

WASHINGTON UNIVERSITY SCHOOL OF LAW

**Administrative Law
Fall 2006**

**Syllabus
Professor Ronald Levin**

Texts: Michael Asimow, Arthur Earl Bonfield, & Ronald M. Levin, State and Federal Administrative Law (2d ed. 1998) and 2005 Supplement

Optional: Ernest Gellhorn & Ronald M. Levin, Administrative Law and Process in a Nutshell (5th ed. 2006).

On this syllabus, the abbreviation "CB" refers to pages in the casebook, "Supp." refers to pages in the Supplement, and a capital "N" refers to the numbered Notes and Questions following the principal cases. An asterisk means to read material in the Supplement that updates the assigned casebook reading.

Many assignments contain references to the federal Administrative Procedure Act (APA) and the 1981 Model State APA (MSAPA). Both acts are reprinted in the appendices. For purposes of class preparation, you are responsible for all sections discussed in assigned text. The final exam will be based primarily on federal law, but you will also be responsible for any state law matters that have been discussed in class.

Many sections of the casebook end with a "Problem" applying the material. We will frequently discuss these problems in class, so please think about them as part of your preparation.

I. INTRODUCTION: CB 1-16. Be prepared to discuss the problem on p. 16 (see also attached clipping on biotech).

II. CONSTITUTIONAL RIGHT TO BE HEARD (Ch. 2)

A. Due process, hearings, and mass justice: CB 18-33.

B. Interests protected by due process: liberty and property.

1. The Roth test: CB 33-42*, 50-51 NN. 2-4.*

2. Elaboration of "property": CB 42-46.*

C. Timing of the hearing: CB 51-64.*

D. Elements of a constitutionally fair hearing: CB 64-73*; G & G Sprinklers, Supp. 6-7.

E. Rulemaking versus adjudication: CB 73-82.

III. ADMINISTRATIVE ADJUDICATION: FUNDAMENTAL PROBLEMS (Ch. 3)

- A. Statutory hearing rights (federal): CB 83-93.*
- B. Statutory hearing rights (state): CB 93-100.
- C. Limiting issues to which hearing rights apply: CB 100-09.*
- D. Institutional decisions and personal responsibility: CB 109-17.*
- E. Separation of functions: CB 117-23.*
- F. Bias: CB 123-32.
- G. Ex parte contacts: CB 132-42.*
- H. The role of political oversight: CB 142-49.

IV. THE PROCESS OF ADMINISTRATIVE ADJUDICATION (Ch. 4)

- A. Investigations and discovery: CB 170-82.*
- B. Evidence at the hearing: CB 182-88.*
- C. Official notice: CB 189-95.
- D. Findings and reasons: CB 196-202.*
- E. Equitable estoppel: CB 210-17.*

V. RULEMAKING PROCEDURES (Ch. 5)

- A. Importance of rulemaking: CB 218-23.
- B. Definition of "rule": CB 223-35.
- C. Initiation of rulemaking: CB 235-44.
- D. Public participation
 - 1. Informal rulemaking: CB 244-47.*

2. Formal rulemaking: CB 247-53.

3. Hybrid rulemaking: CB 253-62.

E. Procedural fairness in rulemaking

1. Role of agency heads: CB 262-63.

2. Ex parte contacts: CB 264-79.

3. Prejudgment: CB 279-86.

F. Statement of basis and purpose: CB 286-94.

G. Issuance and publication: read only the introduction, CB 294-96.*

H. Regulatory analysis: CB 304-14.* [note that the facts of the Problem are partly stated at CB 302-03 N.7]

VI. RULES AS PART OF THE AGENCY POLICYMAKING PROCESS (Ch. 6)

A. Rulemaking exemptions

1. Good cause exemptions: CB 323-29.*

2. Procedural rules: CB 332-36.*

3. Exempted subject matter: CB 329-32.

4. Nonlegislative rules:

a. Legislative and nonlegislative rules: CB 336-38.

b. Policy statements: CB 338-47.*

c. Interpretive rules: CB 347-58.*

B. Required rulemaking: CB 358-69.

C. Petitions: CB 378-86.

D. Waivers: CB 386-94.

VII. POLITICAL CONTROL OF AGENCIES (Ch. 7)

- A. Introduction: CB 396-97.
- B. Nondelegation: CB 397-419; American Trucking, Supp. 28-35.
- C. Rationale for political review: CB 439-40.
- D. Legislative controls:
 - 1. The legislative veto: CB 440-456.*
 - 2. Alternatives to the legislative veto: CB 456-61.*
 - 3. Other legislative controls: CB 461-64.*
- E. Executive controls
 - 1. Appointment power: CB 464-73.*
 - 2. Removal power and the independent agency: CB 473-92.*
 - 3. Executive oversight: CB 492-506.*

VIII. THE SCOPE OF JUDICIAL REVIEW (Ch. 9)

- A. Issues of basic fact: CB 534-41, 545-50.*
- B. Issues of law (the Chevron doctrine): CB 557-65, 568-70; Supp. 44-49.
- C. Exceptional cases (Chevron exceptions): Mead, Supp. 49-62.
- D. Issues of discretion in adjudication: CB 578-92.*
- E. Issues of discretion in rulemaking: CB 592-610.

IX. THE AVAILABILITY OF JUDICIAL REVIEW (Ch. 10-11)

- A. Introduction: Judicial jurisdiction: CB 611-18* (read as background; limited class discussion).

B. Reviewability

1. Statutory preclusion: CB 632-38.*
2. Actions "committed to agency discretion": CB 638-46.
3. Inaction: SUWA, Supp. 62-70.

C. Standing

1. Injury in fact and zone of interests: CB 647-55.
2. Causal connection and public actions: CB 655-67.*

D. Timing

1. Finality: CB 667-75.*
2. Ripeness: CB 675-86.*
3. Exhaustion of remedies: CB 686-99.*
4. Primary jurisdiction: CB 699-706.

E. Fee awards: CB 627-32.*

Who's Watching What You Eat?

Genetically engineered foods hold more potential than they do risk.

But lack of a clear legal authority to regulate them poses a greater risk.

By MICHAEL F. JACOBSON
AND GREGORY JAFFE

Genetically engineered crops, lampooned by critics as "Frankenfoods," actually are yielding major benefits to farmers and the environment.

Cotton, long the most-sprayed crop, has been implanted with a pesticide-producing gene that enables American farmers to increase their yields and profits, while reducing their use of toxic pesticides by about two million pounds annually.

Similar benefits are expected from Monsanto's newly approved corn, engineered to kill rootworm.

In China, biotech cotton is helping small farmers increase profits while reducing pesticide poisonings and protecting wildlife. In Hawaii, papaya engineered to resist viral infections have saved that state's papaya crop. In the offing are virus-resistant sweet potatoes and cassavas that will help subsistence farmers in developing countries fend off pests.

But with each scientific step forward, agricultural biotechnology seems to take a step backward. In recent months, the controversy over biotechnology has roared again, due largely to in-

dustry and research blunders:

- University of Illinois scientists producing genetically engineered pigs sent some of the pigs' offspring to market without the Food and Drug Administration's permission.

- Prodigene, a small biotech company, contaminated soybeans intended for the food supply with an experimental corn that was engineered to produce pharmaceuticals.

- Pioneer and DowAgroSciences were fined by the Environmental

Protection Agency for growing experimental corn in Hawaii in ways that could have polluted nearby conventional crops.

Those mishaps caused no harm, but they demonstrate that the industry and researchers cannot be trusted to abide by government-imposed conditions that safeguard our food and our environment. Instead of seeking clear legal authority to regulate new products, the government defends policies that rely upon industry's voluntary actions. For example, the FDA relies on com-

panies to voluntarily consult before marketing their genetically engineered foods.

Whenever regulatory agencies must choose between strong environmental and food-safety measures or weaker measures advocated by industry, the agencies side with industry. For example, the U.S. Department of Agriculture recently issued rules for plants producing pharmaceuticals. Despite pleas from the food industry and consumer groups to prohibit growing phar-

Michael F. Jacobson is executive director of the Center for Science in the Public Interest, and **Gregory Jaffe**, director of CSP's biotechnology project.

maceutical corn in the Midwest, the USDA sided with the industry and placed no geographic restrictions on those crops.

Similarly, when the EPA approved Monsanto's rootworm-resistant corn, it ignored its own advisory committee's advice to limit plantings to half a farmer's corn acreage. Instead, the EPA is allowing farmers to plant genetically engineered corn on 80 percent of their acreage, as Monsanto wanted.

The shortsighted actions by the biotech industry and govern-

ment have alarmed some of biotechnology's most loyal backers. The National Food Processors Association, whose members include General Mills and Kraft, has bluntly warned that the Prodigene mishap validates its concerns that current practices are not sufficient to protect the integrity of the food supply. Companies like Kellogg are terrified that minuscule amounts of a pharmaceutical might accidentally contaminate their products. That kind of accident could possibly be the death-knell for agricultural biotechnology for years to come.

The current regulatory system is weak and outdated. Companies can market genetically engineered crops without the FDA approving them as safe to eat. The FDA's approval process for engineered animals lacks thorough environmental-impact assessments and is entirely secret. And crops engineered to produce industrial chemicals can be commercialized with little government oversight.

Those and other shortcomings easily could be corrected if biotech advocates and critics alike support sensible legislation that protects the public and the planet — and, indeed, the companies themselves.