Administrative Law Outline

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Standards of Review

- Substantial evidence - formal adjudication
- Arbitrary and capricious – usually informal rulemaking or adjudication
    - Hard look review (*State Farm*)
    - Agency interpretation of statute (*Chevron*)
    - Note that this is substantive, not about process
        - If *Chevron* doesn't apply, *Skidmore*
    - Agency exceeds personally written regulation (*Auer, Seminole Rock, Kisor*)
        - If we fall out, end up in *Skidmore*
- If the question has elements of mixed fact and law, these are separate challenges

Non-Delegation Doctrine

- Congress cannot simply abdicate responsibility and delegate legislative function to the executive.
- Criteria for an acceptable statute of delegation
    - Limited time
    - Theoretically existing procedural safeguards that the agency must use
    - Agency actions subject to judicial review
    - Goal of avoiding "gross inequity"
    - If the statute lacks explicit standards, reviewing courts could easily find permissible standards
    - Note that courts will give Congress broad leeway during wartime
    - END GAME: Intelligible Principle is what you need (*Benzene, Whitman, Gundy*)

General Non-Delegation and Intelligible Principles

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).[1]

- Facts: Schechter Poultry was cited for violating the Live Poultry Code which was promulgated by FDR via executive Order
- Issue: Is the citation valid?
    - No
- Holding: Congress is authorized to make laws for the execution of its general powers by POTUS but cannot abdicate essential legal function to the president

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). [2]

- Facts: In 1933 FDR issued an EO banning the transport of petrol across state lines what was produced in excess of quotas in the National Industrial Recovery Act (NIRA)
- ISSUE: Was the EO constitutional?
    - No
- Holding: Specific parameters must be laid down if the executive is allowed to make rules. When it allows the executive to promulgate rules Congress must provide guidelines by which the executive is formulating them (coloring in the details)

Gundy v. US, 139 S. Ct. 2116, (2019). [3]

- Facts: Gundy was a convicted rapist who had served his time. Under SORNA (sex offender notification and registration act), congress was trying to create a uniform registry of sex offenders. Congress delegated authority to the AG to set the timeline for when pre-act offenders would need to register. Gundy failed to do so and was imprisoned.
- ISSUE: Was delegating this power to the AG an unconstitutional delegation of authority?
    - NO
- Holding: Judgement was affirmed. Delegation was within constitutional bounds. As long as congress

sets out an "intelligible principle" to guide the exercise of authority. Failure only will occur when congress fails to "articulate any policy standards"
- DISSENT: Gorsuch, concerned that we are allowing administrative agencies fluidity in regulating private conduct. This can affect personal liberty

Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980). [4]
- AKA Benzene
- FACTS: Under the Occupational Safety and Health Act, the Secretary of Labor, after determining exposure to benzene caused leukemia, set the standard for workers to be exposed at 10ppm
- ISSUE: Did the secretary exceed his authority?
    - YES!
- Plurality: Act dictates that the new standard was to provide "safe and healthful employment." Court held that since the secretary had not made a threshold determination (i.e. had not determined precisely where harm would be in the record), he could not promulgate the rule.
- To Comply the secretary must
    - 1) Determine that a health risk exists at a certain threshold
    - 2) Decide to issue the most protective standard or a weighted standard
- Rehnquist Argues Non-Delegation violation:
    - 1) congress makes policy (not agencies), agencies should only engage in technical work,
    - 2) agencies of delegation need an intelligible principle,
    - 3) the intelligible principle must provide metrics for judicial review

Mistretta v. United States, 488 U.S. 361 (1989). [5]
- FACTS: Mistretta was indicted for selling cocaine but wanted the sentencing reform guidelines from the Sentencing Reform Act declared invalid via separation of powers. Argument was that the US Sentencing Commission, which is an independent agency, had been delegated a legislative power
- ISSUE: Was the creation of a commission with the power to create binding guidelines an unconstitutional delegation of legislative authority?
    - NO!
- HOLDING: Although the Sentencing Reform Act established a commission which generally used legislative power in the judiciary, nondelegation doctrine does not prevent the legislature from asking for help.
- DISSENT: Scalia argues this is a non-delegation issue. Judiciary is setting rules with the force of law and disregarding them will have opinions reversed

Whitman v. American Trucking Assns., Inc., 531 U.S. 457 (2001). [6]
- FACTS: The Clean Air Act required the EPA to maintain quality standards and set standards for pollutants to maintain adequate safety. In doing so cost tradeoffs were explicitly used when setting standards. This was invalidated by the DC Circuit for lacking an intelligible principle for what an adequate margin of safety is.
- ISSUE: Is there an intelligible principle here? Can costs be used?
    - YES and NO
- HOLDING: 9-0: There is an intelligible principle here, congress is promulgating rule setting to the EPA to reflect best scientific knowledge
    - Cost tradeoffs cannot be included because the statute says levels should be set based on SCIENTIFIC KNOWLEDGE. There is no mention of costs

Statute Specificity

Department of Agriculture v. Murry, 413 U.S. 508 (1973). [7]
- FACTS: Congress started reforming the food stamp act because of hippie communes. Murray was a grandmother with a son over the age of 18 and grandchildren living with her. Because her ex claimed some of these people as dependents she was ineligible for food stamps

- ISSUE: Does the contested provision violate equal protection
    - YES!
- HOLDING: The unrelated persons provision in the act is irrelevant to the purpose of the Act and did not rationally prevent fraud in this case. Changes to the act are unconstitutional due to an unrebuttable presumption
    - Probably would not hold up today

Congressional Oversight and Control of Agencies

Statutory Tools That Congress Has for Agency Oversight

- They write the statute which delegates authority, so there's that
- The Administrative Procedure Act (APA) – default procedures
- Freedom of Information Act (FOIA) – allows transparency into agency actions
- National Environmental Policy Act (NEPA) – requires policy impact reports
- Quality Information Act (QIA)
- Regulatory Accountability Act
- Civil Service Act (CSA) – creates a professional and merit based civil service

Procedural Tools the Congress Has for Agency Control

- LITIGATION AUTHORITY – if an agency doesn't have their own authority, they are at the mercy of DOJ, which gives the solicitor general veto power on actions. This also allows them to specialize and not keep litigators on staff. So, tradeoffs.
- Confirmation Process – extracting promises from agency heads
- Appropriations Process – funds need to be approved and we can take them away
- Oversight Process – We can drag everyone into public committee meetings

INS v. Chadha, 462 U.S. 919 (1983) [8]

- FACTS: Immigration nationality act had a one house veto on immigration decisions made by the AG. When Chadha was about to become stateless the AG suspended his deportation. Congress overrode this decision
- Issue: Can a single house of congress veto the actions of the AG?
    - NO!!!!
- Holding: Legislative veto is unconstitutional. Two reasons, bicameralism and presentment
- WHITE DISSENT: This is absurd. Bicameralism and presentment are how we make laws, why cant congress do things besides make laws. There's no rule against it.

Pillsbury Company v. FTC, (5th Cir. 1966). [9]

- FACTS: Pillsbury sells flour and bought another flour manufacturer. The FTC determined this violated Clayton Antitrust due to the size of the market and ordered divestiture. This was a problem because a senate committee had blasted the FTC commissioner about making sure the Pillsbury merger did not go through
- ISSUE: Were Pillsbury's due process rights violated?
    - YES
- HOLDING: When the legislature probes the decision-making process of agency about a case that is being heard by that agency they are intervening in the agency's judicial function. Separation of powers problem

Bowsher v. Synar, 478 U.S. 714 (1986). [10]

- FACTS: Gramm-Rudman-Hollings act was passed to try to manage the deficit. It compelled the comptroller to make financial reports to the white house and enact various actions. Comptroller had a 15-year term. Appointment was standard but only congress had the power to remove.
- ISSUE: Is congress able to remove an executive officer?

    - NO!!!
- HOLDING: The comptroller general is an agent of congress because congress can remove them. This puts congress in charge of an executive action (spending money). Violates Article II
- KEY: Once congress delegates power, it cant get involved in the execution of that power.

Presidential Control of Agencies

Appointment Power

- Article 2, section 2, clause 2 gives the president the authority to nominate officers
- Who is an officer? Only officers need senate approval

Buckley v. Valeo, 424 U.S. 1 (1976). [11]

- SIGNIGICANT AUTHORITY TEST (TWO PARTS) – Trigger for who must be appointed
    - An officer must be appointed as described in the appointments clause (nominated by POTUS, confirmed by senate)
    - An officer is anyone who exercises significant executive authority
    - Continuing Position - *Germaine*
- FACTS: Federal Election Campaign Act of 1971 created a series of rules for donations. Critical to us, it also created the Federal Election Commission. FEC was comprised of two persons from POTUS, two from the house, two from the senate, and others
- ISSUE: Can the legislature nominate executive officers?
    - NO!!!!!
- HOLDING: FEC powers created by statute are ok but these persons are exercising executive authority. Violates separation of powers

Federal Election Com'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993). [12]

- FACTS: in the wake of the *Buckley* decision, the FEC act was amended to have the president perform all parties to the commission with the exception of the non-voting *ex officio* members
- ISSUE: Even if the congressionally appointed *ex officio* members who cannot vote, does this violate appointments?
    - YES!
- HOLDING: Even if the members cannot vote, they can pressure commission members, which violates appointments. This is an interference with the executive.

Freytag v. Commissioner, 501 U.S. 868 (1991) [13]

- FACTS: Freytag and associates were charged with using a tax shelter. Their case was headed up by a special trial judge who found against them. They appealed, arguing that the case was too complex for a special trial judge who was appointed by the Chief Judge of the Tax Court
- ISSUE: Does the appointment of a special tax judge by a chief judge, whose opinions and findings are reviewable, violate the appointments clause?
    - NO!!!!
- HOLDING: As long as the opinion is reviewable, article I courts can exercise judicial power the same way article III courts can.

Lucia v. SEC, 138 S. Ct. 2044 (2018). [14]

- FACTS: Lucia was tried by an ALJ who imposed sanctions. He challenged the finding arguing that the ALJ was an Officer of the US had not been properly appointed under appointments
    - President, Court of Law, Head of Department → These are acceptable appointers
- ISSUE: Are SEC ALJ's Officers Subject to Appointment?
    - YES!
- HOLDING: Similar to STJ's (*Freytag*) ALJs enjoy career appointments and wield significant authority. Since FTJs are officers, and ALJs look like FTJs, they are officers

United States v. Germaine, 99 U.S. 508 (1879). [15]

- KEY TAKEAWAY: Officers are persons whose duties are continuing, not temporary. If work is not continuous, i.e. occasional or intermittent, then the person is not an officer.

Determining Principal v Inferior Officers

- Principal officers must be appointed by the President (subject to approval)
- Inferior officers can be appointed by the President, Courts, and heads of department

Morrison v. Olson, 487 U.S. 654 (1988). [16] – Principal v Inferior Officers

- FACTS: Independent counsel was appointed by a special division at the request of the AG. IC is removable for cause by the AG but not removable by anyone else.
- ISSUE: Is the IC a principal or inferior officers? INFERIOR
    - Definitely an officer. Significant Authority, Extensive Term, Executive Function
- NO BRIGHT LINE RULE for determining principal v inferior (suggestive, not dispositive)
    - Appointed by head of department
    - Subject to removal by an exec branch official (officer has a superior who is not POTUS)
    - Limited in tenure and jurisdiction (AG assigned task)
- SCALIA DISSENT: This is madness. How can the president not have the authority to remove someone within Article II? In retrospect, not a shit point.

Edmond v. United States, 520 U.S. 651 (1997). [17]

- FACTS: Sec Trans is authorized to appoint civilian members to the Coast Guard Court of Appeals. This is an intermediate court and decisions are reviewable. Judges are not limited in tenure
- ISSUE: Are these officers principal or inferior? INFERIOR
- HOLDING: Inferior officers are those who are supervised and directed by principal officers
- TEST: most important factor is being SUBORDINATE to a NON POTUS person
    - Also, removable at will
    - Also, officer decisions subject to review and reversal

Removal Power

- Chief issue here is that the only thing the constitution says about removal is impeachment

Myers v. United States, 272 U.S. 52 (1926). [18]

- FACTS: Myers was a postmaster who was appointed by the prior POTUS. Statute said he could be removed by POTUS with advice and consent of senate. Resignation was demanded, but the postmaster refused to submit their resignation.
- ISSUE: Can congress put limitations on removal of executive officers?
    - NO!!!! (undermined later)
- RULE: The legislature cannot regulate removal

Humphrey's Executor v. United States, 295 U.S. 602 (1935) [19]

- FACTS: FTC Commish was refusing to resign. FDR trying to remove him. Removal could only be for cause. Efficiency, neglect, dereliction, malfeasance. FDR does not claim any of these.
- ISSUE: Does the statute limit removal? Can congress limit removal? YES TO BOTH
- HOLDING: The president cannot remove heads of independent agencies except for the reasons Congress puts down in the law. Two specific types of people where this applies
    - Quasi-judicial – right to hold hearings and conduct investigations
    - Quasi-legislative – right to make rules that have the force of law
- Effectively cuts down Myers

Wiener v. United States, 357 U.S. 349 (1958). [20]

- FACTS: Commissioner suing for back pay based on illegal removal from War Crimes Commission.

Commission had no removal provision. Was supposed to be a temporary commission.
- ISSUE: Can POTUS remove a commissioner before term expires?
    - NO!!!!
- HOLDING: As the intent of congress was that the commission would be independent, *Humphrey* is controlling. The court assumes the president has no removal authority
    - Inconsistent with *FEC v Political Victory* and *Myers* (removal is unlimited)

Morrison v. Olson, 487 U.S. 654 (1988). [16]
- FACTS: Now about removal. IC was only removable by the AG. Unlike *Humphrey*, core executive function. IC cannot be removed by the president
- ISSUE: Is this constitutional?
    - YES
- HOLDING: The question is if the person is impeding the ability of the president to execute their function. If not, it doesn't matter who can remove them, just that they are removable (POTUS or no)

Free Ent. Fund v. Public Co. Acctg. Oversight Bd., 561 U.S. 477 (2010). [21]
- AKA *Free Enterprise* or *PCAOB* (Peek-a-boo)
- FACT: In the wake of the accounting scandals of the 2000 SarBox was passed. The PCAOB was a five-member board appointed by the SEC. SEC board can only be removed for cause. PCAOB can only be removed for cause.
- ISSUE: May the president be restricted in his ability to remove a principal officer, who in turn is restricted from removing an inferior officer, even though that inferior officer determines policy and enforces the law? More simply, is double for cause removal ok?
    - NO
- HOLDING: Double for cause removal violates the vesting clause.
- REMEDY: Removal of the for cause only restriction.

Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020). [22]
- FACTS: After the 2008 financial crisis, the CFPB was created to police consumer debt. The CFPB is headed by a single Director whose term is longer than POTUS, and can only be removed for cause
- ISSUE: Can you have a single director (longer term) who is removable only for cause
    - NO!!!!
- HOLDING: This violates separation of powers. A single director must be removable at will.
    - This person is not QL or QJ (*Humphrey*), they perform a core executive function and can interfere with the president
- PERSONAL THOUGHT: Not sure if they are going to kill *Humphrey* next, but I have to imagine they will. What is the effect this has on the FED and SEC, at will removal for those would be insane

Presidential Control of Agencies Beyond Appointment and Removal

Youngstown Sheet & Tube Co v Sawyer (1952) [23]
- FACTS: This is the Truman nationalizing the steel industry case. He cant do that obviously. The most important part is the Jackson Concurrence.
- Jackson Concurrence - three-pronged Test. When determining whether the executive has authority there are three general circumstances.
    - First, when the President acts with the express or implied authorization of Congress then the President's authority is at its greatest.
    - Second, in the absence of either a congressional grant or prohibition then the President acts in a zone of twilight. In this circumstance, Congress and the President may have concurrent authority. In this zone of twilight, an actual test on authority will be dependent on the events and the contemporary theory of law existing at the time.
    - The third circumstance is when the President takes measures that go against the expressed will of Congress, his power is at its lowest.

- My reading, couple this with *Chevron* interpretations, and there is no second zone in admin law.

Rule Making

APA Sections Governing Rulemaking and Adjudication

	Rulemaking	Adjudication
Formal	553, 556, 557	554, 556, 557
Informal	553	No Section, Constitutional minimum process may be relevant

Steps to Rulemaking

1. Public Notice of Proposed Rule
2. Comment Period between 30 and 60 Days
3. Publication of Final Rule in Federal Register after comment incorporation
    a. Formal Rulemaking includes hearings presided over by an agency of Administrative Law Judge where evidence can be presented, witnesses called, subpoenas issued, cross-examination can occur, etc. This almost never happens now.

Retroactive Rule Making

SEC v. Chenery Corp., 318 U.S. 80 (1943). [24]

- *Chenery I*
- Reorganization of the Chenery groups went afoul of the SEC, but the SEC changed its reasoning for why the company could not reorganize after its initial decision
- HOLDING: An administrative Agency cannot defend and administrative decision on new ground not set forth in the original decision.

SEC v. Chenery Corp., 332 U.S. 194 (1947). [25]

- Chenery II
- FACTS: During an early 1900s reorganization of a utility holding group one company submitted a re-org plan that was rejected by the SEC. Blah Blah. Second time around, SEC came to the same determination at Chenery I based on a rule promulgated through adjudication
- ISSUE: Can an agency promulgate binding rules through adjudication?
    - YES!!!!
- HOLDING: Agencies can promulgate rules in previously unseen circumstances, that it could not reasonably foresee, as long as the proposed solution is a reasonable way to solve the issue.

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988). [26]

- FACTS: HHS set a limit on how much hospitals could be reimbursed for Medicare services. This original implementation was flawed and struck down. So HHS made a new rule and started collecting dollars retroactively.
- ISSUE: Can agencies make RULES retroactively through RULEMAKING?
    - Sometimes
- HOLDING: Congress must be clear in the statute that the agency has the power to make retroactive rules.

Conditions for Formal Rule Making

United States v. Florida East Coast R. Co., 410 U.S. 224 (1973). [27]

- FACTS: Commission made a rule change regarding the compilation of supply and demand data for freight car rentals. During the hearing discussing changes, the case was adjourned with the expectation that it would be continued, but it was not continued before rules were released.
- ISSUE: Did the ICC fail to comply with the APA by receiving written submissions but not an oral

hearing?
    - NO!!!!
- HOLDING: Agencies need only comply with 556 hearing requirements if the APA mandates that proceedings take place "on the record"
    - EMPHASIS on "ON THE RECORD." Formal rulemaking goes bye bye now

Conditions for Judicial Review of Agency Action

- The reviewing court shall—
    - (1)compel agency action unlawfully withheld or unreasonably delayed; and
    - (2)hold unlawful and set aside agency action, findings, and conclusions found to be—
        - (A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
        - (B)contrary to constitutional right, power, privilege, or immunity;
        - (C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
        - (D)without observance of procedure required by law;
        - (E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
        - (F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
- In making the foregoing determinations, the court shall review **the whole record** or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
    - Hard look review.
- OUTCOME BASED TEST: WOULD WE GET TO A DIFFERENT RULE WITHOUT THE ERROR IN PROCEDURE OR ACTION

Procedural Requirements for Informal Rule Making

Steps for Informal Rule Making

- Notice of Proposed Rulemaking
- Comment Period (Comments then Incorporated)
- Publication of rule in federal register

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). [28]

- FACTS: Abbott et al challenged the Food and Drug Commissioners labeling changes after Congress amended the Food Drug and Cosmetic act and did so prior to regulation enforcement.
- ISSUE: Can subjects challenge rules prior to enforcement?
    - YES!!!!
- HOLDING: Pre-enforcement review can occur when not prohibited by statute or against statutory intent. Suit can be brought when a "final agency decision" will bring a hardship absent judicial consideration.

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). [29]

- FACTS: During the evaluation of an environmental impact study, the Atomic Energy Commission issued a rule based on a survey which didn't have cross examination. No "on the record"
- ISSUE: Can courts compel agencies to add additional steps beyond section 553 of the APA?
    - NO!!!!!
- HOLDING: Federal agencies can take additional steps at their discretion, but reviewing courts are not generally free to impose them absent statutory mandate
    - Thus: Notice of proposed rulemaking, comment period, publication of rule
    - Not necessarily in that order

Notice of Proposed Rulemaking Requirements

Contents of a Notice

- Statement of time, place, and nature of proceedings
- Legal authority under which a rule is proposed
- Terms or substance of the proposed rule, or a description of subject matter

Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991). [30]

- LOGICAL OUTGROWTH TEST
- FACTS: EPA issued NPR on descriptions of what would be hazardous. After notice and comment, the EPA issued rules which included two additional items on which there was no comment. These were substantially different.
- ISSUE: Did the agency fail to provide adequate notice on the additional items?
    - YES!!!!
- HOLDING: Agency final rules must be logical outgrowth from notice and comment
- BALANCING TEST
    - Agencies can promulgate slightly different rules when they learn from commentary – *International Harvester v Ruckelshaus*
    - Final rules must be a logical outgrowth (or sufficiently foreshadowed) - *Small Refiner Lead Phase Down*

Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973). [31]

- FACTS: EPA issued a rule based on a study, but study was not revealed until after rule was issued.
- ISSUE: Can they do that? NO!!!
- HOLDING: To permit meaningful comment an agency must share all data they base decisions on
- TEST for Portland Cement to Apply
    - Data not shown
    - Agency relied on it
    - Proof of prejudice (comment period would have gone differently)

American Radio Relay League, Inc. v. FCC, 524 F.3d 227 (D.C. Cir. 2008). [32]

- FACTS: ARRL challenged FCC rules which were issued based on studies conducted by the FCC but not disclosed to the public during notice and comment.
- ISSUE: Does this violate the APA by not providing notice?
    - YES!!!!!
- HOLDING: Vermont Yankee precludes adding additional steps. But Sec 706 mandates that judicial decisions use the whole record. Omitting the study means we do not have the whole record.

United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977). [33]

- FACTS: FDA passed a series of rules for cooking smoked fish. Firm indicated that blanket rules would destroy their product. FDA did not respond and promulgated rules anyway. Firm refused to comply.
- ISSUE: Is this regulation valid even though comments went unanswered?
    - NO!!!!
- HOLDING: FDA failed to disclose the research it relied on, failed to address comments, and failed to consider alternatives.
    - Return to balancing test: *International Harvester* vs *Small Refiner Lead Phase Down*

Little Sisters of the Poor v Pennsylvania (2020) [34]

- FACTS: In dealing with the contraception mandate from the ACA, HHS promulgated interim rules which were then finalized (basically without change) after notice and comment.
- ISSUE: Can an agency do notice, comment, and publication out of order?

    - YES!!!
- HOLDING: Open mindedness test. The APA is a maximum. As long as the agency does all three, the fact that an interim final is immediately effective doesn't matter unless something else is violated.

Exemptions to Rulemaking Requirements

List of Exemptions to notice and comment rulemaking under the APA

- 553(a)
    - Military actions
    - Agency Personnel
- 553(b)(3)
    - Good Cause
    - Procedural rules
    - General statements of policy
    - Interpretative rules

Telling the difference between things

- Legislative rules (substantive)
    - Issued by agency pursuant to statute
    - Binding – force of law for court, agency, and public
    - Must follow APA procedural requirements
- Interpretative rules (guidance documents)
    - Nonbinding
    - Meant to advise the public of the agency's construction of statutes
- Statements of Policy (guidance)
    - Nonbinding

Issued to advise the public of how the agency might exercise authority

Good Cause Exemption

- ALMOST ALWAYS FAILS. Under the good cause exception, an agency may forgo ordinary notice-and-comment procedures when it "for good cause finds" that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
- Three ways to get a good exemption (only need one of these three prongs)
    - Impracticability – Supposed to be used for imminent or bodily harm. Threat to the environment, safety, or national security
    - Unnecessary – This is relegated to ministerial issues
    - Contrary to public interest – what matters is that the notice and comment will create harm. The notice itself will be harmful. The notice undermines the reason for the proposed regulation
- You could sneak attack like *Sisters of the Poor* and do notice and comment after the interim final rule

Mack Trucks, Inc. v. EPA, 682 F.3d 87 (D.C. Cir. 2012). [35]

- FACTS: The EPA issued rules about new penalties for diesel engines. They then issued a new rule under the good cause exemption to benefit a diesel manufacturer who was unable to comply
- ISSUE: Did the promulgation of the new rule meet the good cause exemption to skip notice and comment?
    - NO!!!!!!
- HOLDING: An agency may only skip notice and comment if doing so would HARM THE PUBLIC
- Two prong test
    - Did they skip notice and comment?
    - If they provided notice and comment, would it harm the public interest?

Procedural Rule Exemptions

- Sec 553(b)(3)(A) exempts "rules of agency organization, procedure, or practice" This is a subject of frequent disputes
- Trick is to differentiate between a procedural rule or a substantive rule
- There are different approaches in different circuits
    - DC – does it substantially affect / alter the rights or interests of the parties
    - 9th – focuses on who is being regulated, the agency or the parties themselves
    - 5th – substantial impact test, what is the magnitude of the burden on the regulated parties
        - FOR THE EXAM JUST CHOOSE ONE AND STAY CONSISTENT

Mendoza v. Perez, 72 F. Supp. 3d 168 (D.C. 2014). [36]

- FACTS: The H2A visa program permits employers to hire foreign workers for ag-work. The Department of Labor then issued a letter reclarifying that herders had different wage requirements. They did this as a procedural rule to avoid notice and comment.
- ISSUE: Are guidance letters that affect the rights of private citizens procedural?
    - NO!!!!
- HOLDING: Echoes *EPIC* case. Procedural actions that affect the rights of citizens are subject to rulemaking requirements.

Interpretive Rule Exemption

- These rules are non-binding, they affect interpretation of rules that are binding
- A legislative rule can create or expand the scope of a legal duty, an interpretive rule can only clarify of particularize the scope of a duty previously created

American Mining Congress v. MSHA, 995 F.2d 1106 (D.C. Cir. 1993). [37]

- FACTS: Statute required mining operations to report injuries and diagnoses. What constitutes a diagnosis was unclear. MSHA then defined diagnoses without going through notice and comment
- ISSUE: Were the policy letters stating that x-ray readings qualify as a diagnosis interpretive?
    - YES
- HOLDING: The issue was already enforceable. The interpretive rule just made it clear to miners what was expected
- TEST – would there be legislative basis for an enforcement action without the interpretation?
    - Did the agency invoke its legislative authority when making the rule?
    - Did the rule amend a prior legislative / substantive rule?

General Statements of Policy

- General statements of policy are not legally binding; rather, they are issued in order to advise the public about the manner in which the agency intends to exercise its discretionary authority
- Even if a document that an agency claims is not "legally binding" the court may find it practically binding if that is the effect – *Appalachian Power Co v EPA (2000)*
    - Here, the court is getting pissed about agency abuse of authority under general statements
- What does practically binding mean?
    - If an agency acts as if a document issued by headquarters is controlling
    - If it treats the document the way it treats a rule
    - If it bases enforcement actions on policies on interpretations from that document
    - If it leads parties to believe permitting authorities will declare permits invalid for non-compliance

Pacific Gas & Electric Co. v. Federal Power Com'n, 506 F.2d 33 (D.C. Cir. 1974). [38]

- FACTS: In the presence of delivery challenges, the FPC issued a policy statement clarifying which pipelines would be given priority during periods of curtailment. This was done without notice and comment
- ISSUE: Is this clarifying document exempt from rulemaking requirements?

    - YES!!!!
- HOLDING: The clarifying document was non-binding. It receives no deference. It was advisory about how providers should expect to be treated under XYZ conditions

Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987). [39]

- FACTS: FDA set new action levels on food contaminants without going through notice and comment. Argued that rules were interpretive and general policy statements
- ISSUE: Were the new action levels ones of general policy?
    - NO!!!! Need notice and comment
- HOLDING: Action levels are binding and require producers to secure exceptions immediately. Their existence implies that action is required to avoid enforcement actions.

Ex Parte Communications

- APA Sec 557(d)(1) prohibits ex parte communication, but only for formal adjudication and formal rulemaking
    - How much does this apply to 553 (informal rulemaking)?
- Ex parte communication is communication between the agency and people who are interested in rulemaking which is outside the official process
- Top line: This content must be summarized in memorandum and placed in the record if it is not already in the record
- In the end, access is only restricted when one side of a dispute is meeting with agency heads at it is big time (pay for politics)

Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977). [40]

- FACTS: This case concerns FCC orders relating to cable and subscription TV. After the comment period was closed, the FCC had meetings with industry participants. These affected the final rule
- ISSUE: Are ex parte communications permissible in informal rulemaking?
    - YES!!!!!!
- HOLDING: Ex parte communications are not forbidden, but should be avoided. Should ex parte occur, and become material, they should be summarized and placed in the record for judicial review.

Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981). [41]

- Consider this the rule for the purpose of class
- FACTS: A series of meetings between executive, legislative, and industry officials occurred during the issuance of rules under the Clean Air Act.
- ISSUE: Do these constitute ex parte communications and violate standards?
    - YES, but NO
- RULE: All relevant ex parte conversations should be summarized and put in the docket.
    - This does not apply to executive branch officials and POTUS (exec privilege)
- *DC Federation* requires two conditions be met before administrative rulemaking be overturned on the basis of Congressional pressure
    - Content of the pressure is designed to force the secretary to decide upon issues irrelevant to the focal statute
    - The Secretary's determination must be affected by those extraneous considerations

Impermissible Bias

- KEY TAKEAWAY for IMPERMISSABLE BIAS in RULEMAKING
    - Clear and convincing evidence of an unalterably closed mind → no case where this has happened
- IMPERMISSABLE BIAS in ADJUDICATION
    - *Cinderella* Standard – disqualification should occur if a disinterested observer may conclude that the decision making may have pre-judged the facts before hearing them

Association of National Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979). [42]

- FACTS: FTC chairman made a series of public statements where he talked about advertising to children that were not "pro" advertising. Rules were then issued which restricted advertisement
- ISSUE: Is the chair impermissibly biased?
    - NO!!!!!!
- Holding: Due process attaches to adjudication, not to rule making. You need evidence of an unalterably closed mind.

Adjudication and Review of Agency Action

- How to determine rulemaking v adjudication?
    - Temporal effect – if an action has a retroactive effect, this is an adjudication
        - If an action has only prospective effects, this is typically a rulemaking
            - There is slippage (congress authorizing retroactive rulemaking)
            - Recall that Sec 551 does define rules in part by reference to a future effect
            - *Stare Decisis* gives adjudications future effect as well
    - Numerosity – number of people affected (*Londoner* and *Bi-Metallic)*
        - Adjudication - *Londoner* – due process applies when there are few people affected (e.g. a tax assessment affected very few people)
        - Rulemaking - *Bi-Metallic* – Due process does not apply when MANY or ALL people are affected (tax assessment affects many people)
            - Differentiation based on the type of facts used (general or specific) and a theory of government (lots of people affected, political question)
- If we are dealing with an adjudication, when does the due process clause apply?
    - Only applies when an adjudication can affect "life, liberty, or property"
        - Requires you to lose one of these things
        - Also that process is due!
        - What does this include? It is expanded but is not unlimited
            - In *Goldberg* property was applied to welfare benefits for families with kids
            - Since then, the court has applied due process elsewhere
    - Three-part balancing test for what process is required – *Mathews v Eldridge (1976)*
        - The private interests of the individual in retaining their property and the injury threatened by the official action;
        - The risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards;
        - The costs and administrative burden (govt interests) of the additional process, and the interests of the government in efficient adjudication.
            - We do a cost benefit analysis on these three things

Generation of Agency Record

- Two triggers for additional review of an adjudication
    - No formal findings (*Overton*), information about what is happening AT THE TIME.
        - Post hoc rationalizations are impermissible
    - Strong showing of bad faith or improper behavior - *Morgan* (1941)
- For a *de novo* review to occur the following must be met
    - 1) Did the agency act within the scope of authority *Schilling v Rogers (1960)*
    - 2) § 706(2)(a) requires the decision was not Arbitrary and capricious, abuse of discretion, not in accordance with law
    - 3) Did agency action follow procedural requirement? (no formal requirements here)

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). [43]

- FACTS: Statute says the Dept of Trans must avoid parks if reasonable. Sec Trans decided to build through Overton Park but did not produce a record in the process of doing so.
- ISSUE: Is the SecTrans required to make formal findings during these decisions?
    - NO (sort of)
- HOLDING: SecTrans is not required to make formal findings but judicial review based on agency affidavits is insufficient. The APA (§706(2)(a)) requires an agency's "whole record" when engaged in review. Post hoc rationalizations of what happened are insufficient

Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633 (1990). [44]

- FACTS: LTV was mid bankruptcy and the PBGC first terminated their relationship and then restored it without notifying LTV or allowing them to present evidence. Ct of Appeals determined this action is arbitrary and capricious. Orders them allow contrary evidence to be presented
- ISSUE: Is the Ct of Appeals order valid?
    - NO!!!! (Sort of)
- HOLDING: PBGC acted lawfully but the created record was insufficient. *Vermont Yankee* does not allow the Court to impose additional requirements, but *Overton* allows them to demand a full record
- TAKEAWAY: Double down on *Vermont Yankee*. You can't impose additional formal requirements without tying them to statute or Due Process. You can do the minimum, but must develop a record

Judicial Review - Rules - https://www.law.cornell.edu/uscode/text/5/706

- To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
    - (1)compel agency action unlawfully withheld or unreasonably delayed; and
    - (2)hold unlawful and set aside agency action, findings, and conclusions found to be—
        - (A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
        - (B)contrary to constitutional right, power, privilege, or immunity;
        - (C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
        - (D)without observance of procedure required by law;
        - (E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
        - (F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
- In making the foregoing determinations, the court shall review **the whole record** or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Judicial Review of Agency Decision Making

Process for Judicial review

- Evaluating facts (substantial evidence)
- Evaluating reasoning (arbitrary and capricious)
- Interpreting statute (Chevron)
- Interpreting regulation (Kizor v Wilke)

Evaluating Facts – Substantial Evidence Standard

- Is there substantial evidence to support the agency's determination in a formal adjudication?
- Empirical observation of levels of evidence for deference – *Cooper* (1958)
- Hearsay evidence is not substantial evidence, notable if opposed by competent evidence

- Findings contrary to uncontradicted testimony is not substantial evidence
- Slight or sketchy evidence is not substantial
- Slight evidence weighted against stronger contrary evidence is not substantial
- An ALJ finding contrary to an agency finding can be a factor but alone is not substantial evidence
    - Dissenting opinions by members of an agency is the same as an ALJ contrary opinion
- The court is more likely to reverse an agency finding if they consistently credit agency witnesses and discredit opposing witnesses

Universal Camera Corp. v. NLRB, 340 U.S. 474, (1951). [45]

- FACTS: Collective bargaining case over a disputed firing. An ALJ's decision was reviewed by the NLRB. The second circuit then enforced the NLRB's decision but did not examine the whole record
- ISSUE: Are courts required to review the whole record when reviewing agency action?
    - YES!!!
- HOLDING: Before enforcing an agency determination, courts are required to consider all evidence and the whole record. This process should be highly deferential to the agency.

Allentown Mack v. NLRB, 522 U.S. 359 (1998). [46]

- FACTS: During an ownership change, new owners called for a vote on the shop's union. To do so, management is required to have a good faith reasonable doubt. The NLRB determined ownership did not reasonably have such doubts.
- ISSUE: Did substantial evidence exist to support the judicial enforcement of the bargaining order of the NLRB against an employer?
    - NO
- HOLDING: The NLRB's "reasonable doubt" test was facially rational but the fact finding was not supported by substantial evidence. The COURT's JOB is to figure out if A REASONABLE JURY could have come to the BOARD's decision.
- TAKEAWAY: Would a REASONABLE JURY come to the same conclusion as the AGENCY?

Richardson v. Perales, 402 U.S. 389 (1971). [47]

- FACTS: Perales filed for disability under the SSA. He was denied based on a physician's report.
- ISSUE: Do physician's reports, which are not subject to cross examination, constitute substantial evidence?
    - YES!!!
- HOLDING: Although medical records are hearsay, they constitute significant evidence. Court offers deference to experts who are non-partisan.
    - *Biestek v Berryhill* (2019) – experts may also refuse the data behind the evidence

Reviewing Agency Actions – Hard Look Review

- The test is most frequently employed to assess the factual basis of an agency's rulemaking, especially informal rulemakings
- This is the arbitrary and capricious standard

Motor Vehicle Manufacturers v. State Farm, 463 U.S. 29 (1983). [48]

- FACTS: NHTSA mandated airbags and automatic seatbelts in 1969. After numerous changes, NHTSA rescinded the rule in 1981 because it determined it was impractical.
- ISSUE: Was the decision to rescind arbitrary or capricious?
    - YES!!!
- HOLDING: The court cannot substitute its judgement for the agency's. But, there must be a satisfactory explanation for an agency action based on the facts found and the choice made. Has there been a clear error of judgement?
    - This is extremely deferential

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009). [49]

- FACTS: Federal statute prohibits foul language on TV. During an adjudication, policy was updated to offer less deference to non-literal use of foul language (viz. uttering "fuck" in surprise as opposed to literal employ "I will fuck someone").
- ISSUE: Is a heightened standard or review applied because the agency is changing a rule?
    - NO
- HOLDING: A rescission is different from never acting. Arbitrary and capricious standard still applies, and there must be some explanation behind an updated agency rule

Dept. of Commerce v. New York, 139 S. Ct. 2551 (2019). [50]

- FACTS: Insertion of a citizenship question into the census was challenged because it could under count people in the country. Allegation is that the agency's reasoning was pre-textual, and the stated reason for the change was not the actual reason for the change?
- ISSUE: Were the actions of the agency arbitrary and capricious?
    - NO
- HOLDLING: A pre-textual reasoning is not acceptable for agency action. Stated reasoning must reflect the whole record.

Department of Homeland Security v Regents of the University of California (2020)

- "We do not decide whether DACA or its rescission are sound policies. 'The wisdom' of those decisions 'is none of our concern.' We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner."

Agency interpretation of Statute (CHEVRON)

Ask four questions when dealing with *Chevron!*

- What is the relevant statutory language (look at the language directly)?
- What is the relevant policy question?
- What is the agency's interpretation?
- How does the court apply *Chevron*?

- CHEVRON DEFERENCE: Two Step Test
    - Step 0: *Mead*, did congress intend for the agency to act with force of law and is it?
    - Step 1: Determine if statute is ambiguous. Footnote 9. Traditional statutory construction
        - Note cannons of construction, including lenity and constitutional avoidance
    - Step 2: Is the agency's construction of the statute permissible or contrary to the statute?

Skidmore

Skidmore v. Swift & Co., 323 U.S. 134 (1944). [51]

- SKIDMORE DEFERENCE: Agency interpretations will be given respect based on thoroughness of evidence, validity of reasoning, and the power to persuade, i.e. court will accept best argument. Tie goes to the agency.
- FACTS: FLSA action from firefighters not being paid for waiting time at the firehouse.
- ISSUE: Is this interpretation of the FLSA correct?
    - NO!!!!
- HOLDING: This was already decided in *Armour*. The secretary is not free to change the law.

Chevron

Chevron USA Inc. v. NRDC, 467 U.S. 837 (1984). [52]

- CHEVRON DEFERENCE: Two Step Test

    - Step 0: *Mead*, did congress intend for the agency to act with force of law and is it?
    - Step 1: Determine if statute is ambiguous. Footnote 9. Traditional statutory construction
    - Step 2: Is the agency's construction of the statute permissible or contrary to the statute?
- FACTS: The EPA had issued guidance regarding permitting stationary pollution sites. In doing so it redefined stationary sources as "bubbles" of polluters
- ISSUE: Was the EPA's construction of the bubble language permissible?
    - YES!
- HOLDING: The Clear Air Act is ambiguous as to how a stationary source is defined. The EPA's construction accommodates the goal of balancing economic growth and pollution management

Chevron Step Zero – Mead

- Mead hinges on whether congress intended the agency to act with the force of law.

United States v. Mead Corp., 533 U.S. 218 (2001). [53]

- FACTS: Customs offers a harmonized tariff schedule. At one point, the three ring binders sold by Mead were reclassified as diaries, which have a 4% tariff.
- ISSUE: Does Chevron deference apply? If not, what is the standard?
    - NO!!!!! And if not → Skidmore and a de novo review
- HOLDING: Chevron deference only applies when congress delegated the authority to make force of law rulings and the agency with acting upon that delegation.
    - Indicators: notice and comment occurred, higher ups in the organization are making the decision,

When do we go *Mead* over *Chevron?*

- Did congress give the agency power to issue legislative rules
- Public participation permitted in the decision making process
- Degree of formality in the decision making process
- Does the interpretation create precedent that should be followed
- Does the interpretation bind third parties (agencies and or employees)
- Was an explanation for the interpretation offered
- Status of the individual making the decision
- Criminal or hybrid contexts, likely not qualify
- When the government doesn't want Chevron deference
- When we are dealing with adjudication, rulemaking is clear chevron, unless its too big

Chevron Step One

Chevron started a lot of debates amongst legal scholars, and one outstanding question is how much statutory clarity step one requires. What does "precise question" mean, etc

- Unambiguous
- Addressed the precise question
- Intent of congress was clear

Major questions doctrine can also come up at this point (*King v Burwell / FDA v Brown Tobacco*). This is somewhat dying, but is observed based on the size of the grab in the army corps cases. Idea is that the court looks on major power grabs less favorably.

Tools of a Step One Analysis

- The degree of clarity required at Step One is partly a function of the evidence we consider
- The footnote 9
    - The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that congress had an intention on the precise question at issue, that intention is the law and must be given effect.
        - Plain meaning rule

        - Legislative history
            - Don't tell SCALIA we do this. He will get mad
        - Legislative purpose
        - Cannons of Construction
            - Specifically Constitutional Avoidance and Lenity
        - Stare Decisis

- How do we treat silence then?
    - Does this mean it is ambiguous? Or does silence mean that it is out of scope?
        - Silence sometimes means go to step 2, sometimes not… If it is ministerial, you are more likely to go to step 2. If you are making a big leap, more likely to get stopped

Statutory Silence and Chevron (Step 1)

Yellow Transportation Inc. v. Michigan, 537 U.S. 36 (2002). [54]

- FACTS: ISTEA directed the ICC to develop a new fee system for common carriers. In doing so, it capped fees for licensure at $10. The Michigan Supreme Court determined that this cap did not apply to reciprocal fees which it shared during licensing. Agency determines the $10 is the TOTAL fee.
- ISSUE: The statute is silent on the fee structure. Does this mean the agency is acting out of scope?
    - NO!!!!
- HOLDING: Although the statute is silent, we can conjecture that congress was deferring to the agency about the fee. As the statute is ambiguous, the agencies reasonable interpretation stands.

Army Corp of Engineers Arc

- *US v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).*
    - ISSUE: Are wetlands adjacent to navigable waters and an owners home subject to the Clean Water Act?
        - YES!!!!
    - HOLDING: Corp had acted properly in interpretating regulations about filling waters that were adjacent to navigable waters. Meets STEP ONE!!!!
- *SWANCC v US Army Corp of Engineers (2001)*
    - ISSUE: Do navigable waters extend to isolated ponds of water such as mudflats and ponds?
        - NO!!! (Plurality Decision)
    - HOLDING: You don't get deference because you are expanding the scope of the statute too much. FAILS AT STEP ONE!!
- *Rapanos v. US, 547 U.S. 715 (2006).*
    - ISSUE: Is a hydrological connection sufficient to invoke authority under the CWA?
        - NO
    - HOLDING: The CWA was not intended to give the Corps authority over non-flowing water or those with intermittent connection. This is an overbroad interpretation of the statute which does not comport with Congress' original intent.
- KEY TAKEAWAY, AS THE AGENCY EXPANDS ITS INTERPRETATION OF THE THINGS IT CAN REGULATE THROUGH POWER GRABS IT IS MORE LIKELY TO GET CLAP BACK

Chevron Step 2 – Hard Look Review (Arbitrary and Capricious)

Look above to all the cases on Hard Look Review. Use this when making a determination. You can also draw on the Corps arc and *Rapanos*.

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016). [55]

- FACTS: The FLSA requires employees to get overtime over 40 hours. Traditionally, this did not apply to sales advisors until an updated ruling from DoL.

- ISSUE: Does this change enjoy Chevron Deference
    - NO!!!
- HOLDING: Following *FCC v Fox*, the agency did not provide adequate rationale for changing their determination. Since there is no justification, *Chevron* does not apply
- KEY TAKEAWAY: If there is a procedural flaw, you WILL NOT GET DEFERENCE
    - Keep logical outgrowth in your mind as well

Chevron, Lenity, and Constitutional Avoidance

- For constitutional Avoidance, look to *Rapanos*. If the court can avoid interpreting a constitutional question it will at all cost.
- For lenity, informing case is *Carter v Wells-Bowen Realty (2013)*
    - The rule of lenity, or the rule of strict constriction, requires the court to apply ambiguous law in a manner that is favorable to the defendant in criminal cases
    - There is no controlling SCOTUS Case
    - 6th Circuit Precedent indicates that Lenity dominates Chevron
    - Lenity forbids deference to the executive branch when interpreting CRIMINAL law
    - Thus, Chevron does not immediately apply. Lenity compels the agency AND the court to be doubtful when interpreting criminal statute. Thus, the state should give citizens fair warning. After that, if the agency's interpretation can pass Chevron, they are good.

Chevron and Prior Judicial Opinion (Stare Decisis)

- *Mead* rases the issue that agency decision can conflict with court decision. The key takeaway is that the statue is AMBIGUOUS the AGENCY WINS (Chevron). If the statute is UNAMBIGUOUS, prior opinion hold. Thus, under ambiguity the court's decision is just a placeholder until the agency comes along

National Cable & Telecommunications v. Brand X, 545 U.S. 967 (2005). [56]

- FACTS: FCC issued a rule indicating that broadband providers were not telecom providers. This avoided common carrier rules of the Telecommunications Act. This determination ran prior to a 9th Circuit opinion holding that broadband providers are telecom providers.
- ISSUE: Does Chevron deference apply when it runs contrary to stare decisis?
    - YES (if the statute is ambiguous)
- HOLDING: If the statute is ambiguous (Step 1) and Mead applies (Step 0) then agency interpretation supersedes prior court decisions. If the language is unambiguous, deference is given to the prior opinion.

Chevron and Jurisdiction

- Jurisdiction is the power, right, or authority to interpret and apply the law. These cases determine the ability of the agency to decide what it can adjudicate

City of Arlington, Tex. v. FCC (2013). [57]

- FACTS: The telecommunications act gives local jurisdictions the ability to decide on siting applications within a reasonable period of time. Due to slow response, applicants appealed to the FCC who in turn defined reasonable periods.
- ISSUE: Does Chevron apply in jurisdictional issues?
    - YES
- HOLDING: Chevron applies. The court should defer to the agency in determining its jurisdiction as long as the interpretation is permissible and the statute is ambiguous

Regulatory Interpretations (AUER)

- This is folding adjudication rules into Chevron

- Kisor is a summary of Auer and Seminole Rock. Auer differentiates itself because it is an agency interpreting its own regulations
- Note
    - Anti-parroting canon – You don't get deference if you restate the language of the statute
- Five steps of Auer!
    - 0) It comes from an authoritative or formal source in the agency (*Mead*)
    - 1) Is the regulation ambiguous? (Chevron Step 1)
        - Use traditional rules of construction and determine ambiguity (Footnote 9)
    - 2) Is the interpretation reasonable? (Chevron Step 2)
        - Is it within the zone of ambiguity?
    - 3) Does the agency have the substantive expertise? (*King v Burwell*)
    - 4) A "fair and considered judgement." Not a post hoc rationalization or an unfair surprise (*Chenery*) – *Citizens to Preserve Overton Park*

Kisor v. Wilkie, 139 S. Ct. 2400 (2019). [58]

- FACTS: Kisor was a Marine who was denied benefits due to a lack of PTSD benefits. When he was eventually diagnosed, he sued for back benefits. Ct of Appeals ruled that the VA regulation was ambiguous, and deference should be granted.
- ISSUE: Should Auer and Seminole Rock be overturned?
    - NO
- HOLDING: Court lays out a five step process on top of Chevron which emphasized authoritative, expertise based, and considered judgement.

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