

# IDAHO ADMINISTRATIVE LAW: A PRIMER FOR STUDENTS AND PRACTITIONERS

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## TABLE OF CONTENTS

INTRODUCTION.....	422
I. GENERAL PRINCIPLES OF ADMINISTRATIVE LAW.....	422
A. What is Administrative Law?.....	422
B. What are Administrative Agencies?.....	424
1. Administrative Agencies in the General, Everyday Sense.....	425
2. Technical Definitions of “Agency”.....	426
C. Where Do Administrative Agencies Come From?.....	427
D. What Do Administrative Agencies Do?.....	430
1. Common Agency Duties.....	430
a. Regulatory Agencies.....	430
b. Benefits Agencies.....	431
c. Agencies Connected with Public Services, Public Property, and Certain Populations.....	431
d. All or None of the Above.....	431
2. Common Agency Powers.....	432
a. Rulemaking and Adjudication.....	432
b. Advice Giving.....	436
c. Investigating and Prosecuting.....	437
d. Agency Inaction.....	438
E. How Do You Analyze Administrative Law Problems?.....	438
1. Every Agency Action Must be Authorized by a Valid Law.....	439
2. No Law Grants Unfettered Power to an Agency; Instead, Every Grant of Power Contains “Internal” Limits on Agency Action.....	440
3. Agency Actions are Always Subject not only to Internal Limits but also to External Limits.....	442
4. The External Limits on Agency Action Often Include a Judicial-Review Requirement of Reasoned Decision Making by the Agency.....	443
5. Agency Actions are Subject to Control by at Least Five Sources, the Most Important of Which is the Agency Itself.....	444
a. The Agency Itself.....	445
b. The Executive Branch.....	445
c. The Legislative Branch.....	446
d. The Judicial Branch.....	447
e. The Federal Government.....	449
f. Analysis of Agency <i>Inaction</i> Requires a Different Analysis from that of typical Agency Action.....	450

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6. Summary .....	452
II. IDAHO STATE AGENCIES .....	453
A. Idaho Agencies Associated with the Idaho Legislature .....	453
B. Idaho Agencies Associated with the Judicial Branch.....	455
C. Idaho Agencies in the Idaho Executive Branch.....	456
1. Constitutional Provisions .....	456
a. Seven Constitutional Officers and Their Offices .....	456
b. Twenty Departments .....	459
c. Eight Constitutionally Referenced Boards or Commissions ...	459
2. Statutes.....	461
a. The Seven Constitutional Officers and Their Offices .....	463
b. Twenty Departments .....	464
c. Eight Constitutionally Referenced Boards or Commissions ...	474
3. Summary .....	476
CONCLUSION .....	477

## INTRODUCTION

This article helps readers learn Idaho administrative law. The article has two main parts. Part I explores general principles of administrative law. Part I especially aids readers with limited experience in administrative law. Part I also aids more experienced readers, however, by using examples from Idaho administrative law to illustrate the general principles. Part II focuses on Idaho administrative agencies. Part II shows how these agencies fit into the three branches of Idaho state government and, in particular, how Idaho executive-branch agencies relate to the Idaho Governor and other constitutional officers.

### I. GENERAL PRINCIPLES OF ADMINISTRATIVE LAW

This part of the article discusses general principles of administrative law by answering five questions about this area of law:

- A. What is administrative law?
- B. What are administrative agencies?
- C. Where do administrative agencies come from?
- D. What do administrative agencies do?
- E. How do you analyze administrative law problems?

#### A. What is Administrative Law?

Administrative law is the law governing administrative agencies. (And administrative agencies, as discussed in more detail below in section B, are basically government entities that do the government's work using government powers.) Administrative law actually has three main components. Administrative law includes:

- (1) the *substantive* law that agencies administer – i.e., the laws that they carry out, enforce, or execute – such as environmental law, labor law, mining law, and tax law.<sup>1</sup>
- (2) the *procedural* law that controls *how* agencies administer the substantive law for which they are responsible. Examples of procedural laws include statutes that require agencies to hold hearings on proposed regulations.
- (3) the law governing *judicial review* of agency action, such as statutes, judicial decisions, and court rules prescribing how, when, and in what courts you can get judicial review of an agency’s denial of a permit.

The term “administrative law” does not refer to any particular *source* of law. On the contrary, administrative law can come from any source of law:

- international law, such as the General Agreement on Tariffs and Trade (GATT), under which the World Trade Organization issues rules and adjudicates disputes about international trade.<sup>2</sup>
- constitutional law, such as the Due Process Clauses of the Fifth and Fourteenth Amendments, which require fair procedures for agency actions that deprive, or threaten to deprive, someone of life, liberty, or property.<sup>3</sup>
- statutes, such as the Idaho Environmental Protection and Health Act,<sup>4</sup> which is administered by the Idaho Department of Environmental Quality, and the Idaho Administrative Procedure Act,<sup>5</sup> which prescribes procedures for Idaho agencies to follow when taking certain actions and authorizes judicial review of agency action.
- agency rules and other executive-branch material, such as the Idaho Board of Medicine’s rules for the licensing and disciplining of doctors<sup>6</sup> and executive orders issued by the Governor of Idaho.<sup>7</sup>

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1. The substantive laws that agencies administer go from A to Z, including, for example, laws regulating these topics: agriculture, banking, consumer protection, disability, environmental protection, food and drug, gaming, hazardous waste, immigration, job safety, kids, labor, mining, nuclear power, occupational licensing, public utilities, railroads, securities law, tax law, underground wells, vocational training, workers compensation, and zoning law.

2. See generally MARK K. NEVILLE, INTERNATIONAL TRADE LAWS OF THE UNITED STATES ¶ 2.03[1], 2013 WL 5356612 (2013).

3. U.S. CONST. amends. V & XIV; see, e.g., Idaho Dep’t of Health & Welfare v. Doe, 273 P.3d 685, 688, 152 Idaho 644, 647 (2012) (due process applies when agency seeks termination of parental rights); Bon Apetit Gourmet Foods, Inc. v. State, Dep’t of Emp’t, 793 P.2d 675, 676–77, 17 Idaho 1002, 1003–04 (1989) (holding that statute violated equal protection guarantees of U.S. and Idaho constitutions by treating door-to-door sales agents of gourmet food business as “covered employees” for purposes of state unemployment compensation statute).

4. IDAHO CODE ANN. §§ 39-101 to 39-130 (2011 & Supp. 2014).

5. IDAHO CODE ANN. §§ 67-5201 to 67-5292 (2014).

6. IDAHO ADMIN. CODE r. 22.01.01.050 (2015); See, e.g., Rosebud Enter., Inc. v. Idaho Pub. Utils. Comm’n, 917 P.3d 766, 775, 128 Idaho 609, 618 (1996) (stating that, although regulatory bodies are “not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past,” the Idaho Public Utilities Commission was required to

- court decisions interpreting the above sources of law and applying statutes and other laws governing judicial review of agency action.<sup>8</sup>

Of all these sources, statutes and executive-branch material such as agency rules are the most important, because most administrative law problems require you to identify and analyze the applicable statutes and executive-branch material. But you may also need to identify and analyze the other sources of administrative law listed above in your analysis of an administrative law problem. Indeed, you can think of the list above as a comprehensive checklist of potentially applicable sources of law to research when dealing with an administrative law problem.

### Checklist for Administrative Law Research

1. international law
2. constitutional law
3. statutory law
4. executive-branch material
5. judicial decisions

Administrative law is sprawling and pervasive. It deals with the thousands of administrative agencies that exist at the federal, state, tribal, and local levels of government. It encompasses both substantive and procedural law, as well as the law of judicial review, and it can come from every possible source of law. Even so, administrative law can be explored in an organized way, and administrative law problems can be analyzed systematically. This article aims to provide an organized exploration of Idaho administrative law to help you analyze Idaho administrative law problems systematically.

#### B. What are Administrative Agencies?

In the everyday sense of the word, “agencies” are simply government entities—not including courts or legislatures—that do the government’s work using government powers. As discussed below, however, sometimes the term “agency” has a technical meaning. Below we explore the everyday meaning of the term “agency” and its technical meanings.

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adequately explain its departure from prior rulings for court to determine whether its decision was arbitrary or capricious).

7. IDAHO CODE ANN. § 67-802 (2014) (authorizing Governor to issue executive orders, which “shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state”).

8. *See, e.g.,* Idaho Power Co. v. Idaho Pub. Utils. Comm’n, 316 P.3d 1278, 1286, 155 Idaho 780, 788 (2013) (reviewing Public Utilities Commission’s refusal to approve contracts between electric utility and wind farm); Duncan v. State Bd. of Accountancy, 232 P.3d 322, 324, 149 Idaho 1, 3 (2010) (describing “four-pronged test” court uses to review agency interpretation of statute or rule).

### 1. Administrative agencies in the general, everyday sense

Agencies, as stated above, do the government's work. Thus, they collect taxes and trash; they regulate trades and professions; they hand out government benefits and impose fines for violations of the law. They do all these things and much more.

Administrative agencies go by different names:

- “agency” – e.g., National Security Agency, Central Intelligence Agency, Agency for International Development
- “board” – e.g., Idaho Board of Tax Appeals, Idaho State Board of Land Commissioners, Idaho Board of Education, National Labor Relations Board
- “bureau” – e.g., Idaho Bureau of Industrial Licenses, Idaho Bureau of Homeland Security, and Federal Bureau of Investigation (FBI)
- “commission” – e.g., Idaho Industrial Commission, Idaho Public Utilities Commission, Idaho Tax Commission, Nuclear Regulatory Commission
- “department” – e.g., Idaho Department of Lands, Idaho Department of Environmental Quality, Idaho Department of Water Resources, U.S. Department of Justice
- “division” – e.g., Idaho Division of Purchasing, Idaho Division of Building Safety, Division of Financial Practices in the Federal Trade Commission
- “office” – e.g., Idaho Office of Energy Resources, Idaho Office of Drug Policy, the Office of Management and Budget in the White House
- “service” – e.g., Internal Revenue Service, U.S. Forest Service, U.S. Marshals Service

Complicating matters, some agencies dwell within larger agencies. For example, the Idaho Division of Purchasing is in the Idaho Department of Administration;<sup>9</sup> the federal Bureau of Land Management is in the U.S. Department of the Interior;<sup>10</sup> and the Internal Revenue Service is in the U.S. Treasury Department.<sup>11</sup> Wheels within wheels!

An administrative agency may be associated with any of the three branches of government: legislative, executive, or judicial. But most agencies are in, or associ-

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9. IDAHO CODE ANN. § 67-5714 (2014).

10. Reorganization Plan No. 3 of 1946, 5 U.S.C. app. 4 § 403 (1946), available at <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5a-node83-leaf92&num=0&edition=prelim>.

11. The IRS began life in an 1862 federal statute creating in the Treasury Department “the office of the Commissioner of Internal Revenue.” Revenue Act of 1862, ch. 119, 12 Stat. 432 (1862). It later was renamed the “Bureau of Internal Revenue,” and thereafter the “Internal Revenue Service.” See *Brief History of IRS*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/uac/Brief-History-of-IRS> (Last visited April 21, 2015).

ated with, the executive branch.<sup>12</sup> That is because most agencies “execute”—or, to use roughly synonymous terms, they carry out, administer, or enforce—the law.<sup>13</sup> In doing so, administrative agencies often have power to affect the legal rights and duties of individuals, companies, and the public. Because of that power, they are an important subject of study for lawyers.

## 2. Technical Definitions of “Agency”

Above we defined “agency” in the general, everyday sense. The term “agency” or “administrative agency” may also have a technical definition, and you might have to analyze that definition when handling an administrative law problem.

The most important technical definition of “agency” is the one found in an administrative procedure act (APA). There is a federal APA that applies to federal agencies.<sup>14</sup> In addition, every State, including Idaho, has an APA that governs that State’s agencies.<sup>15</sup> The Idaho APA defines “agency” as follows:

**Idaho Code § 67-5201. Definitions**

As used in this act: . . .

(2) “Agency” means each state board, commission, department or officer authorized by law to make rules or to determine contested cases, but does not include the legislative or judicial branches, executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution, the state militia or the state board of correction.<sup>16</sup>

The Idaho APA’s definition of “agency” does not match the everyday meaning of the word. For example, the Idaho APA’s definition does not include local school districts and other local agencies, even though they are agencies in the everyday sense.<sup>17</sup> Nor does the Idaho APA definition include the Idaho Board of Correction, though that, too, is an agency in the everyday sense.<sup>18</sup> By the same token, the Idaho APA’s definition of “agency” *does* include human beings—namely, with some exceptions, any “officer authorized by law to make rules or to determine con-

12. The text says that most agencies are “in, or associated with,” the executive branch because some scholars and U.S. Supreme Court precedent treat so-called “independent agencies” of the federal government as separate from the executive branch. *See generally* Kiri Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 775–84 (2013). Examples of federal agencies associated with the legislative branch are the General Accountability Office and the Library of Congress. *See* *Bowsher v. Synar*, 478 U.S. 714, 731, 746 n.11 (1986). An example of a federal agency in the judicial branch is the United States Sentencing Commission. *See* 28 U.S.C. § 991(a) (West 2014).

13. RICHARD H. SEAMON, *ADMINISTRATIVE LAW: A CONTEXT AND PRACTICE CASEBOOK 7* (Michael Hunter Schwartz ed., Series Editor, Carolina Academic Press 2013).

14. Administrative Procedure Act, 60 Stat. 244 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301(2)(E), 5362, 7521 (2012)).

15. You can find citations to the APAs of the 50 States and the District of Columbia at *ABA Administrative Procedure Database*, FLORIDA STATE UNIVERSITY COLLEGE OF LAW, <http://www.law.fsu.edu/library/admin/admin3.html> (last visited April 21, 2015).

16. IDAHO CODE ANN. § 67-5201(2) (2014).

17. *See, e.g., Zattiero v. Homedale Sch. Dist.* No. 370, 51 P.3d 382, 385, 137 Idaho 568, 571 (2002).

18. IDAHO CODE ANN. § 67-5201(2) (2014).

tested cases”—even though people aren’t “agencies” in the everyday sense of that word.<sup>19</sup> In short, you cannot use gut instinct to identify an “agency,” as the Idaho APA (and other APAs) define that term.

The Idaho APA’s definition of “agency” matters because the Idaho APA prescribes procedures and other requirements that every “agency” must follow, and it authorizes judicial review of “agency action.”<sup>20</sup> To determine whether the Idaho APA’s procedures, requirements, and judicial review provisions apply to a particular Idaho governmental entity or official, you must determine whether the entity or official falls within the Idaho APA’s definition of “agency” (and if so whether it has taken “agency action”).<sup>21</sup> If the entity or official is not an “agency,” the Idaho APA will not apply to that entity or official unless some other law expressly makes the Idaho APA applicable to that entity or official.<sup>22</sup>

Statutes other than the Idaho APA may define the term “agency” differently. For example, the Idaho Disaster Preparedness Act defines “agency” in a way that—the Idaho Supreme Court held in *Baca v. State*—covered the Idaho National Guard.<sup>23</sup> The Court’s holding in *Baca* rested on an interpretation of that particular Act’s definition of “agency.”<sup>24</sup> The Court’s holding does not necessarily mean that the Idaho National Guard would be an “agency” for purposes of the Idaho APA. That’s a separate issue.<sup>25</sup> More generally, a governmental entity may qualify as an “agency” for purposes of some statutes but not others.<sup>26</sup> It all depends on how each statute defines “agency.”

### C. Where Do Administrative Agencies Come From?

Most—but not all—administrative agencies are created by statutes enacted by the legislature with the approval (or over the veto) of the chief executive. Thus, most federal agencies are created by Acts of Congress, and most Idaho agencies are

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19. *Id.*; see also *Arambarri v. Armstrong*, 274 P.3d 1249, 1255–56, 1255 n.2, 152 Idaho 734, 740–41, 740 n.2 (2012) (apparently treating agency director as “state agency” for purposes of Idaho statute, IDAHO CODE ANN. § 12-117 (2010 & Supp. 2014), that authorizes attorney fees against a “state agency” in some circumstances).

20. See, e.g., IDAHO CODE ANN. § 67-5221 (2014) (requiring “the agency” to publish notice of proposed rulemaking before adopting, amending, or repealing a rule); *id.* § 67-5270 (broadly authorizing “[j]udicial review of agency action”).

21. *Id.* § 67-5201(3) (defining “agency action”).

22. See *Black Labrador Investing, LLC v. Kuna City Council*, 205 P.3d 1228, 1231–33, 147 Idaho 92, 95–97 (2009) (explaining that while the Idaho APA generally does not authorize judicial review of local government actions, the Local Land Use Planning Act does authorize review under the Idaho APA of certain local government actions).

23. *Baca v. State*, 810 P.2d 720, 722–23, 119 Idaho 782, 784–85 (1991).

24. *Id.*

25. Indeed, the Idaho National Guard might not fall within the Idaho APA’s definition of agency, which excludes the “state militia.” IDAHO CODE ANN. § 67-5201(2) (2014); see also IDAHO CODE ANN. § 46-103 (2014) (providing that “[t]he militia of the state of Idaho” is divided into three classes, one of which is “[t]he national guard”).

26. Cf. *Noble v. Kootenai Cnty. ex rel. Kootenai Cnty. Bd. of Comm’rs*, 231 P.3d 1034, 1039 n.3, 148 Idaho 937, 942 n.2 (2010) (holding that Kootenai County Board of Commissioners is “a governing body of a public agency” for purposes of Idaho open meetings law, IDAHO CODE ANN. § 67-2342(1) (2014), but noting that the Board is not an “agency” as defined in the Idaho APA).

created by statutes enacted by the Idaho Legislature. Indeed, there is a saying in administrative law: “Agencies are creatures of statute.”<sup>27</sup>

The statute creating the agency goes by various names. It may be called the agency “charter,” the agency “mandate,” the agency “organic” statute, or the agency “enabling” statute. Idaho courts sometimes use the term “enabling statute” or “enabling legislation” to refer to statutes that create or confer powers on an agency.<sup>28</sup> The agency’s enabling statute typically includes a provision worded like the following one, which establishes the Idaho Department of Correction:

**Idaho Code § 20-201. Department of correction created**

There is hereby created the department of correction which shall consist of the board of correction and the commission of pardons and parole. The department of correction shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of state government.

When you have a matter involving a particular agency, you must identify the agency’s organic statute. The organic statute typically gives the agency certain duties and powers to carry out those duties. Other statutes may change the agency’s powers and duties, but the organic statute is the place to start. You might say it contains the agency’s DNA.

Though most agencies are created by statute, not all are. Instead, some agencies are created by the state constitution, and still others are created by executive directive. For example, the Idaho Constitution created the Board of Examiners.<sup>29</sup> An Idaho executive order created the Board of Juvenile Corrections.<sup>30</sup> To cite a federal agency example, the U.S. Environmental Protection Agency was created by a reorganization plan approved by President Richard Nixon.<sup>31</sup> In any event, all agencies spring from *some* law — they don’t spring up spontaneously like mushrooms — and in most (but not all) cases that law is a statute.

In contrast to statutes, constitutions, and executive directives, the common law is not a type of law that creates agencies. There is no such thing as a common law agency.

The *source* of law creating an agency (e.g., constitution, statute, executive directive) matters because of the hierarchy of laws. Under that hierarchy, the Constitution trumps conflicting statutes, and statutes trump conflicting executive-branch materials like agency rules and executive orders. Thus, when the Idaho Constitution grants power to an agency or officer, that constitutional power cannot be restricted by Idaho statute or executive action.<sup>32</sup> When multiple laws from multiple sources

27. *In re Bd. of Psychologist Exam’rs Final Order Case No. PSY-P4b-01-010-002*, 224 P.3d 1131, 1137, 148 Idaho 542, 548 (2010); *accord Wilson v. Comm’r*, 705 F.3d 980, 993 (9th Cir. 2013).

28. *See, e.g., Asarco Inc. v. State*, 69 P.3d 139, 143, 138 Idaho 719, 723 (2003).

29. IDAHO CONST. art. IV, § 18.

30. *See* IDAHO EXEC. ORDER 2006-38, 7 Idaho Admin. Bull. 21 (2007).

31. Reorganization Plan No. 3 of 1970, 5 U.S.C. § 906 (2014); *see also* Reorganization Plan, *supra* note 10 (noting that U.S. Bureau of Land Management was created by a reorganization plan).

32. *See Evans v. Andrus*, 855 P.2d 467, 471–72, 124 Idaho 6, 10–11 (1993); *Williams v. State Leg.*, 722 P.2d 465, 466, 111 Idaho 156, 157 (1986); *see also* IDAHO CODE ANN. § 67-802 (2014) (stating that executive orders “shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state”); *Cenarrusa v. Andrus*, 582 P.2d 1082,

address an agency's duties and powers, you may have to synthesize and reconcile these various laws, taking into account their place in the hierarchy and any inconsistencies among them.

Laws creating administrative agencies have been enacted since the United States began. Indeed, the framers of the U.S. Constitution contemplated that the executive branch of the federal government would include agencies. They authorized the President to demand written legal opinions from "the principal Officer in each of the executive *Departments*."<sup>33</sup> They also authorized the heads of executive departments to appoint "inferior officers."<sup>34</sup> Thus the framers contemplated an executive branch that would include executive departments populated by principal officers and inferior officers. In accordance with the framers' understanding, the first Congress created three executive departments (agencies) in 1789: the Department of Foreign Affairs (which today is called the Department of State), the Department of War (today's Department of Defense), and the Treasury Department.<sup>35</sup>

Similarly, the Idaho Constitution recognizes the existence of state agencies. Indeed, as mentioned above, the Idaho Constitution itself creates some agencies, such as the Board of Examiners.<sup>36</sup> In 1972, the people of Idaho approved this provision in the Idaho Constitution apparently to control the growing number of state agencies:

**Idaho Constitution, Article IV**

Section 20. Departments limited. All executive and administrative officers, agencies, and instrumentalities of the executive department of the state and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction, shall be allocated by law among and within not more than twenty departments by no later than January 1, 1975. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections or units in such a manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary agencies may be established by law and need not be allocated within a department; however, such temporary agencies may not exist for longer than two years.<sup>37</sup>

For better or worse, new agencies are created all the time. At the federal level, for example, the September 2001 terrorist attacks on the United States prompted

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1092, 99 Idaho 404, 414 (1978) (holding that Governor's exercise of veto power failed because it did not comply with Idaho Constitution); *Hawley v. Bottolfsen*, 98 P.2d 634, 636, 61 Idaho 101, 103 (1940) (holding that statute authorized court to review whether Governor removed official in accordance with statutory power).

33. U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

34. *Id.* at art. II, § 2, cl. 2.

35. Act of July 27, 1789, ch. 4, 1 Stat. 28 (establishing an Executive Department, to be denominated the Department of Foreign Affairs); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (establishing the Department of War); Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (establishing the Treasury Department).

36. IDAHO CONST. art. IV, § 18.

37. IDAHO CONST. art. IV, § 20.

creation of the U.S. Department of Homeland Security.<sup>38</sup> The Great Recession of 2007–2009 prompted creation of the Consumer Financial Protection Bureau.<sup>39</sup> Once created, an agency tends to endure and expand. Cumulatively, the number of agencies and their power over people’s legal rights and duties tend to increase with time. That trend makes it incumbent on lawyers to learn how to deal with them.

#### D. What Do Administrative Agencies Do?

The short answer is that agencies do whatever their creator, typically the legislature, tells them to do. Every agency receives, through the laws governing it, a set of duties—that collectively constitute the agency’s “mission” or “mandate”—and powers to carry out those duties. The duties typically involve administration of substantive laws on particular subjects, such as environmental law, insurance law, and workplace safety law.

Beyond those generalizations, we can usefully categorize (a) common agency duties and (b) common agency powers. Categorization is useful for systematic analysis of administrative law problems.

##### 1. Common Agency Duties

Many agencies have duties connected with one or more of the following matters:

- a. regulating private sector conduct (including through licensing);
- b. distributing government benefits;
- c. providing public services, administering public lands and other public property, or managing populations (e.g., institutionalized persons) who have a special relationship with the government.

Some agencies do all of the above, while others do none of the above.

##### a. Regulatory Agencies

Agencies whose main job is to regulate private conduct—e.g., by telling people what they can and cannot do—are called regulatory agencies. Examples at the federal level include the Environmental Protection Agency and the Occupational Safety and Health Administration. Examples of Idaho state regulatory agencies include the Department of Environmental Quality (DEQ) and the Idaho Department of Insurance. Many of these agencies exercise regulatory powers partly through licensing. For example, the DEQ issues permits restricting air pollution from Idaho businesses.<sup>40</sup>

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38. Homeland Security Act of 2002, tit. I, § 101(a), Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 111(a)).

39. Dodd–Frank Wall Street Reform and Consumer Protection Act, tit. X, § 2011(a), Pub. L. No. 111-203, 124 Stat. 1376 (codified at 12 U.S.C. § 5491(a)).

40. IDAHO CODE ANN. § 39-115 (2011).

### b. Benefits Agencies

Some agencies exist mostly to grant government benefits. For example, the U.S. Centers for Medicare and Medicaid Services grant (and deny) Medicare and Medicaid benefits, by which tens of millions of people get free or reduced-cost health care. The Idaho Department of Health and Welfare helps administer the federal Medicaid program as well as State-created benefit programs.<sup>41</sup> These benefits agencies do, of course, have regulations (also known as rules). The regulations, for example, restrict who is eligible for the benefits and regulate the providers of those benefits (e.g., health care providers). Still, these benefits agencies typically are not considered “regulatory” agencies, because the regulations merely advance the central mission of handing out benefits.

### c. Agencies Connected with Public Services, Public Property, and Certain Populations

Besides regulatory and benefits agencies, still other agencies have duties and powers associated with providing public services, such as water and sewer service and police and fire protection; administering public property, such as state parks; and managing certain populations who have a special relationship with the government, such as government employees, inmates, and public school students (not to suggest invidious comparisons among these groups). The Idaho Board of Correction, for example, manages the State’s prison population, as head of the Idaho Department of Correction.<sup>42</sup>

Although the Board of Correction would not be called a “regulatory” agency, it does regulate the activities of inmates, and gives them “benefits” such as health care.<sup>43</sup> Similarly, in administering federal lands, the federal Bureau of Land Management regulates the use of these lands, and grants benefits such as permits allowing ranchers to graze livestock on those lands.

### d. All or None of the Above

Some agencies have more than one of the jobs listed above, and others do none of the above. For example, the Idaho Department of Agriculture both exercises regulatory powers over agricultural activity<sup>44</sup> and also provides financial assis-

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41. IDAHO CODE ANN. § 56-203 (2012 & Supp. 2014).

42. See IDAHO CONST. art. X, § 5 (requiring Idaho legislature to establish “the state board of correction,” which “shall have the control, direction and management of the penitentiaries of the state, their employees and properties, and of adult felony probation and parole”); IDAHO CODE ANN. § 20-201 (2014) (establishing Department of Correction); *id.* § 20-209 (2014) (statutory powers of Board of Correction).

43. IDAHO CODE ANN. § 20-209(4) (2014) (authorizing Board of Correction “to promulgate rules required by law or necessary or desirable to carry out all duties assigned to the department of correction pursuant to the provisions of chapter 8, title 20, Idaho Code”); *id.* § 20-209(1) (stating that Board “shall provide for the care, maintenance, and employment of all prisoners now or hereinafter committed to its custody.”).

44. See, e.g., IDAHO CODE ANN. § 22-4903(1) (2014) (authorizing director of Department of Agriculture “to regulate beef cattle animal feeding operations to protect state natural resources, including surface water and ground water.”).

tance to farmers.<sup>45</sup> By comparison, the Idaho Secretary of State carries out a unique, difficult-to-categorize activity: oversight of the election process (among other duties).<sup>46</sup>

All of this is to say that the classification of agencies based on three types of duties—regulating, granting benefits, and administering public services, public property, and special populations—ignores agencies with overlapping duties and agencies whose duties don’t fit into any of those categories. Still, you encounter these categories in the world of administrative law, and so they are worth knowing.

## 2. Common Agency Powers

This section discusses types of agency activities that lawyers commonly encounter in practicing administrative law. Those activities include: (a) rulemaking and adjudication; (b) advice giving; (c) investigating and prosecuting; and (d) taking no action.

### a. Rulemaking and Adjudication

Many agencies get power from their creator to (1) make rules; or (2) adjudicate cases. In fact, the Idaho APA defines “agency” to mean certain governmental entities “authorized by law [1] to make rules or [2] to determine contested cases.”<sup>47</sup> “Contested cases” are cases—such as individual applications for permits or government benefits—that are initially adjudicated within an agency, rather than in a court.<sup>48</sup> The Idaho APA prescribes separate procedures for agency rulemaking and agency adjudication of contested cases, thus reflecting both the importance of those two activities and the distinction between them.<sup>49</sup> Indeed, their importance and the distinction between them are recognized throughout the world of administrative law. We explore the importance of rulemaking and adjudication, and the distinction between them, in this subpart.

Agency rulemaking and adjudication have central importance in administrative law for three reasons.

First, many agencies have both rulemaking and adjudicatory powers. This is reflected in the Idaho APA’s definition of an “agency” as an entity that can make rules or decide contested cases, and in the Idaho APA’s prescription of procedures for agencies’ exercise of those two powers.<sup>50</sup>

45. For example, the federal Agricultural Act of 2014 continues a “special crop block grant program” that is administered in Idaho by the Idaho Department of Agriculture. Pub. L. No. 113-79, § 10010, 128 Stat. 949 (Feb. 7, 2014); Press Release, State of Idaho, *Additional Specialty Crop Grant Applications Will be Accepted for 2014 Funding* (June 3, 2014), available at <http://www.agri.idaho.gov/Categories/NewsEvents/Documents/PressReleases/2014/AdditionalSpecialtyCropGrantApplicationsAccepted20140603.pdf>.

46. See IDAHO CODE ANN. § 34-201 (2008) (“The secretary of state is the chief election officer of this state . . .”).

47. IDAHO CODE ANN. § 67-5201(2) (2014) (bracketed numerals added).

48. See *id.* § 67-5201(6) & (12) (defining “contested case” as a type of agency proceeding); see also 73A C.J.S. *Public Administrative Law and Procedure* § 225 (2014) (“Nature of proceedings—What constitutes an adjudication or contested case”).

49. See IDAHO CODE ANN. §§ 67-5220 to 67-5231 (rulemaking); *id.* §§ 67-5240 to 67-5255 (contested cases).

50. IDAHO CODE ANN. § 67-5201(2) (2014).

Second, each power has defining features. Thus, for example, when an agency makes rules, it is making prescriptions of general applicability—i.e., prescriptions that apply to entire categories of people, not to particular individuals. The general applicability of rules characterizes the rules of both state and federal agencies; it characterizes rules whether they regulate air pollution or define eligibility for government benefits.<sup>51</sup> Similarly, when an agency adjudicates a case, it decides the legal rights or duties of particular individuals or businesses.<sup>52</sup> The particularized applicability of adjudications characterizes adjudications by state as well as federal agencies; it characterizes the adjudication of applications for permits and applications for government benefits.<sup>53</sup> In short, all agency rulemakings have certain things in common, as do all agency adjudications. These common features make it possible and valuable to study rulemaking and adjudication somewhat generically. That is why law school textbooks on administrative law typically devote separate, entire chapters to agency rulemaking and agency adjudication.

Third and most importantly, rulemaking and adjudication have importance because they are the main activities by which agencies affect people's legal rights and duties.<sup>54</sup> When an Idaho agency has the power to make rules and uses that power in accordance with the rulemaking procedures of the Idaho APA, the resulting rule, "although not rising to the level of statutory law, has 'the force and effect of law.'"<sup>55</sup> When an agency adjudicates a contested case, the agency issues an "order" that "determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons."<sup>56</sup> Thus, although Idaho agencies cannot make law,<sup>57</sup> many agencies can make rules and issue orders, either of which can directly affect legal rights and duties. Federal agencies have similar power to affect people's legal rights and duties through rulemaking and adjudication.

Although both rulemaking and adjudication are important powers, they are also distinct. The distinction dates back to two U.S. Supreme Court cases: *Londoner v. City and County of Denver*,<sup>58</sup> and *Bi-Metallic Investment Co. v. State Board of*

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51. Compare *id.* § 67-5201(19), (20) (Idaho APA definitions of "rule" and "rulemaking"), with 5 U.S.C. § 551(4), (5) (2012) (federal APA definitions of same terms).

52. IDAHO CODE ANN. § 67-5201(12) (2014) (defining "order" as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons"); see also *id.* § 67-5201(8) (defining "contested case" as a proceeding that results in the issuance of an "order").

53. Compare IDAHO CODE ANN. § 67-5201(6), (12) (2014) (Idaho APA definitions of "contested case" and "order"), with 5 U.S.C. § 551(6), (7) ("order" and "adjudication").

54. See Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 IDAHO L. REV. 273, 282–83 (1993) (amended Idaho APA encompasses "all state executive entities—other than constitutional officers—empowered to take actions that affect the legal rights, duties, or other interests of the members of the public"); cf. *United States v. Mead*, 533 U.S. 218, 226–27 (2001) (congressional delegation of power to make rulings "carrying the force of law" can be shown "by an agency's power to engage in adjudication or notice-and-comment rulemaking").

55. *Mason v. Donnelly Club*, 21 P.3d 903, 907, 135 Idaho 581, 585 (2001) (quoting *Mead v. Arnell*, 791 P.2d 410, 414, 117 Idaho 660, 664 (1990)).

56. IDAHO CODE ANN. § 67-5201(12) (2014); see also *Laughy v. Idaho Dep't of Transp.*, 243 P.3d 1055, 1059–61, 149 Idaho 867, 871–873 (2010) (Department of Transportation's issuance of a permit was an "order" in a "contested case," even though the Department used informal procedures and did not consider the proceeding to be a contested case).

57. *Mead*, 791 P.2d at 424.

58. *Londoner v. City and County of Denver*, 210 U.S. 373 (1908).

*Equalization of Colorado*.<sup>59</sup> Both *Londoner* and *Bi-Metallic* deserve brief description.

In *Londoner*, a city board of public works—an “agency” in the everyday sense of that word—assessed the cost of paving a street against the owners of properties abutting that street. Each owner’s assessment was based on the extent to which his or her particular parcel of property benefited from the improvement.<sup>60</sup> The assessments were enforceable by liens on each property.<sup>61</sup> The Court held that the Due Process Clause entitled each property owner to individualized notice, and a right to be heard, before the assessment was finally determined.<sup>62</sup>

In the later case of *Bi-Metallic*, however, the Court rejected a due process argument by property owners. In *Bi-Metallic*, Colorado agencies increased the assessed value of *all* taxable property in Denver by 40% across the board.<sup>63</sup> The Court in *Bi-Metallic* held that the Due Process Clause did not give every owner of taxable property in Denver a right to individualized notice and a right to be heard before this across-the-board increase was made final, explaining:

Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. . . . If the result in this case had been reached, as it might have been by the state’s doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it . . . . There must be a limit to individual argument in such matters if government is to go on.<sup>64</sup>

The *Bi-Metallic* Court distinguished *Londoner* as involving a different type of government action:

In *Londoner* . . . a local board had to determine ‘whether, in what amount, and upon whom’ a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.<sup>65</sup>

The “general determination” at issue in *Bi-Metallic* – which increased *all* assessed property values by 40% – was a legislative-type determination, whereas the assessments in *Londoner* – which affected a “small number” of people on “individual grounds” – was an adjudicative determination.<sup>66</sup>

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59. *Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado*, 239 U.S. 441 (1915).

60. *Londoner*, 210 U.S. at 375–77.

61. *Id.* at 380.

62. *Id.* at 385–86.

63. *Bi-Metallic*, 239 U.S. at 443.

64. *Id.* at 445.

65. *Id.* at 445–46.

66. *See id.* at 446.

Thus, as the Court later said, *Londoner* and *Bi-Metallic* established “[t]he basic distinction between rulemaking and adjudication . . . .”<sup>67</sup> The distinction “turns *primarily* on applicability: orders—like judicial decrees—affect identified parties; rules—like statutes—affect classes of persons.”<sup>68</sup> The distinction is fundamental to administrative law, and is recognized in every State and at the federal level.

In *Bi-Metallic*, the Court distinguished rulemaking from adjudication to determine the applicability of the Due Process Clause to an agency’s action. The so-called “*Londoner/Bi-Metallic* distinction” was later built into the Federal APA and every state APA, including Idaho’s.<sup>69</sup> In APAs, the distinction underlies APA provisions that determine whether an agency action is subject to APA-prescribed procedures for agency rulemaking proceedings or, instead, to APA-prescribed procedures for agency adjudicatory proceedings (which are called “contested cases” in Idaho and many other States).<sup>70</sup> Typically, APA procedures for rulemaking do not require the agency to give individualized notice and a right to be heard to everyone who might be adversely affected by the proposed agency rule. In contrast, APA adjudication procedures typically *do* require individualized notice and a right to be heard for agency adjudications that might deprive identified persons of liberty or property—e.g., by revoking their driver’s license or license to practice their profession.<sup>71</sup> The different procedures that APAs typically provide for rulemaking and adjudication reflect that it is generally only agency adjudication – and not agency rulemaking—that, as a matter of due process, requires individualized notice and a right to be heard.

Agency rulemaking and adjudication are often described in administrative law circles as “quasi-legislative” and “quasi-judicial” powers, respectively.<sup>72</sup> The terms reflect resemblances between rulemaking and legislating and between agency adjudication and court adjudication. The terms “quasi-legislative” and “quasi-judicial,” should not, however, obscure that the agencies who receive rulemaking and adjudicatory powers are usually in, or associated with, the *executive* branch of government; they receive these powers for the purpose of carrying out—i.e., “executing”—the laws for which they are responsible.<sup>73</sup> That purpose makes agency rule-

67. *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 244 (1973).

68. *Gilmore & Goble*, *supra* note 54, at 284.

69. *Id.* (“The distinction between adjudicative and legislative decision is central to the [Idaho] APA because it determines whether the agency is required to employ the ‘contested case’ procedures or may instead rely upon the less procedurally demanding ‘rulemaking’ requirements.”) (footnotes omitted); *see also* SEAMON, *supra* note 13, at 82 (“[T]he entire [federal Administrative Procedure] Act is based upon a dichotomy between rule making and adjudication.”) (quoting U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947), *available at* <http://www.law.fsu.edu/library/admin/1947cover.html> (last visited April 21, 2015)).

70. *Gilmore & Goble*, *supra* note 54, at 284.

71. *See, e.g.*, *Platz v. State*, 303 P.3d 647, 659—60 (Idaho Ct. App. 2013).

72. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010).

73. *See id.* at 485, 497 (treating federal agency that had rulemaking and adjudicatory powers as part of executive branch, over which President must constitutionally have adequate oversight to carry out his duty to see that the laws are faithfully executed); *see also* *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011) (explaining that Court had upheld statutes authorizing federal agencies to adjudicate disputes between private parties “when essential to a limited regulatory objective within the agency’s authority”); *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (“From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the

making and agency adjudication fundamentally different from the work of legislatures and courts.

Although agency rulemaking and adjudication are distinct from each other in theory, they can come together in practice. For example, once an agency issues a rule, the agency may have the power to enforce its rule by initiating an agency adjudication against someone whom the agency believes has violated its rule.<sup>74</sup> Clients facing an agency enforcement proceeding – which is a type of agency adjudication – are smart to consult a lawyer. The lawyer must analyze whether he or she can successfully defend the client by challenging the validity of the *rule* that the client has supposedly violated, a challenge that may include an attack on the *rule-making* process that resulted in the rule's issuance.<sup>75</sup> Thus, while administrative law distinguishes rulemaking from adjudication, the two activities often intersect in particular administrative law matters.

#### b. Advice Giving

Despite the importance of rulemaking and adjudication, they are not the only powers that agencies have. Agency advice giving is yet another common agency power that lawyers must deal with. Agency advice does not have the “force and effect of law,” as does an agency rule. Nor does agency advice determine legal rights and duties, as does an agency adjudication. Yet agency advice can have enormous practical effect, especially when a client ignores it.

Agencies give advice on both a “wholesale” level, to the public at large, and on a “retail” level, to particular businesses and individuals. The differing forms of advice giving may resemble rulemaking and adjudication but differ from those activities.

On the wholesale level, agencies issue all kinds of material to help the public understand how the agency interprets and enforces the laws that it is responsible for administering. This material is generically known as “guidance material” in administrative law circles. It can take the form of brochures, policy statements, interpretive rules, agency guidelines, or answers to “FAQs.” The guidance material can be detailed and “official looking” enough that, when cast in generalized terms, it can look like the agency's real rules. But agency's guidance materials are not real “rules” because they lack the force and effect of law. They are just the agency's *opinion* of what the law means or how it is best enforced.

Rather than providing generalized guidance, an agency might give specific guidance to a person—in (say) a telephone call, a response to an email, or an “advisory opinion”—about how that agency's laws apply to that particular person's situ-

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government of their departments—but for administering the laws which did govern. None of these statutes could confer legislative power.”) *But cf.* *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935) (stating of the Federal Trade Commission: “To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers . . .”).

74. *See, e.g.*, *Duncan v. State Bd. of Accountancy*, 232 P.3d 322, 323–24 (Idaho 2010) (judicial review of agency proceeding finding a violation of agency's rule).

75. *See, e.g.*, *Deering Milliken, Inc., Unity Plant v. Occupational Safety & Health Review Comm'n*, 630 F.2d 1094 (5th Cir. 1980) (reviewing procedural challenge to federal agency rules in judicial challenge to agency proceeding to enforce those rules).

ation.<sup>76</sup> Although such individualized guidance might resemble an adjudication, if it is merely advisory and not meant to bind the agency or the recipient—it is not an adjudication (contested case) because it does not actually *determine* legal rights, duties, or interests.<sup>77</sup>

Though agency guidance material is not legally binding, it has great practical importance because it expresses the agency’s view of what the law means and how it is best enforced.<sup>78</sup> After all, if the agency believes that certain conduct violates the law, and says so in guidance material, people will refrain from that conduct to avoid agency enforcement action. An individual or company whose day-to-day conduct is implicated by agency guidance might consult you for advice on dealing with the agency guidance. That is why you must be aware of this type of agency activity.

### c. Investigating and Prosecuting

Many agencies have power to investigate by, for example, inspecting business premises, auditing or subpoenaing records, and requiring reports.<sup>79</sup> These information gathering activities can cost clients time and money, and expose them to liability for asserted violations of the law.<sup>80</sup> Clients may accordingly consult you for relief from the burden and for protection from potential liability.

In addition to gathering information, many agencies have power to initiate administrative adjudications or court actions to enforce the laws for which they are responsible.<sup>81</sup> In the administrative proceeding, part of the agency will act as a “prosecutor” by seeking to prove a violation of the law, while another part of the agency, such as an agency hearing officer, acts in a quasi-judicial capacity by deciding whether the violation has been proven and, if so, what is an appropriate sanction.<sup>82</sup> In agency-initiated court actions, the agency might have power to seek injunctive relief against ongoing violations of a law or civil or criminal fines for past violations.<sup>83</sup>

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76. See IDAHO ADMIN CODE r. 04.11.01.101 (2015) (authorizing use of informal procedure according to Attorney General rule for contested cases, “which may include individual contacts by or with agency staff asking for information, advice or assistance . . . in writing, by telephone or television, or in person”).

77. *Id.*; see also IDAHO CODE ANN. § 67-5201(6) (2014).

78. SEAMON, *supra* note 13, at 19.

79. See, e.g., IDAHO CODE ANN. § 20-209G(2)(C) (2004, & Supp. 2014) (authorizing director of Department of Correction to issue subpoenas in connection with investigations); IDAHO CODE ANN. § 22-3615 (2009) (authorizing Apple Commission to “inspect the premises and records of any grower, carrier, handler, packer, dealer or processor for the purpose of enforcing” Commission’s organic statute “and the collection of the assessment” on apples authorized by that statute); IDAHO CODE ANN. § 39-1404(a) (2011) (authorizing Department of Health and Welfare to “require such reports, inspections and investigations . . . as it deems necessary”).

80. See *United States v. Morton Salt Co.*, 338 U.S. 632, 642—43 (1950) (stating that agency in that case could use subpoena power to “investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not”).

81. See, e.g., IDAHO CODE ANN. § 41-213 (2010) (authorizing director of Department of Insurance to initiate administrative proceedings or court actions to enforce Insurance Code).

82. See, e.g., *State Transp. Dep’t v. Kalani-Keegan*, 311 P.3d 309, 311 (Idaho Ct. App. 2013) (describing administrative process for driver’s license suspension).

83. See, e.g., IDAHO CODE ANN. § 54-1815 (2012) (authorizing Board of Medicine to go to court for injunctive relief against violators of Medical Practice Act); IDAHO CODE ANN. § 26-1116(2) (2014)

In administrative law circles, these investigative and prosecutorial activities are considered “executive”-type powers, to distinguish them from the “quasi-legislative” power to make rules and the “quasi-judicial” activities of determining contested cases.<sup>84</sup> The distinction is useful because it reflects that investigative and prosecutorial activities (unlike agency rules) lack the force and effect of law, and (unlike contested cases) do not directly determine legal rights and duties. These investigative and prosecutorial activities can, however, lead to other activities (contested cases, court actions) that do determine legal rights and duties. Therefore, the targets of agency investigations and prosecutorial activities are well advised to consult a lawyer. After all, the agency is likely to have the help of its lawyers when it undertakes these activities.

#### d. Agency Inaction

Some clients seek legal help with agency inactivity. For example:

- Your client owns a riverfront home downstream from a company that is polluting the river in violation of laws administered by a regulatory agency.
- Your client has applied to the Department of Veterans Affairs for veterans’ benefits, and months have gone by without any response from the VA.
- Your client’s cattle ranch abuts publicly owned land that provides habitat for wolves that prey on your client’s cattle and that the agency which administers the land has done nothing to control.

Assume, as is often true, that the responsible agencies have limited resources and can reasonably claim they are using those resources for more important matters. People affected by the agency inaction may consult a lawyer for help forcing the agency to act.

#### E. How Do You Analyze Administrative Law Problems?

Lawyers are problem solvers, and that is as true in administrative law as in other areas of the law. Indeed, many legal matters have administrative-law aspects. Today, for example, a client starting a business often needs legal help to get the required permits and understand the relevant regulations governing the business.

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(authorizing director of Department of Finance to go to court against violators of state banking laws for remedies include “disgorgement and other equitable remedies”); IDAHO CODE ANN. § 30-14-603 (2013) (authorizing director of Department of Finance to go to court for violations of Uniform Securities Act and to get remedies including civil penalties); IDAHO CODE ANN. § 47-718 (2014) (authorizing director of Department of Lands to go to court for remedies against violations of laws governing mining on state lands).

84. *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (describing powers of independent counsel, which were investigative and prosecutorial, as “executive” in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch”); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (comparing agency decision not to bring enforcement proceeding to “the decision of a prosecutor . . . not to indict—a decision which has long been regarded as the special province of the Executive Branch”); *Hannah v. Larche*, 363 U.S. 420, 445–46 (1960) (distinguishing agency exercise of investigative powers from agency making “determinations of a quasi-judicial nature”).

Because of the pervasiveness of administrative law, virtually every lawyer will have to solve administrative law problems. In this subsection we offer five principles for analyzing most administrative law problems:

1. Every agency action must be authorized by a valid law.
2. No law grants unfettered power to an agency; instead, every grant of power contains limits on or requirements for on agency action. The limits and requirements found within the law that grants power are called “internal” limits.
3. Agency actions are always subject not only to internal limits but also to “external” limits – meaning limits on, and requirements for, exercising power that are found outside of the law that grants the agency power.
4. The external limits on agency action usually include a judicial-review requirement of reasoned decision making by the agency.
5. Agency actions are subject to control by at least five sources, the most important of which is the agency itself.

Below we elaborate on each principle. Then we discuss the distinctive aspects for analyzing problems involving agency *inaction*. We end this section with a summary outlining a framework for comprehensively analyzing administrative law problems.

#### 1. Every Agency Action Must be Authorized by a Valid Law.

Agencies have no inherent power. Thus, whenever an agency takes some action, the agency must be able to identify one or more laws authorizing that action.<sup>85</sup> Ordinarily, the law authorizing an agency action will be a statute.<sup>86</sup> Sometimes, an agency will seek to justify its action by relying on its own rule (or other agency-created material). But this simply raises the question of what law authorizes that rule (or other agency-created material).<sup>87</sup>

Because agencies have no inherent power, when a lawyer comprehensively analyzes an agency action, the lawyer should begin by identifying the law authorizing that action. When the source of power for an agency action is uncertain, one

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85. See *In re Bd. of Psychologist Exam'rs'* Final Order Case No. PSY-P4B-01-010-002 *ex rel* Wright, 224 P.3d 1131, 1137, 148 Idaho 542, 548 (2010) (holding that agency lacked authority to impose additional sanction for a regulated party's violation of agency's prior order).

86. See, e.g., *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 639 P.2d 448, 453, 102 Idaho 744, 750 (1981) (“As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves . . . .”) (quoting *Wash. Water Power Co. v. Kootenai Envtl. Alliance*, 591 P.2d 122, 126, 99 Idaho 875, 879 (1979)).

87. Authority for an Idaho agency's action may come partly from federal law. For example, federal statutes authorize the Governor to designate a state agency to carry out federal programs. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107(f)(2)(B), 42 U.S.C. § 9607(f)(2)(B) (2012); Child Care and Development Block Grant § 658D, 42 U.S.C. § 9858b(a) (2012). In these circumstances, the delegation of authority to promulgate rules is to be found in the conjunction of the federal statute and gubernatorial designation. Reflecting that federal law may provide the source of authority for an Idaho agency action, the Idaho APA defines “provision of law” to include both state and federal law. See IDAHO CODE ANN. § 67-5201(14) (2014).

easy way to identify the (purported) source is to ask the agency. The lawyer should anticipate, however, that agency officials may bridle at such questions and then respond by saying, in effect, “We have always done things this way. No one has ever questioned our authority before.” Indeed, an agency official may be unaware of the authority for the official’s action; the official may simply be following “orders from headquarters.”

Not only must agency action be authorized by law; the law authorizing the agency action must be valid for the agency action to be valid.<sup>88</sup> If, for example, an Idaho agency based its decision on a state statute that violated the equal protection guarantees of the U.S. and Idaho Constitutions, the agency decision itself would be invalid.<sup>89</sup> Going a step further, even agency actions authorized by the Idaho *Constitution* would be invalid if the relevant Idaho constitutional provision violated the U.S. Constitution or violated, or was preempted by, a valid federal statute or federal regulation.<sup>90</sup> Agency action is valid only if the law authorizing it is valid.

In sum, the lawyer comprehensively analyzing agency action must initially determine whether the agency has acted under a valid grant of power.<sup>91</sup>

## 2. No Law Grants Unfettered Power to an Agency; Instead, Every Grant of Power Contains “Internal” Limits on Agency Action.

Laws granting power to administrative agencies always come with strings attached; no law grants an agency unfettered power. Accordingly, when the lawyer has identified the law under which an agency has taken some action, the lawyer must ensure that the agency satisfied the authorizing law’s limits and requirements. Because these limits and requirements come from the very same law that grants the agency power, they are often called “internal” (or “intrinsic”) limits and require-

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88. See *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127, 138 (1947) (stating that “[o]nly if the statutory basis for an [agency] order is within constitutional limits, can it be said that the resulting order is legal”).

89. *Bon Appetit Gourmet Foods, Inc. v. Idaho Dep’t of Emp’t*, 793 P.2d 675, 676–77, 117 Idaho 1002, 1003–04 (1989).

90. See, e.g., *Van Lare v. Hurley*, 421 U.S. 338, 344–48 (1975) (holding that New York City regulations violated the federal Social Security Act); *Conroy v. N.Y. State Dep’t of Corr. Servs.*, 333 F.3d 88, 100–01 (2d Cir. 2003) (holding that agency’s sick-leave policy would violate federal Americans with Disabilities Act unless policy was shown to serve a valid business necessity).

91. Analysis of the actions of executive-branch agencies of state government fundamentally differs from analysis of the actions of the state Governor, the constitutionally created state courts, and the state legislature. Whereas state agencies have no inherent powers, the state’s Governor, constitutional courts, and legislature do have inherent powers because state constitutions, unlike the U.S. Constitution, do not create governments of limited powers. The Idaho Supreme Court explained this connection between the nature of state constitutions and inherent powers of the constitutionally established branches of government:

The Idaho Constitution is a limitation, not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution. Because the Constitution is not a grant of power, there is no reason to believe that a Constitutional provision enumerating powers of a branch of government was intended to be an exclusive list. The branch of government would inherently have powers that were not included in the list.

*Idaho Press Club, Inc. v. State Legislature*, 132 P.3d 397, 399–400, 142 Idaho 640, 642–43 (2006) (internal quotation marks and citations omitted); see also THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”); *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 347 (Mich. 1985) (“State constitutions . . . serve as limitations on the otherwise plenary power of state governments.”).

ments, to distinguish them from limits and requirements on agency power that come from “external” (or “extrinsic”) sources (such as the U.S. Constitution).

Even laws that appear to grant broad power to an agency invariably contain limits. For example, a statute authorizes the Idaho Industrial Commission to “adopt reasonable rules and regulations for effecting the purposes of” the Workers Compensation Act.<sup>92</sup> Though this grant of rulemaking power is broad, it still limits the Commission to issuing rules that advance the purposes of the Act. A Commission rule issued under this grant of rulemaking power must therefore be justified by reference to some purpose or power manifested elsewhere in the Act. A recent case illustrates the point. The Idaho Supreme Court upheld a Commission rule limiting attorney fees because, in addition to the statute authorizing rules “for effecting the purposes” of the Act, the Act authorizes the Commission to “approve” the attorney fees of attorneys who represent claimants in worker’s compensation proceedings.<sup>93</sup>

The law granting an agency power may impose substantive or procedural limits. An agency action may be invalid if it exceeds either type of internal limit.

An example of a substantive internal limit was enforced in *Hood v. Idaho Dep’t of Health & Welfare*.<sup>94</sup> At the time of the *Hood* case, a statute authorized the Idaho Personnel Commission to issue a rule “establishing a probation period not to exceed six (6) months” for state employees.<sup>95</sup> The Commission issued a rule prescribing a probation period of 1,040 hours of credited service.<sup>96</sup> This rule resulted in probation periods of longer than six months for employees who worked less than 40 hours per week.<sup>97</sup> The Court held that the rule exceeded the 6-month limit in the statute, which it construed to mean calendar months.<sup>98</sup> That 6-month limit on the permissible probation period is an example of a substantive internal limit on the Commission’s power to make rules prescribing the probation period.

An example of a procedural internal limit was enforced in *Shokal v. Dunn*.<sup>99</sup> The Idaho Department of Water Resources granted a permit without following the procedures prescribed in the statute authorizing the issuance of such permits.<sup>100</sup> Because the Court found no “substantive error” in the Department’s decision, the Court did not reverse the granting of the permit. But the Court did remand the case to the agency for “a new hearing to correct the procedural error.”<sup>101</sup> Call them “technicalities” if you wish, but procedural requirements can trip up an agency, and can therefore be an effective weapon for the lawyer challenging agency action.

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92. IDAHO CODE ANN. § 72-508 (2008).

93. *Seiniger Law Offices, P.A. v. Idaho ex rel Indus. Comm’n*, 299 P.3d 773, 776 (Idaho 2013).

94. *Hood v. Idaho Dep’t of Health & Welfare*, 868 P.2d 479, 481, 125 Idaho 151, 153 (1994).

95. *Id.* at 480, 125 Idaho at 152.

96. *Id.* at 482, 125 Idaho at 154.

97. *Id.*

98. *Id.*

99. *Shokal v. Dunn*, 707 P.2d 441, 109 Idaho 330 (1985).

100. *Id.* at 445, 109 Idaho at 334.

101. *Id.*

### 3. Agency Actions Are Always Subject not only to Internal Limits but also External Limits

As discussed above, the law authorizing an agency to take some action invariably comes with strings attached. Other laws can also limit agency power. These are sometimes called “external” limits. External limits, like internal limits, can be substantive or procedural.<sup>102</sup>

Starting at the top, the U.S. Constitution puts substantive and procedural limits on all government action, including the actions of federal, state, and local agencies.<sup>103</sup> For example, the Fourth Amendment substantively restricts an agency’s power to inspect business premises that are not open to the public.<sup>104</sup> The Due Process Clause requires an agency to follow fair procedures when it disciplines a doctor or other holder of a professional license.<sup>105</sup> Of course, Idaho agencies are also limited by the Idaho Constitution.<sup>106</sup> More generally, an agency cannot exercise any power in a way that violates constitutional limits on government power.<sup>107</sup>

External limits on agency action can come not only from constitutions but also from *statutes* other than the one authorizing the agency action.<sup>108</sup> Often, the statutes that impose such external limits apply to multiple agencies and may therefore be called “cross-cutting statutes.”<sup>109</sup> For example, the Idaho Whistleblower Act prohibits state agencies from taking adverse actions against employees who report waste of public funds or other illegal conduct inside the agency.<sup>110</sup> As mentioned above, the Idaho APA requires agencies to follow certain procedures when making rules and adjudicating contested cases. The Idaho Whistleblower Act puts *substantive* external limits on Idaho agencies. The Idaho APA puts *procedural* external limits on Idaho agencies.

External limits can be imposed by an agency’s own *rules*, as well as rules of other agencies. Indeed, a central tenet of administrative law requires an agency to follow its own rules.<sup>111</sup> Moreover, some agencies have power to make rules for other agencies. In Idaho, for example, the Attorney General can make rules of procedure for other agencies.<sup>112</sup> The Idaho Department of Labor makes rules implementing the Employment Security Law that, when valid, bind the Industrial Com-

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102. SEAMON, *supra* note 13, at 31.

103. *Id.* at 33.

104. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311–25 (1978) (holding that warrantless OSHA inspection of nonpublic area of Pocatello business premises violated Fourth Amendment).

105. *See Cooper v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.*, 4 P.3d 561, 566–67, 134 Idaho 449, 454–55 (2000).

106. *Twin Falls Cnty. v. Idaho Comm’n on Redistricting*, 271 P.3d 1202, 1203–07, 152 Idaho 346, 347–50 (2012) (holding that Idaho Constitution prohibited the Idaho Commission for Reapportionment from adopting a redistricting plan that split more counties than necessary to satisfy the U.S. Constitution).

107. *E.g., Hampton v. Mow Sun Wong*, 426 U.S. 88, 116–17 (1976) (holding that federal agency rules violated Due Process Clause).

108. *E.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527–34 (1984) (holding that federal agency order issued under National Labor Relations Act violated Bankruptcy Code).

109. SEAMON, *supra* note 13, at 45.

110. *See* IDAHO CODE ANN. § 6-2104(a) (2010).

111. *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954); *see also* Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006).

112. *See* IDAHO CODE ANN. § 67-5206(2) (2014).

mission when adjudicating claims for unemployment insurance benefits.<sup>113</sup> Just as rules have “the force and effect” of law and are therefore binding on businesses and individuals, they are also binding on the agency, until the agency complies with the laws (including the rules) for changing the rules.

#### 4. The External Limits on Agency Action Often Include a Judicial-Review Requirement of Reasoned Decision Making by the Agency.

An agency action is usually subject to judicial review by someone who has been harmed or is imminently threatened with harm by that action.<sup>114</sup> Judicial review of agency action usually occurs under statutes, such as an APA.<sup>115</sup> Most such statutes authorize courts to set aside agency action that is “arbitrary, capricious, or an abuse of discretion.”<sup>116</sup> This so-called “arbitrary and capricious” standard of review allows courts to “ensur[e] that agencies have engaged in reasoned decisionmaking.”<sup>117</sup> The requirement that agency action not be “arbitrary and capricious”—but instead be the product of “reasoned decision making”—applies on judicial review even if the statutes authorizing the agency action itself do not expressly require the agency to act rationally. You might say the grant of power to an agency presupposes that the agency will exercise that power rationally.<sup>118</sup> Put another way, the reasoned decision making requirement is an external, substantive limit on agency action imposed by statutes and other laws authorizing judicial review under the “arbitrary and capricious” standard.<sup>119</sup>

The U.S. Supreme Court gave a useful description of the “arbitrary and capricious” standard in a leading case on federal administrative law:

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113. *Mason v. Donnelly Club*, 21 P.3d 903, 907, 135 Idaho 581, 585 (2001).

114. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (stating that a “strong presumption” favors judicial review of federal agency actions); *Graves v. Cogswell*, 552 P.2d 224, 225, 97 Idaho 716, 717 (1976) (“It is clear in Idaho . . . that unless an appeal is provided from the decision of an administrative body to a court of law, due process [as guaranteed by the Idaho Constitution] has not been satisfied and is denied.”); *see also Electors of Big Butte Area v. State Bd. of Educ.*, 308 P.2d 225, 230, 78 Idaho 602, 610 (1957) (“This court has heretofore recognized that where either constitutional or vested property rights are involved the judicial department of the government must afford a remedy for the protection of such rights.”).

115. *See IDAHO R. CIV. P. 84(a)* (“The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute.”); *Ravenscroft v. Boise Cnty.*, 301 P.3d 271, 274, 154 Idaho 613, 616 (2013) (relying partly on Rule 84(a) to hold that fired county employee could get judicial review of his firing).

116. *See* 5 U.S.C. § 706(2)(A) (2012); IDAHO CODE ANN. § 67-5279(2)(d) (2014).

117. *Judulang v. Holder*, 132 S. Ct. 476, 484 (2011); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (“If [a] [federal] agency takes action not based on neutral and rational principles, the [federal] APA grants federal court power to set aside the agency action as ‘arbitrary’ or ‘capricious.’”); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (stating that agency “adjudication is subject to the requirement of reasoned decisionmaking”); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 104 (1983) (holding that federal agency rule was “within the bounds of reasoned decisionmaking required by the [federal] APA”).

118. *See Idaho Power & Light Co. v. Blomquist*, 141 P. 1083, 1093, 26 Idaho 222, 254 (1914) (agency’s legislatively granted power to regulate public utilities “presupposes an intelligent regulation”).

119. *Cf. Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (holding that judicial review of administrative action had to be available; “[o]therwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual.”).

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>120</sup>

This description, as elaborated in other cases, and as generalized for review of both state and federal agency decisions, puts five restrictions on agencies:

- (1) The agency's decision-making process must be rational and comprehensible.
- (2) The agency's action should rest on consideration of all relevant factors, which include all factors that the laws governing that action *require* the agency to consider, plus all factors (a) that any reasonable decision maker would consider and (b) consideration of which is not *forbidden* by the governing laws.
- (3) The agency's action should not rest on consideration of irrelevant factors, meaning factors (a) the consideration of which is prohibited by the laws governing the agency action; or (b) that no reasonable decision maker would consider relevant and whose consideration is not required by the governing laws.
- (4) There should be a clear, logical connection between the agency's factual determinations and its legal determinations, including its ultimate decision.
- (5) The agency action should be consistent with prior agency action—and thus the agency must treat similar situations similarly—unless the agency adequately explains why it has changed course.

You can think of these as a checklist for determining whether agency action is arbitrary and capricious.

#### 5. Agency Actions are Subject to Control by at Least Five Sources, the Most Important of Which is the Agency Itself.

Agencies have collectively been called a “Headless Fourth Branch” of government.<sup>121</sup> That description implies that agencies are beyond the control of the traditional three branches of government. Agencies *do* wield much power, but they are not beyond control. Lawyers should be aware of five sources of control of agency action and consider each source when handling a matter involving an agency:

- a. the agency itself
- b. the executive branch
- c. the legislative branch

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120. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

121. *Fox Television Stations, Inc.*, 556 U.S. at 525–26.

- d. the judicial branch
- e. if available, a higher level of government

Below we briefly introduce each.

#### a. The Agency Itself

A cardinal rule for the practice of administrative law holds:

*The best place to win your case is in the agency.*

If you resolve a matter favorably at the agency level, you are usually finished. Success! If you don't win your case at the agency level, you face an uphill battle in getting a court or other external source of control to give you victory.

Winning your case at the agency level often requires skillful use of the agency's internal power structure. The structure exists partly to ensure that everyone in the agency is "on the same page" in obeying the law and agency policy. Thus, if a front-line official violates the law—for example, by erroneously denying a permit—the agency will usually have procedures for that error to be corrected by someone higher up in the agency. And this opportunity for an internal appeal often permits the correction of not only legally erroneous decisions but also bad judgment calls by front-line officials.

If an initial agency decision harms your client, you are not only smart but also usually *required* to first seek a remedy within the agency. A lawyer who passes up the agency's internal review process is usually making a huge mistake. More importantly, the lawyer who jumps off the internal agency track and tries to take the matter to court will ordinarily be denied judicial relief for failure to "exhaust" administrative remedies, and, by the time judicial relief is denied for failure to exhaust administrative remedies, deadlines for seeking administrative remedies may have expired. Thus, when your client has a matter before an agency, you cannot treat an initial, adverse result as the agency's final answer.

The skillful administrative lawyer will therefore have mastered not only the statutes governing an agency operations but also all of the agency rules and other published material for pursuing matters within the agency. The lawyer should also learn the names, titles, and powers of all agency officials with authority over the attorney's matter. In this regard, two of your best tools for success are the agency's organizational chart and telephone directory. Furthermore, lawyers who expect to have many matters before a particular agency are smart to arrange short, in-person, "get to know you" meetings with key agency officials.

#### b. The Executive Branch

In addition to internal agency controls, all executive agencies are subject to control by the chief executive. Thus, the Idaho Governor has a constitutional duty to "see that the laws are faithfully executed."<sup>122</sup> This duty comes with certain powers to ensure executive agencies and officials obey the law. Those powers include the power to issue executive orders, appoint and remove the head of many state

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122. IDAHO CONST. art. IV, § 5.

agencies, approve or deny agency requests to promulgate new rules, and determine what agency budget requests will be presented to the Idaho Legislature, and how big or small those requests will be.

In addition to those powers, the Governor controls many agency operations using *other agencies*. For example, Idaho agencies' hiring, firing, and treatment of agency employees are overseen by the Idaho Division of Human Resources, which is part of the Office of the Governor.<sup>123</sup> Agency budget requests are reviewed by another component of the Governor's office, the Division of Financial Management.<sup>124</sup> Idaho agencies contracting with the private sector for goods and services are overseen by the Idaho Division of Purchasing, which is in the Department of Administration.

In exercising some powers, including the power to appoint and remove agency heads, the Governor seeks to ensure that these agencies not only faithfully execute the law but also advance the Governor's policies and priorities. After all, the Governor is directly accountable to the people and is presumably elected because of popular support for his or her announced policies and priorities. The skillful lawyer keeps the Governor's policies and priorities in mind when dealing with agencies headed by gubernatorial appointees. In some situations, the lawyer might be more successful arguing that an agency's action conflicts with the Governor's policies and priorities than in arguing that an agency's action violates the law.

### c. The Legislative Branch

We mentioned above that agencies are creatures of statute. This gives the legislature great control over most agency actions. In Idaho, the control includes methods that can be exercised by the Idaho Legislature as a whole, by its committees, and by individual legislators.

The Idaho Legislature can enact statutes abolishing any agencies or offices that were originally created by statute.<sup>125</sup> Statutes can also increase, decrease, or alter an existing agency's powers and duties—and its budget. In addition to enacting statutes, the Idaho Legislature can, by concurrent resolution reject, amend, or modify agency rules under certain circumstances.<sup>126</sup> In short, if an agency is a "creature of statute," the agency lives and dies at the hands of the legislature.

Legislative committees in the Idaho House and Idaho Senate oversee the operation of agencies. In addition to the committees with substantive oversight power, the Joint Finance-Appropriations Committee oversees the budgets of state agencies. The oversight power gives committees great political influence over agencies, even though they lack the power to veto agency action.<sup>127</sup> Legislative committees are

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123. See IDAHO CODE ANN. § 67-5308 (2014).

124. See IDAHO CODE ANN. § 67-1910 (2014).

125. See, e.g., IDAHO CODE ANN. § 42-1804 (2003) (abolishing executive-branch offices in connection with creation of Idaho Department of Water Resources).

126. See IDAHO CODE ANN. § 67-5291; see also *Mead v. Arnell*, 791 P.2d 410, 117 Idaho 660 (Idaho 1990) (rejecting constitutional challenges to concurrent resolution that was passed under § 67-5291 and that repealed agency rules previously issued under statute granting rulemaking power).

127. See *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (noting that agency's decision to "ignore congressional expectations" expressed in committee report "may expose [the agency] to grave political consequences" even though such expectations don't impose legal restrictions).

good at making agency officials squirm, which in turn makes for good political theater for the mass media.

Finally, individual legislators can often spur agency action. If your client has a matter before an agency, you should at least consider contacting the legislators for the district in which your client resides, and the legislators on the committees who conduct substantive oversight of that agency. True, the agency may be legally prohibited in an adjudicatory matter from being influenced by *ex parte* contacts from legislators as well as other persons. Legal restrictions on *ex parte* communications, however, do not apply to agency rulemaking proceedings and other non-adjudicatory matters. Furthermore, legislators can often help you remedy agency inaction or delay—for example, in acting on your client’s application for benefits or a permit.

In sum, although your lawyer’s instinct might tell you to go to court against a recalcitrant agency, before doing so, consider the alternative of going to the legislature or some part of it.

#### d. The Judicial Branch

Most agency actions are subject to judicial review at the request of someone who has been harmed or is imminently threatened with harm by the agency action. Indeed, judicial power to review executive-branch action date back at least to *Marbury v. Madison*,<sup>128</sup> in which the Court determined that Secretary of State Madison violated the law by failing to deliver William Marbury’s justice-of-the-peace commission. This article will not discuss judicial review of agency action in detail. The main purpose of mentioning it here is to introduce it as one of several methods for controlling agency action.

Judicial review is often not the best method, for three main reasons. First, judicial review to invalidate agency action can be hard to get. In general, you must meet the same requirements as any other plaintiff:

1. You must find a court with subject matter jurisdiction and personal jurisdiction.
2. You must satisfy service-of-process requirements.
3. You must plead and prove you have “standing” to bring the lawsuit.
4. You must plead and prove a cause of action.
5. You must overcome defenses.

Although these requirements are common to all lawsuits, they have tricky twists in lawsuits challenging agency action. Even something as routine as service of process has complexities when the defendant is a government agency.<sup>129</sup> Moreover, government agencies often have uniquely governmental defenses—such as sovereign immunity—that can bar judicial review altogether, delay it (e.g., until

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128. 5 U.S. 137 (1803).

129. See, e.g., IDAHO R. CIV. P. 4(d)(5) (“Service Upon State, Agencies or Governmental Subdivisions”); FED. R. CIV. P. 4(i) (“Serving the United States and Its Agencies, Corporations, Officers, or Employees”).

administrative remedies have been exhausted), or restrict the relief available (e.g., by precluding recovery of money damages from the government).<sup>130</sup> Similar to George Orwell's *Animal Farm*, all defendants are equal, but some defendants—namely, government defendants—are more equal than others.<sup>131</sup>

Second, besides being hard to get, judicial review is costly and time consuming, even when it is available.<sup>132</sup> As to the cost, keep in mind that the government lawyers who defend agency actions against lawsuits are usually on salary, rather than being paid by the hour or on contingency.<sup>133</sup> And although some statutes authorize people to recover attorney's fees for successful judicial challenges to agency action, these statutes invariably have restrictions that limit or bar recovery even for successful challenges.<sup>134</sup> In many or most cases, it doesn't make economic sense to seek judicial review of an agency's adverse action.

Third, when courts review agency action, they often give deference to the agency's interpretation of the laws that the agency is responsible for administering and to the agency's factual determinations. Federal courts defer to many federal agency statutory interpretations under the "*Chevron doctrine*."<sup>135</sup> Similarly, many state courts often defer to their state agencies' interpretations of the state laws that the agencies are responsible for administering.<sup>136</sup> Federal and state courts also defer to most agency factual determinations, rather than reviewing them *de novo*.<sup>137</sup> The upshot of these deferential standards of review is that a court will not set aside agency action even if the court would have decided the matter differently from the

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130. *E.g.*, 5 U.S.C. § 702 (2012) (authorizing judicial review of federal agency action in proceedings seeking "relief other than money damages"); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that sovereign immunity bars Congress from using Article I powers to subject unconsenting States to private actions in their own courts); IDAHO CODE ANN. § 67-5271(1) (2014) (providing that judicial review of agency action is not available until person seeking review "has exhausted all administrative remedies" required under Idaho APA).

131. GEORGE ORWELL, *ANIMAL FARM* 133 (1996).

132. *See, e.g.*, Greg Sisk, *The Essentials of the Equal Access to Justice Act*, 55 LA. L. REV. 217, 222 (1994) (explaining that Congress authorized attorney's fees for certain parties who successfully challenge federal agency action out of recognition that many targets of government action lack resources to challenge the action).

133. *See, e.g.*, Idaho Office of Performance Evaluations, Idaho Legislature, The State's Use of Legal Services 30 (Evaluation Report 15-02, Feb. 2015) (noting that civil attorneys in Idaho Attorney General Office make the same regardless of how many hours they work for client agencies, while private attorneys charge by the hour) available at <http://legislature.idaho.gov/ope/publications/reports/r1502.pdf>; U.S. Dep't of Justice, *Entry-Level (Honors Program) and Experienced Attorneys – Attorney Salaries, Promotions, and Benefits*, (June 23, 2014) (explaining salaries of attorneys employed by U.S. Department of Justice) available at <http://www.justice.gov/legal-careers/attorney-salaries-promotions-and-benefits>.

134. *See, e.g.*, 28 U.S.C. § 2412(d)(1)(A) (2012) (provision in Equal Access to Justice Act authorizing recovery of fees from federal government unless government's position "was substantially justified or . . . special circumstances make an award unjust"); IDAHO CODE ANN. § 12-117(1) (2010 & Supp. 2014) (authorizing attorney's fees against state agencies or political subdivisions if they "acted without a reasonable basis in fact or law").

135. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

136. *See, e.g.*, *Kaseburg v. State Bd. of Land Comm'rs*, 300 P.3d 1058, 1065, 154 Idaho 570, 577 (2013); *see generally* William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017 (2006).

137. *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414–15 (1971); IDAHO CODE ANN. § 67-5279(1) (2014) ("The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.").

agency.<sup>138</sup> In short, victory is not ensured even when the judge thinks the agency was wrong.

In theory, “[t]he availability of judicial review is the necessary condition, psychologically if not logically, for a system of administrative power which purports to be legitimate, or legally valid.”<sup>139</sup> In practice, however, judicial review is not always the best way to control agency action. Resourceful lawyers consider the whole range of control options introduced here.

#### e. The Federal Government

In our federal system, local and state agencies must obey the U.S. Constitution and valid federal statutes and regulations. When a state or local agency violates federal law, the violation can often be addressed by an action in federal court.<sup>140</sup> Some federal violations, moreover, can be addressed by federal agencies.<sup>141</sup> We introduce three common situations in which federal violations arise and can trigger federal judicial or federal agency enforcement action.

First, some federal regulatory statutes apply to both the private sector and state and local agencies. For example, the federal Fair Labor Standards Act (FLSA) prescribes minimum wages and regulates the overtime of private sector employees as well as employees of state and local agencies.<sup>142</sup> The U.S. Department of Labor can sue States and local governments to enforce the FLSA.<sup>143</sup> To cite another example of a federal regulatory law applicable to state and local agencies, municipally owned sewer systems must obey the Clean Water Act or else face enforcement measures by the U.S. EPA.<sup>144</sup> To cite a final example, the federal law known as “Title VII” prohibits employment discrimination by the public and private sector.<sup>145</sup> The general rule is that, although state and local agencies often get special treatment in federal statutes, reflecting their governmental character, state and local agencies generally enjoy no substantive immunity from federal regulation.<sup>146</sup>

Second, state and local agencies must obey not only many federal statutes that regulate the public and private sector alike but also federal statutes that single them out. For example, state and local government’s regulation of land use and operation

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138. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Idaho State Ins. Fund v. Hunicutt*, 715 P.2d 927, 931, 110 Idaho 257, 261 (1985).

139. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965).

140. *See, e.g.*, 42 U.S.C. § 1983 (2012) (creating a federal cause of action for conduct under color of state law that is claimed to violate federal law).

141. *See, e.g.*, 42 U.S.C. § 1396(c) (2012); 42 C.F.R. § 430.35 (2014) (authorizing U.S. Secretary of Health and Human Services to bring compliance action and withhold federal funds from state agencies that violate federal Medicaid program).

142. *See* 29 U.S.C. § 203(d), (e)(2)(C) (2012) (FLSA provisions defining “Employer” to include “a public agency” and “employee” generally to include any individual employed by a State . . . [or] political subdivision of a State”).

143. *See, e.g.*, *Chao v. Va. Dep’t of Transp.*, 291 F.3d 276, 280–82 (4th Cir. 2008); *see also Alden v. Maine*, 527 U.S. 706, 759–60 (1999).

144. *See, e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 857 (8th Cir. 2013) (describing “special set” of federal rules governing “publicly-owned treatment works”).

145. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–56 (1976) (upholding Title VII as applied to state governments); *Brown v. General Serv. Admin.*, 425 U.S. 820, 824–35 (1961) (discussing applicability of Title VII to federal government).

146. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–55 (1985).

of prisons are restricted by the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>147</sup> A state department of motor vehicles' collection and distribution of driver's license information is restricted by the federal Driver's Privacy Protection Act (DPPA).<sup>148</sup> To some extent, in short, state and local governments can be singled out for federal-law regulatory burdens.

Third, state and local agencies must obey federal law when they administer federal programs under schemes of "cooperative federalism."<sup>149</sup> In a cooperative federalism program, a state or local government voluntarily administers a program created by federal law, usually in exchange for money.<sup>150</sup> The best known and probably largest cooperative federalism program is the Medicaid program, which the Court recently described as follows:

Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. . . . In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost.<sup>151</sup>

States' compliance with the Medicaid statute and rules is overseen by the Centers for Medicare and Medicaid.<sup>152</sup> To cite another program of cooperative federalism, States administer portions of the federal Clean Air Act by developing state implementation plans according to criteria established by the Act and regulations of U.S. EPA.<sup>153</sup> In short, when administering federal programs, state and local agencies must obey federal statutes and rules governing those programs.

#### f. Analysis of Agency *Inaction* Requires a Different Analysis from That of Typical Agency Action

Above, we identified examples of agency inaction that a lawyer might have to deal with. To remind you, they were as follows:

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147. 42 U.S.C. §§ 2000cc, 2000cc-1 (2014); *Sossamon v. Texas*, 131 S. Ct. 1651, 1659–60, 1663 (2011) (holding that RLUIPA's authorization of "appropriate relief" did not include suits for money damages against States, while recognizing United States' power to enforce RLUIPA through injunctive and declaratory relief); *see also id.* at 1666 (Sotomayor, J., dissenting) (referring to majority's "implicit acceptance of [private] suits for injunctive and declaratory relief").

148. *See Reno v. Condon*, 528 U.S. 141, 148–51 (2000) (upholding DPPA against State's Commerce Clause and Tenth Amendment challenges).

149. *New York v. United States*, 505 U.S. 144, 167 (1992) (stating that in "cooperative federalism" programs Congress can give states the choice of "regulating [an] activity according to federal standards or having state law pre-empted by federal regulation").

150. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 589–95 (1987) (describing federal "AFDC" program, in which states get federal reimbursement for providing financial assistance to needy dependent children and the parents or relatives who care for them).

151. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012).

152. *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006) (noting that Centers for Medicare and Medicaid Services administer Medicaid under delegation of authority from Secretary of Health and Human Services (HHS)); *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 70 (1st Cir. 2006) (noting that Medicare is administered by Secretary of HHS "through the Centers for Medicare and Medicaid Services").

153. *See* 42 U.S.C. § 7410 (2012).

- Your client owns a riverfront home downstream from a company that is polluting that river in violation of laws administered by a regulatory agency.
- Your client has applied to the Department of Veterans Affairs for veterans' benefits, and months have gone by without any response from the VA.
- Your client's cattle ranch abuts publicly owned land that provides habitat for wolves that prey on your clients' cattle and that the agency which administers the land has done nothing to control.

Now we briefly explain why these and other examples of agency *inaction* require a different analysis from that of typical agency actions.

The reason is that agency *inaction* presents the flip side of typical agency action. When you challenge agency inaction in a court, for example, you will not argue that the agency exceeded its authority. Instead, you will argue that the agency had the power to act—and, if the argument is viable—that the agency indeed had a legal *duty* to act.<sup>154</sup> If you cannot establish a legal duty, you will ordinarily have to show that the agency's failure to act was unlawful—for example, because it was based on unconstitutional discrimination.<sup>155</sup> In short, judicial relief from agency inaction will ordinarily depend on proof that the agency breached a duty or acted illegally.

Agency duties to act typically stem from statutes.<sup>156</sup> For example, the following statute puts duties on the Idaho Department of Health and Welfare:

**Idaho Code § 6-2604, Rules**

The department shall promulgate rules establishing the acceptable process and standards for the cleanup of clandestine drug laboratories. The department shall also promulgate rules establishing a program for addition to, and removal from, a list of residential properties that housed a clandestine drug laboratory.<sup>157</sup>

The statute creates duties by stating that the department “shall promulgate”—as distinguished from “may promulgate”—certain rules.<sup>158</sup>

Sometimes the existence of a statutory duty depends on the agency determining that certain circumstances exist, as illustrated in the following statute:

**Idaho Code § 42-3908. Permit approving construction and use . . .**

154. Cf. IDAHO CODE ANN. § 67-5201(3)(c) (2014) (defining “agency action” to include an agency’s “failure to perform, any duty placed upon it by law”).

155. See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 676 (1985) (explaining that courts can review agency inaction if the inaction violates the Constitution).

156. See *Kendall ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 608–14 (1838) (discussing Congress’s power to impose nondiscretionary duties on executive officers).

157. IDAHO CODE ANN. § 6-2604 (2010).

158. Cf., e.g., *id.*; IDAHO CODE ANN. § 22-112 (2009) (stating that, with certain exceptions, “the department of agriculture may promulgate rules . . . for the purpose of assisting others in the domestic and foreign promotion and certification of Idaho agricultural products”).

If the director of the department of water resources determines the use of the proposed or existing injection well will not affect the rights of others to use water for beneficial purposes [the director] shall issue a permit approving the construction, modification or continued operation of such well.<sup>159</sup>

If your client applies under this statute for a permit to construct an injection well, you must establish the statutory condition for the director to have a duty to issue the permit—the condition being that the proposed well “will not affect the rights of others to use water for beneficial purposes.”<sup>160</sup> Thus, the duty under this statute—unlike the duty in § 6-2604—is a contingent duty.

We can use the same injection-well scenario to discuss agency discretion. In general, an agency has discretion if the governing laws leave the agency with some choice about how or whether to act.<sup>161</sup> For example, the director of the department of water resources might have discretion about whether to issue a permit for an injection well if there is conflicting evidence—as to which reasonable minds could disagree—about whether the proposed well will affect the rights of others to use water for beneficial purposes. The lawyer representing the permit applicant will therefore seek to prevent this discretionary situation from arising, by presenting overwhelming evidence that the proposed well will *not* affect those rights. If the lawyer succeeds, it would be an abuse of discretion for the director not to issue the permit. In a sense, the presentation of overwhelming evidence puts a “duty” on the director to issue the permit, by establishing that failure to do so would be an abuse of discretion.

In short, the lawyer challenging agency inaction seeks to identify that the inaction constitutes either a breach of the agency’s legal duty or an abuse of discretion.

## 6. Summary

The principles discussed above suggest a framework for analyzing agency action that can be posed as asking three questions:

1. Has the agency acted under a valid grant of power?
  - a. Is the agency action authorized by a law?
  - b. If so, is the law valid?
2. If the agency action has acted under a valid grant of power, has the agency complied with requirements for exercising, and limits on, that power (hereafter referred to collectively as “limits”)?
  - a. Internal limits
    - i. substantive limits

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159. IDAHO CODE ANN. § 42-3908 (2003).

160. *Id.*

161. John M. Rogers, *A Fresh Look at Agency “Discretion,”* 57 TUL. L. REV. 776, 777 (1983) (stating that “[t]he law may be said to give an agency discretion when under clear facts the agency may make more than one choice”).

- ii. procedural limits
  - b. External limits
    - i. substantive limits
    - ii. procedural limits
- 3. If the agency has not acted under a valid grant of power, or has not complied with limits on that power, what sources of control can be used to remedy the problem?
  - a. the agency
  - b. the executive branch
  - c. the legislature
  - d. the courts
  - e. a higher level of government<sup>162</sup>

## II. IDAHO STATE AGENCIES

As discussed above, most agencies are in, or associated with, the executive branch of government, because they execute (i.e., administer, enforce, or carry out) the law.<sup>163</sup> That is true in Idaho: most Idaho agencies are part of the executive branch—or what the Idaho Constitution calls the “executive *department*”—of Idaho government.<sup>164</sup> Before turning to Idaho agencies in the executive branch (in Section C below)<sup>165</sup>, however, we briefly discuss Idaho agencies associated with the legislative branch (in Section A)<sup>166</sup> and the judicial branch (in Section B)<sup>167</sup>.

### A. Idaho Agencies Associated with the Idaho Legislature

Legislative agencies support the legislative process.<sup>168</sup> Here are three examples of Idaho legislative agencies.

The Legislative Services Office serves the Idaho Legislature in these ways:

- **Budget and Policy Analysis:** The Legislative Services Office assists legislators with the State's budget making process and provides policy advice to individual legislators and legislative committees.

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162. SEAMON, *supra* note 13, at 37.

163. J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1211–13, 120 Idaho 849, 854–56 (1991) (stating that, “[a]s the need for responsive government has increased, numerous executive agencies have been created to help administer the law” and referring to these executive agencies as “administrative agencies” or simply “agencies”).

164. IDAHO CONST. art. II, § 1 (providing that “[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial . . .”).

165. *See* Part II.C.

166. *See* Part II.A.

167. *See* Part II.B.

168. *See, e.g.,* Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935) (stating that Federal Trade Commission “acts as a legislative agency” when it makes investigations and reports for Congress “in aid of the legislative power”); *see also* Bowsheer v. Synar, 478 U.S. 714, 746 n.11 (1986) (discussing federal agencies that act in support of legislative function).

- Information Technology: The Legislative Services Office maintains the Legislature's comprehensive computer network, which links all legislative and staff offices, and supports other legislative technology initiatives.
- Legislative Audits: The Legislative Services Office conducts financial post-audits of state agencies—an effort to ensure state and local government agencies spend funds properly and in accordance with government accounting standards.
- Research and Legislation: The Legislative Services Office conducts research for legislators, drafts legislation, staffs legislative study committees, reviews administrative agency rules, and provides information on the legislative process and legislative history to the public and other state agencies.<sup>169</sup>

This office is headed by a director, who is appointed by—and serves at the pleasure of—the legislative council, which is a statutorily created entity made up of designated legislators such as the president pro tempore of the Idaho Senate and speaker of the Idaho House of Representatives.<sup>170</sup>

The Idaho Office of Performance Evaluations (OPE) evaluates the effectiveness of state agency administration and “helps legislators ensure that agencies operate as intended, to maximize the quality of state services . . . to Idaho citizens.”<sup>171</sup> The OPE is headed by a director who is appointed by the legislative council and serves at the pleasure of another group of legislators—the joint legislative oversight committee—which exists under the supervision of the legislative council.<sup>172</sup>

Finally, the Idaho Public Utilities Commission (PUC) has been characterized by the Idaho Supreme Court as a legislative agency. In an early case, the Court held that the PUC acts as “the agency of the legislative department” when it sets rates (e.g., electricity rates).<sup>173</sup> The Court reasoned that rate setting is a legislative activity.<sup>174</sup> In a later case, *Owner-Operator Indep. Drivers Ass’n, Inc. v. Idaho Pub. Utils. Comm’n (OOIDA)*, the Court characterized the PUC as a “legislative agency” in a matter that did not involve ratemaking.<sup>175</sup> The *OOIDA* Court held that, as a legislative agency, the PUC did not fall within the Idaho APA, which at the relevant time expressly excluded legislative agencies from its definition of “agency.”<sup>176</sup> The Ida-

169. *Legislative Services Office*, IDAHO LEGIS., <http://legislature.idaho.gov/lso/lso.htm> (last visited April 21, 2015). February 10, 2015); *see also* IDAHO CODE ANN. § 67-701 (2014).

170. IDAHO CODE ANN. §§ 67-427 & 67-428 (2014).

171. IDAHO BLUE BOOK: 2011-2012, 145 (2011), *available at* [http://www.sos.idaho.gov/elect/bluebook/2012/04\\_legislative.pdf](http://www.sos.idaho.gov/elect/bluebook/2012/04_legislative.pdf); *see also* IDAHO CODE ANN. § 67-461 (2014); *Office of Performance Evaluations*, IDAHO LEGIS., <http://legislature.idaho.gov/ope/index.htm> (last visited April 21, 2015).

172. IDAHO CODE ANN. § 67-457 (2014) (establishing joint legislative oversight committee and director of performance evaluations); *see also id.* § 67-427 (2014) (establishing legislative council).

173. *Petition of Mtn. States Tel. & Tel. Co.*, 284 P.2d 681, 683, 76 Idaho 474, 480 (1955).

174. *Id.*

175. *Owner-Operator Indep. Drivers Ass’n v. Idaho Pub. Utils. Comm’n*, 871 P.2d 818, 825, 125 Idaho 401, 408 (1994).

176. *Id.* at 825–26; *see also* *A.W. Brown Co. v. Idaho Power Co.*, 828 P.2d 841, 848, 121 Idaho 812, 819 (1992) (holding, in ratemaking case, that PUC was not an “agency” within the definition of Idaho, APA, which at the relevant time expressly excluded agencies “in the legislative or judicial branch”).

ho APA was amended in 1992 so that it no longer expressly excludes legislative agencies from its definition of “agency.”<sup>177</sup> Yet the PUC presumably remains a legislative, rather than an executive, agency, and it retains that status whether or not it is engaged or ratemaking. Reflecting this general status as a legislative agency, the PUC is not included in the Idaho statute that prescribes the “[s]tructure of the executive branch of Idaho state government.”<sup>178</sup>

In sum, the Idaho legislature has some agencies (in the everyday sense of that word) associated with it. As discussed next, so does the Idaho judiciary.

### B. Idaho Agencies Associated with the Judicial Branch

The Idaho judicial branch includes not only the courts but also administrative entities that support the judicial function. For example, the Court Assistance Office enhances public access to the Idaho state courts by creating standard forms and maintaining local offices where people can get information to help with their civil claims.<sup>179</sup> Another administrative entity that might be considered an agency in the everyday sense and that is associated with the Idaho judicial branch—specifically with the Idaho Supreme Court—is the Idaho State Guardian ad Litem Program.<sup>180</sup>

For lawyers, the most important agency associated with the judicial branch of Idaho state government is the Idaho State Bar (ISB). The newcomer to Idaho administrative law might have trouble discerning the ISB’s connection to the judicial branch. That is because Idaho statutes designate the ISB as part of the executive branch of Idaho state government.<sup>181</sup> The Idaho Supreme Court has held that, despite this statutory designation, “the bar commissioners ‘are part of the judicial rather than the executive branch.’”<sup>182</sup> More broadly, the Court said that the bar commissioners and bar staff, including Bar Counsel, “act in an administrative capacity as an arm of the Supreme Court in carrying out its supervisory function.”<sup>183</sup> The Court has delegated certain powers to discipline lawyers—which is a judicial power, not a legislative or executive power—to the ISB and its staff, subject to the Court’s “ultimate control.”<sup>184</sup>

177. 1992 Idaho Sess. Laws 786–87.

178. IDAHO CODE ANN. § 67-2402 (2014).

179. See Idaho Court Admin. R. 53 (governing court assistance offices); see also *Court Assistance Office*, STATE OF IDAHO JUDICIAL BRANCH, <http://www.courtselfhelp.idaho.gov/services-information> (last visited April 21, 2015).

180. See IDAHO CODE ANN. §§ 16-1632 & 16-1639 (2009 & Supp. 2014) (governing coordinator of guardian ad litem program and grant for the program); Idaho Juvenile Rule 35 (governing guardian ad litem programs); see also *About Guardian Ad Litem*, STATE OF IDAHO JUDICIAL BRANCH, <http://www.isc.idaho.gov/guardian/about-us> (last visited April 21, 2015), March 5, 2015).

181. IDAHO CODE ANN. § 3-402 (2010) (“[T]here is hereby established in the department of self-governing agencies a board of commissioners of the Idaho State Bar . . .”); IDAHO CODE ANN. § 67-2402 (2014) (including Department of Self-Governing Agencies in statute entitled “Structure of the executive branch of Idaho state government”).

182. *Malmin v. Oths*, 895 P.2d 1217, 1221, 126 Idaho 1024, 1028 (1995) (quoting *Dexter v. Idaho State Bar Bd. Comm’rs*, 780 P.2d 112, 114, 116 Idaho 790, 792 (1989)).

183. *Malmin*, 895 P.2d at 1220, 126 Idaho at 1027 (quoting *Idaho State Bar Ass’n v. Idaho Pub. Util. Comm’n*, 637 P.2d 1168, 1170, 102 Idaho 672, 674 (1981)).

184. *Malmin*, 895 P.2d at 1221, 126 Idaho at 1028; see also *In re Edwards*, 266 P. 665, 669, 45 Idaho 676 (1928) (describing power to discipline attorneys admitted to the bar as “judicial powers”); cf. *Application of Kaufman*, 206 P.2d 528, 539, 69 Idaho 297, 315 (1949) (controlling admission to the bar “is a judicial function, inherent in the courts”).

We turn from the judicial branch to the executive branch.

### C. Idaho Agencies in the Idaho Executive Branch

In Idaho, as elsewhere, the executive branch of government contains the vast majority of agencies. To the average person, these agencies appear as an agglomeration known as the “bureaucracy.” Lawyers, however, must understand what the state agencies are, what they do, how they relate to each other, and how they relate to the Governor as the Chief Executive Officer of Idaho, and other constitutional officers. We begin by examining the Idaho constitutional provisions on the executive branch. Then we examine the statutes implementing and supplementing those constitutional provisions.

#### 1. Constitutional Provisions

The Idaho Constitution establishes an executive branch (“department”) with three major components:

- a. seven constitutional officers, each of whom has an “office”;
- b. twenty “departments”; and
- c. eight constitutionally referenced multi-person boards or commissions

Confusion can arise from the Idaho Constitution’s establishment of an executive “department” that can itself contain twenty “departments.”<sup>185</sup> To avoid that confusion, we will use the term executive “branch” to refer to the executive department as a whole. Below we examine the constitutional provisions addressing the three components of the Idaho executive branch listed above. You will learn that all three components contain “agencies” in the everyday sense of that term.

#### a. Seven Constitutional Officers and Their Offices

Article IV of the Idaho Constitution identifies seven officers of which “[t]he executive department shall consist”:

**Idaho Const. art. IV, § 1. Executive Officers Listed . . .**

The executive department shall consist of a governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction, each of whom shall hold his office for four years beginning on the first Monday in January next after his election . . . . They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law . . . .

185. See IDAHO CONST. art. IV, § 20 (stating that, with exception of constitutional officers, “all executive and administrative officers, agencies and instrumentalities of the executive *department* of the state . . . shall be allocated by law among and within not more than twenty *departments* . . . .”) (emphasis added).

These seven officers are “constitutional officers.”<sup>186</sup> Besides their constitutional status, they have in common that they are elected for four-year terms in office and can be removed only by impeachment.<sup>187</sup>

The constitutional officers’ constitutional status matters. It means that their offices cannot be abolished nor can their constitutional powers be altered except as authorized by the Idaho Constitution.<sup>188</sup> Accordingly, the constitutional officers get distinctive treatment under the Idaho APA. As mentioned earlier in this chapter, the Idaho APA defines “agency” generally to include “officer[s] authorized by law to make rules or to determine contested cases.”<sup>189</sup> But, despite the general inclusion of officers who can make rules or determine contested cases, the Idaho APA specifies that the term “agency” does *not* include “executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution.”<sup>190</sup> Thus, the seven constitutional officers fall outside the Idaho APA’s definition of “agency” when exercising constitutional powers, including (but not limited to) making rules and determining contested cases. Their exercise of constitutional powers is not subject to the Idaho APA provisions governing “agencies.”

The seminal article on the Idaho APA explains the justifications for and the scope of the Idaho APA’s exclusion of the seven constitutional officers from the definition of “agency”:

An explicit exclusion of such officers is . . . justifiable on at least two grounds. First, principles of separation of powers limit the legislature’s authority to control the exercise of constitutional functions by officers in the other branches of government. Second, the functions constitutionally vested in executive officers are ordinarily political and thus subject to political rather than judicial scrutiny. Furthermore, the exclusion is a narrow one. It is limited to the officers themselves and does not include “the office of” such officers. For example, if the legislature places a governmental entity

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186. See, e.g., IDAHO CODE ANN. § 67-2402(1) (2014) (referring to offices “assigned to the elected constitutional officers”); *Wasden v. State Bd. of Land Comm’rs*, 280 P.3d 693, 697, 153 Idaho 190, 194 (2012) (“The Attorney General is a duly elected constitutional officer of the people of Idaho.”).

187. See IDAHO CODE ANN. § 19-4001 (2004) (“Any state officer, created by state law, shall be liable to impeachment for any misdemeanor in office.”). No term limits constrain reelection of the constitutional officers. A law review article summarizes the recent history of term limits in Idaho:

Fifty-nine percent of participating Idaho voters approved an omnibus 1994 term limit measure that applied to federal, state, and local offices. The [U.S. Supreme Court’s decision in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)] . . . removed limits on federal offices, but Idaho’s limits on state legislative terms remained in effect. The Idaho legislature attempted to repeal state term limits with a 1998 referendum asking voters to reconsider whether they wished to retain limits on the tenure of state and local elected offices. Fifty-three percent of participating voters approved retaining limits on state and local offices in 1998, thus keeping limits in place. After two largely uncompetitive state legislative contests, the 2002 Idaho legislature voted 26-8 to repeal the citizen-initiated term limit statute, and to overturn the governor’s veto of their term limit repeal bill. Supporters of term limits then qualified a “repeal the repeal” referendum for the November 2002 ballot. The 2002 referendum asking if the legislatures’ repeal of the 1994 initiative should be upheld received a vote of 50.2% in favor, thus repudiating the 1994 citizen-initiated law. No term limit initiatives have been filed in Idaho since 2002.

Todd Donovan, *Direct Democracy as “Super-Precedent”?: Political Constraints of Citizen-Initiated Laws*, 43 WILLAMETTE L. REV. 191, 206–07 (2007) (footnotes omitted).

188. See, e.g., *Williams v. Idaho State Legislature*, 722 P.2d 465, 466, 111 Idaho 156, 157 (1986).

189. IDAHO CODE ANN. § 67-5201(2) (2014).

190. *Id.*

within "the office of the governor," it is an "agency" under the APA if it otherwise meets the definition by being authorized to promulgate rules or decide contested cases. Similarly, functions assigned directly to these officers by statute fall within the definition of "agency" to the extent that they authorize rulemaking or contested case proceedings.<sup>191</sup>

Despite their constitutional status, the constitutional officers do not stand on an equal footing. Only one of them, the Governor, is vested with "supreme executive power."<sup>192</sup> Corresponding to that power, the Governor alone has the express duty to "see that the laws are faithfully executed."<sup>193</sup> To carry out that duty, the Governor has unique powers under the Constitution. For example, the Governor has information gathering powers such as the power to "require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices."<sup>194</sup> The Governor has the power to nominate and, with the consent of the Senate, "appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for."<sup>195</sup> In short, among the constitutional officers, the Governor is, at the very least, first among equals.

Each constitutional officer heads an office, and many of these offices would be considered "agencies" in the everyday sense.<sup>196</sup> In addition, the offices contain components that might themselves be considered agencies. For example, the "Executive Office of the Governor" includes the Division of Financial Management, which is established by statute<sup>197</sup> and the Office of Energy Resources, which is established by executive order.<sup>198</sup> To cite another example, the Office of the State Treasurer includes the statutorily created "Idaho credit rating enhancement committee."<sup>199</sup>

In short, the Idaho Constitution creates seven constitutional officers in the executive branch, each of who heads offices that are "agencies" in the everyday sense and that can include subparts that also are "agencies" in the everyday sense of the word.<sup>200</sup>

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191. Gilmore & Goble, *supra* note 54, at 282 (footnotes omitted).

192. IDAHO CONST. art. IV, § 5.

193. *Id.*

194. *Id.* § 8.

195. *Id.* § 6.

196. IDAHO CODE ANN. § 67-2402(2) (2014) ("The governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction each heads a constitutional office."); *see also supra* notes 9-13 and accompanying text (discussing the meaning of "agency" in the everyday sense).

197. *Id.* § 67-1910.

198. Governor of Idaho, Exec. Order No. 2007-15 (Oct. 19, 2007), *available at* <http://adminrules.idaho.gov/bulletin/2008/01.pdf#page=18>. *See* Official Website of the State of Idaho, Executive, <http://idaho.gov/government/executive.html> (last visited April 21, 2015).

199. IDAHO CODE ANN. § 67-1224(1) (2014).

200. In addition to the seven constitutional officers established in the executive branch, the Idaho Constitution establishes a "commissioner of immigration, labor and statistics," with "such duties . . . as may be prescribed by law." IDAHO CONST. art. XIII, § 8. An Idaho statute enacted in 1919 purports to abolish the commissioner. IDAHO CODE ANN. § 67-3401 (2014). Because the commissioner is a constitutionally created officer, one can argue that a statute cannot abolish this office. But since the office only has "such duties . . . as may be prescribed by law," the legislature presumably can eliminate the office's duties.

## b. Twenty Departments

Article IV says in Section 20 that, except for the “office[s]” of the constitutional officers, all other executive entities must be allocated among twenty “departments”:

**Idaho Const. art. IV, § 20. Departments Limited.**

All executive and administrative officers, agencies, and instrumentalities of the executive department of the state and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction, shall be allocated by law among and within not more than twenty departments by no later than January 1, 1975. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections or units in such a manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary agencies may be established by law and need not be allocated within a department; however, such temporary agencies may not exist for longer than two years.

Article IV, § 20, resembles constitutional provisions in at least thirteen other States and the District of Columbia.<sup>201</sup> According to one source, these provisions limiting the number of departments in the executive branch “simplify and facilitate over-all control of state administration.”<sup>202</sup> However that may be, the Idaho provision does not limit the number of *agencies*; it just requires that all “agencies”—along with all executive or administrative “officers” and “instrumentalities”—fit under one of no more than twenty umbrella “departments.” As noted above, for example, the Office of the Governor includes agencies like the Division of Financial Management and the Commission on Human Rights.

Thus, although the executive branch can contain only seven constitutional offices and twenty departments, those offices and departments – somewhat like spider eggs – can contain multiple, smaller entities that are “agencies” in the everyday sense of that word.

## c. Eight Constitutionally Referenced Boards or Commissions

Besides the constitutional officers and their offices, and the twenty executive departments and their subparts, the Idaho Constitution refers to eight boards or commissions that wield executive power. These eight constitutionally referenced boards or commissions are agencies in the everyday sense of the word. Structurally, each constitutionally referenced board or commission is associated with one of the

201. ALASKA CONST. art. III, § 22; COLO. CONST. art. IV, § 22; D.C. CONST. art. III, § 7(A); FLA. CONST. art. IV, § 6; HAW. CONST. art. V, § 6; LA. CONST. art. IV, § 1(B); MASS. CONST. art. amend. LXVI; MICH. CONST. art. V, § 2; MO. CONST. art. IV, § 12; MONT. CONST. art. VI, § 7; N.J. CONST. art. V, § 4, ¶ 1; N.Y. CONST. art. V, § 2; N.C. CONST. art. III, § 11; S.D. CONST. art. III, § 1.

202. NAT’L MUN. LEAGUE, MODEL STATE CONSTITUTION 71 (rev. 6th ed. 1968) (commentary on Model State Const. § 5.06, which limited number of “principal departments” to “not more than twenty”).

constitutional offices or executive departments. That association is required by the constitutional provision reproduced above: Article IV, § 20.<sup>203</sup>

We can divide the eight constitutionally referenced boards or commissions into two groups, according to their composition. Three boards or commissions consist exclusively of constitutional officers. The other five do not.

These three boards or commissions consist exclusively of constitutional officers:

- 1) The Board of Examiners, which consists of the Governor, Secretary of State, and the Attorney General. This board examines certain monetary claims against the State.<sup>204</sup>
- 2) The Board of Land Commissioners, which consists of the Governor, Superintendent of Public Instruction (Education), Secretary of State, Attorney General, and State Controller. It administers the public lands of the State.<sup>205</sup>
- 3) The Board of Canvassers, which consists of the Secretary of State, State Controller, and State Treasurer. It has certain election functions.<sup>206</sup>

The remaining five constitutionally referenced boards or commissions are made up solely or mostly of gubernatorial appointees. Their general powers and functions are self-evident:

- 4) The State Board of Correction<sup>207</sup>
- 5) The State Board of Education<sup>208</sup>

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203. IDAHO CONST. art. IV, § 20.

204. IDAHO CONST. art. IV, § 18. The Board of Examiners has power “to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law.” *Id.* The statute implementing that constitutional provision is IDAHO CODE ANN. § 67-1023 (2014), which imposes a two-year limitations period on submission of claims against the State. Tort claims against the State, however, are governed by the Idaho Tort Claims Act. Idaho Tort Claims Act, §§ 6-901 to -929. Perhaps tort claims are governed by the Tort Claims Act, rather than by the statute providing for submission of claims to the Board of Examiners because tort claims do not fall within the “claims against the state” that IDAHO CONST. art. IV, § 18 authorizes the Board to examine. *Cf. Davis v. State*, 163 P. 373, 30 Idaho 137 (1917) (holding that the word “claim,” as used in IDAHO CONST. art. V, § 10, does not include claims for damages from negligent acts of state employees), *overruled on other grounds in Smith v. State*, 473 P.2d 937, 93 Idaho 795 (1970) (partially abrogating state sovereign immunity for tortious acts of state employees), *superseded by statute as stated in Newlan v. State*, 535 P.2d 1348, 1350, 96 Idaho 711 (1975).

205. IDAHO CONST. art. IX, § 7; *see also id.* § 8 (describing Board’s duties).

206. IDAHO CONST. art. XXI, § 10; IDAHO CODE ANN. § 34-1211 (2008).

207. IDAHO CONST. art. X, § 5 (establishing Board within Department of Correction and providing for it to consist of three gubernatorial appointees).

208. IDAHO CONST. art. IX, § 2 (creating “a state board of education, the membership, powers and duties of which shall be prescribed by law” and providing for the “state superintendent of public instruction” to be “ex officio member of said board”); *see* IDAHO CODE ANN. § 33-102 (2008 & Supp. 2014) (providing that Board of Education consists of state superintendent of public education, as *ex officio* member, plus “seven (7) members appointed by the governor, each for a term of five (5) years,” with appointment being “subject to confirmation by the senate at its next regular session”); IDAHO CODE ANN. § 33-103 (2008) (authorizing Governor to remove board members “proved guilty of gross immorality, malfeasance in office or incompetency”).

- 6) The Idaho Water Resources Agency (Board)<sup>209</sup>
- 7) The Commission (or Board) of Pardons (and Parole)<sup>210</sup>
- 8) The State Tax Commission<sup>211</sup>

As mentioned above, none of the eight constitutionally referenced boards or commissions is freestanding. Instead, each is associated with either a constitutional officer or one of the twenty executive departments. That association is required by Article IV, § 20, which, as discussed above, in relevant part requires that all executive and administrative agencies, and all instrumentalities of the executive department, be located in either a constitutional office or an executive department.<sup>212</sup> Statutes connect each of the eight entities listed above with a constitutional office or department.

Those statutes are discussed below, along with the statutes governing the constitutional offices and the twenty departments.<sup>213</sup>

## 2. Statutes

The Idaho Constitution controls the composition of the executive branch of Idaho government. But many of the relevant constitutional provisions are implemented and elaborated upon by statutes. Indeed, in many places, the Idaho Constitution provides that the powers and duties of constitutionally created entities shall be “as prescribed by law,” a phrase contemplating statutory supplementation.<sup>214</sup>

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209. The Idaho Constitution says, “There shall be constituted a Water Resource Agency” with various powers. IDAHO CONST. art. XV, § 7. The Idaho Code calls this entity “the Idaho water resource board” and provides for it to consist of eight members appointed for 4-year terms by the Governor with the advice and consent of the senate. IDAHO CODE ANN. § 42-1732 (2003) (emphasis added).

210. The Idaho Constitution provides for a “board of pardons.” IDAHO CONST. art. IV, § 7. The Idaho Code calls this entity the “*commission of pardons and parole*” and provides for it to consist of five members appointed by the Governor to serve three-year terms at the Governor’s pleasure. IDAHO CODE ANN. § 20-210 (2014) (emphasis added).

211. IDAHO CONST. art. VII, § 12.

212. IDAHO CONST. art. IV, § 20.

213. In addition to the constitutionally referenced boards discussed in the text, the Idaho Constitution refers to other entities and officials. Specifically, the Idaho Constitution refers to the University of Idaho and makes it subject to “[t]he regents.” IDAHO CONST. art. IX, § 10. The University of Idaho was created by territorial legislation before Idaho statehood. *See Dreps v. Bd. of Regents of Univ. of Idaho*, 139 P.2d 467, 468–70, 65 Idaho 88 (1943). The Idaho Constitution also refers to entities and officers associated with county government. *E.g.*, IDAHO CONST. art. XVIII, § 6. Finally, the Idaho Constitution refers to a board of canvassers, which was to certify the results of the first set of elections held under the Constitution. *Id.* art. XXI, § 10. A board of canvassers continues to exist and certifies election results. IDAHO CODE ANN. § 34-1211 (2008).

214. IDAHO CONST. art. IV, § 1 (generally stating that the seven constitutional officers “shall perform such duties as are prescribed by this Constitution and as may be prescribed by law”); *id.* § 18 (generally authorizing Board of Examiners to examine claims against the state and “perform such other duties as may be prescribed by law”); *id.* art. VII, § 12 (providing that State Tax Commission may exercise powers and duties previously given to state board of equalization, plus “such other powers and such other duties as may be prescribed by law”); *id.* art. IX, § 2 (providing that State Board of Education has “powers and duties . . . prescribed by law”); *id.* art. X, § 5 (stating that Board of Correction has “such compensation, powers, and duties as may be prescribed by law”); *see also id.* art. XV, § 7 (providing Water Resource Agency with powers and duties to be exercise “under such laws as may be prescribed by the Legislature”); *cf. id.* art. IX, § 7 (providing that State Board of Land Commissioners “shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law”).

We discuss the relevant statutes below, in an order that tracks the organization of the discussion of constitutional provisions above. Thus we identify statutory provisions governing:

- a. the seven constitutional officers and their offices;
- b. the twenty executive departments; and
- c. the eight constitutionally referenced boards or commissions.

The purpose of identifying the statutes governing those three components of the executive branch is to enable the lawyer with a matter before them to analyze their statutory powers and important limits on those powers.

Besides the statutes identified in this section, other statutes may bear on the powers and duties of these administrative entities. Of particular importance are statutes that apply to multiple government entities or to government and private entities alike; these broadly applicable statutes can be called “cross-cutting statutes.” The most important cross-cutting statute is the Idaho APA, which imposes procedural requirements on “agencies,” as defined in that statute, and authorizes judicial review of certain “final agency action[s].”<sup>215</sup> Other cross-cutting statutes include Idaho’s:

- open meetings law,<sup>216</sup>
- public records law,<sup>217</sup>
- State Tribal Relations Act,<sup>218</sup>
- law prohibiting wage discrimination based on sex,<sup>219</sup> and
- Human Rights law.<sup>220</sup>

Still other statutes lurk within the Idaho Code and bear upon the powers and duties of the agencies and officials discussed in this section. When dealing with an unfamiliar agency, you sometimes need creativity and resourcefulness to identify all relevant statutes. Good places to start the identification process are (1) the index to the Idaho Code, which should have index entries for the agencies and officials

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215. IDAHO CODE ANN. § 67-5201(2) & (3) (2014) (defining “agency” and “agency action”); *id.* § 67-5270 (“Right of review”).

216. *Id.* § 67-2342 (1) (generally requiring “all meetings of a governing body of a public agency” to be “open to the public”); *see also id.* § 67-2341(4) & (5) (defining “governing body” and “public agency”).

217. IDAHO CODE ANN. § 9-338 (2010 & Supp. 2014) (generally entitling “[e]very person” to “examine and take a copy of any public record”); *id.* § 9-337(13) (defining “[p]ublic record” to include records of “state agenc[ies]” and “local agenc[ies]”).

218. IDAHO CODE ANN. § 67-4002(1) (2014) (authorizing “[a]ny public agency” to enter into tribal agreements with enumerated tribes on specified subjects).

219. IDAHO CODE ANN. § 44-1701(1) (2014) (defining “[e]mployee” for purposes of wage discrimination law to include “individuals employed by the state or any of its political subdivisions”).

220. IDAHO CODE ANN. § 67-5902(5) (2014) (defining “[p]erson” to include “the state, or any governmental entity or agency”); *id.* § 67-5902(6) (defining “[e]mployer” to include “a person” under certain circumstances); *id.* § 67-5909 (prohibiting some forms of discrimination by a “person” or “employer”); *id.* § 67-5910(5)(a) (providing that some of provisions in § 67-5909 defining “prohibited acts” do not apply to “[a]ny agency of or any governmental entity within the state”).

described in this article and (2) the Idaho Blue Book, published by the Idaho Secretary of State.<sup>221</sup>

a. The Seven Constitutional Officers and Their Offices

The seven constitutional officers identified in the Idaho Constitution must “perform such duties as are prescribed by this Constitution and as may be prescribed by law.”<sup>222</sup> Thus, the Idaho Legislature can create statutory duties supplementing those officers’ constitutional duties. Further, the Idaho Legislature can enact laws that equip constitutional officers with powers to carry out their constitutional and statutory duties.<sup>223</sup>

Below we set out the primary statutes governing the constitutional officers and their offices. If you are a newcomer to Idaho administrative law, you might find it useful to scan these statutes:

- 1) Governor: Idaho Code §§ 67-802 to -808d
- 2) Lieutenant Governor: Idaho Code § 67-809
- 3) Secretary of State: Idaho Code §§ 67-901 to -916
- 4) State Controller: Idaho Code §§ 67-1001 to -1084
- 5) State Treasurer: Idaho Code §§ 67-1201 to -1226
- 6) Attorney General: Idaho Code §§ 67-1401 to -1411
- 7) State superintendent of education: Idaho Code §§ 67-1501 to -1509.<sup>224</sup>

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221. IDAHO BLUE BOOK: 2013-2014, Ch. 3, available at <http://www.sos.idaho.gov/elect/bluebook.htm>.

222. IDAHO CONST. art. IV, § 1.

223. The U.S. Constitution contains the “Necessary and Proper” Clause to give Congress power to enact laws necessary and proper to carry into execution its own expressly enumerated powers as well as the powers of the other branches of the federal government. In contrast, the Idaho Constitution contains no Necessary and Proper Clause, because such a clause is not necessary. Unlike Congress, whose powers are limited to those expressly enumerated or necessarily incidental, the Idaho Legislature is one of plenary power; it “may enact any law not expressly or inferentially prohibited by the state or federal constitutions.” *Standley v. State*, 538 P.2d 778, 781 (Idaho 1975).

224. Unlike the other constitutional officers, each of whom heads a single office, the Superintendent of Public Education is associated with two entities related to public education in Idaho, the *Board of Education* and the *Department of Education*:

1. The Superintendent is an *ex officio* voting member of the State *Board of Education*, IDAHO CODE ANN. § 67-1504 (2014), a body that the Idaho Constitution gives “general supervision of the state education institutions and public school system.” IDAHO CONST. art. IX, § 2; *see also* IDAHO CODE ANN. §§ 33-101 to -132 (2008 & Supp. 2014). By statute, the Superintendent must execute duties that the Board gives him or her “concerning all elementary and secondary school matters under the control of the board except institutions of higher education.” IDAHO CODE ANN. § 67-1504 (2014).

2. The Superintendent serves as “the executive officer” of the State *Department of Education*, which is an “executive agency of the state board of education.” IDAHO CODE ANN. § 33-125 (2008 & Supp. 2014). As the Department’s executive officer, the Superintendent must “carry[] out policies, procedures and duties authorized by law or established by the state board of education for all elementary and secondary school matters.” *Id.*

As the Idaho Blue Book explains, the Superintendent “provides technical and professional assistance and advice to all school districts in reference to all aspects of education including finances, buildings,

When we discussed the constitutional provisions for the constitutional officers above, we said they make the Governor “first among equals” in relation to the other constitutional officers. Reflecting that status, statutes give the Governor powers and duties enabling him or her to exercise the supreme executive power. For example, the Governor can issue executive orders, “which shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state.”<sup>225</sup> In addition, the Governor can “supervise the official conduct of all executive . . . officers.”<sup>226</sup> These statutory powers apparently give the Governor some control over the other constitutional officers and their offices. These powers, in any event, give the Governor legal leverage in any struggles with fellow constitutional officers.

With regard to how the constitutional officers gain and lose their office, as mentioned above, the Idaho Constitution provides for these constitutional officers to be elected for four-year terms.<sup>227</sup> As to losing their office other than being voted out, the Idaho Constitution expressly provides only for impeachment of the Governor.<sup>228</sup> A statute, however, more broadly authorizes impeachment of the other constitutional officers. Indeed, the statute authorizes impeachment of “[a]ny state officer, created by state law . . . for any misdemeanor in office.”<sup>229</sup>

#### b. Twenty Departments

The Idaho Code creates the maximum of twenty departments allowed by article IV, § 20 of the Idaho Constitution. Below we discuss the statutes that (i) explain how these departments relate to the Governor, (ii) identify the departments, (iii) address how they are headed; and (iv) explain how the heads are appointed and removed. We identify these provisions to help you understand what these departments are and how they differ from agencies associated with constitutional officers other than the Governor.

##### i. The Twenty Departments’ Relationship to the Governor

Section 67-2401 of the Idaho Code refers to the twenty executive departments as “civil administrative departments” and establishes them as instrumentalities through which the Governor exercises certain powers:

**Idaho Code § 67-2401. Gubernatorial responsibility--Administrative departments created**

The supreme executive power of the state is vested by the Constitution, article 4, section 5, in the governor, who is expressly charged with the duty of seeing that the laws are faithfully executed. In order that he may exer-

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equipment, administration, organization of school districts, curriculum and instruction, transportation of pupils and interpretation of school laws and state regulations.” IDAHO BLUE BOOK: 2013-2014, *supra* note 221, at 59.

225. IDAHO CODE ANN. § 67-802(1) (2014).

226. *Id.*

227. *See supra* note 187 and accompanying text.

228. IDAHO CONST. art. V, § 4.

229. IDAHO CODE ANN. § 19-4001 (2004).

cise a portion of the authority so vested and in addition to the powers now conferred upon him by law, civil administrative departments are hereby created, through the instrumentality of which the governor is authorized to exercise the functions in this act assigned to each department, respectively.

This statute creates the twenty civil administrative departments to enable the Governor to exercise “a portion” of the supreme executive power constitutionally vested in him or her. The Governor exercises functions statutorily assigned to each department “through the instrumentality” of these departments. The upshot is that these twenty departments support (1) the Governor’s exercise of supreme executive *power* in various areas and (2) the Governor’s discharge of the *duty* to faithfully execute the laws in those areas.

#### ii. Identification of the Twenty Executive Departments

Section 67-2402 identifies the twenty departments in implementing article IV, § 20 (with bracketed numerals added by your author):

**Idaho Code § 67-2402. Structure of the executive branch of Idaho state government**

(1) Pursuant to section 20, article IV, Idaho constitution, all executive and administrative offices, agencies, and instrumentalities of the executive department of state, except for those assigned to the elected constitutional officers, are allocated among and within the following departments:

- [1] Department of administration
- [2] Department of agriculture
- [3] Department of commerce
- [4] Department of labor
- [5] Department of correction
- [6] Department of environmental quality
- [7] Department of finance
- [8] Department of fish and game
- [9] Department of health and welfare
- [10] Department of insurance
- [11] Department of juvenile corrections
- [12] Idaho transportation department
- [13] Industrial commission
- [14] Department of lands
- [15] Idaho state police
- [16] Department of parks and recreation
- [17] Department of revenue and taxation

[18] Department of self-governing agencies  
 [19] Department of water resources  
 [20] State board of education  
 . . . .

### iii. How the Twenty Executive Departments Are Headed

Section 67-2403 provides: “Each department, unless specifically provided otherwise, shall have an officer as its executive and administrative head who shall be known as a director.”<sup>230</sup> Sixteen of the twenty departments have directors; three lack directors and have multi-person entities (boards or commissions) as heads. One executive department has no head of any sort.

#### *(a) Departments with Directors*

Section 67-2406 enumerates directors for these sixteen departments (with numerals added by your author):

**Idaho Code § 67-2406. Directors of departments enumerated**

The following department directors are created:

- [1] Director, department of administration
- [2] Director, department of agriculture
- [3] Director, department of commerce
- [4] Director, department of labor
- [5] Director, department of correction
- [6] Director, department of finance
- [7] Director, department of fish and game
- [8] Director, department of environmental quality
- [9] Director, department of health and welfare
- [10] Director, department of insurance
- [11] Director, department of juvenile corrections
- [12] Director, Idaho transportation department
- [13] Director, department of lands
- [14] Director, Idaho state police
- [15] Director, department of parks and recreation
- [16] Director, department of water resources.

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230. IDAHO CODE ANN. § 67-2403(1) (2014).

Some of these sixteen departments have boards or commissions associated with them. Some of those boards or commissions are referred to in the Idaho Constitution:

- The Board of Land Commissioners—which consists of the Governor, Superintendent of Public Instruction (Education), Secretary of State, Attorney General, and State Controller, and which administers State-owned lands—is in the Department of Lands.<sup>231</sup>
- The State Board of Correction is part of the Department of Correction.<sup>232</sup>
- The Idaho Water Resource Board is “within” the Department of Water Resources.<sup>233</sup>
- The Commission (or Board) of Pardons (and Parole) is part of the Department of Correction.<sup>234</sup>

Other boards or commissions are statutorily created:

- The State Board of Environmental Quality is associated with the Department of Environmental Quality.<sup>235</sup>
- The Board of Health and Welfare is associated with the Department of Health and Welfare.<sup>236</sup>
- The Idaho Board of Transportation is associated with the Department of Transportation.<sup>237</sup>
- The Fish and Game Commission is associated with the Department of Fish and Game.<sup>238</sup>

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231. The Board of Land Commissioners is established by IDAHO CONST. art. IX, § 7; *see also id.* § 8 (describing Board’s duties). The primary statutes governing the Board of Land Commissioners are codified in IDAHO CODE ANN. §§ 58-101–104 (2014), available at [http://www.idl.idaho.gov/LandBoard/index\\_lb.html](http://www.idl.idaho.gov/LandBoard/index_lb.html).

232. IDAHO CODE ANN. §§ 20-201, 209 (2004 & Supp. 2014).

233. IDAHO CODE ANN. §§ 42-1732, 1734 (2003 & Supp. 2014).

234. IDAHO CODE ANN. § 20-201 (2004)

235. IDAHO CODE ANN. § 39-107(1)(a) (2011) (creating board within Department of Environmental Quality and providing for it to consist of seven members appointed by the Governor, with the advice and consent of the senate, to serve four-year terms “at the pleasure of the governor”).

236. IDAHO CODE ANN. § 56-1005 (1)–(2) (2012) (creating board within Department of Health and Welfare and providing for it to consist of a total of eleven members, seven of whom are to be appointed by the Governor with the advice and consent of the senate for four-year terms, subject to removal for cause).

237. IDAHO CODE ANN. § 40-301 (2011) (creating board within Department of Transportation); *id.* § 40-302 (providing for board to consist of seven members appointed by Governor for six-year terms); *id.* § 40-305 (authorizing Governor to remove any board member “for incompetency, inefficiency, intemperance, misconduct in office, [or] neglect or dereliction of duty”).

238. IDAHO CODE ANN. § 36-102 (a)–(b) (2011) (providing for commission within Fish and Game Department to consist of seven members appointed by Governor to serve during Governor’s pleasure for four-year terms).

- The Oil and Gas Conservation Commission is in the Department of Lands.<sup>239</sup>

You must stop and think when you have a matter before an agency that has a director as its “executive and administrative head” but that also has a board or commission associated with it.<sup>240</sup> In that situation, you must identify and analyze the laws delineating the authority of the director and that of the board or commission. That allocation varies from one department to the next.

*(b) Departments Headed Exclusively by Multi-Person Entities*

Three of the twenty executive departments lack directors and are headed exclusively by multi-person entities:

- The Industrial Commission is headed by a commission of three members.<sup>241</sup>
- The Department of Revenue and Taxation comprises two entities—the State Tax Commission (one of the eight constitutionally referenced boards or commission) and the Board of Tax Appeals.<sup>242</sup>
- The State Board of Education consists of the State Superintendent for Public Education and seven gubernatorial appointees.<sup>243</sup>

*(c) Headless Department*

One of the twenty executive departments—namely, the Department of Self-Governing Agencies—has no director or any other head. For that matter, it lacks any employees or physical existence. It exists only on paper, as a repository for many disparate agencies that, as the name “self-governing” indicates, are not actually under the supervision of the department.

The Department of Self-Governing Agencies contains at least fifty-two agencies, fifty-one of which are identified in Idaho Code § 67-2601:

**Idaho Code § 67-2601. Department created--Organization--director--Bureau of occupational licenses created**

(1) There is hereby created the department of self-governing agencies. The department shall, for the purposes of section 20, article IV of the constitu-

239. Act of March 11, 2014, ch. 56 IDAHO CODE ANN. (2014).

240. IDAHO CODE ANN. § 67-2403 (2014).

241. IDAHO CODE ANN. § 72-501(1)–(2) (2008).

242. IDAHO CODE ANN. § 63-101 (2007); *see also* IDAHO CONST. art. VII, § 12 (stating that tax commission “consist[s] of four members, not more than two of whom shall belong to the same political party” and who “shall be appointed by the governor, by and with the consent of the senate” for six-year terms); IDAHO CODE ANN. § 63-102 (1), (4) (2007 & Supp. 2014) (providing for chair of commission to be appointed by Governor, and authorizing chair to “be the chief executive officer and administrative head” of commission); IDAHO CODE ANN. § 63-3802 (2007) (stating that board of tax appeals “shall consist of three (3) members appointed by the Governor with the advice and consent of the senate”); IDAHO CODE ANN. § 63-3806 (2007) (authorizing board to appoint a clerk and other employees).

243. IDAHO CODE ANN. § 33-102 (2008 & Supp. 2014).

tion of the state of Idaho, be an executive department of the state government.

(2) The department shall consist of the following:

(a) Agricultural commodity commissions: Idaho apple commission . . . ; Idaho bean commission . . . ; Idaho beef council . . . ; Idaho cherry commission . . . ; Idaho dairy products commission . . . ; Idaho pea and lentil commission . . . ; Idaho potato commission . . . ; the Idaho wheat commission . . . ; the Idaho aquaculture commission . . . ; and the Idaho alfalfa and clover seed commission . . .

(b) Professional and occupational licensing boards: Idaho state board of certified public accountancy . . . ; board of acupuncture . . . ; board of architectural examiners . . . ; office of the state athletic director . . . ; board of barber examiners . . . ; board of commissioners of the Idaho state bar . . . ; board of chiropractic physicians . . . ; Idaho board of cosmetology . . . ; Idaho counselor licensing board . . . ; state board of dentistry . . . ; state board of dentistry . . . ; Idaho board of licensure of professional engineers and professional land surveyors . . . ; state board for registration of professional geologists . . . ; speech and hearing services licensure board . . . ; Idaho physical therapy licensure board . . . ; Idaho state board of landscape architects . . . ; liquefied petroleum gas safety board . . . ; state board of medicine . . . ; state board of morticians . . . ; board of naturopathic medical examiners . . . ; board of nurses . . . ; board of examiners of nursing home administrators . . . ; state board of optometry . . . ; Idaho outfitters and guides board . . . ; board of pharmacy . . . ; state board of podiatry . . . ; Idaho state board of psychologist examiners . . . ; Idaho real estate commission . . . ; real estate appraiser board . . . ; board of social work examiners . . . ; the board of veterinary medicine . . . ; the board of examiners of residential care facility administrators . . . ; the certified shorthand reporters board . . . ; the driving businesses licensure board . . . ; the board of drinking water and wastewater professionals . . . ; and the board of midwifery . . .

(c) The board of examiners . . .

(d) The division of building safety: building code board . . . ; manufactured housing board . . . ; electrical board . . . ; public works contractors license board . . . ; plumbing board . . . ; public works construction management . . . ; the heating, ventilation and air conditioning board . . . ; and modular building advisory board . . .

(e) The division of veterans services . . .

(f) The board of library commissioners . . .

(g) The Idaho state historical society . . .

(3) The bureau of occupational licenses is hereby created within the department of self-governing agencies.<sup>244</sup>

244. See also IDAHO CODE ANN. § 38-1503 (2011 & Supp. 2014) (creating Idaho forest products commission and placing it within Department of Self-Governing Agencies).

The Department of Self Governing Agencies is like a piñata: a paper-based creation with assorted contents. This is not to denigrate the importance and power of the agencies in that department. To the contrary, many of them wield significant power. But lumping them into an essentially fictitious department undermines Article IV, section 20 of the Idaho Constitution, which limited the number of departments in an apparent effort to limit the number of state agencies.

iv. How the Heads of the Twenty Executive Departments Are Appointed and Removed

Recall that the twenty executive departments function as “instrumentalities” through which the Governor exercises a portion of his or her constitutional and statutory powers.<sup>245</sup> Reflecting that function, the Governor generally has the powers to appoint and remove the heads of these departments. Exceptions exist, however, to the general rules of gubernatorial appointment and removal. Below we separately examine appointment and removal of (a) the sixteen departments with directors and (b) the three departments headed exclusively by multi-person bodies. (We omit from this discussion the Department of Self-Governing Agencies, which, as discussed above, has no head.)

*(a) Departments with Directors*

*(i) Appointment of Directors*

The Constitution empowers the Governor to appoint, with the Senate’s consent, “all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for.”<sup>246</sup> A statute implements this constitutional appointment power for the directors of the sixteen executive departments that have directors. The statute says, “Unless specifically provided otherwise, the Governor shall appoint all department directors . . . subject to the advice and consent of the senate.”<sup>247</sup>

Statutes do “specifically provide[] otherwise” for five departments. These five departments have directors who are not appointed by the Governor. The five departments are the departments of Correction, Fish and Game, Lands, Parks and Recreation, and Transportation. The directors of these departments are appointed by multi-person boards or commissions – namely, the Board of Correction, the Fish

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245. IDAHO CODE ANN. § 67-2401 (2014).

246. IDAHO CONST. art. IV, § 6.

247. IDAHO CODE ANN. § 67-2404(1) (2014). The following statutes specifically authorize the Governor to appoint the directors of specific departments: IDAHO CODE ANN. § 67-5701 (2014) (Department of Administration); IDAHO CODE ANN. § 22-101 (2009 & Supp. 2014) (Department of Agriculture); IDAHO CODE ANN. § 67-2701(a) (2014) (Department of Finance); IDAHO CODE ANN. § 39-104(1) (2011) (Department of Environmental Quality); IDAHO CODE ANN. § 56-1002(1) (2012) (Department of Health and Welfare); IDAHO CODE ANN. § 41-202(2) (2010) (Department of Insurance); IDAHO CODE ANN. § 20-503(2) (2004 & Supp. 2014) (Department of Juvenile Correction); IDAHO CODE ANN. § 67-2901(2) (2014) (Idaho State Police); IDAHO CODE ANN. § 42-1801 (2003) (Department of Water Resources). There appear to be no statutes specifically providing for appointment of the directors of the departments of Commerce or Labor. Cf. IDAHO CODE ANN. § 72-1318 (2006 & Supp. 2014) (referring to director of Department of Labor as “the individual appointed pursuant to section 59-904,” which generally authorizes the Governor to appoint directors of executive departments).

and Game Commission,<sup>248</sup> the Board of Land Commissioners (which the statute calls the “State Land Board”),<sup>249</sup> the Park and Recreation Board,<sup>250</sup> and the Board of Transportation.<sup>251</sup> Some of these boards or commissions spring from the Idaho Constitution; others are creatures solely of statute.<sup>252</sup> Their power to appoint department directors reflects that these boards or commissions oversee the directors’ actions and are thus the true heads of the departments.<sup>253</sup>

(ii) Removal of Directors

The Governor generally can remove a department director at will. Section 67-2404(2) says, “Unless a term of office is provided by law, each director, unless specifically provided otherwise, shall serve at the pleasure of the Governor.”<sup>254</sup> Section 67-2404(2) establishes a general rule giving the Governor unfettered power—often called the power to remove “at will”—most of the directors of the twenty executive departments. Several other statutes reflect § 67-2404(2)’s general rule by providing that directors of specific departments serve at the pleasure of the Governor.<sup>255</sup> Directors of the other departments also serve at the Governor’s pleasure—even if no statute specifically says so—unless one of the exceptions in § 67-2404(2) applies to that director.<sup>256</sup>

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248. IDAHO CODE ANN. § 36-106(a) (2011 & Supp. 2014) (authorizing Fish and Game Commission to appoint director of Department of Fish and Game).

249. IDAHO CODE ANN. § 58-104(2) (2012) (authorizing State Land Board to appoint director of Department of Lands).

250. IDAHO CODE ANN. § 67-4222(b) (2014) (authorizing Park and Recreation Board to “appoint a director to serve at its discretion”).

251. IDAHO CODE ANN. § 40-503 (2011) (director of Idaho Department of Transportation is appointed by and serves at pleasure of Board of Transportation).

252. Specifically, the Idaho Constitution creates the Board of Land Commissioners) and the State Board of Correction. IDAHO CONST. art. IX, § 7; *id* art. X, § 5.

253. *See* IDAHO CODE ANN. § 20-217A (2004) (providing that Director of Correction “shall be the chief administrative officer for the board and business manager of the penitentiary and the properties used in connection therewith”); IDAHO CODE ANN. § 36-106(a) (2011 & Supp. 2014) (Director of Department of Fish and Game discharges official duties “under the direction of the commission”); IDAHO CODE ANN. § 58-105 (2012 & Supp. 2014) (director exercises powers and duties “subject to the general regulation and control of the state board of land commissioners”); IDAHO CODE ANN. § 67-4222(a) & (b) (2014) (providing that Park and Recreation Board “shall administer, conduct and supervise the department of parks and recreation” and that director serves as board’s “secretary and administrative officer”); IDAHO CODE ANN. § 40-505 (2011 & Supp. 2014) (providing that Director of Department of Transportation is “the technical and administrative officer of the board and under the board’s control, supervision and direction”).

254. IDAHO CODE ANN. § 67-2404(2) (2014).

255. The following statutes provide for directors of specific executive departments to serve at the pleasure of the Governor: IDAHO CODE ANN. § 67-5701 (2014) (Department of Administration); IDAHO CODE ANN. § 67-2701(a) (2014) (Department of Finance); IDAHO CODE ANN. § 39-104(1) (2011) (Department of Environmental Quality); IDAHO CODE ANN. § 56-1002(a) (2012) (Department of Health and Welfare); IDAHO CODE ANN. § 67-2901(2) (2014) (Idaho State Police). There are no statutes specifically addressing removal of the director of the Department of Agriculture, the director of correction, or the director of Department of Juvenile Corrections.

256. For example, no statute addresses removal of the director of the Department of Agriculture. *Cf.* IDAHO CODE ANN. § 22-101 (2009 & Supp. 2014) (addressing appointment). Under title 67 section 2404(2), the director of that department accordingly serves at the pleasure of the Governor.

Section 67-2404(2) makes two exceptions to the general rule. The general rule applies (1) “[u]nless a term of office is provided by law” and (2) “unless specifically provided otherwise.”<sup>257</sup> We address each.

The first exception apparently means that, if a director has a statutorily specified term of office (say, four years), the Governor generally cannot remove the officer at will. Instead, the Governor could remove the director only for good cause.<sup>258</sup> That exception itself, however, has an exception: A statute governing a particular director could both specify a term of office and also specify that the director can serve out that term only at the Governor’s pleasure. The only current statute that might fit that description is Idaho Code § 41-202(2), which says that the director of Department of Insurance “shall hold office for a term of four (4) years, subject to earlier removal by the governor.”<sup>259</sup> It is not clear whether “earlier removal” can occur only if the Governor has good cause, or, instead, can occur “at will.”

The second exception in § 67-2404(2) prevents the Governor from removing a director at will if a law “specifically provide[s] otherwise.”<sup>260</sup> This second exception allows the legislature to restrict the Governor’s power so as to permit him or her to remove a director only for good cause. The only current statute that clearly does so is Idaho Code § 42-1803, which says, “The governor may remove the director of the department of water resources for inefficiency, neglect of duty, or misconduct in office.”<sup>261</sup>

The second exception may also operate in another situation: it might allow the commissions or boards that appoint five of the directors to remove those same directors.<sup>262</sup> Of those five directors, two have statutes authorizing them to be removed at will by the board that appointed them.<sup>263</sup> One has a statute that allows for removal by the appointing board, but is ambiguous on whether removal is “at will” or instead may occur only for good cause.<sup>264</sup> The remaining two directors lack statutes expressly addressing their removal. Case law, however, suggests that the boards or commissions that appoint them have incidental power to remove them.<sup>265</sup> An open

257. IDAHO CODE ANN. § 67-2404(2) (2014).

258. See *Gowey v. Siggelkow*, 382 P.2d 764, 774, 85 Idaho 574, 588–89 (1963) (quoting with apparent approval statement in 43 Am. Jur. Public Officers § 183: “appointments . . . for a fixed term of years cannot be terminated except for cause”).

259. IDAHO CODE ANN. § 41-202(2) (2010).

260. IDAHO CODE ANN. § 67-2404(2) (2014).

261. IDAHO CODE ANN. § 42-1803 (2003). The Director of the Department of Water Resources also enjoys a four-year term in office. *Id.* § 42-1801.

262. As discussed *supra* notes 248–253 and accompanying text, the directors of five executive departments are appointed, not by the Governor, but by boards or commissions. They are the Departments of Correction, Fish and Game, Lands, Parks and Recreation, and Transportation.

263. IDAHO CODE ANN. § 58-124 (2012) (stating that Director of Department of Lands and other appointees “shall hold their respective positions during the pleasure of the [State Land] [B]oard”); IDAHO CODE ANN. § 67-4222(b) (2014) (“The [park and recreation] board shall appoint a director to serve at its discretion.”).

264. IDAHO CODE ANN. § 40-503(1) (2011) (stating that Director of Department of Transportation “shall serve at the pleasure of the [Transportation] [B]oard and may be removed by the board for inefficiency, neglect of duty, malfeasance or nonfeasance in office”). *But cf.* *Lowe v. Idaho Transp. Dep’t*, 878 F. Supp.2d 1166, 1181 (D. Idaho 2012) (holding that § 40-503(1) does have a plain meaning, which allows removal only for cause).

265. *Gowey v. Siggelkow*, 382 P.2d 764, 773 (Idaho 1963).

question is whether these five directors can be removed not only by the board or commission that appoints them but also by the Governor.

Our detailed examination of the exceptions should not obscure the general rule, which is that the Governor can generally remove at will the directors of the sixteen executive departments that have directors. This removal power, like the Governor's general power to appoint these directors, reflects their function as instrumentalities through which the Governor exercises a portion of the executive power.

*(b) Departments Headed Exclusively by Multi-Person Entities*

As discussed above, three of the twenty executive departments are headed exclusively by multi-person boards or commissions. Now we discuss how the members of those boards or commissions are appointed and removed.

(i) Industrial Commission

The Governor appoints, with the Senate's advice and consent, the members of the Industrial Commission.<sup>266</sup> Members of the Industrial Commission "may be disciplined or removed or retired from office by the judicial council . . ."<sup>267</sup> for the same causes as the judicial council can take those measures against state judges.<sup>268</sup>

(ii) Department of Revenue and Taxation

The Governor appoints the members of the two multi-person groups that head the two components of the Department of Revenue and Taxation: namely, the Tax Commission<sup>269</sup> and the Board of Tax Appeals.<sup>270</sup> Members of the State Tax Commission are subject to removal by impeachment.<sup>271</sup> Members of the Board of Tax Appeals are subject to removal not only by impeachment<sup>272</sup> but also by the Governor "for cause."<sup>273</sup>

(iii) State Board of Education

The Governor appoints seven of the eight members of the State Board of Education.<sup>274</sup> The eighth member is an elected official and constitutional officer: the

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266. IDAHO CODE ANN. § 72-501 (2006).

267. *Id.* § 72-501(7).

268. IDAHO CODE ANN. §§ 1-2103 & 1-2404(3) (2010 & Supp. 2014).

269. IDAHO CONST. art. VII, § 12; IDAHO CODE ANN. § 63-101(5) (2014).

270. IDAHO CODE ANN. § 63-3802 (2007 & Supp. 2014).

271. IDAHO CODE ANN. § 63-101(5) (2007). The Commissioners are not unique in being subject to impeachment. "Any state officer, created by state law, shall be liable to impeachment for any misdemeanor in office." IDAHO CODE ANN. § 19-4001 (2004). The Commissioners are unusual in having a reference to their removability in a statutory provision that expressly authorizes the Governor to appoint them but does not expressly authorize the Governor to remove them. The provision could be interpreted by negative implication to bar the Governor from removing them.

272. *See* § 19-4001 ("Any state officer, created by state law, shall be liable to impeachment for any misdemeanor in office.").

273. IDAHO CODE ANN. § 63-3805 (2007).

274. IDAHO CODE ANN. § 33-102 (2008 & Supp. 2014).

Superintendent of Public Education, a popularly elected official.<sup>275</sup> The following statute addresses removal of members:

**Idaho Code § 33-103. Removal of members--Cause<sup>276</sup>**

The governor is empowered to remove from membership on the state board any member who has been proved guilty of gross immorality, malfeasance in office or incompetency, and shall fill the vacancy thus created by appointment as hereinbefore provided.

This statute presumably does not allow the Governor to remove the Superintendent of Public Education, because the Governor does not appoint the Superintendent in the first place. Furthermore, the Superintendent and Governor are fellow constitutional officers. Under those circumstances, it would be odd if the Governor could remove the Superintendent and replace him or her with the Governor's choice. Therefore, the Governor's power to remove members of the Board of Education probably encompasses only the appointed members.

c. Eight Constitutionally Referenced Boards or Commissions

Above we identified eight boards or commissions to which the Idaho Constitution refers.<sup>277</sup> We also noted that, as required by the Constitution, each of these boards is connected with either one of the seven constitutional offices or the twenty executive departments.<sup>278</sup> In this section we identify the constitutional office or department to which each constitutionally referenced board or commission is connected and the primary statutes governing each board or commission. We also cite the main statutory provisions governing each board and its official website. In addition, for the boards not headed exclusively by constitutional officers, we describe the members' terms of office and the methods (in addition to impeachment) for their removal.

i. Constitutional Boards Headed Exclusively by Constitutional Officers

- The Board of Examiners consists of the Governor, Secretary of State, and the Attorney General.<sup>279</sup> It examines certain claims against the State.<sup>280</sup> It is in the Department of Self-Governing Agencies.<sup>281</sup>
- The Board of Land Commissioners consists of the Governor, Superintendent of Public Instruction (Education), Secretary of State, Attorney

275. *Id.*

276. IDAHO CODE ANN. § 33-103 (2008).

277. *See supra* notes 204–211 and accompanying text.

278. *See supra* note 212 and accompanying text.

279. The Board of Examiners is established by IDAHO CONST. art. IV, § 18. The primary statutes governing the Board are codified at IDAHO CODE ANN. §§ 67-2001 to -2026A (2014). The Board's website is <http://www.sco.idaho.gov/web/sbe/sbeweb.nsf>.

280. *Id.*

281. *Id.*

General, and State Controller.<sup>282</sup> It administers State-owned lands.<sup>283</sup> It is in the Department of Lands.<sup>284</sup>

- The Board of Canvassers consists of the Secretary of State, State Controller, and State Treasurer.<sup>285</sup> It has certain election functions.<sup>286</sup> It is associated with the Secretary of State, who chairs it.<sup>287</sup>

ii. Constitutionally Referenced Boards or Commissions Not Headed Exclusively by Constitutional Officers

- The State Board of Correction oversees the Department of Corrections.<sup>288</sup> The Board consists of three members appointed by the Governor for six-year terms.<sup>289</sup> The Governor may remove them “for disability, inefficiency, neglect of duty or malfeasance in office.”<sup>290</sup>
- The State Board of Education has “general supervision, governance, and control of the public school systems, . . . .”<sup>291</sup> Its eight members consist of the State Superintendent of Public Instruction, who is elected, and seven members appointed by the Governor for five-year terms.<sup>292</sup> The Governor may remove “any member who has been proved guilty of gross immorality, malfeasance in office or incompetency.”<sup>293</sup> Among other duties, the Superintendent serves as the “executive officer” of the *Department* of Education and has responsibility “for carrying out policies, procedures and duties . . . established by the state *board* of education for all elementary and secondary school matters.”<sup>294</sup>
- The Idaho Water Resource Board is “within” the Department of Water Resources.<sup>295</sup> It controls the planning and development of water re-

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282. The Board of Land Commissioners is established by IDAHO CONST. art. IX, § 7 (West, Westlaw through 2014); *see also id.* § 8 (describing Board’s duties). The primary statutes governing the Board of Land Commissioners are codified in IDAHO CODE ANN. §§ 58-101 to -104 (2012). This Board’s website is <http://www.idl.idaho.gov/land-board/lb/index.html>.

283. *Id.*

284. *Id.*

285. The Board of Canvassers is established by IDAHO CONST. art. XXI, § 10. Its primary statutes are codified at IDAHO CODE ANN. §§ 34-1211 to -1213 (2008). Its website is <http://www.sco.idaho.gov/web/scoweb.nsf/pages/canvassers.htm>.

286. *Id.*

287. *Id.*

288. IDAHO CODE ANN. §§ 20-201 & 20-209 (2004 & Supp. 2014).

289. *Id.* § 20-201A(1).

290. The Board of Correction is established by IDAHO CONST. art. X, §. Its primary statutes are codified at IDAHO CODE ANN. §§ 20-201 to 20-249 (2004 & Supp. 2014). Its website is <http://www.idoc.idaho.gov/>.

291. IDAHO CODE ANN. § 33-101 (2008).

292. IDAHO CODE ANN. § 33-102 (2008 & Supp. 2014).

293. IDAHO CODE ANN. § 33-103 (2008).

294. IDAHO CODE ANN. § 33-125 (2008 & Supp. 2014) (emphasis added). The board of education is established by IDAHO CONST. art. IX, § 2. Its website is <http://www.boardofed.idaho.gov/>.

295. IDAHO CODE ANN. §§ 42-1732 & 42-1734 (2003 & Supp. 2014).

sources in the State.<sup>296</sup> It consists of eight members appointed by the Governor with the advice and consent of the Senate.<sup>297</sup> They serve four-year terms.<sup>298</sup> No law specifically addresses their removal.<sup>299</sup> By statute, however, they are subject to removal by impeachment, like all other state officers.<sup>300</sup>

- The Commission (or Board) of Pardons (and Parole) is part of the Department of Correction.<sup>301</sup> The Commission has “full and final authority” to grant reprieves and pardons for all crimes except serious ones like rape and murder, as to which it can only make recommendations to the Governor.<sup>302</sup> The Commission consists of five members appointed by the Governor with the advice and consent of the Senate.<sup>303</sup> They are removable by the Governor at will.<sup>304</sup>
- The State Tax Commission is part of the Department of Revenue and Taxation.<sup>305</sup> It administers the state tax laws.<sup>306</sup> The Commission has four members appointed by the Governor with the advice and consent of the Senate for six-year terms; they are removable by impeachment.<sup>307</sup>

### 3. Summary

We began our exploration of the Idaho executive branch by identifying its main components: (1) seven constitutional officers and offices, (2) twenty executive departments, and (3) eight constitutionally referenced boards or commissions.

Each component has common features, which is what led us to group them in the first place. For example, the seven constitutional officers are all elected and head their own office. The twenty executive departments all serve as instrumentalities through which the Governor exercises a portion of his or her constitutional powers and duties. The constitutionally referenced boards or commissions are each attached to either a constitutional office or an executive department. We group

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296. IDAHO CODE ANN. § 42-1730 (2003).

297. *Id.*

298. *Id.*

299. The Idaho Constitution requires the creation of a “Water Resource Agency.” IDAHO CONST. art. XV, § 7. This agency is established by a statute that calls this entity “the Idaho water resource board.” IDAHO CODE ANN. § 42-1732 (2003).

300. IDAHO CODE ANN. § 19-4001 (2004).

301. IDAHO CODE ANN. § 20-201 (2004).

302. IDAHO CODE ANN. § 20-240 (2004 & Supp. 2014).

303. IDAHO CODE ANN. § 20-210 (2004 & Supp. 2014).

304. *Id.* The Idaho Constitution provides for a “board of pardons.” IDAHO CONST. art. IV, § 7. The Idaho Code calls this entity the “commission of pardons and parole” and provides for it to consist of five members appointed by the Governor to serve three-year terms at the Governor’s pleasure. IDAHO CODE ANN. § 20-210 (2004 & Supp. 2014).

305. IDAHO CODE ANN. § 63-101(1) (2007).

306. IDAHO CODE ANN. § 63-105 (2007 & Supp. 2014).

307. *Id.* § 63-101(5) & (6). The Idaho state tax commission is established by IDAHO CONST. art. VII, § 12). Its website is <http://tax.idaho.gov/>.

them to help us make sense of what a layperson views simply as the faceless bureaucracy.

Despite common elements, each constitutional officer and office, each executive department, and each constitutionally referenced board or commission is different. That is because each exists and operates under different laws. Lawyers with matters before these agencies must identify and ultimately master these laws. It is hoped this article makes for a useful starting point in the identification process.

#### CONCLUSION

This article introduces readers to Idaho administrative law in two steps. First, the article explored general principles of administrative law using examples from Idaho. Second, the article identified “agencies” (in the everyday sense of that word) in Idaho state government. The article shows that agencies exist in all three branches of Idaho state government but most are in the executive branch (as is true in other States and at the federal level). The Idaho Constitution creates an executive branch that includes seven constitutional officers, each of which has an office, plus no more than twenty executive departments under the Governor. The Constitution also refers to eight boards or commissions that are associated with either a constitutional office or an executive department. Statutes supplement these constitutional provisions. The result is an intricate matrix that wields vast power over Idaho residents. Lawyers play vital roles in ensuring that Idaho agencies exercise that power within legal constraints.