# Chapter 7

## Scope of Judicial Review

### The authority for judicial review

#### Sec. 706 of the APA is the primary authority for judicial review.

#### What is its basic standard for reviewing facts determined by an agency?

#### How would you compare this standard with the preponderance of the evidence standard used in civil cases?

#### Is this standard deferential to the agency and, if so, how does it force the court to be deferential?

#### How does this compare with the de novo review in FOIA cases?

### The Record

#### Why are most agency matters reviewed in Circuit Court, rather than district court?

#### How will that affect the requirements for the agency record?

#### How did *Overton Park* contribute to the modern notion of an agency record?

#### What needs to be in an adjudication record for the court to be able to review the decision?

#### Can the record be amended on appeal to the courts?

#### What are the exceptions and are they commonly used?

### Agency interpretation of law

#### How should the courts treat the agency's interpretation of what the law means?

##### What was the *Skidmore* case about?

##### What is the *Skidmore* standard for reviewing agency decisions?

##### What was *NLRB v. Hearst Publications* about?

##### What is the *Hearst* standard for reviewing agency decisions?

#### *Chevron*

##### What type of agency action was at issue in *Chevron*?

###### How much process was involved in the action in *Chevron*?

##### What legal question was the court asked to resolve?

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

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

##### How does *Chevron* deference compare to *Skidmore* and *Hearst*?

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

#### *Massachusetts v. E.P.A.,* 127 S.Ct. 1438 (2007)

##### What are greenhouse gases and why are scientists worried about them?

##### What had the EPA said before the facts in this case about its authority over CO2 in the past?

##### What did plaintiffs use to force the EPA to consider regulating greenhouse gasses?

##### What were EPA's two findings when it finally ruled on the petition for rulemaking in 2003?

##### What invited judicial second-guessing of their decision?

##### How broad is the definition of pollutant in the Clean Air Act?

##### How does plaintiffs’ claim fit into the definition of welfare in the statute?

##### What is the congressional intent question in *Mass. v. EPA*?

##### What did the court look to determine congressional intent?

##### What did the Global Climate Protection Act of 1987 require the EPA to do?

##### Does this directly support the argument that Congress intended EPA to regulate greenhouse gasses?

#### *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (U.S. 2000)

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

##### Why did the opponents of the regulation say that the only legal result of FDA regulation would be to ban tobacco?

##### What did the plaintiffs point to for support of their argument that the Food and Drug Act did not give the FDA jurisdiction over tobacco?

##### What does it mean to say that the court used a *Chevron* step zero in this case?

###### What would be the usual *Chevron* step one in this case?

###### What does the Court do before it decides what the plain language means?

##### What is legislative history and what did it show that supported the opponents of the regulations?

##### What other agency regulates tobacco?

###### Is this health regulation?

###### How does this support the opponent’s case?

##### What was Breyer's solution to the claim that the FDA would have to ban tobacco because of the requirement that drugs be safe and effective?

#### Post-*Chevron*

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

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

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

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

###### Does this take us back to *Skidmore*?

#### 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?

#### What about 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?

##### Would this require notice and comment, and, if so, what would need to be published?

#### How can an agency bind a regulated party without using a notice and comment regulation? (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 to do what the feds want?

##### Does this bind third parties, such as patients?

#### Agency interpretation of its own regulations

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

##### If the courts defer to the agency on interpretation of regulations in the same say was as statutes, how can the agency use this to extend it regulatory power beyond what it might be able to do based only on the statute?

##### How would you argue that the world of rulemaking has changed since the *Seminole Rock* decision in 1945 and that the case should be overruled?

##### What should the standard be?

#### In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the euthanasia drugs case, who decided what was a legitimate medical use for a drug?

##### Thinking back to the tobacco case, why wasn’t this the FDA?

##### What did the AG do to try to limit the use of the prescription drugs for assisted suicide?

##### Was he successful, and why?

#### 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 this 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 did 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 to be able to properly review agency action?

##### If Congress does not provide enough guidance, is the law unconstitutional?

##### What will the court rule about the law? (Think back to the earlier delegation doctrine discussion.)

#### How is judicial review related to agency flexibility?

##### What are the advantages of agency flexibility?

##### When is it most critical?

##### What are the risks?

## Judicial Review of Facts

### 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.

### 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 is the ALJ's finding most persuasive to the courts?

##### How did the legislature change this in Louisiana for agencies under the central panel?

### Building the Record for Judicial Review

#### How did *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) change the understanding of committed to agency discretion?

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

#### What is hard look review?

##### How is hard look review reconciled with deference to agency decisionmaking?

##### What are the pros and cons of hard and soft look review?

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

##### How is *State Farm* a hard look case?

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

### 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 this was arbitrary and capricious?

### Forcing Agencies to Act

#### What are the limits on mandamus that make it of limited use?

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

#### What is the problem with proving that 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*?

### Relying on Agency Advice

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

#### Can you get damages?

#### 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?

##### Jurisprudentially, why not?

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

##### Does the basis for overruling the regulation matter?

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