

Session 3: Administrative Practice & the Congressional Role in Regulatory Modernization & Reform

I. Administrative Structure & Practice in the 21st Century¹

- Administrative agencies, whether “independent” or not independent, are statutory establishments within the Executive Branch.
- Under current practice, many agencies have the statutory authority to exercise at least three distinct types of power:
 - They can adopt rules that impose new binding standards to regulate the conduct of private parties.
 - They may investigate potential violations of federal laws or agency regulations.
 - They may themselves adjudicate alleged violations of laws or rules and levy penalties or other consequences such as the revocation of professional licenses.²
- An agency’s authority to exercise legislative, executive, and adjudicative powers, including at the same time, raises significant questions under the separation of powers and due process.

A. General Principles: Implications of Broad Statutory Authorizations

- *Delegations*: An agency’s authority to make policy by rulemaking depends upon the scope of the delegation of authority from Congress. Yet these

¹ The House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law recently held a hearing on modernization of administrative practice. Professor Mascott’s testimony at that hearing explored several of these practices and several potential reforms.
<http://docs.house.gov/meetings/JU/JU05/20211201/114285/HHRG-117-JU05-Wstate-MascottJ-20211201.pdf>

² See, e.g., *Lucia v. SEC*, 138 S. Ct. 2049–50 (2018) (petitioner brought Appointments Clause challenge against one of the commission’s in-house administrative law judges who had sanctioned him with a \$300,000 penalty and a lifetime bar from the investment industry, prior to judicial review).



delegations are often broad, and can include the power to regulate in the “public interest.”³

- The U.S. Supreme Court has upheld such delegations as constitutional so long as they provide an “intelligible principle” that the agency must follow in rulemaking. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).
- But some justices have expressed concern that significantly broad or vague statutory instructions improperly delegate “legislative” power to the agency, rather than confining the agencies to implementing policy judgements adopted by Congress. *See Gundy v. United States*, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting).
- *Internal Agency Adjudication or Judicial Review?*:
 - Congress has frequently enacted statutes that give agencies discretion in determining whether to pursue sanctions for alleged statutory or regulatory violations through the agency’s own adjudicators or in federal court.⁴
 - The consequences for parties often are compounded by agency-friendly procedural rules that agencies use in their internal adjudications, which are often less favorable than the federal rules of civil procedure.⁵
 - Agencies also frequently pursue settlement with regulated parties, which leads to significantly different incentives when agencies proceed in-house as opposed to under the supervision of an Article III, life-tenure-protected court.⁶

³ *See, e.g.*, 47 U.S.C. § 307 (authorizing the Federal Communications Commission to regulate licensing under a “public interest” or “convenience” standard).

⁴ *See, e.g.*, 15 U.S.C. § 45(b), (m) (authorizing the FTC to proceed internally rather than through filing a civil action in district court when “it shall appear to the Commission that a proceeding by it . . . would be to the interest of the public”).

⁵ *See* Comment, Prof. Mascott & Administrative Law Clinic, GMU (May 7, 2018), submitted in response to the Consumer Financial Protection Bureau’s Request for Information re Bureau adjudication practices, https://downloads.regulations.gov/CFPB-2018-0002-0033-attachment_1.pdf.

⁶ *See, e.g.*, Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J. FORUM 124, 129–30 (2016).

- *Judicial Review*: Under the Administrative Procedure Act (“APA”), agency action often then is further subject to significantly deferential judicial review. *See* 5 U.S.C. § 706.
 - Legal Challenges: Supreme Court doctrine allows for *Chevron* deference to agency interpretations of statutes and *Kisor* deference to agency interpretations of their own regulations.⁷ Both standards generally suggest that if a court finds a statute or regulation to be “ambiguous,” then it should defer to an agency’s reasonable interpretation. Increasingly, justices and members of Congress have expressed concern that such deference is inconsistent with section 706(2)(C) of the APA,⁸ which arguably requires “de novo” review and the separation of powers, which requires courts to declare the best interpretation of the law in the cases before them, whether or not there may be two permissible interpretations.
 - Factual Challenges: Courts generally review agency factual determinations under a very deferential “substantial evidence” standard, 5 U.S.C. 706(2)(E),⁹ which the Supreme Court has interpreted as close to the level of deference that a reviewing court should give a jury verdict. *See Universal Camera; ADAPSO.*
 - Policy Challenges: Courts review agency discretionary decisions under the “arbitrary or capricious” standard of Section 706(2)(A) of the APA,¹⁰ which the Supreme Court has described as “narrow” review of whether an agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.”

⁷ *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (“... as under *Chevron*, the agency’s reading must fall within the bounds of a reasonable interpretation.”).

⁸ 5 U.S.C. § 706(2)(C) (authorizing a court to “hold unlawful and set aside” agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

⁹ 5 U.S.C. § 706(2)(E) (review of agency action that is “unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute”).

¹⁰ 5 U.S.C. § 706(2)(A) (review of agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

- This interpretation is likely consistent with the APA’s original meaning, and under first principles courts likely should defer to executive discretion within areas of lawful authority.
- The breadth of authority granted to agencies through indeterminate statutory phrases in practice gives agencies very broad discretion under this review standard, compounding potential delegation concerns.
- That said, the increasing complexity of administrative records often affords courts substantial discretion in determining whether an agency has satisfactorily considered a part of the problem at issue. In recent years, courts have stood ready to find “arbitrary” and “capricious” rulemakings with which they may disagree, and petitioners have made a habit of forum shopping.

B. Agency Structure: “Executive” Versus “Independent”

- Structure: Agencies typically are structured as either traditional executive departments with a single head or as multi-member commissions. Typically, those multi-member bodies are headed by commissioners that Congress requires to be bipartisan, with a chairman appointed by the currently serving President. Congress often provides tenure protection to commissioners and staggers their terms.¹¹
 - The multi-member commissions are sometimes described as “independent,” based on a norm developed principally in the twentieth century of envisioning the multi-member bodies as insulated from presidential direction. *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).
 - Congress also labels certain agencies as “executive” or “independent” such as Title 5 provisions regulating agency procedure and the civil service and Title 44 provisions structuring centralized executive branch oversight of administrative operations through the Office of Information and Regulatory Affairs (“OIRA”). *See, e.g.*, 5 U.S.C. §§ 101, 104, & 105 (identifying executive departments, independent

¹¹ *See, e.g.*, 15 U.S.C. § 41 (providing for five Federal Trade Commissioners, to be appointed by the President with Senate consent, of whom no more than three can be members of the same political party and of whom the Chairman should be designated by the President).

establishments, and executive agencies); 44 U.S.C. § 3502(1), (5) (identifying executive versus independent agencies).

- OIRA is situated within the White House’s Office of Management and Budget and has responsibility for reviewing executive agency regulations for efficiency, consistency with presidential policy, and an assessment of whether the regulation’s costs outweigh its benefits.
 - Both OIRA and OMB are situated within the Executive Office of President and, thus, nominally have significant responsibility for overseeing and administering the President’s agenda across agencies.
 - In possible tension with this formal designation, OIRA and OMB consist of a number of career, tenure-protected staff serving under just a handful of presidential appointees at the head of these offices.
- By executive order, OIRA currently exercises jurisdiction to review only regulations issued by executive agencies, not agencies labeled as “independent” such as the FTC, SEC, and FCC. The Executive Branch’s Office of Legal Counsel has advised that it would be lawful for OIRA to exercise full jurisdiction over all administrative agencies, but the Executive Branch has not yet operationalized this position.¹²

C. Recent Examples of Agency Implementation of Broad Delegations

- The broad statutory authority of agencies has often meant that Presidents turn to them to try to implement policy blocked by Congress. President Obama, and now President Biden, have turned to the EPA to seek to adopt greenhouse gas regulations, despite Congress never having clearly adopted such a program. President Obama also relied on broad delegations in seeking to adopt his DACA and DAPA programs.
- Most recently, President Biden has invoked agency authority in seeking to impose a wide range of vaccine mandates across the country.

¹² See Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies, __ Op. O.L.C. __ (Oct. 8, 2019) (opinion of Asst. Attorney General Steven A. Engel).

- Most notably, the OSHA vax mandate was challenged as outside the scope of OSHA’s authority to issue “an emergency temporary standard to take immediate effect” upon a determination that the standard is “necessary” to protect employees from exposure to “grave danger” from toxins. 29 U.S.C. § 655(c).
- Similarly, HHS sought to impose an eviction moratorium, through the emergency authority available under the federal quarantine statute, 42 U.S.C. § 264.¹³ The statute was not used to a significant degree until the COVID-19 pandemic, and its language could be clarified to make clearer how many non-health-related measures can be promulgated under its authority.
- *Indeterminacy in Environmental Standards?:* Due to under-determinate language in the Clean Air Act, the Supreme Court is about to hear oral arguments in the third case over the past fifteen years involving the breadth of EPA’s authority to regulate greenhouse gases. *See, e.g., Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *Massachusetts v. EPA*, 549 U.S. 497 (2007). EPA authority to regulate carbon dioxide emissions is under review in *West Virginia v. EPA* (S. Ct. Docket No. 20-1530). EPA has claimed authority that would purportedly enable it to craft new standards impacting around two-thirds of total electricity-generation capacity in the United States, according to litigants.
- *Recusal of Agency Officials?:* Agency officials are not subject to clear, well-defined recusal standards, which raises the stakes for internal agency adjudication. FTC Chair Khan was appointed in large part because of her strong views concerning the large tech companies. Those companies now have sought her recusal on the ground that she lacks neutrality in the agency matters involving them. If Congress instead required the FTC to pursue enforcement of its regulations before an Article III court, then there would not be so much at stake in its commissioners’ decisions whether or

¹³ Under delegated authority deriving from 42 U.S.C. § 264(a), the CDC Director can “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” The Act then permits this authority to be carried out by actions that “provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [the Director’s] judgment may be necessary.”

not to recuse because the commissioners would not be deciding the relevant matter in the first instance.

II. Executive and Congressional Previously Proposed Reforms

- Below is a list of several significant reforms previously proposed or implemented within either Congress or the Executive Branch.
 - Members of Congress and Senators have repeatedly proposed packages of administrative procedural reforms. It is unclear whether pieces of these proposals would see a greater possibility of enactment, than the attempt to pass them all in one bill. Details of some of the proposals are noted below.
 - The Trump Administration also implemented a number of reforms to the APA through executive order (“EO”). But what one administration can do by executive order, another can undo, and the Biden Administration repealed most of those orders. Congress, of course, could enact the reforms that it feels merit reinstatement. Many of the reforms were about process and transparency, rather than substantively favoring deregulation over regulation, making them perhaps more amenable to bipartisan or eventual majority support.

A. Congressional Reforms

- Since the APA’s enactment in 1946, its core procedural requirements have not been significantly modified. Key congressional reforms that have been adopted to impact executive branch process include the Freedom of Information Act, the Privacy Act, and the Government in the Sunshine Act.
- There have been many legislative proposals for reform, but most proposals have not seen significant progress. Two proposals that provide a good broad overview of potential reforms include the Regulatory Accountability Act and the REINS Act, detailed below.
- *Regulatory Accountability Act of 2017*: has had bipartisan support and is based in part on ABA recommendations.
 - Requires agencies to maintain a public rulemaking record and disclose information on which the agency relies.

- Requires a 30-day minimum comment period for regular rules and 60 days for major rules.
 - Preserves *Chevron* deference but eliminates *Auer/Kisor* deference.
 - Ultimately increases procedural hurdles for regulation.
- *REINs Act*: This Act flips the burden of the Congressional Review Act, requiring congressional approval of certain rules *prior to* their becoming effective rather than after they are promulgated.
 - The Congressional Review Act authorized expedited legislative procedures for reviewing certain agency rules, which in practice would enable Congress to disapprove an executive branch rule, prohibiting from going into effect.
 - The REINs Act instead would require every “major rule” (e.g., those imposing costs of > \$100 million) to receive pre-approval by Congress and “nonmajor” rules would be subject to potential congressional disapproval after promulgation.

B. Significant Trump Administration EOs on Reform of Agency Procedures

- [1. Transparency/EOs 13891 and 13892](#): Improved Guidance Documents & Transparency in Civil Administrative Enforcement and Adjudication. These EOs prohibited agencies from relying on policy statements to impose new binding standards on regulated parties outside the APA’s notice-and-comment rulemaking process. Revoked by [EO 13992](#).
 - Typical APA rules require time for public comment on proposed agency rules, which agencies sometimes circumvent by posting policy statements that are purportedly “nonbinding” but are perceived by parties as standards that the agency is likely to impose.
 - The EOs also required agencies to main a website with a searchable indexed database so that regulated entities could easily identify relevant agency documents.
- [2. Rulemaking by Appointees/EO 13979](#): “Ensuring Democratic Accountability in Agency Rulemaking.” This EO limited the power of career, civil service-protected officials to authorize and give final approval to agency regulations, requiring the signature of senior executive appointees.

Revoked by [EO 14018](#).

- Senior appointees were defined as individuals appointed by the President, or performing the functions and duties of an office that requires appointment by the President, or a non-career member of the Senior Executive Service.
- [3. Mens Rea Reform in Criminalization/EO 13890](#): The order required that all rules identify whether violations of the regulation could subject an individual to criminal penalties. Rules also were to provide a clear explanation of the potential for criminal charges under the rule and what level of “mens rea,” or intent, the government needed to prove to convict someone of a crime under the regulation. EO 14029 revoked this EO.
- [4. Administrative Law Judges as Officers/EO 13843](#): The EO reformed the administrative law judge hiring system, giving the hiring/appointing power to department heads who have authority under the EO to establish the criteria and process that will be used to hire agency adjudicators. The EO responded to the Supreme Court’s holding in *Lucia v. SEC* that ALJs were constitutional officers who needed political appointments, rather than civil-service hiring by lower-level agency officials.
 - This EO has not been revoked. The EO’s changes were broadly supported by agency officials themselves, including currently serving ALJs, as detailed in a report for the Administrative Conference of the United States coauthored by Professor Mascott.
- [5. Civil Service Reform/EO 13957](#): This order created a new Schedule F in the Excepted Service for officials serving in “[p]ositions of a confidential, policy-determining, policy-making, or policy-advocating character.” The excepted service would have removed the positions from the civil-service tenure protections covering the typical career employee within administrative agencies. *See, e.g.*, 5 U.S.C. §§ 7503(a), 7513(a) (limiting disciplinary actions to those justified by “such cause as will promote the efficiency of the service”).
 - [EO 13839](#), “Promoting Accountability and Streamlining Removal Procedures,” built on these reforms by revising and clarifying the

procedures that executive supervisors were to use in more efficiently imposing consequences for poor employee conduct.

- [EO 14003](#) revoked both EOs.

[6. Deregulation/EO 13771](#): “Reducing Regulation and Controlling Regulatory Costs.” This EO required agencies to eliminate two regulations for every one new regulation that they promulgated. [EO 13992](#) revoked it on the first day of the Biden Administration.

III. Additional Potential Frontiers for Reform

Unions/collective bargaining

- In certain cases, Congress has authorized administrative officials to unionize. Negotiated policies can impact agency practice in a manner that is substantially insulated from electoral accountability.

MSPB

- When a department or agency seeks to suspend, reduce pay, terminate, or impose another negative consequence on a civil service-protected employee, the MSPB has statutory authority to review the action. MSPB hearings are conducted by tenure-protected adjudicators, and statutes permit multiple levels of review by the MSPB. Therefore, as a practical matter, it can take a very long time to carry out employee disciplinary action, even if an executive branch supervisor has identified good cause for the action.

Licensing

- The President has previously claimed broad authority related to border control to adjudicate licensing related to international pipelines.
- Reform of permitting under the National Environmental Policy Act for permitting rules related to infrastructure projects