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Administrative Adjudication

Introduction

United States Administrative Law generally includes all actions by government agencies with respect to a citizen or an entity. It does not include criminal actions or actions between individuals and entities needing a neutral forum to settle their differences.

Administrative adjudication is a process for the formulation of an agency decision and an order. It includes adversarial and non-adversarial actions among individual participants in the decision making process. An administrative adjudication action typically begins in a government agency with an adjudicator or an Administrative Law Judge making the initial decision. After an agency's final action on the initial decision and further administrative review if required by law, the matter may then be appealed to the courts. Administrative adjudication exists federally and in the states. This talk will focus on federal administrative adjudication.

The Administrative Procedure Act, 5 U.S.C. §§ 551-559 et seq., prescribes general rules for adjudication, among other things. Government agencies prescribe specific rules through regulations. In the United States there is a great deal more adjudication in administrative agencies than in the court system. If the courts were to adjudicate all matters now adjudicated by the administrative judiciary in the agencies, the court system would be severely overburdened. Administrative adjudication occurring within the agency promotes faster determinations and judicial economy.

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The fundamental, underlying principle in administrative adjudication is DUE PROCESS. I will briefly discuss the origins of due process, what due process is, and what process is due in the context of federal administrative adjudication in the United States.

Origins of Due Process

The logical place to start is with the *Magna Carta* of 1215. Clause 39 of the Magna Carta states, "[n]o 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."

Clause 39 is the underlying principle behind notice and opportunity to be heard. It found its way through the Enlightenment and into American law in general and thence into American administrative law. Subsequent documents interpreted and expanded the Magna Carta concepts and added to the documents eventually comprising England's "constitution." For example, England's Petition of Right (1628) concerned individual rights and set out specific rights and liberties the King was prohibited from infringing upon. In an era when "the Devine Right of Kings" was predominant, the Petition of Right was an objection to the King's various actions without the consent of the governed.

The English Bill of Rights (1689) further shaped England's concept of individual rights such as free elections, free speech, due process, and a limited constitutional monarchy. It was a direct ancestor of America's Bill of Rights. Sovereign power gradually shifted from the monarch to written documents eventually comprising England's "constitution." This process gave rise to a constitutional monarchy, the supremacy of parliament, the rule of law, and individualism as envisioned by English Enlightenment philosopher **John Locke** (1632 – 1704), among others.

In the American colonies, the Massachusetts Body of Liberties (1641) served as further recognition and acceptance of the *Magna Carta*. It outlined the first American "Bill of Rights" which provided the basic right to due process and free speech in courts and public assemblies.

George Mason's Virginia Declaration of Rights (1776) helped influence Thomas Jefferson in drafting the Declaration of Independence (1776) and became one of the bases of the U.S. Constitution's Bill of Rights. It also helped influence France's Declaration of the Rights of Man & of the Citizen.

The philosophers of the French Enlightenment (1715-1789) were a big influence on the America's founding documents, especially **Montesquieu** (1689-1755) who was a strong proponent of separation of powers as a check against despotism. Separation of powers is an important Constitutional principle and is the subject of much debate and litigation, especially in agency adjudication where agencies make rules, enforce the rules, and adjudicate applications or violations of the rules. **Voltaire** (1694-1778) was a proponent that all men are created equal and that Church and State must be separate. **Rousseau** (1712-1778), believed sovereign power existed in the people, not the King. English and French philosophers also influenced America's Declaration of Independence.

The U.S. Constitution was created in 1787 and ratified in 1789. The Constitution now has 27 Amendments. The first Ten Amendments were ratified in 1791 and the Twenty-Seventh was ratified as recently as 1992. The Constitution's first three Articles deal with Separation of Powers – Article I Legislative; Article II Executive; and, Article III Judicial. Federalism is covered in Article IV – the full faith and credit clause; privileges and immunities, and protection of states, Article V – deals with how to propose and ratify amendments; and, Article VI – the supremacy clause which states the Constitution and U.S. laws and treaties are the supreme law of the land. Article VII - covers initial ratification requiring only nine states out of thirteen. The U.S. Constitution is a very simple document yet comprehensive to include all contingencies facing citizens and their elected officials in a federal, representative republic.

Administrative power arose over the years as the government reacted to problems in American life which called for government decisions such as veterans' pension claims, customs enforcement, and steamboat inspections. In 1887, Congress created the Interstate Commerce Commission to regulate railroads and later trucking. As time went on, Congress created additional agencies which engaged in rulemaking and adjudication by personnel within the agency such as hearing officers, hearing examiners, and eventually Administrative Law Judges within the agency.

The Fifth and Fourteenth Amendments of the U.S. Constitution each contain a due process clause. The Fifth Amendment states, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law. . .." The Fourteenth Amendment applies due process protections to actions by the states in section one which states, in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property with due process of law . . .."

What is due process?

Due process is fundamentally notice and an opportunity to be heard in an orderly proceeding in accordance with duly promulgated rules adapted to the particular type of case in the administration of justice. Due process guards against the arbitrary denial of life, liberty, or property by the Government and ensures rights and equality.

The orderly proceedings referred to in this presentation are adjudications before federal agencies. Those proceedings will generally pertain to property interests and the amount of process due will depend on the extent of those property interests. The greater the property interest, the greater procedural due process is afforded to the individual. Fundamentally, agencies will provide notice of issues; an opportunity to present evidence orally or in writing; a decision by a neutral decision maker; and, a statement of reasons for the decision.

The legal basis and framework for federal administrative adjudication is the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 et seq., enacted in 1946 in response to the tremendous increase in the number of agencies and the need to ensure fair hearings.[2] The APA governs agency rulemakings, adjudications, and licensing. It created the independent position of

[2] The APA also encompasses additional administrative activities such as Freedom of Information (§552) and Privacy (§552a), among other provisions, but adjudication is covered in §§ 554 – 558.

Administrative Law Judge to preside at formal adjudications as a check on agency actions contrary to due process, to protect public safety, and to ensure proper entitlements.

Government agencies appoint Administrative Law Judges pursuant to 5 U.S.C. § 3105 and accompanying regulations that provide strict controls on employing agencies to ensure Judges' decisional independence. Experienced attorneys desiring to become Administrative Law Judges undergo extensive screening, interviewing, and a written examination to qualify for placement on a register of individuals eligible for appointment as an Administrative Law Judge. Once appointed, Administrative Law Judges are provided with special civil service protections and the expectation of lifetime careers. In the exercise of their judicial functions, Administrative Law Judges retain decisional independence within the limits of law, regulations, and agency appeal decisions. Decisional independence protects the due process rights of individuals against potential agency bias as well as pressures of the parties or officials within the agency. Agencies cannot control Administrative Law Judges' salaries, nor conduct performance reviews, or provide monetary/honorary awards.

There are over 1,600 Federal Administrative Law Judges in the USA. They 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?

Determining the process that is due in administrative adjudication depends on the type of adjudication. There are two types of adjudication under the Administrative Procedure Act:

(1) Formal Adjudication which requires an Administrative Law Judge (5 U.S.C. §§ 554 - 557); and,

(2) Informal Adjudication which does not require an Administrative Law Judge (5 U.S.C. § 555).

The wording in the statute determines whether the adjudication is formal or informal. For formal adjudication, the statute must state the decision is to be determined on the record after opportunity for an agency hearing. 5 U.S.C. § 554(a). It requires an Administrative Law Judge (ALJ), unless the agency head, Board, or Commission conducts the adjudication. Sections 554 through 557 describe formal adjudication which is very similar to the traditional, American civil trial safeguards.

Those traditional civil trial safeguards are as follows:

(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.[3]

Formal Adjudication: The APA requires the following trial-type procedures when an "adjudication required by statute to be determined on the record after opportunity for an agency hearing."

(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));

(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));

[3] RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 8.2 (5TH ed. 2010).

(9) A party is entitled to a transcript of evidence that shall be the exclusive record for decision (§ 556(e)); and

(10) The decision must include findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record. (§ 557(c) (3) (A)).[4]

Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees [e.g., 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 or to tentative agency decisions; and (C) supporting reasons for the exceptions or proposed findings or conclusions. (§ 557(c)).

In addition to including findings, conclusions, and the reasons or basis therefor on all material issues of fact, law or discretion presented on the record, the decision must also include an appropriate rule, order, sanction, relief, or denial thereof. (§ 557 (c)).

The APA does not provide for discovery, nor does it prescribe evidentiary rules in accordance with the Federal Rules of Evidence. Concerning discovery, agencies are free to issue regulations prescribing as much discovery as necessary for a just, speedy, and inexpensive determination. Concerning evidence, the APA at § 556(d) provides only that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." In their procedural rules, however, agencies may prescribe that the Federal Rules of Evidence are to be followed.

To ensure the above protections are maintained, the Administrative Procedure Act gives the following powers to Administrative Law Judges:

"Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) Administer oaths and affirmations;

(2) Issue subpoenas authorized by law;

(3) Rule on offers of proof and receive relevant evidence;

(4) Take depositions or have depositions taken when the ends of justice would be served;

(5) Regulate the course of the hearing;

[4] Id.

(6) Hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) Inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) Require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) Dispose of procedural requests or similar matters;

(10) Make or recommend decisions in accordance with section 557 of this title; and

(11) Take other action authorized by agency rule consistent with this subchapter."

5 U.S.C. § 556(c)

Informal Adjudication: If adjudication is not within the narrow scope of § 554(a), i.e., that the decision is to be determined on the record after opportunity for an agency hearing, the only provision of the APA that prescribes procedures applicable to that determination is § 555 which 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)).[5]

Agency regulations may prescribe additional procedural protections for informal adjudication and most do so. For example, agencies may require the following procedural safeguards in their informal adjudication: 1) notice of issues resented; 2) opportunity to present data and arguments either in written or oral form; 3) a decision by a neutral decision maker; and, 4) a statement of reasons for the decisions.[6] Depending on the nature of the case, informal adjudication procedures can still provide the necessary due process that fits the interest affected.

[5] Id.
[6] Id. at § 9.1.

Final Agency Action and Exhaustion of Administrative Remedies:

After final agency action in formal or informal agency adjudication and exhaustion of administrative remedies, if required, respondents, applicants, or claimants may appeal to the appropriate court as prescribed by statute and regulation. Those courts are as follows:

(1) One of 94 U.S. District Courts;

(2) One of 11 Circuit Courts of Appeal, the Court of Appeals for the District of Columbia, and the Court of Appeals for the Federal Circuit.

Conclusion

The concept of due process has grown substantially in the 800 years since it first appeared in Clause 39 of the Magna Carta. The English Petition of Right (1628) and its Bill of Rights (1689) continued that process in England. French Enlightenment philosophers Montesquieu, Rousseau, and Voltaire, among others, as well as the English Enlightenment philosopher John Locke, among others, further expanded those concepts. The 1641 Massachusetts Body of Rights and the 1776 Virginia Declaration of Rights drew upon those principles in their written documents which also helped form the basis of the U.S. Declaration of Independence as well as the U.S. Constitution and its Bill of Rights.

Administrative power in the U.S. federal government grew as Congress created agencies in response to the new problems in American life requiring a government decision. The Administrative Procedure Act guarantees citizens and entities appropriate due process through formal or informal adjudication depending on the nature and level of interest protected. Formal adjudication procedures are time consuming and more demanding than informal adjudication procedures yet informal adjudication procedures can still provide the necessary due process that fits the interest affected.