**CONSTITUTION – APA 706(2)(B) – “who”**

AA 🡪 Proposed reg 🡪WH (Exec Office) 🡪 Fed. Register

Final reg OMB Judicial review (fed app cts)

OIRA

(can circle back up to AA from here)

IRC 🡪 not subject to exec order for OIRA 🡪 Fed. Register

**Separation of powers principle**

**Vesting Clauses** (“all” leg powers 🡪 Congress)

**Art 1(7)**: bicameralism and presentment

**Non-delegation principle** (*J.W. Hampton* and *American Trucking* vs. *Schechter* and *Panama Refining*

Stevens concurrence in *American Trucking*: should admit that agency RM is legislative power

*Industrial Union*: construe delegation narrowly to avoid non-delegation problem (*Nat’l Cable, Kent*)

**Congressional control of agencies**

Formalism vs. Functionalism

***Chadha*** (formalist):

Rebuttable presumption that the legislature legislates: must meet Art 1(7) requirements

One-house veto is unconstitutional (this is legislative: effects outside Congress, changes C’s status)

But see concurrence (Powell): narrow reading: Congress not allowed to do a judicial act

But see dissent (White): functionalist: Congress should be able to place checks when it delegates

Functionalist: other ways for Congress to rein in agencies

Amend statute, threaten budget cuts, put substantive “riders” on appropriations bills, committee oversight

***Bowsher*** (formalist):

Congress can’t reserve power for itself of removal of officer w/ exec functions: separation of powers

But see dissent (White): functionalist: no big deal in practice bc POTUS can veto Cong res for removal

**Appointment and removal**

**Appointments Clause** (doesn’t explicitly deal with removal)

Principal officers: POTUS nomination, appointment with advice and consent of Senate

Inferior officers: Congress decides whether it’s POTUS alone, courts, or heads of departments

[Implicitly: employees are appointed by heads of departments]

**Necessary and Proper Clause** (use to argue about Congress’s role in shaping government)

***Buckley* tests** to determine if an individual is an “officer” (and must have conformed w/ Appointments Clause)

1. Do they exercise significant authority? Yes 🡪 They’re an officer (either principal or inferior)
2. Are they supervised? Yes 🡪 They’re an employee

***Morrison*: Congress may not use removal provisions to interfere w/ POTUS Take Care clause duties**

1. “Unduly trammel” on POTUS congressional duty to “faithfully execute the laws”?

If POTUS retains “sufficient control,” it’s acceptable (as in *Morrison*)

If multi-level protection makes officer immune, it’s unacceptable (as in *Free Enterprise*)

Factors (*Morrison*): type of function, degree of authority, degree of interference

1. Congressional aggrandizement vs. encroachment (*Myers* aggrandizement*, Humphrey’s* ok)

Removal constraints will be more suspect if they lead to congressional aggrandizement

*Free Enterprise*: POTUS cannot be reduced to “cajoler-in-chief”

**Test for inferior officer:** (as opposed to a principal officer) **–** then removal restrictions may be ok

1. Can be removed by a higher executive official
2. Empowered to perform only certain limited duties
3. Office is limited in jurisdiction
4. Office is limited in tenure/duration

But see *Edmond*: gave dispositive weight to one factor: “supervision” test

**POTUS control of agencies** (policy for WH centralized overview: effective government, democratic accountability)

Reagan: E.O. 12291 (“major” rules ($100m+) go to OIRA), E.O. 12498 (OMB comments) - anti-regulatory bias?

Clinton: E.O. 12866 (more transparent, equitable/distributive criteria, “softens” CBA, performance standards)

IRCs participate in annual regulatory planning process (but not OIRA review of proposed/draft rules)

**STATUTE – APA 706(2)(C) – “why”**

**Chevron Step Zero**

***Mead***: “force of law”?

1. Did Congress delegate authority to agency to make rules carrying the force of law?
2. Was the agency interpretation under consideration promulgated in an exercise of that authority?

Good indicators: formal ADJ or 553 RM

***Barnhart***: factors to justify *Chevron* for non-553 situations (for informal ADJ and non-leg rules/guidance)

(1) Interstitial nature of legal question (2) agency expertise (3) importance of legal question to administration of statute (4) complexity of agency mandate (5) time spent carefully considering question

**Chevron** “deference”

1. **Has Congress directly spoken to the precise question at issue?**

Statutory interpretation! If clear: Congress’s clear directive controls. If ambiguous: go to Step 2.

But see: extrinsic factors (not semantic meaning) in *Brown & Williamson* [non-del as canon?]

1. **Is agency’s answer to that question based on a permissible construction of the statute?**

Also (within statutory analysis): is agency interp at odds with purpose of statute?

**Skidmore** “respect” (likely for interp rule, policy statement, opinion letters, etc.)

1. Agency’s thoroughness of consideration (2) validity of reasoning (3) consistency (4) power to persuade

**Statutory interpretation** (relevant to *Chevron* and *Skidmore*) – see separate document

**PROCEDURE – APA 706(2)(D) – “how”**

|  |  |
| --- | --- |
| **Informal RM (APA 553)** | **Formal RM (APA 553 🡪 556, 557) – FDA required to** |
| **Informal ADJ (everything else)** | **Formal ADJ (APA 554 🡪 556, 557)** |

**Formal RM required or not?**

Trigger language: “on the record, after opportunity for hearing” 🡪 formal RM (if not, 553 ok: *Florida Railway*)

But: did agency follow the procedural requirements in its organic statute?

**If formal RM is not required: ADJ or informal RM?**

No post-hoc rationalizations of basis for agency action (*Chenery I*)

Agency can use informed discretion to choose between ADJ and RM (*Chenery II*)

Is policy-making by ADJ unavoidable (*Chenery II*), or is agency able to use discretion to do RM (*Bell Aero*)? Retroactive ADJ is ok if it outweighs the mischief of contrary result (*Chenery II*) but RM is only prospective

Earlier ADJ can be reversed by ADJ despite reliance on longstanding policy (RM not required) (*Bell Aerospace*)

**Exceptions to informal RM in APA 553(b) (QP: did this have to be informal RM?)**

**Good cause** no RM if “impracticable, unnecessary, or contrary to PI” (routine, emergency, anticipatory conduct)

**General statements of policy** (*Chamber of Commerce* “comply or die” vs. *PG&E* guidance, flexible, rebuttable)

**Interpretive rules** – “force of law”? – “pay me now or pay me later”

*AMC*: “force of law” test, reas. interp., no serious policy decisions, parallel the statute’s level of flexibility

It is a leg rule if any are met: (1) without rule there would not be adq leg basis for enf actions or other agency action to confer benefits or ensure perf of duties (2) agency published rule in CFR (3) agency explicitly invoked its general leg authority (4) rule effectively amends prior leg rule

*Hoctor*: no flexibility, arbitrary = leg rule (had to go through APA 553 N&C)

**Informal RM (APA 553):**

**Notice**: If inadequate, meaningful opportunity for comment is thwarted (*Choc Mfg*)

Agency may need to disclose scientific studies on which proposed rule is based (*Nova Scotia*)

**Comment**: Must respond if raising Qs of “cogent materiality” (*Nova Scotia*): significant objections, concrete alts

**Concise general statement of basis and purpose (CGSBP) –** Adequate response to comments? Cursory? (*Nova Scotia*)

“Logical outgrowth” test (*Choc Mfg*): need second round of notice-and-comment?

**AGENCY ACTION – APA 706(2)(A) – arbitrary and capricious standard – “what”**

QP: even if agency stat. interp. is ok, has agency made acceptable policy determination/ exercise of discretion?

**Overton Park principle**: Is decision based on consideration of relevant factors? Clear error of judgment?

Ok if cumulative effect of evidence provides rational basis for decision (*Ethyl Corp*) – deferential

Procedure (Bazelon, rejected in *VT Yankee*, but: procedural requirements in statute?) vs. substance (Leventhal)

Ok if agency’s path can reasonably be discerned, even if less than ideal clarity (*Colorado Interstate Gas*)

**State Farm test** (for 553 RM, “hard look” standard) – and change/rescission of rule = same standard as creation of rule

1. Factors Cong didn’t intend (2) Didn’t consider important aspects (3) counter to evidence (4) implausible

***FCC v. Fox*:** Change of rule = more detailed justification sometimes. Deciding not to make rule = usually deference.

**Statutory interpretation**

**Legislative supremacy** (ct as “faithful agent”)

**Judicial power and equitable interpretation** (ct as “junior partner”) (*Marshall* dissent: LSD punish by weight is harsh)

Approach:

**Purposivist** (*Riggs v. Palmer* equity rationale for no recovery: murdered grandpa*, Holy Trinity* laborers, not pastor)

**Textualist** (*West Virginia University Hospitals* expert fees cannot be shifted)

**Textually-Constrained Purposivism** (*Gen. Dyn.* age discrim, *Amer. Trucking* 1940: text = best evidence of leg purpose)

Text:

**Ordinary meaning / Dictionary definition / Scientific meaning** (*Nix* tomato*, Smith* US ‘use’ gun as barter*, MCI* modify)

**Terms of art** (*Moskal* dissent: “falsely made” is specialized legal term with synonyms so anti-surplusage principle isn’t relevant*, Continental Can* “substantially all”*, Corning Glass* “working conditions”*, Nix* no special meaning in industry)

**Common law meaning** (*Babbitt* dissent, *Morrissette* adopts specialized legal meaning – but see *Moskal*: no uniformity)

**Avoiding absurd results** (*TVA v. Hill* dissent: dam almost complete, *Kirby* obstructing mail to arrest carrier, *Public Citizen* “utilizing” ABA as advisor = “odd result”*, Riggs v. Palmer* grandson can’t get $*, Marshall* dissent: LSD weight)

**Scrivener’s error** (*Locke* dissent: errors in other parts of text indicate Dec 31 deadline does not align with intent)

**Rule of lenity** (*Smith* USgun (lost on it), *McBoyle* vehicle (won), *Gould v. Gould* tax leg construed against gov, if doubt)

Structure:

**Structure of statute (uniform usage within statute?)** (*Smith* US “use” gun, *General Dynamics, Gustafson* prospectus)

**Presumption favoring consistent meaning across statutes** (*Gustafson* prospectus*, Continental Can*, *Northcross* (when two statutes use similar language, strong indicator they should be interpreted side by side) *–* but see *General Dynamics*)

Semantic canons:

***Expressio unius*** (*Silvers v. Sony* copyright infringement: exclusive) - Expression of one thing implies exclusion of others.

***Ejusdem generis*** (*McBoyle*: is airplane a vehicle*, Smith* Mich. is rifle a weapon, *Circuit City* “engaged in” – but see *Circuit City* dissent: as meaning of “commerce” has grown, so should scope of exemption)

Of the same type. Lists define categories. Can narrow a catch-all. (Frame at different levels of generality.)

***Noscitur a sociis*** (*Gustafson* prospectus*, Babbitt* is logging “taking” in that it “harms” endangered species)

A word is known by its associates (which can clarify or narrow the word’s meaning).

**Presumption against surplusage** (*Circuit City* employment*, Moskal* “falsely made”*, Gustafson* prospectus*, Babbitt* harm)

Don’t make text redundant/superfluous. Give each term in statute its own meaning.

May be in tension with *ejusdem* or *noscitur* (see overlapping cases).

Substantive canons (“clear statement” rules):

**Constitutional avoidance** (Brandeis (*Ashwander*) *Charming Betsy* find alt interp if fair*, Catholic Bishop* religious schools’ secular teachers*, DeBartolo* union leafleting – but *Marbury* court’s job is to say what the law is*,* *Rust* abortion)

Modern approach: Does agency interpretation raise a serious constitutional Q?

Classic approach: Avoidance only if there is an actual conflict

**Federal preemption of state law**(*SWANCC* migratory birds and navigable waters)

**Major Qs (non-delegation as canon)** (*Industrial Union, Nat’l Cable, Kent, MCI* modify*, Brown & Williamson, Packard*)

**Repeals by implication are disfavored** (*TVA v. Hill* subseq. appropriations bill*, Brown & Williamson* tobacco not FDA)

Legislative history:

**Title of statute / Statement of purpose** (*Holy Trinity* only about manual labor, not religious work: narrows ambiguity)

***What’s the ambiguity?***

* Leg history cannot be used to introduce an ambiguity (*Exxon Mobil* – but dissent*:* ambiguity is in eye of beholder)
* But leg history can be used for things beyond leg intent (*Corning Glass*: specialized meaning, industry practice)

Committee reports (“gold standard”) (*Blanchard* “reasonable” legal fees, but see *Exxon Mobil*: not special; murky)

Sponsors’ statements (*North Haven*: edu funding anti-discrim rule applies to employees?)

Floor statements / colloquies (*Continental Can* “substantially all”*, North Haven* edu funding: employees?)

Statements made during hearings (*Corning Glass*: clarify “working conditions” as term of art)

Multiple versions / amendments

Subsequent legislative action (or inaction) (*Brown & Williamson* Congress created subseq leg scheme for tobacco)