# 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.

## Learn why failing to exhaust administrative remedies before going to court is a fatal error.

## Learn when APA exhaustion applies and its limits.

## Learn that if the APA does apply, common law exhaustion is much stricter.

## Learn what issue exhaustion is and when it might be waived by the court.

# Reading Assignment

## Chapter 6, 241-261.

# Issues to be addressed – Preclusion and Finality

## 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 studied 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 - were 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 concerns 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 the 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 and thus constitute final agency action?

#### 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 as interpretive guidance.

### 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.

##### Has this been generalized by Sackett?

## Sackett v. EPA, 132 S.Ct. 1367 (2012) – decided after the 4th edition of the book was published.

### The book discusses compliance orders in the next section under ripeness, but Sackett looks more like a finality case.

### Are EPA Clean Water Act compliance orders final, appealable orders?

#### These differ from the usual compliance order in that the EPA starts the penalty clock from the issuance of the compliance order.

#### Thus there is an ever increasing penalty for delay in complying.

#### You cannot get review until enforcement, but the penalty keeps going up if you lose.

### Facts and procedural background

#### Why do we want to protect wetlands?

#### The EPA has the legal authority over the wetlands, which is partially delegated to the Army Corps of Engineers, but the EPA retains the right to overrule the granting of wetland permits. The EPA policy is “no net loss” of wetlands. Wetlands are defined by vegetation types, not just by being wet. In areas such as Louisiana the weather and climate allow what would otherwise be wetland vegetation to grow upland, making the determination of whether land is wet complex and controversial. When land is found to be wet, it is said to be jurisdictional, meaning that the Corps has wetlands jurisdiction over it. Once there is a jurisdictional determination, the wetlands development limitations apply, as well as hefty fines and criminal penalties for violating the determinations.

#### The Sacketts filled in part of their 2/3 acre lot with dirt and rocks to allow them to build house. They soon received a Compliance Letter from the Corps telling them that they had illegally filled in a wetland without a permit. It directed them to immediately restore the land and specified that they would be subject to fines of up to $75,000 a day for violating the Clean Water Act and the Compliance Order. The Sacketts asked for a court hearing and the government replied that these orders were not final agency action and thus could not be appealed. The lower courts recognized that this was the precedent and did not grant the hearing.

### Legal analysis

#### How would you analyze whether this is final agency action?

#### How would this change your analysis from the ordinary compliance order?

#### How have the Sackett’s legal rights been affected?

#### Does the Court need more information in the record to review this?

#### What did the United States Supreme Court decide?

### What about the JD itself?

#### There is a case before the United States Supreme Court this term reviewing whether the JD (jurisdictional determination) itself is final agency action even without a compliance order.

#### How would you analyze this question?

#### How do you think the Court should rule?

## 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?

# Issues to be addressed – Exhaustion of Remedies

## Key Questions

### Does the plaintiff have to go through the agency process before going to court?

### Does the plaintiff have to present the same issues to the agency as will be challenged later in court?

### Failing to exhaust agency remedies is a source of significant malpractice

#### Some of the Katrina levee cases were dismissed because the plaintiffs did not exhaust their remedies before filing suit.

## Is Exhaustion Required by Statute or Regulation?

### The key question under the APA is whether the enabling act or an agency regulation requires exhaustion

#### If exhaustion is not required, then the party may go to court directly

#### However, if there is an agency process available, and you lose in court, you may have waived your agency appeal

### APA - 5 U.S.C. § 704

#### . . . Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

#### Under § 704, can the agency enforce an order and still require exhaustion of agency appeals process?

#### Why would this be logically inconsistent?

#### (There is also common law exhaustion for non-APA cases, as discussed later.)

## Example: HUD Regulations

### HUD regulations allow, but do not require that an administrative appeal be filed

### The granting of the appeal is discretionary with the secretary

### The ruling of the ALJ becomes final in 30 days and is not stayed by a request for a hearing.

### Must you request an administrative appeal before going to court?

#### Remember 704

## Common Law Exhaustion: Portela-Gonzalez, 109 F.3d 74 (1st Cir. 1997)

### Plaintiff is fired from a civilian Navy job

#### The APA does not apply by statute

### Plaintiff appeals through 3 levels, but skips last level.

#### Firing is in force during appeal

### Under the APA, she could go to court, but under common law exhaustion she has to go through the entire agency process even though the agency action has not been stayed.

#### She does not have a final ruling if there is agency process left.

#### Just knowing that you are going to lose through the agency process is not enough

### Equitable Exceptions to Common Law Exhaustion

#### Will requiring exhaustion prevent the court from properly reviewing the action?

#### Will the plaintiff suffer irreparable harm?

#### Can the agency process provide the requested relief?

#### Is the agency so biased or prejudiced that it cannot give a fair review? (This, as we have learned, is nearly impossible to prove.)

## What if You Screw Up Your Administrative Appeal?

### Assume that a person tried to exhaust the administrative appeals, but makes a procedural error such as missing a deadline, and the appeal is dismissed by the agency

### Since there is no further process available at the agency, has he exhausted the agency remedies?

### Has he gotten a final judgment from the agency on the merits?

### Can you go to court without a final ruling from the agency?

### Can you get to the Supreme Court in an Article III case if you screw up the appeal to the Circuit Court?

## Administrative Issue Exhaustion

### Must each issue that will be appealed to the courts be raised at the agency level?

### What about in a regular trial: If you do not present an issue to the trial court - other than a jurisdictional issue - can you raise it at the first time on appeal?

### What if you raise some issues with the agency, but not others - can you then appeal the ones you raised?

## Sims v. Apfel, 530 U.S. 103 (2000)

### Social Security disability benefits

### The court held that the general rule is that plaintiffs who are subject to exhaustion of remedies must also present the issues they want to appeal to the agency

### In the specific case, the court found that the special nature of SS militated against preclusion. While the proceeds are formal adjudications, they are in actuality informal, and applicants seldom have counsel.

### Thus the court can waive issue exhaustion if you can argue a compelling reason that it would be unfair in your client’s case.

## Issue Exhaustion in Rulemaking

### How would you argue for issue exhaustion in rulemaking?

### When do parties have a chance to object to provisions in a rulemaking?

### Should they be required to make their objections during the comment period if they plan to challenge the rule later in court?

### Is this analogous to an administrative appeal of an order?

### What if the party did not raise the issue in a comment, but someone else did?

# 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?

## What is exhaustion of remedies?

### What are the APA requirements for exhaustion of remedies?

### What does *Portela-Gonzalez* (the civilian employee of the Coast Guard who was contesting her firing) tell us about common law exhaustion as compared to APA exhaustion?

### Put exhaustion of remedies into the larger administrative law context: Why is failing to exhaust your remedies (if required and not within an exception) a fatal error that the court cannot correct on equitable grounds, i.e., why does it mean standing fails?

### What are the exceptions to exhaustion of remedies?

#### Why might you choose to go through the agency appeals process even if you could go directly to court under an exception, or because exhaustion is not required for your case?

## What is administrative issue exhaustion?

### If you are given a fact situation, how would you analyze it to determine whether the court might waive issue exhaustion and what your argument should be? How would the *Matthews* analysis fit in your argument? Jurisprudentially, how do you argue that it is OK to waive the failure to present all the issues, given that exhaustion itself cannot be waived?

## What is the futility doctrine and what do you have to do to successfully invoke it?