

Administrative Law
Fall 2001 - Richards - Sample Answers

1) Distinguish *Londoner* and *Bimetallic* and explain their significance to administrative law.

These cases deal with the distinction between adjudication and rule making. *Londoner* was the setting of an individual's tax rate based on specific facts about the property. The court found that considering individual factors made it an adjudication and created a right to a hearing. *Bimetallic* involved setting rates that applied to all tax payers. Since there was no individualized decision making, the court found it was a rulemaking and there was no right to a hearing.

2) President Bush used executive orders to create the Homeland Security Czar. You do not need to know or discuss the specific executive order he issued, but discuss in general terms what he could do with his executive powers and what he could not do until congress passed a law enabling the homeland security agency. Be sure to address staffing, funding, etc.

Powers

Reallocate White House Staff

Can reallocate funds in the White House budget

Can reallocate agency funds which are not otherwise restricted by Congress

Direct staff at other agencies to support the Czar

Hire and appoint the Czar

Reallocate general funds to the Czar, consistent with statutory limitations

Provide office space and support services

Give the Czar the power to oversee other agencies

Limitations

Cannot create new budget funds

Cannot assign/reassign agency personnel unless it is within the scope of their statutory duty

Cannot reallocate funds with specific spending limitations

Cannot make regulations or take enforcement actions that are not already authorized by statute

3) Using an example of each, explain how independent agencies differ from cabinet level agencies. How does this difference affect review by the Office of Information and Regulatory Affairs (OIRA)?

The Securities and Exchange Commission is an independent agency. It is headed by a group of commissioners who serve for fixed, overlapping terms and who can only be removed for cause. Because of the independence of the commissioners, the president cannot set SEC policy through Executive Branch oversight and cannot direct the agency through Executive Orders. The rationale for this independence is that the agency must be seen as above partisan political influence so that its regulation of the markets will be trusted.

The Department of Health and Human Services is an Executive Branch agency with a single head who serves at the pleasure of the president. The Executive Branch sets HHS policy, consistent with Congressional statutory mandates. The President can modify HHS policies through Executive Orders, again within statutory constraints. HHS primarily

makes policy through the spending power rather than through enforcement and should be seen to be politically responsive.

OIRA may review actions and regulations of Executive Branch agencies to assure consistency and compliance with Executive Branch policy. This review cannot override Congressional mandates or the notice and comment rulemaking process. OIRA has little real authority to review independent agencies because they are not compelled to follow Executive Branch authority.

4) Using restaurant inspection as an example, explain how inspections can substitute for adjudications.

Adjudications involve individualized fact finding and should allow the regulated party a chance to present rebuttal and to question the agency's case. There should be a record to allow agency appeal and ultimate judicial review.

An inspection allows the direct observation of facts which are documented by the inspector. The inspector follows a checklist of objective criteria to assure consistency between inspections and to assure complete documentation. The regulated party is present and may comment and explain the problems identified by the inspector. The inspector is an expert in food sanitation standards and practices and acts as an expert decisionmaker who is personally familiar with the facts. If the regulated party wants to contest the results of the inspection or any administrative penalties assessed by the inspector, the inspection report is the administrative record for appeal and review.

5) Which APA sections govern notice and comment rulemaking and what does the agency have to do to promulgate a proper rule? Assume that the agency does not follow correct procedure, but the deadline for contesting the rule has passed. How can you attack the rule?

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Publish a notice of proposed rule making in the Federal Register, with a period for public comment. After the comment period is closed, the agency must publish a final rule that will go into effect at a fixed time in the future and has been modified consistent with the comments or respond to substantive comments, explaining why the agency has not modified the rule.

Contesting an improperly promulgated rule

- 1) bring a claim that the rule exceeds the agency's statutory or constitutional authority
- 2) petition the agency for amendment or rescission because there is a substantive flaw other than statutory authority and then appeal the denial of that petition

6) Contrast the significance of ex parte communications in agency adjudications and district court trials and explain how they are handled differently.

Article III court trials

Forbidden in court trials because of the independent decisionmaker

Grounds for a mistrial or to disqualify the judge

Agency Adjudications

Hard to avoid in adjudications because of the interplay between the agency and the decisionmaker

Put them in the record
Not usually grounds for overturning an adjudication

7) How are FOIA requests different from discovery in civil trials? Explain why you might use FOIA instead of discovery in a case you plan to litigate. When can an agency release info that is covered by an exception and how does this lead to reverse FOIA claims?

FOIA versus Discovery
You do not need to be in court
You do not need to show relevance
You do not need to give notice to the subject of the inquiry
No harassment limitations

Release of exempted information
An agency may release mandatory provided information that is subject to an exemption if it is in the public interest and is not otherwise forbidden by statute.
Agency must show some legal basis for overruling an exception for voluntarily provided information, such as a statutory mandate

Reverse FOIA
A party who provided the information that the agency seeks to release may sue for an injunction preventing the agency from releasing the information if it believes that the agency is acting unlawfully.

11) Explain that case! For each case, briefly explain its significance in administrative law and any tests it stands for.

a) *Humphrey's Executor v. United States*

First case to recognize independent agencies
Cannot remove commissioner except for cause

b) *WAIT Radio v. FCC*

Plaintiff claimed new technology justified an exemption from the rules, and the commission rejected the petition
The court kicked it back for better reasons - i.e., fix the record
The court observed that since the petitioner had to give specific facts and reasons supporting the petition, the agency needed to answer those

c) *Pillsbury Co. v. FTC*

Congressional meddling into an ongoing adjudication is grounds for overturning the adjudication

d) *Heckler v. Campbell*

SSI
United States Supreme Court found that the agency could use rulemaking and guidelines to establish the criteria that would be considered at hearings, thus narrowing the reviewable issues

e) Buckley v. Valeo

Violates separation of powers for Congress to control appointment of commissioners to an independent agency.