



COMMENTS: ALEX PLATT SUMMARY JUDGMENT PAPER

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APA originalism and textualism: Non-textual, non-original interpretations

Examples:

- APA definition of "rule" and FTC cease and desist orders

- Treating generalized ratemaking as informal rather than formal rulemaking. *Florida East Coast Ry*

- Allowing general rules to trump statutory requirements for a hearing. *Campbell v. Heckler*

- Construing §553 to require disclosure of scientific evidence & ignoring

- Ignoring the provision that statements of basis and purpose be "concise"

Administrative summary judgment is efficient

- ALJ hearings are costly and agencies are underfunded in relation to their responsibilities. Holding an ALJ hearing when there are no disputed issues of material fact is poor use of limited resources. Limits the amount of agency enforcement.
- *Weinberger v. Hynson, Wescott & Dunning*, 412 US 609 (1973) establishes utility and necessity for administrative summary judgment.

Effects of prohibiting SEC's use of SJ

- Would apply across the government. Supreme Court very reluctant to do this and prefers deference to administrative choices of procedure. Example: *Withrow v. Larkin* (separation of functions), *Mathews v. Eldridge* (deference to agency procedural choice), *Richardson v. Perales* (residuum rule)
- Is paper really motivated by opposition to SEC's "broken window" enforcement policy? Then that should be opposed—but not by stripping SEC & other agencies of needed procedural flexibility. Note that every SEC complaint has to be approved by agency heads to assure it reflects current enforcement policy.

Reframing the paper

- Summary judgment should not apply if there are issues of agency discretion that might benefit from an oral hearing such as in determining the appropriate sanction. E.g. in SEC "follow-on" proceedings or in enforcing "broken window" provisions.
- What's the appropriate penalty? Civil \$ penalty—how much; disqualification of registration statements; suspension or revocation of licenses; cease and desist orders; warning or note in the file?
- Respondent's state of mind of respondent, degree of culpability, ability to pay, deterrent effect