Hester, Tracy

To: C_Law_Class_SP18-HESTER-Statutory-Interpretation-and-Regulation
Cc: Hays, Joseph G; Parker, Amanda
Subject: Answers to E-Questions

Thanks to all of you who sent me your (excellent) email questions, as well as all of you who visited with me over the past week. As promised, I've included my responses below. I'll also post them to the website so that everyone has an opportunity to review them.

See you at the exam,

Tracy Hester
University of Houston Law Center
4604 Calhoun
Houston, Texas 77204-6060
713-743-1152 (office)
tdheste2@central.uh.edu
web bio: www.law.uh.edu/faculty/thester

****

1. *Can you please explain "veracity, thoroughness and power to persuade" factors in Skidmore again? I am still confused about how to argue each one of these. Veracity and power to persuade seem to be very similar to me.*

   The *Skidmore* factors don't set out a series of bright-line tests, and as a result the factors overlap and run into each other. In short, thoroughness focuses on the degree to which the agency considered the facts and materials before it when it reached a conclusion. A short, cursory opinion without any outside feedback or supporting information obviously fares worse than a fully-developed rule with supporting data and analysis. Consistency means, as you probably expect, whether the agency has stuck to its interpretation over a period of time, or (alternatively) has flip-flopped or given differing conclusions and explanations over time. Validity means, essentially, whether the judge agrees with the substantive elements of the agency's statutory interpretation. If the agency gets it wrong, under *Skimore* the judge can give the agency's opinion less weight. And power to persuade essentially combines the effect of the other factors into a collective weight – no one factor prevails over the others in every circumstance.

   And yes, I agree with you that "power to persuade" and veracity sound a lot alike. That was one of the reasons that Justice Scalia viewed the *Skidmore* test as largely an empty truism.

2. *I had a question about the scope of the Interpretative rule exemption in APA 553(b)(3)(a). I understand 553(b) requires general notice of the proposed rulemaking be published in the Federal Register, and 553(b)(3) requires that notice include "either the terms or substance of the proposed rule or a description of the subjects and issues involved". My understanding is that the interpretative rule*

exception only exempts the notice from having to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved". Thus, general notice would still need to be published in the Federal Register, and must satisfy the remaining provisions of 553. In addition, my understanding is that this exemption also applies for general statements of policy and rules of agency organization, procedure or practice. This seems to suggest it would apply for guidances as well. Would these be accurate statements?

Interesting question, but probably no. Most agencies do not feel compelled by the Administrative Procedure Act to publish a general notice of their interpretive rules, general statements of policy, or rules of agency organization in the Federal Register. But as we mentioned in class, they can choose to do so voluntarily if they wish.

3. *You have told us to keep in mind the Major Questions Doctrine when working through Chevron Step 1. If we find a "major question" when working through Chevron Step 1, does that impede the rest of our Chevron analysis? I have written in my notes that the Major Questions Doctrine functions similarly to Mead as a gatekeeper. I just want to make sure that I understand how the Major Questions Doctrine and Chevron Step 1 interact.*

   You've got it right. If an agency interpretation involves a major question issue, the court will likely not defer to the agency's interpretation under a *Chevron* approach. The court essentially will conclude that Congress would not rely on ambiguity and silence to give an agency the power to answer a major question of this type. As a result, the court essentially makes the call, and *Chevron* is largely side-stepped.

4. *Are we allowed to have our text book along with our outlines for the exam?*

   Absolutely.

5. *In regards to the arbitrary and capricious standard, is it understood that the court will scrutinize the agency action under A&C whether they "change course" with their decision during an informal adjudicative process?*

   If an agency declares a policy change via an opinion rendered during an informal adjudication, that agency decision will fall under APA Section 706 (just like any other informal final agency action that's not exempt). As a result, the court will likely use an arbitrary and capricious standard when reviewing informal agency adjudications for most questions. Of course, keep in mind that a statutory interpretation issued via an agency's informal adjudication would still need to undergo the *Mead-Chevron-Skidmore* review process. And *formal* agency adjudications would require a substantial evidence review from the court.

6. *For agency inaction, must the agency only issue a statement for their reasoning if the statute requires (Like Mass v EPA) or is it still generally deferential (Like Chaney)? I guess I am just still slightly confused on the extent to which they must be clear in regards to inaction.*

   Under *Chaney,* an agency does not need to explain why it chose not to pursue enforcement because its decision would qualify in most cases for the presumption for non-reviewability of enforcement actions. By contrast, *Massachusetts v. EPA* relied on both Section 202 of the Clean Air Act and, importantly, APA Section 555(e), which directs the agency to provide "a brief statement of the grounds for denial" of a petition for agency action. Section 555(e) would require agencies in general to explain (briefly) their decision to deny any petition for action in an ongoing proceeding.

7. *Is it helpful (in terms of points) to mention how preferred a rule or canon is? For example, I mentioned that for some canons they are only considered to be weak evidence.*

   In general, it's helpful to highlight which canons or principles are more important or relevant to the question at hand. For example, if the question raises the interpretation of a criminal statute, the Rule of Lenity is likely more relevant and powerful than the general Constitutional Avoidance canon.

8. *Under the rule of lenity I mentioned that it is more appropriately used for malum prohibitum crimes. I know it is a small detail, but does that add points for that rule?*

   Good point. As the text mentions, the Rule of Lenity has special bite for interpretations of statutes that criminalize manifestly wrongful conduct. As a result, it applies with less force for statutes that criminalize technical violations or wrongful actions that aren't immediately and obviously wrongful to the perpetrator (e.g., securities reporting violations). It would be worth a slight increase in points for your final exam answer, but – as in real life – it likely won't make a major difference to your argument.