

The Administrative State

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The Administrative State: Relation to Branches of Government



Legislative

Executive

Judicial

Administrative agencies?



Executive branch agencies

- Characteristics
 - Overseen by a single Cabinet Secretary
 - Appointed by the President with the advice and consent of the Senate
 - May be removed by the President “at will”
- Examples within the Treasury Department
 - Internal Revenue Service
 - U.S. Mint
 - Bureau of Engraving and Printing

Independent agencies

- Characteristics
 - Often led by a board or commission of 5 to 7 people
 - Appointed by the President with the advice and consent of the Senate
 - Head or commissioners can only be removed for cause
- Examples of financial services regulatory agencies
 - Federal Reserve Board (FRB)
 - Federal Deposit Insurance Corporation (FDIC)
 - Office of the Comptroller of the Currency (OCC)
 - Securities and Exchange Commission (SEC)

Consumer Financial Protection Bureau (CFPB)

- Characteristics
 - A bureau within the FRB
 - A single director (versus a multi-member commission)
 - The director can only be removed “for cause”
- CFPB’s constitutionality challenged
 - Argument was that it is an executive agency not an independent agency and therefore its director should be removable at will
 - D.C. Circuit Court and 9th Circuit have found CFPB constitutional

Function of agencies

- Grant licenses and permits
- Distribute benefits
- Make policy pursuant to delegations from Congress in legislation
 - Rulemaking (quasi-legislative)
 - Notice and comment rulemaking under the Administrative Procedure Act
 - Guidance documents
 - Interpretive letters, no action letters, handbooks/manuals, speeches or comments in the press by agency officials

Function of agencies

- In banking world
 - Supervision
 - Examination
 - Enforcement (quasi-judicial)
 - Can involve hearing before an administrative law judge (ALJ)
 - ALJ makes recommendation to head of agency
 - Appeal to a U.S. Circuit Court
 - Standard of review



The Administrative State: *Chevron*

Two step process of review...

Review of agency regulations

- Challenger must have “standing”
- Challenges to an agency’s interpretation of a statute in a regulation
 - *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), set forth a two-step review process
 - If Congressional intent is clear and contrary to the agency’s interpretation, the court should substitute the Congressional intent for the agency’s interpretation.
 - If Congressional intent is not clear, the court should affirm the agency’s interpretation if it is “permissible”

Agency guidance documents

- FRB, OCC, and FDIC issued Leveraged Lending Guidance in 2013
 - Regulators accused of using guidance as a de facto rule
 - Agencies then issued a “Guidance on Guidance” document
 - Guidance cannot be used as basis for an enforcement action
 - But can be used in the supervisory process (i.e., bank exams)

Agency guidance documents

- *Kisor v. Wilkie* (Supreme Court June 2019) – addressed agency interpretations of agency’s own rule
 - *Auer v. Robbins* – defer to Agency’s own interpretation of its ambiguous regulation, but deference principle constrained by
 - Regulation must be “genuinely ambiguous”
 - Agency’s reading must be reasonable
 - Court determines that providing deference is important because
 - Authoritative or official position
 - Implication of substantive expertise
 - Fair and considered judgment

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Part of the Executive branch

Agencies (particularly independent agencies) may exercise

- Quasi-legislative functions (regulations, guidance)
- Quasi-judicial functions (enforcement actions)

Specific banking regulators

- Banks may have a national charter issued by the OCC or a state charter issued by one of the 50 states
 - State banks are regulated by their state regulator and at the federal level by
 - FRB, if a member of the Federal Reserve System or
 - FDIC, if not a member of the Federal Reserve System
 - National banks are regulated by the OCC
 - All banks (national or state) must have federal deposit insurance provided by the FDIC

Specific banking regulators

- Banks owned by a bank holding company (a company that controls a bank) are subject to the Bank Holding Company Act which provides FRB oversight over the BHC and its nonbanking subsidiaries
- National banks are subject to state laws unless the state law is preempted by the National Bank Act (the state law prevents or significantly interferes with the national bank's operation pursuant to the National Bank Act)

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