Appendix L: Administrative Procedure

Regulatory Agencies Follow “Administrative Procedure Act”
– Commissions must solicit comments
– Engage in open decision making
– Establish factual record

Agency Actions
1. “Rule Making”: Creating general rules
   • “Adjudication”: deciding company-specific cases
     – Agency enforcement of regulations
     E.g. FCC takes away TV licenses from General Tire Corp for misrepresentation in its application

Rulemaking
• Example: FCC ownership ceilings on TV stations

References
Rulemaking Procedures
• NOI (Notice of Inquiry)
• NoPR (Notice of Proposed Rulemaking)
• Final Rules
• Litigation (often)
• Enforcement

Rulemaking Procedures (1)
• Often, Commission publishes a “Notice of Inquiry” (NOI)
• Inviting outside parties to comment on issue before the FCC, provide information
• All comments are public
• Responses are possible
• Some public hearings possible

Rulemaking Procedure (2)
• Commission then proposes regulation
• Notice of Proposed Rulemaking (NOPR) published in Federal Register

Rulemaking Procedure (3)
• Parties affected by proposed rule submit comments
• No oral evidence
• No cross-examination, but response to comments possible
Rulemaking Procedure (4)
• Agency can seek information beyond testimony of interested parties in order to form final decision

Rulemaking Procedure (5)
• Staff drafts rules, commissioners may modify. No “backroom meetings” allowed by commissioners
• Public vote on rules
• Final rules published

Rulemaking Procedure (6)
• Then, many parties sue in court, to overturn rules

Adjudication
• E.g. Can Fox TV keep extra TV stations the company got with a merger, since they are UHF and not VHF?
• Procedure similar to court trial
Formal Adjudicatory Procedure

• Often started by filing of a complaint from the agency, private citizen, Attorney General of US, or injured party against the company

• Business must produce response to complaint

Formal Adjudicatory Procedure

• Administrative Law Judge (ALJ) from agency then heads a hearing
• Cross-examination is allowed
• ALJ issues decision

• A party can object to the ALJ decision, the agency decision and then reviews the commission

Formal Adjudicatory Procedure
• If objections remain, party must go to Federal Courts

Judicial Review
• Agency decision can be reversed if:
  - agency did not follow procedure as required by constitution, existing law, or agency-created regulations
  - agency failed to satisfy court as to the reasons for its actions

• Appeals to courts (In US, Courts of Appeals; Supreme Court rarely takes administrative appeals)

• Grounds for legal appeals are limited:
  – exceeding authority or jurisdiction
  – no due process or no substantial evidence
  – violation of constitution
  – “Bad policy” is no ground for appeal

“Chevron Deference”

- **Chevron vs. Natural Resources Defense Council** is a landmark case in Administrative Law.
- Before *Chevron*, courts could supersede agency interpretations on “questions of law” but deferred to agencies on “questions of fact.”

“Chevron Deference”

- Now a two step process:
  - Court rules whether legislative language is ambiguous or not.
  - If it is not ambiguous, the court’s judgment supersedes the agency.


“Chevron Deference”

- If legislative language is found to be ambiguous, the any “reasonable” agency interpretation supersedes the court’s own judgment.


“Chevron Deference”

- Legal philosophy behind *Chevron* deference: Congress has given the agency the power to interpret ambiguous laws.
- But not to change clear legislation on its own.

An Investigation

• May occur when agency requires data to support rulemaking or adjudication actions

Investigation

• Agencies need a source of legal authority (statute or regulation) to conduct any inspection
• Agency cannot exercise authority that violates legal constraint

Investigatory power

• The administrative agency can require a business to produce periodic reports showing that the business is complying with the law

Requirements

• An Administrative inspections do not violate the 4th amendment if:
• It takes place in a public area
• Takes place under an issued warrant consistent with reasonable administrative or legislative standards
• Involves a pervasively regulated business

### Obtaining Documents and Testimony

**Agency can obtain information in two involuntary ways:**

1. **Reporting requirements** – Require reports to be made periodically to an agency e.g. Tax returns to IRS

2. **Subpoenas** – Directed to specific individuals who are instructed to produce documents or testimony. Subpoenas require specific statutory authority and can be enforced through judicial contempt proceedings

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### Morton Salt Test

**United States Vs. Morton Salt Co.** (1950)

- Interprets 4th amendment to impose limits on agency subpoenas
- Cannot be too indefinite or overly burdensome
- Must seek information relevant

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