What To Watch As Justices Consider Appeal Deadline Case

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On March 25, the U.S. Supreme Court will once again consider the distinction between jurisdictional procedural rules — which, if violated, categorically bar a court from hearing a case — and less stringent claims-processing rules, from which exceptions can be made in certain circumstances.

In Harrow v. U.S. Department of Defense, the court will hear arguments on whether the 60-day statutory deadline for appealing decisions of the Merit Systems Protection Board — the independent agency responsible for reviewing federal employment actions — is a jurisdictional deadline that cannot be excused, or instead a claims-processing rule subject to exceptions like equitable tolling and waiver.

The answer will be important for the many federal employees who seek judicial review of adverse MSPB decisions. But Harrow also marks the first time the Supreme Court will squarely consider whether a statutory deadline for appealing from a federal agency to an Article III court is jurisdictional.

The court's decision thus could have broad implications for litigants seeking judicial review of all sorts of agency decisions.

Jurisdictional Rules, Claims-Processing Rules and Time-Related Directives

The Supreme Court has grouped procedural rules — such as filing deadlines — into three basic categories: jurisdictional rules, claims-processing rules and time-related directives.

The strictest category consists of jurisdictional rules, which define a court's authority to hear a case. A missed jurisdictional deadline dispossesses the court of the power to consider the case and the court must dismiss it for lack of jurisdiction. Jurisdictional deadlines are neither waivable nor subject to equitable exceptions.

Indeed, courts must enforce jurisdictional rules themselves, sua sponte, even if no party asserts a jurisdictional defect. A classic example of a jurisdictional deadline is the time for filing a notice of appeal from a district court to a court of appeals.[1]

Claims-processing rules do not define a court's power to hear a case, but simply seek to "promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times," according to the Supreme Court's 2011 ruling in Henderson v. Shinseki.[2]

Claims-processing rules are generally mandatory and must be enforced if a party raises them. But, unlike jurisdictional rules, they can be waived or forfeited if a party fails to assert them, and may be subject to equitable exceptions like tolling.

Examples of claims-processing rules include deadlines for appealing agency decisions to non-Article III

tribunals like the U.S. Court of Appeals for Veterans Claims and the U.S. Tax Court.[3]

The least stringent category of deadlines — one not directly implicated in Harrow — is time-related directives. Time-related directives typically instruct courts or agencies to take certain action within a specified time frame, but do not invalidate actions taken after the deadline, even if a party objects.[4]

In light of the potentially harsh consequences of classifying a deadline as "jurisdictional," the Supreme Court in recent years has sought to rein in use of that label.

As the court explained in its 2022 ruling in Boechler PC v. Commissioner of Internal Revenue, the court now applies a clear statement rule and will "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is."[5] Applying that rule, the court has "repeatedly held that filing deadlines ordinarily are not jurisdictional," according to its 2013 ruling in Sebelius v. Auburn Regional Medical Center.[6]

Harrow's Appeal

The case before the Supreme Court arose when the Defense Department temporarily furloughed Stuart Harrow due to budget sequestration in 2013.

When the department denied Harrow a financial-hardship exemption to the furlough, he appealed pro se to the MSPB. An administrative judge upheld the furlough decision in July 2016. Harrow then sought further review from the MSPB's governing board.

While Harrow's appeal to the board was pending, the MSPB's chairman resigned, leaving the board without a quorum for more than five years.

During that time, the Defense Department assigned Harrow a new email address, and he failed to update his contact information in the MSPB's e-filing system.

Consequently, when the board finally regained a quorum in March 2022 and affirmed the administrative judge's decision, it sent its ruling to Harrow's defunct former email address.

By statute, a federal employee has 60 days to appeal an adverse MSPB decision to the U.S. Court of Appeals for the Federal Circuit. In this case, however, Harrow did not learn of the board's decision until after that deadline had passed.

Harrow appealed to the Federal Circuit outside the 60-day deadline. He acknowledged that his appeal was untimely, but asked the court to equitably toll the deadline because the late filing was due to "excusable neglect" — namely, his failure to update his email address in the MSPB's system, based on his mistaken belief that emails sent to his old address would forward to his new one.

While expressing sympathy for Harrow's situation, the Federal Circuit refused to hear his appeal. The court explained that, under its precedent, the 60-day statutory deadline for appealing MSPB decisions is jurisdictional and thus not subject to equitable tolling.

The Arguments Before the Supreme Court

The time for appealing from the MSPB to the Federal Circuit is governed by Title 5 of the U.S. Code,

Section 7703(b)(1)(A), which provides that "any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board."

At first glance, that language does not appear to satisfy the Supreme Court's clear statement rule for classifying procedural rules as jurisdictional. The provision does not refer to jurisdiction. And it concerns filing deadlines, which the court has described as "quintessential claims-processing rules."[7]

The government argues, however, that Section 7703's time limit should be considered jurisdictional in light of Title 28 of the U.S. Code, Section 1295(a)(9), which grants the Federal Circuit jurisdiction over appeals from MSPB decisions.

Section 1295(a)(9) states that "the Federal Circuit shall have exclusive jurisdiction ... of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to [Section] 7703(b)(1)."

Based on that cross-reference, the government argues that Section 1295(a)(9) limits the Federal Circuit's jurisdiction to appeals taken pursuant to Section 7703(b)(1). And "pursuant to," the government argues, means "in compliance with."

Accordingly, the government claims, Federal Circuit jurisdiction depends on an appeal being in compliance with Section 7703(b)(1) — including its 60-day deadline. In the government's view, those provisions together provide the clear statement needed to characterize the deadline as a jurisdictional requirement.

Harrow, of course, disagrees. He argues that "pursuant to" simply means "under" or "as authorized by." In his view, Section 1295(a)(9) merely means the Federal Circuit has jurisdiction over MSPB appeals taken under Section 7703(b)(1) — not that the court's jurisdiction turns on strict compliance with Section 7703(b)(1) and its 60-day deadline.

More broadly, Harrow argues that such statutory cross-references simply are not enough to overcome the presumption against classifying filing deadlines as jurisdictional.

He observes that the Supreme Court has previously stated — albeit in a parenthetical within a footnote — that "a nonjurisdictional provision does not metamorphose into a jurisdictional limitation by cross-referencing a jurisdictional provision."[8]

The government responds that the Supreme Court has already effectively decided the issue. It points to the court's statement in a 1985 decision, Lindahl v. Office of Personnel Management, that "Sections 1295(a)(9) and 7703(b)(1) together ... provide for exclusive jurisdiction over MSPB decisions in the Federal Circuit."[9]

In the government's view, Lindahl supplies a "definitive earlier interpretation" of Section 7703(b)(1) that warrants treating its requirements as jurisdictional, even if the court's more recent approach might otherwise counsel a different result.[10]

Harrow disputes that account, arguing that nothing in Lindahl depended on whether Section 7703(b)(1) was strictly "jurisdictional" as the court now understands that term, and that Lindahl did not address Section 7703(b)(1)'s 60-day deadline in any event.

In Harrow's view, a more relevant consideration is the relative informality of MSPB proceedings. About

half of all federal employees appearing before the MSPB proceed pro se, and MSPB procedures are relatively employee-friendly — for example, they generally require the agency to carry the burden of proving that an employment action was lawful.[11]

In its 2011 Henderson ruling, the Supreme Court indicated that an agency process's "high degree of informality and solicitude for the claimant" favors finding a deadline for seeking review to be nonjurisdictional.[12] Harrow argues that the 60-day deadline for appealing MSPB decisions should be treated the same way.

Potential Broader Implications for Judicial Review of Agency Actions

While many of the arguments in Harrow focus on the specific language, history and context of the statutes governing review of MSPB decisions, the case also presents more sweeping theories that — if adopted by the Supreme Court — may have significant implications for judicial review of all sorts of agency actions.

Most notably, the government advances the theory that statutory deadlines for appealing to Article III courts of appeals should generally be treated as jurisdictional.

The Supreme Court held, in Bowles v. Russell in 2007, that statutory deadlines for appealing from district courts to courts of appeals are jurisdictional.[13] The court could conclude that the same rule should apply to statutory deadlines for appealing from agencies to courts of appeals.

Indeed, as the government observes, Bowles referred generally to the court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional," without limiting that principle specifically to appeals from district courts.[14]

On the other hand, the court has often held that statutory deadlines for appealing from agencies to agency tribunals — such as the Tax Court and Veterans Court — are nonjurisdictional.[15] In doing so, it emphasized that "Bowles concerned an appeal from one court to another court," as stated in its Henderson ruling.[16]

Thus, while it is relatively settled that statutory deadlines for court-to-court appeals generally are jurisdictional, and that statutory deadlines for agency-to-agency appeals generally are not, the Supreme Court has never squarely addressed the situation in Harrow: appeals from agencies to Article III courts of appeals. Harrow provides an opportunity for the court to clarify how such appeals should generally be treated.

One consideration that will doubtless weigh heavily on the justices' minds is the Hobbs Act, which sets a 60-day deadline for seeking judicial review of a broad range of agency actions.[17] The courts of appeals have uniformly held that deadline is jurisdictional, but the Supreme Court has never decided the issue.[18]

If the court holds the deadline in Harrow is nonjurisdictional, that may suggest that the Hobbs Act's deadline — which is similarly connected to the statute's jurisdictional provision by a cross-reference — should likewise be treated as nonjurisdictional.

That could dramatically reshape the landscape for challenging agency decisions, opening the door to equitable exceptions to a deadline that had long been understood to be rigid and unyielding.

Conclusion

Harrow is an important case for the thousands of federal employees who seek to challenge employment actions before the MSPB and Federal Circuit.

But it could also have ramifications well beyond the MSPB, potentially loosening time restrictions on challenging a broad range of agency actions.

Next week's arguments may provide clues to whether the court will deliver such a blockbuster ruling. Parties and practitioners with business before federal agencies should listen with interest.

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[1] See Bowles v. Russell, 551 U.S. 205 (2007).

[2] Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

[3] Henderson, 562 U.S. at 435, 441-42; Boechler v. Commissioner, 596 U.S. 199, 211 (2022).

[4] Last month, in McIntosh v. United States, the Supreme Court heard argument on whether a deadline for seeking criminal forfeiture is a time-related directive or a mandatory claims-processing rule.

[5] Boechler, P.C. v. Comm'r of Internal Revenue, 596 U.S. 199, 203 (2022).

[6] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 154 (2013); see also United States v. Wong, 575 U.S. 402, 410 (2015) ("Time and again, we have described filing deadlines as 'quintessential claim-processing rules.'").

[7] Wong, 575 U.S. at 410 (quoting Henderson, 562 U.S. at 435).

[8] Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1851 n.8 (2019) (citing Gonzales v. Thaler, 565 U.S. 134, 145 (2012)).

[9] Lindahl v. Office of Personnel Management, 470 U.S. 768, 792 (1985).

[10] John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 137-38 (2008).

[11] 5 C.F.R. §1201.56(b); 5 U.S.C. §7701(c)(1).

[12] Henderson, 562 U.S. at 432 (holding deadline for veterans to appeal benefit denials to Court of Appeals for Veterans Claims is nonjurisdictional).

[13] 551 U.S. 205, 209 (2007).

[14] Id. at 210.

[15] Henderson, 562 U.S. at 441-42; Boechler, 596 U.S. at 211.

[16] Henderson, 562 U.S. at 436.

[17] See 28 U.S.C. §§2342, 2344.

[18] See Henderson, 562 U.S. at 437.