# Judicial Review of Facts

# Learning Objectives for this Module

## Learn that Congress sets the standard of review for agency review of facts.

## Learn the limits on an agency ability to ignore the findings of an ALJ.

## Learn how arbitrary and capricious review has the same practical effect as substantial evidence review.

## Learn how arbitrary and capricious review has become a review of the adequacy of the record supporting the decision.

## Learn how the courts have turned record review into “hard look” review.

# Reading Assignment

## Chapter 7 to 313

# Issues to be addressed

## Scope of Judicial Review of Facts

### Congress sets scope of review, within constitutional boundaries.

### Since the Constitution is silent on agencies, Congress has a pretty free hand.

### Congress can allow anything from a trial de novo to no review, unless such an action otherwise runs afoul of the constitution.

## Standards for Judicial Review of Facts

### Trial De Novo

#### You start over at the trial court

#### Agency findings can be used as evidence, but there is no deference to the agency

#### FOIA

#### Used more by the states than the feds

### Independent Judgment on the Evidence

#### Decide on the agency record, but do not defer to the agency's interpretation of the record.

### Clearly Erroneous

#### Definite and firm conviction that a mistake has been made on the facts or policy

#### Same as reviewing a verdict by a trial judge without a jury

### Substantial Evidence - Formal Adjudications and Formal Rulemakings

#### 706(2)(E) - only applies to formal adjudications and formal rulemaking

#### Could a reasonable person have reached the same conclusion?

##### Standard for reviewing a jury verdict or for taking a case from the jury.

##### Should a jury get more or less deference than an agency?

#### Hint - substantial means some, not a lot, when you are the agency

### Substantial Evidence - Informal Adjudications and Rulemaking

#### 706(2)(A)

##### Arbitrary and capricious or abuse of discretion

##### Same assessment of reasonableness as 706(2)(E), so the result is about the same as the substantial evidence test used for formal proceedings

#### [it is] ‘‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’’; it is evidence sufficient to withstand a motion for a directed verdict. It is a less rigorous standard than ‘‘clearly erroneous,’’ the standard by which appellate courts review factual findings made by a trial judge. It is more rigorous than ‘‘no basis in fact.’’ The agency’s ‘‘findings are entitled to respect, but they must nonetheless be set aside when the record before a [court] clearly precludes the [agency’s] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. . . .’’ Universal Camera v. NLRB, 340 US 474 (1951)

#### This is the most common standard

### Some Evidence

#### Scintilla test

#### The agency needs to show even less than in the substantial evidence standard

#### Only limited use

### Facts Not Reviewable At All

#### Congress can prevent certain types of judicial review

##### Compensation decisions under the Smallpox Vaccine Compensation Act are not reviewable

#### Enabling law is always reviewable unless Congress has taken away the court's subject matter jurisdiction.

## What if the court thinks the agency's policy choice is wrong?

### Should the court defer to findings which it believes are clearly erroneous, but are supported by substantial evidence?

#### Why is this consistent with the political control of agencies?

#### When the legislature gives the agency the power, it is also saying that it only wants agency decisions overturned in the most serious cases

### Courts have different political views than agencies and thus they should be esp. careful about reversing agency decisions.

## Agency Review of ALJ decisions and recommended rulings

### Basic questions

#### Assume there is a hearing before an ALJ, the ALJ prepares a recommended opinion, and the agency wants to overrule the ALJ.

#### Are there limits to the agency’s right to substitute its decision for the ALJ’s opinion?

#### What must the agency do when it wants to overrule an ALJ?

### Key issue

#### As with an appeals court review a jury or lower judge’s decision, the key is whether the record is sufficient for the appellant reviewer to make an independent determination of the issue.

#### We know that if it is a pure legal question, the reviewing body can evaluate the question without regard to the record.

#### In pure factual questions, the record is the only source for information about the facts. A court cannot look things up for its own, as it can for the law. But an agency can check some facts for itself by consulting with staff or using its own expertise.

#### If the agency accepts the facts as found by the ALJ, it can disagree about what they mean. For example, the agency can decide that testimony that the ALJ found credible is not sufficient to decide the case.

#### Problems arise when the agency wants to reject or modify facts that the agency cannot independently verify. These will mostly be veracity determinations about live witness testimony. Thus it is not just what the witness said, which can be found in the transcript, but the way it was said and how that influenced the determination about whether the testimony was credible.

#### The smoking hypothetical

##### In the smoking case, the agency wanted to reject testimony that that the ALJ found credible, and accept other testimony that the ALJ did not find credible.

##### The agency must show its justification for rejecting this evidence. This might be inconsistencies with other evidence that the ALJ admitted, such conflicts in the chronology showing that witness could not have seen what he claimed to have seen. But if the agency cannot show why it is rejecting this testimony, it may be reversed on judicial appeal.

##### The agency can find other factual evidence that moots the testimony. For example, in this hypothetical, if the union organizer caught smoking was show to be violating a policy on smoking that was routinely enforced by firing, the other testimony would not matter. (There are petrochemical plants with these zero tolerance policies because of the fire hazard.)

#### In general, the question is whether the ALJ has special expertise or access to information that the agency cannot independently evaluate.

### Is it a mixed/hybrid question of law and fact?

#### O’Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951)

##### Was a worker within course and scope of employment when he drowned trying to save a foundering swimmer?

##### Were there any disputed facts?

##### Is this a legal question, entitled to less deference, or a factual one, entitled to more deference?

#### Frankfurter’s Hybrid Decision Analysis

##### [This] only serves to illustrate once more the variety of ascertainments covered by the blanket term ‘‘fact.’’ Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as ‘‘questions of law.’’

#### NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)

##### Company refuses to collectively bargain with buyers, saying they are managers.

##### Agency finds that only managers whose interests align with the company are exempted from unionization.

##### The court overruled the agency, holding that the law exempted all managers.

###### Why no substantial evidence review and Hearst/ Chevron deference?

##### How might the agency still get deference on the remand to determine whether buyers are managers?

###### Is the term “manager” well defined in the statute?

## Cabining Arbitrary and Capricious Review

### Old definition

#### Highly deferential to the agency

#### Same as rational relationship test in constitutional law, which almost always results in the law being found constitutional.

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

#### This has been seen as the first modern administrative law case. It changed the focus from pure deference to the agency’s power to make the decision to whether the agency has properly supported its decision in the record. Thus the secretary had to show that he had considered the factors specified in the legislation on roads in parks – no reasonable and prudent alternative – before the court would defer to his decision that no other routes met the standard.

#### ‘‘a substantial inquiry,’’ ‘‘a thorough, probing, in-depth review, and [a] searching and careful [inquiry into the facts].’

### "Hard Look" - National Lime Assn. v. EPA, 627 F.2d 416, 453 (D.C. Cir. 1980)

#### Since courts do not like to defer to anyone, many judges took this searching review standard as an invitation to nitpick the record to find reasons to remand the case, using the remand as a way to try to force the agency to change its decision.

#### [judicial review should] evince a concern that variables be accounted for, that the representativeness of test conditions be ascertained, that the validity of tests be assured and the statistical significance of results determined. Collectively, these concerns have sometimes been expressed as a need for “reasoned decision-making.” . . . However expressed, these more substantive concerns have been coupled with a requirement that assumptions be stated, that process be revealed, that the rejection of alternate theories or abandonment of alternate course of action be explained and that the rationale for the ultimate decision be set forth in a manner which permits the . . . courts to exercise their statutory responsibility upon review.

### Hard Look at What?

#### The courts cannot use hard look to change the underlying requirement that they defer to agency decisionmaking on facts and policy.

#### Hard look analysis requires agencies to make sure that the record for the case provides a clear basis for their factfinding and their policy decisions.

#### The federal court cannot change the decision, but it can require the agency to provide better support for its decisions.

## When Should the Court Allow the Record to be supplemented by the Agency?

### This would result in de novo review of the new material

#### Like a trial transcript on appeal, the record is usually closed.

### There can be an exception if the issue being appealed to the courts is the agency's failure to allow outside input and thus failing to consider all relevant factors.

#### The court can allow the new material and give the agency a chance to supplement its record in response.

### There can also be an exception if the plaintiff makes a credible showing of significant bias by the agency and the court needs to evaluate it.

#### The court can ask the agency to appoint an ALJ to take evidence and present it to the court - RARE

## Motor Vehicle Manufacturers v State Farm Mutual Auto, 463 U.S. 29 (1983)

### Who are the real parties at interest?

### What are these parties in the case?

### DOT had previously justified the need for a rule on seatbelts.

### Now DOT wants to rescind that rule.

#### Why is a rescission subject to the same record requirements as the promulgation of a rule?

#### Why does rescission so soon after the promulgation of the rule undermine deference arguments?

## NRDC, Inc. v. Herrington, 768 F.2d 1355 (D.C. Cir. 1985)

### Background

#### Post 1973 oil embargo, Congress wanted national standards that would improve energy efficiency.

#### DOE was given the power to set a standard for appliance efficiency that preempts state standards.

#### A federal standard would block stricter state standards so that there would be a national market.

#### Congress also allowed the agency to find that no standard was necessary, which also triggered preemption.

### Procedure for a Binding Non-Rule

#### DOE publishes the support for its conclusion that there should not be a rule.

##### This standard did not include an analysis of the environmental impact of not having the standard.

##### The NRDC challenges the failure to publish this analysis.

#### Must the agency provide State Farm support for not making a rule?

##### Why is this different denying a petition for rulemaking?

## American Dental Assn. v. Martin, 984 F.2d 823 (7th Cir. 1993)

### OSHA bloodborne pathogens rule

#### Requires universal precautions in all health care workplaces

#### These include gloves, sharps management, eye protection, and other controls to reduce exposure to blood

#### Dentists charge that the agency did not show specific risks in dentistry and thus the rule was arbitrary and capricious

#### Were they right? Is there any reason that getting stuck in a dentist’s office is any different from getting stuck in a doctor’s office or a hospital?

## What if the Agency Promises to Not Enforce a Rule?

### The bloodborne pathogens rule required employers to control exposure in the workplaces.

### In all health care workplaces except home health, the employer had control over the employee.

### Home health agencies said they could not comply with the rule because they did not have enough control

### OSHA says it will not enforce the rule against them.

### Is this enough to save the rule from being arbitrary and capricious for home health?

#### How would you argue the agency’s side?

#### How would you argue the home health side?

## De Novo Review Under the APA

### Section 706(2)(F) provides for setting aside agency action found to be “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”

### Overton Park - such de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate

#### Absent bad faith, the court never finds this

#### In real life, you only get de novo rule by statute

# Evaluation Questions

## Reviewing facts versus reviewing law

### Agencies find facts through adjudications and through their research in putting together the record to support rulemaking.

### Analogizing to Article III trial practice, why do appeals courts view review of facts differently from the review of law?

### Putting aside the various standards of review, are appeals courts more likely to defer to determinations of facts or of law?

## Standards of review

### Define and distinguish these standards for review of agency findings of fact:

#### Trial de novo;

#### Independent judgment on the evidence;

#### Substantial evidence – how is this effectively the same as arbitrary and capricious?

##### How does the *Chevron* standard for reviewing law look like the substantial evidence test for reviewing facts?

##### Should the court be more deferential to the agency when reviewing facts, as opposed to law?

#### Facts not reviewable at all.

## Building the Record for Judicial Review

### Before *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) committed to agency discretion was seen as meaning essentially no judicial review.

#### What did the court find was arbitrary and capricious about the Secretary’s actions in *Overton Park*?

#### What does an agency have to do after *Overton Park* to justify its decisions?

#### Did *Overton Park* change the standard of review of the underlying decision, or only of the completeness of the record?

#### How does this review of the completeness of the record fit with the *Chevron*, etc., line of cases on deference to agency interpretation of law?

#### How does “hard look” review fit into these two approaches?

#### Which of these arguments would you apply when arguing a case attempting to overturn an agency action when you think that the court will likely defer to the decision made by the agency?

## Reconciling ALJs and Agency Decisionmaking

### When a hearing officer is overruled by the agency, how should the reviewing court treat the ALJ's opinion?

#### What does the agency need to do if it wants to overrule the ALJ's finding?

#### When are the ALJ's findings most persuasive to the courts? When the agency wants to overrule the ALJ on this sort of evidence, such as the credibility of a witness, what would the agency need to show in the record?

#### Are agencies in Louisiana able to overrule ALJs in the central panel?

### What is a hybrid question of law and fact?

#### How do the courts review these?

#### How do you use the differing standards of review to support your arguments pro or con in a hybrid case?

### What is the general rule on amending the agency record when it is on appeal to the courts? When may the court allow the record to be supplemented by the agency?

### What does the case withdrawing seat belt regulation (*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*) tell us about procedure for withdrawing a rule?

#### Why did the court require this process, rather than just allowing the rule to be withdrawn?

#### How is the seat belt case (*Motor Vehicles Manufacturers Assoc. v State Farm*) the logical result of *Overton Park*?

#### How could you argue that *State Farm* is a hard look case?

#### What does the Seatbelt Saga teach us about the politics of agency regulations and the role of lawyers?

### What is the procedure for a non-rule rule?

#### What is the analysis if the agency makes a finding that no regulation is necessary on the energy use of kitchen appliances, and that finding then preempts states from passing their laws or regulations on the subject? Is this a final agency action that can be reviewed? How would you argue that this requires notice and comment, and, if so, what would need to be published in the record?

### Factual basis for regulations

#### The OSHA bloodborne pathogens rule requires universal precautions in all health care workplaces

##### Dentists said that there was no specific factfinding about the risks in dentistry.

##### How did the court resolve the allegation that it was arbitrary and capricious to make a rule covering dental practice without providing specific factual information about dentists?

#### The same bloodborne pathogens rule requires the employer to control several risks in the workplace. Home health agencies, which are covered by the rule, argue that they do not control the workplace since it is the patient’s home.

##### How does this make the rule arbitrary and capricious as to them?

##### Can the agency cure this promising not to enforce the rule for home health care agencies?

##### What would you argue as the home health care agency lawyer when presented with this offer?