# Study Guide - Chapter 7

# How would you use *Skidmore* and *Hearst* in argumentation over the applicable standard for a court to review the agency’s finding in a given case?

# *Chevron* then comes along as a way for the court to decide where on the *Skidmore* and *Hearst* continuum the case falls.

## How do you use the two *Chevron* steps in arguing a case?

## What is step one in the court’s analysis in *Chevron*?

## What is step two in the court’s analysis in *Chevron*?

## How does *Chevron* deference fit with the political control of agencies?

# We read *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (U.S. 2000) as a counterpoint to *Mass v. EPA* and *Chevron*. This is a case where the statute looks clear on its face and appears to support the agency action, but the court ultimately finds that it does not mean what it says.

## Does the plain language of the Food and Drug Act appear to give the agency jurisdiction over tobacco?

## Why does the Food and Drug Act seem to require that tobacco would have to be banned if it was under the authority of the FDA?

## Why did the Court look beyond the plain language in this case? How would you use this technique in other cases?

# The key to *Chevron* is the assumption that an ambiguous statute implies that the Congress meant to leave the policy choice of action under the statute to the agency.

## Why did the court in *King v Burwell* not want to leave the decision about the ACA to the IRS?

## What does it mean when the court says a decision is too important to leave to the agency?

## Can a statute be unintentionally ambiguous?

# Post-*Chevron*

## What was the agency action in *Mead*?

### How much process and finality are involved with the *Mead* action?

### How did the court explain why this led to a different result from *Chevron*?

### What is the general principle in *Mead* that you can use in other cases?

## What are the *Barnhart* Factors for evaluating agency persuasiveness?

## How do you use the series of cases we have discussed on from *Skidmore* to *Barnhart* as tools for arguing either side of any statutory interpretation case?

## What is the key to a successful argument by the agency?

# How can an agency bind a regulated party without using a notice and comment regulation, while limiting the avenues for judicial review? (Hint - *Public Citizen v. DHHS*)

## In this situation, what are the only grounds for attacking the provisions?

## What is the party's recourse if it does not like the terms?

## How is this used by federal agencies without regulatory powers to get states and other parties to do what the feds want?

# Agency interpretation of its own regulations

## What does *Auer/Seminole Rock* tell us about deference to an agency’s interpretation of its own regulations?

## How has the world of rulemaking changed during the decades since *Seminole Rock*?

## How does this reduce the ability of an agency to abuse the *Auer* deference?

# Does going first matter? (*Brand X*)

## Assume that a court interprets a statute before an agency promulgates regulation under the statute.

## What would the court need to say about the interpretation to preempt a subsequent regulation by the agency that would conflict with the court’s interpretation?

## Assuming that the court did not say this, must the court defer to the agency if the agency goes against the court’s original ruling when it promulgates the regulation?

# Agency conflicts

## In areas where more than one agency has legal authority over a regulated activity, which one, if any, does the court defer to?

# Opinions in ligation

## How do you analyze the deference issue when an agency first raises an interpretation during litigation?

## When might an agency’s views during litigation might be entitled to some deference?

# Lawyering statutory interpretation cases

## If you represent the agency, how do you present your arguments to persuade the court to support the agency interpretation?

## If you are opposing the agency, how do you present your arguments against deference to the agency?

## An agency promulgates a rule that is appropriate for most workplaces, but one industry segment cannot comply because of the structure of their workplaces. (Assume the agency must conform its rules to the workplaces, rather than force employers to restructure their workplaces.)

### Can the agency avoid having the court finding the rule is arbitrary and capricious by promising not to enforce the rule against these employers?

### Challenging a rule can be expensive – what would you advise your client if the agency makes this offer?

### What would you want from the agency?

# Congressional direction to the agency

## The Americans with Disabilities Act is very detailed and does not leave the enforcement agencies much room for discretion in setting standards in many areas.

### Why would Congress write the law this way?

### How does this effectively limit the court's deference to the agency?

## In contrast, many laws gave very broad authority to agencies with few specific details. This gives the agencies broad discretion.

### What are the reasons, good and bad, why congress might not want to give specific direction to agencies?

### How does this broaden the court's deference to the agency? (Think *Chevron*)

### What is the limit on broad delegations of authority, i.e., what does the court need the legislature to provide to be able to properly review agency action?

# 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?

## 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?

# 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?

# 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 require the Secretary to do before the court would defer to his decisionmaking?

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

### How does this requirement for a complete record become hard look review?

### What is the court taking a hard look at?

### How do hard look and deference fit together, i.e., what does the agency have to show in the record before the court gets to the deference decision? (Think about *Overton Park*.)

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

## What does the case withdrawing seat belt regulations (*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 without a full record?

### 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 *Fox* tell us about how you might argue that the standards should be different for rules that 1) rely on the same facts and analysis as the previous rule, but change the policy choice versus 2) change the facts or analysis from the previous rule?

### What does Encino Motorcars tell us about rules that change well-established policies that the regulated industry relies on?

### Why is reliance important?

## Assume that you are an agency lawyer. How would you explain the standards for the record based on *State Farm*, *Fox*, and *Encino Motorcars*?

## What is the procedure for a non-rule rule to be binding, i.e., to preempt state action?

### 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 by 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?

# Forcing Agencies to Act

## What are the limits on mandamus that make it of limited use? (Remember our previous discussion of mandamus.)

## How does 706(1) provide an APA remedy?

## Why is it hard to prove that an agency action has been unlawfully or unreasonable withheld - how is the choice to act a discretionary function?

### What might be valid reasons for the agency to not act?

### What legal process got the plaintiffs into court in *Mass v. EPA* to try to force the agency to act?

# Relying on Agency Advice

## When can you claim equitable estoppel for relying on agency advice?

### Can you get damages for relying on bad advice?

### What can it be a defense for?

## How does the formality of the advice matter?

### Example of when you can rely?

## Can you rely on an agency mistake about the law or regulation?

### Thought question - jurisprudentially, why not?

# What is collateral estoppel?

## What does a party have to show to prove that an action is collaterally stopped?

## What if the agency has lost on the legal point against other parties in a different circuit – does that bind it in all circuits? (Assume no nationwide injunction.)

## Why might an agency keep using a standard in other circuits after it is rejected in one circuit?

# Non-Acquiesce

## If an appeals court disagrees with an agency’s interpretation of law in an adjudication, can the agency relitigate the same interpretation in other adjudications with different parties?

## If a court finds that the agency has promulgated an improper rule, can the agency keep using the rule in other circuits?

### Does your answer depend on the basis for overruling the rule?

### If not, why is it different from the court overruling adjudication?

## What is the effect of a nationwide injunction?

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