

Comment from Public Member John F. Duffy on *Procedural Fairness in Judicial Review*
December 4, 2020

I was able to listen to the meeting yesterday, but unfortunately, I wasn't able to make any comments because the software kept me on mute. I think that I needed an "audio pin" in order to unmute myself, or maybe I was making some other error.

In any event, here are some additional thoughts.

1. The Overall Project and Its Title: Towards the end of the meeting, Kristin said that she read my comments as favorable to the overall project, and she's quite correct. She also said that the title "Housekeeping Rules of Judicial Review" was probably not the optimal title, and I agree with that too. Perhaps something along the lines of "Fair and Reliable Access to Judicial Review" might be better. I do think that the overarching thrust of Jon Siegel's suggested changes is to assure access to judicial review by, for example, eliminated traps for the unwary. Of course, that title is a mere suggestion, but I do think it's worthwhile to come up with a title that fits the project.

2. A Choice-of-Forum Project: The issue whether review should be in courts of appeals or district courts is a very interesting topic, but I also think that it logically is outside the scope of the project envisioned by Jon Siegel. His focus is, as my suggested title above suggests, on ensuring reasonable access to review, not on where review should occur. That said, I think that an updated choice of forum project might be a good idea. The prior ACUS project on the same issue does not seem preclusive given that a lot has changed in judicial review in the ensuing decades.

One additional point about the choice of forum issue not mentioned yesterday is that the Census Case (Dept. of Commerce v. NY) adds a new dimension to the issue. If reviewing courts are now going to be entertaining claims of pretext even to a small degree, then the discovery and fact-finding processes of district courts are going to be necessary. I'm not so sure what I think about the Census Case, but it does seem like the litigation would have been quite different if review had been originally in a court of appeals.

3. Section 2401(a): I do think that the general statute of limitations in 28 U.S.C. § 2401(a) should be within any "Access to Judicial Review" project. Unlike the choice-of-forum issue, the general statute of limitations seems to fall within the type of issue that should be addressed within Jon's project (whatever we call it).

4. Review in Enforcement Proceedings: The issue whether review can be obtained in enforcement proceedings is also, I think, within the scope of Jon's contemplated project. It's true, as Jon said on the call yesterday, that section 703 of the APA seems to give a good rule on that matter (allowing judicial review in enforcement proceedings unless there was "prior, adequate, and exclusive opportunity for judicial review," but section 703 did not seem to be a clear winner for the party seeking review in *PDR Network, LLC v. Carlton Harris Chiropractic, Inc.* I realize that this issue is a bit more controversial than many of the ones targeted in Jon's

seven suggestions that we discussed yesterday, but I think ACUS should examine it and that it does lie within the logical scope of the project contemplated by Jon.

5. Section 702 and Sovereign Immunity: Finally, Jon yesterday mentioned one of ACUS's great successes was in getting section 702 of the APA amended to allow parties to name the United States and its agencies as defendants in review proceedings. As Jon mentioned yesterday, the law before that amendment was that the plaintiff had to sue the relevant agency officers in their official capacity because otherwise the suit was barred by sovereign immunity. In at least some litigations, DOJ in recent years has argued that, if a plaintiff relies on that change and does sue the United States but not the officers, then the lawsuit is fully subject to the canon of statutory construction that waivers of sovereign immunity should be construed strictly. Theoretically, this could lead to a suit for judicial review being dismissed if only the agency is named as the defendant (because all statutory requirements of the APA are construed strictly) where the very same suit could have been entertained if the plaintiff had merely named that agency head as the defendant (because suits against officers in their official capacity do not need any waiver of sovereign immunity, and thus for purposes of that suit, the requirements of the APA would not be strictly construed. I'll try to find some examples of cases in which DOJ has made this argument, but it seems like an argument that really undermines to some extent the reliability of the section 702 amendment that ACUS supported long ago.

That's all!