

# Legal Background for Administrative Adjudicative Law in the United States

Walter J. Brudzinski  
Chief Administrative Law Judge  
United States Coast Guard

# Administrative Law in the USA

Includes all actions by government with respect to a citizen or vice versa.

Excludes criminal actions and actions between individuals and entities in which they need a neutral forum to settle their differences.

Administrative Procedure Act, 5 U.S.C. §§ 551-559 prescribes general rules. Agencies prescribe specific rules.

Much more adjudication in administrative agencies than in U.S. Courts.

# Administrative Adjudication

Includes actions among individual participants in the decision making process such as when an agency makes a decision with respect to an individual.

Central to administrative adjudication is DUE PROCESS.

# Due Process

Analysis:

Origins

What is Due Process?

What Process is Due?

# Magna Carta

## 1215

- Clause 39: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."

# Magna Carta

## 1215

Clause 39 guaranteed the rights of due process:

- Underlying principle behind notice and opportunity to be heard.
- Found its way through the Enlightenment and into American law in general and thence into administrative law.
- Due process is the oldest American liberty with which we identify.

# English Petition of Right 1628

Further interpreted and expanded the concepts in the Magna Carta and added to the documents comprising England's "constitution."

The *Petition* of Right of 1628 is one of England's most famous Constitutional documents. It was written by Parliament as an objection to an overreach of authority by King Charles I. During his reign, *English* citizens saw this overreach of authority as a major infringement on their civil *rights*. Charles believed in the devine right of kings.

# English Bill of Rights 1689

- Huge influence on US colonies.
- It further shaped England's conception of individual rights. [free elections, free speech]
- It was a direct ancestor of the United States' Bill of Rights. [limited const monarchy]
- It put sovereign power of government into documents instead of putting it all into the act of naming the king as the sovereign power.

[Glorious Revolution, constitutional monarchy]

John Locke 1632-1704, classical liberalism; wrote Two Treatises of Gov't and A Letter Concerning Toleration



# First Charter of Virginia in 1606 and the Ordinances for Virginia in 1618

Outlined framework for colonial governance.

[Purpose was King James' intention to spread Christianity but he kept a tight reign on the settlers – not much freedom. That would come later]

# The Massachusetts Body of Liberties of 1641

- Outlined the first “bill of rights” in America, and served as a ratification of the *Magna Carta*.
- The basic right to **due process** was once again defined.
- Gives the right to free speech in courts and public assemblies.

# Virginia Declaration of Rights 1776

- Drawn upon by Thomas Jefferson in drafting the Declaration of Independence.
- Became one of the bases of the U.S. Constitution and its Bill of Rights.
- Basic rights of man, including right to abolish inadequate gov't. Influenced Dec. of Indep., Bill of Rights, and France's Declaration of the Rights of Man & of the Citizen.

# French Enlightenment 1715-1789

Big influence on U.S. founding  
documents.

# Montesquieu (1689-1755)

## Separation of Powers

[concerned with despotism]

Wrote Persian Letter, Considerations on the Causes of the Grandeur and Decadence of the Romans, 1734), and The Spirit of the Laws, Influenced James Madison

Voltaire (1694-1778)

All men are created equal. Church  
and state must be separate.

# Rousseau (1712-1778)

Sovereign power existed in the people,  
not the king.

Wrote On the Social Contract as well as  
Discourses on the Origin of inequality, Political  
Economy, and the Science and the Arts

# Declaration of Independence

## 1776

- John Locke (1632-1704) – life, liberty, pursuit of happiness; tolerance
- Montesquieu (1689-1755) – separation of powers [not in Declaration exactly but despotism was the theme]
- Rousseau(1712-1788) – social contract theory and consent of the governed
- Voltaire 1694-1778 – all men are created equal; free speech; separation of church and state
- Thomas Jefferson – (1743-1826) drafter
- Ben Franklin (1705-1790), John Adams (1735-1826, and other Founding Fathers - reviewers



# U.S. Constitution

- Created in 1787
- Ratified in 1789
- Influence by
  - John Locke (1632-1704)
  - Charles de Montesquieu (1689-1755)
  - Virginia Declaration of Rights
  - Founding Fathers

# U.S. Constitution

## Separation of powers

- Art. I - legislative power - Congress;
- Art. II - executive power - president and subordinates;
- Art. III - judicial power located in the courts;

# U.S. Constitution

## Federalism

- Art. IV - full faith and credit clause; privileges and immunities; protection of states;
- Art. V - how to propose amendments;
- Art. VI – supreme law of the land;
  
- Art. VII – ratification.
- How does Administrative Law fit?

# Administrative Power

- Arose as a practical and necessary response to government agency involvement in new and complex practical problems in American life.
- Congress passes laws establishing and empowering agencies to enforce laws, including adjudication within the agency.

# Origins of U.S. Admin Law

- Early years – customs officers - war department clerks considering pension claims - ship's hull and boiler inspectors.
- Interstate Commerce Commission in 1887;
- As time went on, Congress created more agencies – Bureau of Corporations (1903), later the Federal Trade Commission (1914).

# Due Process Clauses of the U.S. Constitution

The Fifth and Fourteenth Amendments each contain a **due process clause**.

- 5<sup>th</sup> Amendment: “No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .”
- 14<sup>th</sup> Amendment, section one: “. . . nor shall any State deprive any person of life, liberty, or property with due process of law . . . .”

# Due Process

- Notice and opportunity to be heard in an orderly proceeding adapted to the nature of the case in the administration of justice.
- Safeguards against arbitrary denial of life, liberty, or property by the Government outside the sanction of law.

# Due Process

## Ensures rights and equality

### Four Protections

- Procedural due process in civil and criminal proceedings;
- Substantive due process – protection of certain rights deemed fundamental;
- Prohibition against vague laws;
- As a vehicle for incorporating the Bill of Rights.



# Due Process

- This lecture's focus is on procedural due process in civil law;
- Further broken down to civil administrative law;
- Further broken down to the adjudicative process within government agencies.

# Administrative Procedure Act (APA)

## 5 U.S.C. §§ 551-559

- Enacted in response to the tremendous increase in agencies and the need to ensure fair hearings.
- Established Administrative Law Judges to check agency behavior contrary to due process, to protect public safety, and to secure proper entitlements.
- The APA governs all three main agency functions: rulemakings, adjudications, and licensing.
- Our focus is adjudication.

# Administrative Law Judges (ALJs)

- There are over 1,600 Federal Administrative Law Judges in the USA.
- ALJs conduct formal hearings in advertising, antitrust, banking, communications, energy, environmental protection, food and drugs, health and safety, housing, immigration, international trade, labor management relations, maritime credentials [USCG], securities and commodities markets, transportation and transportation security, social security disability, as well as other benefits claims.
- The Social Security Administration is authorized the most Judges (approx. 1,400 in 2015) and the Office of Financial Institution Adjudication, among others, has but one Judge.

# What process is due?

Ref: Administrative Law Treatise, 5<sup>th</sup> ed. § 8 (2010) by Prof. Richard J. Pierce, Jr.

- Depends on the type of adjudication.
- Two types:
  - Formal Adjudication - requires an ALJ.
  - Informal Adjudication – does not require an ALJ.
- Determined by wording in the statute.

# Formal Adjudication

- Required only if statute says decision is to be determined on the record after opportunity for an agency hearing.  
See 5 U.S.C. § 554(a)
- Requires an ALJ, unless adjudication performed by agency head, Board, or Commission.
- APA §§ 554 through 557 describe formal adjudication
- Similar to civil trial traditional safeguards.

# Civil trial traditional safeguards

- (1) timely and adequate notice of issues and contentions;
- (2) an effective opportunity to confront adverse witnesses;
- (3) oral presentation of arguments;
- (4) oral presentation of evidence;
- (5) cross-examination of adverse witnesses;
- (6) disclosure of opposing evidence;
- (7) the right to retain an attorney;
- (8) a decision based solely on the evidence adduced at trial;
- (9) a determination based on findings of fact and conclusions of law;
- (10) a decision by an impartial decision-maker.

See Administrative Law Treatise, 5<sup>th</sup> ed. (2010) by Prof. Richard J. Pierce, Jr., Section 8.2.

# Elements of formal adjudication

- (1) notice of legal authority and matters of fact and law asserted (§ 554(b));
- (2) an oral evidentiary hearing presided over by the agency, one of the members of the body that comprises the agency, or an Administrative Law Judge, each of whom must be impartial and can be disqualified for bias (§ 554(b));
- (3) the presiding officer may not consult privately with a party with respect to a fact in issue; be responsible to someone with an investigative or prosecutorial function, or communicate privately with anyone outside the agency with respect to the merits of the case. (§§ 554(d) and 557(d)(1));
- (4) a party can be represented by an attorney or other authorized representative (§555(b));

# Elements of formal adjudication, cont.

- (5) the proponent of an order has the burden of proof (§556(d));
- (6) a party is entitled to present oral or documentary evidence (§ 556(d));
- (7) a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts (556(d));
- (8) an order can be issued only on the basis of the record adduced at the hearing (§ 556(d));
- (9) a party is entitled to a transcript of evidence that shall be the exclusive record for decision (§ 556(e));



# Elements of formal adjudication, cont.

- (10) before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees [ALJ], the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions— (A) proposed findings and conclusions; or (B) exceptions to the decisions or recommended decisions of subordinate employees [ALJ] or to tentative agency decisions; and (C) supporting reasons for the exceptions or proposed findings or conclusions (§ 557(c)).
- (11) the decision must include findings and conclusions, and the reasons and basis therefor on all the material issues of fact, law, or discretion presented on the record (§ 557(c)(3)(A)).
- (12) the record shall show the ruling on each [proposed] finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of— (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof (§ 557 (c)).

# Practical limitations of using formal adjudication

- Millions of adjudications conducted each year.
- Formal adjudication too elaborate, time-consuming, and expensive.
- Administrative adjudication would collapse if all were formal adjudications.
- Formal adjudication can be used to resolve no more than a small fraction of agency adjudications.

# Informal Adjudication

If an adjudication is not within the narrow scope of § 554(a), such as requiring a determination based on a hearing, the only provision of the APA that prescribes procedures applicable to that determination adjudication is § 555. That section requires only that the agency:

- (1) permit a party to be represented by an attorney or other authorized representative (§ 555(b));
- (2) permit a person to obtain a copy of any data or evidence he or she provides (§ 555(c)); and,
- (3) provide a brief statement of the grounds for denying an application or petition (§555(e)).

# Remedies after final agency action

- After final agency action, respondents may appeal to the appropriate court as prescribed by statute.
- One of 94 U.S. District Courts.
- One of 12 Circuit Courts of Appeal and the Court of Appeals for the District of Columbia.

# Conclusion

Informal adjudication procedures can be substantially less demanding than the formal adjudication procedures of the APA and still comply with due process, especially if an Administrative Law Judge presides.

Procedural safeguards in APA formal adjudication exceed the maximum protection required by due process for almost all agency decisions.