# Access to Judicial Review and Finality

# Learning Objectives for this Module

## Learn how Congress can limit judicial review of agency actions.

## Learn that judicial review is favored but will be limited based Congressional intent.

## Learn that even if review will be highly deferential, the agency still must support its decisionmaking in the record.

## Learn how to argue whether an agency action is final and thus reviewable.

# Reading Assignment

## Chapter 6, 241-261.

# Issues to be addressed

## Access to Judicial Review

### Statutory Preclusion of Judicial Review

#### Since Congress creates jurisdiction, Congress has the power to limit judicial review of agency actions, including allowing no review at all.

#### This is subject to constitutional limits

##### Congress could not limit the review of due process questions which arise under the Constitution.

##### Congress could not limit taking claims if agencies took property.

#### If Congress is silent on the availability of judicial review in a particular statute, should the courts imply judicial review?

##### Do you think federal judges would be biased toward finding review or denying review?

#### If there is implied judicial review, does the statutory language giving the agency the power to make a decision, "Committed to agency discretion" mean that the decision is not subject to judicial review?

### If there is review, when should the court allow review? (Prelude to the later ripeness discussion)

#### Should the plaintiff be able to get review of an agency regulation before the agency takes enforcement action?

##### This is facial review of a statute which you studies in constitutional law.

##### What are the problems with a facial review?

##### How are these similar to the problems of pre-enforcement review?

#### "As Applied" (Post-Enforcement) Review (discussed later as Ripeness)

##### Why does the agency prefer post-enforcement review?

##### What additional information does the court get when it requires the plaintiff to wait until there is enforcement?

##### What if the penalties are so Draconian that no one will risk enforcement?

#### Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) - Is There Review?

##### Abbott Labs is an early foundational case in administrative law. We read Abbott Labs for two issues. The first is whether there is any judicial review at all, in the absence of specific congressional authorization. The second issue is the timing for review, i.e., was the issue ripe?

##### This was a dispute over the authority of the FDA to require the generic name on prescription drug labels

###### The plaintiffs claimed that the FDA exceeded its statutory authority

###### FDA said that this was not reviewable because the enabling act provided for specific review of other actions and this was not included in the list

##### The Court found that judicial review is favored, and that it would not hold it precluded unless the congressional intent was clear.

#### Block v. Community Nutrition Institute, 467 U.S. 340 (1984)

##### Clarified Abbott's policy on reviewability

###### Consumers wanted to challenge rules under the milk price support law, which was intended to protect milk producers

###### Congress had specified who could appeal these orders and how, and this did not include consumers.

###### Plaintiffs argued that under Abbott, the court should imply that Congressional silence on consumer review should allow review.

##### The Court found that the silence, when read with the Congressional intent of the act to protect farmers, was enough to show intent to prevent consumer claims.

###### In more modern cases, as will be seen latter, this might also be seen as a zone of interest question - where the consumers in the zone of interest meant to be protected by the law?

## Does Committed To Agency Discretion By Law Mean No Judicial Review?

### 5 U.S.C. § 701(a)(2) (§ 701, et seq is judicial review)

#### (a) This chapter applies, according to the provisions thereof, except to the extent that -

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

### This is related to the political question doctrine

#### The courts recognize that agencies are charged with making policy under the direction of the legislature and the executive branches.

#### The proper review of a policy choice is through the ballot box.

### Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)

#### Congress said no federal money to build roads in parks if there was a "feasible and prudent" alternative.

#### The Secretary authorizes a road in a park and tells plaintiffs challenging the decision that it is within his discretion and cannot be reviewed by the courts.

#### Thinking back to way the delegation doctrine problem was resolved, the court needs to find whether the statute has provided a standard (intelligible principle) to review this decision.

#### If there is no principle to review the decision, and the decision is otherwise proper for the secretary to make, then it would be an unreviewable policy choice.

#### The court found that "feasible and prudent" provided adequate law to guide judicial review.

#### Committed to agency discretion was held to be very narrow, unless specified by statute.

#### The key procedural point from this case is that the court while the court was willing to defer to the secretary’s decision, it would only do so if the decision was properly documented in the record. In this case that meant showing that that agency had considered alternatives and found them unsuitable.

### Heckler v. Chaney, 470 U.S. 821 (1985)

#### The FDA Act directs the agency to require that drugs be approved for a specific use before they can be sold in interstate commerce

#### The agency does not police the use of drugs for unapproved purposes, once they are approved for at least one use

#### Plaintiffs (inmates on death row) sued to force the FDA to prevent the use of approved drugs for lethal injections.

##### The court rejected this challenge, finding that the choice to not enforce the law against the prisons was classic prosecutorial discretion, which an agency did not have to justify.

##### (Later cases established that the FDA did not have the authority to regulate post-sale use.)

### Decisions on Rulemaking Petitions

#### The court distinguished a decision to refuse to amend a rule as different from prosecutorial discretion to do enforcement, allowing judicial review of these decisions.

#### This review is implicit in the statutory provision for rulemaking petitions.

##### American Horse Protection Assn., Inc. v. Lyng, 812 F.2d 1 (D.C. Cir. 1987)

#### As we have learned, the extent of this review may be very limited.

### Webster v. Doe, 486 U.S. 592 (1988)

#### National Security Act allows CIA employees to be fired without due process or judicial review

#### How would this affect the analysis of an expectation of continued employment?

#### The court found that limiting this review was within congressional power, especially for national security.

#### However, the court also said that the plaintiff's constitutional law claim can be reviewed because no agency is above the constitution

##### Dissent says this makes no sense because it undermines the agency discretion.

##### This might only support constitutional claims, such as being fired for being black, rather than just being fired because the agency was unhappy with your work.

### Lincoln v. Vigil, 508 U.S. 182 (1993)

#### We have seen this case before, it concern the Indian health service’s choice on spending certain funds.

#### We learned earlier that this was not reviewable because it was a classic policy choice.

#### However, whether the policy has to be announced through notice and comment versus a simple policy statement, is reviewable

#### The procedure may be reviewable, even if the policy is not.

## Problems of Timing

### If there is jurisdiction for judicial review, then there are three questions about the timing of the review.

### Is there a final agency action to review?

### Did the plaintiff exhaust all of the required internal agency procedures before going to court?

### Is the problem ripe, i.e., does court have enough information to review the action?

## Is There a Final Agency Action?

### APA - 5 USC 704

#### Similar to the rules on appealing orders by trial judges

### Bennett v. Spear, 520 U.S. 154, 177-178 (1997)

#### It must be the consummation of the agency process

#### It must affect legal rights or have legal consequences

### Federal Trade Commn. v. Standard Oil Co. of California, 449 U.S. 232 (1980)

#### FTC finds that Standard Oil is engaging in anticompetitive practices

##### Standard wants to appeal this

##### Can be used in private antitrust actions

##### Court says this alone does not have legal consequences

##### Standard must wait until the agency brings an enforcement action

### National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971)

#### Agency opinion letters - are they just restating the law, or do they change substantive rights?

#### This letter was to an association explaining how the agency would interpret a new law

##### Detailed explanation

##### From the secretary's office

##### Not based on individualized facts

#### In this case, the court found that the opinion was sufficiently specific and from a high enough level to affect the plaintiff's rights.

##### In a modern court, this would likely be seen as a question of whether this was a rule, requiring notice and comment, or an interpretive guidline.

### Taylor-Callahan-Coleman Counties Dist. Adult Probation Dept. v. Dole, 948 F.2d 953 (5th Cir. 1991)

#### This is a classic question - even if an opinion letter is final action as to the requestor, does it apply to others?

#### The opinion was to an individual party, based on that party's specific facts. An example would be IRS letter rulings and OIG opinions.

#### The plaintiff was a third party who wanted to challenge the opinion as it would be applied to it.

#### The court found that this was not a final agency action, at least as to other parties.

### Franklin v. Massachusetts, 505 U.S. 788 (1992)

#### MA wants to contest the method the Department of Commerce used to correct the census numbers

#### Why does this matter?

#### The President is charged with determining the final count, and Congress does the reallocation of representatives

#### The court found that the report from Commerce was only a recommendation to the President

#### Still an issue: who do you count?

### Western Ill. Home Health Care, Inc. v. Herman, 150 F.3d 659 (7th Cir. 1998)

#### This was an opinion letter to two specific parties about whether they were subject to the joint employer doctrine

#### The letter said they were, and that they were now on notice so they would be subject to the penalties for a willful violation

#### The court found this was a final agency action as to the parties because it required an immediate change in behavior

##### This was influenced by the harsh results

### Finality Wrap-up

#### Is the agency action directed to your client?

#### If not, what is your argument as to why it affects your client’s interests?

#### Is it complete, or an intermediate action?

#### Does it have legal consequences, i.e., will it require your client to change its behavior?

#### Does it require an immediate change?

# Evaluation Questions

## Availability of Review

### Your corporate client is concerned about a new agency guideline that seems to require it to engage in costly relabeling of its main product line. You have filed a challenge to the guideline. The enabling law is silent on the right to judicial review of the agency’s actions. The agency says there is no final agency action because this is just an interpretation of the statute that does not change legal rights. The agency has asked the court to dismiss your challenge as premature, arguing that your client will get its day in court if the agency brings an enforcement action against your client.

#### What is your response to the agency position that there is no statutory provision allowing a challenge until the agency applies the statute?

#### How does the later *Block* case modify this *Abbott* driven claim to reviewability? How would you restate *Block* as a zone of interests case?

### What standard did the court develop in *Overton Park* to review decisions which in which the Secretary’s decisions were “committed to agency discretion by law.”

#### If you are advising an agency, how does the *Overton Park* standard affect how you build the agency’s record justifying its decisions?

#### How has the court applied this to complicate the process of rulemaking?

### What are the limits the court has imposed on Congressional authority to take away the judicial right of review of agency actions?

#### Does the original jurisdiction of the United States Supreme Court come into your answer?

### Congress gives the Indian Health Service unallocated money in its budget. Congress earmarks the money for a new health center.

#### What is an earmark?

#### The Indian Health Service does not build the health center. Can this decision be challenged by the affected tribe?

#### Why?

### What is collateral estoppel?

#### What does a party have to how to show that an action is collaterally stopped?

#### What if the agency has lost on the legal point against other parties in a different circuit?

### What is non-acquiesce and what policy issues does it raise?

### What is the general rule on which actions are reviewed by district courts and which are reviewed by circuit courts?

#### What is it that circuit courts are not in a position to do?

## Is there a Final Agency Action to Contest?

### As soon as you convince the court that you have a right to review, you have to show the court that there is a final agency action to review. What is this a constitutional requirement?

### What is a facial challenge to a regulation or agency policy?

#### Why are facial challenges disfavored by the courts?

#### What additional information does the court get when it requires the plaintiff to wait to until there is enforcement?

### How would you analyze the finality action question in challenges to non-legislative rules, i.e., guidelines, letter rulings, etc.?

#### *National Automatic Laundry* was a 1971 case. With the evolution of the law since then, what is another way of looking at the letter in that case which would make it easier to attack in a modern court?

### What was the final agency action problem in the *Standard Oil* adjudication?

### Parents of children with ADHD are suing the FDA to force it to take enforcement action against a Louisiana physician who is selling a crayfish based ADHD treatment over the Internet. Assume this is within the FDA’s legal powers, but FDA does not think it is worth the effort. How would you defend the agency’s refusal to act in this case?