# Chapter 6 – Availability of Judicial Review

# Jurisdiction – Statutory or Constitutional Basis

## 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 the section on suing the government.)

## Looking back at the basic statutes which can give you statutory jurisdiction, be prepared to explain how you would use them to state a claim against an agency and how the court resolves potential conflicts between them, such as the OSHA case where it was unclear in which court the action should be filed.

## What is the case and controversy requirement?

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

### Why does this prevent advisory opinions from federal courts?

# Jurisprudential Standing

## Discuss the components of *Lujan* standing:

### Injury

### Causation

### Redressability

## 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?

## 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 want to challenge regulations on lab research animals?

### What if you want to challenge the regulations on keeping animals in the zoo?

## 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?

## Probabilistic 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 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 used “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 Clapper as a general model for arguing for or against standing in probabilistic injury cases?

## 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 (discussed earlier in the course)?

# Standing in 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 showed that congress had been aware of 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

## 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 did the court find was reviewable in *Overton Park* where the Secretary’s decisions were “committed to agency discretion by law.”

## What are the limits the court has imposed on Congressional authority to take away the judicial right of review of agency actions? (Webster v. Doe)

### 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 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 which district courts may do?

### Can Congress require review to be done by the district court, rather than the appeals court?

# Is there a Final Agency Action to Contest?

## Why is a final agency action necessary for judicial review?

##  How is related to *Lujan* standing?

## What is a facial challenge to a regulation or statute?

### 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 concerning an opinion letter from the Secretary to a trade association with detailed advice on complying with a new regulation. 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?

# Zone of Interests Review

## How did Lexmark simplify zone of interests analysis by analogizing it to the general methods of statutory construction?

## 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))

# 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 that jurisdiction fails?

## What are the exceptions to exhaustion of remedies?

### Where does the futility doctrine fit in this list?

### Why did it fail in *Portela-Gonzalez*?

### 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?

# Ripeness

## What is ripeness?

### How is ripeness used in the analysis of whether there is an injury that satisfies standing requirements?

### Why is a final action required before a case can be ripe?

### Thinking about *Abbott Labs* and *Toilet Products*, how do you analyze whether a case is ripe?

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

#### What is the key legal issue the court will be concerned with when deciding whether a case is ripe for pre-enforcement review?

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

### 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 arguments against granting an injunction?

## How do you analyze whether compliance orders are ripe? (assume that the underlying law or regulation is well accepted).

### What did the court look to in *Sackett v. EPA* to determine that the order was ripe?

### As counsel to an agency, what would you tell them about how to structure compliance orders after *Sackett* to avoid the courts finding them ripe for review.

## What would be your argument in *Hawkes* that the case was ripe/that there was final agency action, the case arguing that Corps determination that a property is subject to 404 restrictions.

# Primary Jurisdiction

## When does the primary jurisdiction doctrine come up?

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

## What factors do you argue to the court as the agency when you want the court to defer to the agency action?

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