

## Judicial Review Lecture—Ritsumeikan University 2004

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It is a great pleasure for me to spend my summer as a Visiting Professor at Ritsumeikan. It hasn't been a summer vacation, of course, because I have been working. But in the sense of having a good time and refreshing my outlook on life, I can't think of a better way to spend my summer. I have been very impressed by Kyoto, by this great University, by the new law school, and I want to thank everyone here for treating me so well. I hope that the strong ties between American University and Ritsumeikan become even stronger in the years to come.

Because my two areas of teaching are Administrative Law and Environmental Law, Dean Ichikawa suggested I combine them by speaking about the United States system of judicial review of administrative action—with a special focus on review in environmental cases. Most of these cases involve our Environmental Protection Agency (EPA). Environmental regulation produces a lot of litigation. It has been estimated that nearly 3/4 of all EPA's rules are challenged in federal court by either business interests or environmental groups.<sup>1)</sup>

EPA has extensive rulemaking and enforcement powers, given to it by our Congress in a series of major statutes passed since 1970. These cover air and water pollution, hazardous waste, pesticides, and endangered species. They have generally substituted for the common law nuisance cases that were at the heart of environmental law until 1970. Many of these laws also provide for "citizen suits" against polluters or government officials.

One key aspect of our system of government, from the beginning, was the creation of a judiciary that is completely independent in its decisionmaking. Our federal judges are appointed by the President, subject to confirmation by the Senate.<sup>2)</sup> The Constitution protects their independence by granting them lifetime tenure, prohibiting a reduction in their salary, and by protecting them from removal by the executive.<sup>3)</sup> They can only be impeached by a vote of 2/3 of the Senate after a trial for conviction of Treason, Bribery, or

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1) EPA Administrator Lee Thomas, in a 1987 address to a colloquium of the Administrative Conference of the United States, pegged the level of litigation at more than 75 percent. Lee Thomas, "The Successful Use of Regulatory Negotiations by EPA," 13 ADMIN. LAW NEWS 1 (Fall 1987).

2) U.S. CONST. art. II, § 2, cl. 2.

3) U.S. CONST. art. III, § 1.

other High Crime or Misdemeanor—the same test for impeachment of a President.<sup>4)</sup>

Our system of judicial review dates back to the first few years of our country—the famous case of *Marbury v. Madison*<sup>5)</sup> (1803), when the Supreme Court, under Chief Justice John Marshall, held that the federal courts have the power to (1) review and determine the constitutionality of statutes passed by Congress, and (2) determine whether executive action is authorized by law.

(As an aside, I can tell you that this case is famous even in China. Last October, I was giving a lecture at a university in Shanghai that was being translated by a student. When I mentioned the name of this case, the student made a mistake and called it “*Maryland v. Madison*.” Immediately half the students in the room raised their hands and said, “No, it’s *Marbury*.”)

A second well-known case shows how entrenched our system of judicial review is. This is the case of *United States v. Nixon*<sup>6)</sup> (1974), in which our Supreme Court required then-President Nixon to follow the rule of law and release copies of taped conversations made in his office to determine whether he had violated any criminal laws. This forced release of the tapes led to his resignation (to avoid impeachment).

So after *Marbury*, it was clear that the courts could review the actions of the executive branch to determine whether they were constitutional or within the boundaries established by the statutes enacted by the Congress.

This principle was regularized by the enactment in 1946 of the Administrative Procedure Act (APA)<sup>7)</sup> which contained procedures and standards for the courts to use in reviewing agency action.

The EPA, of course, is an “agency” covered by the APA,<sup>8)</sup> so its actions—its rulemakings and its enforcement adjudications are subject to the APA’s judicial review provisions.

The APA provides for a *presumption of reviewability* of all final action (and certain types of inaction) by administrative agencies.<sup>9)</sup> It provides for review on the following grounds: Unconstitutionality, violation of a statute, violation of required procedure, lack of support by substantial evidence, or abuse of discretion. The APA has greatly increased the importance of judicial review of agency decisions and rules.

To first give you a brief outline of the APA’s judicial review provisions—they are found in sections 701-706 of Title 5 of the U.S. Code:

§ 701—Whether the action is reviewable ?

§ 702—Who may sue ?

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4) U.S. CONST. art. II, § 3, cl. 6; U.S. CONST. art. II, § 4.

5) 5 U.S. 137 (1803).

6) 418 U.S. 683 (1974).

7) Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946).

8) See 5 U.S.C § 551 (1).

9) See 5 U.S.C §§ 701(a), 702.

§ 703—Where can the judicial review petition be filed (which court) ?

§ 704—The timing of the petition. When is the agency action ready to be reviewed ?

§ 705—Whether the agency action can be temporarily stopped pending the conclusion of the judicial review ?

§ 706—How should the court review? What is the scope of review and available remedy ?

### **Presumption of Reviewability**

The APA provides that agency action is reviewable except in two situations:

First, when another statute provides for unreviewability or limitations on review.<sup>10)</sup> I should emphasize here that the APA is a general statute and that Congress can always enact more specific legislation that supersedes the APA.<sup>11)</sup> Most of the major environmental laws in the US contain judicial review statutes. Some of these statutes contain time limits on judicial review challenges to EPA rules. For example, rules issued by EPA under the Clean Water Act must be challenged within 120 days of issuance or they cannot be challenged later.<sup>12)</sup> Similarly, the toxic waste cleanup law.<sup>13)</sup> states that actions by EPA to simply list a site on the national cleanup list may not be challenged in court at that point.<sup>14)</sup>

Second, the other exception in the APA is for actions that are deemed to be “committed to agency discretion.”<sup>15)</sup> The Supreme Court has held that this is a narrow exception.<sup>16)</sup> The one situation that it clearly applies is to agency decisions about whether or not to initiate an enforcement action. If EPA decides not to bring an enforcement action against a polluter, this decision cannot be challenged because it is within EPA’s prosecutorial discretion.<sup>17)</sup>

### **Standing To Seek Judicial Review**

Of course one key question in any judicial system is who has standing to challenge agency action. In the United States, the standing rules are relatively liberal, although the

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10) See 5 U.S.C § 701(a)(1).

11) See 5 U.S.C § 559.

12) See 33 U.S.C § 1369(b)(1).

13) Comprehensive Environmental Response, Compensation and Liability Act (popularly known as the Superfund law).

14) See 42 U.S.C § 9613(h). After a series of lawsuits were brought to challenge the EPA’s decision to list sites on the NPL, the law was amended to prohibit such challenges.

15) See 5 U.S.C § 701(a)(2).

16) See *Heckler v. Chaney*, 470 U.S. 821 (1985).

17) But if the statute provides for a deadline for agency action and the agency misses such deadline, suits may be brought to challenge agency inaction.

government often raises this issue when it is sued. The American standing doctrine is partly based on the Constitution, partly based on statute, including the APA, and partly based on prudential concerns—raised by the courts.

Some of our decisions on standing tend to be rather inconsistent, because courts sometimes invoke the standing doctrine to bar cases they don't want to decide, but ignore it or give it little concern if the case is one they do want to decide. Just a few weeks ago, the Supreme Court decided not to rule on whether the phrase "under God" in the U.S. Pledge of Allegiance was unconstitutional. Instead the Court decided that the father of a schoolgirl lacked standing to challenge the Pledge.<sup>18)</sup>

The constitutional aspect is based on the provision in Article III that requires that federal courts only decide real "cases or controversies."<sup>19)</sup> Our courts are not permitted to make purely advisory opinions. This requires that the party show some sort of "injury in fact."

Historically, before the APA, the courts had required that a challenger could have standing against the government only if he or she could show that the government had committed a *legal wrong* violating some common law property, contract or tort law requirement.<sup>20)</sup> Thus when the government opened a government-owned power plant, a nearby private power plant couldn't challenge it because there was no common law right to be free from competition.

But the 1946 APA provided that persons who are "aggrieved by agency action within the meaning of the relevant statute"<sup>21)</sup> are allowed to sue. This means that a competitor could qualify. But it also raised the question of what does "injury in fact" mean, beyond economic harm? How abstract can the injury be?

In 1970 the Supreme Court recognized that such non-economic injuries as aesthetic, conservational, and recreational injuries could be enough to allow for standing.<sup>22)</sup> For example whale watchers were permitted to (unsuccessfully) challenge the government's failure to enforce treaties limiting the killing of whales.<sup>23)</sup>

The Court also recognized "associational standing"—that if one member of an association is injured, and would have standing, then the association can bring the case.<sup>24)</sup> This can be quite helpful to environmental organizations.

But in a 1992 case, the pendulum swung the other way, against broader standing.<sup>25)</sup>

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18) *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct 2301 (2004).

19) U.S. CONST., art. III, § 2.

20) *See, e.g., Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939).

21) *See* 5 U.S.C. § 702.

22) *See Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). The Supreme Court held that non-economic injuries such as aesthetic, conservational, and recreational injuries would be enough to allow standing. This decision was reinforced in *Sierra Club v. Morton*, 405 U.S. 727 (1972).

23) *See Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221 (1986).

24) *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

25) *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The case arose under our Endangered Species Act which requires federal agencies to consult with the Interior Department to ensure that agency-funded action does not jeopardize the habitat of endangered species. The Interior Department issued rules saying there was no need for an agency to consult about its actions *outside* the US. This meant that the US international aid agency did not need to consult about a dam project it was helping to fund in Africa that might threaten endangered elephants, leopards, and crocodiles.

An environmental organization challenged this, and the plaintiffs, who were members of the organization, stated they would be injured because they wished to observe these endangered species. They submitted affidavits about their past observations of the animals and future plans to do so. But the Supreme Court said this was not enough—these general plans to view the animals were too speculative to amount to injury.

If you think about it, it's easy for a plaintiff to show injury when the agency *action* threatens plaintiff. But when the asserted injury arises from the government's allegedly weak regulation, or *lack* of regulation, it is harder to show injury. This tends to make it easier for regulated interests like businesses to obtain standing than environmental groups or trade unions.

### Timing of judicial review

Once a challenger has convinced the reviewing court that he or she has standing to bring the challenge, the government may argue that the suit is premature.

The first part of this issue is *finality*—whether there is final agency action. This is a statutory requirement, because section 704 of the APA provides that only “*final* agency action” is subject to judicial review. For example a *proposed* EPA regulation may not be challenged—only a final regulation.

A related doctrine requires that challengers exhaust all of their administrative remedies (within the agency appeals process) before going to court. So if EPA is seeking to assess administrative civil penalties against a polluter, the polluter must first defend itself in the administrative hearing process before going to court to challenge the EPA.

Another related doctrine says the agency action must not only be final, it must be “ripe” (ready) for a court to review it.

There are two purposes of this doctrine: (1) to prevent courts from entangling themselves in abstract disagreements over administrative policies, and (2) to protect agencies from judicial interference until an administrative decision has been made in an authoritative way.

One important question that the Supreme Court resolved in 1967<sup>26)</sup> was whether an

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26) *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

agency regulation could be challenged as soon as it was issued.

The old rule was that a rule could only be challenged by a person facing an enforcement action under it. But in a case involving a new labeling rule issued by the Food & Drug Administration, the Supreme Court established a two-prong test for ripeness:

1. Are the issues primarily legal ones and therefore appropriate for judicial decision ?
2. If review is withheld, will the parties suffer a hardship ?

In the FDA labeling rule, the issues raised by the challenger were primarily legal, and the issuance of this rule presented the drug company with a dilemma: whether to comply with rules and pay a lot of money to change the labels or risk criminal penalties for distributing mislabeled drugs. Therefore, the Court held the rule to be ripe and reviewable. This case was very significant because it established definitively that agency rules could, in many circumstances, be reviewed prior to their enforcement.

In fact, as I said, many of the environmental laws go farther and require that challenges to EPA rules must be brought within 60 or 90 or 120 days of the issuance of the rule or they cannot be challenged at all.

### **In which court should the case be filed ?**

The APA provides that Congress can provide for review of an agency's action in either the district court or directly in the court of appeals.<sup>27)</sup> Environmental statutes normally do provide for review of EPA rules or EPA adjudications in the court of appeals directly, because the records compiled in the agency proceedings are appropriate for appellate court review.<sup>28)</sup> If a statute is silent, however, the challenger must file for injunctive or declaratory relief in the appropriate federal district court.

### **What is the scope of review of legal issues ?**

Once the case is accepted for review by the court, what standards should the court use in reviewing the agency action ? The APA's provision on scope of judicial review governs, unless another statute provides otherwise.

In conducting this review, the courts generally distinguish between the agency's legal, factual and policy determinations, because different standards apply to each.

Constitutional issues—After *Marbury v. Madison* it is clear that the courts are to provide *de novo* review of constitutional challenges to agency action. These can include claims that the agency action was based on illegal discrimination or violated the Due Process Clause.

Procedural errors—Challengers may raise violations of the procedural requirements of the

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27) See 5 U.S.C. § 703.

28) See, e.g., 42 U.S.C. § 7607(b) (Clean Air Act).

APA or other statutes, or violations of the agency's own regulations. If the court finds a violation, the action will be overturned, unless it is a harmless error.<sup>29)</sup> There is a well-known EPA case involving a challenge to some important Clean Air Act regulations governing coal burning utility plants.<sup>30)</sup> The environmental group thought the rules were too weak and that they had been improperly influenced by lobbying by the White House and by some Senators from coal-producing states. But the federal court held that this lobbying was not inappropriate in the context of rulemaking, because rulemaking (unlike adjudication) is a policy making activity, and as long as the rule was supported by the factual record, it had to be upheld.

Statutory issues—The court will invalidate an agency action if it finds that the action exceeds the authority granted, or violates limitations imposed by, a federal statute. In many such cases the court must review the agency's interpretation of its own statute.

Where Congress has delegated to the agency the power to issue regulations, and the agency, in doing so, has interpreted a statute that it administers, the reviewing court must afford some deference to the agency's statutory interpretation.

The formula for such deference is provided by the two-step test announced in the well-known 1984 "*Chevron*" case.<sup>31)</sup> In that case the question was raised whether the EPA could legally interpret the statutory term "stationary source" in the Clean Air Act to include an entire factory (as if there was a "bubble" over it), or whether the law required EPA to treat each major pollution source within a plant (smokestack, loading dock, etc.) as a separate source—each requiring a separate permit. The court of appeals had ruled that EPA could not use the "bubble" concept.<sup>32)</sup>

But the Supreme Court reversed the court of appeals and came up with a two-step test:

1. Has Congress directly spoken to the precise question at issue? If Congress's intent is clear, that is the end of the matter. The court and agency must follow it.
2. If the court determines that Congress has *not* directly addressed the precise question at issue—if the statute is silent or ambiguous—the court must uphold the agency's construction if it is permissible.

Because the Court found that the Clean Air Act was ambiguous on this issue, it moved to step two and found that the agency's interpretation was a permissible one.

You might see from this that step 1 becomes the key step. Because once a court finds a lack of clarity, deference to the agency is likely. In fact—the Supreme Court has rarely overturned an agency interpretation in Step 2. So when courts wish to overturn an agency interpretation, they tend to do so at step one. They find clarity, and conclude that Congress clearly precluded the agency's action.

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29) The harmless error rule can be found in the APA in the last sentence of 5 U.S.C. § 706.

30) See *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir 1981).

31) *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

32) See *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

A good example is the recent case during the Clinton Administration where the Food and Drug Administration changed its long standing policy and determined that the Food and Drug Act did give them jurisdiction over cigarettes because they contained the drug nicotine.<sup>33)</sup>

The tobacco companies challenged the agency's rule and the Supreme Court specifically applied the *Chevron* test. But the Court decided the case at step one—ruling that, for several reasons, congressional intent was clear that Congress had declined to give the FDA jurisdiction over tobacco products. But this was a 5-4 decision. The four dissenters found ambiguity in the statute and would have invoked step 2 to find the agency's interpretation permissible.

### Issues of Fact

Agencies must base their adjudicative decisions or their regulations on an appropriate factual foundation. It is not uncommon for parties to challenge the agency action for inadequacy of fact finding. In the EPA rulemaking case I just mentioned involving coal burning power plants, the court spent 50 pages carefully reviewing the factual basis for the rule that provided a permissible level of sulfur dioxide emissions, and found that the rule was adequately supported.<sup>34)</sup>

When an agency itself conducts a formal adjudication, the APA provides a special test—the “substantial evidence test”.<sup>35)</sup> In applying this test, the court must look at the whole record (including the decision of the Administrative Law Judge) to determine if there is substantial evidence to support the agency's final determination.<sup>36)</sup> The test was later explained by the Supreme Court as “whether on [the] record [before us] it would have been possible for a reasonable jury to reach the [agency's] conclusion”.<sup>37)</sup>

For other types of agency action, including rulemaking or policy choices within an agency's discretion, the test stated in the APA is whether the agency's action is “arbitrary, capricious or an abuse of discretion”. In effect this is a reasonableness test. If the agency acted reasonably the court will approve.

Two examples—First the 1971 *Overton Park* case,<sup>38)</sup> a case involving review of a decision by the Secretary of Transportation to provide a grant of funds to build a highway through a park in Memphis, Tennessee. The Supreme Court ruled that the substantial evidence test was not applicable, since the agency action was informal, not formal, adjudication. Therefore it applied the abuse of discretion test and found that the Secretary

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33) See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

34) *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir 1981).

35) See 5 U.S.C. § 706(2)(E).

36) See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

37) *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998).

38) See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).



had failed to provide any justification for his decision.

Even though *Overton Park* involved the review of an informal *adjudication* it was followed a few years later in the *State Farm* case<sup>39)</sup>—which involved a review of an agency rulemaking.

In this case, the National Highway Traffic Safety Administration had adopted a rule in 1977 requiring *either* airbags or automatic seatbelts to be installed in 1983 model cars. In 1981, after President Reagan came into office, the agency rescinded the standard. Its real reason for doing so was political—but it attempted to justify the rescission on the basis that in most cars, manufacturers would choose to use automatic detachable belts, that such belts were too easily unbuckled, and not enough lives would be saved to justify their \$1 billion cost.

The Supreme Court found the agency's decision to be an abuse of discretion because it gave no consideration at all to requiring mandatory *airbags*.

In conclusion, judicial review of government action is an important component of our legal and political systems. Challengers do not win a high percentage of cases against the government,<sup>40)</sup> but, as the examples I have given you show, they do win some important ones. And just the possibility of being sued makes the agency much more careful in its underlying action than it would be otherwise. Moreover, in many situations, the mere filing of a court challenge will gain the challenger some helpful delay or some favorable publicity that might result in pressure on an agency to change its decision.

Administrative law has therefore become a popular specialty for American lawyers, especially in Washington, DC. I suspect that with the ongoing legal reforms in Japan, (including the addition of administrative law to your bar exam) it will become an important and popular specialty for Japanese lawyers soon too.

Thank you very much for your attention.

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39) See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

40) Good statistics on reversal rates are hard to find, but one study found that agencies were upheld about 75% of the time. See Peter Schuck & Donald Elliott, *To the Chevron Station*, 1990 DUKE L.J. 984, 1008.