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# Introduction to Federal Administrative Law Part II: The Availability of Judicial Review, An

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# An Introduction to Federal Administrative Law Part II: The Availability of Judicial Review

by William L. Andreen

This is the last article in a two-part series which is intended to present a broad overview of federal administrative law. Part 1 in this series discussed the rulemaking and adjudicatory powers that are commonly possessed by federal agencies and the standards used by the federal judiciary to determine the validity of rulemaking and adjudicatory action. This final article will examine the various threshold questions that confront parties seeking judicial review of agency action such as jurisdiction, preclusions of review, sovereign immunity, standing, and timing.

## I. Availability of judicial review

### A. Jurisdiction

#### 1. Specific grants

Most federal regulatory statutes specifically provide for judicial review of certain kinds of administrative action. In doing so, Congress has chosen a wide variety of routes for judicial review. For example, orders denying or terminating social security benefits are reviewable in federal district courts,[1] while cease and desist orders issued by the Federal Trade Commission may be challenged only in an appropriate United States court of appeals.[2]

Congress has in some cases made things even more complicated. Under the Clean Air Act, for instance, a national ambient air quality standard rule promulgated by the United States Environmental Protection Agency (EPA) must be challenged in the United States Court of Appeals for the District of Columbia.[3] However, a challenge to an EPA action which is locally or regionally applicable, such as EPA's approval of a state implementation plan, may be taken only to the court of appeals in the appropriate circuit.[4] In either case, the petition for review must be filed within 60 days after notice of the final rule or approval appears in the Federal Register.[5] In addition, the Clean Air Act authorizes a suit to be brought in a United States district court in a case where the complainant alleges a failure by EPA to perform any nondiscretionary duty under the Act.[6] Therefore, due to the complexity and variety of jurisdictional grants, one should pay close attention to the jurisdictional provisions contained in the particular regulatory statute in question.

#### 2. General grants

Despite the plethora of specific jurisdictional grants, there are many kinds of administrative action for which Congress did not explicitly provide an avenue to obtain judicial review. In that situation, an aggrieved person must predicate jurisdiction upon a more general grant of jurisdiction such as 28 U.S.C. § 1331—general "federal question" jurisdiction. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Most challenges to federal administrative action for which there is no specific jurisdictional provision will clearly meet this test. Prior to 1976, however, section 1331 also required that the amount in controversy had to exceed $10,000.[7] Consequently, many challenges involving relatively small pecuniary amounts were based upon other general grants of jurisdiction such as 28 U.S.C. § 1361 which provides for mandamus. In a number of instances, plaintiffs asserted that sections 701-704 of the APA created an independent source of jurisdiction for district courts, and seven circuit courts agreed with that interpretation.[8]

This dilemma was resolved in 1976 when Congress eliminated the $10,000 jurisdictional amount in cases brought against a federal agency under section 1331.[9] A year later, the Supreme Court, relying in large measure upon the amendment to section 1331, held that sections 701-704 of the APA do not confer subject-matter jurisdiction upon district courts.[10]

### B. Preclusion of review

Despite the assertion of an appropriate grant of jurisdiction, judicial review, nevertheless, may not be available. Section 701 of the APA states that the APA's provisions concerning judicial review do not apply where (1) a statute precludes judicial review or (2) "agency action is committed to agency discretion by law."[11]

These two hurdles to judicial review run counter to the basic presumption favoring judicial review which is embodied in the APA.[12] After all, the APA provides that any person "adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."[13] Consequently, the Supreme Court has declared that access to the courts should be restricted "only upon a showing of clear and convincing evidence" of congressional intent to that effect.[14]

Express statutory preclusion of judicial review is not common, and, even when such preclusion exists, the courts are likely to give it a narrow interpretation.[15] For instance, the administration of veteran benefits has long been insulated to some extent from judicial scrutiny. In *Tracy v. Gleason*,[16] the court held that the prohibition on review of "any question of law or fact concerning a claim for [veteran] benefits" (38 U.S.C. §211[a] [1958]) did not apply to the termination of benefits.[17] The court clearly thought that the termination of benefits did not involve a "claim." In response, Congress amended the section to bar judicial review of "the decisions of the Administrator of any question of law or fact under any law administered by the Veterans Administration [VA] providing benefits for veterans . . . ."[18] The Supreme Court, however, held that this prohibition did not preclude an attack on one such decision because the challenge went to the constitutionality of the Veterans' Adjustment Act of 1966 rather than the VA's administration of the statute.[19]

Judicial review under the APA is also unavailable where an "action is committed to agency discretion by law."[20] This exception to reviewability applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[21] The Supreme Court recently identified such a rare instance when it held that an agency's decision not to undertake administrative or civil enforcement against a violation of the law is a decision gen-

erally committed to the unfettered discretion of the agency. Therefore, such a decision is presumptively unreviewable.[22] The presumption may be rebutted, however, where Congress has indicated an intent to limit the agency's enforcement discretion and has provided guidelines for the agency to follow. In such an instance, there would be some "law to apply."[23]

**C. Sovereign immunity**

Only Congress has the power to determine whether the United States may be sued, and, if so, in which courts the suit may be brought.[24] Where Congress has not waived the sovereign immunity of the United States, no officer of the federal government has the authority to consent to a suit against the government.[25] Although the defense of sovereign immunity blocked many challenges to agency action in the past, it poses much less of a problem today.

Congress amended the APA in 1972 to eliminate the defense of sovereign immunity in cases brought in federal court where the complainant seeks "relief other than money damages."[26] Therefore, an action seeking declaratory and injunctive relief no longer will be hampered by sovereign immunity. This waiver, of course, does not apply to a case brought against the United States in a state court. In such a situation, the government still will be cloaked with sovereign immunity, unless an explicit statutory waiver applies. Moreover, sovereign immunity still may provide the federal government with an absolute defense to an action seeking monetary relief.[27]

**D. Standing**

Related to the issue of whether a particular claim is appropriate for judicial review is the question of whether that claim may be advanced by a particular plaintiff or petitioner. This latter question involves the requirement of standing. The constitutional source of standing law is Article III, § 2 which restricts federal judicial power to "cases" and "controversies."

Prior to 1940, the Supreme Court analyzed standing as if it were an integral part of the merits of a case. A party thus could obtain judicial review of agency action only if that action invaded a legal right of the party which was created by statute or common law.[28] This analysis, of course, confused the threshold issue of standing with the ultimate merits of a claim. Moreover, it served to reduce the ability of the federal judiciary to monitor the expanded activities of the federal bureaucracy. This venerable formulation of the standing doctrine began to crumble, as a result, during the 1940s.

The Supreme Court, during that decade, recognized that Congress could explicitly grant a right of judicial review to any person aggrieved or adversely affected by a particular agency action, regardless of whether that person could show a violation of a "legally protected interest." Thus, a party could obtain review merely by demonstrating a personal injury in a situation where a statutory provision granted standing to aggrieved persons or, in other words, to private attorney generals.[29]

In 1946, the APA was enacted and provided that a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" could obtain judicial review.[30] The federal courts, however, generally refused to view section 702 as a broad grant of standing. Instead, the courts held that section 702 only provided standing where the interest in question was recognized by some other statute.[31] Consequently, the legal interest test still had some residual vitality.

In 1970, however, the Supreme Court re-examined the issue of standing under the APA and, in the process, drastically revised existing law. In *Association of Data Processing Service Organizations v. Camp*,[32] the court rejected, once and for all, the test of a legally recognized interest. In its place, the Court substituted a new two-part test. The first test is based on the constitutional requirement of a case or controversy. Thus, a plaintiff must allege that the agency's action caused the plaintiff some "injury in fact, economic or otherwise."[33] Moreover, the dispute must be "presented in an adversary context and in a form historically viewed as capable of judicial resolution."[34] The second test requires that "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[35] This is based upon section 702 of the APA as well as more general prudential considerations.[36]

*Data Processing* is still good law. Since 1970, however, the Supreme Court has handed down a number of decisions which refine the two-part test first enunciated in *Data Processing*. In *Sierra Club v. Morton*,[37] the Court held that the party seeking review must allege facts showing that he or she is among those adversely affected by the agency's action. A litigant thus must assert a direct stake in the controversy.[38] But such a stake need not be economic. Environmental or aesthetic injury, for example, is enough to satisfy the requirement of an injury in fact.[39] Furthermore, the alleged injury need not be significant. Even an "identifiable trifle" is enough to give a party standing to vindicate an important principle.[40]

It is clear, nevertheless, that the Court will not extend standing to a party who has not alleged facts demonstrating some causal link between the agency's action and the party's alleged injury.[41] If this causal link is too speculative or seriously attenuated, standing will also be denied.[42] Such denials have been predi-

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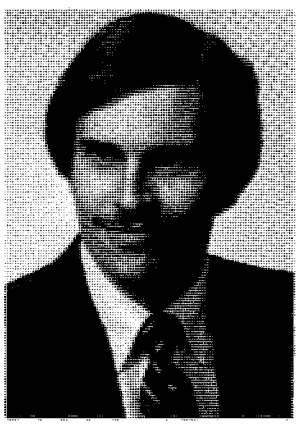

cated upon the Article III requirement that, in order to be justiciable, a case must be capable of judicial resolution.[43] These rules are easily articulated but rather difficult to apply. In close cases, therefore, it may be hard to predict whether a court will find that a party seeking judicial relief has satisfied the requirements of standing.[44]

**E. Timing**

The doctrines of primary jurisdiction, finality, exhaustion of administrative remedies, and ripeness are all designed to avoid unnecessary or untimely judicial involvement in the administrative process. They do not forbid judicial review, but merely postpone the time at which a court may entertain a particular matter.

**1. Primary jurisdiction**

The doctrine of primary jurisdiction is a judicially created principle designed to deal with a situation where both a court and an agency have the legal authority to address the same dispute. For example, the federal courts have the power to hear a complaint alleging an illegal restraint of trade such as a conspiracy to fix prices, while the Federal Trade Commission has the power to determine whether such price fixing constitutes an unfair trade practice. When both arms of government have the power to act, which should be regarded as having primary jurisdiction?

In such a case, the federal courts have recognized the primary jurisdiction of the agency, thereby postponing judicial consideration of the case, if that course of action will lead to more uniformity in decisionmaking.[45] The courts also have deferred to an agency where it possesses specialized knowledge and expertise that would be of use in resolving the controversy.[46]

**2. Finality**

Section 704 of APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[47] Consequently, in the absence of express statutory authority to the contrary, a preliminary or intermediate agency ruling is not reviewable until the agency has taken final action.[48]

A statute, however, may specifically speed up the process. For example, the Freedom of Information Act authorizes judicial review where an agency fails to respond to an information request within a certain time period.[49] On the other hand, a statute may state that an action is final for purposes of judicial review only after a number of steps (hearings, appeals, etc.) are taken within the agency. Finally, a number of agencies have also used regulations to define the point at which a particular action becomes final.

In the absence of a statute or regulation which defines finality for purposes of judicial review, it may not always be clear when agency action is final. In such a situation, reference to the judicially-created doctrines of exhaustion and ripeness may help define the time at which a dispute may be taken to court.

**3. Exhaustion of administrative remedies**

No party is entitled to judicial review until that party has exhausted the prescribed administrative remedies.[50] Thus, if an administrative proceeding is at an early stage and the party who seeks judicial review has a right to an agency hearing or appeal, a court generally will refuse to entertain the case because that party has failed to await the completion of the administrative process.

A number of factors favor the application of the exhaustion doctrine: (1) it respects the choice made by Congress to delegate initial decisionmaking authority to an agency; (2) it allows an agency to bring its expertise to bear on a particular issue; (3) it prevents judicial review from proceeding on the basis of an inadequate administrative record; and (4) it avoids the necessity for judicial involvement in cases where the agency is able to resolve the problem.[51] However, a court might intervene in a pending agency proceeding —an "extraordinary remedy"—where it is "necessary to vindicate an *unambiguous* statutory or constitutional right."[52]

**4. Ripeness**

The doctrine of ripeness concerns the ability of a court to resolve a particular dispute without further refinement of the issues by an administrative agency.

> [I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also

to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[53]

*Abbott Laboratories v. Gardner*[54] involved an attempt to obtain judicial review of a Food and Drug Administration (FDA) rulemaking before it was enforced against any party. The final rule required pharmaceutical companies to include a drug's generic name on all labels and in all advertising whenever the drug's proprietary name was used.[55] Abbott claimed that the FDA had exceeded its statutory authority in promulgating the rule. The FDA, on the other hand, argued that the case was not appropriate for judicial review since the rule had not yet been applied in the context of an actual enforcement action.

On the question of ripeness, the Supreme Court established a two-part test. First, a court must examine whether the issues presented are fit for judicial review. Second, a court must consider whether the parties seeking review will suffer substantial hardship if review is withheld.[56]

In applying the first part of the test, the Court held that the sole issue presented was appropriate for judicial review. This case posed the purely legal question of whether the FDA had the authority to require a generic name to appear every time a proprietory name was employed. Moreover, since the rulemaking was final, no further administrative action was necessary in order to refine the case for judicial review.[57] The Court also held that Abbott would suffer substantial hardship if judicial review were refused. Abbott either would have to comply with the regulation at some considerable cost, or refuse to comply and thereby risk prosecution.[58] Therefore, absent some statutory bar, Abbott was entitled to judicial review because the case was indeed ripe.

Allowing for pre-enforcement challenges to agency rulemakings makes a great deal of sense. If the government prevails, industry must comply. On the other hand, should the government lose, the agency can quickly change course and revise the rule as necessary. Recognizing the pragmatic nature of this reasoning, Congress now often restricts judicial review of rulemakings to the pre-enforcement period.[59]

## Conclusion

The administrative state is neither a monster nor a misfortune. It is rather a structure built over the course of two centuries which is designed to further the collective goals of the American people. The rise of the administrative state, nevertheless, has posed a challenge to the ability of the American legal system to establish a proper equilibrium among our three branches of government. The challenge involves the question of how federal power will be allocated and requires our legal system to come to grips with the real tension which exists between the necessary role of administrative discretion and the need for some degree of accountability. The struggle to balance the conflicting, but complementary, roles of specialized expertise and external control is the dynamic that has shaped and continues to shape the contours of federal administrative law. ■

**FOOTNOTES**

1. 42 U.S.C. § 405(g) (1982).
2. 15 U.S.C. § 45(c) (1982).
3. 42 U.S.C. § 7607(b)(1) (1982).
4. *Id.*
5. *Id.*
6. 46 U.S.C. § 7604 (1982). The section is known as the citizen suit provision.
7. *See* Pub. L. 94-574, 90 Stat. 2721 (1976).
8. *See Califano v. Sanders*, 430 U.S. 99, 104 n.4 (1977).
9. Pub. L. 94-574, 90 Stat. 2721 (1976) (amending 28 U.S.C. § 1331).
10. *Califano*, 430 U.S. 99, 107 (1977).
11. 5 U.S.C. § 701(a) (1982).
12. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).
13. 5 U.S.C. § 702 (1982).
14. *Abbott Laboratories*, 387 U.S. at 141.
15. The federal courts generally refuse to imply a preclusion of judicial review on the basis of statutory materials. See, *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975) (finding that the Secretary of Labor "has failed to make a showing of 'clear and convincing evidence' that Congress meant to prohibit all judicial review of decision"); but see *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-48 (1984) (implying preclusion from the language of the statute, the structure of the statutory scheme, the objectives of the legislation and the legislative history).
16. 379 F.2d 469 (D.C. Cir. 1967).
17. *Id.* at 473.
18. 84 Stat. 790 (1970).
19. *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974).
20. 5 U.S.C. § 701(a)(2).
21. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)(quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 [1945]).
22. Heckler v. Chaney, 470 U.S. 821, 837 (1985).
23. *See Id.* at 838.
24. *Minnesota v. United States*, 305 U.S. 382, 388 (1939).
25. *Id.* at 389.
26. 5 U.S.C. § 702.
27. Monetary relief from the federal government may be sought in appropriate actions brought in compliance with the terms of the Federal Tort Claims Act, 28 U.S.C. § 1346(b), and related, but scattered sections (1982), and the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1982).
28. *See, e.g., Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938).
29. *See, FCC v. Sanders Radio Station*, 309 U.S. 470 (1940) (applying language found in the Communications Act of 1934); *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942) (same).
30. 5 U.S.C. § 702.
31. See, e.g., Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955), cert. denied, 350 U.S. 884.
32. 397 U.S. 150 (1970).
33. *Id.* at 152.
34. *Id.* at 151-52 (quoting from *Flast v. Cohen* 392 U.S. 83, 101 [1968]).
35. *Id.* at 153.
36. *See id.* at 153-54; *see generally Barlow v. Collins*, 397 U.S. 159 (1970).
37. 405 U.S. 727 (1972).
38. *Id.* at 740.
39. *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 686 (1973).
40. *See id.* at 689 n.14 (quoting Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 603 [1968]).
41. *Warth v. Seldin*, 422 U.S. 490 (1975).
42. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976).
43. *Id.* at 38.
44. For more recent treatments of standing issues by the Supreme Court, see *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).
45. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907).
46. *See, United States v. Western Pacific R. Co.*, 352 U.S. 59, 64-65 (1956).
47. 5 U.S.C. § 704 (1982).
48. *See id.*
49. 5 U.S.C. § 552(a)(6)(C).
50. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).
51. See McKart v. United States, 395 U.S. 185 (1969).
52. *Coca-Cola Co. v. United States*, 475 F.2d 299, 304 (5th Cir. 1973) (emphasis added), cert. denied, 414 U.S. 877; see also *Leedom v. Kyne*, 358 U.S. 184 (1958) (involving an NLRB decision that was made in excess of its authority and contrary to a specific statutory prohibition).
53. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).
54. 387 U.S. 136 (1967).
55. *Id.* at 137-38.
56. *Id.* at 149.
57. *Id.*
58. *Id.* at 152-53.
59. *See, e.g.*, 33 U.S.C.A. § 1369(b) (West 1986 & Supp. 1989) (Clean Water Act) (barring a challenge to certain regulations in any subsequent enforcement action if review could have been obtained within 120 days after the rule was promulgated).

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