An agency has the capacity to act with the force and effect of law.

Did the agency have authority to do what it did from a statute?

If the statute says that the agency can promulgate rules interpreting the statute (and therefore passes Mead), do we need to evaluate within the statute to determine if Congress precluded some kinds of interpretation (for example, if the statute defines a term, can the agency promulgate a rule refining the meaning of that term?)?

There are four types of agency actions: 1. Notice and Comment Rulemaking

2. Formal Adjudication (Court-like Procedures)

3. Informal Adjudication – Did not study (555).

4. Guidance Documents

1. OIRA – If it is an executive agency, and the economic impact is greater than $100M, then OIRA standards must be met (Ch. 6 – Presidential Control of Agency Action).
2. Notice and Comment Rulemaking
   1. Notice of Proposed Rule – Governed by 553(b).
      1. Issue Notice in Federal Register – Notice contains one or more proposed rules. A common error is to publish the notice online, which is not enough and not necessary.
      2. Statement of the time place, nature of the public rulemaking proceedings.
      3. References the legal authority under which the rule is proposed – the statute that gives the agency the authority to make the rule.
      4. Contains terms of substance of the proposed rule or descriptions of the subjects/issues involved.
      5. Make any studies used as the basis of the rule available.
   2. Exceptions to Notice Requirement – 553(b)
      1. The notice requirements don’t apply when the agency is making guidance/interpretative rules (b/c they don’t speak with the force and effect of law).
      2. General statements of policy (guidance).
      3. Press releases (guidance).
      4. Rules of agency organization, procedure, practice (intra-agency).
      5. If notice and comment procedures would be impracticable, unnecessary, or against the public interest.
   3. Comment Period – Interested persons must have an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.
      1. Interested Persons – individuals, partnerships, corporations, associations, or public and private organizations and other agencies (inclusive standard).
      2. Opportunity to submit written data views or arguments (at a minimum, and maybe oral presentation if the statute requires).
      3. Opportunity to participate – There must be a reasonable comment window, which is usually 60 to 90 days.
      4. *Example* – NHTSA Standard 208 – passive restraints (airbags vs. seatbelts).
   4. Consideration – The agency must carefully consider the comments and materials received from the interested parties.
      1. Considering comments received after the comment period ended, the rule is arbitrary and capricious.
      2. A comment consider the need for a statute to conduct a statutory analysis, scientific analysis, economic analysis, etc.
         1. Scientific Analysis (pg. 18 of OL) – Helps agencies evaluate the risks of a bad event occurring and develop responses.
            1. Risk Assessment – The agency gathers info to evaluate the probability and magnitude of the risk.
            2. Risk Management – The application of political, social, and economic policy to determine the response to the risk assessment.
            3. Margins of Error – There is always a margin of error, so there is a question of reliability.
            4. Trans-scientific Questions – There are questions that can’t be answered with science—there will always be a gap between knowledge and a scientific answer, because you can’t perform enough experiments.
            5. Uncertainty – How did the agency handle the uncertainty? Generally, you should make a conservative assumption; however, see *Yucca Mountain*.
            6. Legitimate Results – The results may be illegitimate if the agency had made a policy judgment before doing an assessment.
         2. Economic Analysis – Use to assign a dollar amount to the benefits of a regulation, and then compare to the costs. The quality is based on the assumptions.
            1. Valuation Methodology – Did the agency use a willingness to pay or a human capital approach to determine the value of statistical lives?

Critique either approach based on the arguments on page 22 of the OL – Further Notes on Issues of Monetization.

* + - * 1. Discount Rate – Did the agency select a proper discount rate? It is usually about 7% unless the statute states otherwise.
        2. Does the statute require something less than full cost/benefit analysis (pg. 26 of OL)?
    1. *Example* – *State Farm* – The Court used the hard look doctrine and said that the NHTSA did not carefully consider the comments regarding passive restraints.
    2. Ex Parte Communication – Communication outside of the comment proceedings. There is a split: under one (DC under HBO), you must disclose in the final rule publication; under another, ex parte communication makes the rule arbitrary and capricious.
  1. Final Rule
     1. Logical Outgrowth –The final rule must be a logical outgrowth of the proposed rule.
        1. Logical outgrowth – is one where the parties should have that that the change that was made in the rule was possible and, thus, reasonably should have submitted their comments on that potential changed during the comment period.
           1. Are the interested parties unfairly surprised?
           2. Could they have made a reasonable prediction about the rule?
           3. Does the rule create undue hardship?
           4. *Example* – NHTSA 208 – They stopped talking about airbags altogether.

*State Farm* – The Court used the hard look doctrine and said that the NHTSA did not carefully consider the comments regarding passive restraints.

* + 1. Basis and Purpose – The final rule must contain a statement of basis and purpose.
       1. Must show the rationale for the final rule.
       2. Must show the legal authority for the final rule.
    2. Publication – The court must publish the final rule in the Federal Register no less than 30 days before the rule is to become effective.
       1. Exceptions
          1. If it is a rule that grants/recognizes an exception.
          2. Relieves a restriction.
          3. Interpretive rules/statements of policy.
          4. Agency provides good cause, published with the rule, justifying the shorter time period.
  1. Post Rule – 553(e).
     1. Opportunity to Petition – Agency must give interested parties the opportunity to petition for amendment, repeal, or issue of new rule. All petitions must be carefully considered.
        1. If the agency grants the petition, the steps start over.
        2. If the agency denies the petition, the agency show that they carefully considered the petition before denying it. The denial of the petition must be prompt.

1. Guidance – Guidance documents (interpretive rules, statements of policy, press releases, handbooks, enforcement manuals) are not binding on the agency or the regulated entities. In practice, a guidance policy will prompt a regulated entity to change its behavior because it will establish law for those unwilling to pay the expense or suffer the ill will of the challenging the agency in court.
   1. Force and Effect of Law – If guidance documents start to act with the force and effect of law, courts may strike them down.
   2. Obligatory Statements – Obligatory statements are treated as binding so they may be stricken for violating informal rulemaking procedures.
   3. Substantive Change – If the guidance changed the rule in a substantive way.
   4. *Example* – Toys that presented choking hazards. The agency issued a press release saying that they were going to start enforcing as to fabric.
   5. *Example* - The FCC is giving guidance by examples of indecency in prior case action.
2. Formal Adjudication – 556 and 557. 553(c) says that formal adjudication isn’t subject to that provision, and it sends you to 556 and 557.
   1. Notice – The agency must provide notice. Notice must include the time, place, and nature of the hearing, the legal authority and jurisdiction under which the hearing is to be held, and the matter of fact and law asserted (circumstances).
   2. Opportunity to Resolve Dispute – The agency will provide an opportunity: for the parties to resolve the dispute peaceably, and if it can’t be resolved, they will have the hearing. (554(c)).
   3. Hearing – The hearing is analogous to a bench trial.
      1. Evidence – Parties have the right to present their position using oral/documentary evidence, to submit rebuttal evidence, and to cross-examine witnesses to get a true and full disclosure of the facts.
         1. The agency can get rid of evidence they consider to be irrelevant or repetitious.
      2. Burden of Proof – The agency has the burden of proof.
   4. Ex Parte – There can be no ex parte communication. If there is an instance of ex parte communication, it will be evaluated against the standard of avoiding impropriety.
   5. Decision – The final decision must be made based on the record, and the agency must justify its decision.
      1. Record – testimony and exhibits, together will all papers and requests filed within the proceeding.
      2. Outside the Record – If the agency decides based on something not in the record, it is arbitrary and capricious.
      3. Precedential Value – After a final decision is issued, that decision has precedential value within the agency.
3. Judicial Review (Court) – Article I and Article III allow Congress to delegate power to executive branch agencies, so long as the judicial branch can review.
   1. Litigation Posturing – A rule that is promulgated in anticipation of litigation receives very low deference.
   2. Deference Limited to Organic Statute – If an agency interprets the APA, it is given no deference. It is given deference only when interpreting the organic statute/statutes that give it authority.
   3. Standing
      1. Injury
      2. Causation
      3. Redressability
      4. Political Question Exception
      5. Advisory Opinion Exception
      6. Mootness
      7. Ripeness
   4. APA Procedural Blocks
      1. Right of Review – If a person suffers a legal wrong by an agency **final** action, under the APA, a court can review.
         1. Exception – If the statute expressly/impliedly forbids the relief sought, APA 702(2) says there is no right of review.
         2. Actions Reviewable (704) – A court has power to review actions made reviewable by the statute or are final actions, and there is no other remedy.
   5. Scope of Review (706)
      1. The court will review relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.
      2. To strike down agency action, the court must find:
         1. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
         2. contrary to a constitutional right, power, privilege, or immunity;
         3. in excess of statutory jurisdiction or authority;
            1. Why when an agency legislates outside of its organic statute do we call it arbitrary and capricious instead of “in excess?”
         4. without observance of procedure required by law (APA and statute);
            1. When the agency fails to follow a required procedure when producing an informal rule, why is called arbitrary and capricious and not “without observance of procedure required by law.”
         5. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing; or
         6. If the court is reviewing a decision of formal adjudication, then the court may strike it down if it is not supported by **substantial evidence**.
            1. Can we strike down formal adjudication as being arbitrary and capricious?
      3. The court must review the whole record that the agency considered in making the decision the court is reviewing.
4. Judicial Control of Agency Statutory Interpretation
   1. Step 0 from *Mead* – Did Congress expressly/impliedly delegate authority to decide the matter to the agency? Yes, then go to *Chevron*. No, then go to *Skidmore*.
      1. Express – An express delegation occurs when it is apparent that the agency can act with the force and effect of law (thru either notice and comment rulemaking or formal adjudication).
      2. Implied – Congress provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underline a pronouncement that has the force and effect of law.
      3. Example – *Mead* – The court found that there was no delegation – no indication that Congress intended the letters to be binding (no express), and the rules looked more like interpretive rules because they had limited applicability, no precedential value, and little opportunity for outsiders to input (no implied).
      4. Example – *Barnhardt* – The court found implied delegation based on the intricate nature of the legal question, the expertise of the agency, the importance of the question to the administration of the statute, and the careful consideration of the agency indicate Chevron applies.
   2. *Skidmore* Deference – Is the interpretation persuasive? A court may find that an agency’s interpretation may merit some deference:
      1. Given the specialized experience and broader investigations and broader information available to the agency.
         1. Example – *Mead* – The tariff regulations are highly detailed and Customs has better information. The court didn’t have a good standard to judge whether something was a day planner or diary because it was bound by a three-ring clip.
      2. Given the value of uniformity of what a national law requires.
         1. Example – *Mead* – There is value in uniformity knowing how all the types of binders would be taxed. The ruling by customs was thoroughly explained, but there were so many different rules from the different officers, that uniformity was undercut.
      3. Complexity of the regulation.
      4. Timing of the litigation (litigation posturing).
      5. Consistency with prior rulings.
         1. Example – *Skidmore* – The overtime rule was just a formalization of the practice that had already existed.
      6. Judicial interpretations under *Skidmore* are binding on future courts and agency action.
         1. Exception – The agency can get around something precedential by using a congressional authorized procedure (if they’re statute allows them to use notice and comment rulemaking, but they failed to do that before).
   3. *Chevron*
      1. Step One – Is the statute ambiguous? Has Congress already spoken on the matter?
         1. Look to the plain language, legislative history, and purpose of the statute and apply the rules of statutory construction to determine if it is ambiguous.
         2. If it is not ambiguous or Congress has given it meaning, then the agency is bound by that meaning.
            1. Check for pre-1984 decisions because they speak with the force and effect of law regarding what the statute means.
         3. If it is ambiguous and Congress has not given it meaning, then go to Step Two.
      2. Step Two (See 10 – Canons of Interpretation) – Is the agency’s interpretation reasonable? (What standard do we use?)
         1. All constructions are permissible unless they are arbitrary, capricious, or manifestly contrary to the statute.
         2. Look to the plain language, legislative history, and purpose of the statute and apply the rules of statutory construction.
         3. \*There is no requiring that the agency have consistent interpretations over time.
            1. Example – National Labor Review Board (medical attendant case) – The agency continuously changes its rules, but there is no requirement that they act consistently.
5. Judicial Control of Agency Procedures
   1. APA Maximum – The APA applies the maximum. The court cannot impose stricter procedures than those required by the APA or the agency’s organic statute.
      1. Exceptions
         1. Agency Bound – Agencies can bind themselves to additional procedures.
         2. Constitutional – The court can bind an agency to an additional procedure where there is a constitutional concern, like due process.
         3. Organic Statute – If the organic statute says to do more.
         4. Extremely Compelling Circumstances – escape clause.
6. Judicial Review of Content – A court may not give a reasoned basis for an agency’s action that the agency itself hasn’t given.
   1. Hard Look (*State Farm*) – The hard look doctrine applies when there are lots of people, money, or significant interests affected (Where is the line? What test do we apply?). It allows the court to require an agency to issue rules that are logically sound, factually supported, and thoroughly considered.
      1. Factors to Consider:
         1. Congressionally Approved Factors – The statute says to consider certain things, but the agency didn’t.
         2. The agency failed to consider an important aspect of the problem.
         3. The agency made a decision contrary to the weight of the evidence.
         4. The agency made a decision that was so implausible that it could not have originated from the agency’s expertise.
      2. Scientific and Economic Analysis – Check and see if the agency performed scientific and economic analysis (they may not have performed enough or the right type of analysis).
      3. Example – *State Farm* – The court said that the agency hadn’t carefully considered the evidence in the record because it did not explain why airbags should not have been selected. The record did not support the decision.
   2. Substantial Evidence – The decision must be supported by substantial evidence in the record when the decision is from formal adjudication.
   3. Arbitrary and Capricious – The agency must have examined the relevant data and articulated a satisfactory explanation for its actions, including a rational connection between the facts and the choices made.
7. Persuading the Court – What theory of interpretation does the judge follow?
   1. Intentionalism – The court looks to find Congress’s meaning/intent.
      1. Would use all textual tools, all substantive tools, legislative history, and purpose.
   2. Purposivism – The court looks to the purpose and aims.
      1. Would use all textual tools, all substantive tools, **legislative history, and purpose**.
   3. Legal Process Purposivism – What would a reasonable legislature have sought to accomplish under the circumstances? What would a reasonable legislature do?
      1. Would use all textual tools, all substantive tools, **legislative history, and purpose**.
   4. Imaginative Reconstruction – The court should stand in the shoes of Congress and ask how it would have resolved the issue had they foreseen it (WWCD?).
      1. Would use legislative history and purpose.
   5. Textualism – Look just at the text (Scalia).
      1. Would just use the text.
   6. Dynamic Interpretation – Courts apply their understanding and values.
      1. Anything.
8. Canons of Interpretation
   1. Textual
      1. Linguistic
         1. Ejusdem Generis – General terms are construed in relation to the specific terms proceeding them (dogs, cats, and other pets – does not include cows).
         2. Noscitur a Sociis – A word is known by the company it keeps. A word is interpreted consistently with the surrounding terms (loss, miscarriage, or negligent transmission – all refer to delivery).
         3. Expressio Unis Est Exclusio Alterius – Stating one thing precludes the others. It applies to lists.
            1. When a statute says to do something one way, it precludes all other ways.
            2. Exceptions

If Congress says the list isn’t exhaustive (10th Amendment).

If the application precludes state action, it will probably not apply (preemption).

* + - 1. Punctuation – never sufficient, but adds to the weight of the conclusion.
         1. Parentheticals get less weight.

Example – *Chicasaw Nation* – Language in parentheses act like illustrative lists.

* + - 1. Last Antecedent Rule – A limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.
         1. Example – *Barnhart* – She was still able to perform her previous work, even though the national economy had driven it out.
      2. Conjunctive (and) vs. Disjunctive (or) – Terms connected by or should be given separate meaning unless the context dictates otherwise (a or b or c vs. a, b, or c).
         1. Exception – If a court senses that a statute has carelessly used the word or, it can change it.
      3. May vs. Shall – May connotes a permissive or discretionary action. Shall connotes a mandatory action.
         1. Example – Pro bono rules say that you may and should do work, but that doesn’t mean you have to.
         2. Example – Tunney Act – The DC Circuit court misinterpreted “may.” The Congress changed it to “shall,” but the court did not interpret shall as mandatory.
      4. Dictionary Act – *Rowland v. California Men’s Colony* said that courts can disregard.
    1. Whole Act Canons – The meaning of a term in relation to other terms, phrases, and provisions in the same statute.
       1. Whole Act Rule – Presumes that identical words have the same meaning throughout, and each provision should work together to make a coherent whole (no surplusage/redundancy).
       2. Titles – A title alone is not sufficient.
       3. Provisos = “provided that” – exceptions/limitations on the application of a statute.
    2. Whole Code Canons – Interpret a statute in light of the entire code.
       1. In Pari Materia – Statutes addressing the same subject matter generally should be read as if they were one law (the tax code is construed together). A later act can be regarded as a legislative interpretation of the former.
       2. Inferences Across Statutes
          1. Language Similar to Other Statutes – A term used in one statute with a similar purpose, particularly when acted close together, presume Congress intended that text to have the same meaning in both statutes.
          2. Prior Judicial Interpretations – If a judicial interpretation settled the meaning, the repetition of the same language in a new statute implies that Congress intended to incorporate the judicial interpretation.
          3. Expressio Unis – May create a negative inference.
       3. Repeals by Implication – Disfavored by the courts and only arises when a later statute expressly contradicts the original act, or it is absolutely necessary in order for later statutes to have meaning at all.
          1. Saving Clause – If the statute includes a clause that says that nothing in the statute should repeal any other statute.

1. Did other branches do something wrong?
   1. Presidential Control – What can the President do wrong?
      1. Discretionary Withholding – The President can withhold funds unless Congress has specifically prohibited impoundment.
      2. No Line Item Veto
      3. The President cannot amend a duly elected budget.
   2. Congressional Control – What can the Congress do wrong?
      1. Congress cannot have single house vetoes (*Chadha*).
      2. Congress can have positive legislative vetoes – requiring an agency to obtain Congress’s approval before acting.
      3. Congress can’t remove an officer charged with an executive function.