

GOVERNMENT AGENCIES AND ADMINISTRATIVE PROCESS

Chapter 6

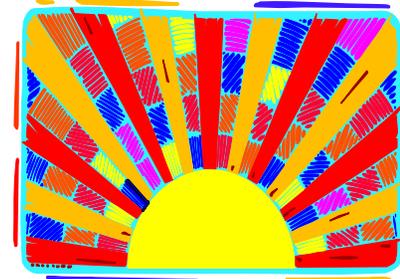
“The rise of the administration bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courtsThey have become a veritable fourth branch of the government. . . . *Supreme Court in F.T.C. v. Ruberoid Company (1952)*”

Chapter Issues



- **The development of administrative agencies**
- **Powers delegated to agencies by Congress**
 - **Legislative**
 - **Executive - Investigative and Enforcement**
 - **Judicial - Adjudicatory**
- **Judicial review of an agency's actions or decisions**

The Rise of Administrative Agencies

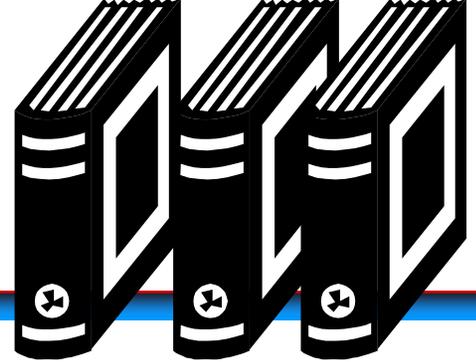


- The first federal regulatory agency was the Interstate Commerce Commission (ICC, 1887)
- Early 1900s -- the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA)
- 1930s – Securities & Exchange Commission (SEC) and Federal Communications Commission (FCC)
- Late 1960s & early 1970s – Environmental Protection Agency (EPA) and Equal Employment Opportunity Commission (EEOC)
- See Exhibit 6.1 for more agencies & websites
- Agencies are tools for government regulatory functions

Creating An Administrative Agency

- Congress gives an agency power & authority through *legislative delegation*
- Congress delegates power to the agency to perform the regulatory purpose
- **Congressional statute delegates powers to the agency through an *enabling statute; this statute limits the area in which the agency can act.***
- Agencies are created to have expertise and supervision over problems Congress wishes to control

Administrative Law



- **Administrative law consists of legal rules that define authority & structure of an agency**
- **Sources include**
 - **Enabling statutes of administrative agencies**
 - **Administrative Procedures Act (APA, 1946)**
 - **Court decisions**
 - Review validity of agency actions
 - Enforce the law
- **The structure of administrative law is defined by the APA**
- **An agency must abide by APA requirements**
- **Congress may impose different or additional requirements than the APA**

ADMINISTRATIVE REGULATORY POWERS

- **Legislative (or Rulemaking)**
- **Executive - Investigative and Enforcement**
- **Judicial - Adjudicatory**
- **Most powers of the three branches of the government are incorporated into an agency**

Enforcing Rules



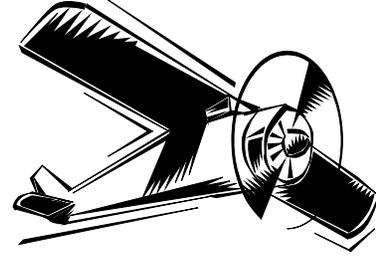
- Gathering of information and investigating violations
- Broad investigative powers of agencies through
 - **Monitoring and self reporting by business**
 - Business is concerned with 5th Amendment violations re: self incrimination (see following slide)
 - **Direct observation by agency**
 - See *Dow Chemical v. US*
 - **Agency obtains information through subpoena power**
- Refer also to “*Regulators Protecting Consumers?*” regarding Japan & Germany consumer regulations

5th Amendment Self Incrimination Concerns of Businesses



- This privilege applies to *individuals*
- Privilege does not apply to corporations or other legal entities
- Corporations **MUST** produce documents requested by an administrative agency
 - If business doesn't comply, will receive fines and penalties for non-reporting under the law
 - If they do comply, information may incriminate business or persons within an organization
 - Sometimes compliance places business "between a rock and a hard place"

Dow Chemical v. US



- Dow denies EPA entry to its complex for an on-site inspection
- EPA hires aerial photog who uses a precision camera to view 2000-acre manufacturing facility area
- Dow claims there is a 4th Amendment Constitutional violation re: warrantless search & seizure
- District Court rules for Dow; Court of Appeals reverses for EPA
- Supreme Court **HOLDS:** Aerial photographs from navigable airspace are not a 4th Amendment violation
- Photographing is lawful, if area is observable by the general public
- However, cannot “penetrate walls”; that would violate trade secrets or confidentiality
- Use of highly sophisticated technology such as satellite is questionable as well

General Principles of 4th Amendment Search & Seizure Guidelines of Administrative Agencies

- **Need Warrant-- “Routine inspections”**
- **No Warrant-- “Open field observation”**
- **No Warrant--Consent by management for agency to look over or search the premises**
- **No Warrant--Closely regulated industries, i.e.**
 - **Pharmaceuticals industry**
 - **Nuclear facility**
 - **Even junk yards (if protection of evidence is necessary)**



Enforcement Power



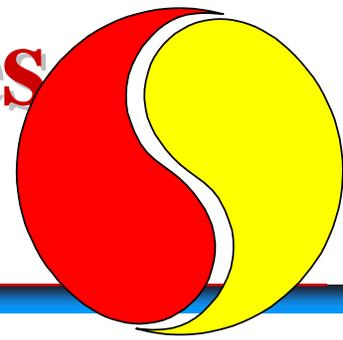
- Agencies have an array of enforcement tools in civil and criminal penalties, plus the use of injunctions
- Possible sanctions
 - Prohibitions, requirements, limitations
 - Withholding of relief; penalties & fines
 - Destruction, taking, seizing, withholding of property
 - Assessment of damages, reimbursements, restitution, compensation, costs, charges or fees
 - Requirement, revocation, suspension of license
- Informal procedures (i.e. tests, inspections, permits, negotiations, advice, settlements) vs Formal procedures (i.e. adjudicatory hearings--see *Exhibit 6.3*)
- Businesses sometimes request a jury at an admin. hearing
- See “*Administrative Agencies in Japan*”

Agency Hearings and the Right to Trial By Jury

- Hearings are held before Administrative Law Judge (ALJ)
- Question: Is there a right to trial by jury at such hearings?
- Answer: The Supreme Court has held that there is no right to a jury trial since these are neither criminal nor common-law cases



“Administrative Agencies In Japan”



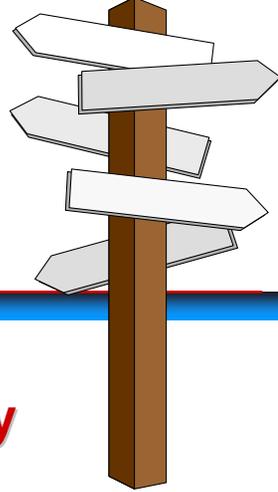
- Very regulated
- Administrative “guidance system” (*gyosei shido*)
- They only give “guidance by direction” (*shiji*) or “suggestions” (*kankoku*)
- Have requests (*yobo*)
- Give warnings (*keikoku*)
- Give “encouragement” (*kansho*)
- Theoretically, businesses are not forced to comply
- Practically, non-compliance creates problems for businesses
- If businesses don’t comply there may be subtle, unrelated ways that make doing business more difficult
- “Voluntary” nature of the system saves face for everyone
- Unlike the U.S., a Japanese agency does not actually confront violators
- The Japanese judiciary has a “hands-off” policy toward this administrative guidance system and its effects on businesses

“Judicial Review Of An Agency Action”



- APA sets out procedural requirements for court review
- Jurisdiction is needed by the court to hear the case
- Action must be reviewable by the courts (sometimes review is prohibited by statute, i.e. Dept. of Veterans Affairs actions regarding benefits for veterans, their dependents or survivors)
- A party must have standing to seek court review of an agency action
 - See *Lujan v. Defenders of Wildlife* (within text)
- The agency action must be final to warrant judicial review under the ripeness doctrine
- Parties must complete all agency appeals before turning to the courts under the exhaustion doctrine

Scope of Judicial Review



- **Review of substantive determination**
 - Usually the courts yield to an agency's judgment unless decisions are *arbitrary, capricious, or an abuse of discretion* or rulemaking is vague or unduly burdensome on business
- **See *Georgia-Pacific v. OSHA***
- **Review of statutory interpretation**
 - Courts determine if the agency has gone beyond Congressional authority
- **Review of procedural requirements**
 - Courts ensure that an agency has not acted unfairly or disregarded procedures (has not violated "procedural fair play")

CONTROLS ON AGENCY POWERS

■ Direct Controls

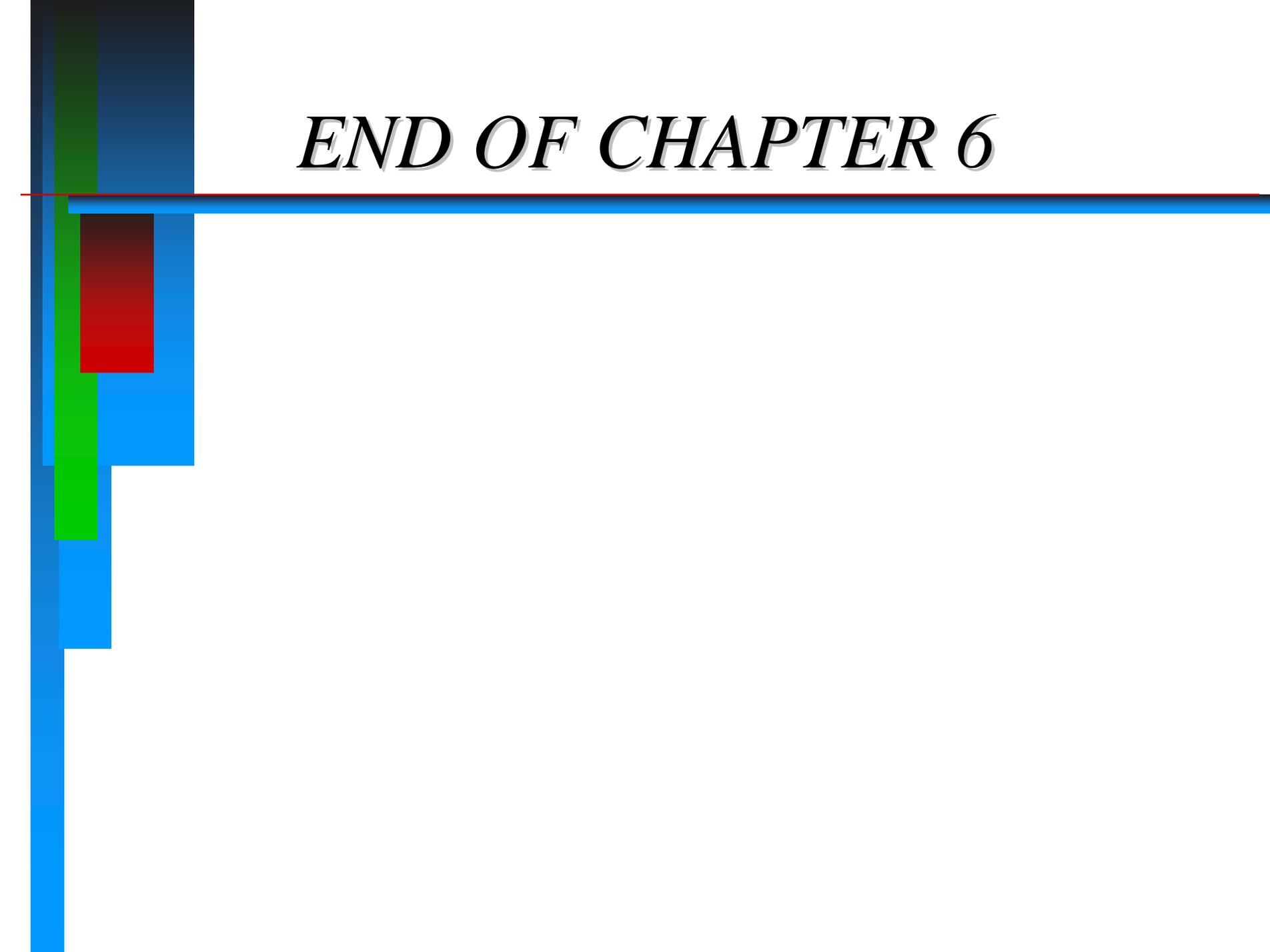
- Agency Appropriations & Reporting Requirements
- Sunset Laws
- Cost-Benefit and Risk Analysis

■ Indirect Controls

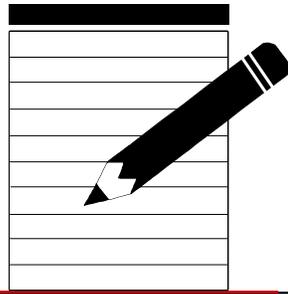
- Freedom of Information Act
- Privacy Act
- Government in the Sunshine Act
- Executive Orders to instruct agencies to undertake certain tasks
 - EX: Pres. Johnson's order to agencies re: affirmative action programs



END OF CHAPTER 6



Rulemaking Powers (Types of Rules)



- **Substantive or Legislative**
 - Same force as statutes of Congress
 - Agency usually must give public notice of these rules
- **Interpretative**
 - Statements issued by an agency to provide guidance regarding interpretation of a substantive rule or Congressional statute
 - These rules may be created without public notice
- **Procedural**
 - Rules that outline the method of agency operation
 - Procedures used to deal with the public regarding enforcement, investigation & adjudicatory review

United Technologies Corp. (UTC) v. U.S. EPA



- RCRA instructs the EPA to require hazardous waste disposal facilities to meet design/operating standards
- Regulations impose detailed requirements
- UTC challenged new rules as legislative, not interpretative, and therefore there must be public review before EPA enacted them
- Legislative rules: those based on an agency's power to exercise its judgment & implement statutory mandates
- Interpretative rules: those based on how to interpret statutory provisions
- Court says that the APA excludes interpretative rules from public notice and comment
- **Held: This rule is EPA's "view of what Congress intended" under RCRA. Hence, it is interpretative, not legislative. No public notice is required.**

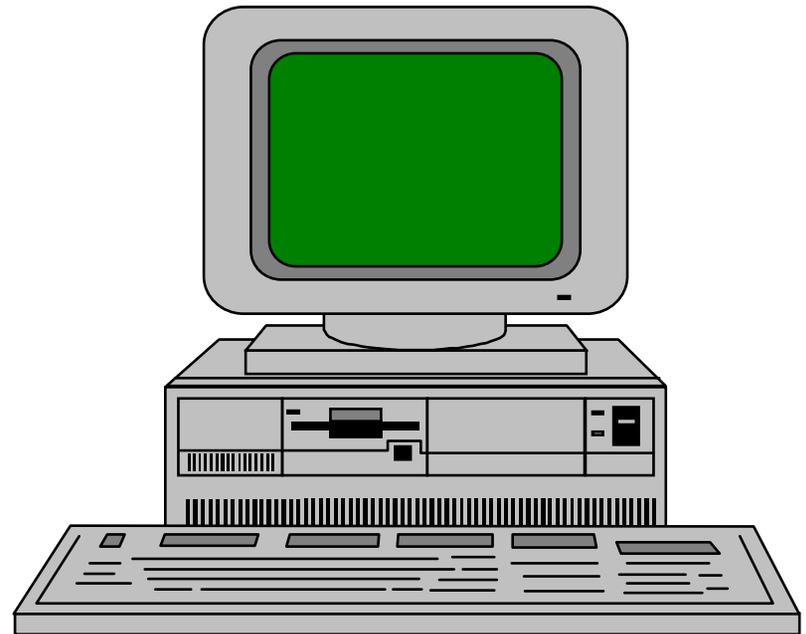
Rulemaking



- Proposed rule drafted by the agency staff
- Internal review of the rule
- Rules approved by the head of the agency for public consideration
- Publishing of the proposed rules in the *Federal Register*
- Interested parties may submit written comments to agency
- After public comment period (60-90 days), agency reviews comments and finalizes the rule
- Formal Rulemaking: Formal hearings held & interested parties may present formal exhibits, witnesses, etc.
 - Occurs in small fraction of rules issued
- Once agency issues final rule, it may be appealed through agency, then to the US Court of Appeals

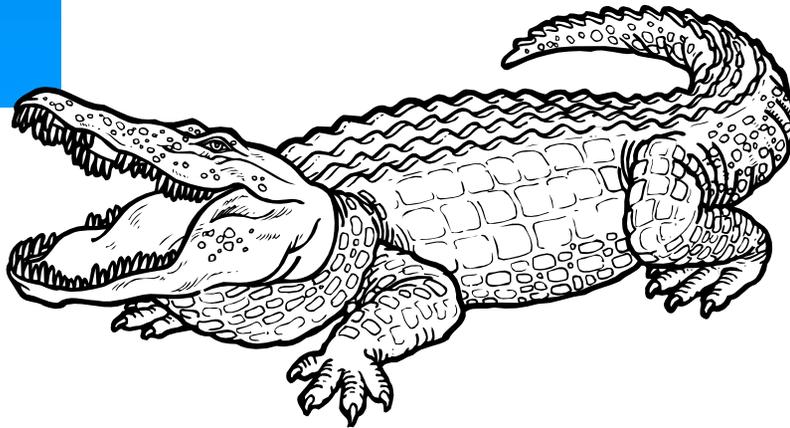
Cyberlaw: *Do Old Regulations Apply to New Forms of Competition?*

- **Problems with regulating technology related to the Internet**
- **If a new technology is not covered in a regulation that governs existing competitors, are the new competitors covered?**
- **Existing firms want new web-based competitors subject to the same rules**
- **Problem: the way the regulations are written does not envision new inventions--are they really covered under the regs?**



Lujan v. Defenders of Wildlife

“Legal Standing”



- Environmental groups argue that US should stop providing aid to Egypt to build dams on Nile River as that endangers the rare Nile crocodile
- Groups assert providing aid should comply with US Endangered Species Act
- Court holds: Plaintiffs lack *standing* and have suffered no “injury in fact”
- Disagreement with agency policy is not = to an injury

Georgia-Pacific Corp. v. OSHA

Substantive Rulings

- **Forklift strikes and kills employee who was painting and out of sight of the forklift driver**
- **OSHA cites a violation and imposes a \$480 fine**
- **OSHA's regulation requires forklifts must drive in reverse with "load trailing" when carrying loads that "obstruct forward view"**
- **G-P says rule is vague, as any load in front may "obstruct forward view" in some manner**
- **Unions say load trailing is unsafe, since driver's field of vision is limited**
- **Is language "obstructs forward view" unreasonably vague?**
- **HELD: Yes. Court vacates fine.**
- **OSHA must create a more specific standard**



“Through the Smog: What the Court Actually Ruled”

Deeper Meanings of Seemingly Minor Cases



- **Some Supreme Court cases appear to involve small matters**
- **But, it's not always the details of cases that are the focus, but rather legal principles that have broader applications**
- **In *Whitman v. American Trucking Assn.*, the trucker's lost, but the court's decision provided new opportunities for attacks on other regulatory rulings**
- **Issues concerning the delegation of Congressional powers look at “ill-formed” statutes like Clean Air Act, that allow much regulatory action by the EPA (big government concerns)**
- **If a statute is “silent or ambiguous” the court has allowed “reasonable interpretation made by the administrator of any agency”**
- **The application of the *nondelegation doctrine* in *Whitman* may cut into an agency's broad legislative powers**