# Chapter 3 - Introduction to Adjudications

# Learning Objectives

## Learn how adjudications different from Article III trials

## Learn how ALJs different from Article III judges

## Learn how the role of expertise shapes adjudication procedure.

## Learn the basic procedural requirements for an adjudication.

# Reading assignment

## Chapter 3 to p. 76, Part II, p. 84 (Part III) to p. 92, G. Ex Parte Communications

# Issues to be addressed

## Every new tribunal, erected for the decision of facts, without the intervention of jury, . . . is a step towards establishing . . . the most oppressive of absolute governments.

### Are adjudications really more abusive than jury trials?

### The problem of administrative cost and access to justice

## Adjudications in the Old Days

### What did "jury of your peers" mean originally?

#### How has that changed?

### Government regulation

#### Did you get a hearing when the King told you what to do?

### Was there a right to a jury in civil trials?

## Defining an Adjudication

### Adjudications are the process used to make an order involving specific identified parties.

### Adjudications may be like trials and deal with past facts.

### Adjudications may also involve permits, licenses, and other permissions to do things in the future.

## Examples of Adjudications

### Adjudications to resolve factual questions.

#### Why is your federal student loan application an adjudication?

#### What is the order?

#### What about social security disability determinations?

#### Payments for Medicare claims

#### Penalties for Clean Water Act violations.

### Adjudications to Make Policy

#### Are courts charged with making law and policy through legal opinions?

##### Do their opinions make law and policy?

##### What is happening with gay marriage?

#### Are civil law courts bound by precedent?

##### Why do we read civil court opinions?

##### How do they set law and policy?

#### Agency adjudications can work the same way

#### California Dental Association v. FTC, 526 U.S. 756 (1999)

##### What did the FTC accuse the CDA of?

##### What was the sequence of the agency review?

##### Why are agency rulings appealed to the Circuit courts rather than district courts?

##### How does this adjudication set national policy, if the adjudication is not precedent?

###### Who will be deciding future cases?

#### Why Make Policy Through Adjudications?

##### Rulemaking is a long and tortuous process

##### Takes time, which makes deal with new situations impossible to handle

##### Almost impossible to change, so you have to get it right the first time.

##### You can use adjudications to try different approaches or deal with problems that do not fit the rule

### Permits as adjudications

#### Wetlands development requires a permit from the Army Corps of Engineers

##### The developer must submit proof that the land to be developed is not a wetland, or, if it is, that there will be appropriate mitigation

##### The Corps evaluates the application and makes a decision, which can then be appealed to an internal Corps appeals board

##### If the application meets the standards, the Corps will issue a permit.

#### In the absence of regulations, the decision reflects the Corps' policy on how it defines and regulates wetlands

### Inspections as adjudications

#### Restaurants need a food handling permit to sell to prepare food and sell it to the public

##### Must show that you have the proper equipment

##### Must show proper training for employees

#### These permits provide for surprise inspections to assure that the conditions are still being met

##### The inspector views the facts

##### The owner can provide input during the inspection

##### The inspector provides written findings

## Federal Agency Adjudications versus Article III Trials

### Inquisitorial rather than adversarial

#### What does this mean?

#### How does this change the nature of trials?

#### Why is this the norm internationally?

### Expertise versus impartiality/cluelessness

#### Do we choose federal judges based on expertise in the matter before them?

#### How does an expert judge and an inquisitorial system change the nature of trials?

### Ex Parte Communications - Art III Trials v. Adjudications

#### Why are these forbidden in Article III trials?

#### Why are they less of a problem in agency proceedings?

##### How is the relationship between a litigant and the court different between a litigant and an agency?

##### Why is knowledge by the judge of the issues and parties treated differently from a trial?

## The Core Importance of Expertise in Understanding Agencies

### A primary reason for congress delegating rulemaking powers to agencies is that the agency has experts in the subject matter

### As we will see later in the section on judicial review, the courts generally defer to agencies. This is based in part on agency expertise.

### Agency adjudications have very different procedures and due process requirements from Article III trials because the decision is being made based on the judge's expertise, not just the presentation of materials by the parties.

### We will see how state efforts to make ALJs impartial undermine this core value.

## ALJs versus Article III Judges

### Article III Judges

#### Protections

##### Lifetime tenure

##### Cannot reduce salary

##### Cannot fire, only impeach

##### Cannot discipline

#### Why do we have these protections?

#### How are state judges different?

### ALJs

#### Civil service protections

##### Can be fired

##### Can have salary lowered, but hard to do this

##### Can set work standards and discipline

#### How are the pressures different than those on an Article III judge?

#### What about contract ALJs that some states use?

## Federal ALJs

### What do most (75%) of federal ALJs do?

#### Why the growth in this area?

#### What do you think is happening during this prolonged recession?

#### This is the major due process problem/issue in government benefits adjudications.

### ALJs are such a “PIA/protective of individual rights” that they become another reason agencies try to use informal adjudications as much as possible.

### Very few adjudications are done by ALJs

#### AJs

#### Hearing officers

#### Other agency personnel

#### Contractors

#### Computers

## What is the Legal Status of an ALJ's Opinion?

### What is an initial decision, in contrast to a recommended decision?

#### 557(b)

### Why did the EPA switch to allowing ALJ decisions to be final decisions if the agency did not act and there were no internal appeals in 45 days?

### We will discuss agency rejection of ALJ opinions in the chapter on judicial review.

## Basic Procedure for Adjudications

### Federal APA Sections 554, 556, and 557.

### Louisiana - 955, et seq.

### Right to bring your own lawyer

#### No right to appointed counsel

### Right to a record

### Right to notice of the findings and reasons

## Who Gets to Appear Before the Agency?

### Interested persons versus parties.

### Thinking about nuclear power plant licensing hearings

#### Are there more interested persons than parties?

#### What will be effect on the proceeding if it allows participation by interested persons rather than just parties?

### How about hearings on permitting landfills?

### What are the pros and cons of allowing interested persons as opposed to parties?

## Notice

### APA 554(b)

### What is notice?

### Why is it required?

### What has to be provided in the notice?

### What can complicate notice?

#### Language - What about in immigration?

#### Address - Welfare benefits?

### Why will we see notice become a constitutional right?

## Burden of Proof

### Who has the burden of proof in an administrative proceeding?

#### What is the Social Security Disability example?

#### What is the order in this example?

#### Sometimes the movant is not clear - SSI recertification

#### This follows the judicial notion of burden of persuasion, which can be different from the burden of going forward or the burden of production.

### Shifting the Burden

#### Old welfare system – Goldberg (later)

##### Beneficiary gets benefit until agency moves to disqualify

#### New system - TANF

##### Benefits have limited term

##### No action necessary to terminate benefits.

#### Recertification schedules

##### Shift the burden to recipient to show qualifications.

##### License renewals can do the same.

## Standard of Proof

### What is the standard of proof required in an agency proceeding, unless otherwise specified in the law?

### Are there other standards in administrative proceedings?

#### The United States Supreme Court has upheld a clear and convincing standard in mental health commitments.

#### Congress is free to require even higher standards of proof.

### When we learn about judicial deference to agencies, we will rethink what preponderance of the evidence really means.

## Rules of Evidence in Administrative Proceedings (Formal and Informal)

### What is the purpose of the rules of evidence in Article III trials?

#### What is the underlying theory of the rules?

#### How does this change when there is no jury?

### Why would this be different in an inquisitorial proceeding?

### Does the APA set the standard of evidence?

#### Do all agencies use the same standards?

### Hearsay

#### What is hearsay?

##### Why is it excluded in the rules of evidence, except for the zillion exceptions?

##### Why would the hearsay rule not be as important in an agency proceeding?

#### The Residuum Rule

##### Once prevented adjudications from being based solely on hearsay evidence

##### This has been replaced by the "substantial evidence" standard used for all agency evidence

##### LA uses "sufficient evidence" - may not be the exactly same standard.

## Discovery

### Not provided for by the APA

#### Some agencies allow discovery

#### Why is it less of an issue than in Art. III trials?

#### Freedom of information/Open Records Acts

### Parties may also be entitled to have the agency use its subpoena power on their behalf, if the agency can order discovery for itself.

# Evaluation Questions

## What is an adjudication?

### What is the definition of an adjudication?

#### What would you look to decide is something is an adjudication?

### Explain how inspections are a form of adjudication using a restaurant inspection as an example.

### How are federal student loan applications an adjudication?

## Making policy through adjudications

### How does an agency make policy through adjudications?

### Why would an agency want to do this, as opposed to making a rule?

### Why is it easier to assure consistent agency policy through rulemaking than through adjudications?

## ALJs and AJs

### How does an inquisitorial process (agency adjudication) differ from an adversarial (court) trial?

### What are Article III judges, how are they selected, disciplined, and removed?

#### How do these factors change for an Article V Louisiana judge?

### How can an Article III judge enforce a judgment?

#### Can an ALJ enforce a judgment?

### How does the section and supervision of an ALJ differ from an Article III judge?

#### Can ALJ’s be fired?

#### Can they be required to meet performance standards for their work?

### How is an ALJ's decision in the federal system different from an Article III judge's decision?

#### Is an ALJ decision final (when issued)under the APA?

##### Can the agency treat the decision as final?

##### Why did EPA do this for some decisions?

#### If the agency does not treat the decision as final, what does the agency do with it?

#### Do ALJs bind the agency in the federal system?

## Admission of Evidence

### What is the purpose of the rules of evidence in Article III trials?

### How does the policy for admitting evidence differ between an Article III jury trial and an ALJ hearing?

#### How is this changed when it is an Article III non-jury trial?

### Does the APA establish the rules for admitting evidence into administrative proceedings?

### Do all agencies use the same standards for evidence?

### What was the Residuum Rule?

#### How does the "substantial evidence" standard change the Residuum Rule?

## Notice

### What is required for Sec. 554(b) notice?

### What can complicate notice?

#### What about in immigration cases?

#### Welfare benefits cases?

## Burden of Proof

### What is the standard of proof required in an agency proceeding, unless otherwise specified in the law?

### Who has the burden of proof in an administrative proceeding?

### How do you determine who is the movant?

#### Why does it matter for burden of proof?

#### Why does this mean that it is harder for you to lose a law license than to be denied one in the first place?