# Formal Adjudications

# Learning Objectives for this Module

## Learn the historical limitations of the APA in providing guidance for modern adjudications.

## Learn how the requirement for a formal adjudication is triggered.

## Learn why the courts are reticent to order formal adjudications.

## Learn that there is no bright line between the process afforded and the complexity in formal and informal adjudications.

# Reading Assignment

## Chapter 3, pp 76-84

# Issues to be discussed

## APA Background

### The APA was passed in 1946 and its provisions reflected the administrative law world of that period.

### There was a major federal presence because of the New Deal agencies and the war.

### There were not nearly as many federal programs requiring large numbers of adjudications.

#### SSI Disability, which employs 80%¾ of ALJs, was not passed until 1956

#### Medicare and Medicaid were passed in 1965

### The APA adjudications provisions anticipated a smaller number of more involved adjudications than are the norm in the modern administrative law world.

## Administrative Cost and Formal Proceedings

### Administrative cost is a key concept in adlaw

#### This is enshrined in Matthews v. Eldridge in 1976, discussed in the due process module.

#### The cost of the process provided has to be justified by an improvement in the accuracy of the proceeding and the value of that accuracy.

#### This analysis explicitly recognizes that in administrative law we make mistakes and it may not be worth the money to change procedures to correct those mistakes if they are not very costly.

### All other things being equal, the more due process rights the proceeding provides, the more expensive it will be.

#### Agency resources

#### Time to resolve the dispute

#### More costly for the regulated party as well.

#### Remember – criminal trials are so expensive that only the richest defendants can get one.

### The larger the number of adjudications under the statute and the more disruptive the costs of more procedure, the less likely the courts are to require more formal procedures.

#### What would it cost if Medicare payment determination looked like a trial?

##### What sort of delays would you expect?

#### What if FEMA used trials to decide on compensation checks?

## APA Provisions - Formal Procedures

### Equal Access to Justice Act – allows the collection of attorney’s fees against the feds.

#### 28 U.S. Code § 2412 (d)(1)(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

### Formal (APA) Adjudications under the US APA

#### 554, et seq.

#### Exemptions to 554

##### (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

##### (2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;

##### (3) proceedings in which decisions rest solely on inspections, tests, or elections;

##### (4) the conduct of military or foreign affairs functions;

##### (5) cases in which an agency is acting as an agent for a court; or

##### (6) the certification of worker representatives.

### There is a parallel provision on rulemaking that we will study later.

#### There is more direct precedent on what triggers formal rulemaking because formal rulemaking is very expensive and very time consuming, thus the courts are reluctant to require it.

### Since the courts are reluctant to require formal adjudications, what specific language do they look for in the statute enabling the adjudication?

#### "on the record after opportunity for an agency hearing“

### What are the subsequent provisions this triggers?

#### 556, 557

### How formal is formal?

#### Unlike formal rulemaking, which is always complex, the majority of formal adjudications are pretty simple, with the regulated parties often not represented by attorneys and with no representation of the agency.

#### Some can be very complex, such as NLRB adjudications establishing whether a group such as college athletes can form a union.

### Why do we call informal adjudications non-APA adjudications?

## Informal (Non-APA) Adjudications v. Formal Adjudications

### Most statutes that establish frameworks for adjudications do not trigger formal proceedings, and whenever possible agencies avoid formal proceedings because of the administrative cost.

### These can be thought of as non-APA proceedings because they do not have to closely follow 554, 556, 557.

### The procedures are determined by the legislature as part of the enabling law or left to the agency.

#### These procedures are limited by Constitutional due process requirements as discussed later.

#### The Constitutional requirements mirror those of the APA in many regards, so both informal and formal adjudications will have to provide notice, a record, an unbiased decisionmaker, and other core protections.

### Some agencies have developed rules based on the Federal Rules of Civil Procedure and Evidence, which make their informal hearings look like trials.

## Practice Issues

### Challenges to whether an adjudication triggers the 554 requirements for a formal adjudication are relatively rare, as you might guess from the small number of cases on the issue.

#### The courts are reticent to order formal rulemaking unless the statute is clear.

#### If the statute is ambiguous, most circuits defer to the agency – Chevron deference discussed later.

### In practice, if the issue has not been settled for your hearing type, you have to argue the issue to the court based on the circuit’s precedent.

#### You argue the ambiguity in the statute to support your client’s interest.

#### If you are the regulated party, you have to convince the court that added procedures are worth it because of the harm of an incorrect ruling.

#### If you are the agency, you argue that procedure that you provide adequately protects the party’s rights without wasting time or money.

### The book spends a lot of time on examples of arguments for and against the court ordering a formal adjudication.

#### You do not need this level of detail for this course

### The most common fight over procedure is whether the agency meets the basic constitutional due process requirements, discussed latter, not whether 554 is triggered.

# Evaluation Questions

## How has the nature of adjudications changes since the passing of the APA?

## Why are courts reticent to order formal adjudications?

## What is the language from Sec. 554 that triggers a formal adjudication?

## Assume that the statute enabling the adjudication in question is ambiguous on the language triggering 554.

### What do you need to argue on behalf of a regulated party who wants a formal adjudication?

### What do you argue on the behalf of the agency that is opposing the litigation requesting a formal adjudication?

### (These answer will be better informed after later discussions of rulemaking and due process.)