Review Slides 5
The Bureaucracy and Judiciary
Spring, 2019

The Bureaucracy…

… is so gosh-darned important b/c it implements the policies set by Congress and the president. The Bureaucracy —

- Writes regulations

- Issues fines

- Testifies before Congress

- Is part of "iron triangles" and "issue networks"

Bureaucracy includes

- **Cabinet** departments (quasi-legislative (Q-L) and quasi-judicial (Q-J))

  - Broad mission — defense, education, etc.; political focus

- **Independent regulatory commissions** (Q-L and Q-J)

  - Usually protect part of economy (ex: the Fed, SEC)

- **Executive agencies** (neither Q-L nor Q-J)

  - Narrow focus, not political (ex: NASA)

- **Gov't corporations** (neither Q-L nor Q-J;

  - Privately owned, performing public function; not political (ex: Fannie Mae)

The Bureaucracy is designed to be…

… professional, neutral, specialists. The following are intended to help achieve that:

- Pendleton Act

- Office of Personnel Management

- Merit Systems Protection Board

Political patronage still exists at highest levels and can compromise effectiveness.

Relations with Congress

Congress delegates much power to bureaucracy. Why?

- Congress lacks time

- Congress lacks expertise

- Congress wants plausible deniability

Congress can check bureaucracy by —

- Power of the purse

- Oversight hearings

- Changing agency's jx or reversing its actions

- Abolish agency altogether

Relations with the President

President can —

- Appoint agency heads (subject to A&C)

- Reorganize an agency

- Issue executive orders

- Influence the budget of an agency

- Through OMB, review regs (cost-benefit analysis)

The president has lots of control over agencies but perhaps less than one might expect. Why?

- Agency heads might become agency advocates

- Expertise is in career employees. They outlast presidents.

- Other actors (namely, Congress) try to influence agencies, too.

Bureaucrats' checks

- Congress and president need agencies' expertise for effective implementation of statutes.

- Bureaucrats can affect how a statute gets implemented through —

    - regulations

    - interpretations ("street-level bureaucrat")

    - enforcement actions

Relations with the public

The public checks through —

- FOIA requests

- Open Meeting Law/Sunshine Act

- Administrative Procedures Act (allows people to comment on proposed regs)

- Lawsuits

- Complaining to Congress or White House.

The Judiciary
First, the structure

- **Dual court system** — Federal and state gov'ts have separate courts

- Federal system

  - Article III courts (a/k/a "constitutional courts"):

    - District Courts (94; original jx; not required by Constitution)

    - Appeals Courts (13; appellate jx only; not required)

    - USSC (1; almost all appellate jx; required by Constitution)

  - Article I courts, a/k/a "legislative courts")

    - Courts — like bankruptcy, tax, maritime — to help Congress.

- Our courts are based on "**adversarial system**"

Powers

- Ultimately, the power of persuasion (see, e.g., Federalist #78). Courts need to protect their legitimacy lest orders be ignored. That said…

- …courts have final say on what is legal, binding, and constitutional…

- … thanks to *Marbury v. Madison*. USSC has power of "judicial review," which is the power to declare something unconstitutional.

- Opinions can be a source of "unfunded mandates" (think *Brown v. Board of Education*).

Judicial philosophy

- How a judge rules depends in part on judicial philosophy. All judges look at literal language. Difference arises when language is ambiguous.

  - **Judicial restraint** (a/k/a strict constructionist): what did drafters understand the words to mean

  - **Judicial activism** (a/k/a loose constructionist): what was the intent of the drafters

- Other influences on a judge:

  - Stare decisis

  - Precedents of superior court

Getting a case into federal court

- Need —

    - "diversity" (parties from different states + $75k in dispute) or

    - federal Q (about Constitution, treaty, or fed'l statute or reg)

- Need "**justiciability**" (courts must be able to provide adequate remedy). So no case, for instance, that —

    - is moot (i.e., the dispute has been settled)

    - is hypothetical

    - involves wrong party

    - involves political question

How cases get before USSC

- Petition for **writ of certiorari**

  - Rule of 4

- Reasons for granting cert

  - Split in the circuits the #1 reason

- Types of decisions: majority (a/k/a "opinion of the court"), concurrence, dissent, plurality

Appointment process

- Named by President

  - Will often use informal "**litmus tests**" — this is where judicial philosophy enters

  - Note role of "senatorial courtesy" and "blue slips"

- Subject to A&C of Senate (and ONLY the Senate!)

- Theoretically **insulated from politics** by

  - lifetime appointments during "good behavior" (can be impeached, but very, very rare)

  - salaries that cannot be reduced

  - control over docket (at the Supreme Court level) — note that only about 1% of cert petitions are granted.

  - no lobbying (other than through briefs, oral argument, other formal steps)

- But note that judges go through very political nomination process

Checks

On the court by the other branches:

- President —

  - nominates (requires A&C of Senate);

  - grants pardons, thus effectively undoing what court did.

  - can ignore court order (not legally)

- Congress can —

  - change court's jx

  - change # of inferior courts

  - impeach and remove judges

  - amend Constitution

  - pass laws overturning non-constitutional decision.

On the other branches by the court:

- Declare laws/actions unconstitutional

- Force executive to turn over documents

- CJ presides over impeachment trial of president

On the court by the court:

- Stare decisis

- precedent

Review games

http://jeopardylabs.com/play/presidential-jeopardy31

https://create.kahoot.it/create#/edit/151f8e5e-0ecb-426d-a3fa-e117ee841796/overview

Or perhaps a little