

SABERES

Revista de estudios jurídicos, económicos y sociales

VOLUMEN 2 ~ AÑO 2004

Separata



THE UNPREDICTABLE SCOPE OF JUDICIAL REVIEW

Andrew Popper



UNIVERSIDAD ALFONSO X EL SABIO
Facultad de Estudios Sociales
Villanueva de la Cañada

© Andrew Popper

© Universidad Alfonso X el Sabio
Avda. de la Universidad,1
28691 Villanueva de la Cañada (Madrid, España)

Saberes, vol.2, 2004

ISSN: 1695-6311

No está permitida la reproducción total o parcial de este artículo ni su almacenamiento o transmisión, ya sea electrónico, químico, mecánico, por fotocopia u otros métodos, sin permiso previo por escrito de los titulares de los derechos.

THE UNPREDICTABLE SCOPE OF JUDICIAL REVIEW

Andrew F. Popper*

RESUMEN: Mirada crítica a los prodecimientos de revisión judicial

PALABRAS CLAVE: procedimiento, revisión, jurisdicción.

I am honored to have been invited to participate in this important program, the second annual US Embassy/ITAM seminar studying administrative law, the role of the courts, and agency functions¹.

When I first agreed to participate in this program I assumed I would be discussing the *Chevron* doctrine (see *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)), and its effect on courts, particularly after the decisions in *U. S. v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000). *Chevron*, *Mead*, and *Christensen* — and, in retrospect, *Skidmore v. Swift and Co.*, 323 U.S. 134 (1944)— are cases that limit judicial review of agency action. Although you have already had a detailed presentation on the *Chevron* doctrine, there are reasons to discuss *Chevron* further.

First, *Chevron* and the subsequent Supreme Court cases that discuss the doctrine, involve those situations in which a court is reviewing a policy or rulemaking of an agency. Arguably, these cases are focused on questions of law rather than review of factual decisions. The scope of judicial review, however, my topic, is far more expansive.

Second, the range and number of judicial decisions in the last twenty years regarding the proper interpretation of *Chevron* is so vast that anything I might say about *Chevron* or fact-based review will be different from what other commentators might have said thus far.

Third, *Chevron* is a case that has symbolic value and there are never enough interpretations of symbols in law. *Chevron* symbolizes judicial restraint; *Mead* and *Christensen* limit *Chevron* and we are back to open-

* Professor of Law, Washington College of Law, American University.

¹ Presented at the ITAM/ United States Embassy Symposium on Administrative Law, Mexico City, October 10, 2003.

ended questions regarding the scope, breadth, and intensity of judicial review.

In the United States, agencies are the government. The president is only able to function through the federal agencies— the White House does not have any independent enforcement power. Likewise, the Congress, the constitutionally designated source of public policy, has no power to implement its decisions internally. It delegates power, again to the agencies, to carry out congressional will. The courts, like the president and the Congress, actually do not govern. They hand down decisions that hopefully will be implemented by agencies.

It is the agency administrator who actually reaches out and touches private citizens and corporations. Agencies are on the premises of our businesses. Agencies are the entities that collect our taxes. Agencies are tactile in nature, visible government experienced by the vast majority of the population. It is the customs office, the Securities Exchange Commission, the Environmental Protection Agency, the Homeland Security Agency that affects the lives of those living in or coming into the United States. For that reason, judicial review of agency action, the scope of what gets reviewed, and the deference given by courts to the agencies is of such basic importance that it seems unnecessary to limit our discussion in any way.

The analysis of this topic begins with the realization that there is no one single useful interpretation of the scope of judicial review in the United States. Perhaps the most interesting thing about the scope of judicial review is the extent to which there is comprehensive disagreement regarding the appropriate role of courts when assessing the decisions of federal agencies.

There is a general sentiment that in a system of checks and balances, judicial review of agency action plays a critical role in insuring the competence, effectiveness, and fairness of agency decisions. Consequently, even in those policy matters where, under *Chevron*, agency decisions are entitled to deference, the public policy mandate is for courts to take a hard look at the actions of agencies. Beyond scrutiny of decisions, there is the matter of individual accountability. Many agency decision makers are not elected, but rather appointed. Therefore, or so goes this first line of reasoning, the actions of agencies require careful judicial attention.

While we ask courts to take a hard look at agency action, at the same time, intrusive action by courts can grossly interfere with the important constitutional notion of separation of powers. If courts substitute judgement for that of agencies, then the judiciary is undertaking policy tasks vested to congress or, in the instance of initiating agency enforcement, the executive.

Judges are not supposed to be legislators, and therefore, a policy of judicial review that optimizes judicial intervention and allows courts to rewrite agency action violates separation of powers.

Can a court take a hard look at an agency record and, thereafter, withhold personal judgement, when it comes to deciding whether the agency acted in a proper manner or not? Judges who take the time to give a hard look at a complex agency record often become well-informed about the fields that are the subject matter of agency action. Once one takes the time to learn a great deal about a field, it is inevitable that decisions in a field will be based on personal opinion. Even if a judge is remarkably disciplined and can dissociate from their own informational base, is that is good public policy? After all, if the task is to ensure that agency decisions are fair and legitimate, should judges back away from cases because they have developed expertise? Should judges be dissuaded from engaging in penetrating review because of some generalized notion of strict construction by which the judiciary is supposedly denied the opportunity to formulate public policy?

The current administration takes a dim view of judicial activism. The Congress, it is argued, not the courts, should be the forum for the articulation and development of public policy. Common sense and experience tells us, however, that there is a strong public and constitutional expectation that the courts play a role in the formulation of policy. Major shifts in public policy in the United States have come frequently from the United States Supreme Court and the appellate courts. Civil rights, and for that matter, human rights, have their most profound expressions in judicial decisions.

I would like to turn to the formalist approach to the scope of judicial review. There are phrases and standards that are used in this area and, I assume, it is my responsibility to make sure those words are, at a minimum, said out loud.

When reviewing factual determinations, courts are supposed to make sure there is substantial evidence in the record to ensure that the decision is properly supported. When reviewing matters of law, courts are supposed to make sure that the decisions are neither arbitrary capricious, nor an abuse of discretion. Parenthetically, if it is a legal or interpretative question, should we think *Chevron*-deference— or go in an entirely different direction and follow cases that hold that courts are in a far better position to interpret law than are agencies — and rules made by agencies are nothing but

interpretations of law. In any case, what follows are the baseline statutory mandates on review:

An agency action should be set aside, or so says 5 U.S.C. § 706, if it is arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law;

If the decision is contrary to constitutional rights, constitutional powers, privileges or immunities, the decision should be set aside.

If a decision is in excess of statutory authority or jurisdiction, the decision should be set aside.

If a decision is rendered in a manner that contravenes procedural fairness, it should be set aside.

If it is unsupported by substantial evidence or otherwise unwarranted by the facts, the decision should be set aside by the courts.

In form, these standards [5 U.S.C. §706] are not substantially similar to Article 738 of the Federal Fiscal Code of Mexico, (6 C.F.F. § 238 (1996), specifically, the portion of that code pertaining to judicial review of administrative action. A decision of an agency in Mexico can be set aside if the agency is without authority or juridical power, if the decision is procedurally deficient, if the agency failed to address the formal requirements of a statute, if the fact-finding is patently inadequate to support the record, or if the agency action exceeds the discretion vested in the agency.

In substance, the language of the Code in Mexico provide no more guidance for the task of reviewing courts than does the text of Section 706 of the United States Code. Generalizations about exceeding discretion or insufficiency of fact finding do not inform judges on the vital question of the extent to which they should penetrate the record and modify the decision of an agency. A recitation of statutory standards, then is the kind of doctrinal exercise that might create a framework for the hard business of review, but in no way does it actually guide decisionmakers.

In the United States, when a court is reviewing an interpretation of a statute or regulation made by an agency, the *Chevron* doctrine applies. If congressional intent is clear regarding the meaning of the statute, no deference is due. If, on the other hand, the interpretation of the statute is unclear, then the idea is that a court should defer to the agency's action so long as the action of the agency makes sense.

The Supreme Court has said that judicial decisions regarding the efficacy of administrative action are bounded by common sense (in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.* 529 U.S.

120 (2000)), but one person's common sense is another person's nonsense. The *Chevron* idea is simple --- and not original. Courts are not to substitute their judgement for that of the agency, so long as the agency has put forward a reasoned basis for its determination. (*Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)). However, if the judgement of the agency is unsupported by reasoned explanation, courts must intervene, and in that moment, will interject their own perspective.

There are situations when deference has been withheld. One area where this has occurred is where the agency's interpretation of law or policy supports the expansion of the agency's authority or otherwise is an attempt to expand the agency's scope of influence. A series of cases decided in the last few months suggests that the scope of review expands in the presence of institutional ego. Four federal agencies, the Federal Energy Regulatory Commission, the Department of Transportation, the Department of Energy, and the Department of Interior have all had agency actions set aside in cases where their interpretations reflected little more than an expansion of jurisdictional or authority.

Concern about expansion of agency authority is evident in the *Food and Drug Administration v. Brown & Williamson*. A simple way to look at the case is that the FDA decision (the agency had found cigarettes to be a drug delivery device and nicotine a drug) was not accorded deference because the agency action would have greatly expanded FDA authority. {EDIT}

Beyond self-interest cases, there is a collection of recent scope of review decisions that are hopelessly eclectic. In *Cilaio v. Fineberg*, a federal court gave deference to a series of decisions by a special master administering a fund for the victims of the 9/11 catastrophe, 262 f. Supp. 2d 273 (SDNY, 2003). These were both procedural and substantive decisions that seem similar to the decisions in the *Mead* case.

In *Mead*, the court set aside the decisions of the customs authority on the premise that customs and rate decisions were inherently not public policy and therefore not entitled to deference. At most, assuming the decisions were made carefully, in a well-developed manner, in a field where there was a public expectation of consistency, the decisions would be entitled to respect. It would seem that the individual payment decisions in *Cilaio* were exactly the same. The court held, however, that the special master's decisions were binding on the claimants. At roughly the same time as the 9/11 case was decided, the Court of International Trade decided *Intercontinental Marble Corp. v. United States*. 264 F. Supp. 2d 1306 (2003). In this case, the government argued that its decisions for the

classification for marble was entitled at a minimum to *Skidmore* respect. These are major decisions in a major trade field where there is considerable public anticipation. The court not only refused to give *Chevron* deference in that case, it also denied application of *Skidmore* respect.

The Eighth Circuit decided *O'Shaunessy v. Commr. of Internal Revenue*, again about the same time that the prior two cases were decided. 332 F.3d 112 S (8th Cir. 2003). This case involves a question of whether individual revenue rulings are entitled to deference. Parties rely extensively on revenue rulings in formulating their annual tax filings. Nevertheless, the Eighth Circuit decided that revenue rulings were not entitled to any particular level of deference. When a court decides that it is not going to give deference to an agency decision, it opens the door for judicial decisions becoming the basis for the formulation of public policy. Judicial formulation of public policy is, however, inconsistent with our notion of separation of powers.

Decided at almost exactly the same time as the prior three cases, is the Tenth Circuit decision of *U.S. Cellular Telephone of Tulsa v. City of Broken Arrow*, in which the court said that the scope of review of an appellate court is by definition a narrow one. 340 F.3d 1122 (2003). If the scope of review is so narrow, how is it that courts, on an almost random basis, seem willing to set aside agency decisions in some cases, while in other cases appear to be stuck with a reasoning of the agency as if their hands are tied. This pattern did not begin with *Chevron*, and it certainly has not ended with the last four or five circuit court decisions just mentioned. Further, the Supreme Court's "clarification" of scope of review — *Mead* and *Christensen* — muddy the waters even further.

In *Christensen*, decided by the supreme court in May 2000, the question arose as to whether an employer can force an employee to take comprehensive time — time off from work, as opposed to being paid for time that had accrued. This is a fairly important labor law question since accrued time or overtime can exact a dollar cost on an employer — an alternative to paying is for the employer to compel the employee to stay away from work, in effect, forcing a leave. The agency involved sent a letter to the employer, in this instance a county, telling them that a change in comp time rules could not be done without a new agreement. The employer contended that its regulations allowed it to make changes in comp time rules without a specific new agreement. It is a typical complex administrative law case. Here is what the Supreme Court did as it reviewed the agency letter.

First they said that policy statements, manuals, and guidelines are not entitled to *Chevron* deference because they are not promulgated in a way that involves public participation.

Then they said that internal guidelines are entitled to some deference, although not the same as *Chevron*, based on their power to persuade.

Then they said interpretations contained in a regulation that are promulgated by the agency are entitled to *Chevron* deference.

Then they said a formal opinion letter is not an interpretation because it is not a regulation — opinion letters are produced without any public process — and is entitled to no deference — and on that, the government could have lost the case.

Then the court noted that an agency's interpretation of its own rules is entitled to deference, citing a case decided in 1997 called *Auer v. Robbins*, 519 U.S. 452 (1997).

Finally, the court said that you would not give deference here because the agency regulation being interpreted in this instance is clear, not ambiguous. Clear regulations, like clear legislation, have only one meaning, says the court, and therefore the action of the Department of Labor can be set aside by a reviewing court.

Based on what I have said, do you know what the *Christensen* case actually held?

While *Christensen* may be unclear, there is clarity in one regard pertaining to agency policy statements. The Administrative Procedure Act (APA) makes clear that if all an agency does is an interpretation of an existing rule or regulation outside of a case disposition or a new substantive rule, then the action of the agency is vested to the discretion of the agency and is non-reviewable. By the same token, if the agency action involves the production of the statement of policy disconnected with a current case or a rulemaking, then it too is outside the scope of judicial review until such time as that policy is implemented. Part of the reasoning underlying the preclusion of judicial review for interpretations and policy statements is that Article 3 of the Constitution requires a case and controversy for any proceeding in any court. Courts are not permitted to render, outside of the declaratory judgement field, advisory opinions. Therefore, if a court is commenting on a policy statement through a judicial decision, it is acting in contravention of the Judiciary Act of 1789 and Article 3 of the Constitution.

While aggrieved parties have a general right to review, there are discrete areas where no review is permitted. For example, decisions pertaining to the alternative dispute resolution mechanism of regulatory negotiation.

Since 1990, agencies have been required to investigate whether a negotiation process can be used to promulgate rules. There have been numerous examples of negotiated rules — where the production of policy is actually the result of a negotiation as opposed to a rulemaking. There are difficult negotiations, as you might guess, and require the agency to find a balanced group of representatives who can sit down to negotiate standards. The decision as to whether a negotiated rulemaking will take place is non-reviewable. It is a good example of how for certain internal policy matters, agency action is outside the scope of review at all.

For those matters courts can review, one thing we know with certainty is that a decision will be entitled to no deference if there is a lack of an articulated rationale for the decision, whether it is a fact-finding or legislative interpretation. In one of the few unequivocal moments the Supreme Court has had in this field, it has found, in *Overton Park v. Volpe*, 401 U.S. 402 (1971), that while courts are not to probe the mind of administrative agencies and courts are to limit their substitution of judgement for that of the agency, if the agency does not produce a meaningful record and justification for its action, the decision cannot pass judicial scrutiny. *Overton Park*, which finds that an agency must produce a meaningful record to support its decisions, is consistent with Supreme Court cases throughout the twentieth century. Judicial review requires a meaningful record and at some level, in the absence of a well-developed record, the right to judicial review, which is the right of any aggrieved party — cannot take place. Decisions are inherently arbitrary if they are unsupported.

When it comes to fact-finding, agency decisions must be supported by substantial evidence. They must be made in an environment that is fundamentally fair. When a court reviews an action of an agency, it reviews the whole record, not just those parts of the record that support the decision.

The evidence need not be “competent,” that is, not hearsay, so long as it is reliable and probative. The issue of judicial review of the competency of the evidence is part of the scope of review dialogue.

The breadth of the rule regarding admissibility of evidence is symbolized by the fact that hearsay is admissible in administrative proceedings.

In *Carroll v. Knickerboker*, 113 N.E. 507 (N.Y. 1916), decided at the beginning of the twentieth century, the New York State Court of Appeals found that if a decision contained no competent evidence, that is, the entire decision rested on hearsay, then it could not support a fact-finding made by

the agency. Some years later the court held in *Altschuller v. Bressler*, 46 N.E. 2d 886 (1943), that if there was some scintilla of competent evidence, the court could affirm a record and deem it substantial, even though it was based primarily on hearsay. This set of decisions represent the residuum rule. The residuum rule states that there must be some residuum of competent evidence before a body of fact can be construed as substantial. The First Circuit has held that this rule can apply to administrative proceedings where there is an expectation of competent evidence. The D.C. Circuit and the Fifth Circuit also follow the rule, although it is greatly diluted. State agencies in the majority of states likewise adhere to the rule.

The Supreme Court considered the residuum rule in the 70's in *Richardson v. Perales*, 402 U.S. 389 (1971). In *Richardson*, an agency determination was made that an individual was not entitled to disability benefits by an agency. The agency relied entirely on the testimony of a witness who was summarizing medical reports. The decision, therefore, rested exclusively on summaries of the medical findings made by individuals who did not testify in the proceeding.

The court found that it was acceptable in this instance for the agency to rely on a hearsay based record in part because the claimant had failed to subpoena first-hand witnesses. The court also said, however, that although cross examination was normally a right, in the absence of the subpoena, it had been waived.

The decision stops short of saying that agencies can rely entirely on non-competent evidence. In *Wallace v. Bowen*, the Third Circuit held that *Richardson* actually stands for the proposition that cross examination is a right in a formal hearing and, quite obviously, you cannot cross examine a witness who is testifying based on hearsay because the true declarant is not present in court. 864 F.2d 271 (3d cir. 1988).

Suffice it to say that substantial evidence review includes an assessment of the quantity and the quantum of evidence. The working premise of the law of evidence is that hearsay restrictions are based on the susceptibility of jurors and that agency heads and officials do not suffer from the same lack of experience and therefore ought to be able to sort out hearsay without having it excluded. From the standpoint of judicial review, however, I think it is safe to say that courts have not been uniformly receptive of that rationale.

Looking broadly at scope of review, there are two schools of thought: one is that the scope of review should be limited in large part to making sure that the process was adequate to produce the fact-finding. Under that

theory, if the process was fair and the parties had a full opportunity to make their presentations, a court should not interfere with the essence of the agency action. [Bazelon]

A contrary view is that the courts should look at the substance of what the agencies do. Courts can review and do review technically difficult data and an aggrieved party is denied due process if the agency does not carefully check the action of the agency, particularly if fundamental rights are involved.²

In both cases, the scope of review includes looking to see if the form of the agency decision is adequate as well as the following: Is there a legally sufficient basis for the action of the agency? Does the agency have a statutory basis for its action? Has the agency made its decision in appropriate context given the other regulations involved? If the scope question involves the review of fact, how should oral testimony be treated? The traditional approach is that an agency administrative law judge who observes a witness is in a better position to judge credibility than would be a court that has only a written record to review. However, it is often the testimony of one or two witnesses that determines the decision in a case and credibility is frequently central to an outcome. If a court does not review the consistency, weight, and nature of oral testimony, it is probably abdicating its responsibility for effective judicial review.

The legal questions surrounding the scope of review can be seen in different ways. Sometimes, quality review is subordinated by courts so that agency enforcement can go forward. There are times when it seems that all that matters is the sustained vitality of agency enforcement. A series of striking cases decided from the early 1940s through to the present reflect this proclivity, and therefore, give us a perspective of limiting the scope of review in the adjudicatory end of agency decision making, as opposed to the rule or policy end where *Chevron* is dominant.

The problem set in this field is retroactivity. Agencies from time to time, initiate enforcement actions for behavior or activity that seems wrongful — yet on closer inspection there is no specific prohibition in the statute, rules or guidelines the agency follows. Such enforcement actions, known as retroactive enforcement, seem inherently unfair. They raise the

² For a good discussion of these two approaches, see Matthew Warren, Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit, 90 Geo. L. J. 2599 (2002).

obvious question: how can an agency go after an individual or company for behavior that, when it took place, was not legally condemned?

The court has held that even when there is no question of the scope of review, agency action should not be automatically set aside merely because the decisions are retroactive. There is a judicial interest in protecting the adjudicatory power of agencies from time to time.

Retroactive decisions are set aside by courts, however, if

- 1) there is a clear statutory prohibition of retroactivity;
- 2) a manifest injustice would occur because the agency action was truly unexpected and
- 3) there was justifiable reliance on prior agency action.

Further, if a court finds that there were easy and available means for the court to inform the public of the proposed action, the court will be less tolerant of retroactivity because of its inherent unfairness. On the other hand, courts have permitted retroactive enforcement to avoid a situation of letting off the hook one who has contravened the purposes underlying a statute.

One overt limit to this is *Morton v. Ruiz*, 462 U.S. 818 (1972), where the court said that while retroactivity may be tolerable, if there is a congressional directive, congressional intent, to establish guidelines in a particular field prior to prosecution, and the agency fails to do so, it cannot make enforcement actions the form for producing guidelines.

This question of the importance of legislative intent is apparent in *U. S. v. Mead Corp*, 533 U.S. 218 (2001), decided by the Supreme Court in 2001. *Mead* makes clear that what counts is congressional intent, *i.e.*, does it seem that congress intended deference in the field? In addition, *Mead* forces courts to look at the thoroughness of the deliberative process and the thoroughness of the agency action itself. *Mead* also requires courts to look at the extent to which the public can and will rely on the decisions of the agency.

Formal decisions — whether they are adjudicatory or rulemaking — are untouched by the court's action in *Mead*. As to non-formal action, *Mead* revives the notion that courts are only required to give respect to the decisions of the agencies, and that respect is on a sliding scale that almost looks like the kind of grading process a faculty member in a law school might use. Thorough well-reasoned decisions are entitled to respect, summary judgements regarding factual presentations are not.

In the *Mead* case, the court made the decision that diaries and notebooks were different from books, as in law books or fiction, and that action had significant tax consequences. I ask you: is that a matter of a policy decision or a factual decision? Is it within the scope of review for factual interpretations where substantial evidence applies? Or is it a policy question involving the importation of information? A customs decision, like a revenue ruling, helps shape the way businesses function in a market environment. Are these decisions any more or less entitled to deference?

Justice Scalia dissented in *Mead* finding the case to be disastrous because he believes it tampers with the separation of powers. In Scalia's opinion, when agency decisions are entitled to deference based on the "quality" of the agency action, the business of judicial intervention into the world of a legislative and executive has been relegated to the most subjective of measures.

One of Scalia's primary concerns is that the action of executive officials, and that might include the head of a major department or cabinet secretary, could be overturned by the courts if they are not accompanied by either a formal notice and comment rulemaking process or some other extensive record. This necessity of excessive procedure, Scalia contends, ossifies the agency process and elevates the courts, making them like super legislatures.

Of course the problem of separation of powers can be a stalking horse or a false issue. In 1986 the Supreme Court decided *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), a case that raised the question of whether a federal agency can become a forum for hearing state law counterclaims — normally adjudicated at the state trial level in order to resolve the dispute. The question was, could an agency, in effect, function like a state court without violating Article 3 of the Constitution which defines the power of the courts. It is the courts that are to be the forum for the resolution of civil disputes, not the agencies.

In the *Schor* case, the Supreme Court analyzed the conflicting issues regarding the need for the resolution of complex commodity trader claims — a task best undertaken at the CFTC — against the historic role of courts to resolve disputes between individuals. The court found that it was acceptable for the agency to resolve such disputes if it was well-suited to that practice. Based on this case, could there ever come a time when the use of agencies to perform adjudicatory functions would violate separation of powers? The answer to this question is yes. The *Schor* court found that if an agency was engaged of "a phalanx of Article 3-like tribunals" then that

would violate separation of powers. This idea is a defining notion today for scope of review/separation of powers problems. It is impossible, in the course of modern government, for agencies to avoid policy making (the function of Congress) or adjudication (the function of courts). It is only when the mass — or a significant quantum — of the activity of the agency crosses over into other branches of government that a genuine separation of powers argument can be made.

Scope of review questions also get to the question of the nature of review.³ When is the review of a case so comprehensive in scope that it becomes a trial *de novo*? There are several situations:

1) When a substantive statute says that review of agency action shall be a suit in any jurisdiction where the aggrieved party resides, then Congress has resolved the question and obligated *de novo* review.

2) Under §706(f) of the APA, a *de novo* trial can be held if there are grossly unwarranted fact-finding by an agency or if the procedures are so fundamentally inadequate that you cannot say the decision is fair.

3) A *de novo* trial can also take place if the action the agency seeks is judicial enforcement of an agency order where there was no prior underlying adjudication.

4) *De novo* trials can also occur for decisions that include constitutional facts — for example the question of whether a particular island is within interstate or is the subject of the jurisdictional reach of an individual state.

Scope of review questions also include the entire field of governmental estoppel. When should a court set aside an agency decision because it is, on its face, unfair. In the 1981 case, *Schweiker v. Hansen*, 450 U.S. 785 (1981), the Supreme Court said the answer is rarely. The estoppel scenario is as follows: a government administrator gives a member of the public advice that is at odds with the rules or regulations. The member of the public relies on that advice to his or her detriment. At some point thereafter the government realizes it has given erroneous advice and then prosecutes the individual for acting in a manner inconsistent with the real statutory or regulatory mandate. The individual complains that the government should

³ For a comprehensive overview and interesting view on the scope of judicial review of agency decisions, see Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 *Wm. & Mary L. Rev.* 679 (2002).

be estopped because the individual relied in good faith on advice that was, unfortunately, bad advice. *Schweiker* holds that unless

- 1) a fundamental right such as citizenship is involved and unless
- 2) the individual giving the erroneous advice is the head of an agency, the government will not be held to bad advice and the scope of review will be limited to looking at what the agency did as its final action.

This doctrine emanates from two old Supreme Court cases, *Federal Crop Ins. v. Merrill*, 332 U.S. 380 and *Moser v. United States*, 341 U.S. 41 (1951).

In *Merrill*, a government agent approved the issuance of crop insurance for a farmer who was planting winter wheat. Winter wheat is a highly risky crop and there are regulations that prohibit the issuance of insurance that would allow for funding winter wheat plantings. The farmer, relying on the assurance that his crop was insured (a critical financial element in the event of adverse weather) went forward, planted his crop, bad weather came, the crop failed, and the farmer tried to collect. When the farmer failed to collect, the bank foreclosed.

When the farmer complained that the government told him he would get insurance, the Supreme Court took the position of the government. The court found no basis for undermining the final decision of a federal agency when that final decision was predicated on a clear standard in the public record.

In *Moser v. United States*, the complainant was a Swiss national who came to the United States just prior to World War II. He was assured by a senior official in the State Department that since he came from a neutral country, he did not have to register for the Selective Service or serve in the armed forces. When he applied for his citizenship five years later, after the requisite waiting period, he received a deportation notice on the premise that he had refused to serve in the armed forces. When the Supreme Court received this case, even though it was the case that foreign nationals lawfully present in the United States were required by law to register for the Selective Service, the court sided with Mr. Moser, finding that there were a few rare instances where the government would actually be estopped from enforcing an accurate legal standard because of the gross inequity of that enforcement. These are limited to the most precious of rights and the most limited of circumstances.

Four decades later, when the Court decided *Schweiker v. Hansen*, it reiterated the basic rules from *Moser*, which has left courts in the position of affirming agency actions today even when those actions render an inequity on private citizens.

Another set of legal questions that fall broadly within the scope of review of agency actions is review of *res judicata* claims. Should a court review the propriety of relitigating a claim? Perhaps the best case to discuss *res judicata* is *Evans v. Monaghan*, 118 N.E. 2d 452 (N.Y. 1954).

In *Evans*, there was an administrative agency looking into police corruption. A trial was held at the agency level and a fact-finding was made that there was insufficient or insubstantial evidence to find corruption. Some months after the administrative trial, a witness came forward with the name of Harry Gross. Mr. Gross stated that he had been intimidated and had not testified in the first hearing but was ready to do so now.

Those accused argued that they could not be tried twice for the same violation. If there are identical claims, parties, a final decision on the merits, the doctrine of *res judicata* can bar a substantial trial. If, however, there has either been an unfair prior hearing or a change in primary facts, technology, or policy, an agency can be permitted to hear a case a second time. In this instance, the court found that the “unsealing of the lips of Harry Gross” was sufficient new evidence to allow a trial to go forward.

Questions regarding the scope of review question are often determined by characterization of the problems as fact or law questions. In *Connecticut State Medical Society v. The Board of Examiners*, 546 A.2d 830 (Conn. 1988), a case decided by the Connecticut Supreme Court, the question of deference and scope of review came up regarding, of all things, the definition of an ankle as part of a foot. Podiatrists are allowed to provide service on people’s feet. A state board decided that the term foot would also include ankle and that would allow podiatrists to provide more comprehensive medical services. The court decided that the decision of the agency, which had been to expand the jurisdiction of the podiatrists they regulated, was not entitled to deference because it was a matter of statutory construction. Courts, the Supreme Court reasoned, are in a position superior to agencies when it comes to the business of interpreting the meaning of the statute. The court then looked independently at the state statute, observed that the word foot appeared not to pertain to ankles, and decided that the agency action was not entitled to deference. I guess you could put this into the category of the following: when agencies seek to expand their own

jurisdiction or engage in judgements of self-interest, the level of deference provided is simply less.

There are also non-reviewability issues in the scope of review question. The classical APA interpretation is that if an area is relegated by law to the discretion of the agency, it is non-reviewable. If there is “no law to apply,” that is, Congress has said nothing in a particular field, then the field must be relegated to the discretion of the agency. Agencies take on legislative power with no judicial oversight if Congress has left a gap in the statute.

The scope of review field also involves the question of finality of agency action. Unless an agency action is final in all respects, it is not ripe for judicial review. In *Heckler v. Chaney*, the Supreme Court held that if the agency had chosen not to act at all, then the decision was non-reviewable and outside the scope of review. 770 U.S. 821 (1985). This was a lethal injection case where condemned prisoners challenged the FDA’s failure to act regarding the use of various pharmaceutical products that were being used to implement death penalty sentences. When the prisoners claimed the FDA had not acted at all, the Supreme Court held that agency inaction is non-reviewable. One might question why, under a circumstance where the agency gives the appearance of acting arbitrarily, review is not mandated.

There is some comfort to the discontinuity in the courts in the post-*Chevron* era. I think it is unusually risky for one to believe they have a lock on the nature of judicial review. It is probably healthy that agencies cannot predict with certainty whether a court’s review will be inconclusive or comprehensive, summary, or even penetrating. If judicial review could be reduced to a formula, I doubt it would make for a better process. The broad guidelines that exist for judicial review are more than adequate to suggest caution on the part of agencies that function as the fourth estate in our government.