

From: [Hester, Tracy](#)
To: [C Law Class SP15: HESTER - Statutory Interpretation and Regula](#)
Subject: Stat Interp -- Review questions and responses
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I've attached below the email questions that I've received over the past three weeks up until yesterday's deadline. They will also be posted to the website today.

Our final is scheduled for Monday at 9 am in TUII 144. See you then, and good luck!

1. *We discussed how the APA specifically exempts agencies from notice and comment when they implement an interpretive rule or a general policy statement. Towards the end of class we discussed guidances -- and this is where I want to make sure I am on the right track. Guidances are an even more informal way of the agency to state how they are going to implement a regulation through something such as a bulletin or circular -- making them even less formal than interpretive rules or general policy statements, and not subject to APA guidelines on notice and comment. Is this correct?*

You're correct -- a guidance document is usually less formal than an interpretative rule or an agency's statement of general policy. Keep in mind, however, that an agency cannot shield a rule from APA procedural requirements by simply labelling it as a guidance document; if the document has a binding legal effect on the regulated community and constrains future agency decisions, the agency must use the appropriate procedure spelled out in the APA.

2. *We said that interpretative rules and policy statements are excluded from judicial review under the APA. However, in Gonzalez I thought the court was reviewing an interpretive rule? I must be mistaken somewhere, but why this inconsistency?*

Gonzales v. Oregon has complicated facts -- remember that it involved a federal statute, implementing substantive regulations promulgated by the Department of Justice, and a subsequent separate interpretive rule by the Attorney General. The point isn't that a rule includes an interpretation of a statute (most regulations do); an agency action is an interpretative rule if its *only* substance is to offer an interpretation.

3. *In Mead in order to determine whether Congress had delegated to the agency power to interpret w/ force of law? AND whether the agency had exercised that authority, the court identified four factors: (1) procedural defect- no notice and comment process; (2) no express congressional intent to delegate in statutory language (3) no presidential value to the Customs classifications b/c they are not binding, it goes by whatever articulate customs office decides as products are being unloaded (4) Too many decisions and too varied across customs offices. Are these factor just factors in a balancing sense or are they each conductive requirements? If they are just factors which of the questions do they help answer?*

These factors are cumulative and part of a broader fact-specific evaluation of congressional

intentions to delegate authority to the agency to authoritatively interpret the statute at issue using the approach adopted by the agency.

4. *In Chevron, if we find that the delegation is implied or express under step one, then for practice purposes you don't have to go on to step 2, but for the exam would we want to move on to step 2 and analyze that as well?*

Actually, the *Chevron* doctrine requires you to proceed to step 2 when you find that Congress expressly or implicitly delegated authority to the agency to resolve the statutory question at hand. But even if you find that Congress had already spoken clearly on the statutory interpretation at issue through its legislative language and therefore resolved it under *Chevron* step 1 (and you have enough free time), you might still want to address the outcome of a possible *Chevron* step two analysis and provide a fuller answer.

5. *For the exam, do you want a discussion of what all the approaches are to interpreting the statute or just what's relevant?*

Without divulging what's on the exam (of course), the discussion will depend on the scope of the question. Some questions, for example, may raise a potential issue even if you ultimately find the doctrine inapplicable. As a general rule, you should focus on approaches that are clearly relevant to the question, and then include other approaches that might flesh out your answer if you have sufficient time.

6. *Thank you for directing us to the pages about the APA exclusions. I guess I read the provision as excluding interpretive rules and policy statements from the requirements for notice-and-comment. But does that also mean that they can't be challenged in a court? Section 702 of the APA, as I read it, only exempts challenge where Congress has precluded judicial review by statute.*

An excellent question. The APA exempts interpretive rules and general statements of policy from most procedural requirements, including the need to conduct notice-and-comment procedures or to publish the final result in the Federal Register. Those rules, however, may still constitute final agency action and undergo judicial review as possible arbitrary and capricious actions under APA section 706(2).

Because interpretive rules and general statements of agency policy cannot be enforced as law or regulatory requirements (by definition), persons challenging these types of rules may face major hurdles in showing that they have standing to challenge the interpretive rule or that the agency has taken "final agency action" as required for judicial review under the APA. But it does happen – recall the [*Perez v. Mortgage Bankers Association*](#) decision that we discussed briefly in class on April 8, which involved an APA challenge to an interpretive rule as an arbitrary and capricious agency action.

7. *If an agency interpreted a statutory provision using guidances, opinion letters, or advisory ruling letters, there is NO way that the agency would get Chevron deference, because such devices do*

not carry the force of law, correct?

Actually, agencies have sought – and received – *Chevron* deference for their interpretations of statutes through a variety of media, including amicus briefs and letter opinions. The key question is whether Congress intended to delegate the power to the agency to offer binding interpretations through those particular means. That said, the gold standard and overwhelming preferred route for binding agency action is informal notice-and-comment rulemaking.

8. *For the purposes of the Federalism Clear Statement Rule, what is an example of a "substantive interest" which Congress would have to use specific language to affect in a statute? The only case I have under this rule is Ashcroft, so I'm just looking for one or two more examples of "substantive interests" that would fall under this rule.*

In general, any state function that lies at its core sovereign functions would likely trigger the federalism clear statement principle (i.e., federal statutes that attempted to control state taxation and revenue functions, traditional police power activities and responsibilities, or state political high office functions or qualifications).

9. *I am having difficulty also differentiating between the supremacy clause and the clear statement rule (Federalism Canons). They both seem to indicate that Congress has to expressly make clear their intention to override the state law in the language of the statute. What is the key difference here, aside from the fact that the supremacy clause also includes implied intention?*

There are some similarities, but the federalism clear statement rule focuses on determining the scope of a statute based on Congressional intent. The supremacy clause operates at a Constitutional level, and consequently addresses the power of Congress to preempt a state law. The key difference is that Congress may have the power under the Supremacy Clause to preempt a state law, but then the federalism clear statement rule can lead to court to conclude that Congress did not exercise that constitutional power through the language of a particular statute.

10. *Does the Office of Information and Regulatory Affairs only review 1) regulations likely to exceed \$100 million or does it also review 2) any significant regulation (that could encompass more than regulations likely to exceed \$100 million) to make sure the regulation is consistent with the president's priorities and not in conflict with another agency. I understand what OIRA does, but I am confused about what regulation it has jurisdiction to review- i.e. just regulation exceeding \$100 million or any "significant" regulation.*

OIRA gets to review agency regulations because the President has ordered other agencies to submit their regulations to OIRA under [Executive Order 12,866](#) (which is included as an appendix in your textbook, if I remember correctly). EO 12,866 mandates OIRA review of “significant regulatory action,” which includes rules that have an economic impact exceeding \$100 million, but it also sweeps up rules that raise novel legal principles or conflict with other agency actions. See the definition of “significant regulatory action” in section 3(f) of EO 12,866.

11. *Quick question: Does the whole code rule and the "in pari materia" rule mean the same thing?*

Not exactly - *in pari materia* applies to different statutory provisions that deal with similar subject matter, without regard to whether those provisions are in the same code or not. For example, statutory provisions on attorney's fees deal with a similar subject and can trigger *in pari materia* -- even if they're in vastly different statutes in wholly different codes. But you're correct that statutory provisions in the same code that address similar subjects can also qualify for *in pari materia* treatment as well.

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