# Judicial Review – Procedural Issues

# Learning Objectives for this Module

## Learn that there is a limited period for facial challenges to regulations.

## Learn that you use a petition for rulemaking to restart the clock on challenging a regulation.

## Learn that the agency is not bound by bad advice, but cannot punish you for relying on it.

## Learn the rules for collateral estoppel.

# Reading Assignment

## Finish Chapter 7 (V. REVIEW OF AGENCY ACTION UNLAWFULLY WITHHELD OR UNREASONABLY DELAYED)

# Issues to be addressed

## Forcing Agencies to Act

### Section 706(1) provides that a court is to compel agency action unlawfully withheld or unreasonably delayed.

## Rulemaking

### If there is a Congressional deadline, then you have a standard for the court to use and it is no problem to get the court to compel the agency to comply with the deadline.

### If the agency is just failing to make a rule, then there is no standard for the court, and no record to use. This makes it hard to get a court to order the agency to act. Sometimes the court will find that there has been too much delay, such as in OSHA's decade’s long refusal to address drinking water standards for workers, yet even in that case the court only ruled for plaintiffs after the agency made a rule (record) that no rule was necessary.

## Attacking a Rule after the Deadline

### 28 U.S.C.A. § 2401 Time for commencing action against United States

#### (a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

#### (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

### 6 years, unless the enabling statute sets a shorter timeframe.

#### Remember the question of issue preclusion – must you (or someone else) have raised issues – other than constitutionality or acting beyond statutory authority – during the rulemaking?

#### Does the SOL matter if you are attacking agency’s legal authority?

### Once the deadline for attacking the substance of a rule has passed, you cannot attack the rule directly.

#### If the agency uses the rule in an enforcement action against you, you can raise claims of exceeding statutory authority or unconstitutional action as a defense, since the clock on as applied challenges start when it is applied.

#### You can file a petition requesting a rulemaking, the removal of a rule, or the amendment of a rule. When the agency answers, based on the existing rule, you can then litigate the answer – Mass v. EPA. This lets you raise the issue of the legality of the rule in a challenge to the response by the agency about why the rule is just fine and does not need to be changed.

#### This can be a way to air the issues in court

## Judicial remedies when the court holds a rule violates the law.

### Remand but leave the rule in force while the agency cures the defects in the register posting.

#### This would be important for rules such as those dealing with life-safety issues where the court is concerned about the risks of not having the rule.

#### Can the court do this for unconstitutional rules or rules that exceed agency authority?

### Remand and stay the rule

#### Will wild animals escape?

#### Will there be risks?

#### Is the court defeating agency policy making?

## Relying on bad agency advice - equitable estoppel

### The more formal the advice, the more you can claim equitable estoppel.

#### How did you get the advice?

#### IRS letter ruling v. advice over the phone?

#### Relying on an agency mistake that you know about or an agency failure to enforce a law does not work.

### You cannot get money damages for detrimental reliance on bad advice.

#### Not covered under the Federal Tort Claims Act (FTCA) and the only other avenues for suing the feds are for takings or Biven’s actions.

### It is a defense to criminal claims because it defeats mens rea.

### Can be a defense to civil enforcement penalties, but not to a claim for the underlying tax that is owed.

## Collateral estoppel - relying on previous court decisions

### Same facts, same parties

#### Government is bound

### Same facts, different parties

#### Government is not bound

### What if they are close?

#### Fred loses on a FOIA claim, gets his friend Taylor to ask for the same document

##### 10 Cir says close enough, estoppel.

#### United States Supreme Court says no exception to identity of the parties for virtual representation - no estoppel

##### Taylor v. Sturgell, 128 S. Ct. 2161 (2008)

## Non-Acquiescence

### The government can relitigate the same facts (different parties) in different circuits to get better results

#### Or to get a split to get United States Supreme Court review

### Intra-circuit non-acquiesce is more controversial

#### Agency loses in the circuit in a specific case, but continues to apply the same law to other parties

#### How would you argue that you are not bound by the earlier determination?

### If a circuit finds that a rule exceeds the grant of statutory authority or is unconstitutional, it can issue a nationwide injunction. Then the only remedy is appeal for an en banc hearing and then to the United States Supreme Court.

## Challenging Agency Action - Review

### First, you have to show it is a final agency action

#### Rules

#### Orders

#### Everything else

### Then you argue about standard of review

#### The more agency process, the more deference

#### Unless the statute or congressional intent conflicts with the agency action or interpretation

# Evaluation Questions

## Forcing Agencies to Act

### What are the limits on mandamus that make it of limited use?

#### How does 706(1) provide an APA remedy?

### What is the problem with proving that agency action has been unlawfully or unreasonable withheld - how is the choice to act a discretionary function?

#### What might be valid reasons for the agency to not act?

#### What legal process got the plaintiffs into court in *Mass v. EPA*?

### What is the statute of limitations for challenging an agency action?

#### Why is this seldom a problem for enforcement actions?

#### How can you use a petition requesting a rulemaking to start the clock when it has run on a rule?

## Relying on Agency Advice

### When can you claim equitable estoppel for relying on agency advice?

#### Can you get damages for relying on bad advice?

#### What can it be a defense for?

### How does the formality of the advice matter?

#### Example of when you can rely?

### Can you rely on an agency mistake about the law or regulation?

#### Jurisprudentially, why not?

## Non-Acquiesce

### If an appeals court disagrees with an agency’s interpretation of law in an adjudication, can the agency relitigate the same interpretation in other adjudications with different parties?

### If an appeals court finds that the agency has promulgated an improper rule, can the agency keep using the rule in other circuits?

#### Does the basis for overruling the regulation matter?

#### If not, why is it different from the court overruling adjudication?