

Comment from Public Member Andrew N. Vollmer on *Clarifying Statutory Access to Judicial Review of Agency Action*

April 20, 2021

1. The Committee might decide to do something further on the general federal statute of limitations in 28 U.S.C. § 2401(a). If it does include a recommendation on the statute, especially if it leaves open the possibility that the statute is a statute of repose, the Committee should discuss how the statute should be interpreted together with the APA general rule that agency action is subject to judicial review in later litigation. See 5 U.S.C. § 703 (“[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.”); Draft Sourcebook 48-50.

Only in rare circumstances should a person be prevented from challenging an agency regulation, policy, interpretation, or other action as applied to the person in an enforcement or private case even if the subsequent litigation occurs many years after the agency’s adoption of the initial action. If the circumstances of the person and the case present a valid legal reason to set aside the earlier agency regulation etc., a court should set it aside at least for purposes of the litigation because the system has little interest in enforcing an invalid agency action. Fairness is a further consideration. A party in litigation often has no reason to expect to be in court disputing the meaning of the agency regulation or interpretation and therefore would have had no reason to challenge the agency action at the time it was first adopted.

A court could forbid a person from challenging agency action in an enforcement or private case in two situations. First is when a statute allows facial, pre-enforcement judicial review for a certain period of time and also explicitly prohibits judicial review in a later enforcement case. The second is when the person in the enforcement case petitioned for review of the initial agency action and lost.

2. Should the Committee recommend a place or two within the U.S. Code for the location of the judicial review statute being developed? The new statute seems to fit most naturally as a part of the APA. That is where most lawyers now look for general administrative law provisions to supplement provisions in a substantive statute.

We have heard concern that proposing to add the new statute to the APA would create the possibility that Congress would see an opening to amend a variety of unrelated parts of the APA. That risk exists but does not seem very high. Congress often makes a specific amendment to one part of an important statutory area, such as the securities laws, without making reforms to provisions unrelated to the main amendment. In any event, congressional action to modernize and improve various parts of the APA could be beneficial.

If the new statute is not part of the APA, lawyers might not know to look elsewhere for a general statute on judicial review issues. I am not sure there is practical way to put a cross-reference to the new statute in each substantive statute, such as the securities laws, the environmental laws, etc. Perhaps a cross-reference to the new statute could be added to the APA.