# Chapter 6 - Standing to Seek Judicial Review and the Timing of Judicial Review

## Getting into court

### What do we mean when we talk about the original jurisdiction of the United States Supreme Court?

### Are federal agency actions within the original jurisdiction of the United States Supreme Court?

### Where does jurisdiction for actions that are not part of original jurisdiction come from? (Exclude pure constitutional claims such as *Bivens –* discussed in section on suing the government.)

### Which APA section is the general provision for getting into court when the agency does something against the law?

### 28 USC § 1331 provides basic jurisdiction for federal questions.

#### Where must actions brought under § 1331 be brought?

#### Why might this be a problem for reviewing agency actions?

#### Why has congress moved most agency appeals to the circuit courts?

#### If the agency enabling act says an action MAY be brought in the appeals court, what have most courts said about whether MAY really means MUST?

### What is the case and controversy requirement?

#### Can case and controversy be waived by Congress?

#### What does it have to do with advisory opinions from federal courts?

## Standing

### Discuss the components of standing:

#### Injury

#### Causation

#### Redressability.

### The Sierra club needs a member with standing to contest an order allowing the cutting of redwood trees in a wilderness area that is remote, but is accessible to hikers.

#### Joe really likes trees and thinks about them a lot. He wants to protect the redwoods, but he never gets out of NYC. Can he get standing?

#### What will a person need to show to get standing?

### The EPA has issued a permit to cut bristlecone pine trees on a mountain top that is not accessible to the public.

#### What standing problem does this create when the Sierra Club wants to contest the order?

### What are the issues with getting standing to challenge agency actions that affect animals?

#### What if you work with lab animals?

#### Does it matter when?

#### Visit the zoo regularly?

### Indigent rights plaintiffs claim that non-profit hospital does not provide adequate indigent medical care to justify its non-profit tax exemption. They ask the IRS to cancel the hospital’s non-profit status. What are they trying to accomplish? What are the standing issues with this case? (*Eastern Kentucky*)

### What is the special problem with redressability for procedural injuries?

#### How have the courts relaxed the traditional notions of causation for procedural injuries, i.e., what are examples of how you can show redressability when you cannot prove that the result would have changed if you were given the proper procedure?

### "Injury in fact" and "zone of interest" tests.

#### Distinguish the "injury in fact" and "zone of interest" tests.

#### Ranchers do not want their irrigation water used to help endangered species. They contest the EIS (environmental impact statement) supporting the release for the endangered species. (*Bennett v. Spear,* 520 U.S. 154 (1997). Standing or not and why?

#### Mail carriers want to sue to prevent the post office from allowing a private company to carry mail. - in the zone of interest and the mail carriers. (*Air Courier Conference of America v. American Postal Workers Union*) Standing or not and why?

#### How was the zone of interest different between a trade organization who wanted the EPA to have more rigorous standards for waste treatment (*Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989)) and a company contesting whether a CFC replacement met the statutory requirements? (*Honeywell International, Inc. v. EPA*, 374 F.3d 1363 (D.C. Cir. 2004))

### When can fear be the basis for injury?

#### Why did having 500,000 members make it easier for an NGO to get standing in case based on exposure to a toxin with a low probability of causing injury? (*NRDC v. EPA*, 464 F.3d 1 (D.C. Cir. 2006)?)

#### How do you use the violation of an EPA permit for the release of a pollutant into a river to help you get standing for a when the actual risk of injury is low? (*Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000))

#### How has the United States Supreme Court recently used to “substantial probability” to increase the burden on environmental groups challenging safety standards? (*Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F.3d 1279 (D.C. Cir. 2007))

### Why didn’t plaintiffs get standing in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009) (the tree cutting permit case) but did get standing in *Monsanto Co. v. Geertson Seed Farms* (the GMO seeds case), 130 S.Ct. 2743 (2010)

### Why were plaintiffs unable to get standing in *Clapper v. Amnesty International USA*, 568 U.S. XXX (2013) (the phone tap case)?

#### What did they say their injury was?

#### Why was this not *Geerston Seed*?

#### How would you use Edward Snowden’s disclosures to argue to the court they should rethink this case?

### Congressional Standing

#### Does congress have standing to sue to overturn its own laws?

##### What is the separation of powers issue?

##### What is the proper remedy for a congressman who does not like a law?

##### What doctrine would the court likely use to abstain in these cases?

#### How would you argue that Congress can defend a law, such as the Defense of Marriage Act, before the United States Supreme Court if the DOJ will not?

##### What case would you cite as support for this position?

## Associations and Third Parties

### What does an association have to show to get standing?

### What are the limits on the remedies in association standing cases?

### Why is associational standing important to vindicate individual rights?

## *Mass v. EPA*

### What was the role of the petition for rulemaking in *Mass. v. EPA*?

### What is the agency required to do when it gets a petition requesting rulemaking?

### What was the standing problem before the court?

#### How did the government attack the plaintiff’s standing?

#### Which elements were at issue?

#### What role was the state playing in the representation of its citizens?

#### How did the court resolve the standing issue?

### Why did EPA say it did not have the authority to make a rule?

#### Why did this invite judicial review?

### What was the evidence before the court that congress had considered global warming?

#### How did this affect the court’s analysis in the case?

### What might the agency have said that would have satisfied the court and have avoided this case?

#### What was the conflict with DOT?

#### What was the problem these rules might cause for the Department of State?

## Availability of Review

### 5 U.S.C. § 701(a)(2) - This chapter applies, according to the provisions thereof, except to the extent that agency action is committed to agency discretion by law.

#### Does Congress have to specifically allow judicial review in an agency enabling statute (*Abbott Laboratories*) for the courts to allow judicial review?

### In *Overton Park*, the Secretary said that his actions could not be reviewed because they were “committed to agency discretion by law.”

#### Did the court accept this?

#### What did the court require the Secretary to do to facilitate deciding the question?

#### What does the Secretary have to show if he wants the court to defer to his decision?

### *Block* dealt with a law that established price supports for milk.

#### Who is the law intended to benefit?

#### Were consumers able to get standing to contest milk price increases?

#### How did the court’s reasoning clarify *Overton Park*?

#### Is *Block* really just a zone of interest case?

### *Webster v. Doe* dealt with the right to a hearing by a fired national security employee.

#### Congress said no hearing for these employees.

#### Did the court accept this?

#### Why?

#### What, if any, claims did the court say Congress could not prevent from being reviewed?

### 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 statutory preclusion of review?

#### How was it used in the smallpox vaccine compensation act?

#### Are there claims congress cannot prevent from being reviewed by the courts?

#### What legal questions about agency actions will the court always review? (*Webster v. Doe*, 486 U.S. 592 (1988))

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

### 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?

#### Does non-acquiesce pose policy issues?

### 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?

### 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?

### Will the court review an action that is within an agency’s prosecutorial discretion?

#### Why not?

#### Why didn't the court require the FDA to explain why it was not regulating the use of drugs for lethal injections?

### What is a final agency action?

#### Why is final agency action required before you can go to court in most cases?

#### What do the courts look for to determine it an agency action is final?

### What is the finality problem with reviewing non-legislative rules, i.e., guidelines, letter rulings, etc.?

#### What do you have to show to claim a final agency action for documents like opinion letters?

#### Why was the letter ruling was found to be final action in *National Automatic Laundry*?

#### *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 court?

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

#### Why did the Standard Oil Company care about the finding if it was not a final agency action?

## Ripeness

### What is ripeness?

#### Is ripeness a constitutional issue, i.e., do you have an injury before the case is ripe?

#### While an action is not ripe until there is a final agency action, what are examples of when there is a final agency action but the controversy is yet ripe.

#### In the FDA food action level example, why is the action ripe as to consumers, but not ripe as to food processors?

### Discuss pre-enforcement review, contrasting *Abbott Labs* with *Toilet Products*.

#### What is the ripeness issue in these cases?

#### Why do we get different results?

#### What are the equitable factors that you have to show to get pre-enforcement review?

#### What is the key legal issue you have to sell to the court if you want pre-enforcement review?

### Are compliance orders ripe? (assume that the underlying law or regulation is well accepted)

#### When does a compliance order require a party to change its behavior?

#### Is that a good ground for judicial review?

#### When does a compliance order become ripe?

#### Why did the Court find that the orders in *Sackett v. EPA* were ripe?

#### Assume that the EPA still wants to use compliance orders. How must they be modified to avoid judicial review under *Sackett*?

### Why is getting an injunction critical to pre-enforcement review?

#### What are the factors the court should consider in reviewing a request for an injunction in a pre-enforcement challenge case?

#### What are possible agency counter arguments against granting an injunction?

## Exhaustion of Remedies

### 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?

#### 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?

#### How is the final agency action requirement related to exhaustion of remedies?

#### Have you exhausted your remedies if you miss a deadline and cannot complete your agency appeal?

### 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?

#### When might the court waive it?

#### Why would you argue that waiving it in this situation is consistent with *Matthews*?

#### Jurisprudentially, how do you argue that it is OK to waive the failure to present all issues, given that exhaustion itself cannot be waived?

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

## Primary Jurisdiction

### When does the primary jurisdiction doctrine come up?

### How do the primary jurisdiction doctrine and exhaustion doctrine differ?

### What are the standards the court should use when deciding whether to defer to an agency in a primary jurisdiction question?