Lecture 2: Introduction to Administrative Law (Continued)

ADMINISTRATIVE LAW

How Are Agencies Created?

- An agency is created when a state or federal legislature enacts a statute creating the agency. This statute is referred to as an ***enabling act***.

- An enabling act is the **source** of an agency's power.

- Therefore, the legislature creates agencies and sets limits on their authority via enabling acts.

- When a legislature creates an enabling act, the legislature **transfers power** and **delegates its authority** to the administrative agency.

- "Delegation" thus refers to the transfer of legislative, executive, and judicial power to the agency.

What Does An Enabling Act Look Like?

SECTION I. SHORT TITLE.

This act may be known and cited as the "Hillsborough County Environmental Protection Act.

SECTION 2. DECLARATION OF LEGISLATIVE INTENT.

The Legislature finds and declares that the reasonable control and regulation of activities which are causing or may reasonably be expected to cause pollution or contamination of air, water, soil and property, or cause excessive and unnecessary noise may be necessary for the protection and preservation of the public health, safety, and welfare.

It is the intent and purpose of this act **to** designate the board of county commissioners as the environmental protection commission of Hillsborough County **to provide and maintain** for the citizens and visitors of said county **standards which will insure the purity of all waters and soils** consistent with public health and public enjoyment

thereof, the propagation and protection of wildlife, birds, game, fish, and other aquatic life, atmospheric purity and freedom of the air from contaminants or synergistic agents injurious to human, plant, or animal life, and freedom from excessive and unnecessary noise which unreasonably interferes with the comfortable enjoyment of life or property or the conduct of business.

Delegation Doctrine

- Underlying reasoning: Congress has a central role in controlling administrative agencies since Congress is the ultimate repository of lawmaking powers.

  Statutes should **create** the agencies **and define** the substantive and procedural limits within which they must operate.

Non-Delegation Doctrine

- The issue to resolve is when Congressional delegations of power to administrative agencies are constitutional.

- Use the ***intelligible principle*** test:

  Delegation forbidden unless Congress articulates an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.

- To satisfy the intelligible principle test, Congress must delineate:
  - The general policy;
  - The public agency which is to apply it; **and**
  - The boundaries of delegated authority.

- Non-Delegation doctrine is rooted in the principle of separation of powers that underlies the tripartite system of government.

- 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 these standards.

- 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 Schechter Poultry v. United States*).

ALA Schechter Poultry

- Involved a challenge to Section 3 of the NIRA, which allowed different industry groups to organize into guilds and promulgate "codes of fair competition."
  - If the codes were approved by the President, a subsequent violation "shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act" -

- which carried criminal fines of up to $500 a day.

- Before the President could approve the codes, he had to find that the guilds were representative of the industry, and that the codes were not designed to promote monopolies or to suppress competition.

- One of these codes was certified for the poultry industry and was challenged.

- Issue: Whether Congress' transfer of authority to the President to set codes of fair competition in the poultry industry was a constitutional delegation of power.

    - In other words, did Congress articulate a valid intelligible principle?

- Holding: No.

- The Court reasoned that “adequately representative of the industry” is not a valid intelligible principle – too vague to provide any meaningful restriction.

- The Court reasoned that “fair competition” also was not a valid intelligible principle – again, too vague. “Fair competition” can cover just about everything the industry does.

- President had unlimited ability to approve of any proposed code. There is no way to know whether a submitted code is likely to be found to promote “fair competition” or not. It is simply too vague.



QUIZ TIME!

- What to take from *Schechter Poultry*:
  - Delegation of lawmaking is constitutionally impermissible any time Congress gives a lawmaking power to a governmental agency to police itself without any clear set of rules.
    - No procedural safeguards for the agency to follow = defect because the agency and Congress are making law without affording due process rights.

- Trends re: Delegation
  - Court less reluctant to approve a delegation regarding an area of critical importance to the country (e.g., *Schechter*).
  - When delegation concerns a narrow matter, court more comfortable with a delegation that is broader in scope.

- Non-delegation is pretty rare – only declared if there is an absence of standards for the agency's action, such that it would be impossible in a proper proceeding to determine whether the agency has obeyed Congress' directives.

Agency Criticism

Critics argue that administrative agencies constitute an unconstitutional, **fourth branch of government** with powers that exceed those of the three recognized branches of government.

Supporters argue that agencies are the only government entities equipped to deal with the day-to-day minutiae of governing.

- Example: One thing for Congress to decide to regulate trucking companies, but the last thing Congress wants to decide is how much Company X may charge to carry a package from New York to Chicago. Delegating those tasks to an agency is more efficient and productive.

Discretion

- Agencies can be flexible in the manner in which they respond to social and economic problems because agencies have the ability to exercise ***discretion***:
  - Enabling acts often establish only **minimum** standards and requirements.
  - Agencies therefore have a lot of leeway to fill in the gaps of the legislation.

- Legislature must strike a balance:
  - **Too much** discretion = failure to guide agency on how to implement legislature's intent.
  - **Too little** discretion = agency not given the flexibility it needs to solve the problem.

- This discretion leads to courts adopting a “hands off” approach toward agencies.

- The ability of a court to change an agency’s decision is limited.

Key Things To Remember:

1. Agencies are created by the legislature (via an enabling act – more on that later). They cannot be created by the courts.

2. Agencies function only so far as the legislature gives them the authority to function.

Types of Agencies

- Executive Department or Cabinet Level
  - President/Governor has a lot of control over this type of agency.
  - Heads of cabinets are appointed by the President/Governor.
  - Heads of cabinets can be removed by President/Governor without cause and without formal proceedings.

- Congress can only remove through impeachment.

- Goal is to carry out the policies of the President/Governor within the Department as directed by the President/Governor.

- Subcabinet
  - Located within a cabinet department.
  - Responsible for a prescribed area of responsibility.
  - E.g., the National Security Agency is located inside the Department of Defense.

- Independent-Agency or Commission/Board Type
  - President/Governor has less control over this type of agency.
  - Constraints placed on the appointment and removal process theoretically make the commission independent of the President/Governor.

- Members serve fixed terms in office and cannot be removed except for cause.

– Independent of Congress as well.

– Goal is for agency to be free from political influences.

- Regulatory, Social Welfare, Ratemaking (e.g., Social Security)
  - A regulatory agency issues rules and regulations.
  - A social welfare agency dispenses social services.

Administrative Procedure Act

- An agency acquires a specific substantive mission from its enabling act.
- An agency derives its procedures from a more general statute setting out procedural requirements for all agencies under the statute's jurisdiction.
- The governing procedural statute at the federal level is the Administrative Procedure Act (APA).

- States have their own administrative procedure statutes.
  - Model State Administrative Procedure Act has been promulgated. Many states have either adopted it or incorporated substantial portions of it.
  - Like the Constitution, the APA contains broad, open-ended provisions that have been provided substantive content through subsequent judicial interpretations.

Importance Of Procedural Requirements

- Mitigate concerns over unrestrained agency power.

- Can soothe concerns even when the substantive intelligible principle governing the scope and/or breadth of that delegation seems broad and expansive.

Additional Sources Of Administrative Procedure

- *Constitution*
  - Due process imposes **procedural minimums**. Although, in many cases, the APA extends protection well beyond due process requirements.

- *Statutory Law*
  - APA applicability is presumptive. An enabling act can **strengthen or weaken** procedural requirements (although not below minimum required for Due Process).

- *Agency's Own Regulations*

  - Agencies frequently promulgate rules and regulations that govern their own decision-making.

  - These frequently add additional procedural requirements above and beyond those imposed by Due Process, the APA, or the enabling act.

- *Courts*
  - Issue of whether federal courts can introduce extra procedural requirements for administrative agencies is **disputed**.
  - Does not appear permissible *(Vermont Yankee*).
  - Nonetheless, courts find ways to increase procedural requirements for administrative agencies.

- *Executive Orders*
  - Can suggest certain agency procedures.
  - President/Governor can likely direct procedures of executive branch agencies, but not independent agencies.