ADMINISTRATIVE LAW

WEEK THIRTEEN
Tuesday, Nov. 16, 2021
Professor Julia M. Glencer

AGENDA

6:00 to 7:30	Lecture on Access Issues
	▪ *Standing, Timing of Review, Reviewability*
	▪ One other issue: *Non-Acquiescence*
	----------Break----------
7:40 to 8:10	*In-Class Reading*: 5th Cir. Decision
8:10 to 8:30	Final Thoughts . . .
8:30 to 9:00	Preparing for the Final Exam . . .

INVENTORY of WHAT'S LEFT . . .

ACCESS ISSUE
Standing

The 3 Elements of *Lujan*

(*each* a research universe unto itself)

STANDING

- Standing is a *justiciability* doctrine.
- Standing has both *constitutional* & *prudential* aspects.

STANDING

"The judicial power shall extend to all **cases**, in law and equity, **arising under this Constitution, the laws of the United States,** and treaties made, **or which shall be made, under their authority**;-- . . . to **controversies to which the United States shall be a party**;-- to controversies between two or more states;-. . ."

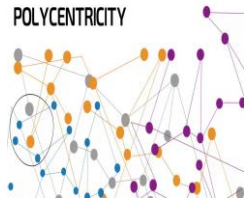
U.S. Const., Art. III, Sec. 2.

STANDING

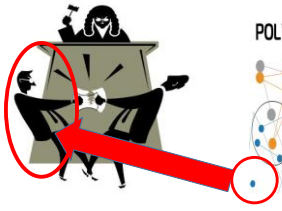
- The requirement of a "**case or controversy**" acts as a limit on federal judicial power; *it is tied to Separation of Powers* and enforced to ensure courts act ONLY in their own sphere.
  - Courts will *not* adjudicate cases in which the litigants do NOT have standing, nor (with limited exceptions) where a litigant seeks to raise someone else's rights (including society's).
  - Courts will *not* adjudicate cases where litigant raises merely a generalized grievances best addressed in the political process.
  - Courts will not adjudicate mere theoretical debates or "speculative injuries" nor will they issue "advisory opinions."

Adversarial: Bi-Polar

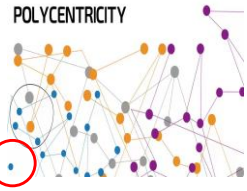
Legislative: Polycentric



Mr. Eldridge, complaining about the admin agency's decision to cut off *his* disability benefits



Litigant challenging legality of government action or inaction



STANDING: BASIC DOCTRINAL FRAMEWORK

"[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered **an "injury in fact"**—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a **causal connection** between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "**redressed** by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal citation omitted).

"Tri-partite shorthand" -
- Injury
- Causation
- Redressability

"The party invoking federal jurisdiction bears the burden of establishing [standing.]" *Id.* at 561.

[*Remember this because "pleading" is key here.*]

These 3 together comprise the CONSTITUTIONAL CORE of Standing

Injury - invasion of a legally protected [cognizable] interest which is

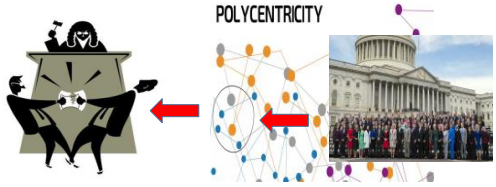
(a) concrete and particularized, . . . and

(b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'"

Causation – injury has to be "fairly trace[able] to the challenged action of the defendant" [usually the admin agency and NOT] the result of independent action of some third party not before the court.

Redressability - likely as opposed to just possible/speculative that the injury will be "redressed by a favorable decision."

CONGRESS IMPACTING STANDING?



PROCEDURAL RIGHTS?

Procedural injury?
Informational injury?

ZONE OF INTERESTS . . .

- This test comes from well-known case of *Assoc. of Data Processing Organizations v. Camp* (U.S. 1970).
- Characterized as a *prudential* consideration.
- Is the alleged interest (now said to have been injured) one falling within the "zone of interests" said to be protected by the statute or Constitutional provision in question for that individual?

STANDING: ASSOCIATIONAL STANDING

Hunt v. Washington Apple Advertising Comm., 432 U.S. 333 (1977) is THE key case – offers 3-part test to capture form of "associational standing" that is derivative of members' standing:

(a) association's members would otherwise have standing to use in their own right;

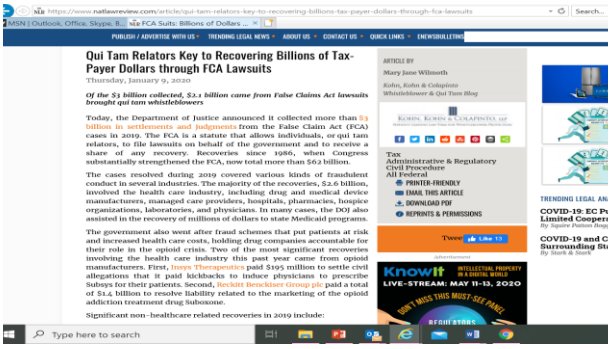
(b) the interests it seeks to protect are germane to the association's purpose; and

(c) neither the claim asserted nor the relief requested requires the participation of individual members in the suit.

A FEW SPECIFIC ISSUES . . .

Qui tam & civil penalties (cash bounties)

- Statutory schemes that essentially enlist private parties to help government pursue enforcement against wrongdoing.
- Long-standing history of use & often used where statutory scheme takes account of affects of government programs on land, recreation, aesthetics.
- Do these violate Art. II? Alter power of enforcement?



Qui Tam Relators Key to Recovering Billions of Tax-Payer Dollars through FCA Lawsuits

Thursday, January 9, 2020

Of the $3 billion collected, $2.1 billion came from False Claims Act lawsuits brought qui tam whistleblowers

Today, the Department of Justice announced it collected more than $3 billion in settlements and judgments from the False Claim Act (FCA) cases in 2019. The FCA is a statute that allows individuals, or qui tam relators, to file lawsuits on behalf of the government and to receive a share of any recovery. Recoveries since 1986, when Congress substantially strengthened the FCA, now total more than $62 billion.

The cases resolved during 2019 covered various kinds of fraudulent conduct in several industries. The majority of the recoveries, $2.6 billion, involved the health care industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians. In many cases, the DOJ also assisted in the recovery of millions of dollars to state Medicaid programs.

The government also went after fraud schemes that put patients at risk and increased health care costs, holding drug companies accountable for their role in the opioid crisis. Two of the most significant recoveries involving the health care industry this past year came from opioid manufacturers. First, Insys Therapeutics paid $195 million to settle civil allegations that it paid kickbacks to induce physicians to prescribe Subsys for their patients. Second, Reckitt Benckiser Group plc paid a total of $1.4 billion to resolve liability related to the marketing of the opioid addiction treatment drug Suboxone.

Significant non-healthcare related recoveries in 2019 include:

TWO MORE ACCESS ISSUES

Timing of Review: Three Related Doctrines

Reviewability: Sources, Presumptions & Immunity

STRATEGIC ISSUES . . .

- Who has standing?
- Which court? (usually statutorily dictated).
  - If more than one, which court is preferred?
- Which claims? (often statutory dictated or unique to that subject matter realm).
- When can the action be brought? (many unique doctrines impact this including exhaustion, ripeness and finality).
- Obstacle of immunity doctrines/privileges when litigating against government actors, including admin agencies.

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These kinds of questions are addressed by:
(1) the surrounding statutory framework (including organic & enabling acts); (2) the APA; *and/or* (3) case law embodying these largely prudential doctrines.

agating
agencies.

- ***Abbott Labs v. Gardner*, 387 U.S. 136 (1967).**
  - KEY case in Admin Law.
  - Offered a series of black-letter concepts that impact judicial review of agency action.
  - Pre-enforcement context; permitted pre-enforcement review.
  - This case + two other related cases give us the *Abbott Labs* trilogy.

ACCESS ISSUE Timing Of Review

Exhaustion of Administrative Remedies

Ripeness

Finality

BACKDROP RULE . . .

"[F]ederal courts are vested with a virtually unflagging obligation to exercise the jurisdiction given to them."

Cohens v. Virginia, 6 Wheat. 264, 404 (1841).

EXHAUSTION *of ADMIN REMEDIES*

- If the admin agency has internal procedures that should be used to remediate errors, a court will refuse to intervene unless and until those procedures are pursued and *exhausted* first.
  - The inquiry typically focuses on whether surrounding statutory framework requires *exhaustion* . . .
  - But courts have recognized both statutory & common law-based exhaustion requirements.

5 U.S.C. § 704

. . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Darby v. Cisneros, 509 U.S. 137 (1993) (holding the APA itself does NOT require exhaustion of administrative remedies unless such exhaustion is expressly required by statutory or administrative rule).

COMMON LAW EXHAUSTION

- Courts may require exhaustion if such will protect admin agency authority and promote judicial efficiency.
- Balancing test: individual's interest in retaining prompt access to a judicial review forum vs. institutional interests favoring exhaustion.
- Three sets of circumstances weigh *against* exhaustion:
  - Admin remedy may cause **undue prejudice** to later assertion of a court action (takes too long; a defense expires, etc.)
  - Admin remedy may be **inadequate** due to doubt about admin agency's ability to grant effective relief
  - Reason to doubt admin remedy because **admin agency shown to be biased** or having predetermined the issue.

COMMON LAW EXHAUSTION

Common law exhaustion is supplanted by statutory provisions that require or dispense with exhaustion.
But sometimes those statutory provisions themselves require *interpretation* . . .

EXHAUSTION'S *COUSIN*: DOCTRINE OF PRIMARY JURISDICTION

- When an admin agency and a court have **concurrent jurisdiction**, the federal court *may* abstain to let the admin agency address the matter first.
- Almost like a form of "referral" tied to a recognition that the admin agency has expertise to bring to bear.

RIPENESS

Basic test for ripeness from *Abbott Labs*:

- "[The basic rationale of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both [(1)]the fitness of the issues for judicial decision and [(2)] the hardship to the parties of withholding court consideration."

Abbott Labs., 387 U.S. at 148-49.

RIPENESS & PRE-ENFORCEMENT REVIEW

Pros of Review Now

- Avoids cost of compliance with illegal/unauthorized rules
- Removes/alleviates uncertainty about legality of admin scheme
- Affected entities treated equally (no one bears the brunt of defying compliance & suing later; weaker entities not brow-beaten into compliance.
- Holds admin agencies accountable (by permitting review before agency can suppress review via compromises & settlements)

Pros of Waiting for Review Later

- Pre-enforcement review known to impact admin agencies choice of activity (rule-making replaced by incremental adjudication)
- Promotes creation of better "record" for later review (which may foster better research on costs/feasibility)
- Better records ensures more informed judicial review by generalist judges.

RIPENESS & PRE-ENFORCEMENT REVIEW

Abbott Labs trilogy case – *Toilet Good Ass'n* – featured a refusal to permit pre-enforcement review:

"At this juncture we have no idea whether or when such an inspection [to inspect whether manufacturers were adding forbidden additives] will be ordered and what reasons the Commissioner will give to justify his order. . . . Whether the regulation is justified thus depends . . . not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets. . . . [J]udicial appraisal . . . is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here."

387 U.S. at 163-64.

RIPENESS & PRE-ENFORCEMENT REVIEW

Be the *expert* on the statutory scheme!
Be able to *characterize*!

387 U.S. at 163-64.

FINALITY

- Characterized as the most "amorphous" of the three timing doctrines.
- Really comes down to assessment of the appropriateness of judicial intervention at *that time*.
- "Legal grab bag" of questions posed by the courts to assess appropriateness.
- Courts tend adopt pragmatic approach to finality.

FINALITY

Hallmarks of Finality

- Marks consummation of decision-making process
- Determines rights or obligations
- Imposes a legal obligation to do/refrain from doing something
- Starts a "flow of legal consequences"
- Exposes to penalty
- Limits ability to take subsequent steps (perhaps under other scheme)

Is Any Still- Open Process Likely to Impact Status of Decision?

- Invitation to engage in further activity?
  - Is this an "entitlement" to further process? Or just a possibility?
  - Can further process possibly change the admin agency's position/decision?
  - Mere discussion without hope of altering status?
- How would this open process impact the other timing doctrines?

FINALITY

- Usually turns on intricate review of statutory procedures.
- Can turn on *characterization* of an issue as admin agency's "definitive view" an issue, even if that issue is determined at early juncture in an on-going statutorily-prescribed process.
- Sometimes gnarly issue of "whose" actions are final in a multi-layers admin process. Which actor has final authority?
- Can an agency establish a *definitive view* in a soft law (e.g., a guidance document)?
  - Do real legal consequences flow?

FINALITY

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  - Do real legal

Be the *expert* on the statutory scheme!
Be able to *characterize*!

ACCESS ISSUE: Reviewability

Methods of Obtaining Judicial Review
Presumption (Plus Possible Preclusion)

METHODS OF OBTAINING REVIEW

(1) **Special statutory review**: judicial review authorized by admin agency's organic/enabling acts.

(2) **General statutory review**: judicial review authorized by the APA (§ 703).

(3) ***So-called* "Non-statutory" review**: originally referred to judicial review authorized by common law; also now includes judicial review authorized by statutes *other than* organic/enabling acts and APA.

METHODS OF OBTAINING REVIEW

5 U.S.C. § 703:

"The form of proceeding for judicial review is the **special statutory review** proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction."

METHODS OF OBTAINING REVIEW

(1) **Special statutory review**: judicial review authorized by admin agency's organic/enabling acts.

Scrutinize the organic/enabling act because it:

- May dictate specific court, review type & type of actionable claims
- May identify those meant to have standing/injury
- May dictate the standard/scope of review
- May waive the defense of sovereign immunity
- May dictate/waive need for exhaustion of admin remedies

WWCW?

What Would Congress Want?

METHODS OF OBTAINING REVIEW

(2) **General statutory review**: judicial review authorized by the APA (§§ 703 & 704).

5 U.S.C. § 704: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

BUT the APA is not a grant of jurisdiction; must hook the APA to 28 U.S.C. § 1331.*

*Review under **28 U.S.C. § 1331** usually then starts in trial court, *unless* organic statute committed review of FINAL agency action to Court of Appeals. If so, courts indulge presumption that all suits affecting such start in Court of Appeals (a.k.a. *TRAC Suits*).

METHODS OF OBTAINING REVIEW

(3) ***So-called* "Non-statutory" review**: originally referred to judicial review authorized by common law; also now includes judicial review authorized by statutes *other than* organic/enabling acts and APA.

Like what?

- Suits against government official in individual capacity (*Ex Parte Young*)
- Declaratory Judgment Act
- All Writs Act (things such as habeas, mandamus)
- § 1983

METHODS OF OBTAINING REVIEW

CAUTION!

This "non-statutory review" world is *really complex*, especially in terms of the overlap with sovereign immunity.

SOVEREIGN IMMUNITY

§ 3654 Jurisdiction Over Actions Against the United States—The Sovereign Immunity Problem: "The major problem in determining whether a suit can be brought against the United States in federal court is determining whether the suit is barred by the traditional doctrine of sovereign immunity. **It has been settled since at least the mid-nineteenth century that the United States may not be sued without its consent**. . . ."

14 Fed. Prac. & Proc. Juris. § 3654 (4th ed.)

SOVEREIGN IMMUNITY

- **§ 3655 Actions Against Federal Agencies and Officers: "***Suits against federal agencies and officers may be barred by the doctrine of sovereign immunity if the conduct in question has been undertaken on behalf of the Government **and Congress has not waived the immunity of the United States for the asserted claim**.* Although the United States district courts have general subject matter jurisdiction over actions brought by federal agencies or officers who are authorized to sue, **there is no corresponding general statute** that both confers jurisdiction over suits against federal agencies and officers **and waives the defense of [sovereign] immunity[.]**"

14 Fed. Prac. & Proc. Juris. § 3655 (4th ed.)

"[J]udicial review of a final agency action by an aggrieved person **will not be cut off unless there is persuasive reason to believe that such was . . . Congress['s intent].** [T]his type of judicial review [had long been entertained and was] reinforced by . . . **[APA] which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . so long as [1] no statute precludes such relief or [2] the action is not one committed by law to agency discretion.** [Legislative history of the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions . . . [its] 'generous review provisions' must be given a 'hospitable' interpretation."

Abbott Labs, 387 U.S. 136, 140-41.

APA, 5 U.S.C. § 701:

(a) This chapter [*i.e., Judicial Review §§ 701-706 of the APA itself*] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

ABBOTT LABS

- Famous because it recognized the presumption of judicial review of admin action
  - Reinforces Prof. Jaffe's sense of judicial review as a legitimizing psychological influence . . .
  - Traced back to Marbury – essence of civil liberty to be able to claim protection of the law.
- *Abbott Labs* long questioned for its selective use of legislative history.
- Did this presumption foster APA encrustment/ossification?
- A presumption can be overcome; courts require clear & convincing evidence of Congressional intent to preclude judicial review.

JUDICIAL REVIEW: CONSTITUTONALLY REQUIRED?

- Congress has plenary power over jurisdiction of Supreme Court; full range of judicial power has NEVER been statutorily vested in federal courts.
- This might mean no forum available or perhaps the case should be punted to a state forum.
- Congress cannot withdraw jurisdiction from federal courts to the point of vitiating the essential function of the judiciary ensured by Art. III.
- And if Congress tried to do so, that would violate other independent constitutional provisions (DP, EP).

J… C…

In Admin Law realm, judges & scholars have argued judicial review is guaranteed also by the Separation of Powers concept enshrined in Constitution.

J… C…

In Admin L… scholars h… g… s…

Unresolved theoretical issue.
We *really don't know* the impact of a flat-out preclusion for a case involving a Constitutional claim . . .

REVIEW PRECLUDED BY STATUTE?

"[The presumption favoring judicial review], like all presumptions used in interpreting statutes, may be overcome by **specific language or specific legislative history** that is a reliable indicator of congressional intent. . . . [Intent] . . . may also be inferred from **contemporaneous judicial construction barring review and the congressional acquiescence in it**, . . . or from the **collective import of legislative and judicial history behind a particular statute** . . . [T]he presumption favoring judicial review of administrative action may be overcome by **inferences of intent drawn from the statutory scheme as a whole**. In particular, at least *when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded*."

Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984).

REVIEW PRECLUDED BY STATUTE?

"[T]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."

Bowen v. Mich. Acad. Fam. Physicians, 476 U.S. 667 (1986)

REVIEW PRECLUDED BY STATUTE?

"The reticulated statutory scheme, which carefully details the forum and limits of review of 'any determination . . . of . . . the amount of benefits under part A,'. . . and of the 'amount of ... Payment' of benefits under Part B, *simply does not speak to challenges mounted against the method by which such amounts are to be determined* rather than the determinations themselves. As the Secretary has made clear, 'the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program' is not considered in a "fair hearing" held by a carrier to resolve a grievance related to a determination of the amount of a Part B award. As a result, an attack on the validity of a regulation is not the kind of administrative action that [the statutory scheme] impliedly denies judicial review."

Bowen, 476 U.S. at 675–76.

REVIEW PRECLUDED BY STATUTE?

"The reticulated ... tails the forum and limits of rev... of benefits under ... under Pa... *hod by ...* dete... legali... ... in a regulat... "fair hea... ... a determin... ... n attack on the vali... ...ve action that [the st... ..."

Be the *expert* on the statutory scheme!
Be able to *characterize*!

...675–76.

REVIEW PRECLUDED BY DISCRETION?

- A statutory scheme may commit action to administrative agency discretion thereby making it something a court cannot review.
- *Webster v. Doe*, 486 U.S. 592 (1988): Worker with exemplary job record employed by CIA for 9 years, was terminated as a "security" threat after he disclosed he was gay.
  - Nat'l Security Act of 1947 – by its language and its structure – gave CIA Director *complete discretion* over discharges for security reasons, thus precluding judicial review.

R...

Chief Justice Rehnquist then held:

"In [the CIA's] view, all [CIA] employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims." *Id.* at 603.

But Justice O'Connor & Justice Scalia disagreed . . .

REVIEW PRECLUDED BY DISCRETION?

Are admin agency refusals to act reviewable?

- *Heckler v. Chaney*, 470 U.S. 821 (1985), established that non-enforcement decisions are presumptively unreviewable. "An agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."
- Why? Because it involves a complicated balancing of decisions within agency's expertise, involving its resources . . .
  - whether agency resources are best spent on this violation or some other,
  - whether agency is likely to succeed if it seeks enforcement,
  - whether the particular enforcement fits the agency's overall policies,
- BUT this too is a rebuttable presumption; need evidence of Congressional intent to limit agency's exercise of enforcement by setting priorities or otherwise circumscribing the agency's prosecutorial discretion.

REVIEW PRECLUDED BY DISCRETION?

Inherent tension between two parts of the APA?

§ 701(a)(2) recognizing that agency action committed to agency discretion is unreviewable?

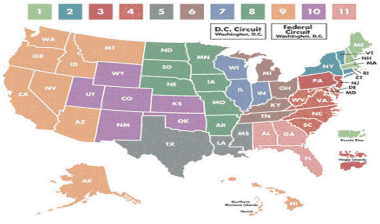
§ 706 offering "abuse of discretion" standard as a standard of review for agency decision-making?

NON-ACQUIESCENCE

"What is this *crazy* practice of non-acquiescence?

"Is it *me* or is the administrative law state as I thought I understood it currently under some kind of attack?"

PRACTICE OF NON-ACQUIESENCE



WORDS, WORDS, WORDS . . .

Acquiescence & Non-acquiescence

Merriam-Webster.com

Acquiescence: "(1) passive acceptance or submission : the act of acquiescing or the state of being acquiescent . . . (2) an instance of acquiescing."

Nonacquiescence: "Legal Definition of nonacquiescence: an administrative agency's disagreement with and refusal to follow judicial precedent in cases before the agency to which the precedent applies."

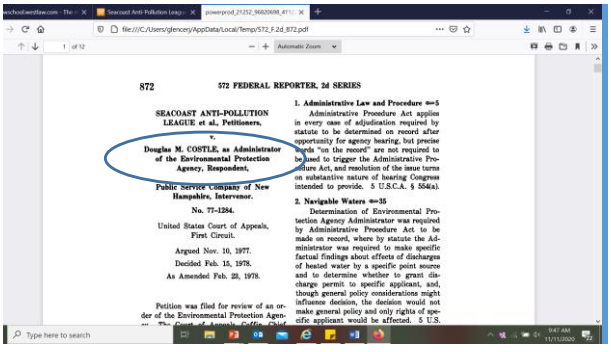
INFORMAL ADJUDICATION

- *Dominion Energy Brayton Point , LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006).
  - Initially EPA decided to "acquiesce" in the appellate court's decision in *Seacoast v. Costle* (1st Cir. 1978) that "public hearing" in the Clean Water Act presumably requires FORMAL Adjudication.

OH. OK

INFORMAL ADJUDICATION

- *Dominion Energy Brayton Point , LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006), continued.
  - After the EPA decided to "acquiesce," *then what happened*?
    - *Chevron* (buttressed by a presidential directive to streamline admin agency procedures).
    - *Brand –X:* "[A] court's prior judicial construction of a statute trumps an [admin] agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and leaves no room for agency discretion."



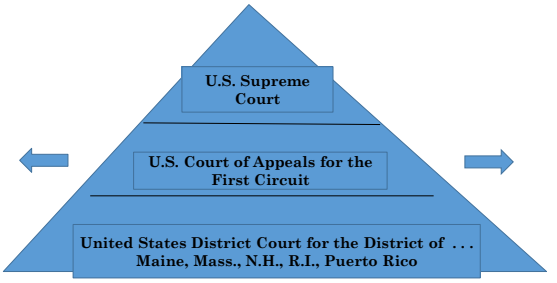
872 572 FEDERAL REPORTER, 2d SERIES

SEACOAST ANTI-POLLUTION LEAGUE et al., Petitioners,
v.
Douglas M. COSTLE, as Administrator of the Environmental Protection Agency, Respondent,
Public Service Company of New Hampshire, Intervenor.
No. 77-1284.
United States Court of Appeals, First Circuit.
Argued Nov. 10, 1977.
Decided Feb. 15, 1978.
As Amended Feb. 23, 1978.

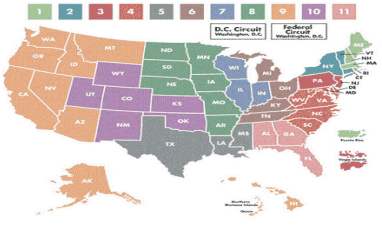
Petition was filed for review of an order of the Environmental Protection Agency.

1. Administrative Law and Procedure ⇨5
Administrative Procedure Act applies in every case of adjudication required by statute to be determined on record after opportunity for agency hearing, but precise words "on the record" are not required to be used to trigger the Administrative Procedure Act, and resolution of the issue turns on substantive nature of hearing Congress intended to provide. 5 U.S.C.A. § 554(a).

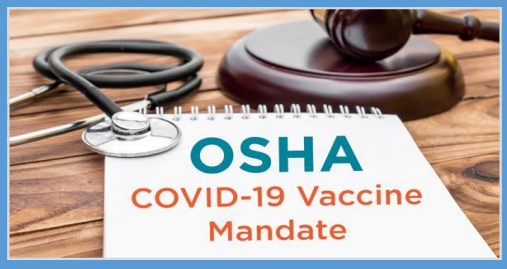
2. Navigable Waters ⇨35
Determination of Environmental Protection Agency Administrator was required by Administrative Procedure Act to be made on record, where by statute the Administrator was required to make specific factual findings about effects of discharges of heated water by a specific point source and to determine whether to grant discharge permit to specific applicant, and, though general policy considerations might influence decision, the decision would not make general policy and only rights of specific applicant would be affected. 5 U.S.



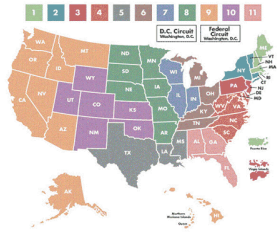
PRACTICE OF NON-ACQUIESENCE



BREAK



LOTTERY . . .



RECOGNIZABLE!?

FINAL THOUGHTS . . .

ENCRUSTMENT/OSSIFICATION OF THE APA?

- Is the APA "out of sync" with modern society?
- Has informal "notice & comment" rulemaking just become too hard?
- What might the APA be replaced by or amended to contain?
- Is the APA a "super-statute" inviting a method of interpretation akin to the "living, breathing Constitution" approach?
- How does APA history & purpose fit in?
- Our experience with COVID will surely impact this debate . . .

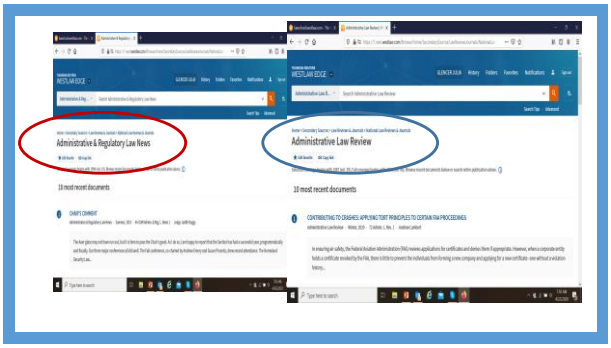
UNCOVERED TOPICS

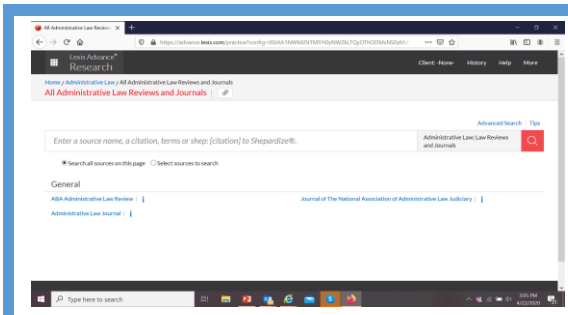
In Your Textbook

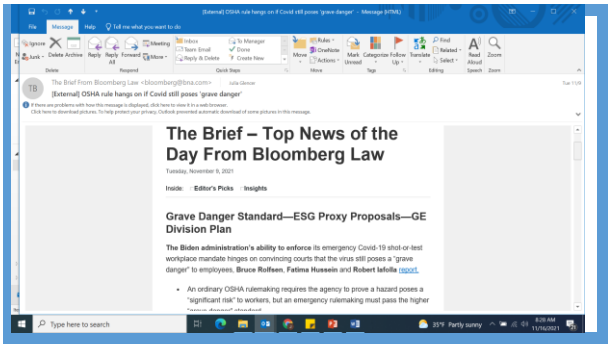
- We jumped around in the textbook so there's lots left to read (esp. the Notes).
- Ch. VI on Transparency & E-Gov in the Info Age
- Judicial Review: Remedies (pg. 1430-1440)
- Great extended hypo in Ch. 1 (pg. 3-20).

The Great Beyond . . .

- Many admin agencies we never encountered (esp. rate/licensing bodies)
- Entire World(s) of Practice & Procedure before individual admin agencies
- Skills (research, writing and advocacy before admin agencies)
- We saw some of the Scholarship on Admin Law; lots to explore!





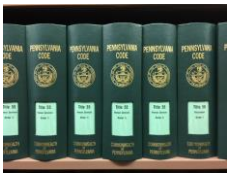


ADMINISTRATIVE LAW: PA

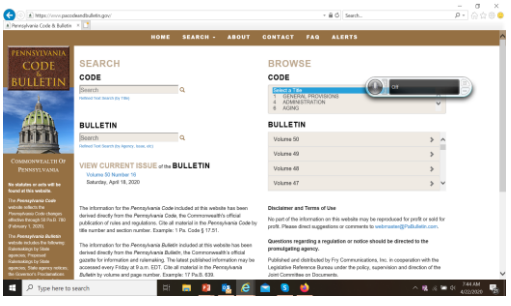
- PA has its own APA: Pennsylvania Administrative Procedure Act, 2 Pa.C.S. §§ 101-754.
- We have the Commonwealth Court!
- No dedicated Pa Admin Law textbook, but little primers & dedicated journals (esp. in environment)
- Tons of info on Pennsylvania admin agency websites.
- *There be jobs here . . .*

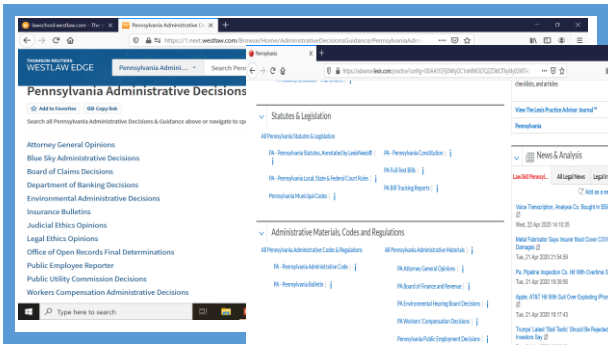
PENNSYLVANIA COUNTERPARTS

PA Code (akin to C.F.R.)

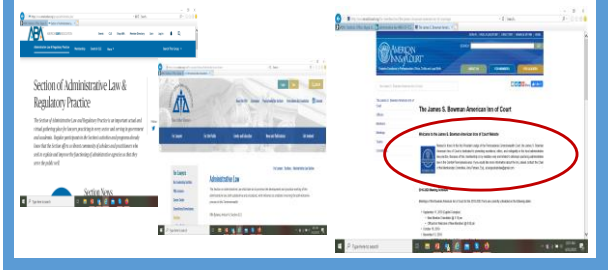


Pennsylvania Bulletin (akin to Federal Register)





VIBRANT PRACTICE WORLD



FINAL EXAM

Points & Directions
The Taped Zoom Review
Scheduling & Plan for Live Review
Essay Q – with 3 Samples (A, B, low C)