Judicial Review of Agency Actions in the U.S.

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The 1946 Administrative Procedure Act (APA)

1. Openness of Agency Action
2. Agency Adjudication
3. Agency Rulemaking
4. Judicial Review of Agency Action

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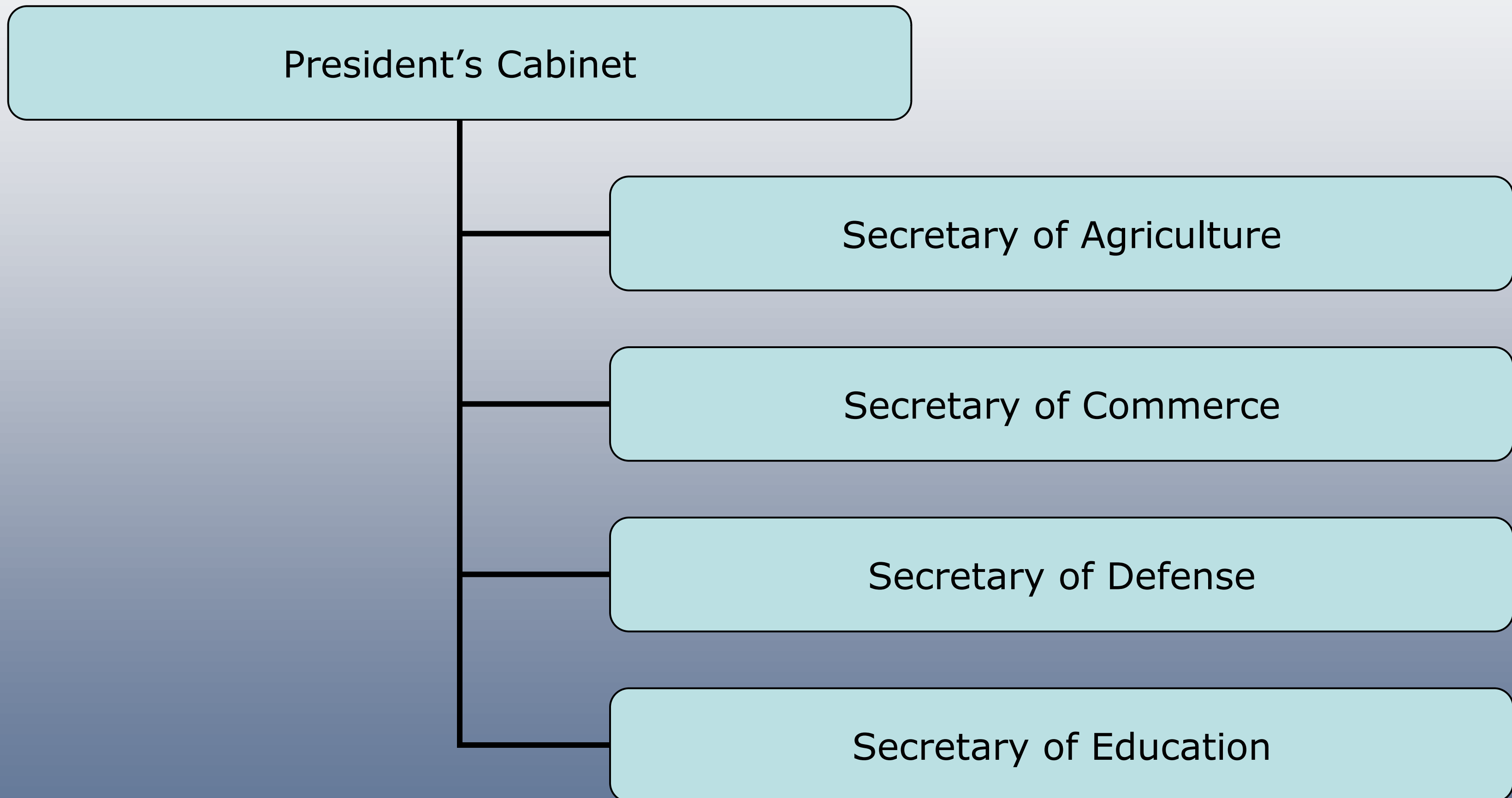
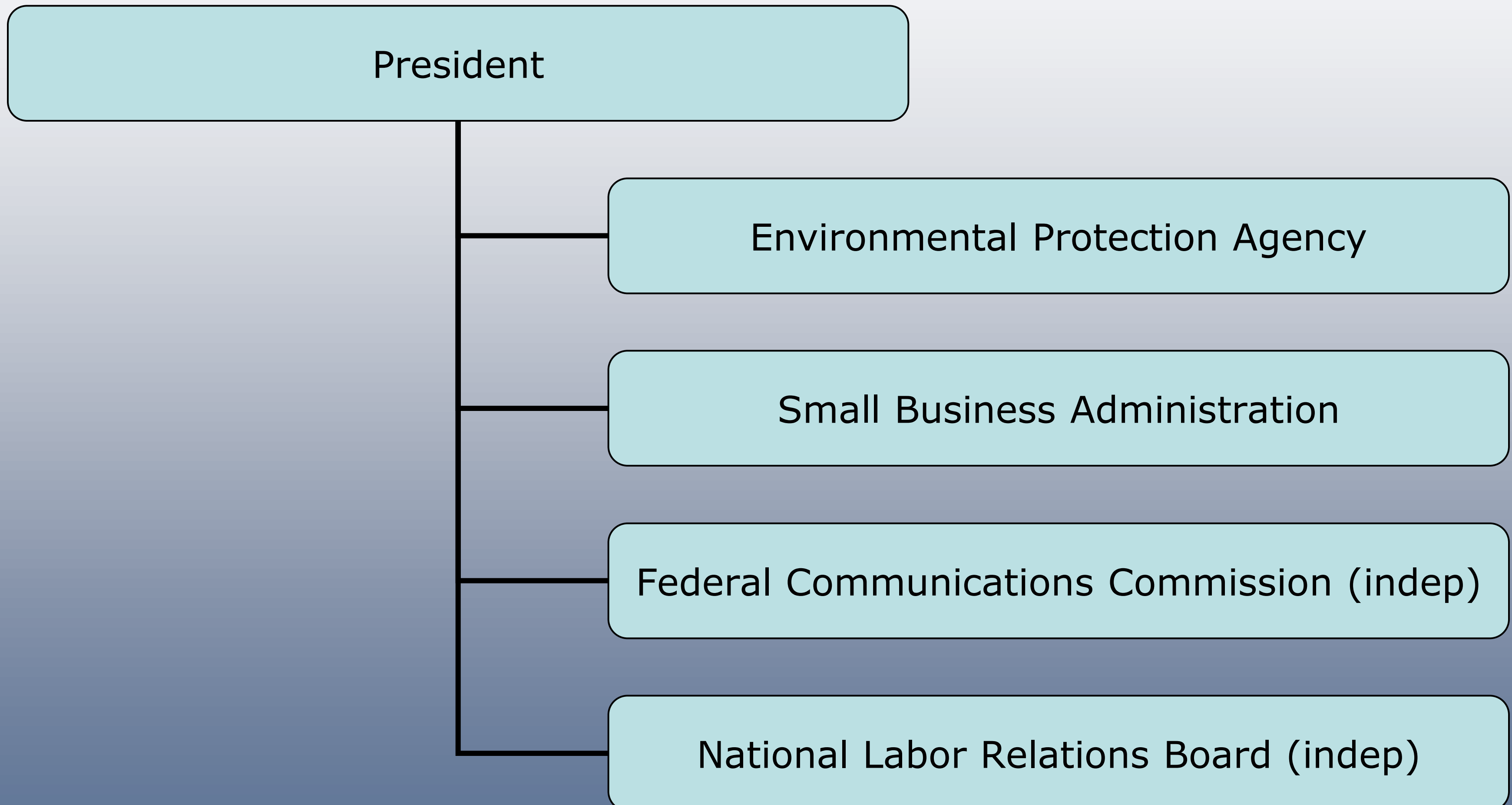
Executive Agencies



Federal Freestanding and Independent Agencies



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Adjudication<-->Rulemaking

- Under the federal APA, agency action is either adjudication or rulemaking.
- Adjudication leads to “orders,” retrospective decisions about a particular party.
- Agency statements of future effect—usually with general applicability, are “rules.”

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Rulemaking Procedure

These rules must be promulgated consistent with the APA, 5 U.S.C. §553

- Notice of proposed rulemaking
- Opportunity for public comment
- Consideration of comments
- Publication of final rule
- Effective date—30 days later

Administrative Adjudication

- In 1932 the U.S. Supreme Court upheld the constitutionality of a law passed by Congress that assigned the adjudication of certain disputes between dockworkers and the U.S. Government to an administrative agency—as long as judicial review was preserved in an Article III court.
- After the APA was enacted in 1946, there was a large increase in agency adjudication.

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Administrative Law Judges

- Formal hearings are normally presided over by an administrative law judge (ALJ).
- An ALJ is not in the Judicial Branch. They are employed by each (Executive Branch) agency.
- But the APA gives ALJs statutory guarantees of decisional independence.
  - Must be hired off a central "register" of eligible applicants
  - Exempt from performance rating
  - Can't be removed except for cause
  - Salaries set by statute
  - Can't perform non-judicial functions
- About half of the states have established a "central panel" of their ALJs to serve the agencies to enhance their independence .

Source: ***Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3214 (2010) (Breyer J. dissenting)**

According to data provided by the Office of Personnel Management, [t]he table below lists the 28 federal agencies that rely on ALJs to adjudicate individual administrative cases.

AGENCY	TOTAL NUMBER OF ALJs
Commodity Futures Trading Commission	2
Department of Agriculture	4
Department of Education	1
Department of Health and Human Services (Departmental Appeals Board)	7
Department of Health and Human Services (Food and Drug Administration)	1
Department of Health and Human Services (Office of Medicare Hearings and Appeals)	65
Department of Homeland Security (United States Coast Guard)	6
Department of Housing and Urban Development	2
Department of the Interior	9
Department of Justice (Drug Enforcement Administration)	3
Department of Justice (Executive Office for Immigration Review)	1
Department of Labor (Office of the Secretary)	44
Department of Transportation	3
Environmental Protection Agency	4
Federal Communications Commission	1
Federal Energy Regulatory Commission	14
Federal Labor Relations Authority	3
Federal Maritime Commission	1
Federal Mine Safety and Health Review Commission	11
Federal Trade Commission	1
International Trade Commission	6
National Labor Relations Board	39
National Transportation Safety Board	4
Occupational Safety and Health Review Commission	12
Office of Financial Institution Adjudication	1
Securities and Exchange Commission	4
Social Security Administration	1,334
United States Postal Service	1
TOTAL	1,584

But many more other Non-ALJ "Hearing Officers" in Federal Agencies

- Department of Defense—military discharge and security clearance cases
- Federal personnel appeals
- Immigration cases
- Government contract appeals
- Small civil penalty cases

Federal Court System

Supreme Court

- Highest court in the federal system
- Nine Justices, meeting in Washington, D.C.
- Appeals jurisdiction through *certiorari* process
- Limited original jurisdiction over some cases

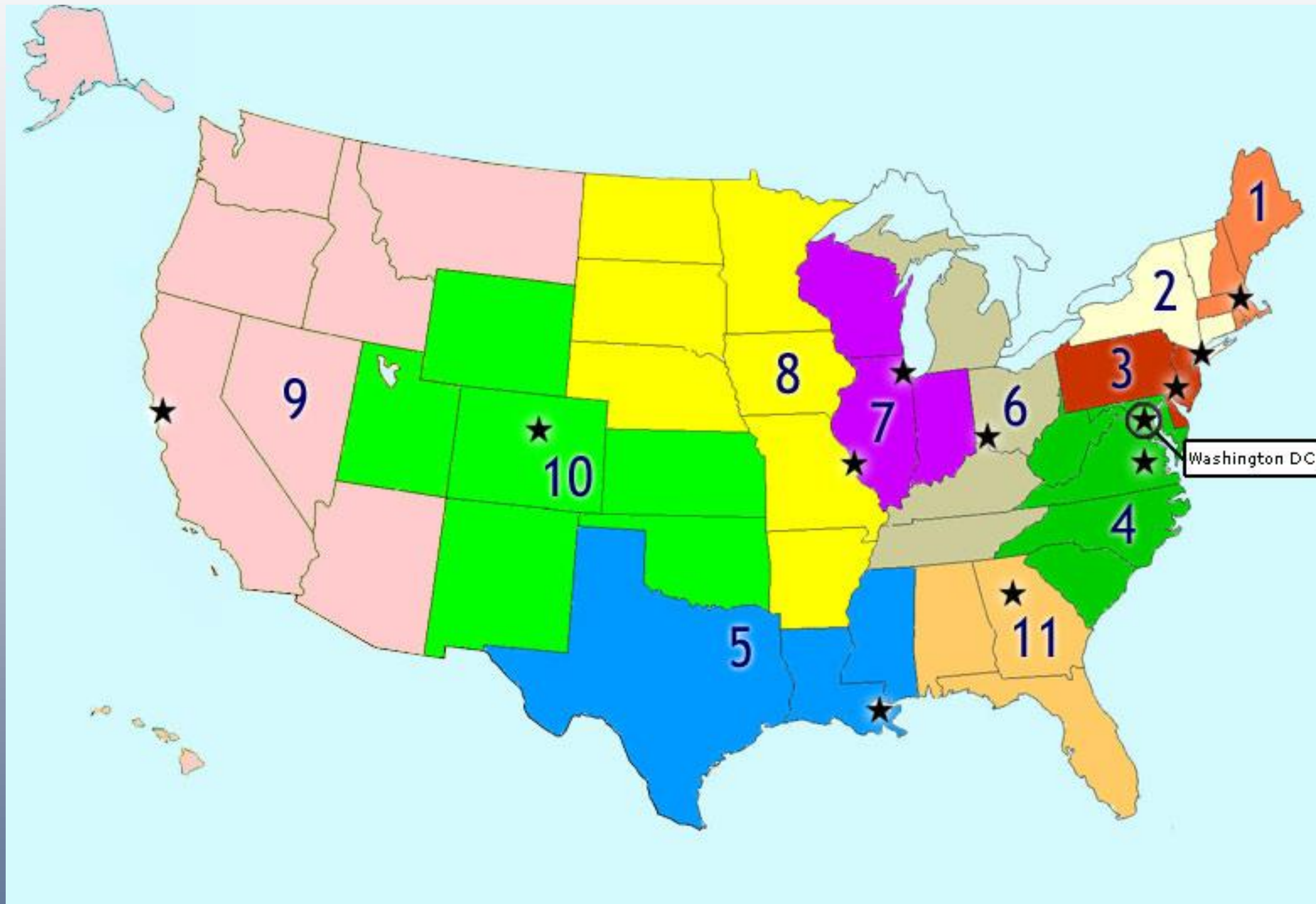
Courts of Appeal

- Intermediate level in the federal system
- 12 regional "circuit" courts, including D.C. Circuit
- No original jurisdiction; strictly appellate

District Courts

- Lowest level in the federal system
- 94 judicial districts in 50 states & territories
- No appellate jurisdiction
- Original jurisdiction over most cases

Geographic Circuits—U.S. Courts of Appeals



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Generalist vs. Specialized Courts

- Most of our federal courts are courts of general jurisdiction, but Congress has created several specialized Article I courts:
  - Tax Court
  - Court of Federal Claims ($$ claims against US)
  - Court of Veterans Claims
  - Court of Appeals for the Armed Services

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"Article I" Courts

- Under Article I Congress can create tribunals to carry out specialized functions.
- When the judges lack the lifetime tenure and guaranteed salary protection afforded to Article III judges, they become "Article I judges."

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Specialized Article III Courts

- Court of International Trade (New York)
- Court of Appeals for the Federal Circuit (Washington)—has exclusive jurisdiction over certain various specialized types of appeals — patents and trademarks, international trade, money claims against the US, veterans benefit denials, government contracts disputes, and government employee disciplinary cases.

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On appeal

- Appellate courts review issues of law decided by lower courts "de novo" (anew).
- Appellate courts review issues of fact determined by lower courts only for "clear error."
- But in cases where the courts "review" the actions of administrative agencies, the review is to determine whether there was "substantial evidence" to support the agency decision.

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APA's Provisions on Judicial Review

- § 701—Whether the action is reviewable?
- § 702—Who may sue?
- § 703—Where can the petition for judicial review be filed? (which court)
- § 704—When is the agency action ready to be reviewed? (finality, ripeness, exhaustion)
- § 705—Can the agency action be temporarily stopped pending court review?
- § 706—How should the court review? (scope of review)

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Courts can also “compel action unlawfully withheld or unreasonably delayed”

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Which Court?

- APA provides that Congress can provide for review in either district courts or courts of appeals.
- If Congress fails to specify in a particular statute, the suit must be filed in district court.

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Presumption of Reviewability

- Agency action is reviewable except:
  - 1. A statute provides for unreviewability or limits on reviewability
  - 2. The agency action is "committed to agency discretion." Example—agency decisions to enforce or not to enforce. *Heckler v. Chaney* (1985).

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Standing to Seek Judicial Review

Based on

1. Constitution—Article III requires federal courts decide "cases or controversies." No purely advisory opinions. This requires "injury in fact."
2. APA—Allows parties who are "aggrieved by agency action within the meaning of the relevant statute" to sue. "Zone-of-interests test"

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“Injury-in-Fact” Test

- Not just economic injury, but aesthetic, recreational, environmental injuries allowed.
- But not enough to claim injury as citizen or taxpayer.
- Also must show that injury is “caused” by agency action and that it will be “redressed” if plaintiff wins suit.

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Standing to Sue

- To demonstrate standing, a litigant must show that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favorable decision will likely redress that injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).
- But see *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007):
  - EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent." There is, moreover, a "substantial likelihood that the judicial relief requested" will prompt EPA to take steps to reduce that risk.

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Associational Standing

- If one member of an association is injured and would have standing, then the association can bring the case.
- Beneficial doctrine.

Standing Rules—Criticisms

- *Too complicated*—too much judicial energy expended
- *Unbalanced*—Easier for regulated parties (businesses, etc) to obtain standing than plaintiffs challenging weak regulation or lack of regulation (e.g., environmental groups)

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Timing of Judicial Review

- Finality—APA requires that agency action be “final” before review.
- Ripeness—Even if final, the action must also be “ripe” (ready) for review
  - Fitness of issues for judicial decision
  - Hardship to parties of withholding review

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Judicial Review of Agency Adjudications

- Courts normally require exhaustion of administrative remedies and finality.
- Courts review the agency's decision on the administrative record, using the "substantial evidence" test.
- Relatively easy for agencies to satisfy—even if there is counter evidence.
- But courts look at both the ALJ and agency head's decision. *Universal Camera* case (1951)
- Appeal is normally to the general appellate courts, not to specialized courts.

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Exhaustion of Administrative Remedies

- Exceptions:
- 1. Requiring resort to administrative remedy may prejudice subsequent right to judicial review (if agency is unduly slow, for example, or is unduly rushing the litigant).
- 2. Doubt that the agency can grant the relief sought (inadequacy of the administrative remedy).
- 3. Biased agency tribunal or futile to proceed in the agency.

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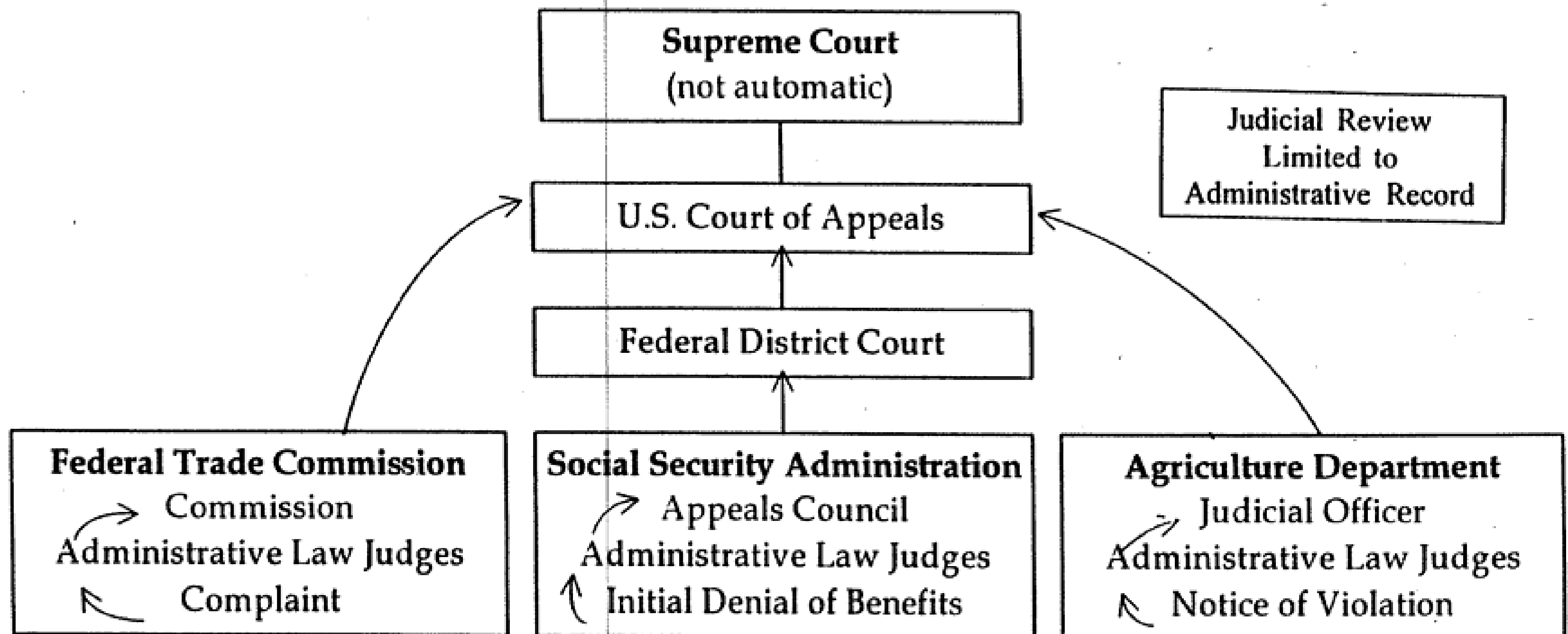
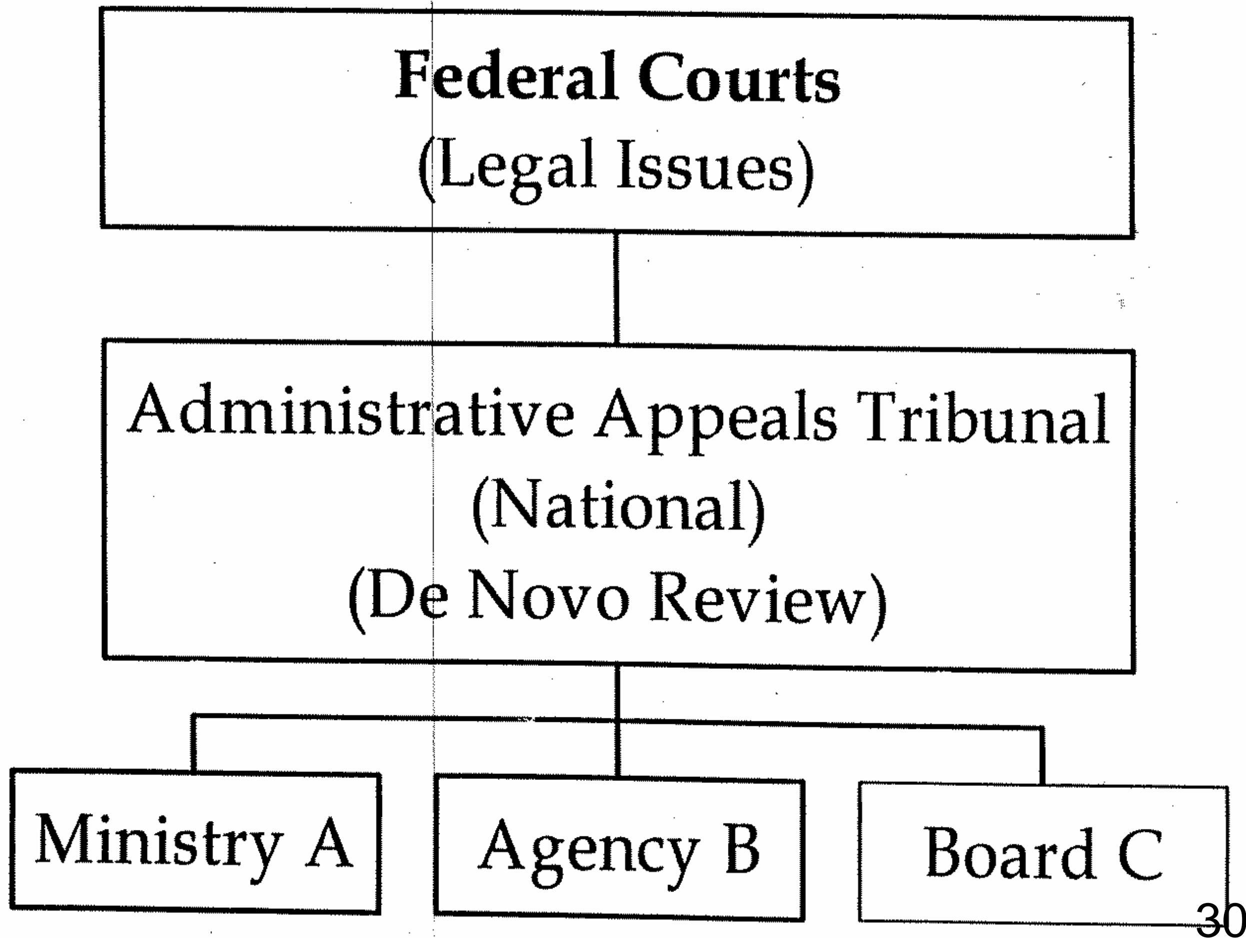
U.S. Administrative Law Judge System



Australia Administrative Court System



Procedural Review: *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (1978)

- The Administrative Procedure Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."
- "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."

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Judicial Review of Agency Interpretations of *Law*

- When an appeals court reviews a trial court's decision, it defers to the trial court's determination of the facts (since the trial judge and jury had an opportunity to evaluate the credibility of witnesses), but it decides the law without deference.
- How much deference should be paid to an agency's determination of the law?

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Deference to Agency Interpretations of Statutes

- APA is silent on this
- Traditional approach—courts give weak deference
- After 1984, strong deference approach now used in federal cases (*Chevron* case)

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Chevron Two-Step Test

- Step one—Has Congress directly spoken to the precise question at issue. If so—courts must follow. If not (ambiguous or silent), go to step two.
- Step two—If the agency's interpretation is reasonable, court should accept it.

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Step One Becomes Key Step

- If court wants to find interpretation to be *ultra vires*, the court will find that the statute is clear—and does not support the interpretation. E.g., *Brown & Williamson Tobacco* case (2000).
- Few cases overturn agency interpretations under Step two.

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Chevron debates

- Two step test sounds easy—but step one becomes key question.
- Also when does *Chevron* apply—to what type of agency interpretations? Now called "*Chevron* Step Zero."

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“*Chevron* Step Zero”

- The Scope of *Chevron**
- 1. *Chevron* principles apply to an agency’s interpretation of a statute the agency administers, where that interpretation
- (a) is embodied in a rule that has the force of law;
- (b) was developed in the course of formal adjudication, except where the adjudicating agency’s lawmaking power is limited by virtue of a “split-enforcement” statutory scheme, in which lawmaking authority over the same subject has been vested in an enforcing agency; or
- (c) was developed in the course of informal agency action if the agency’s conferred authority and other statutory circumstances demonstrate that “Congress would expect the agency to be able to speak with the force of law” in taking such action. *United States v. Mead Corp*., 533 U.S. 218, 229 (2001).

- *Source: *ABA Blackletter Statement of Federal Admin. Law, 54 ADMIN. L. REV.* 1, 39-40 (2002).

Chevron Principles Do Not Apply to Agency Interpretations:

- (a) of statutes that apply to many agencies and are specially administered by none, such as the APA, FOIA, or the National Environmental Policy Act (although *Chevron* may apply to interpretations of statutes administered by two or a few agencies);
- (b) of criminal statutes where the agency's power with respect to the statute consists solely of the power to prosecute offenses in court;
- (c) that contradict a controlling judicial decision, if that controlling decision was pre-*Chevron* or decided under *Chevron* Step one.
- (d) that represent merely the agency's litigating posture developed after the agency's decision; or
- (e) that are embodied in policy statements, manuals, enforcement guidelines, interpretive rules, and other such documents unless the agency's conferred authority and other statutory circumstances demonstrate that "Congress would expect the agency to be able to speak with the force of law" in taking such action.

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Skidmore Deference

In situations in which *Chevron* principles do not apply, courts ordinarily will give some deference or weight to an agency's interpretation of a statute that it administers. In these circumstances, as the Supreme Court ruled in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the agency's view can have "power to persuade," as distinguished from "power to control."

In determining whether and to what extent an agency interpretation deserves *Skidmore* deference, courts are guided by such factors as the timing and consistency of the agency's position and the nature of the agency's expertise.

Arbitrary-and-Capricious test

- Used to review:
- 1. Fact finding in informal adjudication (*Overton Park* case 1971)
- 2. Discretionary elements of informal rulemaking (interpretation of facts, policy choice) (*State Farm* case)
- 3. Choice of penalty in enforcement cases

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Legal Standards for “Arbitrary and Capricious”

- Lack of factual support for agency’s conclusion
- Failure to disclose data on which decision based -- for public comment
- Inadequate explanation for chain of reasoning
- Failure to give reasonable consideration to important aspects of the problem
- Inadequate explanation for any change in position
- Lack of appropriate consideration of important alternatives
- Inadequate consideration and response to relevant and significant comments
- Unfairness of remedies
- Unreasonable decisionmaking catch-all

Enforcement of Agency Decisions

- After judicial appeals are finished, courts have power to force enforcement by ordering parties (including the government officer) to comply.
- Normally not a problem (e.g., President Nixon obeyed the Supreme Court's decision that he must give up Watergate tapes).

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