

Administrative Decision-Making and Deference in U.S. Telecoms Law and Policy.

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I. Broad Outline

A. Background

1. U.S. Congress enacts Communications Act of 1934, creating Federal Communications Commission (FCC).
2. FCC granted authority to regulate U.S. civilian telecoms in the 'public interest'.
3. As an agency, FCC must act within the 'statutory mandate' of Congress.

B. Issues Presented

1. What level of deference will U.S. Courts give to an FCC-promulgated order pursuant to a specific provision of the Telecoms Act?
2. How much deference will Courts give to the FCC to act under its broad authority to act in the 'public interest, convenience, or necessity'?

C. Threshold Inquiry

1. Did Congress mandate agency action?
2. If so, how did Congress delegate mandate?
3. •The level of deference turns on whether Congress delegated rule-making authority to the FCC, or only the power to interpret its own statutory mandate.

D. Mead is a 'Weathervane'

1. If it is an implicit grant of rule-making authority, then the FCC gets broad deference. (Chevron USA Inc. v. U.S., 467 US 735 (1984).
2. .If Congress has explicitly delegated the power to interpret a statute, but withheld the power to engage in rule-making, the FCC gets a more narrow deference. (Skidmore v. Swift, 323 US 134 (1944).

E. Skidmore :Traditional approach from 1944:

1. Whether a court defers to an agency's order 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier or later pronouncements.
2. This allows for significant judicial scrutiny.

F. Chevron:

1. when statute is ambiguous, and implementing agency's construction is reasonable, a federal court must accept agency's construction of statute.
2. But, if Congress had directly addressed the issue at hand, an agency's action would not be afforded deference but judged by the reviewing court to see if the "administrative constructions are contrary to clear congressional intent"
3. Level of scrutiny thus depends on statutory interpretation and Congressional intent.

G. Judicial Scrutiny for Agency Action Taken in "Public Interest"

H. Recent Developments

II. Selected Sections, United States Code.

5 U. S. C. § 706 (2) (A). Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

47 U.S.C. § 151. Purposes of Chapter: Federal Communications Commission Created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 154. Federal Communications Commission

(H) The Commission may establish rules of conduct and other regulations governing the service of individuals under this paragraph.

III. Relevant U.S. Cases:

U.S. v. Mead Corp., 533 U.S. 218 (2001).

National Cable & Telecommunications Assn. v. Brand X Internet Services, 125 S. Ct. 2688 (2005).

Skidmore v. Swift, 323 U.S. 134 (1944).

Chevron U.S.A. Inc. v. United States, 467 U.S. 837 (1984).

Smiley v. Citibank, 517 U.S. 735 (1996).

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

HBO v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

Gonzalez v. Oregon, 126 S. Ct. 904 (2006).