ADMINISTRATIVE LAW OUTLINE

§1: OVERVIEW OF THE ADMINISTRATIVE PROCESS

§1.1: The Fourth Branch of Government

I. INTRODUCTION

A. **Generally**: the purpose and function of administrative law in a constitutional system which does not provide for administrative agencies:

1. The power of administrative agencies is inferred from Congressional and Presidential authority over administrative agencies.
2. The purpose of administrative agencies is to make law, Congress does not make most laws; however the power to make law is delegated to administrative agencies by Congress.
    a. *Delegation:* is the key word, Congress delegates its power to promulgate rules to administrative agencies because they are experts in specialized fields which make them better equipped to make specialized laws.
3. Policy: the policies behind administrative laws are:
    a. Congress does not have (a) the time, (b) expertise, or (c) people to regulate all aspects of American life which need to be regulated.
    b. Expertise, time, and capacity are the main reasons for administrative law.
    c. *Fairness*: the goal of administrative law is to have agencies work in a fair way; however, it is not always possible to treat similarly situated people the same.
        i. Thus, a lot of administrative law is designing structures and procedures to ensure fairness. When the public is involved in administrative law, the process is generally more fair.
4. Elements of Fairness: there are three main elements of fairness that the Courts try and promote in administrative law:
    a. *Reviewability:* review by the court is a safeguard that makes regulation by agencies more fair.
    b. *Consistency:* equal protection and due process requirements establish procedures for making administrative law more consistent, and hence, more fair.
    c. *Efficiency:* is part of the task of administrative agencies, and the more efficient the system is, the more fair it is to participants in the system.

B. **4th Branch of Government:** the administrative branch is referred to as the fourth branch of government. There are various kinds of administrative agencies:

1. Executive Agencies: consist mostly of cabinet departments (such as the State and Treasury departments) and their components, such as the Food and Drug Administration (FDA) and the Social Security Administration, both within the department of Health and Human Services.
    a. There are some executive agencies that are not located within any department, such as the EPA.
2. Independent Regulatory Agencies: are agencies which are not subject to direct presidential controls.
    a. Examples: ICC, Federal Reserve Board, FTC, NRLB, and FCC.
3. It is difficult to categorize agencies for separation of powers purposes because modern administrative the functions of all three branches of government:
    a. formulate rules;

b. adjudicate cases; and
c. prosecute actions and violations of the rules.

C. Policy Behind Administrative Law: the increase in the size of the nation and government has required administrative agencies to play a more prominent role in the structure of government since the New Deal Era.

1. The traditional three branches of government did not have enough people to regulate the many facets of American life;
2. Expertise;
3. In administrative law the government should try and strive to:
    a. Ensure fairness, consistency, and efficient governmental functioning.
    b. This is achieved by:
        i. Public involvement, which takes the forms of knowledge and participation;
        ii. Judicial review, because the courts have an interest in judicial review, however, judicial review of every agency action would be impracticable.

II. ADMINISTRATIVE PROCEDURE ACT OF 1946

A. **G/R:** an administrative agency draws its substantive and procedural power from the organic legislation that creates it.

1. The APA is the prominent and important piece of legislation concerning federal administrative agencies.
    a. States have their own APA's modeled after the federal APA.
    b. The basic structure of the APA is the same today as it was in 1946 with more procedural safeguards.

B. **G/R:** APA Definitions: [§551]: the definitional section is one of the most important sections of the APA, for the purposes of the APA the following definitions apply:

1. *Agency:* means each authority of the US government, whether or not it is within or subject to review by another agency.
    a. An agency does not include:
        i. Congress;
        ii. the Courts of the US;
        iii. the governments, territories, or possessions of the U.S.
2. *Rule:* means the whole or part of an agency statement of (a) general or particular applicability; and (b) future effect, designed to implement, interpret, or prescribe law or policy. Rules include:
    a. Any law or policy describing the organization, procedure, or practice requirements of an agency;
    b. the approval or prescription for future rates, wages, corporate, or financial structures or reorganizations.
    c. Rules deal with lawmaking/rulemaking and have *future effect.*
3. *Rulemaking:* is the agency process for formulating, amending, or repealing a rule.
4. *Order:* means the whole or part of a final disposition of an agency matter other than rulemaking but including licensing.
    a. Orders deal with adjudication and apply to *past actions*.
5. *Adjudication:* means agency process for the formulation of an order.
6. *Agency Proceeding:* means an agency process of rulemaking, adjudication, or licensing.

7. *Agency Action:* includes the whole or part of an agency rule, order, license, sanction, relief, or the denial thereof, or a failure to act.
8. *Ex Parte Communication:* means oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

C. **G/R:** Adjudication under the APA: [§§554-557]: the APA sections for adjudication apply in every case of adjudication required by statute to determine on the record after opportunity for an agency hearing with certain exceptions.

1. In other words, the APA is a default statute; that is, absent a statutory command in the organic legislation the APA adjudication procedures apply.
2. The APA never requires adjudication by its own force; it just applies when other law (statutory or constitutional) requires it to apply.
3. Agencies still perform prosecutorial and adjudicative functions, however there are more built in procedures:
    a. Hearing Examiners, Administrative Law Judges (ALJs) hear the case and are independent officers not subject to agency control of salary, promotion, and tenure.
    b. In the hearing process; the Agency has the burden of proof and the taking of official notice is fairly regularized.
    e. Administrative adjudications broadly resemble judicial trials without a jury. They share with trials the compilation of a record to provide the exclusive basis for decision. They are also open to the public.

D. **G/R:** Agency Rulemaking under the APA: [§553]: the most distinctive administrative procedure is rulemaking. There are three kinds of rules: substantive, interpretative, and procedural.

1. **§553(c):** *Substantive Rules:* have the force of law because they are based on statutory authority to adopt them. The APA's generally applicable procedure for adopting substantive rules requires only:
    a. that an agency publish notice of a proposed rule;
    b. afford the public an opportunity to comment on the proposed rule; and
    c. accompany the final rule with a concise statement of its basis and purpose.

1(a). There are two types of substantive agency rules:
    a. *Informal Rulemaking:* is the procedure that most agency laws take and it only requires compliance with §553(c) to take effect. Informal rulemaking does not require an exclusive record for decision.
    b. *Formal Rulemaking:* occurs in relatively few instances when a statute specifically requires a rule to be based on the record of an agency hearing [§553(c)].
        i. Formal rulemaking tends to resemble adjudication, it requires an exclusive record for its decision, although there is provision for some flexibility in this regard [§ 556(d)].

2. *Interpretive Rules:* say how an agency will interpret its statutory mandate, to guide both the staff and affected persons in such important matters as enforcement of policy.
    a. Interpretive rules range form informally developed policy statements announced through press releases to authoritative rulings issued only after interested persons are given notice and opportunity to comment.

3. *Procedural Rules:* identify the agency's organization, describe its method of operation, and spell out the requirements of its practice for rulemaking and adjudicative hearings.

a. These are largely housekeeping rules, however, they are binding on the agency in the sense that an agency decision will usually be reversed if a regulated party can show injury due to an agency's noncompliance with its own rules.

E. **G/R:** Judicial Review of Administrative Action: *Marbury v. Madison* established judicial review as a fundamental constitutional precept. With respect to administrative law *Marbury* has three fundamental principles:

1. courts can review executive action only when that review is validly authorized;
2. the functions of an administrator such as the Secretary of State are partly political and partly controlled by law; and
3. the Supreme Court (or judiciary) determines whether an enforceable legal right is a political question.

F. **G/R:** Judicial Review under the APA: [§§ 701-706] the APA for the most part codified but did not expand preexisting law on the availability and nature of judicial review of federal agency action.

1. **§706(2)(A)-(D):** restates traditional doctrine by authorizing reviewing courts to invalidate agency actions that are:
   a. §706(2)(A): substantially arbitrary or capricious;
   b. §706(2)(B): unconstitutional;
   c. §706(2)(C): without statutory authority; and
   d. §706(2)(D): procedurally insufficient.
2. **§§701-703:** the APA recognizes that judicial review of agency action is not always available to a particular plaintiff at a particular time.
3. There are two basic types of judicial review of agency action:
   a. Statutory Review: the legislature explicitly authorizes review of specified administrative actions, usually in the court of appeals. Statutory review may occur when the agency seeks to enforce an administrative order, or when the person subject to the order appeals upon its issuance.
      i. Statutory review is not the exclusive or even necessarily the most common method of obtaining judicial review of administrative action.
   b. Non-Statutory Review: begins in the trial court and is subject to technical complications because of its nature.

G. **G/R:** Informal Agency Proceedings: informal agency proceedings are actions taken by the agency which are not rulemaking or adjudication; therefore, the APA does not apply because the agency is not making law.

1. DISTINGUISH informal agency *proceedings* from informal *rulemaking* because they are not the same thing. The APA applies to informal rulemaking because Congress has told the agencies how to proceed; whereas, in informal proceedings the agency is performing internal housekeeping measures, usually.

§2: CONSTITUTIONAL STRUCTURE OF GOVERNMENT

§2.1: Federal and State Constitutions

I. CONSTITUTIONAL STRUCTURE

A. **US Constitution:** the united states constitution divides government powers in the first three articles.

1. Article I: all legislative power shall be vested in Congress.
    a. Legislation generally applies to everyone and is prospective in nature.
    b. Voting on legislation is done openly.
    c. Therefore when an agency acts the law it implements cannot be retroactive and must be subject to judicial review.

2. Article II: the executive power shall be vested in President of the United States. Article II speaks directly only about elected officials, chiefly the president and his powers; it describes thosw powers in the most summary of terms. He is vested with the power (without going into foreign affairs):
    a. to appoint officers of the United States, with advice and consent of the senate; and
    b. take care that the laws are faithfully executed.
    **The president is vested with many other powers, but those two are sufficient for administrative law purposes.
3. Article III: vests the judicial power of the United States in one Supreme Court and such other courts as the Congress shall establish. Article III courts are protected from political pressure because:
    a. They have life time tenure, their salaries cannot be increased or decreased during their term, and can only be removed through impeachment (serve during good behavior).
    b. A party has to have standing and justiciable case or controversy to argue before a court or seek judicial review.
    c. ALJ's are *not* Article III judges because they are:
        i. appointed by the head of the agency;
        ii. do not serve for life tenure; and
        iii. exercise executive, judicial and legislative powers.

B. **State Constitutions:** because of our federalist form of government there are also 50-State APA's modeled after the federal APA. Only need to know the Wyoming Administrative Procedure Act.
1. Differences between State and Federal Agencies:
    a. State constitutions are longer and power is divided more into agencies (i.e. education, treasurer, secretary of state, etc…are elected and/or appointed by the governor therefore the separation of powers analysis changes).
2. *See* infra §§ ???? for WAPA.

§2.2: Legislative Control of Administrative Agencies

I. NON-DELEGATION DOCTRINE

A. **G/R:** Non-Delegation Doctrine: as the ultimate repository of lawmaking power, Congress has a central role in controlling administrative agencies. Statutes create the agencies and define the substantive and procedural limits within which they must operate.
1. The delegation of lawmaking power to administrative agencies has been problematic for liberal theories of constitutionalism; however, since the 1930s it has become common place.
2. The non-delegation doctrine is rooted in the principle of separation of powers that underlies the tripartite system of government.

B **G/R:** Classical Rule: Congress has the authority to delegate power to administrative agencies; however, Congress must impose standards on the agency so that the president and executive agencies can follow those standards.

1. The Court has the institutional power to review the delegation of authority to administrative agencies, therefore, the standards also provide a basis for judicial review.
*[*ALA Schectner v. US; Panama Refining Co. v. Ryan*].

C. **G/R:** Impermissible Delegation: a delegation of lawmaking to an administrative agency is constitutionally impermissible anytime that Congress gives a lawmaking power to a governmental agency to police itself without any clear set of rules [*ALA Schectner*].

1. If there are no procedural safeguards for the agency to follow then ispso facto there is a substantive defect because the agency and Congress are making law without affording interested parties due process protections.
2. Delegation is permissible but there are substantive and procedural limits on Congress' delegation authority which the court can use to review agency action and determine if it complied with the enabling act or if it failed to comply with the enabling act.

D. **G/R:** Non-Delegation Doctrine Test: [Modern Test]: *Intelligible Principle Test:* so long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power.

1. There are three standards which have to be met for a permissible delegation, Congress must delineate:
    a. the general policy;
    b. the public agency which is to apply it; and
    c. the boundaries of delegated authority.
2. The Court will only declare a Congressional delegation of authority to an administrative authority unconstitutional if there is an absence of standards for the agency's action, so that it would be impossible in a proper proceeding to determine whether the agency has obeyed Congress' directives.

E. Note: in the 1930s [*ALA Schectner; Panama Oil*] the non-delegation doctrine was alive and well; however, today it is not as power fully because Congress had learned to set procedural safeguards and guidelines for the agencies to follow. In addition, Congress passed the APA which facilitates judicial review. The APA is a generic piece of legislation which agencies must follow in the absence of other structures.

II. LEGISLATIVE CONTROL WITHOUT SUBSTANTIVE STATUTORY CHANGE

A. **G/R:** Congressional Control over Delegations of Power: there are seven main ways that Congress controls delegations of lawmaking authority, plus one which was declared unconstitutional:

1. *Enabling Act:* one of the most important ways to control delegation of power. The enabling act can be either a broad or narrow delegation of power.
    a. Rule: agencies only have the power given to them in the enabling act by Congress.
    b. Congress must put substantive limits on the agency's power, or the delegation will be declared unconstitutional.
2. *Sunset Legislation:* allows Congress to reevaluate the agency after X (usually four or five) number of years. Typically, Congress must reauthorize the delegation of power to the agency.

3. *Congressional Oversight:* committees and subcommittees oversee, and influence agency policy. The Congressional oversight hearings are important because the agency director usually has to come before Congress and ask for money. Legislative involvement is always important.
4. *Appropriations:* Congress has the power of the purse and can cut or add agency funding indicating approval or disapproval with the agency action. This includes the interrelated control on agency power which is that Congress can always cut funding completely and abolish the agency. The threat of abolishment scares agencies and agency directors, so it is actually influential even if Congress never abolishes the agency.
5. *Appointment Process:* (confirmation) Congress can exercise control through the appointment process by denying or approving a Presidential appointee.
6. *Individual Oversight:* the intervention of single congressman can influence the agencies decision, particularly if that congressman has strong political clout or is the head of the agencies apportionment committee. The intervention of individual congressmen is always permissible, absent illegal ex parte contacts, because congressmen are supposed to act on behalf of their constituents.
7. *APA:* the passage of the APA was probably Congress' most important method of agency control because the agencies must act in a public manner, and with public help.
8. *Legislative Veto:* declared unconstitutional in *INS v. Chadha*. Before being declared unconstitional the legislative veto allowed Congress to delegate broad amounts of power, subject to the authority of Congress vetoing the agency action by one house or joint resolution.

B. **G/R:** Legislative Veto: Congress cannot delegate its lawmaking authority if the activity is legislative in nature to an agency without satisfying the presentment and bicameralism requirements of Article I, § 7 [*INS v. Chadha*].

1. Article I, §1: vests all legislative power in Congress.
2. *Presentment Clause:* [Article I, §7, cls. 2] every bill must pass both houses of Congress and be presented to the president.
3. *Bicameralism Requirement:* [Art. I, §7, cls. 3]: every bill that has passed the senate and house shall be presented to the president.
4. In *Chadha*, the Court in reviewing the ALJ's determination to deport Chadha, said that when a court reviews agency action it divides that issues into two categories: (a) issues of fact, which the Court will defer to; and (b) issues of law, which the Court will not defer to.

§2.3: Executive Control over Administrative Agencies

I. APPOINTMENT POWER OF THE PRESIDENT

A. **G/R:** Role of the President: Article II of the constitution defines the president's powers.

1. Article II gives the president:
    a. The executive power is vested in him;
    b. The appointment powers;
    c. The power to require opinions of the heads of departments regarding their duties; and
    d. the power to make sure that the laws are faithfully executed.
2. Most of the organization and power of the executive are provided by statute, pursuant to Congress' power to make laws that are "necessary and proper" both to execute its own enumerated powers and "all other powers vested in the Government…or an any department or officer thereof. [Art. I, §8, cls. 18].

B. Analysis of Presidential Power over Agencies: The Supreme Court's analysis, and hence yours, of the President's power to control administration fall into three categories:

1. The appointment of officers;
2. The removal of officers; and
3. a residual appraisal of the overall effect of congressional restrictions on the balance of power among the three branches.

C. **G/R:** Appointments Clause: [Art. II, § 2, cls. 2]: the president shall have the power to "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the U.S., whose Appointments are not herein otherwise provided for, and which shall be established by law."

D. **G/R:** the president cannot delegate to an agency quintessentially executive functions, which can be completed only by *principle officers* rather than *inferior officers* of the government [Buckley v. Valeo].

1. *Principle Officers:* are officers of the government that the president can appoint with the advice and consent of the senate (i.e. the ones listed in Art. II, §2, such as ambassadors and cabinet officers).
2. *Inferior Officers:* are officers, which are basically employees of the government and lesser functionaries subordinate to the principle officers of the US.

E. **G/R:** Congress cannot regulate the appointment of principle officers, but can regulate to an extent over inferior officers [Buckley v. Valeo].

1. Congress CANNOT vest the control of appointments of principle officers in itself because the appointment powers are vested in the executive (at least for principle officers).
2. In other words, Congress cannot reserve for itself the power to appoint principle officers.

F. **G/R:** Officer Division [Morrison v. Olson] the constitution for purposes of appointment divides all of its officers into two classes:

1. *Principle Officers:* principle officers are officers selected by the President with the advice and consent of the senate, only the president can appoint principle officers with the advise and consent of the senate; and
2. *Inferior Officers:* are employees of principle officers, Congress may allow inferior officers to be appointed by the president alone, by the heads of departments, or by the judiciary.

G. 4-Prong Test for Determining whether an Officer is a Principle or Inferior Officer: if all of the following questions are answered affirmatively, the officer is an *inferior officer:*

1. is the officer subject to removal by a higher executive branch official?
2. is the officer empowered by statute to only perform certain limited functions; that is, does the officer lack the power to formulate general policy for the government or executive branch?
    a. does the officer have lack any administrative duties outside of those necessary to operate his/her office?
3. is the officer's office one of limited jurisdiction?
4. is the officer's office one of limited tenure?

*Thus, an officer is a inferior officer under the Appointments Clause if the office is of limited jurisdiction, limited tenure, limited to specific functions (lacks policymaking or significant administrative authority), and is subject to removal by the president.

H. **G/R:** Excepting Clause: [Article II, §2, cls. 2 ("…but Congress may by Law vest the appoint of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments")] the language of the Excepting Clause admits no limitation on inter-branch appointments; in fact, the clause gives Congress significant discretion to determine whether it is proper to vest the appointments of officers in other branches of government [Morrison v. Olson].

1. In other words, Congress has the power to give inter-branch appointments of inferior officers, but the president can only appoint principle officers.

I. **G/R:** Inter-branch Appointments: it is usual and proper to vest the appointment of *inferior officers* in another branch of government, executive or judicial, or in that particular executive department to which the duties of such officers appertain; thus, inter-branch appointments of inferior officers are not proscribed by the excepting clause of the constitution [Morrison v. Olson].

1. *Caveat:* Congress' power to provide for the appointment of inter-branch officers is not unlimited and is improper if there is some incongruity between the functions normally performed by the branch and its power to appoint such inferior officers.

II. REMOVAL POWER OF THE PRESIDENT

A. **G/R:** Removal Power**:** the only thing the constitution says about removal is impeachment, which means nothing for officers, therefore the constitution is silent on removal powers. However, the power to remove executive officers is almost as important to presidential control of administration as the power to appoint them.

1. Take Care Clause: [Art. II, §3, (the president "shall take care that the laws be faithfully executed"].
2. Art. II, § 1: the executive power shall be vested in the president.

B. **G/R:** Inherent Removal Power: the president has the inherent power to remove officers in the Take Care Clause and the provision that the executive power shall be vested in the president [Myers v. US].

1. The executive has the exclusive responsibility to execute the laws; to execute the laws the President must have agents, and for the president to fulfill his responsibility the agents must be subject to his power to remove them.
    a. The president has the exclusive authority to execute the laws; and to execute the laws he has to have the power to remove agents who do not follow his instructions.
2. The president has the power to remove an officer on the ground that the discretion regularly entrusted to the officer by the statute has not been on the whole intelligently or wisely executed. If the president did not have this power he could not see that the laws are faithfully executed and fulfill his constitutional duty.
3. Congress cannot control the appointments process indirectly through the power of removal.
    a. Thus, Congress cannot impose restrictions on the president's power of removal.
    b. The constitution prevents Congress from drawing to itself the power to remove or the right to participate in the removal power.

C. **G/R:** Removal for Good Cause: Congress pursuant to its Article I powers can create independent agencies and insulate their members form presidential removal unless good cause for firing exists [Humphrey's Executor v. US].

1. **G/R:** a provision in an independent regulatory agencies enabling act limiting the president's removal power to one of the enumerate causes listed is valid under the constitution because the "for cause"

removal provision is constitutional under the appointments clause because the president does not possess the power of removal over officers who perform quasi-legislative or quasi-judicial functions.

a. A quasi-legislative or quasi-judicial function is one in which the independent regulatory agency is in engaged in all three activities of government, executive, judicial, and legislative.

2. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot be doubted; and the authority includes:

a. the power to fix the period during which they shall continue in office; and

b. to forbid their removal except for cause in during that tenure.

3. Character of Office: whether the power of the president to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Meyers* decision affirmed the power of the president alone to make the removal is confined to purely executive officers.

a. *Practical Effect:* the practical effect of the *Humphrey's* decision is to draw a line between cabinet officials and those who are in independent regulatory agencies:

i. for cabinet officials such as the attorney general or postmaster general Congress may not limit removal because the cabinet is there to carry out the functions and policies of the president;

ii. for independent regulatory agencies such as the FTC, Congress may limit removal to situations where there is just cause for firing.

b. *Policy:* if Congress is without the authority to prescribe causes for removal of members of independent regulatory agencies and to limit executive removal power accordingly, that power becomes all inclusive with respect to civil officers except for the judiciary exception provided by the Constitution.

i. The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of each other, has bee often stressed and is not open to question.

D. **G/R:** even without a statutory limit on removal in the enabling act, the president cannot remove executive officials where independence president is desirable [*Wiener v. US*].

1. The Court in *Wiener*, extended the *Humphrey's* decision by holding that the War Claims Commission Act, which did not contain a limit on removal "for cause", could limit the president's removal power because Congress intended that the commission be protected from presidential review because it was an adjudicating body (quasi-judicial) charged with deciding claims on the merits, entirely free from influence by the president.

E. **G/R:** Congress cannot give itself the power to remove purely executive officers, except by impeachment, because it is impermissible for the executive power to be exercised by a person who is totally insulated from presidential removal [*Bowsher v. Synar*].

1. Rule: Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws (like the Comptroller General) because by placing the execution of the laws in the hands of an officer who is subject to removal only by Congress, it has retained control over the execution of the Act, has intruded on the executive function, and in effect makes laws that are not in compliances with Article I, §7's presentment clause.

2. The constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.

a. The constitution explicitly provides for removal of officers of the US by Congress only upon impeachment by the House and conviction by the Senate.
b. A direct congressional role in the removal of officers charged with execution of the laws beyond the limited impeachment role is inconsistent with the separation of powers doctrine.

3. Once Congress makes its choice in enacting legislation, its participation ends. Thereafter, Congress can only control the execution of enactment indirectly—by passing new legislation.
4. *Policy:* to permit an officer controlled by Congress to execute the laws would be, in essence, to permit a Congressional Veto; Congress could simply remove or threaten to remove an officer executing the laws in any fashion found to be unsatisfactory to Congress.

F. **G/R:** Test for Determining When Congress can limit the President's Removal Power: if the removal restrictions are of such a nature that they impede the president's ability to perform his constitutional duty, and functions of the officers in question in question, then the removal power is an unconstitutional aggrandizement of executive power by Congress [Morrison v. Olson].

1. The determination of whether the constitution allows congress to impose a "good cause" type restriction the president's power does *not* turn on whether the activity is categorized as purely executive; rather, the analysis is whether the restriction on the removal power interferes with the president's exercise of the executive power and his duty to take care that the laws are faithfully executed under Article II (functionalistic analysis, focusing more on the balance of powers rather than strict formalistic separation of powers analysis).
2. **G/R:** a good cause removal provision does not impermissibly burden the president's power to control or supervise *inferior officers.*

III. GENERAL SEPARATION OF POWER ANALYSIS

A. Analytical Framework: the Supreme Court is very pragmatic in the administrative law field, and today uses more of a functionalistic perspective than formalistic perspective.

1. Look at the statutory scheme:
   a. identify the activity the officer performs (legislative, executive, judicial or quasi-legislative or quasi-judicail);
   b. identify the functions of the officers, the duties they perform; and
   c. identify whether the officer is a principle officer or inferior officer.
2. Identify the restrictions in the enabling Act:
   a. does it limit appointment, or removal, or vest that power in someone other than the president or congress;
3. Decide if the function of the officer, or the restrictions in the enabling act, violates or usurps the powers of another branch, and if so, whether that impermissibly interferes with the other branches core or central function.
   a. If not, then the delegation or restriction is permissible;
   b. If so, then the delegation or restriction is impermissible.
4. The Supreme Courts separation of power analysis involves determining [Mistretta v. US]:
   a. the extent to which a provision of law prevents the executive branch from accomplishing its constitutionally assigned functions;
   b. when the activity involves the judicial branch the court guards against two dangers:
      i. that the judicial branch is not assigned or allowed to perform tasks that are more appropriately accomplished by other branches; and

ii. that no provision of law impermissibly threatens the institutional integrity of the judicial branch.

c. under this functionalist inquiry, the analysis does not turn on the labeling of an activity as substantive (as opposed to procedural, political, or judicial); rather, the inquiry is focused on the unique aspects of the congressional plan at issue and its practical consequences in light of the lager concerns that underlie Article III.

B. **G/R:** Independent Regulatory Agencies: an independent regulatory agency is constitutional under a separation of powers analysis *unless:*

1. Congress have vested the Commission with powers that are more appropriately performed by the other branches of government; or
2. the provisions vested in the commission undermine the institutional integrity of the judiciary.

*[Mistretta v. US].

C. **G/R:** under Article III the judicial power of the US is limited to cases and controversies. The executive or administrative duties of a non-judicial nature may not be imposed on Article III judges [Mistretta v. US].

1. *Caveat:* nonetheless, the Court has recognized significant exceptions to this general rule and approved the assumption that some non-adjudicatory activities be performed by the judicial branch.

a. None of the cases indicate that rulemaking per se is a function exclusively committed to the executive branch (i.e. the court is involved in rulemaking, FRCP, rules and enabling act).

D. **Breakdown:** separation of powers cases dealing with the constitutional structure of government can be divided into two categories, for analogy and analysis purposes on the exam:

1. Formalistic Cases: the Court uses a formalistic approach when one branch impermissible interferes or usurps the power of another branch of government:

a. *ALA Schectner Corp. v. US; Panama Oil v. Ryan:* [1930s] these were the last to cases to declare a delegation to an administrative agency impermissible under the delegation doctrine, thus, in 99.9% of the cases the delegation will be permissible.

b. *Buckley v. Valeo:* Court held Federal Election campaign act unconstitutional because the election commission could perform actions that could only be completed by "principle officers" rather than "inferior officers". The commission had too much idependence from the executive and legislative branches because it was not under the direct control of either, and performed legislative, executive, and judicial functions.

i. established *principle/inferior* officer dichotomy.

c. *INS v. Chadha*: court held legislative veto unconstitutional because it violated the presentment and bicameralism clauses.

i. Court said constitution divides the delegated powers of federal category into three distinct categories: legislative, executive, judicial. Identify the function of the core function of the branch and see if regulated activity impermissibly interferes.

d. *Humphrey's Executor/Wiener v. US:* the independent regulatory agency (FTC) commissioner could only be removed for good cause, and limited the term of office.

i. Court held "good cause" removal provisions of officers in *independent* (but not executive) regulatory agencies, and the fixing of length of terms, is constitutional for officers who perform quasi-legislative or judicial functions. Court identified the actions, and said that because they weren't traditional of either of three branches congress could regulate.

e. *Bowsher v. Synar:* Congress empowered the Comptroller General, head of a congressional agency, to impose budget cuts. The comptroller general is a principle officer. Court held congress could not reserve for itself the complete power of removal of a principle officer.

2. Functionalistic Cases:

a. *Mistretta v. US:* congress gave the judiciary a role in making sentencing rules which would be imposed by law. Court held because congress established procedures and guidelines it could delegate some rulemaking authority to the judiciary without violating separation of powers.

b. *Morrison v. Olson:* under Ethics in Government Act, congress gave AG power to appoint independent counsel and restricted presidential removal power to good cause.

i. Court held that a good cause removal provision in the enabling act is okay for INFERIOR officers, but not principle officers.

****Morrison and Mistretta* are the latest cases in this line of cases and demonstrate the Court's shift to functionalistic, rather than formalistic, reasoning.

§2.4: Judicial Power and Administration

I. ARTICLE III LIMITS TO AGENCY ADJUDICATION

A. Article III: provides that the judicial power of the US shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.

1. Article III tenure requirements: judges of Article III courts shall serve during good behavior (life) and cannot have their compensation diminished during that tenure.

2. Despite the fact that the constitution only confers Article III courts, there are other kinds of courts:

a. *Article I Courts:* tax courts, claims courts, bankruptcy courts and administrative agencies employing full adjudicate procedures of the APA (i.e. FTC, FCC).

b. Some adjudicative actions are "executive" in two constitutional senses:

i. they may be vested in the executive; and

ii. they may not be transferred to the courts.

B. **G/R:** Congress can rely on its Article I powers to create adjudicative bodies [*American Insurance Co. v. Canter*].

C. **G/R:** Private Rights: relate to suits between private individuals over rights and duties arising under the common law [Crowell v. Benson].

1. Article III pertains to private rights and any allocation of these private rights must first be in compliance with the strictures of Article III.

D. **G/R:** Public Rights: if the federal government is a party in the action, then it is a public right; however, the federal government need not be a party for a case revolve around public rights [Crowell v. Benson].

1. The analytical question, in cases not involving the government, is whether Congress acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly "private" right so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.

2. Public rights refer to the government acting in its sovereign capacity to enforce rights created by statute.

3. Public Rights are not subject to the strictures of Article III and Congress can assign public right adjudications to the judiciary.

E. **G/R:** Standard of Judicial Review: non-Article III courts are permissible for the adjudication of public or private rights so long as there is judicial review of the agency action, and the Article III courts may fully correct agency determinations on matters of law and overturn unreasonable findings of fact.

1. In other words, the essential attributes of judicial power preserved by limited judicial review of agency action.
2. *De Novo Review:* courts will review agency's conclusion under the non-deferential de novo standard.
3. *Substantial Evidence Test:* the court will review the agencies findings of fact under the deferential substantial evidence test.

F. **G/R:** the court will uphold a regulatory scheme for adjudication if (a) it has a substantial public purpose; and (b) there is limited judicial review [Thomas v. Union Carbide Agricultural Products Co.].

G. **G/R:** an individual is afforded the protections of Article III, from a functionalist perspective, when:

1. a person has a right to an impartial and independent federal adjudication which can be brought before the agency in the first instance (ajudicatory hearing) and appealed to an Article III court for judicial review; and
2. the reason for the agency's dispute resolution makes since from a practical, efficiency, and expertise standpoint.
3. Rule: an agency with limited jurisdiction over a particular area of law can adjudicate state law claims as a necessary incident to the adjudication of federal claims that are voluntarily submitted to an agency for adjudication without violating the separation of powers doctrine.

*[Commodity Futures Trading Comm'n v. Schor].

H. **G/R:** Jury Trials: the 7th Amendment requires that there be a jury trial in all civil actions; however, this has not been interpreted to include most of the agency hearings and adjudications. There are several rules:

1. **G/R:** No Jury Trial Required: if a public right is in dispute there *never* has to be a jury trial [Atlas Roofing v. OSHA]; or
    i. when Congress creates a new statutory "public right" it may assign their adjudication to an administrative agency without a jury trial, and this does not violate the 7th Amendment [Atlas Roofing v. OSHA];
3. **G/R:** Jury Trial Required: there is a right to jury trail when a federal court is determining liability for penalties as required by the 7th Amendment; and
    i. when a private right is being disputed, and the claim *must be tried* in an Article III court, there must be the right to a jury trial.

I. **G/R:** all public right claims can be adjudicated by non-article III courts.

J. **G/R:** private right claims can be adjudicated by non-article III courts if limited in jurisdiction (something less than a bankruptcty court) and if incidental to matter other legitimately committed to the non-Article III court, if there is at least minimal judicial review by an Article III court.

§3: RULEMAKING

§3.1: The Nature and Uses of Rules

I. TRADITIONAL USES OF RULEMAKING

A. **G/R:** Definitions: the definitions of rules are the most *important* thing because you have to know what capacity the agency is working in, or what task it is completing.

1. *Rule:* a rule is an agency statement of (a) general applicability and (b) future effect that proscribes, interprets, or implements law or policy.
2. *Rulemaking:* is the agency process for formulating, amending, or repealing a rule.
3. *Agency Action:* includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

B. **APA § 553:** governs the implementation of rules by an agency.

1. § 553(a): This section applies to rulemaking with certain exceptions:
    a. military or foreign affairs;
    b. matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts;
2. § 553(b): Notice: general notice of a proposed rulemaking shall be published in the federal register unless persons subject to the rulemaking are (a) named and personally served or have actual notice of the rulemaking. The notice shall include:
    a. a statement of the time, place, and nature of the public rulemaking proceedings;
    b. reference to the legal authority under which the rule is proposed; and
    c. either the terms or substance of the propersed rule or a description of the subjects and issues involved.
    d. Exceptions to the notice requriement:
        i. interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or
        ii. when the agency for *good cause* finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
    c. *Notice Requirement:* the courts have extended the notice requirement to include a summary or some concise statement of information so people understand what's going on. The courts have required this because if the rule was just published it would probably be incomprehensible to the average person.
3. § 553(c): Comment: after notice, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.
    a. The agency shall incorporate in the rules a concise general statement of their basis and purpose.

***REMEMBER the APA does not control everything, it is a default statute, it is the minimum requirements if the enabling act does not say you have to do more.

C. Basic Agency Procedure: the agency will generally go through a five step process in promulgating a rule: (1) propose a rule; (2) allow comments on the rule (oral or written) at a public hearing; (3) consider the rule and comments; (4) adopt a final rule; and (5) publish the rule.

1. *Policy:* Congress, and the courts, have implement this process because they want to protect individuals due process rights.

a. In lawmaking one typically does not have the right to a hearing; however, when an agency is making law there has to be a hearing and public involvement because un-elected officials, bureaucrats, and commissioners are making law. Therefore an open process insures fairness, consistency, and the basic theory that we accept law because we elected officials.

D. **G/R:** Constitutional Standards: rules, like statutes, must meet constitutional standards. A rule does not have to meet a higher constitutional burden of justification than a statute for *constitutional purposes* [Pacific States Box & Basket Co. v. White].

1. Where a regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes and to orders of administrative bodies.

a. In other words, like a statute, there is a presumption of constitutionality.

E. **G/R:** *Storer* Doctrine: the APA assumes that rulemaking forms law and adjudication applies it. Rulemaking is a deliberate, planned effort to create general law independent of any individual case (as opposed to judicially created law), party, or circumstance. Agencies may foreclose issues through rulemaking rather than having a hearing on every individual case [US v. Storer].

F. **G/R:** Rulemaking Authority: an agency has a general rulemaking authority based on its enabling act which supplies the statutory basis for the commission to enact regulations codifying its view of the public interest, so long as that view is based on permissible factors and otherwise reasonable [FCC v. National Citizens Committee for Broadcasting].

G. **G/R:** Analysis:

1. the first step is always to look in the definitions and figure out if the agency promulgated a rule. If the rule is of (a) general applicability; and (b) future affect, it is a rule.
2. the second step is to find out of the agency has the power and/or authority to implement the rule. LOOK at the enabling act to determine this.
3. The third step is to decide if the agency exceeded its scope of authority under the enabling act. GO to APA § 706 and apply the four rules:

a. is the enabling act constitutional,

b. if the act is constitutional, did the agency exceed its scope of authority by acting arbitrary and capriciously;

c. are there any procedural defects in the rule.

II. CHOICE BETWEEN RULEMAKING AND ADJUDICATION

A. Generally: there are several instances in which an agency would prefer to use adjudication rather than rulemaking:

1. when the agency does not want to, or cannot, be specific enough about the rules (like the EPA has the right to regulate the environment);
2. when a rule is complex or controversial;
3. if the agency goes through adjudication, it is like common law, the agency goes to the hearing and states the policies they are trying to implement, then the next case comes along, and the agency says this is the standard we applied in the last case, so now it applies to you, etc…

4. in adjudication, the agency is not required to give notice, which makes policy implementation more efficient;
5. Adjudication, in some instances, can be more effective than rulemaking because through the comment and notice periods it is long cumbersome process which sometimes leads to the rule not getting implemented; and
6. Adjudication can be applied retroactively, whereas rulemaking cannot.

B. **G/R:** Constitutional Limits: there are constitutional limits on an agencies choice between rulemaking and adjudication:

1. *Adjudication Required:* in some situations the Due Process Clause requires adjudicative procedures:
    a. a small number of people are exceptionally affected in each case upon individual grounds (i.e. when there is a policy question of individual effects).
        i. Where the agencies actions apply to a small group of people, and the action depends on an individual factual determination then due process requires a hearing.
    *[Londoner v. Denver]
2. *Adjudication Not Required:* adjudication is not necessary when an agency rule affects a large number of people in a similar way. In other words, if a large amount of people are affected then rulemaking can be used [Bi-Metallic Investment co. v. St. Bd. of Equalization].

C. **G/R:** When Can Agency Choose Between Rulemaking and Adjudication: there are two lines of case, each with the support of Supreme Court precedent, for determining when an agency can choose between rulemaking and adjudication:

1. *Deferential Approach:* when the constitution does not require an adjudicative process, an agency is free to employ rulemaking unless the enabling act requires otherwise. Further, absent a constitution requirement, the decision between proceeding by general rule or ad hoc adjudication is one that lies primarily in the informed discretion of the administrative agency.
    a. The choice between rulemaking and adjudication lies in the first instance with the agencies discretion. There may be situations where the boards reliance on adjudication would amount to an abuse of discretion or a violation of the enabling act, such as relying on earlier policy for the imposition of penalties.
    b. There must always be judicial review for abuse of discretion, and if the agency tires to apply a new rule retroactively than that is an abuse of discretion.
    c. *Policy:* more efficient.
    **[*SEC v. Chenery Co.*; *NLRB v. Bell Areospace;* majority of the circuit courts].
2. *Non-Deferential Approach:* if the agency tries to enact standards of general applicability through adjudication, rather than rulemaking, then it is an abuse of discretion.
    a. A plurality of the Supreme Court seemed to indicate that if an agency is going to implement prospective rules then it must do so through the rulemaking process. Thus, if the agency is making rules, as they are defined in §551, the agency must use the rulemaking process set forth in §553.
    b. *Policy:* more public involvement in rulemaking.
    **[*NRLB v. Wyman-Gordon*; 9th Circuit court of appeals].

III. AGENCY'S VIOLATION OF ITS OWN RULES

A. **G/R:** an agency is bound to follow its own regulations, if it shown that the agency did not follow its own regulations the action can be declared void.

1. If the agency enacts a rule, and violates its own rules in the process that is a *per se* reason for voiding the agencies action because if an agency follows the APA the promulgation is a rule, has the binding force of law, so the agency has to follow its own rules.
    a. *Hint:* this is the most effective way of declaring an agency action void. Look at the enabling act and the APA and if it says *shall* the agency has to do it; if it says *may* then the agency can have more discretion.
2. It is unsettled whether this principle is based on the due process clause or federal administrative law.

IV. RULEMAKING IN THE MODERN ERA

A. **Agency Procedure:** the agency goes through four periods, which different rules and procedures in period, in implementing a rule. SO ALWAYS DETERMINE WHAT PERIOD THE CHALLENGED PROCEDURE OCCURRED IN.

1. Pre-Notice: until the agency publishes notice in the federal register, as required by § 553(b), the agency can do whatever it wants because the APA only becomes operative when the notice that the rule is going to made goes out pursuant to the notice requirement.
    a. All pre-notice actions taken by the agency are unreviewable by the courts.
    b. This is the period which makes the agency powerful because they are deciding what the "debate" is going to be over (i.e. what the proposed rule will look like).
2. Notice Period: during the notice period, notice has to be published and the agency cannot be involved in any ex parte contacts. The notice becomes part of the record.
3. Comment Period: the comment is a public record where the public submits written or oral comments on the proposed rule, and the comments become part of record, what the court will review later if the rule is challenged in court.
4. Pre-Adoption: during this period, the agency meets and decides what it is going to do with the comments, this reviewable, but more problematic for the court because the public does not have to be involved.

**Remember, when a court is reviewing an action, it is very *important* what stage the agency was in.

B. **Court Procedure:** the in reviewing an agency action, will go through a 4-step analysis:

1. The Court will go to §553 (the default informal rulemaking statute), unless the enabling act provided otherwise, and will determine if the agency complied with the procedural requirements for making a rule (i.e. notice, comment, adoption, etc…).
2. The Court will the go to §706(2) and apply the appropriate scope of review standard (i.e. arbitrary and capricious, constitutional, procedural standards).
3. The court then looks at the record (the record as been implied in the APA through judicial interpretation. The record has to consist of what happened.
    a. *The Record:* (a) communications during the pre-notice period do not have to become part of the record, except what the agency relied on ot make the rule that was ultimately proposed in the "notice period." (b) the notice that was published in the federal register has to be in the record; (c) comments form the comment period should be in the record; (d) in the pre-adoption period, it is very controversial because agencies are contacted by congressmen and other interested parties, and the court will require all ex parte communications to be in the rcord.

i. The court is looking for things that the agency looked at (e.g. evidence) in promulgating the rule, and whatever the agency refers to has to be in the record.
ii. The record is required because the court would not be able to review agency action without it.

4. The Court then applies a standard of review, which may differ, depending on the agency action:
a. *Rational Basis Standard of Review:* the court only asks if there is something in the record which provides the court with evidence that the agency acted rational in promulgating the rule. The agency's action is rational if there is something in the record which points to the fact that the agency decision was based on some evidence.
i. The court must give due deference to the agency's ability to rely on its own developed expertise and the courts review is designed solely to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors.
ii. The reviewing court exercises a narrowly defined duty of holding agencies to certain minimal standards of rationality. Although the inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.

b. *Searching Inquiry Standard:* if the agency cannot support the rule based on the rational basis standard, then the court will engage into a substantial inquiry into the facts, one that is searching a careful (particularly in highly technical cases) to determine if the agency actually had a rational basis for enacting the rule.
*[Ethyl Corp. v. EPA].

C. **G/R:** Notice Requirement: [§553(b)] the court has extended the notice requirement to include a summary or brief statement of information indicating what is in the proposed rule. Thus, prior to the final promulgation of the rule, the agency must make public either the terms or substance of the proposed rule or a description of the subjects and issues involved.

1. The notice should be sufficiently descriptive of the subjects and issues involved so that interested parties may offer informed criticism and comments.
2. *Caveat:* the notice need not contain every precise proposal which the agency may ultimately adopt as a rule. The qualification is important since the notice invites comments, and comments frequently prompt chances in the regulations.
*[Ethyl Corp. v. EPA].

D. **G/R:** Notice After Change in the Rule During the Comment Period: §553 does not require new notice whenever the agency reasonably adopts the suggestions of the interested parties in the comment period.

1. Thus, the agency does not have to re-publish, and go through the notice and comment period again, if it takes a comment and changes the rule in accordance with the comment. This is the point of the comment period. However, the change must be supported in the record by the comment which prompted the change and if it is in the record then the change to the rule is rationally based.
*[Ethyl Corp. v. EPA].

E. **G/R:** Final Adoption: implicit in the decision to treat the promulgation of a rule as a final event in an ongoing process of administration is the assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material (the record) comprised of documents, comments, transcripts, and statements in various forms declaring the agency expertise or policy; with reference to which such judgment was exercised.

1. *Standard of Review:* it is the obligation of the Court to test the actions of the agency for arbitrariness or inconsistency with delegated authority (enabling act) by reviewing the administrative record that was before the agency official at the time he made his decision.
2. *Public Record:* the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of reviewing courts by persons participating in agency proceedings.
    a. When an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court presumes the agency acted improperly and must treat the agency's justification as a fictional account of the actual decision making process and must find its actions arbitrary.

*[HBO v. FCC].

§ 3.2: Rulemaking Process

I. EX PARTE COMMUNICATIONS

A. **Analytical Framework:** there are two main questions to ask when an agency engages in ex parte contacts:
1. What is the agency regulating?
    a. *Competing Private Interests:* if the agency is regulating competing private interests, then ex parte contacts are more suspect. *HBO v. FCC* rules apply and ex parte contacts are usually not allowed.
    b. *General Public*: if the nature of the rulemaking is general, and applicable to everyone, then ex parte contacts are allowed more often courts are not as concerned because the action is more like legislation. *ATC v. FCC* rules apply.
2. What is the procedural posture in the rulemaking process?
    1. *Pre-notice period*: ex parte communications are allowed because the agency has not proposed a rule;
    2. *After Pre-Notice* and *Before Final Action:* (all other periods): more often than not, the ex parte contacts will occur in the pre-adoption period after notice and comment but before final action.
        a. The court may allow ex parte contacts if the contacts are:
            i. recorded by the agency with the time, date, and place the occurred; and
            ii. the substantive communications are noted in a memo about what the contacts involved, the substantive content of the conversation, and are placed in the record so that the court can review it in the record.
        b. If the ex parte contacts are not written down and placed in the record the court will usually not allow them.
3. Test: the closer the agency action is to adjudication, the ex parte contacts are looked at in more disfavor.

B. **G/R:** Competing Private Interests: if competing private interests are involved ex parte communications are prohibited in the rulemaking process.
1. If the information contained in the ex parte contact forms the basis for agency action, that information *must* be disclosed to the public in some form before it will be allowed.
    a. If ex parte contacts occur, any written document or a summary of the oral communications must be placed in the public file established for each rulemaking docket immediately after the communication is received, so that interested parties may comment on it.

2. Once notice of a proposed rulemaking has been issued, the agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should refuse to discuss matters relating ot the disposition of a rulemaking proceeding with any *interested private party, attorney, or agent for any party* prior to the agency's decision.
3. *Impermissible Factors:* the issue comes down to whether, even if the rule is wholly rational, did the agency rely on impermissible facts, which weren't provided for by Congress. The court takes into account whether the impermissible factor, influenced the adoption of a rational rule.
4. *Policy:* avoid both a public and private record. When competing private interests are involved, i.e. specific companies that would be directly affected, the court is more stringent with regard to ex parte contacts because one party will be affected adversely and one beneficially.
*[HBO v. FCC].

C. **G/R:** General Public: if the rule is one of general applicability, the courts have limited the rule prohibiting ex parte contacts because in light of Congress' intent not to prohibit or require disclosure of all ex parte contacts during or after the public comment period, the court draws the line at the point where the rulemaking proceeding is not involving competing claims to a value of privilege. It is at this point where the potential for unfair advantage outweighs the practical burdens of a judicial rule would place on administrators.

1. In other words, were there are not competing private interests, the courts will be more lenient in allowing ex parte contacts, and will not follow *HBO's* strict prohibition rule, however, as a practical matter it is good to record the ex parte contacts and put them in the record.
[*ACT v. FCC (the court basically declined to follow *HBO* because it thought the test was unworkable)].

D. **G/R:** Adjudication/Rulemaking Distinction: in determining whether ex parte contacts are permissible you have to distinguish between the rulemaking and adjudication process. In the adjudication process ex parte contacts are almost never allowed (except for procedural questions) because there are very few people involved.

1. The more formal the process, the more strict the rules become on ex parte contacts.
2. The less people affected by a rule or policy implementation through adjudication, the stricter the rules become on ex parte contacts.
3. Although the APA says nothing about ex parte contacts, the court must still look at the enabling act because there will probably be additional requirements in the enabling act.
*[Sierra Club v. Costle].

II. Congressional and Presidential Oversight of Rulemaking and Ex Parte Contacts

A. Congressional Oversight Generally: Congress, and individual Congressmen, can exert influence and control over an agency by oversight. The usual relationship between Congress and an agency is reciprocal, with each institution needing something from the other.

B. **G/R:** Individual Congressmen Pressure: a decision of an agency will be invalid if based in whole or in part on the pressures emanating from *individual congressmen*.

1. Improper Purpose Test: there are two conditions that must be met before an administrative rulemaking may be overturned on the grounds of an individual congress member's pressure:
    a. *Improper Purpose:* the content of the pressure upon the agency is designed to force it to decide upon factors not made relevant by Congress in the enabling act; and
    b. *Improperly Affects:* the agencies decision must be affected by those extraneous considerations.

2. Rule: it is entirely proper for congressional representatives to vigorously represent the interests of their constituents before administrative agencies engaged in informal, general policy, rulemaking. So long as individual congressmen do not frustrate the intent of Congress as a whole as expressed in the enabling act, nor undermine the applicable rules of procedure.
[*Seirra Club v. Costle].

C. **G/R:** Presidential Oversight, Generally: Presidential oversight is more unitary and consistent than congressional oversight because the executive branch is hierarchally organized under one person. Most of the executive branch oversight is done by the OMB.

1. *Interagency Review:* is diverse in content and frequent by the executive branch.
    a. The president can constrain the parochialism of agencies by instillin in them broad principles of his policy outlook and by ensuring some coordination of the policy making.
        i. The president does this through the appointment and removal process. These powers are augmented by a number of statutory powers.
    b. Control is also exercised through the OMB's budgetary functions and its administration of procedural directives. The most important of the OMB's power is the power to review and revise the budgetary and legislative requests of most federal agencies and the Justice Departments authority to conduct litigation for most of the agencies.
    c. The president occasionally intervenes in a particular agency rule makings that are especially important or controversial.
        i. The authority of the president to control and supervise executive policymaking is derived from the constitution; the desirability of such control is demonstrable form the practical realties of agency rulemaking.

D. **G/R:** Direct Presidential Contracts: the purposes of full record review, which underlie the need for disclosing ex parte conversations in some settings do not require the courts to know the details of every White House contact, including a Presidential one, in the informal rulemaking process.

1. The existence of intra-executive branch meetings during the *post-comment* period, even if the president is involved, does not usually violate the enabling act (unless otherwise stated) and does not violate due process if the agency is an executive agency.
2. The president falls into his own category, but there are two threshold questions that must be answered in evaluating ex parte contacts with the president:
    a. What is the nature of the agency; (executive [treasury, department of transportation, etc…] or independent regulatory [FCC, FTC, etc…].
        i. Ex parte contacts between the president and an executive agency are generally allowable because he is the head of the agency; and moreover there does not have to be a summary of the conversation.
            (A). The rule is still subject to review under §706(2)(A).
        ii. If the agency is an independent regulatory agency, then the agency should make a summery of the contact, just like with congressional oversight.

*[Sierra Club v. Costle].

E. **G/R:** Independent Regulatory v. Executive Agency and Presidential Oversight: the nature of the agency is important in analyzing ex parte contacts with the president.

1. *Executive Agencies:* the court will probably find the ex parte contact with the president rational, even if not supported in the record, because the president is, in effect, the head of the executive agency.
    a. The court will use the ordinary arbitrary and capricious standard in reviewing the ex parte contact:
        i. If there a rational basis in the record for having the ex parte contact, and the rule, then the ex parte contact will not nullify the rule.
2. *Independent Regulatory Agencies:* the court will probably treat an ex parte contact with the president and an independent regulatory agency like any regular ex parte contact and use the improper purpose test:
    a. Thus, the court will require the agency to take note of the ex parte contact with the president, and put it in the record. Then the court will apply the improper purpose test:
        i. did the president has an improper purpose; and
        ii. did that improper purpose and ex parte contact actually affect the judgment of the agency.

III. <u>STATUTORY HYBRID RULEMAKING</u>

A. **Background:** the APA is a default provision for informal rulemaking procedures, it has a lot of information, but says "unless otherwise provided." When Congress adds additional rules, any combination of formal or informal rulemaking procedure, then it is using hybrid rulemaking.
1. This has the general effect of making rules:
    a. more fair;
    b. with more knowledge and better information;
    c. which results in more accurate information;
    d. which makes rules easier to defend and easier for the public to accept.
2. The Magnuson-Moss Act is one example of statutory hybrid rulemaking: the enabling act required the FTC to follow the APA's informal rulemaking procedures then added six additional requirements:
    a. a particular statement of reasons for the proposed rule;
    b. mandatory public comment period in which agency is required to make all comments public;
    c. mandatory public hearing, with oral arguments and limited right to cross-examination;
    d. agency had right to compensate inadequately represented interests;
    e. strict, and more involved, requirement for the purpose of the rule; and
    f. pre-enforcement judicial review.
    **If you see any of these types of things in the enabling act, you know you are in statutory hybrid rulemaking.
3. Thus, is some enabling acts, Congress, requires more procedural safeguards. You will have to look at the enabling act, if its says nothing go to the APA, if it provides more safeguards, the agency must abide by them.

B. **G/R:** <u>Procedural Mechanisms for Reducing Bias in Agencies:</u> agencies can take several steps to lessen the view that decisions are biased and comport with the due process, including:
1. Consulting, whenever possible, multiple sources of information in preparing regulatory analysis documents;
2. Carefully citing all of the information available upon which the analysis draws and making the information available for public scrutiny at convenient times and places; and

3. By attempting to trial basis to engage in cooperative regulatory impact assessment by bringing representatives from all affected parties together to assess the validity of particular studies prior to relying on those studies in regulatory analysis documents.

C. **G/R:** Impartial Agency Proceedings: the public, or interested parties, have a right to a fair and open proceeding; that right includes access to an impartial decision maker.

1. Impartial, however, does not mean uninformed, unthinking, or inarticulate.
2. The requirements of due process clearly recognize the necessity of decision makers to formulate policy in a manner similar to legislative action.

D. **G/R:** Disqualifying Agency Personnel for Bias: bureaucrats, or agency rule makers, are not judges; therefore, the court will not hold them to standard of a judge or ALJ when considering bias in the rulemaking proceeding. There are two tests for considering bias:

1. *Cinderella Rule* [minority, dissent in Ass'n of Nat. Ads v. FTC, classical]: the rule disqualifies a decision-maker if a disinterested observer may conclude that he has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.
    a. Policy AGAINST *Cinderella Rule* that modern courts follow:
        i. The courts NEVER intended the *Cinderella* rule to apply to a hybrid rulemaking procedure because it would limit the ability of administrators to discuss policy questions.
        ii. The *Cinderella* rule of a neutral and detached adjudicator is simply inapposite role model for an administrator who must translate broad statutory commands into concrete social policies.
        iii. If an agency official is to be effective he must engage in debate and discussion about policy matters before him.
2. **Unalterably Closed Mind Test:** [modern, majority rule]: an agency decision-maker (commissioner) should only be disqualified when there has been a *clear and convincing* showing that the agency member has an *unalterably closed mind* on matters critical to the disposition of the proceeding.
    a. Clear and Convincing Test: is necessary to rebut the presumption of administrative regularity;
    b. Unalterably Closed Mind: is necessary to permit rule makers to carry out their proper policy-based functions while disqualifying those unable to consider meaningfully the disposition of the proceeding.

IV. Exceptions to the Procedural Rulemaking Requirements of the APA

A. **APA § 553:** obliges the agency to provide notice and an opportunity to comment before promulgating a final rule, subject to four exceptions.

1. §553's notice and comment requirements are essential to the scheme of administrative governance established by the APA.
2. These procedures reflect Congress' judgment that informed administrative decision making requires that an agency decision be made only after affording interested persons an opportunity to communicate their vies to the agency.
3. By mandating openness, explanation, and participatory democracy in the rule making process, these procedures assure the legitimacy of administrative norms.
4. For these reasons the court has consistently afforded a narrow case to the exceptions in §553, permitting an agency to forgo notice and comment *only when* the subject matter or the circumstances of rulemaking divest the public of any legitimate stake in influencing the outcome.

B. Exceptions: **§ 553(b)(3)(A)-(B):** except when notice or hearing is required by statute, this subsection [Rulemaking] does not apply to:

1. Interpretive rules;
2. general statements of policy;
3. rules of agency organization, procedure, or practice; or
4. when the agency for *good cause* finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are *impracticable, unnecessary*, or *contrary to the public interest*.

C. **§553(b)(3)(A):** Interpretive Rules: an interpretive rule does not provide a new rule, it merely advises the public explaining what the existence and meaning of the enabling act is, and how the agency interprets that enabling act.

1. Inquiry: The key inquiry is whether the purported interpretive rule ADDS or EXPLAINS rights.
    a. If it adds new rights, then no matter what the agency labeled it, it is a rule and the exception does not apply.
    b. If it merely explains, interprets, or advises the public then it is an interpretive rule and the exception applies.
2. Distinction: Substantive rules are distinct from interpretive rules by being based on an express or implied grant of power form the legislature to the agency to promulgate the substantive rule in aid of the agency's mandate.
3. Test: an interpretive rule only says what the agency thinks the statute means and only remind affect parties of existing duties; substantive rules create new law, rights, or duties.

D. **§553(b)(3)(A):** Policy Statements: agencies can promulgate policy statements without a notice and comment period.

1. *Definition:* a policy statement is a general statement of policy, which does not establish a binding norm and is not finally determinative of the issues or rights to which it is addressed.
    a. A policy statement announces the agencies tentative intentions in the future.
    b. A rule has prospective effect that is general or particular; whereas a policy statement is a general objective the agency wants to achieve.
    c. A rule is binding, a policy statement is not binding, it must be determined what the purported policy statement affects, or who it affects.
2. Test: in determining whether an agency's pronouncement is a policy statement or is in fact a binding norm courts have employed two criteria:
    a. unless a pronouncement acts prospectively, it is a binding norm (i.e. rule); and
    b. whether a purported policy statement genuinely leaves the agency and its decision makers free to exercise informed discretion; if it appears that a so-called policy statement is in purpose or likely to affect one that narrowly limits administrative discretion, it will be taken as a binding norm (rule) of substantive law, no matter what the agency labels it.

E. **§553(b)(3)(A):** Rules of agency organization, procedure, or practice: [this is the most commonly invoked exception]: court cases construing this exception have long emphasized that a rule does not fall within the scope of the exception merely because it is labeled "procedural."

1. Rather than focus on whether a particular rule is substantive or procedural, the court employs a *functional analysis*.

2. This is exception has been described as essentially a "housekeeping" measure the distinctive purpose of which is to ensure that the agencies retain latitude in organizing their *internal operations*.
3. **G/R:** where nominally procedural rules encode a substantive value judgment or substantially alter the rights or interests of regulated parties the rules must be proceeded by notice and comment.
4. Test: an agency can use the "procedural rule" exception when the public has no legitimate interest in influencing an agencies discretionary deployment of enforcement resources, a classic internal matter essentially to how an agency constitutes itself. Thus, when the agency rule encodes a substantive value judgment the notice and comment requirements of §553 must be complied with.
    a. Rules which fall under this exception are ones in which the need for public participation in the rulemaking process are too small to warrant notice.
    b. The exception does not exempt rules of procedure *per se*, but rather, rules of agency organization, procedure, or practice which Congress intended to distinguish between rules affecting different subject matters—the rights or interests of regulated parties and internal operations of the agency.

*[Air Transport Ass'n of America v. D.O.T.]

F. **§553(b)(3)(B):** Good Cause Exception: the good cause exception, has been interpreted to mean when notice and comment are *impracticable*. In turn, it is only in the unnecessary or contrary to the public interest when it is impracticable to go through the notice and comment requirements.

1. The inquiry then is when is it impracticable for the agency to bypass the notice and comment period:
    1. Notice and comment periods are impracticable when Congress passes an enabling act giving the agency a short duration of time to implement rules (like 3-months or less), thus, to comply with Congress' intent the agency has to bypass the notice and comment period.
2. Test: good cause exception can only be used when:
    a. There is a very short period of time for the agency to promulgate a rule;
    b. it is unnecessary, which means only when there is good cause; and
    c. it is in the public interest, which only means when another exception applies.
3. Like the other exceptions, the good cause exception is narrowly construed and only reluctantly countenanced.

G. **G/R:** Monetary Penalties: under both the due process clause, and the APA, a party has a right to notice and a hearing before being forced to pay a monetary penalty.

1. In other words, none of the exceptions apply when the agency is going to enforce a monetary penalty.

H. **G/R:** Strict Construction: the courts construe the exceptions to the notice and comment periods narrowly because:

1. Public involvement in rulemaking is important because agencies are ran be un-elected bureaucrats; therefore, the exceptions are going to be narrowly construed, and if it is too close to determine whether an exception applies or not, the tie will go to the public. The agency has the burden of proving the exception is applicable;
2. The label on the rule is *not* important, the court will use a functional analysis because administrative law is functional in nature;
3. The court will then look to what effect that rule has on the public because when the agency changes someone's ability to seek review; it has affected their rights, and when the agency affects someone rights it is a substantive, rather than procedural rule.

F. **G/R:** Policy Reasons: there are four main reasons why we have the notice and comment period, and always look at these policy reasons, then construe the exception narrowly, and if the exception is still valid then it can be used.

1. The policy reasons for notice and comment are:
    a. consistent, fair, accurate, and acceptable results.
2. Look at these policy reasons when you look at an exception and it will help to determine if the exception applies.

§ 3.3 Judicial Review of Rulemaking

I. PROCEDURE FOR JUDICIAL REVIEW

A. **G/R:** the enabling act governs judicial review, but Congress usually says go to the APA, and then §706 governs. ALWAYS START YOUR ANALYSIS WITH WHAT THE ENABLING ACT SAID.

B. **APA §706:** Scope of Judicial Review: to the extent necessary the reviewing court *shall* decide all relevant questions of law, interpret the statutory and constitutional provisions, and determine the applicability of the terms of agency action. The reviewing court shall:

1. **§706(1):** (not used much) compel agency action unlawfully withheld or unreasonably delayed; and
2. **§706(2):** hold unlawful and set aside agency action, findings and conclusions found to be:
    a. §706(2)(D): without observance of procedure required by law;
    b. §706(2)(C): in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
    c. §706(2)(A): arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law; or
    d. §706(2)(B): contrary to constitutional right, power, privilege, or immunity.

**The court in analyzing a case will for this framework, because it does not decide constitutional questions until last, will dismiss the case without getting into the merits if there is a procedural flaw, or the agency did not have the authority to enact the law. The arbitrary and capricious standard is the most commonly used and analyzed.

C. **G/R:** Extra Procedural Safeguards: the APA §553 establishes the *maximum* procedural requirements, which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.

1. Congress can always provide additional procedural safeguards and rights in the enabling act; agencies are free to grant additional procedural safeguards and rights in the exercise of their discretion; but reviewing courts are *NOT* generally free to impose them if the agencies or Congress has not chosen to grant them.
    a. Court *cannot* engraft extra procedures on the APA, the agency and Congress can engraft extra procedures.
    b. This is because the legislative history of §553 demonstrates that Congress intended that the discretion of the agencies, and not the courts, be exercised in determining when extra procedural devices should be implemented.

*[Vermont Yankee v. NRDC].

D. **G/R:** Agency Discretion: absent constitutional constraints, or *extremely compelling circumstances*, the administrative agencies are free to fashion their own rules of procedure and to purpose methods of inquiry capable of permitting them to discharge their duties.

1. *Compelling Circumstances:* in a rule making proceeding when an agency is making a "quasi-judicial" determination by which a very small number of affected persons are exceptionally affect in each case upon individual grounds in some instances additional procedures will be required in order to afford the aggrieved individuals due process.
*[Vermont Yankee v. NRDC].

E. **G/R:** Standard of Review: when there is a contemporaneous explanation of the agency decision, the validity of the action must stand or fall of the propriety of that finding judged by the reviewing court by the appropriate standard of review *set forth in the enabling act* [Vermont Yankee v. NRDC].

II. ISSUES OF FACT AND POLICY

A. **§706(2)(A):** Arbitrary and Capricious Standard: under the arbitrary and capricious standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of authority delegated to the agency by statute.

1. The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency.
2. Test: the agency must examine the relevant data and articulate a satisfactory explanation for its action *including a rational connection between the facts found and the choice made.*
3. When an Agency Action is Arbitrary and Capricious: an agency rule is arbitrary and capricious if the agency:
    a. has relied on factors which Congress has not intended it to consider;
    b. entirely failed to consider an important aspect of the problem;
    c. offered an explanation for its decision that runs counter to the evidence before the agency; or
    d. is so implausible that is could not be ascribed to a difference in view or the product of agency expertise.
4. The court in reviewing the agencies explanation must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.
    a. The reviewing court should not attempt itself to make up deficiencies in the agency's judgment; the court cannot supply a reasoned basis for the agency's action that the agency itself has not given.
    b. However, the court will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

*[Motor Vehicles Mfs. Ass'n v. State Farm]

B. **G/R:** Rescission, Modification, or Amendment of a Rule: under the informal rulemaking procedures of §553 the agency's actions in promulgating standards or rules may be set aside if they are found be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law under §706(2)(A).

1. In addition, the rescission or modification of a rule is subject to §706(2)(A)'s arbitrary and capricious standard.
2. Thus, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

3. *Caveat:* regulatory agencies do not establish rules of conduct to last forever, and agency is given ample latitude to adapt their rules and policies to the demands of changing circumstances.

a. *Dissent Rule:* a change in administration, according to the dissent (Rhenquist) is a change in circumstance.

4. Thus, the direction the agency chooses to move (implementing or rescinding a rule) does not alter the standard of judicial review established by law.

a. In other words, the rule to be rescinded must be based on a rational basis in the record supporting the change of decision and when the agency changes its mind and rescinds a rule, it is reviewed under §706 and the agency must have a rational basis in the record for the repeal of the rule, and review is essentially the same:

i. Hard look at the record; and then

ii. Deference to the agency if there is a rational basis.

*[Motor Vehicles Mfs. Ass'n v. State Farm].

III. ISSUES OF LAW

A. **Analytical Framework:** Reviewing an Agency's Construction of a Statute: when a court reviews an agency's construction of a statute (enabling act) which it administers, the court must answer two questions:

1. Whether the issue one of fact, law, or mixed law and fact.

a. If it is a question of fact, analyze under *State Farm* analysis: (i) hard look at the record; (ii) deference to the agency if there is a rational basis for its decision supported by the record.

b. If it is question of law, or mixed law and fact, go to #2.

2. Whether Congressional intent is clear; that is, has Congress directly spoken to the precise question at issue:

a. If *YES*, then congress has addressed the matter in the *plain language* of the statute; that is, congress' intent is ascertainable from the four corners of the statute, either in the plain language or by definition.

i. If Congressional intent is ascertainable in the plain language of the statute then that is the end of the inquiry, the Court reviewing the issue will give effect to that intent.

(A). When Congressional intent is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

**However, keep in mind that if Congress' intent was clear, the matter would probably not be in court in the first place, so as a practical matter, the analysis will probably fail this step.

b. If *NO*, Congress has not expressly spoken to the precise question at issue, the court does not simply impose its own construction on the interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the court will ask:

i. whether the *agency's answer to the specific issue is based on a permissible/reasonable construction of the statute*.

ii. If the court determines that the agency interpretation is reasonable, the court will defer to the agency's interpretation of the statute.

(A). Deferring to the agency interpretation really means deferring to the implementation and promulgation of rule because that is what is being challenged, and the rule is based on the agency's interpretation of the statute.

(B). The Court will defer to a reasonable agency interpretation because an agency is the expert in that field.
(C) Deferring to an agency interpretation is much like the arbitrary and capricious standard, if the interpretation/definition is a reasonable accommodation of conflicting policy choices, then the court will find it permissible and reasonable, thus deferring.

*[*Chevron v. NRDC*].

B. **G/R:** Deference to an Agency's Interpretation: the court has long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

1. The principle of deference to administrative interpretations has been consistently followed by the Court whenever a decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations (i.e. expertise).
2. If the choice of the agency represents *a reasonable accommodation of conflicting policies* that were committed to the agencies care by the statute, the court will not disturb it unless it appears from the statute or its legislative history that the accommodations are not ones that Congress would have sanctioned.

*[*Chevron v. NRDC*].

C. **G/R:** an agency to which Congress has delegated policy making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments [*Chevron v. NRDC*].

D. **G/R:** Pure Questions of Statutory Construction: if the question of Congress' intent is a question of *pure* statutory construction, then it is for the courts to decide the issue.

1. If the court is employing traditional tools of statutory construction, and ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect.

*[*INS v. Cardozo-Fonseca*].

E. **Remember:** *Chevron* was a case where Congress' intent was NOT clear, so you have to go through the entire analysis, and use it as precedent on the exam when you cannot ascertain Congress' intent. *Cardozo-Fonseca* was a case where Congress' intent was clear in the plain language of the statute, so if you get one of those, or use it is as counter argument; it is precedent for not deferring to the agency interpretation.

F. **G/R:** Priority of Tools Used by a Reviewing Court: the court in determining Congressional intent will use three "tools" to aid its determination of whether Congress was clear:

1. The *plain language* of the statute;
    a. The Court can also use extrinsic aids (like dictionaries) before deferring to the agency interpretation [*MCI Telecommunications v. ATT*];
2. *Legislative History*, which includes at the federal level, house and senate reports, and conference or committee reports; at the State level there is not as much legislative history.
3. *Agency Interpretation*: if the plain language of the statute, or its legislative history are not helpful, the Court will examine the agencies interpretation to see if it is reasonable.

§3.4: Standards: Rationality, Politics, and Public Purpose

I. STANDARDS OF JUDICIAL REVIEW

A. **Analytical Framework:** a reviewing court will take this analysis when reviewing a challenged rule:

1. Determine if the question at issue is one of law or fact:
    a. If a question of law, then go to #2;
    b. If a question of fact; then go to #4(c).
2. Look at the statutory language (plain language) and determine if it prohibits or permits the promulgated rule expressly:
    a. If yes, the analysis is over and the Court must give effect to the legislative intent.
3. Look at the legislative history and determine if Congress intended (or thought it was permissible) for the agency to promulgate the rule:
    a. If Congress' intended or thought the rule was permissible than that supports the agency's interpretation, and the court's decision; the analysis is over.
    b. If the legislative history is silent or ambiguous, then go to #4.
4. Evaluate the Rule under §706(2) to determine if the rule was reasonable:
    a. §706(2)(D): is there a procedural flaw which would require the Court to dismiss the action?
        i. If yes, the analysis is over; if not go to #4(b).
    b. §706(2)(C): is the agency action in excess of the statutory authority granted to it by Congress?
        i. Under this analysis the Court will look at (a) the plain language of the statute; (b) its legislative history; and (c) the agency's interpretation which it will defer to if the agency interpretation was reasonable. This standard will probably pass muster because before the Court even determines if the rule was reasonable, it must make sure the agency had the statutory authority to promulgate the rule.
        ii. If yes, the analysis is over and the court will remand; if not, go to #4(c).
    c. §706(2)(A): is the rule arbitrary and capricious?
        i. Under this analysis the Court will:
            (A) Take a hard look at the record; and
            (B) Defer to the agency decision if there is a rational basis in the record for concluding that the rule was reasonable.
        ii. If yes, the analysis is over, and the court will remand; if not, go to #4(d).
    d. §706(2)(B): is there a constitutional flaw in the agency's organization or has the agency violated any constitutional rights, such as due process?
        i. Under this analysis, which the court will do last, it will look at the delegation doctrine, due process rights.
        ii. If yes, the analysis is over, the court will declare the rule unconstitutional; if no, the rule is reasonable.

*[*Sierra Club v. Costle*].

B. **G/R:** Courts Reviewing Function: in reviewing the merits of an agency's action, the court's function is to ensure that the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in formulation of rules for the future [*Sierra Club v. Costle*].

1. If the Court finds the agency action is arbitrary and capricious it will set it aside under §706(2)(A).

2. The court evaluates whether the agency has exercised reasoned discretion, and this means the agency must consider all of the relevant factors and demonstrate a reasonable connection between the facts on the record and the resulting policy choice.
3. Generally, the broader the delegated power, the broader the judicial review. Whenever an agency has a broad delegation of authority (like in the "public interest"), there comes with it a broad scope of judicial review which is less deferential.
*[*Sierra Club v. Costle*].

C. **G/R:** Agency Rescission of Rule: an administrative agency, like a court, is not absolutely bound by its precedent and can reject its previous decisions. However, it must explain why it is disregarding its previous precedent.

1. This is an aspect of the duty of rational explanation; a rational person acts consistently and therefore only changes course when something has changed.
2. The Court will review, and go through the same analysis, under a rescission of a rule as it will for the promulgation of a rule.
    a. An agency's opinion on why it promulgated rules is unreasoned and unreasonable when it is not supported by the record and fails to mention why the agency acted, or why it excluded and overlooked evidence during the comment period.

§4: AVAILABILITY OF JUDICIAL REVIEW

§4.1: The Timing of Judicial Review

I. DOCTRINE OF FINALITY

A. **APA § 704:** Actions Reviewable: agency action is made reviewable by statute and *final agency action* for which there is no adequate remedy in a court.

1. *Agency Action:* includes any rule defined by the APA as a agency statement of (a) general or particular applicability and (b) future effect, designed to implement, interpret, or prescribe law or policy.
2. An agency action is final is when the agency action is otherwise final (e.g. there are no more administrative remedies or actions that the agency could take).
    a. Basically, when there is nothing left for the agency to do, the rule goes into effect, and is in effect, and there is *no discretion* left in the agency. Thus, the implementation and enforcement of a rule does not involve agency discretion anymore because the rule is binding on everyone. There is nothing left for the agency to do besides enforce the rule.
3. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review, *only* on review of the final agency action.

B. **G/R:** Jurisdictional Requirement of Finality**:** the doctrine of finality applies in EVERY case because it is jurisdictional requirement statutorily imposed on the courts through §704 of the APA.

1. Thus, you should always start your analysis with finality because if the action is not a *final agency action* the court does not have jurisdiction to hear the case.

C. **G/R:** Final Agency Action: an agency action is final, and within the doctrine of finality when the rules are promulgated by order of the agency, and the expected conformity to them causes injury cognizable by a court, and hence, are properly subject to judicial challenge [*Abbott Labs v. Gardner*].

1. Administrative orders are final when they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process [*Ticor Title Insurance Co. v FTC*].

a. The expense of an administrative proceeding (e.g. attorney's fees) does not qualify as the imposition of a burden or denial of a right.

i. Mere exposure to litigation stands in stark contrast to cases where administrative action in the course of a proceeding will inflict an irreparable injury, effectively denying a right.

b. An administrative act is not final merely because it constitutes an agency's last word on a discrete legal issue in the course of a proceeding.

c. An agency's decision to initiate proceedings does not become final merely because the challenger attack's the agency's jurisdiction, even where the attack raises a pure question of law.

d. Finality looks to the conclusion of the activity by the agency.

2. The action giving rise to the issue must be a final agency action with the meaning of §704.

a. The key for reviewability is whether the action is actually final; that is, if there is *discretion* left to the agency then the action may not be final.

b. Remember, an agency action that is final, may not always be final, if the agency has something left to do after the promulgation of a rule, like apply the rule in the agency's discretion, even if it is a "final rule" the agency must enforce it or do something before it is *final agency action*.

*[*Toilet Goods Ass'n v. Gardner*].

3. Finality Test: if there is something left for the agency to do, even if the formal rulemaking procedures are over, then the action is not a final agency action. If the agency has to enforce the rule through the use of discretion, then it is not a final agency action.

D. **G/R:** Exceptions to the Finality Doctrine: review of non-final agency action is available only in the most exceptional circumstances.

1. Clear Right Test: the formulation is that a federal court may only take jurisdiction before final agency action only in the case of *clear right* such as:

a. An outright violation of a clear statutory provision; OR

b. violation of basic rights established by structural flaw, and not requiring in nay way a consideration of interrelated aspects of the merits.

II. DOCTRINE OF RIPENESS

A. **G/R:** Pre-enforcement period: the doctrine of ripeness, a judicially created doctrine, only applies in the pre-enforcement period, therefore, it is analytically distinct from exhaustion and primary jurisdiction; if the action is post-enforcement do not apply the ripeness doctrine.

1. In the pre-enforcement period, there are no administrative remedies available so the court will apply the ripeness doctrine because the agency has not taken any direct action against the individual.

a. Thus, ripeness applies when there are no administrative remedies available.

B. **G/R:** Ripeness Doctrine**:** the basic rationale of the ripeness doctrine is:

1. to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies; and

2. to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties;

3. the purpose of the ripeness doctrine is to protect the court from having to issue advisory opinions when it is not presented with a justiciable case or controversy.
4. Ripeness also serves to protect the agency because everyone wants to go to court before using administrative remedies, and that severely limits the power of the agency and would defeat the purpose of having administrative law.
*[*Abbott Labs v. Gardner*].

C. **G/R:** Elements of Ripeness**:** there are two elements that must be satisfied for a case to be ripe for judicial review:

1. Fitness*:* the issues must be fit for judicial review;
    a. in determining the fitness of the issues for judicial decision the court considers whether the issue is *purely a legal one* or and if further administrative proceedings are contemplated.
        i. *Purely Legal Issues:* the court wants the agency to resolve the factual issues before it decides legal issues. Look at the nature of the claim and determine if the question is better suited for the agency (i.e. a factual issue) or if it is purely a legal issue, which is better suited for the court.
            (A) If the issue is a purely legal one then the issue is tendered and appropriate for judicial review.
        ii. If a *factual record* is absent and would aid the court in its review, and determination of the legal issues, then the issue is not ripe for review until a factual record is compiled.
        iii. The most important issue in determining fitness is whether the issue is one of fact (agency) or a legal one (courts)
2. Hardship*:* the affected party must not suffer hardship from the withholding of judicial consideration.
    a. Hardship occurs when an affected party is *directly and immediately* impacted by the regulations and the party would suffer (monetary, change in practice or procedure) if the court did not issue a decision.
    b. The question of hardship is really whether the agency has put the affected party in a catch-22; that is, must the affected party comply with the rule and incur a lot of expenses or not comply with the rule and getn fined.
    c. The cost of attorney's fees is not a hardship.

*[*Abbott Labs v. Gardner*].

D. **G/R:** Test for Ripeness**:** when the ripeness doctrine will apply depends on:

1. how adequately a court can deal with the legal issue presented to it; and
2. the degree and nature of the regulation's present effect on those seeking relief.
    a. In other words, the agency action must be a final agency action with the meaning of §704, and when the agency's action does not have a present effect on the affected party because it still can enforce the action in its discretion, the action is not final.
    b. A case does not present a justiciable issue when:
        i. the regulation merely states that the agency *may* take some action in the future, upon its *discretion*;
        ii. requires no advance action of the affected party; and
        iii. no irremediable adverse consequences flow form the agency's regulation of the affected party.

*[*Toilet Goods Ass'n v. Gardner*].

III. DOCTRINE OF EXHAUSTION

A. **G/R:** Post-Enforcement Period: the doctrine of exhaustion, a judicial doctrine, only applies in the post-enforcement period. Thus, the agency must have taken some action to affect the legal rights or duties of a party.

1. If the issue arises in the pre-enforcement period, do NOT apply exhaustion apply the doctrine of ripeness.
2. With exhaustion, only the agency has jurisdiction to hear the case.
3. Exhaustion is largely determined by looking at the enabling act, and decided if Congress granted the agency jurisdiction to hear the case first.

B. **G/R:** Doctrine of Exhaustion: the basic rationale the exhaustion doctrine is:

1. It promotes judicial economy because it lets agencies decide their own cases;
2. it allows the agencies to correct their own mistakes;
3. it creates a record for judicial review;
4. it is more efficient because it allows the agencies, which are experts in the field, to determine the facts of a case or controversy.
5. *Congressional Intent:* the court wants to fashion the exhaustion principles with congressional intent. The reason courts have created exhaustion is because Congress has created a scheme, which typically makes agencies responsible for the action.
    a. Where congress has not clearly required exhaustion, sound judicial discretion governs.

**If there are administrative remedies available, then the doctrine of exhaustion applies

C. **G/R:** Exhaustion: parties must exhaust prescribed administrative remedies before seeking relief from the federal courts.

1. *Policy:* exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.
    a. *Protecting Administrative Agency Authority:* the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation authority to coordinate branches of government, that agencies, not the courts, ought to have primary responsibility for the programs Congress has charged them to administer.
        i. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to its special expertise.
        ii. The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.
        iii. Exhaustion principles apply with special force when frequent and deliberate flouting of the administrative process could weaken an agency's effectiveness by encouraging disregard for its procedures.
    b. *Promoting Judicial Efficiency:* exhaustion promotes judicial efficiency in two ways:
        i. when an agency ahs the opportunity to correct its mistakes, judicial controversy may well be mooted, or at least piecemeal appeals may be avoided; and
        ii. even when a controversy survives administrative review, exhaustion of the administrative procedure may procedure a useful record for subsequent judicial consideration, especially in a complex or technical factual context.

*[*McCarthy v. Madigan*].

D. **G/R:** Exhaustion: the exhaustion of available administrative remedies is a prerequisite to obtaining judicial relief for an actual or threatened injury.

1. This rule has been applied frequently even where the plaintiff's have challenged the very authority of the agency to conduct proceedings against them.
2. The Exhaustion doctrine retains it vitality even when the collateral judicial action challenges the constitutionality of the basic statute under which the agency functions, even though on frequently asserted reason for requiring exhaustion is to give the agency an opportunity to avoid error, is inapplicable because an agency will not ordinarily pass on the constitutionality of the statute under which it operates.
3. *Policy:* two separate interests are advanced by the application of the exhaustion doctrine:
    a. the court might be able to avoid the needless decision of a constitutional question, because the plaintiff might prevail on non-constitutional grounds before the administrative agency; and
    b. the court would be able to forestall frequented disruptions of administrative proceedings; disruptions that would intolerably interfere with the agency's performance of its assigned task by Congress.

*[*Ticor Title Insurance Co. v. FTC*].

E. **G/R:** Exceptions to Exhaustion: there are five exceptions to the exhaustion doctrine:

1. when requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of court action [*McCarthy*];
2. an administrative remedy may be inadequate because of some doubt as to whether the agency was empowered to grant effective relief [*McCarthy*];
3. *Futility Exception:* an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it [*McCarthy*];
    a. The showing of undue bias is usually equated with something that would get a judge excused from a case for bias.
4. immediate judicial review of a challenge to agency authority is permissible where the agency's assertion of jurisdiction would violate a clear right of the plaintiff by disregarding specific and unambiguous statutory, regulatory, or constitutional directive [*Ticor*]; and
5. where postponement of review would cause the plaintiff irreparable injury [*Ticor*];
    a. The mere litigation expense, even substantial and un-recoupable cost, does not constitute irreparable injury.

IV. DOCTRINE OF PRIMARY JURISDICTION

A. **G/R:** Post-Enforcement Period: primary jurisdiction, a judicially created doctrine, like exhaustion which seeks to allocate decision making power between agencies and courts can only be applied in the post-enforcement.

1. The court will use the primary jurisdiction doctrine when both the agency and the court have jurisdiction over the issue.

B. **G/R:** Primary Jurisdiction: applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

1. When an issue of primary jurisdiction arises, the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.
2. **Test:** whether the court will invoke the doctrine of primary jurisdiction depends on the issue of the nature before the court:
    a. if the nature of the issue is factual, the court will send the action back to the agency for the compilation of factual record;
    b. if the nature of the issue is legal, the court will retain jurisdiction and hear the case because there is no need for a factual record.
    *Thus, it really comes down to which institution has more expertise on the issue: issues of law, courts are experts; particular factual issues, agencies are experts.
3. *Policy:* the policy behind the doctrine of primary jurisdiction is the desirability of uniform decisions that can be obtained if a specialized agency passed on certain types of administrative questions. Other policy considerations are:
    a. the expertise and special knowledge of agencies should allow them to decide issue which congress empowered them to administer;

V. DIFFERENCES BETWEEN FINALITY, RIPENESS, EXHAUSTION, AND PRIMARY JURIS.

A. **General Differences between the Four Doctrines:**

1. Applicable Period: (1) *Finality:* applies in post-enforcement and pre-enforcement periods, whenever any goes to court it must because a final agency action. (2) *Ripeness:* applies only to pre-enforcement periods; (3) *Exhaustion* and *Primary Jurisdiction* apply to post-enforcement actions.
    a. Thus, ripeness will not typically apply when all the other doctrines apply; however, if an action is not a final agency action, it will not be ripe.

2. Jurisdiction: (1) Finality is directed at the Court's jurisdiction to hear the case, the court can only review final agency action. (2) *Ripeness:* the agency, or no one, has jurisdiction because the issue is not fit for review and no hardship has been suffered, i.e. no Article III case or controversy for the court; (3) *Exhaustion:* Congressional intent or the statutory scheme dictate that the agency has jurisdiction in the first instance with subsequent review by the courts; (4) *Primary Jurisdiction:* the courts and the agency has jurisdiction, it comes down to who has more expertise to hear the case.

3. Force of Law: (1) Finality is statutory requirement mandated by §704 of the APA: (2) Ripeness, exhaustion, and primary jurisdiction are all judge made doctrines.

4. Nature of the Doctrines: (1) *Finality* deals with what the court can review; (2) *Exhaustion* is directed at the steps a litigant must take to get judicial review; (3) *Ripeness* depends on the fitness of the issue for judicial review; (4) *primary jurisdiction* deals with which institution is better able to resolve the dispute.

5. Nature of the Remedy: (1) *Finality:* the appropriate remedy is dismissal because the court lacks jurisdiction; (2) *Exhaustion:* the appropriate remedy is dismissal of the action because the litigant has not taken the correct procedural steps to even be in court; (3) *Ripeness*: appropriate remedy is dismissal because it is not an actual case; that is, the neither the agency nor the court could afford the claimant a remedy (there is nothing to

exhaust); (4) *Primary Jurisdiction:* is not dismissal because the court is simply deferring the complaint to the relevant agency.

§4.2: Standing to Seek Review

I. CONSTITUTIONAL, STATUTORY, AND PRUDENTIAL STANDARDS

A. **U.S. Const. Article III, §2, cls. 1:** the judicial power shall extended to all cases, in law and equity arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all *Cases*…[and] *Controversies*.

1. The standing requirement is grounded in this Article III "case and controversy" requirement clause.

B. **APA §702:** Right of Review: A person suffering a legal wrong because of agency action, or *adversely affected* or *aggrieved* by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

1. The government also waives sovereign immunity in this section.

C. **Analytical Framework:** there are several questions to answer to determine if a party has standing to sue:

1. Determine, by looking at the enabling act, whether it has requirements for standing or if it defaults to the APA,
2. Determine whether an association, or individual is seeking standing to sue and apply the respective rules.

D. **G/R:** Standing: the question of standing to sue is whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.

1. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party ahs alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.
2. Where Congress has authorized public officials to perform certain function according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes judicial review at the behest of the plaintiff.

*[*Sierra Club v. Morton*]

3. The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of constitutional questions [*Duke Power v. Carolina Env. Study Group*].

E. **G/R:** Standing without Right in Enabling Act: where review is sought not pursuant to a specific authorization in the substantive statute, but only under the general review provisions of the APA, the agency action must be *final* [finality requirement] and the party seeking review must show that he has suffered a legal wrong or is adversely affected or aggrieved within the meaning of the relevant statute [*Lujan v. Nat. Wildlife Federation*].

F. **G/R:** Pleading Requirements: specific facts must be alleged in the pleadings so as to raise a genuine issue of material fact as to whether the agency action cause the party to be adversely affected or aggrieved within the meaning of the relevant statute.

1. If the pleadings only contain a bare allegation of injury and fail to show specific facts supporting an affiant's allegation of injury, the party will be denied standing.
2. The affidavits asserting injury should be (a) specific; and (b) assert an on-going process of injury.
*[*Lujan v. Nat. Wildlife Federation*].

G. **G/R:** Standing under §702: for a party to have standing under the APA §702 they have to satisfy two requirements:

1. Injury in Fact Test: for a party to have standing within the meaning of §702 they must be directly injured within the meaning of §702; that is, it must be an injury to a cognizable interest, and requires that the party seeking review be *himself* among the injured.
    a. **g/r:** a person suffering economic injury always satisfies this test, and he has standing to sue, and argue as a representative of the public interest;
    b. **g/r:** injuries other than economic harm are also sufficient to bring a person within the meaning of the relevant statute, the interest alleged to be injured may reflect:
        i. aesthetic;
        ii. conservational;
        iii. recreational harm;
        iv. harm to property values;
        v. *fear* of immediate injury, as well immediate injury; or
        vi. economic harm.
2. Zone of Interest Test: the adverse affect or aggrievement must be within the meaning of the relevant statute; that is, is the person claiming injury in the zone of interest that the statute is trying to protect.
*[*Sierra Club v. Morton; Lujan v. NWF; Duke Power Co. v. Carolina Env. Study*].

H. **G/R:** Elements of Standing: for an individual (or corporation) to have standing they have to satisfy two elements:

1. *Injury in Fact:* demonstrate a personal stake in the outcome of the controversy; that is, a distinct and palpable injury;
2. *Redressability:* a fairly traceable causal connection between the claimed injury and the challenged conduct that falls within the zone of interest protected by the statute.
*[*Duke Power Co. v. Carolina Env. Study*].

I. **G/R:** Associational Standing: there are three criteria for an association to have standing:

1. the individual members of the association must have standing (i.e. must meet all the constitutional and prudential requirements); that is, an association/organization whose members are injured may represent those members in a proceeding for judicial review;
    a. Conversely, a mere interest in problem, no matter how long standing the interest and now matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render that organization adversely affected or aggrieved within the meaning of the APA.
        i. In other words, ideological feelings do not give you standing. The association must show that its members where injured in some concrete way.
        ii. An association can not bring a claim because the injury is not concrete because association is really just a non-profit corporation, a legal fiction, and cannot be injured.

2. The association must be related to the claim being asserted, the nature of the association is important.
    1. Ex: the Sierra Club can bring environmental claims but cannot assert a claim arguing the FCC's regulation of hard core porn is causing them injury (although it probably is).

*[*Sierra Club v. Morton*].

J. **G/R:** the court will not grant standing where the harm asserted amounts to a generalized grievance shared by a large number of citizens in a substantially equal measure [*Duke Power*].

K. **G/R:** Third Party Standing: the court has narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another:

1. Even when the plaintiff has alleged injury sufficient to meet the case or controversy requirement, the court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief in the legal rights or interests of third parties.
2. A party has standing were he champions his own rights, and where the injury alleged is concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are satisfied when the constitutional requisites are met.

L. **G/R:** Prudential Requirements of Standing Doctrine: the standing doctrine embraces three judicially self imposed limits on the exercise of federal jurisdiction:

1. *Third Party Standing:* there is a general prohibition on a litigant's right of raising another person's legal rights;
2. *Generalized Grievance Rule:* the rule barring adjudication of generalized grievances more appropriately addressed in the legislative (representative) branches;
3. *Zone of Interests Test:* the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

*The first two elements are prohibitions, and the third element is the most important.
*[*Allen v. Wright*]

M. **G/R:** Zone of Interest Analysis: [3rd Element of prudential standing requirements]: in analyzing the third element you will have to determine if the zone of interests is protected by the enabling act:

1. Once a party has shown that they are adversely affected, i.e., have suffered an injury in fact, the party must show that they are within the zone of interest protected by the enabling act:
    a. Specifically, the party must establish that the injury he complains of his (his aggreivement, or the adverse affect *upon him*) falls within the zone of interests sought to be protected by the statutory provision which forms the legal basis of his complaint.
2. To find the zone of interest protected by the statute you have to:
    a. Look at the *plain language*, the four corners of the statute;
        i. If the plain language does not help because it is ambiguous;
    b. Look at the *legislative history* and the purpose and structure of the statute;
        ii. if that does not help,
    c. Look at the agency interpretation and if it is reasonable defer to it.

*[*Air Courier Conf. V. Amer. Postal Workers Union*].
***Air Courier* is the only case that found that the person did not have standing because the zone of interest was not protected by the statute, therefore use it for counterarguments.

N. **G/R:** Constitutional Components of the Standing Doctrine: there are three constitutionally imposed limits on the exercise of federal jurisdiction:

1. *Injury in Fact:* a plaintiff, under Article III, must allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct; that is, he must a direct injury to cognizable interest;
    a. This means the injury must distinct and palpable; NOT abstract, conjectural, or hypothetical.
2. *Causal Link:* the injury must be fairly traceable to the challenged action, and relief from the injury must be likely to follow form a favorable decision;
    a. The injury asserted must direct to confer standing, if the injury asserted is too attenuated, or indirect, it is more difficult to meet the minimum requirements of article III.
3. *Redressability:* the defendant's allegedly unlawful conduct must be likely to be redressed by the requested relief;
    a. Article III requires the plaintiff who seeks to invoke judicial review stand to profit in some personal interest.

*[*Allen v. Wright*]

§4.3: Reviewability; Exceptions to Judicial Review

A. **G/R:** Reviewability: the APA's comprehensive provisions set forth in §§701-706 allow any person adversely affected or aggrieved by agency action to obtain judicial review thereof, so long as the decision challenged represents *a final agency action* for which there no other adequate remedy in court.

1. Typically a litigant will contest an action (or failure to act) by an agency on the ground the agency has neglected to follow the statutory directives of Congress.

*[*Webster v. Doe*].

B. **APA §701(a):** Exceptions to Judicial Review: The APA subjects administrative action to judicial review, *EXCEPT* to the extent:

1. §701(a)(1): statutes preclude judicial review; or
    a. A court that is focusing on express or implied statutory policies is likely to use this exception [*Johnson v. Robinson*].
    b. This exception is concerned with whether Congress expressed an intent to prohibit judicial review [*Webster v. Doe*].
2. §701(a)(2): agency action is committed to agency discretion by law.
    a. A court that is focusing on the nature of the agency function, or the difficulty of judicial review/supervision is likely to invoke this exception [*Johnson v. Robinson*].
    b. This exception applies in those rare instances where Congress where statutes are drawn in such broad terms there is no law to apply [*Webster v. Doe*].

**Remember, the presumption is that everything is reviewable, and the analysis will really depend on the enabling act because it is either *statutorily* precluded, or committed to agency discretion by law through the *enabling act.*

I. STATUTORY PRECLUSION

A. **APA §701(a)(1):** if a statute precludes judicial review then the action is unreviewable.

1. A court focusing on the express or implied statutory polices is likely to invoke this exception [*Johnson v. Robinson*].

2. The exception requires construction of the applicable substantive statute involved to determine whether Congress intended to preclude judicial review of certain decisions. The exception applies when Congress intended to preclude judicial review [*Heckler v. Chaney*].

B. **G/R:** Presumption: as a general principle agency action is presumptively reviewable.

1. The APA provides specifically not only for review of agency action made reviewable by statute, but also for review of final agency action for which there is no other adequate remedy in court. *[*Johnson v. Robinson*].

C. **G/R:** Standard of Review: only upon a showing of *clear and convincing evidence* of contrary legislative intent should the courts restrict access to judicial review [*Johnson v. Robinson*].

1. Only upon a showing of *clear and convincing* contrary legislative intent should the courts restrict access to judicial review [*Block v. Community Nutrition Inst.*].

2. *Caveat:* whenever the congressional intent is fairly discernable from the statutory scheme the presumption favoring judicial review is overcome because it provides clear and convincing evidence of Congress' intent [*Block v. Community Nutrition Inst.*].

D. **G/R:** Limits on Statutory Preclusion: Congress cannot pass a law that takes away a person's property or liberty interest, without a hearing and due process of law. In addition, Congress does not have the authority to preclude constitutional challenges to a statute.

1. *Caveat:* anything else, which does not involve a property or liberty interest, may properly be precluded by judicial review.
*[*Johnson v. Robinson*].

E. **G/R:** Preclusion Analysis Rules: the presumption favoring judicial review of administrative action is only a presumption; hence, this presumption, like all presumptions used in interpreting statutes can be overcome by the specific language or specific legislative history that is a reliable indicator of Congressional intent.

1. Whether, and to what extent, a particular statute precludes judicial review is determined by [in decreasing order of priority]:
    a. the express or plain language of the statute;
    b. the structure of the statutory scheme;
    c. the statutes objectives, that is, the purpose or mischief the statute is trying to remedy;
    d. the statutes legislative history; and
    e. the nature of the administrative action involved and whether the absence of judicial review would be better served by the expertise of the agency.
2. The court must examine the statutory scheme to determine whether:
    a. Congress precluded all judicial review, and if *not*;
    b. whether Congress nevertheless foreclosed review to the class to which the challengers belong.
3. The Congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it or from the collective import of legislative and judicial history behind a particular scheme;
    a. In other words, the Court may rely on previous judicial constructions of the statute in determining whether Congress foreclosed judicial review.
4. The presumption favoring judicial review may be overcome by inferences of intent drawn from the statutory scheme as a whole.

5. When a statute provides a detailed mechanism for judicial consideration of particular issues by particular persons, judicial review of those issues by other persons (that provided in the statutory scheme) may be found impliedly precluded.
*[*Block v. Community Nutrition Inst.*].

F. **G/R:** Preclusion Test: in the context of preclusion analysis, the clear and convincing evidence standard is not a rigid evidentiary test, but a useful reminder to the courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.

II. UNREVIEWABLE DISCRETION

A. **APA §701(a)(2):** provides an exception to judicial review when the agency action is committed to agency discretion by law.
1. A court that is focusing on the nature of the agency function or the difficulty of judicial review is likely to invoke this exception [*Johnson v. Robinson*].

B. **G/R:** Committed to Agency Discretion Exception: [§701(a)(2)] this is narrow exception and the legislative history of the APA indicates that it is applicable only in those rare instances where statutes are drawn in such broad terms that in a given case *there is no law to apply*.
1. The exception applies where Congress has not affirmatively precluded judicial review.
a. Test: review is not available if the statute is drawn so that a court would have no *meaningful standard against which to judge the agency's exercise of discretion*.
i. In such a case, the statute (law) can be taken to have committed the decision making to the agency's judgment only.
*[*Heckler v. Chaney*].
2. The exception applies in those rare instances where statutes are drawn in such broad terms there in a given case there is no law to apply [*Webster v. Doe*].

C. **G/R:** Applicability: refusals to take enforcement steps by an agency generally involve a situation in which there is a presumption that judicial review is not available.
1. The court has recognized that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to the agency's absolute discretion.
a. *Hint:* if the statute says "SHALL" then there is not much agency discretion and the exception probably does not apply.
b. The discretion is the agency to enforce is analogous to prosecutorial discretion; that is, the executive branch can enforce when it feels it worth the time and expenditure of public funds.
2. An agency's decision not to take enforcement action should be presumed to be an exception from judicial review under §701(a)(2).
a. *Caveat:* The decision not to take enforcement action is only *presumptively unreviewable*; the presumption may be overcome or rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.
*[*Heckler v. Chaney*].

D. **G/R:** Committed to Agency Discretion Analysis: §701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based to determine if Congress intended to commit the action *solely* to

agency discretion, and to determine if the statute provided any guidelines for the agency to follow in exercising its enforcement powers, by looking at:

1. the *plain language* of the enabling act;
2. the legislative history; and
3. the structure of the enabling act to determine if it was Congress' intent to prohibit judicial review by granting or committing to the agency discretion by law.

*[*Webster v. Doe*].

E. **G/R:** Constitutional Claims: §701(a)(2) cannot be read to exclude judicial review of constitutional claims unless Congress intends to preclude judicial review of constitutional claims. The Court will look at constitutional claims because:

1. If a statute creates a right, Congress can limit that right; however, constitutional claims are fundamentally different because the courts are experts on constitutional claims and Congress cannot provide less rights than the constitution provides, absent constitutional amendment; and
    a. Thus, you must determine whether the claimant is raising a statutory or constitutional claim;
2. Congress is not empowered to do things that are unconstitutional and that means they cannot limit judicial review of constitutional claims.

*[*Webster v. Doe*].

§5: AJUDICATION

§5.1: Introduction

I. CLASSIFYING THE AGENCY ACTION

**The first step on the exam will be to classify the agency action.

A. **Rulemaking:** Governed by §553: you will know if you need to perform a rulemaking analysis, and that you are in rulemaking by doing the following:

1. Look at the definition: if the action the agency took is (a) general applicability; and (b) future effect. If the action the agency took satisfies this definition you are in rulemaking.
2. Then see if the agency followed the procedures established by §553.
    a. If not, the party is not bound, if so, the party is bound.
3. Then you go to section §706(2) and review under that standard.

**Remember the agency must create a binding norm, i.e. rule, that affects everyone.

B. **Adjudication:** Governed by §§ 554, 556, 557: you will know if you need to perform a adjudication analysis, and that you are in adjudication, by doing the following:

1. Look at the definition: adjudication is defined as an agency process for the formulation of an order. If the agency formulated an order, you are in adjudication.
2. Adjudication occurs *after* the promulgation of rule. Adjudication generally applies after the agency, pursuant to the rule, has investigated or taken other action because the agency is *applying the standard of conduct* established by the rule.
3. In adjudication, the court is looking at the agencies (a) applications of conduct; (b) to past conduct.
4. Adjudication applies to a *limited* number of parties so it is fundamentally different process than the procedures set forth for rulemaking.

5. After the action is categorized as adjudication, go to §554.
6. Adjudication involves the formulation of an order, and the order is formulate after the final disposition of a hearing.

C. **Informal Administrative Actions:** Not Governed by the APA: informal administrative actions are defined by what they are *not*. They are not rulemaking or adjudication.

1. Informal agency actions include formulating contracts, disseminating and accepting applications, and all other administrative duties which make up most of the agencies actions.
2. With informal agency actions, you do not have to go anywhere because the APA does not regulate informal agency action.
3. DO NOT confuse informal administrative actions with informal rulemaking. IF YOU HEAR, SEE, OR CATEGORIZE AN ACTION AS INFORMAL RULEMAKING, ANALYZE UNDER RULEMAKING.

II. APA ADJUDICATION PROVISIONS

A. **§554:** Adjudications: §554(a) this section applies in every case of adjudication *required by statute* to be determined **on the record*** after an agency hearing.

*When the enabling act says that a party is entitled to a hearing "on the record" you have to go through the adjudication analysis:

i. Go to §554, make sure notice, and requirements of §554(c) are met;
ii. Then go to §556 and §557 and make sure that parties were afforded the correct procedures in the trial type hearing.

b. A party is also entitled to a hearing when:

i. the constitution says a party has a right (due process);
ii. the statute provides for a hearing; or
iii. a persons legal rights or duties are affected.

1. *Exceptions:* §554(a)(1)-(6): there are six exceptions to the adjudication requirement:
   a. (1) a matter subject to a subsequent trial of law and the facts de novo in a court;
   b. (2) the selection or tenure of an employee (except hearing examiners);
   c. (3) proceeding which rest solely on inspections, tests, or elections;
   d. (4) the conduct of military or foreign affairs;
   e. (5) cases in which the agency is acting as an agent of the court; and
   f. (6) the certification of worker representatives.
2. **§554(b):** Notice: persons entitled to notice* of an agency hearing shall be timely informed of:
   a. (1) the time, place, and nature of the hearing;
   b. (2) the legal authority and jurisdiction under which the hearing is to be held; and
      a. The legal authority is very important because it has to be law:
         i. constitutional;
         ii. statutorial; or
         iii. a rule. These three things are "law" and the notice of a hearing has to be based on one of those three things.
   c. (3) the matters of fact and law asserted.

   **Persons Entitled Notice:* means whoever is entitled to notice in the enabling act, even if it is other people not directly affected by agency action, but who also have certain rights.

***Distinguished from Rulemaking Notice:* the difference between this notice, and rulemaking notice, is that only affected parties are required to receive notice, and with rulemaking notice EVERYBODY gets notice which is a general notice that is published in the federal registrar and CFR; whereas, in adjudication notice is given only to the affected parties which by its nature is limited to a small number of people.

3. **§554(c):** the agency *shall* give all *interested parties** opportunity for:
   a. (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding and the public interest permit;
   b. (2) *hearing and decision on notice and in accordance* with §§ 556, 557.
      i. Only if the parties are unable so to determine a controversy by consent (i.e. settlement between affected party and agency).

   *An interested party is defined by the enabling act, very close to a standing requirement.

4. **§554(d):** outlines the procedures the ALJ. The ALJ:
   a. is a civil service personnel, and not an Article III judge, because they are not appointed by the president and confirmed by the senate, and do not serve life tenure;
   b. does all the evidentiary and procedural matters and controls the hearing like at a trial but always *without a jury*;
   c. administers a lower evidentiary standard (required by law) and receives a lot of documentary evidence;
   d. at the end of the hearing, the ALJ will make a recommendation:
      i. the ALJ makes a recommendation which is subject to final agency approval or disapproval;
      ii. after the agency makes its decsion, based upon the recommendation of the ALJ, you have the *final agency action* and after that the party may appeal to court.
      iii. The process basically works like this:
         (A) The affected party must exhaust all administrative remedies;
         (B) goes to a hearing *on the record* before the ALJ;
         (C) the ALJ, after the hearing makes a recommendation;
         (D) the agency reviews that recommendation, and issues an order based either on it, or opposed to it which is the final agency action;
         (E) then the party can appeal to court.

B. **APA §556:** Hearings: (a) the sectional applies to hearing required by §§ 553 or 554 to be conducted in accordance with the section:

1. **§556(b):** the agency or the ALJ (most common) can preside at the taking of evidence (i.e. the hearing).
2. **§556(c):** lays out the powers of the presiding officer, but the most important line is "subject to the published rules of the agency" can change the rules and powers governing hearing officers.
   a. This caveat gives the agency a lot of control over the hearing officers.
      i. This means the ALJ only has the power to apply the agencies rules; and in turn, if the agency does not like what the ALJ is doing it can change its rules, through the rulemaking process to make him comply.
   b. All other enumerated powers in this section give the ALJ, although less than a trial judge, the powers to administer information much like judges.
   c. §§ 556(c) and 556(d) also give the agency more authority over the hearing process.
3. **§556(d):** Burden of Proof: the proponent of the rule has the burden of proof.

a. If the agency is trying to enforce, or take something away from a party, they are the proponent of the rule.

i. The agency is usually the proponent of the rule.

b. If the party is trying to something from the agency (like a license or entitlement), they are the proponent of the rule.

c. The standard of proof is a preponderance of the evidence.

4. **§556(e):** Record: the transcript of the testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exlusive record for decision in accordance with §557.

C. **§557:** Decisions, Review, Submissions, Contents, and Record: (a) this section applies when a hearing is required to be conducted in accordance with §556.

1. **§557(b):** Initial Decisions: the ALJ (or employee) after a §556 hearing is required to make a recommendation to the agency if the agency did not preside at the reception of evidence.

2. **§557(c):** The record shall include a statement of the findings and conclusions, and reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and the appropriate rule, order, sanction, relief, or denial thereof.

a. The findings of fact and conclusions of law are needed for a reviewing court when it reviews the record.

§5.2: Hearing Rights and the Basic Process

A. **G/R:** Right to a Hearing: the right to a hearing is determined by statutes (enabling acts) that govern the particular administrative functions to be performed, by the agency in implementing the statutes, or by the due process clauses of the 5th and 14th Amendments.

1. For most important administrative programs hearing rights and procedures set forth in the enabling act satisfy the minimal requirements of due process.

a. The requirements of due process are typically not very demanding in the kinds of formal procedures they require and in such instances constitutional requirements play a marginal role in influencing administration or judicial interpretation of statutory hearing provisions [*Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio*].

2. There is no comprehensive federal statutory right to a hearing.

a. The APA (§§ 554-557) specifies certain minimal procedures that are applicable in "every case of adjudication required by statute to be ***determined on the record*** after opportunity for an agency hearing, with certain exceptions [§554(a)].

b. In general terms, the APA §556(d) provides that in such hearings every party shall have the right to present his case or defense by or al or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for full and true disclosure of the facts.

3. **g/r:** Nothing in the APA itself determines when a right to have a hearing, or ***adjudication on the record*** arises; this is left to the enabling act.

B. **G/R:** ALJs: at the trial type hearing, an ALJ presides by conducting the hearing and ruling on all motions.

1.The agency is represented by counsel from the particular branch or division that is prosecuting the case.

2. After the hearing, the ALJ, renders a decision, usually supported by findings and a written opinion.

3. The ALJ is independent of the agency's control as to general status (usually enjoys at least as much protection as a State court judge, although he does not have Article III protections), and is not subject to the agencies direction in a particular case, but he is nevertheless a subordinate decision maker whose decision are subject to agency review for conformity to *agency policy.*
4. In reviewing an ALJ recommendation the agency (i.e. the head of the agency) is not bound to defer to the ALJ's decision to the degree that an appellate court must defer to a trial court.
    a. An appellate court is bound by a trial courts finding unless clearly erroneous; whereas, an agency is bound to given an ALJ finding *only such probative forces as it intrinsically commands* [*Universal Camera v. NLRB*].
5. Moreover, since it is agency policy that the ALJ is bound to implement, the agency can, by rule, issue detailed programmatic guidelines to constrain the ALJ's decision [*Heckler v. Campbell*].
6. In an administrative hearing the ALJ is expected to take a more active role than a common law judge.
    a. *So Far As Practical Evidentiary Standard:* the APA does not attempt to impose a well-defined set of evidentiary rules; §556(d) provides that "any 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.
        i. Hearsay is ordinarily admissible in administrative hearings. Sufficient hearsay evidence ALONE is sufficient to constitute the substantial evidence necessary for the final determination of the facts if it is reliable [*Richardson v. Perales*].

C. **G/R:** Burden of Proof: the burden of proof in administrative proceedings is generally that the agency beards the burden of production and persuasion as to any order or rule it proposes [APA §556(d)].
1. In the absence of any special statutory standard, the standard of proof required by the APA is the minimal preponderance of the evidence standard [*Steadman v. SEC*].

D. **G/R:** Official Notice: official notice is sometimes employed in administrative hearings with the effect that the agency's normal burden of production is shifted—on those issues officially noticed—to the respondent. Official notice is similar to judicial notice but is distinguishable in several ways:
1. A specific procedure has been established to receive extra-record facts, with parties receiving notice and an opportunity to rebut "noticed" facts;
2. Extra-record facts usually have first been developed by the agency's expert staff or accumulated from previous agency decisions;
3. agency recognition of extra-record facts is clearly not limited to either indisputable or disputable facts; rather, official notice may extend to almost any information useful in deciding the adjudication as long as elemental fairness is observed.
4. **§556(e)** "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, upon timely request, to an opportunity to show the contrary."

E. **G/R:** When Agencies Do Not Have to Hold Hearings: an agency does not have to hold a hearing if no dispute is raised as to a fact that is pertinent to the agencies decision. Generally, an agency does not have to have a hearing where:
1. it finds, on the basis of the application and other pleadings submitted, no substantial and material questions of fact exist and that granting the application would serve the public interest;
2. there are not undisputed facts to resolve;
3. the facts required to resolve a question are not disputed and the disposition of the appellant's claims turn not on determination of the facts but inferences drawn form those facts; and

4. a hearing is not required to resolve issues which the commission findings are either not substantial or material regardless of whether facts involved are in dispute.

§5.3: Participation in the Adjudication Process

I. INTERVENTION, STANDING, AND PUBLIC PARTICIPATION

A. **G/R:** Participation: any party who is given a right in the enabling act to a hearing, or a hearing on the record, is entitled to participate in the adjudication process (obviously, the party directly adversely affected or aggrieved may participate in adjudication).

1. The court uses a functional analysis for determining who else may participate in the adjudication process. Allowing a party to participate in adjudication is not the same as saying that they are entitled to a hearing, it just means they are able to participate in the process, although there may not always be a hearing.
2. The court uses a functional analysis in determining when a party can intervene, and asks three questions:
    a. if there is a substantial question the intervening party wants to raise;
    b. can the intervening party effectively raise the issue; and
    c. will the opposing party's rights be adversely affected be intervention.

*[*Church of Christ v. FCC*].

B. **G/R:** Standing for Intervention: a party can obtain standing to intervene in an agency proceeding if they can demonstrate:

1. Economic injury;
2. A substantial interest the intervener is trying to promote; that is, the nature of the issue, it has to be important and there has to be improper conduct by the party;
3. An interest so that there is some commitment to the injury; that is, the association must be able to protect the interest it is intervening for.
4. Standing is this process is lesser than in a court; it is a more flexible approach and even if a party does not have a direct stake in the outcome it may still have standing.

*[*Church of Christ v. FCC*].

C. **G/R:** Intervention Requirements: before a commission will allow intervention into its proceeding it must be shown that:

1. *Substantial Issue:* the persons seeking such intervention desire to raise substantial issues of law or fact which would not otherwise be properly raised or argued;
2. *Good Cause:* the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the commission's limited resources on a necessarily longer and more complicated proceeding in the case, when considered in light of other important matters pending before the commission;
    a. This second factor means a determination that such additional expenditure is fully consistent with the commission's own assessment of overall priorities governing the allocation of its resources.
    b. A finding of this nature should be one prerequisite to an ultimate judgment that good cause exists to permit intervention in a particular case.

3. additional factors in considering the intervention question which will generally be considered are:
    a. the applicant's ability to contribute to the case;
    b. the commission's need for expedition in handling the case; and
    c. the possible prejudice of rights to the original parties if intervention is allowed.

4. *Policy:* (a) Against intervention: if everyone was allowed to intervene then the procedure would be very cumbersome and may affect the rights of the original parties (i.e. efficiency of the agency). (b) For intervention: allows the agency to decide important issues which are high on the list of the commission's priorities and may contribute to the fuller appreciation of the need for stronger remedies generally in commission cases.

*[*Firestone Tire & Rubber Co.*].

D. **G/R:** Discretion: intervention is a discretionary matter, and the agency may deny intervention for any compelling reason; even if all of the *Firestone* elements are met, the agency may still deny intervention.

1. A compelling reason to deny intervention is administrative efficiency and cost.

D. **G/R:** Public Standing: any party, adversely affected or aggrieved, can assert standing before an agency not only for economic injury, but also for other injury affecting the public interest [*Church of Christ v. FCC*].

1. A party, absent a potential direct substantial injury or adverse effect from an administrative action may have standing to intervene in the action if it affects the consuming public's rights because the congressional intent, in its mandate for public participation, mandated that the consuming public should have the right to present their case before a decision is rendered on the issue.

§5.4: Formality and Fairness

I. FAIRNESS AND ADJUDICATION

A. **G/R:** the essence of an opportunity to be heard in an administrative adjudication, as in a judicial trial is a fair hearing before an impartial tribunal.

1. The trier of fact (including agency members as well as judges) is expected to have opinions on law and policy relevant to an adjudication; that is inherent in the rationale of "expertise" which is a prominent reason for the existence of administrative tribunals.

2. It is not expected that the "expertise" form whatever source it is derived, will be suspended each time it becomes important to apply it.

3. *Caveat:* the officer cannot have either a personal interest in, or a prejudgment of the merits of a particular case.

    a. More than that, he is expected to hear the case and decide it on the particular facts and issues openly exposes in the hearing and made a part of the record.

B. **G/R:** Fairness Elements: there are two elements of fairness:

1. Actual fairness;
2. Appearance of due process.

II. EX PARTE CONTACTS AND ADJUDICATION

A. **APA § 557(d)(1)(A):** no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising an agency, ALJ, or other employee who is or may reasonable be expected to be involved in the decisional process of the proceeding, an ex parte contact relevant to the merits of the proceeding.

1. In other words, ex parte contacts are prohibited.

B. **G/R:** Ex Parte Contacts: an improper *pattern of influence* or communications relevant to the merits of pending adjudicatory cases gives the agency the power to void its (or the hearing examiners) decision in the hearing.

1. The very attempt to establish a pattern of influence does violence to the integrity of the commission's process. Such an attack on the integrity of the process of any ajudicatory body brings into play its inherent right to protect such process, and one of the remedial measures available is its discretion in the voiding of any previous action that may have been tainted by such an attempt.
2. The appearance of fairness is important to the court also; therefore, if it appears unfair then the court will even the playing field by requiring the appearance of due process, even the ex parte contacts where not bad.

*[*WHDH, Inc.*]

C. **G/R:** a party cannot engage in ex parte that are substantive or on the merits.

1. *Caveat:* there can be ex parte contacts about procedural issues and posture but nothing else.

D. **G/R:** Distinguished from Rulemaking: in rulemaking ex parte contacts are much more acceptable because of the fundamental nature of what is going on. In rulemaking ex parte contacts are okay because the rule will affect everyone; whereas, in adjudication it only involves a limited number of people.

1. *Hint:* the more rulemaking looks like adjudication, the more concerned the court is with the contacts.

III. BIAS AND PREJUDICE

A. **G/R:** Impermissible Agency Action: individual commissioners of an agency cannot prejudge cases or give speeches which give the appearance that they have prejudged the case [*Cinderella v. FTC*].

1. Congress has specifically vested the administrative agencies both with the power act in an accusatory capacity and with the responsibility of ultimately determining the merits of the charges presented.

B. **G/R:** Test for Disqualifying Agency Personnel: the test for disqualification is whether a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.

1. Such an administrative hearing must be attended, not only with every element of fairness but with the *very appearance* of complete fairness.
2. This test applies to all high officials in the agency, at least, but may apply to lesser officials too.
3. Always be aware of (a) who said what, (b) when it was said; and (c) what effect it may have had. [*Cinderella v. FTC*].

C. **G/R:** Impartial Hearing: litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is now way which the courts know whether the influence of one upon the other can be quantitatively measured [*Cinderella v. FTC*].

D. **G/R:** Timing: when in the process were the improper statements made is a question the court will always consider. Timing is important because if a decision is pending before an agency when the commissioner makes an improper statement indicated prejudgment it is more likely to be reversible error.

1. ALWAYS look at when the statements where made for bias analysis:
    a. if it is before or after a hearing or adjudication it is more likely to be harmless error;
    b. if it is during the pendency of the action, then it is the worst time, is more likely to indicate bias, and is probably reversible error.

E. **G/R:** Congressional Interference: common justice to a litigant requires that the court invalidate orders entered by an agency (during adjudication) that is importuned by members of Congress, however innocent they intended their conduct to be, to arrive at their ultimate conclusion.

1. *Caveat:* the court is aware that pursuant to its adjudicatory function, it frequently becomes necessary for the agency to set forth policy statements or interpretive rules in order to inform interested parties of its official position on the various matters and this does not raise any statutory or constitutional problems.
*[*Pillsbury Co. v. FTC*].

F. **G/R:** Separation of Functions Rule: when an investigation function of Congress focus directly and substantially upon the mental decisional process of a commission *in a case which is pending before it*, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function.

1. When Congress intervenes in an agency's judicial function, the court becomes concerned with the right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.
2. The court is protecting the agency, and the *integrity of the process*. The court would allow this kind of intervention in rulemaking; but when it is an adjudicatory hearing the Court becomes a lot more stringent because the commission is performing a judicial function.
*[*Pillsbury Co. v. FTC*].

G. **G/R:** Pillsbury Principle*:* intrusive questioning of agency decision makers concerning pending adjudicatory matters is improper.

1. This principle/rule is widely accepted.
*[*Pillsbury Co. v. FTC*].

H. **G/R:** Distinguished from Rulemaking: remember to distinguish between rulemaking and adjudication.

1. In rulemaking there has to be an unalterably closed before agency personnel will be disqualified for bias;
2. In adjudication the standard for disqualification is more lenient, if a *disinterested observer* would believe that a person has prejudged the facts and the case then there must be disqualification.

§5.5: Judicial Review of Adjudication

I. APA PROVISIONS

A. **APA §702:** any person suffering legal wrong because of agency action, or *adversely affected* or *aggrieved* by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.

1. Any person can seek judicial review, and have standing, after an adverse order entered by the commission.

B. **APA §706(2)(E):** Scope of Review: the reviewing court shall decide al relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be…*unsupported by substantial evidence in a case subject to section* 556 and 557 or otherwise reviewed on the record of an *agency hearing* provided by statute.

C. **Analysis:** a court reviewing an adjudicatory hearing will:

1. The court will determine if the party was adversely affected or aggrieved under §702.
2. §706(2)(D): the court will see if the agency adhered to the procedures required by law.
3. §706(2)(C): the court will determine if the agency had the statutory authority to have the hearing.
4. §706(2)(B): the court will then determine if the agency determined the questions of law correctly.
    a. Under this analysis the court will review the agencies conclusions of law which it is required to give pursuant to §557(c)(3)(A). Under this analysis the court is not deferential to the agency because it is the expert on questions of law and does not need to defer to the agency.
5. §706(2)(E): the court will then use the substantial evidence test to decide if the agency's determinations of the facts are supported by evidence.
    a. Under this analysis the court will review the agencies findings of fact, which it is required to give pursuant to §557(c)(3)(A), under the deferential substantial evidence test. The court will uphold the findings if there is a rational basis for agency findings supported in the record.

**The arbitrary and capricious standard [§706(2)(A)] does not apply in most adjudication proceedings (unless the agency shifted its policy or something during the hearing).

II. REQUIREMENTS FOR JUDICIAL REVIEW OF ADJUDICATION

A. **G/R:** Elements of Judicial Review: there are two main elements for judicial review of adjudication:

1. *Findings Requirement:* the agency must articulate the factual and legal basis of its decision.
    a. §557(c): requires that every adjudicatory decision must be accompanied by a statement of findings and conclusions and the reason or basis therefore, on all materials of fact, law, or discretion presented in the record.
    b. Thus, the agency's decision must state the evidentiary facts considered AND the agency must explain the reasons for its conclusions of law and policy.
2. *Scope of Review:* for agency determinations of FACT the standard varies with the type of *agency action* involved:
    a. §706(2)(A): Arbitrary and Capricious Standard: is a broad test applicable to *all* agency action to the extent that it is reviewable. The arbitrary and capricious test is used for all non-formal action:
        i. notice and comment rulemaking and informal actions.
    b. §706(2)(E): Substantial Evidence Test: the substantial evidence, by terms of the APA, is applicable only to formal proceedings which are subject to the requirements of §§ 556, 557 that all evidence be placed on a defined record.
        i. Thus, the substantial evidence test is employed for formal adjudications.
        ii. *Test:* the substantial evidence test means such relevant evidence as a reasonable mind accept as adequate to support a conclusion.

(A) It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from is one of fact for the jury.

*[Greater Boston TV v. FCC].

B. **G/R:** Court's Function in Judicial Review of Adjudicatory Proceedings: the court's role is provide a supervisory function in the review of agency decision. The court:

1. requires the agency to use a reasonable procedure, with fair notice and opportunity for the parties to present their case; then
2. examines the evidence and agency's findings of fact under the substantial evidence test, which requires the agency to provide a rational basis for an agency's inference of ultimate fact;
3. will defer to the agencies, at least the examiners, observations of demeanor of the witnesses (credibility issues) and the agencies expertise (in the technical scientific sense or specialization in regulatory programs or schemes); and then
4. undertake to study the record under the *hard look* standard to satisfy the court that the agency has exercised reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

*[Greater Boston TV v. FCC].

C. **G/R:** Hard Look Review: the court's supervisory functions call on the court to intervene not merely in the case of procedural inadequacies, or bypassing the mandate of the enabling act, but more broadly if the court becomes aware especially form a combination of danger signals, that the agency has not really taken a "hard look" at salient problems, and not genuinely engaged in reasoned decision making.

1. The court will not upset the agency decision because of errors that are not material; that is, the harmless error doctrine applies in review of agency action.

*[Greater Boston TV v. FCC].

D. **G/R:** Policy Formulation: assuming consistency with the law and legislative mandate, the agency has not merely latitude to find facts and make judgments, but also to select the policies deemed in the public interest.

1. The function of the court is to assure that the agency has given reasoned consideration to all material facts and issues.
2. This requires the agency to articulate with reasonable clarity its reasons for its decision, and identify the significance of crucial facts.

*[Greater Boston TV v. FCC].

E. **G/R:** Question of Law v. Question of Fact: the court, and you, must always determine if it is reviewing a question of fact or law because the standards it applies will vary:

1. *Question of Fact:* under a question of fact, the court will apply the substantial evidence test under §706(2)(E):
    a. Substantial Evidence Test: on questions of fact the court wants to defer, so the substantial evidence test is a relatively low standard.
        i. The standard of proof at the adjudication level is a preponderance of the evidence, then on appeal the court is looking for substantial evidence in the record that the plaintiff proved the case by a preponderance of the evidence.
        ii. *Test:* there must be enough evidence in the record that a *reasonable mind* could accept the evidence and allow it to go to trial under the directed verdict standard.
        iii. When the court reviews under the substantial evidence standard it looks at:

(A) the record, which will include things like the hearing transcript and exhibits etc.., which is different from a rulemaking record;
(B) then the court will take a hard look at the record which basically means it will look at the entire record.

*Keep in mind, this only occurs when there is a hearing.

2. *Questions of Law:* if it is a pure question of law the court will not defer to anyone; it just applies the proper standard in §706(2); the court will defer to the enabling act if it says that the agency has the primary duty to interpret the statute.

3. *Mixed Questions of Law/Facts:* in mixed law/fact questions the courts take a two approaches:

a. The court will ask: is the agency applying a well accepted standard of law to the facts, and if so, the court will defer to the agency.

i. If the agency is not apply a clear standard of law to the facts, the court will not defer to the agency. The court does this because it is the expert on questions of law and can establish will accepted standards and general rules.

ii. This is a nice distinction, but practically, it the court wants to uphold an action they say it is a fact and defer; if they want to reverse, they say it is a question of law and do not defer.

4. When analyzing apply facts, easy law issues, and then go to mixed questions. Always remember that who has the expertise is the one who should decide the issue.

5. Remember the main functions of the court's supervisory role:

1. establish standards; and
2. make sure that the proper procedures were followed.

§5.6: Rationality and Public Purpose

A. **G/R:** Standard of Review: the proper standard of review in evaluating an agency decision after a comparative hearing is that the agency must engage in reasoned decision making, articulating with some clarity the reasons for its decisions and the significance of facts particularly relied on.

1. The agency cannot silently depart from previous policies or ignore precedent.

a. An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored.

*[*Committee for Community Access v. FCC*]

B. **G/R:** Agency Changing Precedent: when the agency is going to change its own precedent it ness to follow these rules:

1. when the agency changes its procedures, it must acknowledge that it is changing them; and
2. then it must provide a reasoned basis for changing its procedure.

*A change of policy, method, or procedure can be a problem if the agency does not follow the foregoing two elements.

**[*Committee for Community Access v. FCC*]

C. **G/R:** Announcing New Policy: when an agency announces a new policy, which departs from is prior policy, the agency must supply a reasoned analysis explaining this departure form its prior policies and standers concerning the considerations under consideration [*Monroe Communications v. FCC*].

D. **G/R:** Change in Procedure: When the agency changes its procedure, that changes the procedural posture of the case, and hence, changes the standard of review.

1. **G/R:** the court will use an arbitrary and capricious standard because the question is really whether the agency applied its own procedures and does not relate to the evidence adduced at trial which would invoke the substantial evidence test.
*[Monroe Communications v. FCC].

E. **G/R:** Substantial Evidence Test:

1. *Standard of Review:* the agencies factual findings are conclusive if supported by evidence sufficient to permit a reasonable person to accept the agency's conclusion.
2. **g/r:** the findings of fact of the *commission* and not the ALJ are controlling because the report of the ALJ's recommendation is in the record, so if the agency did not follow the ALJ's recommendations, and the agency overturned it, there has to be substantial evidence to support the reversal.
3. **g/r:** when the agency and ALJ agree, the appellate court will not reverse the ALJ's credibility findings unless they are not supported by substantial evidence;
4. **g/r:** when the agency and ALJ disagree, finding of an ALJ are merely part of the record before the agency and the court's deference is to the agency determination, not that of the ALJ.
*[Southwest Sunsites v. FTC].

F. **APA §554(b)(3):** requires that an agency inform affected parties timely of matters of fact and law asserted.

1. **g/r:** the purpose of the notice requirement of §554(b)(3) is satisfied, and there is no due process violation, if the party proceeded against understood the issue and was afforded full opportunity to justify his conduct.
*[Southwest Sunsites v. FTC].

G. **G/R:** Concurrent Jurisdiction: cases have recognized that an agency jurisdiction may overlap and concur with other regulatory jurisdiction and such concurrent jurisdiction is not against public policy [*Thompson Medical v. FTC*].

§6: INFORMAL AGENCY ACTIONS

§6.1: JUDICIAL CONTROL OF INFORMAL ACTIONS

I. OVERVIEW: INFORMAL ADMINISTRATIVE AGENCY ACTIONS

A. **Analytical Framework:** first you must classify the action, if it is not rulemaking or adjudication, it is informal agency action (the catch-all category [*distinguish* from informal rulemaking]).

1. Look at the enabling to determine whether rulemaking or adjudication was required;
    a. If so, the agency probably failed to comply with the procedures and must be reviewed under those sections;
    b. If not, go to #2.
2. Go to APA §701: the threshold question is whether the plaintiff is entitled to any judicial review at all, all agency action under chapter 7 agency action is presumptively reviewable, *unless:*
    1. §701(a)(1): statutes preclude judicial review;
    2. §701(a)(2): agency action is committed to agency discretion by law.
    *If either of these exceptions apply analyze under those provisions;

**If not, go to #3.

3. Go to APA §706 (Scope of Review); the Court will then review the agency this way:

a. §706(2)(C): was the informal agency action in excess of statutory jurisdiction, authority or limitations; you have to look at the enabling act to determine.

b. §706(2)(D): was the informal agency action without observance of procedure required by law.

1. You have to look at the enabling act to determine if the agency complied with the correct procedure because there are no formal procedures set forth in the APA for informal agency action.

c. §706(2)(A): was the agency informal action arbitrary, capricious or an abuse of discretion.

1. This is the one that will more likely than not apply.

d. §706(2)(B): was the agency action contrary to constitutional right, power, privilege or immunity.

*If all these are inapplicable, then the informal agency will withstand judicial scrutiny; if not go to #4.

**§706(2)(E) is inapplicable to informal agency action because review under the substantial evidence test is only authorized when the agency action is taken pursuant to a rulemaking provision of the APA itself, or when agency action is based on an adjudicatory hearing.

4. The court will then review (more likely than not) the action under the arbitrary and capricious standard of §702(2)(A).

1. If there is a rational basis for the informal agency action supported by the "procedural requites" set forth in the record, which is a contemporaneous explanation of the decision based on the material before the agency when the decision was made, the action will be upheld.

B. **G/R:** Definition: informal agency action is defined by what it is not, it is *not rulemaking* or *adjudication*.

1. The agency is not required to follow the APA when it takes informal agency action because neither making rules, or adjudicating cases.

C. **G/R:** Judicial Review: the generally applicable standards of §706 require the court to engage into a substantial inquiry of the informal agency action.

1. The Court is first required to determine whether the agency (or commissioner) acted within his scope of authority.

a. This inquiry naturally begins with an in depth review of the delineation of the scope of the agency's (commissioner's) authority and discretion.

b. Scrutiny of the facts does not end with a determination that the agency (or commissioner) has acted within the scope of his authority.

c. The court will then apply §706(2)(A).

2. *Standard:* the court will look at all the evidence (compiled into a record) that the agency had before it when the decision to act was made. If there is a rational basis in the record, for the agencies decision, the court will uphold the action.

a. In other words, the Court is reviewing the process ("procedural requisites") the agency took, making sure that it did not act arbitrarily, and if it acted rational and on an informed basis (supported by the record) the court will uphold the action.

D. **G/R:** Record of Informal Agency Action: an agency (or commissioner) is required to submit the full administrative record it had before it when it made the decision to take an informal agency action to provide the

court with a record to review; in other words, the agency is simply required to submit a contemporaneous explanation of the agency decision [it need to be long, or burdensome]. However, the agency when taking informal agency action is not:

1. required to file formal findings of fact and conclusions of law;
2. *post-hoc* litigation affidavits of why the agency action was taken; or
3. required to be subjected to depositions or other testimony on why the agency action taken. This is because the Courts do not like to inquire into the mental process of the administrative decision-making. *[*Overton Park v. Volpe*].

E. **G/R:** Test for Arbitrariness: in an informal agency action, whether the administrator was arbitrary must be determined on the basis of what he had before him when he acted, and not on the basis of some new recored made initially in the reviewing court [*Camp v. Pitts*].

F. **G/R:** Arbitrary and Capricious Test: if the substantial evidence test is the tradition form of review of adjudications, and formal rulemaking, the arbitrary and capricious test is equally traditional for informal rulemaking and other informal actions.

1. In *Overton Park* the court formulated the standard as an inquiry into "whether the decision was based on a consideration of the relevant factors and whether there has been a *clear error of judgment*."
    a. This is not a requirement for the clearly erroneous standard, it is still traditional arbitrary and capricious standard, which is much more deferential (rational basis) than the clearly erroneous standard of review.

§6.2: CONGRESSIONAL CONTROL OF INFORMAL ACTIONS

I. STATUTORY INTERVENTION

A. **Generally:** Congress often constrains informal agency actions through special statutory requirements for particular planning or analytic techniques. Even where such controls are present, Congress may remain displeased with administrative policy and take further action.

B. **G/R:** Congressional Power: Congress may always change, or amend the law. However there is a limit to how far Congress can go in enacting or amending laws:

1. Congress cannot amend the law to change or direct the outcome of a lawsuit; nor can Congress enact a law to direct the outcome of a lawsuit.
*[*Robertson v. Seattle Audubon Society*].

II. ADVICE AND ESTOPPEL:

A. **Generally:** many administrative agencies advise the public regarding statutes and regulations they administer. The question then generally, is whether the government's advice is reliable, and if not whether unsuspecting private citizens should be allowed to rely on the advice of supposedly responsible officials of the government, or whether the government should be held liable every time erroneous advice is given.

B. **G/R:** Equitable Estoppel: equitable estoppel will not run against the government as against private litigants.

1. Equitable estoppel arises when someone reasonably relies *to their detriment* on a promise.

2. The court recognizes the serious hardship caused by a government's agent misinformation; nonetheless, the court has rejected, many times, the argument that estops the government from denying (or granting) some benefit.
3. In other words, the private law of estoppel does not apply to the government; that is, if the government gives out harmful advice, and there is detrimental reliance, the government cannot be held liable.
4. *Policy:* the rule of estoppel (allowing it to run against the government) might not create more reliable advice, but less advice. That natural consequence of a rule that made the government liable for statements of its agents would be decision to cut back and impose strict controls upon the government providing information in order to limit liability.
    a. In addition, it would open the floodgates of litigation and subvert the rule of law (i.e. allowing middle level bureaucrats who give out wrong information to change the law).

*[*Office of Personnel Management v. Richmond*].

§7: FREEDOM OF INFORMATION ACT

I. DISCLOSURE AND OPENNESS

A. **Freedom of Information Act (FOIA):** adopted in 1966, and amended several times, requires (with several exceptions) disclosure, on request by any *person* by federal agencies of documents in their possession.
1. The Open Meetings (or Government in the Sunshine) law specifies that all meetings of multimember agencies that are not subject to an exception must be open to the public [5 USC §552b].
2. The Privacy Act limits the disclosure within the government or to third parties of information about an individual without the person's knowledge and consent, and it also provides a means for checking and challenging the accuracy of person information in governmental files [5 USC §552a].

II. FREEDOM OF INFORMATION ACT

A. **Generally:** FOIA is contained in the APA §552. The Act provides a comprehensive statement of rights of *private parties* to obtain information in the possession of the government. Although its primary purpose is to provide information to the general public, the Act can also be a useful method of discovery for those litigating against the government.

B. **Structure of FOIA:** [**APA §552**]: the pertinent sections of FOIA are:
(a) Each Agency shall make available to the public information as follows:
    (1) Publications and Procedures: requires that each agency publish in the Federal Registrar a description of its organization, the party from whom the public can obtain information, a statement of its *procedures*, and its general *rules* and *interpretations*. A person cannot be bound or adversely affected by any matter not so published, unless he has actual notice of the procedures, rules and interpretations.
    (2) Opinions Available for Public Inspection: requires each agency make available for public inspection and copying: its *opinions* in decided cases, its statements of *policy and interpretations* not published in the Federal Registrar, and any administrative staff manuals that affect the public.

--*Opinion v. Memorandum:* remember to make the distinction between "opinions" which must be made available under §552(a)(2) and "memoranda" which may be exempt under §552(b)(5).

(3) Other Records Must Made Available: requires that each agency, upon request for *any other identifiable records*, make such records promptly available to *any person* if the agency fails to disclose the requested information, the federal district courts have jurisdiction to compel production and the *burden of proof* is on the agency to sustain any failure to disclose.

(e) **Agencies and Records Covered:** the Act covers all agencies, including executive and military departments, government-controlled corporations, and the executive office of the president [§552(e)]. The Act does not require disclosure from the president nor his immediate staff members.

C. **Exemptions to FOIA:** [APA §552(b)]: sets out exceptions to FOIA. The court is allowed to privately examine the requested documents *in camera* to determine whether any of these exceptions apply. However, the agency must make a detailed and indexed statement of its claim for exemption, identifying the reasons why a particular exemption is relevant, to aid the court in its examination of the disputed material. The three most important exemptions (and the most controversial) are exemptions numbers 5, 7, and 4—in that order.

1. **Exemption 5:** [§552(b)(5)]: Inter or Intra Agency Memoranda: memoranda that would not be available *by law* to a party (other than the agency) in litigation with the agency are exempted from disclosure.
2. **Exemption 7:** [§552(b)(7)]: Investigatory Records: compiled for law enforcement purposes are exempt from disclosure. Records that were once gathered for other purposes, but have now been compiled for law enforcement purposes, qualify for exemption from disclosure.
3. **Exemption 4:** [§552(b)(4)]: Commercial Secrets: trade secrets and commercial or financial information that is *privileged or confidential* need not be disclosed.

D. **G/Rs:** Exemption 5: covers inter or intra office memoranda and withholds from a member public documents which a private party could not discover in litigation with the agency.

1. Since virtually any document *not privileged* may be discovered by the appropriate litigant, if it is relevant to the litigation, and since the Act clearly intends to give any member of the public as much right to disclosure as one with a special interest therein, it is reasonable to construe Exemption 5 to exempt those documents normally privileged in the civil discover context:
    a. The privileges, which are non-discoverable, that fall under Exemption 5 are:
        i. *Executive Privilege:* the generally recognized privilege for confidential intra-agency advisory opinions disclosure of which would be injurious to the consultative functions of government. This privilege does not cover everything, and a distinction is made between high level executive officials which do not have to disclose, and lower level officials which do have to disclose.
        ii. *Attorney-Client Privilege:* [Fed. R. Evid. 501]: usually exists by statute in every jurisdiction, and there are three elements to establish attorney/client privilege:
            (A). *Communication*, oral or written, or even observation or acts;
            (B). *With an attorney* or the attorney's staff and the client; and
            (C). the communication has to involve the professional relationship (i.e. legal advice), but not matters not dealing with the legal relationship.
            *This privilege belongs to the client and she can waive it but the attorney cannot.

**The government attorney-client privilege has a different standard in the public sector and the government is not protected as much by attorney client privilege.

iii. *Work Product Doctrine:* [Fed. R. Civ. P. 23(b)(3)]: any material prepared in anticipation of litigation, or the lawyer's mental impressions or legal theories are covered by work product doctrine.

2. Pre-Decisional Memoranda: pre-decision memoranda (i.e. those involving recommendations to the decision makers to help them decide) are protected from disclosure by the *executive privilege*. Memoranda that recommend issuance of a *complaint* (i.e. file suit, appeal, and litigation strategy) are pre-decisional and covered by the exemption.

a. The theory is that disclosure of such information/documents may inhibit frank discussion within the agency.

b. *Hint:* if there are still steps to be taken, or action left to be done, then the exemption does not apply.

3. Post-Decisional Final Opinions: memoranda that explain policy or decisions *already made* are not covered by the exemption. Appeal memoranda that *terminate* the charge (i.e. don't pursue any further litigation) are *final opinions* and thus subject to disclosure.

a. This is because a final opinion which terminates a charge is the agency's ***final action*** and the public is entitled to information that has ended.

*[*NRLB v. Sears, Roebuck & Co.*].

E. **G/Rs:** Exemption 7(C): §552(b)(7) is the law enforcement exemption which exempts from disclosure investigatory records compiled for law enforcement purposes.

1. This exemption protects only those items that would:

(A) interfere with law enforcement proceedings;
(B) deprive a party of the right to a fair and impartial adjudication;
(C) constitute an unwarranted invasion of personal privacy;
(D) disclose the identity of a confidential source;
(E) disclose…information furnished by a confidential source;
(F) disclose investigative techniques or procedures or prosecution guidelines; or
(G) endanger the physical safety of law enforcement personnel.

2. **g/r:** exemption 7(C) by its terms permits an agency to withhold a document only when revelation could reasonably be expected to constitute an unwarranted invasion of personal privacy.

3. **g/r:** except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the party requesting has no bearing on the merits of his FOIA request.

4. *Balancing Test:* the application of Exemption 7(C) requires the Court to balance the public interest in disclosure against the interest Congress intended the Exemption to protect.

5. Public information: the exemption does not mean that just because the information is public availably that it can be obtained; if, the government has compiled the "public" information from various sources (i.e. court archives, police reports, etc…) it does not have to turn the information over.

*[*DOJ v. Reporter's Committee*].

F. **G/Rs:** Exemption 4: trade secrets and commercial or financial information that is *privileged* or *confidential* need not be disclosed.

1. There are three elements which must be satisfied in order for this Exemption to apply; it must be shown that the information is:

a. commercial or financial;
b. obtained from a person; and
a. look to APA definitions to determine what constitutes a "person."
c. privileged or confidential.

2. The privilege element is the same as mentioned above (i.e. attorney/client; executive; work product).
3. *Confidential*: [is different, and broader than privilege because is not limited to just evidentiary matters]: the term confidential refers to information, which if disclosed, would impair the government's ability to obtain necessary information in the future or would cause substantial harm to the competitive position of the outside party.
1. If the information is only partially confidential, the balance must be disclosed by the agency.
4. **Test:** if the government discloses the information, and (1) it will impair its ability to obtain information in the future, or (2) will financially or otherwise harm the competitive position of the source of the information, then the information does not have to be disclosed.
a. Look and see if the information was voluntarily given to the government, or if it was compelled by the government; if it was given voluntarily, then it will probably impair the government's ability to obtain similar information in the future if disclosed.

*[*National Parks v. Morton*].

III. <u>OPEN MEETINGS</u>

A. **Government in the Sunshine Act:** [**APA §552(b)**]: the Act requires that generally agencies hold their meetings *open to the public*; that is "every portion of every meeting of an agency shall be open to public observation" *unless* it falls within one of 10 exemptions.

1. <u>Agency Definition:</u> an agency for this purpose means one headed or a collegial body of two or more members and any subdivision thereof authorized to act on behalf of the agency [§552b(a)(1)].
2. <u>Meeting Definition:</u> a meeting for this purpose means deliberation of agency members that determine or result in the conduct or disposition of official agency business [§552b(a)(2)].
3. <u>Consultations:</u> the Sunshine Act does not apply to informal consultations between agency members and other agencies.
4. The Act does not require that the agency hold meetings, only that if they do, they be publicly open.

B. **Exemptions to the Sunshine Act:** the Sunshine Act sets forth many exceptions to the open meeting rule. Many of them parallel exceptions in FIOA. In general, where the agency can refuse to disclose documents under FIOA, it can close meetings to prevent disclosure of similar information. In addition, meetings can be closed when:

1. they involve accusing a person of a crime or formally censuring a person;
2. significantly frustrate the implementation of a proposed agency action; or
3. concern the agencies issuance of a subpoena or its participation in civil litigation, or disposition of formal agency adjudication.

**When the agency is supposed to have an open meeting and does not, then at the State level any action taken is null and void; but not necessarily at the federal level.

IV. PROTECTING AGAINST DISCLOSURE: FREEDOM OF INFORMATION ACT IN REVERSE:

A. **G/R:** Forbidding Disclosure: FIOA does not restrict the government from disclosing confidential information if it wishes to do so; instead, the Act protects the *agency* from disclosing information it wishes to keep secret; it does not protect the company that submitted the material from disclosure by the agency [*Chrysler Corp v. Brown*].

1. In other words, the government cannot go too fast in releasing sensitive data. FIOA does *not* create a prohibition on disclosure of information. FIOA will not prevent disclosure, it just limits what must be disclosed.
2. The Court held that an agency rule that state that the material could be disclosed was both substantively and procedurally invalid; consequently, disclosure was not authorized "by law." If an agency proposes to disclose material information, the person submitting the information can obtain judicial review under the APA.

V. THE PRIVACY ACT:

A. **Privacy Act:** [**5 USC §552a**]: was passed to protect the privacy of citizens by regulating the collection, maintenance, use and dissemination of personal information in records systems maintained by federal agencies.

1. Conditions on Disclosure: the Act sets out conditions on disclosure by requiring:
    a. the agency to keep records of any and all disclosures;
    b. to provide individuals with access to their records for examination and correction of inaccuracies;
    c. providing for detailed rules for collection and maintenance of information systems; and
    d. provides for both criminal and civil penalties for willful violation of the Act.
2. In contrast to FIOA, only *INDIVIDUALS* may evoke protection of the Act (which means US citizens); thus, it excludes businesses entities.
3. **G/R:** Non-Disclosure: the heart of the Act is the non-disclosure provision, which states that agencies may not disclose any record to any individual or another agency; EXCEPT:
    1. with the consent of the individual discussed; or
    2. if the situation falls within one of the exceptions provided in §552a(b). [Information required to be released by FIOA is one exception].