

Review Questions – Jan. 21, 2014

1. Who can draft and introduce legislation into a session of Congress?
 - a. Lobbyists
 - b. Legislative drafting staff
 - c. Congressional staff
 - d. Congressional legislators
 - e. All of the above

2. Which of the following “vetogates” will automatically result in the death of pending legislation?
 - a. Failure by the Speaker of the House to refer the bill to committee.
 - b. The President decides not to sign the legislation within the last twenty days of an active session of Congress.
 - c. A majority of the committee which has received the bill fails to report it back to the House or Senate.
 - d. a and c.
 - e. All of the above.

Review Questions – Jan. 30, 2014

1. Briefly define each of the following schools of thought on statutory interpretation. Be sure your definitions are brief, but substantively enough to distinguish each theory from the other.

a. Intentionalism: _____

b. Purposivism: _____

c. Textualism: _____

d. Dynamic Interpretation: _____

e. Imaginative Reconstruction: _____

Review Questions

Feb. 6, 2014

1. The textual canon *noscitur a sociis* is best described as:
 - a. A tool to clarify the meaning of a broad catch-all term at the end of a list of more specific terms.
 - b. A maxim that draws on the common or shared aspects of other words listed in proximity with an unclear statutory term to help clarify that term's meaning.
 - c. Latin for "a thing is known by its companions".
 - d. b and c.
 - e. All of the above.

2. In *Babbitt v. Sweet Homes Chapter of Communities for a Great Oregon*,
 - a. Justice Scalia relied on traditional dictionary definitions of "take" to give the term a broader meaning that included habitat alteration;
 - b. Justice Stevens relied on the textual maxim *ejusdem generis* to define the term "harm" in the same fashion to other specific terms used in the statutory definition of "take";
 - c. The statutory definition of "harm" included a reference to habitat alteration, which was persuasive evidence of Congress' intent to ban that conduct;
 - d. All of the above;
 - e. None of the above.

Review Questions

Feb. 13, 2014

1. Which of the following maxims fall within the Whole Act canons?
 - a. *In pari materia*.
 - b. The title of a statute alone does not control its interpretation.
 - c. While a proviso customarily applies to the clause immediately preceding it, courts can apply it more broadly.
 - d. B and C.
 - e. All of the above.

2. Which of the following rules are specific iterations of the general maxim *expressio unis est exclusio alterius*?
 - a. When Congress specifies a mode of preemption for a statute, the courts will not imply additional areas of preemption based on the substantive provisions of the statute.
 - b. If Congress expressly requires proof of knowing conduct for one portion of a criminal offense, the court will not extend that requirement to other portions of the criminal offense absent express Congressional direction.
 - c. When Congress specifies the particular method of compliance with a statutory command, it excludes other possible ways to comply.
 - d. A and C.
 - e. All of the above.

3. True or False: while a court will generally give identical words and phrases in a statute the same meaning, it can ignore this fundamental canon and define the same word in the same statute differently if it has reason to believe that Congress used that term in two different senses.

Review Questions

Feb. 20, 2014

1. Which formulation best matches the unconstitutionality canon?
 - a. Courts should avoid interpretations that raise a serious question as to the constitutionality of a statute.
 - b. When faced with two competing interpretations of a statute, the court must choose the interpretation that will save the legislative act over an interpretation that would find it unconstitutional.
 - c. Either A or B, depending on circumstances of the case.
 - d. None of the above.

2. If the Governor of Texas chooses not to sign a bill that has passed both chambers of the Texas Legislature with less than 15 days left in the current legislative session, he (or she) has:
 - a. Allowed the bill to become law.
 - b. Subjected the bill to a pocket veto.
 - c. Automatically passed the bill for reconsideration by the next Legislature.
 - d. Automatically triggered a special session of the Legislature (if the governor has designated the bill as emergency legislation during the session).

3. The two elements required to invoke the constitutional avoidance canon are:
 - a. Existence of statutory ambiguity; and
 - b. One of the possible interpretations raises grave constitutional doubt

Review Questions

Feb. 25, 2014

1. In a fit of legislative frustration after several high-profile incidents of corruption and bribery of federal officials by corporations, Congress passes a statute that bars any corporation previously convicted of a federal or state criminal bribery offense from obtaining a contract with the U.S. government. This type of debarment can be a death knell for vulnerable corporations. Which interpretative canons would apply to this statute?
 - a. The presumption against retroactivity.
 - b. The federalism clear statement rule.
 - c. The rule of lenity.
 - d. The presumption against preemption.
 - e. All of the above.
 - f. None of the above.

2. The United States wishes to extradite “El Chapo”, the leader of a vicious Mexican drug cartel, to face criminal charges for manufacturing and distributing drugs in Mexico. Other criminals allegedly purchased and conveyed these drugs into the United States for ultimate use. As his defense counsel, which canons of construction would offer the strongest arguments against the U.S. prosecution? What other facts might you need to make your arguments?
 - a. Presumption against extraterritorial application

 - b. Rule of Lenity

Review Questions

Feb. 27, 2014

1. How did the D.C. Circuit use the doctrine of absurd results in reaching its decision to uphold EPA's Tailoring Rule in *Coalition for Responsible Regulation of Industry v. EPA*?
 - a. EPA properly applied the doctrine of absurd results because using the Clean Air Act's naked statutory thresholds for major sources would have required millions of smaller emitters of greenhouse gases to get permits.
 - b. EPA properly applied the doctrine of absurd results because EPA could properly regulate a subset of facilities that emitted greenhouse gases and postpone regulating smaller sources to avoid the absurd result of impossible administrative burdens.
 - c. EPA did not properly apply the doctrine of absurd results because EPA could not choose an interpretation of the statute that led to absurd results, and then depart from the statutory language to avoid that absurd result, if another interpretation would avoid that absurd result in the first place.
 - d. A and B.
 - e. None of the above.

2. Which judicial action best demonstrates the doctrine of scrivener's error?
 - a. A court determines that Congress erroneously overlooked an administrative interpretation of a statute when it reauthorized that statute, and therefore Congress did not mean to adopt that interpretation by reference.
 - b. A court rules that Congress used the wrong year in specifying a deadline of "April 15, 2013" for tax filings in 2015.

- c. A court holds that Congress did not intend to allow claims submitted on Dec. 31, 2013 if the statute required submittals “prior to Dec. 31.”
- d. B and C.
- e. All of the above.

3. To deal with the rampant use of off-label use of prescription drugs to enhance academic performance (Ritalin, Modafinil, Adderall), Congress passes a law that disqualifies any student from federal financial aid if they submit a sample that tests positive for these substances (and they do not have a legitimate prescription for those drugs). Some colleges begin to require drug tests as part of their financial aid applications, and these drug tests include analyses of hair samples – which can yield data on historical drug use for up to 12 months (or, in some cases, much longer).

A student is disqualified from financial aid because of a hair sample result that indicated use of cognitive enhancers prior to the passage of the law, and she files a lawsuit challenging application of the law to her financial aid request. Which of the following courses will a federal court most likely taken when applying statutory interpretative canons?

- a. The law does not apply to the student because of the rule of lenity.
- b. The law does not apply to the student because the presumption against retroactivity disfavors that interpretation (assuming Congressional intent is not otherwise clearly stated).
- c. The law would apply to the student because the remedial purpose canon overrides the presumption against retroactivity.
- d. A and C.
- e. None of the above.

030414 Statutory Interp Review Questions

1. In descending order of priority, please list how federal courts will typically rank the following legislative history tools to determine Congressional intent:

FOUR: Testimony by an outside academic expert before a congressional committee during deliberation of the bill that Congress subsequently enacted.

ONE: A Congressional Committee report on the substituted bill that ultimately passed both chambers.

THREE: Statements on the floor by congressional member opposing passage of the ultimately enacted bill.

FIVE/SIX: A Presidential signing statement noting the president's disagreement with Congress' legislative findings within the enacted bill.

TWO: A statement by the bill's author or sponsor during the debate when Congress passed the bill.

FIVE/SIX: Congress' failure to amend the statute after an agency adopted a controversial interpretation of its terms.

2. What intent-based tool of statutory interpretation led the Fourth Circuit to withdraw and reverse its decision in Montana Wilderness Association v. U.S. Forest Service?

The definition of "public lands" in section 1323(b) of the Alaska Lands Act included only lands in Alaska, and therefore the same limitation could be read in pari materia into section 1323(a)'s access language for land located entirely within the National Forest System.

The legislative history for the Alaska Lands Act was too sparse and ambiguous to support an interpretation that would expand its access provisions to the full United States because "Congress does not hide elephants in mouseholes."

CORRECT: The access provisions of Section 1323(a) applied nationally because the members who sponsored and authored the Alaska Lands Act stated during Congress' passage of a subsequent bill that they believed the access provisions applied nationally.

A and B.

None of the above.

Done

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032014 Stat Interp Review Questions

1. Under a strict reading of the definition of an agency as "a unit of government created by statute," which of the following entities would qualify as agencies?

- the U.S. Department of Education
- the U.S. Environmental Protection Agency
- the federal bankruptcy court system

CORRECT: a and c

all of the above

2. List two examples each of independent and executive federal agencies.

Independent Agency 1:

Independent Agency 2:

Executive Agency 1:

Executive Agency 2:

3. Which provisions of the U.S. Constitution discuss the control or administration of federal departments or agencies?

Article III's bestowal of original federal judicial power over cases involving Controversies where a United States Department is a Party

Article II, Section 1's empowerment of the President to require written Opinions from the principal Officer in each of the executive Departments

The Necessary and Proper clause of Article I, Section 8

CORRECT: b and c

all of the above

Done

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032214 Delegation and Chevron Review Questions

1. In the seminal case of *Chevron v. NRDC*, the U.S. Supreme Court held that:

federal courts should defer to EPA's interpretation of the Clean Air Act to allow regulation of the discharge of greenhouse gases into the atmosphere from major sources;

unless Congress has directly spoken to the precise question at issue, federal courts should defer to an agency's reasonable regulatory interpretation as a permissible construction of a statute;

EPA's interpretation of the term "stationary source" in the Clean Air Act to include bubbling was acceptable;

CORRECT: b and c;

all of the above.

2. The two steps of Chevron analysis require:

Step one:

Clear statement of Congress' intent?

Step two:

If not, reasonable agency interpretation?

3. If an agency has adopted a regulation based on an interpretation of a statute under Step Two of the *Chevron v. NRDC* analysis, a federal court will overturn that interpretation if:

Congress improperly delegated its legislative power under Article I of the U.S. Constitution by allowing the agency to choose how it interpreted or implemented that statute without a guiding intelligible principle;

the agency's regulation is arbitrary, capricious or manifestly contrary to the statute;

the agency's interpretation failed to accord with the overall legislative purpose of the statute, even if Congress had not explicitly addressed that specific issue;

CORRECT: A and B

All of the above.

Done

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032514 Delegation Review Questions

1. To satisfy minimal constitutional requirements, Congress must provide _____ to an agency when it delegates authority to the agency to implement a statutory program.

express authorization

CORRECT: an intelligible principle

funding

all of the above

none of the above

2. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the U.S. Supreme Court struck down portions of the Sarbanes Oxley Act because

the Act failed to provide a clear and discernible delegation of authority to the Public Company Accounting Board;

CORRECT: the Act improperly insulated the Public Company Accounting Board from executive oversight;

the Act required the President to obtain Congressional approval of the Public Company Accounting Board appointees;

A and B

All of the above.

3. Name three conditions where Congress will likely provide a greater degree of delegation to an executive agency.

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Done

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040114

1. Mark every answer that is correct: when a federal agency conducts a risk assessment that requires valuation of human life,

☒ it is not bound by any federal statute that sets a specific monetary value for human life;

☒ it should classify costs and risks to human life through the methodology specified by OMB Circular A4;

it cannot assign a value for future human lives that is greater than current human lives because federal law prohibits application of discount rates to human life valuations;

☒ it typically relies on values for statistical human lives rather than values of specific lost human

lives; it must use a "willingness to pay" methodology to determine the value of a lost human life.

2. A federal agency wants to use its foreign aid programs to purchase and distribute free anti-HIV medications to impoverished nations. Part of the agency's cost benefit analysis is that its program will help more people live longer and create financial benefits through their increased productivity. These healthy citizens will have more children, and those children will also have longer and more productive lives. They in turn will have children who will work too, thereby creating a "compounding" effect that generates huge financial benefits from the rule over a period of thirty (30) years. The agency has assigned a constant value of \$1 million for each human life saved during the duration of the entire program based on data from similar drug support programs that the agency implemented in the U.S.

Your client, a drug company, wants you to persuade the agency that this cost benefit calculation is unjustified and unsound. Offer briefly three reasons why a federal agency should not use this particular cost benefit analysis approach in this particular context.

1.
2.
3.

Done

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040314 Scientific Information Review

1. Which example below best demonstrates an agency's application of a precautionary approach when generating scientific information in a risk assessment?

the agency assigns a smaller value to risks that may materialize in the future than to risks that might arise immediately from implementation of the regulation;

CORRECT: the agency "stacks" risks by assuming the most conservative risk level for each step of a course of action, so that the resulting overall risk is set at extremely low levels;

the agency refuses to consider risks that fall into certain categories because they cannot be objectively quantified, such as moral objection or irreversible harm;

a and b;

all of the above.

2. When EPA refused to accept the National Academy of Science's conclusion that the high-level radioactive waste disposal site at Yucca Flats would pose risks for more than one million years (and that EPA should assess those risks), EPA instead insisted that it would use its conventional 10,000 year period to assess long-term risks. In response, the D.C. Circuit:

upheld EPA's choice under Chevron v. NRDC as a clear exercise of agency discretion when Congress had given EPA the authority to decide such as highly complex issues within the agency's expertise;

rejected EPA's choice because EPA failed to satisfy Step Two of the Chevron analysis by acting arbitrarily, capriciously and not in accordance with law;

CORRECT: rejected EPA's choice because EPA failed to give the weight to the National Academy of Science's conclusion required by Congress;

dismissed the action because the plaintiffs could not prove that they would be injured by long-term future exposure to high-level radioactive waste, and therefore they lacked standing.

3. Check every answer below that is correct --

President Obama's March 9, 2009 memorandum on scientific integrity directed heads of executive departments and agencies to:

refer key scientific questions to independent scientists within the agency or at other federal agencies that specialize in scientific research (such as the National Institutes of Health or the National Science Foundation);

☒ use scientific information in policy decisions subject to well-established scientific processes, including peer review where appropriate;

☒ unless otherwise restricted, make scientific findings available to the public;

select candidates for scientific and technology positions in the executive branch as political appointments because knowledge, credential, experience and integrity are relevant but not mandatory for such positions.

Done

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040814 Political Information and Use of Guidance

1. Select every correct answer below: when an agency issues a guidance document that interprets a regulation or statute,

the guidance typically cannot be subjected to judicial review under the Administrative Procedure Act;

the agency may choose to open the guidance to public notice in the Federal Register;

that guidance may be judicially reversed if it imposes substantive obligations without proper notice and comment;

the agency may explicitly state that the guidance does not bind the agency or any related entity.

2. Briefly explain why the following statement is true or false: while an agency may use economic, scientific and political rationales when it crafts a regulation, a federal court will most likely defer to agency actions supported by scientific or economic explanations rather than political considerations.

3. In a formal adjudication to implement a statute, an agency:

A. must allow a party to cross examine witnesses as required for a full and true disclosure of facts;

B. typically will provide an administrative law judge to preside over an initial hearing;

C. must comply with the Federal Rule of Evidence during the hearing;

D. must provide a statement of findings and conclusions along with the reasons for its decision;

E. A and B;

F. A, B and D;

G. all of the above.

Done

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041014 Presidential Control of Agency Action

1. List three tools that the President can use to force an executive agency to change its consideration of a pending rule.

1.
2.
3.

2. Which of the following agencies must participate in the regulatory planning process under Executive Order 12,866?

- ☐ The U.S. Environmental Protection Agency
- ☐ The Federal Reserve Board
- ☐ The U.S. Department of Health and Human Services
- ☐ A and C

☒ All of the above

3. Explain briefly the difference between a prompt letter and a return letter issued by the Office of Information and Regulatory Affairs under E.O. 12,866.

4. (Mark each and every answer that applies) -- E.O. 12,866 does NOT apply to:

☒ a regulatory action that is not "major" as defined by E.O. 12,866.

☒ any rule pertaining to military or foreign affairs functions of the United States.

☐ any emergency rule or situation where an agency is obligated by law to act more quickly than normal review procedures allow.

☐ any rule subject to a deadline established by judicial order or consent decree.

Done

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041514 Congressional Control of Agencies Review Questions

1. Mark each correct answer: which of the following methods can Congress use to control agency actions?

hold an oversight hearing to investigate an agency's implementation of a statutory program.

withhold funding for specific agency activities in an appropriations bill.

prohibit an agency from incurring contractual commitments beyond the current fiscal year.

pass new legislation to restrict or bar the agency's future actions.

create a new cause of action to allow persons injured by an agency's actions to sue that agency for failure to comply with mandatory statutory duties.

2. Under the Congressional Review Act,

a major agency action will not take effect until Congress passes a joint resolution to authorize its implementation.

a joint resolution can revoke an agency action upon passage in both chambers of Congress and approval by the President (or veto override).

a joint resolution is not subjected to traditional rules of cloture in case of filibuster in the Senate.

B and C.

All of the above.

3. Describe in one sentence the U.S. Supreme Court's majority holding in Bowsher v. Synar.

Done

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041714 Thresholds to Judicial Review of Agency Action

1. In *Heckler v. Chaney*, the U.S. Supreme Court held that:

the FDA properly exercised its discretionary authority under Chevron Step 2 to determine that states could use drugs to execute prisoners without proper branding or clinical trials about that particular use;

the EPA failed to adequately consider whether greenhouse gases posed an endangerment to human health because Congress' unambiguously broad definition of "pollutant" in the Clean Air Act would include carbon dioxide;

the federal courts could not review the FDA's decision not to pursue enforcement against companies that arguably provided misbranded drugs for executions because decisions not to take enforcement action are presumptively immune from review under the Administrative Procedure Act;

while the Administrative Procedure Act generally does not provide for judicial review of agency decisions not to enforce, the FDA's decision not to enforce any and all such misbranding claims amounted to a pattern of nonenforcement of clear statutory language that would support judicial review;

A and C.

2. True or False: private plaintiffs alleging a "procedural injury" typically do not have to demonstrate their specific or individual standing to seek judicial review in federal court because the underlying Congressional statute usually defines such injuries as cognizable claims.

True

False

3. Mark each correct answer below: In *Massachusetts v. EPA*,

the U.S. Supreme Court did not find that the private land owners had standing to pursue their claims that EPA had improperly failed to designate carbon dioxide as an air pollutant under the Clean Air Act;

EPA had properly exercised its discretionary authority as provided by Congress to allow major sources to use "bubbling" under the Clean Air Act;

Massachusetts had standing to sue EPA because the state's sovereign interests, as well as its special role under the Clean Air Act as a state, merited special solicitude from the federal courts;

the U.S. Supreme Court held that a litigant with a procedural right, such as Massachusetts, has standing if there is some possibility that the requested relief will prompt the agency to reconsider its decision;

EPA's refusal to declare whether carbon dioxide constituted a "pollutant" under the Clean Air Act was a decision to not take enforcement action that could not be reviewed under the Administrative Procedure Act.

Done

042214 Judicial Review of Agency Statutory Interpretation

1. In *FDA v. Brown & Williamson Tobacco Company*, the U.S. Supreme Court held that:

A. the Food, Drug & Cosmetics Act's broad and ambiguous definitions of "drug" and "combination product" acted as a Congressional delegation of authority under Chevron Step 1 that authorized the FDA to regulate tobacco;

B. the Food, Drug & Cosmetics Act's broad definitions of "drug" and "combination product" did not include tobacco because the FDA's proposed regulations on sale and advertising were arbitrary and capricious under Chevron Step 2;

C. the FDA improperly attempted to regulate tobacco under the Food, Drug & Cosmetics Act because Congress unambiguously denied that authority to FDA under Chevron Step 1 in light of the sizable policy stakes involved, contrary subsequent Congressional legislation, and prior inconsistent statements by FDA officials;

D. the FDA's earlier decisions not to regulate tobacco were a valid exercise of regulatory discretion under *Heckler v. Chaney*;

B and C.

B and D.

2. In April 2014, the Department of Homeland Security issued a memorandum to its field offices that modified its training manual for asylum case officers. In the new training manual, the DHS Asylum Office directed its officers to require asylum applicants to "demonstrate a substantial and realistic probability of succeeding in court" with their asylum claims. This language did not change the underlying regulation, but it will likely lead the case officers to deny many more claims because they previously had allowed asylum applicants to proceed if they could show only "a minimal or bare possibility of success."

The DHS did not publish the memorandum or the revised training manual in the Federal Register, but it did post it to the public on its website along with a press release. The memorandum and manual provide a two-page analysis to justify the action, which focused primarily on the dramatic increase in asylum claims asserted at U.S.-Mexican border crossings.

An advocacy group for Mexicans fleeing drug violence that targets indigenous populations has asked you to challenge the new memorandum and manual. Assuming that a federal court will entertain your complaint, BRIEFLY explain what legal standard of review that the court will likely apply when reviewing the agency's action.

[Explain choice between *Skidmore*, *Mead* and/or *Chevron* 1 or 2.]

Done

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