Judicial Review of Agency Statutory Interpretations (Chevron/Skidmore)

Prof. Tracy Hester
University of Houston Law Center
Announcements and Updates

• Practice Exam – answer posted today

• Review session for last day of class
  – Submit email questions for final by
  – Will distribute group reply and post to website

• Final exam
  – Week-long window to download
  – 3-hours to take exam
  – 1 essay, 10 multiple choice
Quick look back: Other Forms of Agency Action

- Majority of agency action isn’t rules or orders, but specific decisions and informal directions

- Judicial review of informal agency action
  - Presumption of judicial review still applies
  - BUT -- APA 701(a) “committed to agency discretion by law”
  - BUT -- statutory prohibition on judicial review (it happens)

- No notice-and-comment process for “interpretative rules” or “general statements of policy”
Overton Park and Heckler v. Chaney

- **Overton** – the dead-end highway case
  - Judicial review available for informal agency decision
    - Not “committed to discretion”
    - No statutory exclusion
  - Standard of review: arbitrary and capricious under APA 706(2)
  - Meeting this standard requires contemporaneous record, connection of facts in record to decision set out in transparent rationale
  - Justice Marshall’s tactically clever solution

- **Heckler v. Chaney** – Dead Man Walking case
  - Judicial review of agency decision not to act
  - Presumption against judicial review
  - Narrow exceptions for
    - Denial of action based on jurisdiction
    - Agency consciously and expressly adopts a general policy so extreme that it amounts to abdication of statutory responsibilities
Massachusetts v. EPA

- *Brown v. Board of Education* for environmental law

- Focus on its admin dimension:
  - Why not *Heckler*?
  - What statutory interpretive tools did the Court use to read Section 202(a)(1)?
  - What’s the remedy for agency inaction here?
  - What does EPA have to do differently here?

- Secret ingredient - standing
Chevron and Skidmore doctrine

- Judicial review of agency statutory interpretations
- Hugely contentious and likely target of new Supreme Court majority
Don’t forget the baseline: *Skidmore*

- How much should courts defer to agency guidance and legal opinions in general?

- How much should courts defer to agency *interpretations of statutes* they administer?
  - Why a court would approach this review differently from any other agency action?
  - Who decides?
  - Does it matter *how* the agency announced its opinion?
    - Amicus briefs
    - After-the-fact letter written specifically for litigation
Skidmore’s Standard

The Very Clear Power to persuade

T  Thoroughness
V  Validity
C  Consistency
P  Persuasiveness
Chevron v. NRDC

- “Bubbles” and permits
- Don’t forget the procedural prerequisites
- Chevron Step One
  - How to determine if “ambiguous”?
  - Statutory tools
- Chevron Step Two
  - Quirky aside: standard for *intentional* ambiguity
  - If language is ambiguous or silent, then court must defer if agency interpretation is “reasonable”
- What benefits does *Chevron* offer over *Skidmore*?
So Ask Yourselves…

• Remember our *Skidmore* questions
  – Who decides?
  – Does it matter *how* the agency announced its opinion?

• What if an agency interprets its own regulations?

• Should agencies use judicial canons of construction? What happens if they don’t?
Next class…

- Extending *Chevron* to regulations (*Auer* and *Kisor*)
- Trimming back on *Chevron*: *U.S. v. Mead Corp.*
  - *Chevron* Step Zero
  - Integrating *Mead* with *Skidmore*
Tracy Hester
University of Houston Law Center

tdheste2@central.uh.edu
713-743-1152 (office)