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Administrative & Public Law

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Contents

Administrative & Public Law

UPDATE AND TRENDS

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USA

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CONSTITUTION

Sources of constitutional law

What are the basic sources of law in your jurisdiction and what is the hierarchy of these sources?

The United States has a written constitution. Below the Constitution are the federal statutes, and below the federal statutes are federal regulations issued by administrative agencies. Each state has its own written constitution, legislative statutes and regulations, all of which generally are subordinate to the federal laws and regulations.

Law stated - 7 October 2024

Creation, establishment and amendment

How are the sources of constitutional law created or established and amended?

The US Constitution has been in place since 1789 and has been amended 27 times since then. Amendments to the Constitution may be proposed by Congress (on two-thirds of the votes of both houses) or by the states (on two-thirds of the votes of the state legislatures). To take effect, an amendment must be ratified by either three-quarters of the state legislatures or three-quarters of conventions called in each state for ratification. The US Supreme Court has ultimate authority to interpret the Constitution.

Law stated - 7 October 2024

Case law

Have there been any recent significant judicial decisions regarding the constitution?

The US Supreme Court hears and decides several cases each year interpreting and applying constitutional provisions. Most recently, the US Supreme Court has decided cases holding that:

- public universities may not expressly preference certain racial categories when admitting students;
- the Constitution does not confer a right to abortion;
- the President of the United States is absolutely immune from criminal prosecutions for actions within their preclusive constitutional authority, is presumptively immune for their official actions, and enjoys no immunity for unofficial actions; and
- Congress generally may not insulate the head of an executive agency from removal by the President at will.

Law stated - 7 October 2024

INTERNATIONAL LAW

Incorporation

Is any significant body of international law incorporated into the law of your jurisdiction?

The US Constitution does not explicitly incorporate international law, and judges have different views on whether international law or custom is informative when interpreting the US Constitution or federal statutes. In general, the current US Supreme Court gives little weight to international law when interpreting the US Constitution or federal statutes.

The Alien Tort Claims Act gives federal courts jurisdiction to hear civil cases brought by a non-citizen or non-national of the United States for torts committed in violation of international law. There are differing views as to what qualifies as international law for the purposes of a lawsuit under the Alien Tort Claims Act, and in particular, what level of acceptance a norm or custom must achieve before it is incorporated as international law under the Alien Tort Claims Act.

Law stated - 7 October 2024

Relationship to domestic law

Does international law have equal status to domestic law? If not, what is the hierarchy between these bodies of law?

International law does not have status equal to that of domestic law. Some members of the judiciary treat international law as informative, though not dispositive, when interpreting the US Constitution. Others give little weight or consideration to international law. Except where explicitly incorporated by statute (such as in the Alien Tort Claims Act), international law does not control.

Law stated - 7 October 2024

JUDICIAL REVIEW

Available mechanisms

What mechanisms (eg, judicial review) are available to challenge administrative decision-making by public bodies?

Rules and regulations promulgated by administrative agencies are subject to challenge in the federal courts pursuant to the Administrative Procedure Act. Some rules and regulations must be challenged first in the federal district courts (the trial courts of the federal judiciary), but many can be challenged in the federal courts of appeals (the intermediate appellate courts). The US Supreme Court has final authority to rule on any challenges to administrative action.

Some administrative action consists only of a decision in an administrative proceeding between the agency and a single private party, such as in a case brought by the agency against a private firm to enforce a statute or regulation. Many administrative agencies have

internal appeals processes in such cases, through which the parties to the administrative proceeding may seek review of an administrative law judge's decision by appealing to the agency's final decision-makers. The agency's final decision in an administrative proceeding may be appealed to federal court after all administrative appeals have been exhausted.

Law stated - 7 October 2024

Decisions subject to review

What types of administrative decisions are subject to judicial review?

Final administrative action is subject to judicial review. Final administrative action comprises any decision of the administrative agency that:

- marks the conclusion of the agency's decision-making process; and
- determines rights or obligations or otherwise has legal consequences.

Interlocutory decisions by an administrative agency during a proceeding may be challenged as part of an appeal from the final agency order in the proceeding but ordinarily cannot be immediately challenged in federal court while the administrative proceeding remains pending.

Law stated - 7 October 2024

Restrictions

Are there any restrictions on judicial review of administrative decisions?

On rare occasions, a court will decline to adjudicate a case by invoking the political question doctrine, which applies to issues that are viewed as too politically charged for fair adjudication by the judiciary. The doctrine is rarely invoked in cases arising out of the action of an administrative agency, in part because Congress has expressly provided for judicial review of administrative action in the Administrative Procedure Act.

Law stated - 7 October 2024

Standing and third-party intervention

Who has standing to bring judicial review proceedings in your jurisdiction? In what circumstances, if any, may third parties intervene in judicial review proceedings?

Challenges to administrative action are governed by the same constitutional standing rules as all other federal court actions. To establish standing, the challenger must establish: (1) a concrete injury; (2) arising out of the challenged administrative action; and (3) redressable by a judgment in the challenger's favour.

Additionally, courts have some discretion to decline to hear a case on prudential grounds if:

- the litigant seeks to assert the rights of non-parties, rather than its own;

- the litigant seeks redress for a generalised grievance widely shared by a large number of non-parties; or
- the litigant does not fall within the 'zone of interests' arguably protected or regulated by the statute or constitutional provision underlying the claim.

Interested non-parties may seek to intervene in a judicial review proceeding. In district courts, intervention is governed by Federal Rule of Civil Procedure 24, which provides:

- an absolute right of intervention to anyone who has such a right by federal statute or has an interest in the property or transaction that is the subject of the action; and
- a discretionary opportunity for intervention to anyone who has a claim or defence that shares a common question of law or fact with the main action.

In the courts of appeals, intervention is governed by Federal Rule of Appellate Procedure 15(d), which allows a non-party to move for intervention within 30 days of the filing of the petition for review. An intervenor must establish its own standing to sue if it seeks relief different from that sought by the plaintiff or petitioner.

Non-parties may ask a court for leave to file amicus curiae briefs in support of or in opposition to a challenge to administrative action. Amicus curiae briefs are commonly filed in cases before the courts of appeals, and those courts will almost always grant a request by an amicus curiae to file a brief. Amicus curiae briefs in the district courts are rarer, but still are often accepted. The US Supreme Court allows the filing of amicus briefs by any non-party, without requiring the non-party to seek leave.

Law stated - 7 October 2024

Challenging legislation

Is it possible to challenge legislation by way of judicial review mechanisms?

Legislation may be challenged through judicial review and is subject to same procedural and substantive rules as ordinary federal litigation. The US Constitution, however, extends the jurisdiction of federal courts only to 'cases' or 'controversies', which means that federal courts can only resolve active disputes between parties and may not issue advisory opinions. Accordingly, to pre-emptively challenge legislation through an independent judicial action, the plaintiff must show that there is a specific threat of prosecution if it violates the statute, giving rise to a cognisable case or controversy.

Law stated - 7 October 2024

Grounds for review

On what grounds may a challenge to administrative decision-making, if any, be brought?

Administrative action may be challenged under the Administrative Procedure Act as arbitrary and capricious, contrary to law, in excess of statutory jurisdiction, without observance of

proper procedure, or unsupported by substantial evidence. The most common grounds for challenging administrative action are that the action is arbitrary and capricious or that the action is contrary to law.

'Arbitrary and capricious' is a high standard that generally applies to decisions that implicate the administrative agency's discretionary functions. Typically, the agency must offer a rational connection between the facts found and the choice made, and must also consider all relevant factors in reaching its decision. Administrative action will be overturned on this ground only if the court finds there has been a clear error of judgment.

Administrative action challenged as contrary to law receives less deference. Historically, courts have afforded some deference to an administrative agency's interpretation of federal legislation for which it is responsible and of regulations promulgated by the agency. Recently, the US Supreme Court indicated that deference to an agency's interpretation of federal legislation is appropriate, if at all, only in narrow circumstances. In the October 2023 term, the US Supreme Court will consider whether to eliminate that form of deference entirely.

Additionally, a party may bring a lawsuit to enjoin administrative proceedings if the proceedings violate a constitutional provision or if the agency itself is unconstitutionally structured. An agency may be unconstitutionally structured if, for example, the agency head or its commissioners have been granted excessive protection from presidential removal.

Law stated - 7 October 2024

Available remedies

What remedies are available if a court upholds a challenge to administrative decision-making?

The standard remedy for a judicial challenge to administrative action is to 'set aside' the challenged action. This means, at the very least, that the action cannot have any effect on the challenging party. The action will then be remanded back to the agency, to either close the proceeding or seek to correct any errors identified by the court.

There are two other species of remedies that courts sometimes grant at their discretion and that are subject to ongoing judicial debate.

The first is an order vacating the challenged action in its entirety, as to all affected entities (including non-parties). The US government, through the US Department of Justice, has taken the position that this remedy is not allowed for a challenge to administrative action, but courts nonetheless frequently vacate the entirety of an administrative action upon successful challenge.

The second is remand without vacatur, in which the court returns the administrative action back to the agency for reconsideration or to correct an error in reasoning, but the administrative action remains in effect during the remand period. If the challenging party is unsatisfied with the agency's decision on remand, it may again challenge the action in federal court. The practice of remand without vacatur is controversial, and most courts of appeals do not allow it.

Law stated - 7 October 2024

Principles and measure of damages

Is damages one of the remedies available in a successful challenge to administrative decision-making? If so, please summarise the principles, including the measure of damages and any limitations to this remedy.

Damages are generally not available in a successful challenge to administrative decision-making. The US government and its agencies enjoy sovereign immunity from suits for damages except where expressly waived by statute. Under the Tucker Act of 1887, for example, the United States has waived sovereign immunity for a limited class of claims, including those seeking damages for a government 'taking' of property in violation of the Fifth Amendment.

Law stated - 7 October 2024

Procedural requirements

What are the basic procedural requirements to bring a challenge to administrative decision-making?

If a particular administrative action may be challenged only in federal district court, the challenger must file a complaint with the federal district court. The complaint sets forth the allegations giving rise to the challenge, including the background facts and the legal theories to be pursued. The challenger may, but is not required to, attach the underlying administrative action to the complaint. The complete record from the administrative proceedings is provided by the agency defending the action. The challenger typically is not allowed to present any evidence to the court other than what was presented to and considered by the administrative agency.

For other administrative actions, judicial review is initiated by filing a petition for review with a federal court of appeals (if the statutory scheme provides for review in the appellate courts). Unlike a complaint, a petition for review need contain only a short statement of the decision to be reviewed and the basic grounds for the challenge. The petitioner must attach the underlying administrative action to the petition. The complete record from the administrative proceedings is provided by the agency defending the action.

Law stated - 7 October 2024

Courts

Which courts hear challenges to administrative decision-making in your jurisdiction? Are challenges considered by a separate system of administrative courts or specialist tribunals?

Judicial challenges to administrative action are decided by the federal courts of general federal jurisdiction. Some challenges must be brought in the federal district courts, and can then be appealed up to the courts of appeals and, potentially, the US Supreme Court. Other challenges may be brought, by statute, directly in the courts of appeals. The proper forum for judicial challenges is determined by statute.

Judicial challenges to administrative action by a federal agency may not be brought in state courts. Administrative action by a state agency, however, often can be challenged in that state's courts, or in a federal court, if the state agency violates the US Constitution or a federal statute.

Law stated - 7 October 2024

Time frame

How long does it typically take for a judicial review to be completed?

The timing for a decision on a judicial challenge to administrative action is highly variable. After a judicial challenge is filed, the agency will provide the full administrative record to the court and the challenger, and the court will set a briefing schedule, usually lasting anywhere from two to five months. After the briefs are submitted, the court may elect to hear oral argument, which may occur anywhere from a few weeks to a few months after the parties submit their briefs (oral argument is more common in the courts of appeals than in the federal district courts). The court will then deliberate and issue its decision, which may take another few weeks to a few months. If the challenger filed suit in federal district court, the losing party will often file an appeal to the court of appeals, which triggers a similar briefing and decision process. The whole process, from start to finish, typically lasts at least a few months, but often can take years to resolve.

If the challenged action is causing the challenger immediate and irreparable harm, the party may ask a federal court to preliminarily enjoin the action until the completion of the proceedings. The court will consider the strength of the challenger's case (based on preliminary briefing) and the threat of irreparable injury to the challenger. If it is satisfied that those factors weigh in favour of a preliminary injunction, the court will enjoin the administrative action while the remaining judicial proceedings play out as outlined above. Decisions by the federal district courts to preliminarily enjoin or not preliminarily enjoin administrative action are subject to immediate review in the courts of appeals.

Law stated - 7 October 2024

Limitation period

What time limit applies to judicial review claims brought in your jurisdiction?

The default rule is that administrative action may be challenged within six years of when the challenged administrative action first caused harm to the petitioning party. The US Supreme Court recently ruled that administrative action within this default rule may be challenged many years (even decades) after it was taken if the petitioning party was not first injured by the action until more recently (such as when, for example, the petitioning party is a corporate entity that did not exist at the time of the challenged action).

Other types of administrative action, however, may have a shorter limitation period specified by statute. Some administrative actions must be challenged in as few as 60 days after the action is taken, regardless of when the petitioning party feels the effects of or is injured by the action.

Law stated - 7 October 2024

PUBLIC PROCUREMENT

Key legislation

What legislation (if any) governs public procurement in your jurisdiction? What does each piece of legislation cover?

The principal legislation governing public procurement are the Federal Property and Administrative Services Act of 1949 and the Competition in Contracting Act of 1984. These statutes broadly govern procurements by all federal agencies, except the US Department of Defense, the US Coast Guard and the National Aeronautics and Space Administration. Military contracts are generally governed by the Armed Services Procurement Act of 1949.

In addition, the Federal Acquisition Regulation generally applies to agencies, including military departments. The Federal Acquisition Regulation sets forth in more detail the procedures agencies must follow when awarding procurement contracts.

Law stated - 7 October 2024

Contract award procedures

What types of contract award procedures are used for public procurement in your jurisdiction? What are the main stages of each procedure?

In general, procurement contracts are awarded through a competitive bidding process. The governing legislation and regulation express a general preference for the use of sealed bids, but other competitive bidding procedures may be used as called for by the circumstances.

Law stated - 7 October 2024

Exemptions

Are there any key exclusions or exemptions to the requirement to follow public procurement procedures?

Most federal agencies are subject to any or all of the following:

- the Federal Property and Administrative Services Act of 1949;
- the Armed Services Procurement Act of 1949; and
- the Competition in Contracting Act of 1984.

Most federal agencies are also subject to the Federal Acquisition Regulation. There are a few agencies that are not subject to those laws but nonetheless are subject to other laws that impose similar procurement requirements.

Law stated - 7 October 2024

Redress mechanisms

Are any procedures available to provide effective redress in respect of the breach of public procurement laws? If so, are these the same procedures as those used to challenge administrative decision-making (eg, judicial review)?

Challenges to procurement awards may be brought before the procuring agency, the Government Accountability Office (a federal agency), or the US Court of Federal Claims. Challenges brought in the US Court of Federal Claims are subject to standards of the Administrative Procedure Act, which generally governs judicial review of administrative action. Only decisions by the US Court of Federal Claims are legally binding.

Law stated - 7 October 2024

HUMAN RIGHTS

Key legislation and scope

What is the key human rights legislation in your jurisdiction? What does each piece of legislation cover?

This is beyond the scope of administrative law in the United States.

Law stated - 7 October 2024

Private enforcement of international law

Do the laws of your jurisdiction incorporate international human rights law in a manner that allows its enforcement by private citizens?

This is beyond the scope of administrative law in the United States.

Law stated - 7 October 2024

Enforcement against private individuals

Do your jurisdiction's human rights laws regulate acts carried out by private individuals in addition to those of the state?

This is beyond the scope of administrative law in the United States.

Law stated - 7 October 2024

FREEDOM OF INFORMATION

Key legislation

Is there legislation in your jurisdiction around freedom of information (ie, requiring the disclosure of certain types of information held by public bodies)?

Federal administrative agencies are subject to the Freedom of Information Act (FOIA), which provides individuals and organisations with the ability to request access to records of the Executive Branch (the President and the administrative agencies). FOIA broadly permits individuals and organisations to request any records maintained by the Executive Branch, but there are some exemptions that protect such records from disclosure.

Law stated - 7 October 2024

Exemptions

Are certain types of information held by public bodies exempt from mandatory disclosure?

There are nine categories of records that are exempt from mandatory disclosure pursuant to the Freedom of Information Act as follows:

- documents kept classified for national defence or foreign policy reasons;
- documents related to internal personnel rules;
- documents specifically exempted from disclosure by a separate statute;
- trade secrets and sensitive commercial information obtained from a third party;
- government memoranda or letters that are protected by the attorney-client privilege or work product doctrine;
- personnel and medical files;
- records compiled for law enforcement purposes, to the extent disclosure would interfere with the enforcement proceedings;
- reports of examination of financial institutions; and
- geological and geophysical information and data.

A government agency generally may withhold information that falls within one of these categories only if the agency reasonably foresees that disclosure of the information would harm an interest protected by one of these exemptions.

Law stated - 7 October 2024

Procedural requirements

What are the main procedural requirements to obtain disclosure of information held by public bodies?

Each administrative agency is required to establish its own procedures regarding access to public records. Generally, a person or organisation must submit a written request to the agency providing a reasonable description of the records sought. The agency will respond to that request within a certain timeframe, often either by agreeing to produce certain records

on an agreed-upon schedule, asking the applicant to narrow the request or refusing to produce records at all. The applicant must exhaust all administrative avenues for resolving disputes regarding the production of records before it may seek judicial relief.

Law stated - 7 October 2024

PUBLIC INQUIRIES

Available mechanisms

Are there any mechanisms for the government to order an official review of events or actions, such as public inquiries or commissions?

The US Congress has broad authority to conduct public inquiries into any matters within its purview. It has the power to subpoena documents and testimony from witnesses. The findings and conclusions by Congress from those inquiries do not have the force of law, but can inform what statutes, regulations or enforcement action (by the Executive Branch) may be appropriate.

The US Department of Justice can separately appoint a special counsel to investigate criminal wrongdoing if members of the US Department of Justice would have a conflict of interest in investigating such wrongdoing. This power is often exercised to investigate members of the Executive Branch for wrongdoing.

Law stated - 7 October 2024

Key legislation

What (if any) legislation governs public inquiries?

The ability of US Congress to conduct public inquiries is an implied power under the US Constitution.

Law stated - 7 October 2024

Recent cases

Are there any recent high-profile examples of public inquiries or related review processes?

Both the current US President (President Biden) and the prior one (President Trump) have been the subject of inquiries by Congress into possible impeachment charges.

Following the 2016 presidential election, the US Department of Justice appointed Special Counsel Robert Mueller to investigate possible interference in the 2016 presidential election by Russia, and in particular any ties between such interference and the campaign of President Trump.

Law stated - 7 October 2024

UPDATE AND TRENDS

Emerging trends and hot topics

Have there been any key emerging trends or hot topics in administrative and public law in your jurisdiction?

The current US Supreme Court views administrative action with more scepticism than past courts and, as a result, has been revising existing doctrines to make challenges to administrative action easier. In 2024, the Court issued several significant rulings.

Arguably the most significant of these rulings was the Court's overruling of a doctrine called ***Chevron*** deference (named after the case in which it was developed). The doctrine of ***Chevron*** deference provides that courts should defer to an administrative agency's interpretation of an ambiguous statute that it enforces or operates under, provided that the administrative agency's interpretation is not unreasonable. For many years, this doctrine provided a powerful shield for administrative agencies and made even purely legal challenges to administrative agencies difficult.

In a case decided in 2024, however (***Loper Bright Enterprises v Raimondo***), the US Supreme Court held that courts cannot defer to an administrative agency's interpretation of an ambiguous statute that the agency enforces or operates under and that courts instead must make their own judgment about what the law means. Because the Court had been signalling greater scepticism of ***Chevron*** deference over the past several years, administrative agencies had relied less and less on the doctrine in court. The impact of the Court's decision on the success of administrative agencies' arguments in court, therefore, remains uncertain. Nevertheless, the decision removes one tool that at least some agencies had relied on heavily to justify their regulations or enforcement decisions.

In another case decided in 2024, the US Supreme Court held that administrative actions that fall under the default six-year statute of limitations can be challenged within six years of the date on which the action first injured the petitioning party rather than within six years after the action itself was taken, as all lower federal courts had previously held. This decision opens up administrative rules and regulations that have long been on the books for renewed attack under the Court's modern framework, which affords less deference to administrative agencies.

Finally, in a third case decided in 2024, the US Supreme Court held that the Securities and Exchange Commission – an agency responsible for overseeing and regulating the registration, purchase, and sale of securities – cannot issue civil penalties through proceedings in its internal administrative tribunal, and must instead file such cases in federal court. The use of administrative tribunals to impose civil penalties is a relatively new development, but this ruling may be used to challenge other types of administrative proceedings as well.

There are other significant developments in progress. Recently, the US Supreme Court endorsed a legal rule called the 'major questions doctrine', which establishes a presumption that a statute does not vest administrative agencies with significant regulatory authority unless the statute explicitly says so. The US Supreme Court has also begun scrutinising the structure of agencies, including by analysing whether the heads of agencies are unconstitutionally protected from removal at will by the President, whether decision-makers

at an agency must be confirmed by the Senate, and whether the procedures afforded by administrative agencies for in-agency adjudications comply with the US Constitution.

Law stated - 7 October 2024