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To: C_Law Class SP14: Hester - Statutory Interpretation and Regulati
Subject: Final emailed review questions for Statutory Interpretation

As promised, I've listed my answers to your emailed questions below. I hope they're helpful. Good luck with your remaining finals, and see you tomorrow morning!

REVIEW QUESTIONS FOR STATUTORY INTERPRETATION/REGULATORY PRACTICE (Hester)

1) *One of the problems with our snack attack statute was "indefinite term". I have in my notes that a court can try to interpret the statute within semantic range in order to satisfy the point of the statute. But can a court imply term or time? Is that something that would render the statute inapplicable?*

If a statute fails to specify the time frame for its operation, the court typically can imply a term or time from general language in the statute as needed to effectuate its statutory purpose. Of course, this rule isn't hard and fast – for example, a court might not be able to infer an effective time frame for a statute if it creates an ambiguity that causes constitutional issues by imposing a retroactive criminal liability.

2) *Can a court scrap part of a statute and not another provision? Is it separable and still enforceable? Mentioned when we were talking about Church of the Holy Trinity. For example, could the court just get rid of the one provision that made a statute absurd?*

Courts can interpret a statute in a way that overrides a separable portion of a statute in certain circumstances – but they tend to be rare. The court usually will strive for an interpretation that will give full effect to all provisions of a statute, and it will usually resort to disregarding express statutory language in rare cases where the plain language leads to an absurd result (e.g., our discussion about the greenhouse gas case before the U.S. Supreme Court and its emphasis on absurd results doctrine). Congress can also expressly state that the rest of the statute remains in effect even if the courts declare one portion of it unconstitutional; think of it as a statutory severability clause.

3) *How ambiguous does a statute/word meaning have to be before courts are able to invoke the rule of lenity? (dissent position in Muscarello)*

Generally, a court will insist on a substantial ambiguity that it cannot resolve through traditional tools of statutory construction. As we saw in *Muscarello*, though, justices can strongly disagree on how much ambiguity must exist in a statute before a defendant can successfully invoke the rule of lenity.

4) *Can you define the dictionary act or how that is applicable to what we need to know? I know it falls under additional linguistic canons, but I don't specifically remember applying it to a case.*

The Dictionary Act is a federal statute that attempts to define general terms commonly used in federal statutes. The Dictionary Act is over a century old and has remained relatively uncontroversial, but recent amendments have attempted to import substantive policy issues through a definitional backdoor (i.e., see the definition of "person"). You can use it in the same fashion as a regular dictionary – it's a useful source, but the federal courts have not found it binding on their ability to exercise full judicial review or disagree with those definitions. Also, don't forget that Texas has its own Code Construction Act which can serve similar (and other) purposes.

5) *Can you give a definition and example of the clear statement rule? Is it like in Gregory v. Ashcroft, when O'Connor said that Congress had to be clearer in their statements and acts if they were going to take away state's rights and they had to write their statutes in a clear way, or the court would not interpret them the way they wanted?*

More precisely, it's the federalism clear statement rule – and *Gregory v. Ashcroft* is a stellar example. Under this rule, the courts will not interpret a statute in a way that impinges on matters of core state sovereignty unless Congress has clearly and directly stated that it wishes to do so. In *Gregory*, the appointment of judges fell into this category of core state sovereign functions, and the Court demanded that Congress expressly state that it meant for the Americans with Disabilities Act to apply to state judges.

6) *Just how absurd does the absurd results doctrine have to be to apply?*

As Justice Potter once observed, you'll know it when you see it. There really isn't a black-letter answer to this one – but the courts are usually quite reluctant to invalidate express statutory language unless the result is truly absurd.

7) *Suppose there is a guidance with references to existing laws and what to do with them- is it a regulation or a law?*

Usually a guidance can refer to existing laws and how to implement them (in fact, that's a primary purpose for most guidances). The courts will strike down a guidance as an impermissible attempt at "backdoor regulation", however, if the guidance specifies and fixes legal obligations and rights in the same fashion as a regulation. If an agency goes too far with its guidance, the court will usually deem it an attempt to promulgate a regulation without proper notice-and-comment rulemaking, and it will remand the guidance to the agency for further development or clarification.

8) *What conditions did Mead establish as a prerequisites to the application of Chevron deference? I have possible notice-and-comment and following procedure given to them by Congress.*

Mead doesn't spell it out with any precision. But generally, an agency action will almost always qualify for full *Chevron* consideration if it underwent notice-and-comment rulemaking.

9) *On the agency side of things, we talked about how some case such as Chevron, Mead, and Skidmore are seminal to the body of administrative law. Going back to statutory interpretation, are there any cases that are of similar importance or are they primarily important in the sense that they are illustrative examples of various interpretive canons?*

Some statutory interpretative cases are definitely important and appear routinely in judicial opinions. In particular, *Church of Holy Trinity*, *Gregory v. Ashcroft* and *Bob Jones University* are worth knowing by name for statutory interpretation principles.

10) *What are the main differences between executive orders and presidential directives?*

An excellent question. The main difference is that traditional executive orders focus on the structure and processes of government, including public lands and the federal workforce. When issuing these orders, the President typically points to specific Congressional authorization in a statute or to the Constitution itself. The White House usually identifies specific authorizations for actions under an order because (as Prof. Turner probably told you) President Truman suffered a stinging defeat when he tried to use an executive order to nationalize the U.S. steel industry, but was turned back by the Supreme Court. Keep in mind that while executive orders have legal effect, they do not themselves constitute agency action subject to judicial review.

By contrast, a Presidential Directive typically orders agencies to instigate work that they otherwise would not have begun. For example, President Obama in 2013 directed several federal agencies to take specific steps to address climate change (including adaptation planning for future climate disruption and future rules to control greenhouse gas emissions from power plants), but most of those steps led to future regulatory action rather than an immediate and direct change in

any particular agency's rules. In another example, President Clinton directed the FDA to undertake regulation of tobacco as a drug using only the agency's existing authority under the Food, Drugs & Cosmetic Act (ultimately leading to our class reading, *FDA v. Brown & Williamson Tobacco*).

That said, it's a slippery distinction. Many presidential directives could probably be issued as executive orders, and vice versa. Some directives integrate and coordinate with parallel executive orders. And legally, both directives and executive orders have the same status as presidential actions and carry over from one administration into the next. The President has usually chosen to issue a directive when the action requires broad and overarching activity by multiple agencies which require some coordination.

11) *Could you distinguish between ejusdem generis and noscitur a sociis and give an example? It's a little difficult to follow Scalia when he's being a bit snobby. My understanding is that EG is invoked when there is a certain list with a catch-all provision at the end. The catch-all is bound and restricted by the list itself. NaS, on the other hand, is a pure list where the understanding of one word in the list is given definition by the surrounding words in the list. Is that roughly correct?*

You got it.

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