it; and
(e) Whether remand would serve a useful purpose.
3) Due Process arguments
(i) Parties have a right to:
(a) Notice
(b) Opportunity to be heard.
(c) Right to a neutral decision maker
(i) One who has no personal or financial interest in the case that would sway his or her consideration of the facts.
4) The ex parte communication must have been "new and material" information, to be a violation, not merely duplicative.
5) Due process rights attach when:
(i) There is an **individualized decision** making taking place;
(a) The resolution of mass issues is for the political process.
(ii) Must have been **a liberty or property interest** at stake.
(a) A property interest can come from having an entitlement or a legitimate, not-unilateral expectation of a guaranteed benefit.
(i) Interest in pursuing a particular profession;
(b) A Liberty interest can be infringed by a reputational harm (a stigma) that seriously impedes that pursuit, so long as it is accompanied by some other action (a plus) by the agency.
(i) The government must be doing something that alters the subject's legal status.
6) *Matthews v. Eldridge* applies when a plaintiff is claiming there should be more process.
(i) We look to the general type of procedure that the plaintiff is claiming should have been used.
(ii) Then we balance on the one side, the burden to the government and on the other side, the interest that is at stake for people in plaintiff's position, discounted by

the value of the procedure based on the number of cases in which it can fix the bad result.

(iii) Looked at for the entire class, not just the plaintiff.

G. Judicial Review

1) When reviewing formal adjudication using the 706(2)(E) "substantial evidence" test, the court looks to see whether a reasonable person could have found enough evidence in the record that they could have reached the same conclusion as the ALJ.
   (i) ALJs is able to make assessments about a witness's demeanor.
   (ii) If an adjudication involves an ALJ and agency head, the ALJ's findings derived from the demeanor of witnesses receives weight. Inferences that can be derived from the record do not.
   (iii) If the head wishes to differ from the ALJ and survive Article III review, it must either rely on sufficient derivative inferences that satisfy 706(2)(E) or offer a good reason for rejecting the ALJ's inferences.
2) Formal adjudication fact questions (what happened?) are reviewed under the substantial evidence test while questions of law (statutory interpretation) are de novo, but with *Hearst* deference:
   (i) The statute is one that the agency is in charge of applying; and
   (ii) The statute is ambiguous and leaves it to the agency to resolve the ambiguity.
      (a) The court will accept the agency interpretation if it is reasonable.
3) Mixed questions of law and fact:
   (i) How to handle:
      (a) Unmix and ask
         (i) What was the legal standard used (de novo);
         (ii) Was there substantial evidence to support this for formal proceedings or was it arbitrary and capricious for informal proceedings.
   (ii) If *Hearst* applies, then the deferential standard is reasonableness;
   (iii) If *Hearst* does not apply, then they do not receive as much deference.
   (iv) Did the agency use a reasonable standard, and, if so, is there substantial evidence to support it.
4) The § 706(2)(F) standard of de novo review applies when the agency's fact finding is inherently inadequate.
5) Arbitrary and Capricious review of questions of fact for informal adjudication
   (i) Would a reasonable decision maker not have reached that result from the record;
   (ii) Inadequate explanation;
   (iii) Is it inconsistent with past decisions?

IX. Choice of Procedures

A. General v. Individualized

B. Rulemaking Pros
   1) More notice
   2) More generalized
   3) Agency must be authorized to make rules.

C. Adjudication Pros
   1) Bypass all of the rulemaking requirements.
   2) Faster and cheaper.
   3) Gives the agency more flexibility

D. Adjudication with retroactive effect
    1) An issue of first impression;
        (i) First cases need to have a harsher penalty.
    2) The new rule represents an abrupt departure;
    3) How much did the party rely on the original rule;
    4) The burden imposed;
    5) Statutory interest in applying a new rule.
E. Adjudications cannot merely be prospective
F. Ambiguous Rules
    1) *GE* deference is given when an agency is interpreting its own vague rule if it is reasonable.
    2) An entity can claim that it had no notice but only succeed if:
        (i) There really was no notice;
        (ii) It must be reasonable for the entity to not have anticipated that agency might choose the interpretation that it did;
        (iii) The entity will have a hard time prevailing unless the penalty leveled against it is both substantial and retrospective.

X. Nonlegislative Rules
A. Two types
    1) Interpretative rules
    2) Policy statements
B. Advantages
    1) No notice and comment
    2) Provides for flexibility
C. Disadvantage
    1) They do not get the deference or have the force of law of rules or formal adjudications
D. APA Requirements
    1) Must be published in the Federal Registrar
        (i) If they don't publish it, cannot use it.
        (ii) Can be binding on the agency
        (iii) Gives everyone constructive notice.
E. Policy statements
    1) What we'd like to do in the future
        (i) Words used: should or may
    2) Do not bind the agency
    3) Test to determine if it is a policy statement or interpretative rule
        (i) Does it have a present effect? If no, it is a policy statement;
        (ii) Does the action prevent future exercises of discretion by the agency?
F. Interpretative Rules
    1) Test
        (i) What it the agency's characterization of its actions?
        (ii) What is the source of the duty placed on the regulated entity?
            (a) If it really is an interpretative rule, the duty will come from the statute or legislative rule.

(b) If it creates a new duty, it cannot be an interpretative rule and must go through notice and comment.

2) It is rare that the government is estopped from using an interpretation against a regulated entity on the grounds that the entity had been told something different, unofficially, by an agency employee.
   (i) In private cases, it requires reasonable, detrimental reliance.
      (a) Not reasonable to rely on informal government communications.
   (ii) Government acts pursuant to law, which anyone can find out about.
   (iii) Also, the Appropriations Clause of the Constitution might prevent the agency from being estopped if there are money damages involved, as Congress did not authorize it.
3) *Skidmore v. Swift* deference is often indeterminate and can apply where *Chevron* doesn't. Factors are:
   (i) The expertise of the agency;
   (ii) The care with which the issue was considered.
4) Changing an interpretative rule can be done without notice and comment as well.
5) An agency's interpretation of its own vague rule is given *GE* deference, unless the rule merely parrots the statute under *Gonzales*, then it will get *Walton*.
6) Under *Walton*, interpretations of statutes from informal adjudication and nonlegislative rulemaking requires an analysis of:
   (i) The **centrality** of the gap in the statute;
   (ii) The **expertise** of the agency;
   (iii) The amount of attention the agency gave to it.
      (a) In some cases this can be *Chevron* like deference, in others it is like *Skidmore.*
      (b) More of the factors present, more likely *Chevron*.

XI. Reviewability

A. Basics:
   1) Jurisdiction is not an issue here, federal question.
   2) Cause of action
      (i) § 702-A person suffering a legal wrong because of agency action, or adversely affected by agency action, within the meaning of the relevant statute.
         (a) Legal wrong-a wrong suffered by a regulated entity; broad third party standing.
         (b) Adversely affected or aggrieved-must show they are within the "Zone of Interest."
      (ii) § 701(a) no reviewability if
         (a) Statute precludes it, or
         (b) Agency action is committed to agency discretion by law.
      (iii) Timing/process (ripeness, exhaustion, finality)
         (a) Primary jurisdiction-a case between 2 parties in which the agency and the court both have jurisdiction; court will give it to the agency.
   3) Standing (Constitutional Requirements)
      (i) Injury-in-fact
         (a) Actual and particularized versus generalized and speculatice
         (b) Associational standing
            (i) A member of the group has an injury-in-fact;

(ii) Purpose of the organization has something to do with the area;
(iii)The suit must be for declaratory or injunctive relief.

(ii) Causation-**"fairly traceable"** to the challenged agency action.

(iii)Redressability-injury is likely to be redressed by remedy requested.

4) Injury-in-fact
   (i) Plaintiff has suffered or is about to suffer a concrete and particularized injury.
      (a) Economic, physical, aesthetic, or recreational.
      (b) Reasonable fear can constitute a recreational injury.
      (c) Does not include speculative future injuries, nor generalized, abstract injuries.
5) Procedural injuries represent an exception to the causation and redressability requirements.
6) Standing does not require a nexus between the injury and the merits of the litigation.
7) If a person is entitled to a particular piece of information and the agency fails to produce it, a member of the public can establish injury.

B. Zone of Interest
   1) A prudential standing requirement that applies in third-party cases.
   2) Need to show that the interest the plaintiff is advancing are what Congress meant to address with the statute.
      (i) A "what" and not a "who" question.

C. Agency Action
   1) Failure to act
      (i) Agency has failed to take a discrete course of action like making a rule; and
      (ii) That the agency was required to take that discrete action.

D. Preclusion (§ 701(a)-talk about with standind)
   1) Express preclusion is rare, and generally not total.
   2) Implicit preclusion exists only where it is "fairly discernible" from the statute and/or legislative history.
   3) "Committed to agency discretion"
      (i) A lot like the political question doctrine.
      (ii) Does the statute give the court any "law to apply?"
         (a) Are there external standards that constrain the agency and that the court can apply in review?
            (i) If not, then the matter is committed solely to the agency, with exception of a constitutional claim.

E. Timing
   1) Finality
      (i) Has the agency completed an action?
         (a) Is it the **definitive** position?
         (b) Do **legal consequences** flow from the action? Does it affect the legal status of the plaintiff?
         (c) Penalties for noncompliance?
         (d) Immediate compliance required?
   2) Exhaustion
      (i) Is there a **mandatory internal agency procedure** required by statute or rule?
      (ii) Must be issue exhaustion as well. Cannot bring an issue up in court if it was not brought up in the agency.

(iii) Exceptions
(a) Cause unreasonable and prejudicial delay.
(b) The agency does not provide the type of relief asked for.
(c) The agency is so biased that it is futile to bother with exhaustion.

3) Ripeness
(i) Is the factual or legal case developed enough for the court to consider it?
(ii) Is the record sufficiently developed?
(iii) Balance the hardship that delay would cause the plaintiff with the interference immediate review would present to the agency.
(a) Whether the agency action will be stayed must be considered.

XII. Separation of powers

A. Non-delegation doctrine
1) So long as the delegation contains an "intelligible principle" that constrains the agency's discretion and provides a reviewing court with a way of knowing whether or not the agency is acting consistently with Congress's desires, there is no issue.
2) Courts will narrowly interpret statutes to avoid constitutional problems.

B. Delegation of final judicial authority is an issue when the agency decision maker is given the last word on an issue. Article III reviewability, even if deferential, is sufficient to save the statute.

C. Public rights cases, cases in which the agency is a party, or private rights cases arising entirely from a regulatory scheme can be handled completely by agency adjudicators.

D. Bicameralism and Presentment is viewed strictly.
1) For an action to be legislative in nature it must have the purpose and effect of altering legal rights, duties, and relations.
2) Reviewing rules is fine.
3) Requiring agencies to work together is also fine.

XIII. Information and Inspections

A. Limits on searches and inspections
1) Congress must authorize the agency to do so, and Congress usually limits and specifically defines the boundaries of an agency's search powers.
2) The Fourth Amendment requires that searches be reasonable and that warrants be specific and based on probable cause.
(i) Exceptions to warrant
(a) No expectation of privacy;
(b) Consent
(c) Pervasively regulated entities if the search has an important governmental purpose and the agency's process offers other protections.

B. Types of warrants
1) General warrant must be based on a general and prospective plan, neutrally applied, and the warrant must describe the plan.
2) Specific warrants must be based on probable cause and specificity requirements, and are limited to what was complained about.

C. Recordkeeping and reporting requirements
1) May be established by rulemaking.
2) Administrative subpoenas can be issued if Congress expressly said so.

3) The Paperwork Reduction act applies to any reporting requirement that affects 10 or more people. Agencies must follow for a new reporting requirement:
   (i) Requirement of notice and comment;
   (ii) Critically analyze the reporting requirement to make sure it is necessary;
   (iii) Compatible with existing requirements;
   (iv) Makes allowance for small business;
   (v) OMB must sign off on it.
4) A control number must be assigned, otherwise you do not have to fill out the form.

XIV. FOIA

A. Agencies must have their own rules telling prospective FOIA requesters the who, the what, and the where of the agency's records.
B. 20 day time limit to reply to a request.
   1) Often violated but means no fees.
C. Cost schedule
   1) Education/scholarly/media must pay for copies over 100 pages.
   2) Not 1 or 3 must pay for copies over 100 pages and search costs.
   3) Commercial requesters must pay for copies, search, and review.
D. Judicial Review
   1) Defendant-agency bears the burden to justify its actions
   2) Court determines de novo, no deference is given,
   3) Reasonable attorney's fees if you win.
E. Request must be specific with reference to the index it is in.
F. Agency records depends on
   1) Whether the agency created it;
   2) Where it is stored;
   3) Who has control over it;
   4) What it is used for.
G. Exceptions to FOIA
   1) Classified information
      (i) President gets a lot of discretion.
      (ii) "Glomar denial"-neither confirm nor deny.
   2) Internal Personnel Rules
      (i) Minor materials in which there is no public interest or so major it would interfere with proper functioning of the agency.
   3) Exempted by statute
   4) Confidential business information
      (i) Voluntarily given to the government but is not the sort ordinarily disclosed to the public; or
      (ii) Required to be given to the government but its release would cause substantial competitive harm to the submitter.
   5) Inter- or Intra-Agency Memoranda
      (i) Privileged materials
      (ii) Product of the information will remain secret.
   6) Personal privacy
      (i) Constitutes HR/personnel files
      (ii) Clearly unwarranted invasion of privacy

(iii)Redacting can work.

7) Law enforcement materials
8) Financial institution records.
9) Oil well data

H. Reverse FOIA
1) Does not exist, but E.O. 12,600 requires the agency to have a policy to address requested information.

XV. Other Public Access Measures

A. The Federal Advisory Committee Act (FACA) requires that advisory committees that include non-governmental employees must be created only after a showing that the public interest requires it, with a charter setting forth its organizing principles and a sunset date.
1) Membership must be balanced and inclusive.
2) Must be agency oversight
3) Meetings must be noticed and open.

B. The Government in the Sunshine Act requires that an independent agency meeting be open.
1) A meeting is one where official decision making occurs and there is a quorum.

XVI. Attorney's fees

A. EAJA
1) A plaintiff can be awarded attorney's fees if
(i) He is prevailing; and
(ii) The government is unable to establish that its position was substantially justified (that it was reasonable to litigate).
2) To be a prevailing party requires some level of judicial imprimatur be placed on the victory
(i) A judgment
(ii) Consent decree (not a settlement between the private parties but acts as a judgment of the court)
(iii)Possibly a settlement in which the court retains jurisdiction.
3) A plain settlement or voluntary cessation does not make a plaintiff a prevailing party.
4) The government might be able to avoid having to pay if it can show that its position was supported by a lower court or by one side of a body of conflicting case law.