ADMINISTRATIVE LAW

WEEK ELEVEN
Tuesday, Nov. 2, 2021
Professor Julia M. Glencer

AGENDA

6:00 to 7:00 **Some Practicalities of Judicial Review**
- ► Standards of Review (including a review . . .)
- ► **"Substantial Evidence" Review**

7:00 to 8:00 *Exercise:* **Judicial Review of "Mine Run" Cases**

Break During the Exercise

8:00 to 9:00 **Identifying the Hallmarks of "Arbitrary & Capricious" Admin Agency Action**

4. Which of the following is *not* an example of an "internal check" being used to monitor administrative agency behavior from within the Executive Branch?

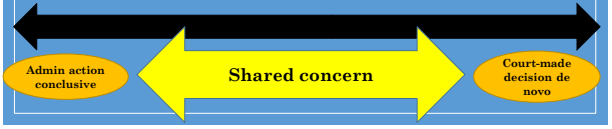
A. A report issued by an Inspector General of the Department of Justice which examines the costs associated with the Federal Bureau of Prisons' increased use of home confinement as a response to the COVID-19 pandemic.

B. A memorandum placed in the "Dissent Channel" at the Nuclear Regulatory Commission (NRC) by an NRC Reliability & Risk Engineer complaining that the NRC has been ignoring an important report which documents the potential danger faced by a specific nuclear reactor located downstream of a large dam.

C. A subpoena issued by the Chairman of the House of Representatives Education and Labor Oversight Committee to the Chairman of the National Labor Relations Board (NLRB) seeking documents related to how NLRB Members appointed by President Trump have been handling recusal requests in cases before them for adjudication.

D. The creation of an Office for Civil Rights and Civil Liberties inside the Department of Homeland Security (DHS) to handle tasks ranging from administering the DHS's Equal Employment Opportunity program for potential DHS hires to conducting civil rights inspections of immigration detention facilities overseen by the DHS.

JUDICIAL REVIEW OF REVIEW OF ADMIN AGENCY ACTION



OVERARCHING THOUGHT

"The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate or legally valid."

-Louis L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

JUDICIAL REVIEW FOSTERING . . . ?

Then we watch the courts in representative cases *use* these concepts and *apply* the standards of review.

SCOPE & STANDARD: *They Work Together*

Standards (used to test what's in the BOX)
Substantial evidence?
Arbitrary & capricious?

Scope as the boundaries of the BOX

FEDERAL JUDICIAL SYSTEM

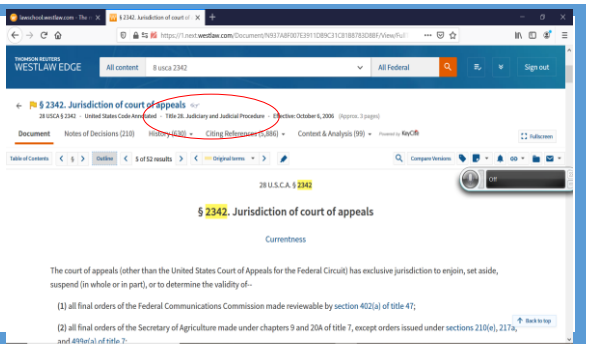
Many federal statutory schemes provide for judicial review of admin agency action.

Most of the time, review is in the Courts of Appeals.

Sometimes, review starts in the District Court with further appeal available in the Court of Appeals

Most of the time, review is in the Courts of Appeals:

United States Code Annotated (U.S.C.A.)
Title 28. Judiciary and Judicial Procedure
Part VI. Particular Proceedings
Chapter 158. Orders of Federal Agencies; Review

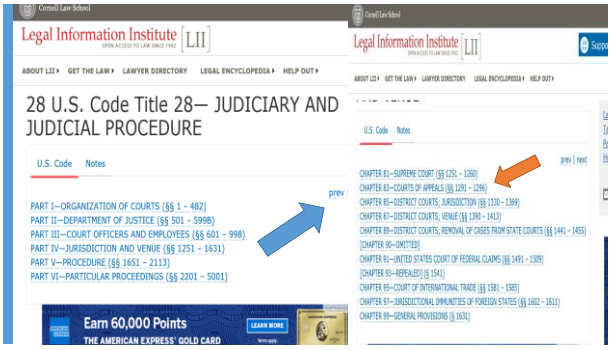


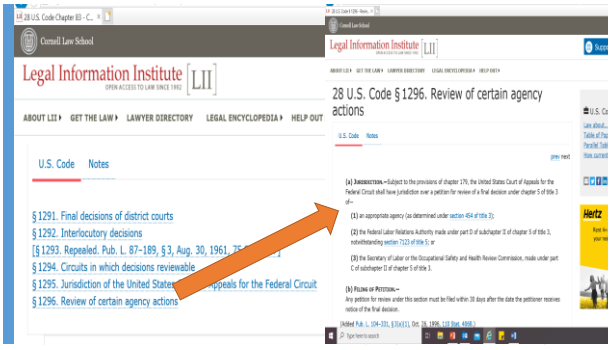
Sometimes, review starts in the District Court with further review available in the Court of Appeals:

42 U.S.C. § 405 Evidence, procedure and certification for payments

(g) Judicial review

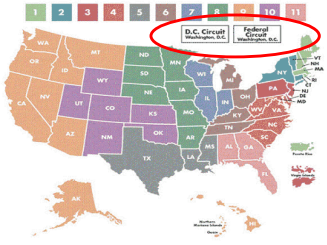
Any individual, after any final decision of the **Commissioner of Social Security** made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in **the district court** of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, . . . if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . . The judgment of the court shall be final ***except that it shall be subject to review in the same manner as a judgment in other civil actions. . . .***



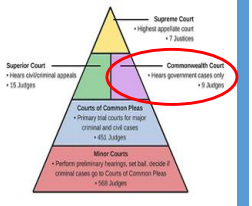


VEHICLES . . .

- Lots of variation in vehicles to get a "case" involving a challenge to administrative agency action before a court for judicial review (most dictated by statute):
  - Petition for enforcement
  - Appeal
  - Petition for review
- Sometimes lawyers must get creative in finding/ cobbling together a workable (analogous) vehicle.



The Thirteen Federal Judicial Circuits



Sometimes the specific court authorized to conduct judicial review is identified.

(b) Judicial review

(1) **A petition for review of action of the Administrator in** promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,.3 any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)1 of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter **may be filed only in the United States Court of Appeals for the District of Columbia.**

-- 42 U.S.C.A. § 7607(b)(1).

THE APA AND JUDICIAL REVIEW

- § 701 Application, definitions
- § 702 Right of review
- § 703 Form and venue of proceedings
- § 704 Actions reviewable
- § 705 Relief pending review
- **§ 706 Scope of review** [Our focus is mainly here]

§702 Right of review

A person suffering legal ~~wrong~~ because of agency action, or adversely affected or aggrieved by agency action ~~within the meaning~~ of a relevant statute, is entitled to judicial review thereof . . .

"**Agency action**" is defined in § 551(13). It "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"

~~§704~~ Actions reviewable

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~~.

§ 701 Application, definitions

(a) This chapter [i.e., the chapter on judicial review of admin agency actions!] 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.

ADMINISTRATIVE RECORD

"**Administrative record**" refers to the repository of materials built by the administrative agency *as it engaged* in the process of reaching the action the court is subsequently asked to review.

- Rulemaking (both formal and informal) creates an *administrative record.*

[So too do other forms of "agency action"!]

KEY CONCEPT:

"[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."

***Camp v. Pitts*, 411 U.S. 138, 142 (1973).**

- Historically, admin agencies did not make a "contemporaneous" *administrative record*, but assembled a "historical record" of what had been available for consideration ~~when the rule was promulgated if challenged~~.
- This does NOT occur anymore. Admin agencies are VERY conscious of the need to build a complete *administrative record* to facilitate judicial review.
- Items relevant to ~~the notice and comment~~ process would BE in the *administrative record* unless subject to some kind of privilege or redaction.
- Much of it would also be publicly available (regulations.gov dockets and/or resort to FOIA request).

REALIZE . . .

- *Formal* rule-making (under § 553(c)) and *formal* adjudication (under § 554(a)) [both of which trigger the procedures under § 556] create an administrative record.
- A "paper hearing" [HEY! *Remember* that?] creates an administrative record.
- Informal rule-making and informal adjudication also create an administrative record.

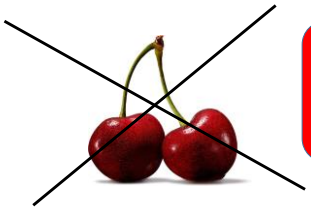
ADMINISTRATIVE RECORD

Largely beyond this problem nowadays because admin agencies *know* they need to provide an "administrative record" that support their actions.

"The Vara Declaration is a **post-hoc account**. It is persuasive, however, because it shows that the previously undisclosed internal materials in fact do state the contemporaneous explanation for TSA's denial . . . The Vara Declaration "illuminate[s]" **the reasons that are implicit in the internal materials**. . . . In other words, [it] furnishes an explanation of the administrative action that is necessary to facilitate effective judicial review. ***Camp v. Pitts***, . . . The critical point is that the Vara Declaration contains "no new rationalizations"; it is "merely explanatory of the original record," and thus admissible for our consideration. . . . *Manhattan Tankers, Inc. v. Dole*, 787 F.2d 667, 672 n. 6 (D.C. Cir. 1986) (upholding "the [agency's] decision on the basis of [the decision maker's] affidavit[ ]," where the affidavit was "consistent with the administrative record")."

Olivares v. TSA, 819 F.3d 454, 464 (D.C. Cir. 2016).

WHOLE RECORD



The Anti-Cherry-Picking Rule!

(ala *Universal Camera*)

WHOLE RECORD

"Congress has left no room for doubt as to the kind of scrutiny which courts of appeals must give the record before the [administrative agency] to satisfy itself that the [administrative agency's] order rests on adequate proof . . . . Whether ***on the record as a whole*** there is substantial evidence to support agency findings is the question which Congress has placed in the keeping of the courts of appeals."

-*Universal Camera*, 340 U.S. at 487, 491.

Primary Inference

- ALJ/Hearing Examiner's testimonial inferences/**primary inferences** concerning a **fact found as a matter of credibility** binds the admin agency.

Secondary Inference

- ALJ/Hearing Examiner's derivative inference/**secondary inference** concerning facts to which no witness orally testified but which the examiner **inferred** from testimonial facts **do NOT bind the admin agency**.
- Admin agency may reach its own **secondary inferences** and those bind the court on judicial review as well unless they are irrational.
- Admin agency may adopt the ALJ's rational **secondary inferences** and, if so, those also bind the court on judicial review.

THE PRACTICALITIES . . .

Basics:

- Statutory provisions offering judicial review (jurisdiction)
- Courts involved
- APA provisions
- "Administrative Record"

Standard/Scope of Review

- "Whole Record"
- The Actual Standards of Review
  - Substantial Evidence
  - Arbitrary & Capricious
- Deference to agency expertise

BRIEF DETOUR . . .

Back to the Standards of Review as You Should Already Be Familiar with Them . . .

STANDARDS OF REVIEW <u>ARE</u> *REAL*, PEOPLE!

"The rules governing judicial review have no more substance at the core than a seedless grape."

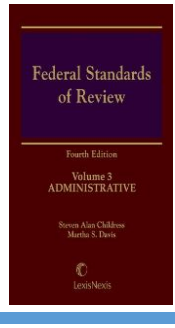
-Ernest Gellhorn

"That's HOGWASH."

-Professor Glencer

CORRESPONDING APPELLATE STANDARD OF REVIEW

QUESTION	STANDARD OF REVIEW
• Pure question of law	• De novo/plenary
• Pure question of fact	• Clearly erroneous (judge) or competent evidence (jury)
• Discretionary question	• Abuse of discretion
• Mixed question of law and fact	• *De novo* or clearly erroneous OR a mix of both.



VOLUME 3: AMINISTRATIVE APPEALS

Chapter 14 Administrative Decision-Making and Availability of Review

Chapter 15 Review Standards

Chapter 16 Review Based on Nature of Agency Procedure

Chapter 17 Review Based on Nature of Agency Decision

STANDARDS OF REVIEW – UNDERLYING THEORY

"[T]he fundamental notion behind a standard of review <u>is that of defining the relationship and power shared among judicial bodies</u>."

Steven Alan Childress & Martha S. Davis, FEDERAL STANDARDS OF REVIEW 1 (1st ed. Wiley 1986).

STANDARDS OF REVIEW – UNDERLYING THEORY

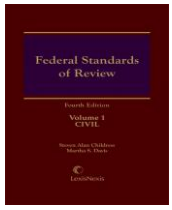
Our tiered legal system is built on a basic, <u>structural</u> assumption:

*that trial judges are better positioned to decide **questions of fact**, while the appellate bench is better suited to resolve **questions of law**.*

STANDARDS OF REVIEW – UNDERLYING THEORY

Standards of review are a "**body of law.**"

That body of law exists to help separate the kinds of questions on which appellate courts are expert from those they are ill-equipped to decide compared to the lower tribunal whose decision they are reviewing.



STANDARDS OF REVIEW – UNDERLYING THEORY

"[A] standard of review . . . focuses on the deference due to a lower court, jury or agency . . . It broadly defines the freedom or the handcuffs the appellate court carries in passing on the [correctness of actions undertaken by] prior decision makers within the judicial process."

Childress & Davis, FEDERAL STANDARDS OF REVIEW at 1:17.

Standards of Review as simultaneously:

- a *limiting* feature: prescribes the degree of deference the appellate court will give to the decision of the lower body.
- an *empowering* feature: prescribes the positive authority of the appellate court (what it can do something about)

STANDARDS OF REVIEW – Metaphors

Judge's Measuring Stick	Lens	Decibel Level to Catch the Judicial Ear	Height of the Hurdle

SHARED CONCERNS . . .

- Admin agency and reviewing court will share a concern with these items in every case (although not all of these items will be disputed every case):
  - Jurisdiction, Facts, Judgment, Law, Policy.
  - Structural considerations may favor the expertise of the agency over the court *or vice versa* for each of these 5 items
- APA § 706 (Scope of Review) was built with this in mind!

Section 706 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—

(1) **compel** agency action unlawfully withheld or unreasonably delayed; and

(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;

(B) contrary to constitutional right, power, privilege, *or* immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title *or* otherwise reviewed on the record of an agency hearing provided by statute; or

hearing

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, **the court shall review the whole record or those parts of it cited by a party**, and due account shall be taken of the rule of prejudicial error.

AGENCY EXPERTISE HAS A LARGE ROLE TO PLAY HERE TOO . . .



THE APA'S TWO KEY STANDARDS OF REVIEW

Substantial Evidence
Arbitrary & Capricious

Section 706 Scope of Review

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SUBSTANTIAL EVIDENCE STANDARD

- "This Court had described the APA court/agency substantial evidence' standard as requiring a court to ask whether **a reasonable mind might accept a particularly evidentiary record as 'adequate to support a conclusion.'"**
- The Court has also stressed "the importance of not simply rubber-stamping agency fact-finding."

Dickinson v. Zurko, 527 U.S. 150, 162-63 (1999).

NOT A SEEDLESS GRAPE!

A GRAPE WITH *MANY* SEEDS!

- An advocate knows what the seeds are and builds arguments around them.
- Find the seeds.
- Use the seeds.

WATCHING THE COURTS REVIEW ADMIN AGENCY ACTION

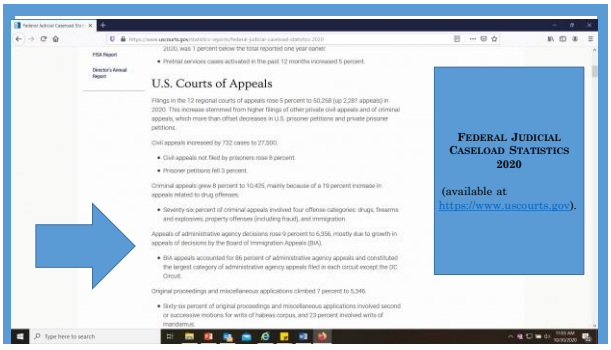
Hands-On Exercise: Two "Mine Run" Cases

TWO "MINE RUN" STYLE CASES

- *Taylor v. Commissioner of Social Security*, __ Fed. Appx. __, 2020 WL 5587705 (3d Cir. Sept. 18, 2020) (unpublished).
- *Esquivel v. Attorney Gen.* 805 Fed. Appx. 128, 2020 WL 1487824 (3d Cir. March 24, 2020) (unpublished).

Fiscal Year	New Court Cases Filed	Appealable AC RR Dispositions	Percentage
FY 2010	12,256	75,501	16.23%
FY 2011	14,236	94,476	15.07%
FY 2012	16,422	126,393	12.99%
FY 2013	18,779	137,381	13.67%
FY 2014	18,503	131,802	14.04%
FY 2015	18,399	123,682	14.88%
FY 2016 (52 Weeks) *	17,864	129,216	13.82%
FY 2016 (53 Weeks) *	18,239	133,024	13.71%
FY 2017	18,445	137,534	13.41%
FY 2018	18,252	130,396	14.00%
FY 2019	17,192	116,019	14.82%

Appeals to Court as a Percentage of Appealable AC Dispositions (available at https://www.ssa.gov)



U.S. Courts of Appeals

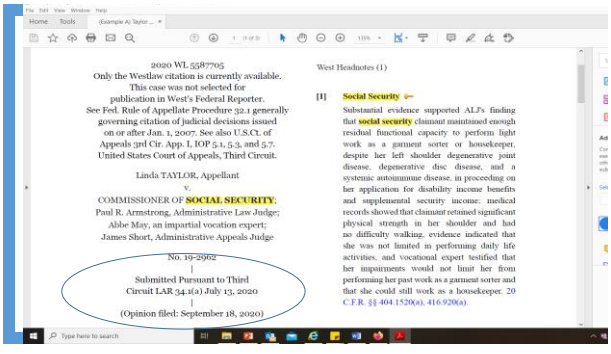
FEDERAL JUDICIAL CASELOAD STATISTICS 2020

(available at https://www.uscourts.gov).

HANDS-ON EXERCISE

As you read *Taylor*, look for:

- The **procedural history** (vis-à-vis the journey thru the system)
- The **substantive standard** for Disability Income Benefits & Supplemental Security Income decisions (i.e., 5-step test)
- The **scope/standard of review** for such decisions
  - The very **fact-intensive nature** of the inquiry
  - How **credibility determinations** are handled
  - Placement of the **burden** of persuasion
- Stress on admin agency "**explanation**"
- Any signs of **formulaic opinion writing** by the Third Circuit



2020 WL 5587705
Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

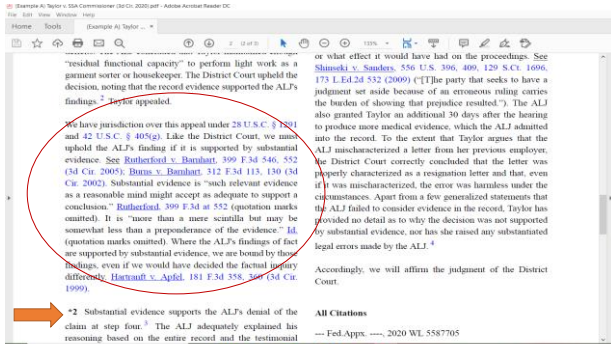
Linda TAYLOR, Appellant
v.
COMMISSIONER OF SOCIAL SECURITY;
Paul R. Armstrong, Administrative Law Judge;
Abbe May, an impartial vocation expert;
James Short, Administrative Appeals Judge

No. 19-2962
|
Submitted Pursuant to Third Circuit LAR 34.1(a) July 13, 2020
|
(Opinion filed: September 18, 2020)

West Headnotes (1)

[1] **Social Security**

Substantial evidence supported ALJ's finding that **social security** claimant maintained enough residual functional capacity to perform light work as a garment sorter or housekeeper, despite her left shoulder degenerative joint disease, degenerative disc disease, and a systemic autoimmune disease, in proceeding on her application for disability income benefits and supplemental security income; medical records showed that claimant retained significant physical strength in her shoulder and had no difficulty walking, evidence indicated that she was not limited in performing daily life activities, and vocational expert testified that her impairments would not limit her from performing her past work as a garment sorter and that she could still work as a housekeeper. 20 C.F.R. §§ 404.1520(a), 416.920(a).



"residual functional capacity" to perform light work as a garment sorter or housekeeper. The District Court upheld the decision, noting that the record evidence supported the ALJ's findings.[2] Taylor appealed.

We have jurisdiction over this appeal under 28 U.S.C. § 1291 and 42 U.S.C. § 405(g). Like the District Court, we must uphold the ALJ's finding if it is supported by substantial evidence. See Rutherford v. Barnhart, 399 F.3d 546, 552 (3d Cir. 2005); Burns v. Barnhart, 312 F.3d 113, 130 (3d Cir. 2002). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Rutherford, 399 F.3d at 552 (quotation marks omitted). It is "more than a mere scintilla but may be somewhat less than a preponderance of the evidence." Id. (quotation marks omitted). Where the ALJ's findings of fact are supported by substantial evidence, we are bound by those findings, even if we would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999).

*2 Substantial evidence supports the ALJ's denial of the claim at step four.[3] The ALJ adequately explained his reasoning based on the entire record and the testimonial

or what effect it would have had on the proceedings. See Shinseki v. Sanders, 556 U.S. 396, 409, 129 S.Ct. 1696, 173 L.Ed.2d 532 (2009) ("[T]he party that seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted."). The ALJ also granted Taylor an additional 30 days after the hearing to produce more medical evidence, which the ALJ admitted into the record. To the extent that Taylor argues that the ALJ mischaracterized a letter from her previous employer, the District Court correctly concluded that the letter was properly characterized as a resignation letter and that, even if it was mischaracterized, the error was harmless under the circumstances. Apart from a few generalized statements that the ALJ failed to consider evidence in the record, Taylor has provided no detail as to why the decision was not supported by substantial evidence, nor has she raised any substantiated legal errors made by the ALJ.[4]

Accordingly, we will affirm the judgment of the District Court.

All Citations

--- Fed.Appx. ----, 2020 WL 5587705

HANDS-ON EXERCISE

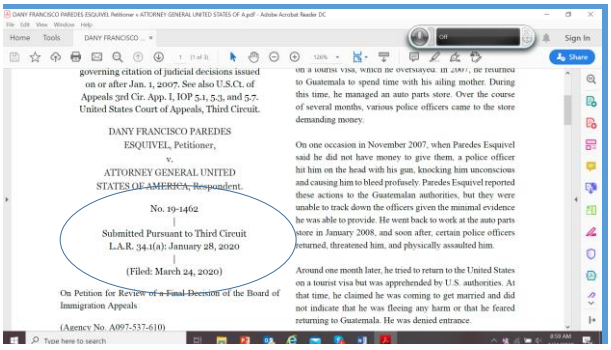
As you read *Taylor*, look for:

- The **procedural history** (vis-à-vis the journey thru the system)
- The **substantive standard** for Disability Income Benefits & Supplemental Security Income decisions (i.e., 5-step test)
- The **scope/standard of review** for such decisions
  - The very **fact-intensive nature** of the inquiry
  - How **credibility determinations** are handled
  - Placement of the **burden** of persuasion
- Stress on admin agency "**explanation**"
- Any signs of **formulaic opinion writing** by the Third Circuit

HANDS-ON EXERCISE

As you read *Esquivel*, look for:

- The **procedural history** (vis-à-vis the journey thru the system)
- The substantive standard for CAT decisions
- The **scope/standard of review** for such decisions
  - The very **fact-intensive nature** of the CAT inquiry
  - How **credibility determinations** are handled
  - Deference given
  - Points of disagreements between agency decision-makers (IJ & BIA)
- Any signs of **formulaic opinion writing** by the Third Circuit
- ***The question left open . . .***



governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7. United States Court of Appeals, Third Circuit.

DANY FRANCISCO PAREDES
ESQUIVEL, Petitioner,
v.
ATTORNEY GENERAL UNITED STATES OF AMERICA, Respondent.

No. 19-1462

Submitted Pursuant to Third Circuit L.A.R. 34.1(a): January 28, 2020

(Filed: March 24, 2020)

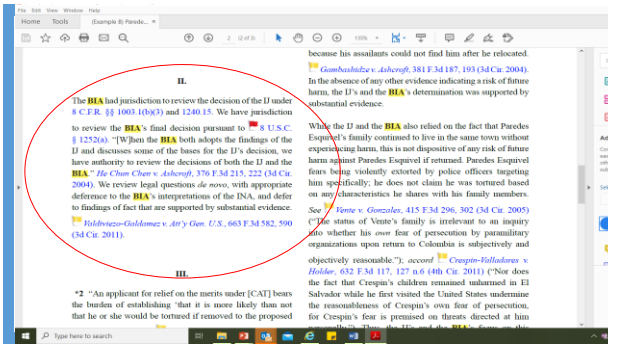
On Petition for Review of a Final Decision of the Board of Immigration Appeals

(Agency No. A097-537-610)

on a tourist visa, which he overstayed. In 2007, he returned to Guatemala to spend time with his ailing mother. During this time, he managed an auto parts store. Over the course of several months, various police officers came to the store demanding money.

On one occasion in November 2007, when Paredes Esquivel said he did not have money to give them, a police officer hit him on the head with his gun, knocking him unconscious and causing him to bleed profusely. Paredes Esquivel reported these actions to the Guatemalan authorities, but they were unable to track down the officers given the minimal evidence he was able to provide. He went back to work at the auto parts store in January 2008, and soon after, certain police officers returned, threatened him, and physically assaulted him.

Around one month later, he tried to return to the United States on a tourist visa but was apprehended by U.S. authorities. At that time, he claimed he was coming to get married and did not indicate that he was fleeing any harm or that he feared returning to Guatemala. He was denied entrance.



II.

The BIA had jurisdiction to review the decision of the IJ under 8 C.F.R. §§ 1003.1(b)(3) and 1240.15. We have jurisdiction to review the BIA's final decision pursuant to 8 U.S.C. § 1252(a). "[W]hen the BIA both adopts the findings of the IJ and discusses some of the bases for the IJ's decision, we have authority to review the decisions of both the IJ and the BIA." *He Chun Chen v. Ashcroft*, 376 F.3d 215, 222 (3d Cir. 2004). We review legal questions *de novo*, with appropriate deference to the BIA's interpretations of the INA, and defer to findings of fact that are supported by substantial evidence. *Valdiviezo-Galdamez v. Att'y Gen. U.S.*, 663 F.3d 582, 590 (3d Cir. 2011).

III.

*2 "An applicant for relief on the merits under [CAT] bears the burden of establishing 'that it is more likely than not that he or she would be tortured if removed to the proposed

because his assailants could not find him after he relocated. *Gambashidze v. Ashcroft*, 381 F.3d 187, 193 (3d Cir. 2004). In the absence of any other evidence indicating a risk of future harm, the IJ's and the BIA's determination was supported by substantial evidence.

While the IJ and the BIA also relied on the fact that Paredes Esquivel's family continued to live in the same town without experiencing harm, this is not dispositive of any risk of future harm against Paredes Esquivel if returned. Paredes Esquivel fears being violently extorted by police officers targeting him specifically; he does not claim he was tortured based on any characteristics he shares with his family members. *See Vente v. Gonzales*, 415 F.3d 296, 302 (3d Cir. 2005) ("The status of Vente's family is irrelevant to an inquiry into whether his *own* fear of persecution by paramilitary organizations upon return to Colombia is subjectively and objectively reasonable."); *accord Crespin-Valladares v. Holder*, 632 F.3d 117, 127 n.6 (4th Cir. 2011) ("Nor does the fact that Crespin's children remained unharmed in El Salvador while he first visited the United States undermine the reasonableness of Crespin's own fear of persecution, for Crespin's fear is premised on threats directed at him

HANDS-ON EXERCISE

As you read *Esquivel*, look for:

- The **procedural history** (vis-à-vis the journey thru the system)
- The substantive standard for CAT decisions
- The **scope/standard of review** for such decisions
  - The very **fact-intensive nature** of the CAT inquiry
  - How **credibility determinations** are handled
  - Deference given
  - Points of disagreements between agency decision-makers (IJ & BIA)
- Any signs of **formulaic opinion writing** by the Third Circuit
- ***The question left open . . .***

MASS ADJUDICATION . . .

- Social Security cases and BIA cases are species of "mass adjudication" handled, in the first instance, by an administrative agency.
- Realize how the "**substantial evidence**" standard of review applicable to judicial review of such cases doesn't give the courts much of a role to play.
  - Very high hurdle for claimant/petitioner to overcome
  - But perhaps there is *still* a valuable "oversight role" . . .

HANDS-ON EXERCISE

- **Introduction** from Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097 (2018).

ARBITRARY & CAPRICIOUS STANDARD OF REVIEW

Section 706 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—

(1) **compel** agency action unlawfully withheld or unreasonably delayed; and

(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;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

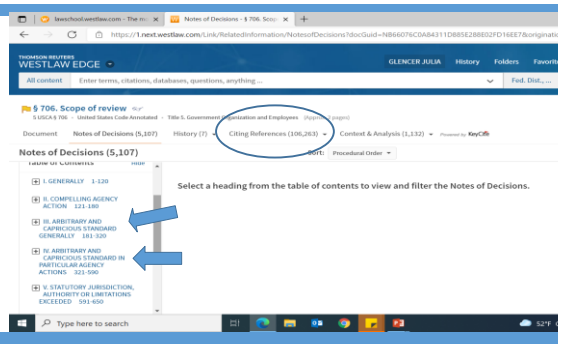
(D) without observance of procedure required by law;

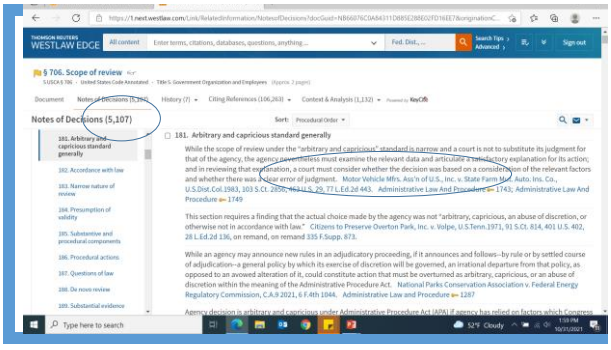
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

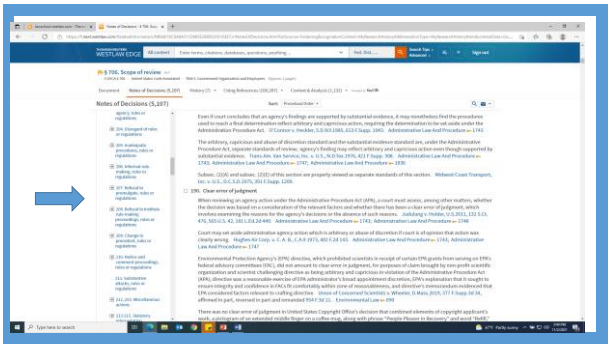
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

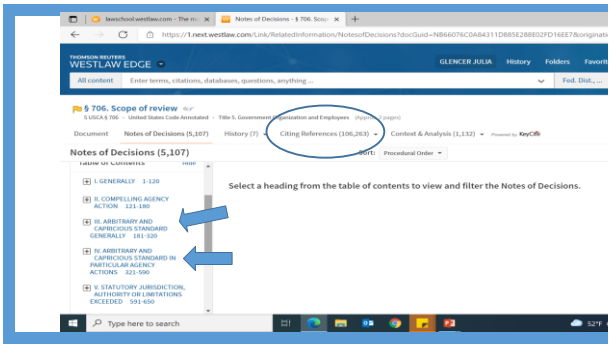
hearing

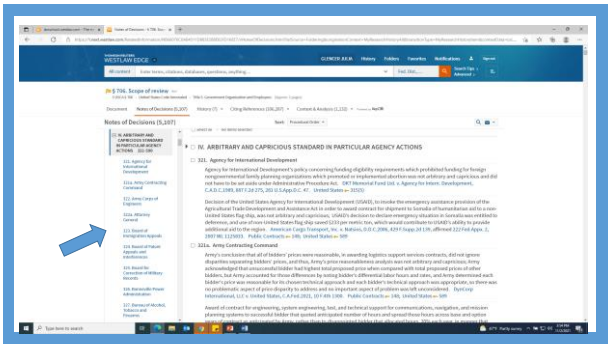
In making the foregoing determinations, **the court shall review the whole record or those parts of it cited by a party**, and due account shall be taken of the rule of prejudicial error.











BIG, IMPORTANT AND IN YOUR TEXTBOOK!

- *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983) (finding NHTSA's change in policy arbitrary & capricious).
- *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (Majority finding FCC's change in policy NOT arbitrary & capricious but the dissent said it WAS).
  - **For both of those cases, make sure you understand why the justices said the change was arbitrary & capricious or not.**
  - **Initially, in terms of generalities . . . (R/E)**
  - **Then, in terms of specifics . . . (A)**

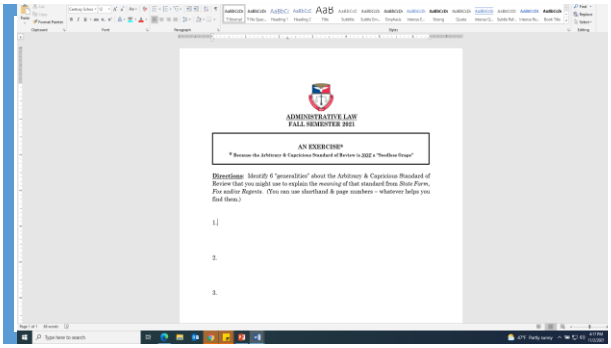
Your job is to go back into *State Farm* and *Fox* and "dig out" these kind of generalities.
Why?
Because ***these*** are what constitute the "law of the standard" that we call "arbitrary & capricious."

(Perhaps this law *is* INFINITELY MALLEABLE.)

NOT A SEEDLESS GRAPE!

A GRAPE WITH *MANY* SEEDS!

- An advocate knows what the seeds are and builds arguments around them.
- Find the seeds.
- Use the seeds.



FIND SOME SEEDS!

Take 10 minutes and find seeds in:

- *State Farm* (NHTSA action *was* arbitrary & capricious)
- *Fox* (FCC was NOT arbitrary & capricious)
- *Regents of Univ. of California* (remanded to DHS for what?)