

LAW 222 - FEDERAL COURTS
Instructor in Charge: Professor W. Fletcher

TIME ALLOWED: 3 HOURS

INSTRUCTIONS:

This is a 3 hour exam. There are four questions. I suggest that you allocate your time as follows:

- Question 1: 1 hour
- Question 2: 1 hour
- Question 3: 30 minutes
- Question 4: 30 minutes

I will weight the questions in proportion to the times suggested. Please save enough time for the last question.

The examination is designed to be completed in the time provided, but you will have to move right along to do so. Please keep careful track of your time.

The examination is open book. You may bring into the examination room with you any materials assigned in this course, plus any notes. No commercial outlines or other outside reading.

Question 1

(suggested time: 1 hour)

The federal Clean Air Act (CAA) requires the Administrator of the Environmental Protection Agency (EPA) to regulate air pollutants in certain circumstances. It provides:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class of new motor vehicles or new motor vehicle engines which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1). “Air pollutant” is defined as follows:

The term “air pollutant” means any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.

Id. § 7602(g). The CAA provides that

any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under [the CAA] which is not discretionary with the Administrator[.]

Id. § 7604(a)(2).

The Administrator of the EPA has concluded that he does not have authority under the CAA to regulate so-called “greenhouse gases.” Such gases include carbon dioxide, which is produced by combustion of fuel in vehicle engines. After being emitted into the “ambient air” from the exhaust pipe of a motor vehicle, most carbon dioxide rises to the upper atmosphere (the “troposphere”) where it is not breathed by humans.

There is credible scientific evidence that carbon dioxide in the troposphere contributes to global warming. There is also credible scientific evidence that global warming, in turn, contributes to the melting of ice in Greenland, Antarctica, and other places, with the consequence that sea levels will eventually rise. The timing and amount of any increase in sea level is somewhat uncertain.

Massachusetts and California have brought suit in federal district court under § 7604(a)(2), *supra*, seeking an injunction that would require the Administrator to promulgate regulations requiring the reduction of emissions of carbon dioxide by new motor vehicles. (Existing motor vehicles would not be affected by the regulations.) All of the currently operating motor vehicles in the United States contribute no more than 6% of the carbon dioxide produced in the United States in a year. If the EPA aggressively regulates greenhouse gases produced by new motor vehicles, it is possible that a reduction of slightly less than 50% of the carbon dioxide that would otherwise be produced may be achieved. The United States currently produces about one-third of the greenhouse gases produced in the world every year. The rapid industrialization of China is responsible for substantial yearly increases in the amount of carbon dioxide emissions. The anticipated increase in carbon dioxide emissions from China during the next decade is many times greater than any decrease in carbon dioxide emissions that may be achieved over that same period by any EPA regulation of emissions by new motor vehicles in the United States.

Massachusetts owns several hundred miles of property along the ocean shore. If sea level rises, this shoreline property will be adversely affected.

California, like Massachusetts, owns hundreds of miles of property along the ocean shore. In addition, unlike Massachusetts, California has explicitly been granted authority by the federal CAA to regulate emissions of air pollutants from motor vehicles more stringently than the EPA. 42 U.S.C. § 7543(b). However, the CAA's grant of authority requires that any California regulation be "consistent" with EPA regulation of air pollutants under 42 U.S.C. § 7521(a)(1), *supra*. There is a substantial argument that if the EPA has no authority to regulate carbon dioxide emissions from new motor vehicles under § 7521(a)(1), California also has no such authority; on the other hand, if the EPA does have such authority, so does California.

Do Massachusetts and California have standing to pursue their suit in federal district court? Please discuss.

After the examination, you may wish to consult *Massachusetts v. Environmental Protection Agency*, 415 F.3d 50 (D.C.Cir. 2005), *cert. granted* 126 S.Ct. 2960 (2006), from which this question was drawn (with some modifications). Oral argument was held in the Supreme Court on November 29, 2006.

Question 2

(suggested time: 1 hour)

You work for a United States Senator who would like to address two problems:

(1) Dissatisfaction with the Court of Appeals for the Federal Circuit: Federal district courts have exclusive subject matter jurisdiction over suits brought to enforce federal patents. 28 U.S.C. § 1338. Appeals in patent cases do not go the regional Courts of Appeals (such as the First Circuit, Second Circuit, etc.). Rather, all patent appeals go the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(1). The Federal Circuit is an Article III court. In recent years, the United States Supreme Court has become increasingly dissatisfied with the performance of the Federal Circuit in deciding patent appeals. *See, e.g., KSR International v. Teleflex*, 292 F. Supp. 2d 581 (E.D.Mich. 2003), *vacated and remanded*, 119 Fed. Appx. 282 (2006), *cert. granted*, 126 S. Ct. 2965 (2006) (oral argument November 28, 2006).

(2) Availability of state sovereign immunity in patent cases: In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (p. 1029 in the casebook), the Supreme Court held that the Eleventh Amendment protects an unconsenting state from suit in federal court for patent infringement under the federal Patent Remedy Act. Many patent holders have been left without effective remedies against state infringers, including state universities.

To address these problems, your Senator has drafted a Bill:

(1) In response to the first problem, the Bill would take all patent cases out of the Article III courts and give them to specially constituted Patent Courts. The Patent Courts would decide all cases involving questions of the validity of federal patents, and of patent infringements. There would be Patent Trial Courts, several regional Patent Courts of Appeals, and one Supreme Patent Court. No appeal would be available from a decision of the Supreme Patent Court to the United States Supreme Court. The Judges of the Patent Courts would be nominated by the President and confirmed by the Senate. If confirmed, a judge on any of the Patent Courts would serve for a 15-year term.

(2) In response to the second problem, the Bill would authorize the Patent Courts to entertain suits against state universities and their employees when (a) the university engages in federally financed research, has an established division dealing with university-owned patents, and has earned in excess of \$1 million per year from its patents during each of the past five years; and (b) the university and/or its employees are alleged to have infringed the plaintiff's patent. For what it is worth, I remind you of *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S.Ct. 1864 (2002) (p. 1061 of the casebook), in which the Court held that a state can assert sovereign immunity as a defense in a proceeding before a federal administrative agency.

Please evaluate your Senator's Bill.

Question 3

(suggested time: 30 minutes)

Your Senator has another idea. She has drafted a Bill that would allow appeals to a State Supreme Court in all cases in which either a United States Court of Appeals or the United States Supreme Court has decided a question of state law. If the case has been decided by a United States Court of Appeals, the loser in that court can appeal right away to the State Supreme Court of the State in which the district court was located; or the loser can seek certiorari in the United States Supreme Court, and, upon denial of certiorari, appeal to the State Supreme Court. If the case has been decided by the United States Supreme Court, the loser can appeal to the State Supreme Court of the State in which the district court was located. In all appeals to the State Supreme Court, the jurisdiction of that court would be limited to questions of state law decided by the federal court.

If your Senator's Bill is enacted, would the law be constitutional? Would it be a good idea? Please discuss.

Question 4

(suggested time: 30 minutes)

If the Supreme Court were to reverse *Lincoln County v. Luning*, 133 U.S. 529 (1890) (p. 985 of the casebook), and hold that counties, municipalities, and other forms of local government have sovereign immunity to the same extent as the states, what would change? Please discuss.