

## Legislation and Regulation, Fall 2012

### First Week Assignments

You should have the casebook, Manning & Stephenson, *Legislation and Regulation* (Foundation, 1st ed. 2010). Please visit the TWEN site for the course, which contains the full syllabus and will have postings of supplementary course materials. Before each class I will post a preview similar to the ones you will find below for our first two classes. The previews will contain guidance for you and questions that I want you to think about before each class; the guidance and questions will identify the parts of the readings that I will emphasize in class. These first two classes introduce themes that we will spend lots of time on in the course. Start thinking about them now but do not worry about resolving them.

Class #1 preview: Casebook pages 1-19.

The book begins with an important federal statute, the Endangered Species Act (ESA) of 1973. Begin by reading it carefully. There is a simple rule for reading all statutes: *Every. Word. Matters.* Even punctuation matters! So read slowly and carefully. Having done that, what is your first impression about what this statute means? The issue in the Supreme Court case that interprets it, *TVA v. Hill*, is whether the statute applies retroactively to a “virtually completed” federal dam, instead of prospectively to new projects only. Before reading the case, what is your initial answer? Does the ESA answer the question? The ESA is nearly forty years old. Consider how the nation and Congress have changed in that time. Does that matter? Would it affect your interpretation of its provisions?

The *TVA* case. First, make sure you understand what kind of litigation this is, and how it wound up in the Supreme Court. What is the legal authority for this lawsuit to be filed and decided? Exactly what did the District Court (the federal trial court) decide? Note that the Supreme Court accepts the facts as found by the trial court, instead of making fact determinations itself. Thus, the Court assumes that the dam will destroy the snail darters or their “critical habitat.” The Court upholds an injunction against the Tellico Dam. That will stop the project. This is an extremely common kind of challenge to a federal (or state) administrative action. Notice the complicated background. Do you suppose the dam was ever built?

Second, notice the federal entities in the suit: the Department of Interior (a cabinet-level department) and the Tennessee Valley Authority (a government corporation). How would you expect each of these administrative beasts to behave? Why do you suppose this wasn’t settled within the executive branch without involving the courts? Should the President have knocked some heads? Would that have worked?

Third, notice the congressional entities that were involved. First, the authorizing committees formulated the ESA. These were the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce. Then the Appropriations Committee in each house enacted the funding for TVA, including amounts earmarked for Tellico in the committee reports but *not* in the appropriations legislation itself. (Pay attention to why the Justices think this

is important, and what they say about it.) How would you expect these congressional beasts to behave? What are the likely attitudes of the members of the various committees about endangered species and dams?

Reading *TVA v. Hill*. The case contains two quite capable opinions—by Chief Justice Burger for the majority and Justice Powell in dissent. In reading any case, you first need to understand what the judge is saying. This is difficult for you now, so don't be surprised. (Before long, you'll see plenty of cases in which it's very hard to tell what the judges are saying, but lack of clarity is not a problem here.) Once you understand each opinion, you need to analyze it—that is, take its reasoning apart and critique it to see where you think it's right (and why) and where you think it's wrong (and why). That's the really hard part, the fun part, and the core of being a lawyer. Here are a couple of simple ways to help yourself analyze cases. First, if there's a dissent, as in this case, the majority and the dissent will usually get into an argument that lets you unpack the reasoning of each side. Second, whether or not there's a dissent, just remember that there are two clashing parties in the case. For each major contention in an opinion you are reading, ask yourself what the opposing party would argue in response (the opinion may or may not tell you this). Ready? Let's go.

CJ Burger's opinion uses several main techniques of interpreting the statute, and J Powell's dissent adds some more. Work your way through them.

1. Text. The critical statutory term is "actions" and the issue is whether continuing work on the dam is an "action" to which the statute applies. Burger relies on the "ordinary meaning" of this "plain" language. How broad is the ordinary meaning of "action"? Would you turn to a dictionary to find out? Would a member of Congress? Does it seem to have any specialized meaning here (eg, scientific or trade meaning)?

CJ Burger thinks there is no ambiguity in this statutory term. J Powell thinks it's "fuzzy." Is he right? Here, Powell wants to find enough wiggle room in the term to allow him to invoke the canon of construction that statutes should be read, if possible, to avoid absurd results. He thinks it is absurd to read the ESA to require wasting \$53 million on this nearly-completed dam. To add force to his argument, he quotes the hypo asked by the District Judge—would it require stopping an entirely completed dam on the day before it was to be filled? Powell offers the alternative reading of the text to apply to prospective actions only, that is new projects. Is this a better reading? To buttress his reading he offers the canon that statutes are presumed to apply prospectively (for instance, criminal provisions). Thus, the canons push interpretation one way or another. There are lots of them, often pushing both ways!

2. The majority also interprets the term "actions" in light of the structure of the statute, that is the other provisions it contains. This line of analysis is always useful. What parts of the statute does the majority cite, and how much do they help?

3. Legislative history. There are two kinds of it here. First, precursor statutes contained a "practicability" condition that this one does not. How persuasive is that? Second, such a condition was in early versions of the ESA and was deleted. Again, how much does that count? CJ Burger also quotes a conferee, Rep. Dingell. Does his example resemble Tellico? Finally, the majority can find much general rhetoric about the "priceless" value of endangered species in the legislative history. How much does that tell us? Powell rejoins that the legislative history is

entirely silent on the retroactivity question, and that if it had come up, there would have been a big fight about it. Is he right?

4. Subsequent appropriations for the dam. The majority invokes two canons. First is the rule that implied repeal of earlier statutes is disfavored and will not be presumed. What accounts for this canon? Does invoking it make sense here? (Think about the role of the committees in authorizing the ESA and funding the dam. Where did the main work on the ESA take place?) Second, the majority cites the canon that an appropriations statute will not be read to modify a substantive authorization unless it does so explicitly. This is in part a subset of the first canon, and the Court also notes that it helps to enforce the congressional rule against including substance in an appropriations bill. (Think about why this rule exists and what the problems are in enforcing it.)

5. Law vs. policy. The majority claims it is just doing law not policy, and that a court has no authority to add common sense to a statute that is clear. The majority uses CJ Marshall's famous quote from *Marbury* to justify its claim as the ultimate interpreter of law. Burger then throws the great quote from *A Man for All Seasons* at Powell, accusing him of sinning by doing policy (boo!). Of course Powell does not admit that—he's just coming out another way, using standard interpretive techniques, he says. At the end of all this, who's right?

Obviously, there is a lot in this first assignment. Work hard on the *TVA* case, and expect that we will still be working on it in the second class period.

Class #2: Casebook pages 19-38.

First, absorb the basic nature of each of the three main theories of statutory interpretation. Intentionalism is a search for the *specific* intent of the legislature on the issue in question. It differs somewhat from purposivism, which is a more *general* search for the aims of the legislation, based on the premise that a search for specific intent is probably unavailing. For an illustration of the intent/purpose distinction, consider Elmer Palmer, the nice boy we meet on p. 31. Elmer's specific intent was to cause his grandfather's death by poison (and prosecutors had to prove that to convict him of murder). Elmer's general purpose, or motivation, was to inherit under the will before Francis could alter it. Textualism, especially in its strongest form, is a basic challenge to the legitimacy and workability of a search for intent or purpose. Textualism stresses the meaning of the words actually enacted into law, as opposed to such general background as legislative history. It claims to give the law predictability compared to the other approaches. As you read the cases, see what you think about this. A common formulation of textualism, often associated with Justice Scalia, is that it seeks the way a normal "person on the street" would have understood a word at the time of enactment, for example 1973 for the ESA or 1787 for the original Constitution. A frequently cited overall guide for all of these approaches is that the court is supposed to be the legislature's "faithful agent," detecting legislative policies and enforcing them, not making things up on its own.

Take a look back at *TVA* and find elements of these approaches in the two opinions. Does either Justice rely solely on one approach? If not, does one dominate either opinion?

Next, absorb the basic introduction to the legislative process. Regarding the Constitution's mandatory process in Article I, section 7, notice the careful attempt to blend three distinct constituencies and the sheer difficulty of legislating. Pay attention to the number of "vetogates," that is opportunities to stop legislation, that a bill must survive before becoming law. Modern analysts emphasize the problems of "collective action" that Congress confronts; we will often talk about them. The Constitution also authorizes Congress to make formal rules for its operations (Article I, section 5), for example the Senate's cloture rule to stop filibusters. In addition, informal traditions or norms can be very durable, such as the Senate's practice of "courtesy," by which all Senators enforce the decision of a colleague to object to a nominee in his or her home state. Modern "game theory" explores all these problems, as we will see.

The casebook then turns to the law's most basic dilemma—between the need for rules that apply to everyone and the need to do justice in an individual case. (The most famous example of the dilemma is probably the one from Bologna.) The imperfections of legislative knowledge and expression create this dilemma, as has been understood at least since Aristotle. In the English law from which ours is derived, the idea of "equity" jurisdiction arose to soften the harshness of the law's application. (Some judges were given power to issue orders having that effect. You will see this in various courses. *Riggs* is an example of an equity order to reform a will.) Notice the theme of both the ancient and modern writers that the judge's task is to stand in the shoes of the legislator and do what he or she would have done with the problem at hand (eg, compare Aristotle on p. 28 with Judge Hand on p. 21). The excerpt from Blackstone dates from the period of the formation of our Constitution. Notice the variety and the essentially modern nature of the approaches he endorsed. His work was a main guide for all American lawyers of that era. What significance does that fact have for deciding what judges should do today?

*Riggs v. Palmer* (NY 1889). This case and *Holy Trinity* in our next assignment are probably the two most famous statutory interpretation cases ever. First, notice that the plaintiffs are Francis Palmer's two daughters, who have small legacies under his will. They want the court to issue an order changing the will so that Elmer will not receive the bulk of the estate. Which of the three main approaches do each of the judges, Earl and Gray, use? With whom do you agree? How does Judge Earl know that it "never could have been" the legislature's intent to let Elmer inherit? In what sense would that produce an "absurd" result? Apart from that essentially moral conclusion and its close relative, the canon that one should not profit from one's own misconduct, what arguments can be made for the majority's result here? What force does Judge Gray's argument about the comprehensiveness of the Statute of Wills have? He argues that the statute's provision that wills could be voided in cases of "fraud, duress, or incapacity" state the exclusive grounds for refusing enforcement and the court may not add others. Do you agree? He also argues that Elmer is serving the time the criminal law imposed for his crime, so that he should not be twice punished. Which way does that cut?

If *Riggs* seems an easy case to you, what is the limit to the principle it establishes? Would a New York lawyer succeed in voiding a will if she proves that after it was made, the beneficiary joined a political party that was anathema to the testator (eg, the Nazis)? Many states require two witnesses for a will to be valid. Should a court enforce a will with only one witness signature if it appears to be a case of simple mistake?

Finally, notice the relation of statutes to the common law. Today we live in an age of statutes, which is a main reason this course exists. At the time of the Constitution and before, though, the common law decided most controversies and statutes nibbled around the edges. Common law judges became fond of saying that statutes in derogation of (that is, having the nerve to change) the common law should be strictly construed, that is, given minimal effect. This was rather obviously a power play by the judges, and it went on for a long time. Is there any role for it today? The common law does remain relevant in an age of statutes for the simple reason that statutes do not cover everything, as you will discover in such courses as torts and contracts. In addition, the common law provides default rules in statutory gaps and background understandings that inform statutory interpretation. This is a rich relationship, as you will learn.