



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Clarifying Statutory Access to Judicial Review of Agency Action

Committee on Judicial Review

Proposed Recommendation for Committee | May 3, 2021

1 Judicial review of federal administrative action is governed by numerous statutes,¹
2 including two general statutes, the Administrative Procedure Act (APA) and the Hobbs Act, and
3 hundreds of agency-specific statutes. The APA's judicial review provisions govern judicial
4 review of agency action generally and provide default rules that apply in the absence of any more
5 specifically applicable rules.² Agency-specific statutes govern judicial review of actions of
6 particular agencies (often, of particular actions of particular agencies) and may provide
7 specifically applicable rules that displace the general provisions of the APA.³ Certain procedural
8 aspects of judicial review are governed by federal court rules that specify how to file a petition
9 for review, the content of the record on review, and other matters.⁴

10 The Administrative Conference of the United States undertook an initiative to identify
11 and review all statutory provisions governing judicial review of federal agency rules and
12 adjudicative orders that appear in the *United States Code*.⁵ In the course of this initiative, the
13 Conference observed various ways in which some of these statutes create unnecessary obstacles
14 to judicial review or overly complicate the process of judicial review. The Conference

¹ Judicial review is also governed by judicially developed doctrines. *See generally* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

² 5 U.S.C. §§ 701–706.

³ See 5 U.S.C. § 559, which provides that a “[s]ubsequent statute may not be held to supersede or modify . . . chapter 7 [of the APA] . . . except to the extent that it does so expressly.”

⁴ *See* Fed. R. App. P. 15–20.

⁵ *See* JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (Mar. 17, 2021).



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15 recommends eliminating these obstacles and complications in order to promote efficiency and
16 fairness, and to reduce unnecessary litigation.⁶

17 This Recommendation is divided into two sections. The first section (Recommendations
18 1–3) provides a set of drafting recommendations for Congress as it writes new specific judicial
19 review statutes. The second section (Recommendation 4) recommends the passage of a general
20 judicial review statute (referred to below as “the general statute”) that would cure problems in
21 existing judicial review statutes. The specific topics covered in the Recommendations are listed
22 below.

Specifying the Time within which to Seek Review

23 Judicial review statutes typically specify the time within which a party may seek judicial
24 review. The Conference’s review revealed two problems that some such statutes cause. First,
25 some specific judicial review statutes specify the time limit using an unusual formulation that
26 results in a time period one day shorter than might be expected. In cases involving these statutes,
27 some parties have lost their right to review because they sought review one day late. Such
28 denials of review serve no substantial policy interest.⁷ Accordingly, Recommendation 1 provides
29 that Congress, when specifying the time within which to seek judicial review of agency action,
30 should use one of the usual forms of words and avoid the unusual forms. Recommendation 4(a)
31 provides that Congress should include in the recommended general judicial review statute a

⁶ The proposals and recommendations made herein are not intended to address all issues related to access to judicial review. The Conference makes no recommendations relating to, among other issues, the application of statutes of limitations to rights of judicial review (*see, e.g.*, *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991)); the extent to which judicial review remains available after the expiration of a time period specified in a special statute authorizing pre-enforcement review of agency rules (*see, e.g.*, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019)); the application of judge-made issue-exhaustion requirements in curtailing judicial review (*see, e.g.*, *Carr v. Saul*, 141 S. Ct. 1352 (2021)); or whether Congress should specify where judicial review should be sought with regard to agency actions that are not currently the subject of any specific judicial review statute (*see* 5 U.S.C. § 703 (providing that review of such actions may be sought using “any applicable form of legal action . . . in a court of competent jurisdiction.”)).

⁷ SIEGEL, *supra* note 5, at 24–28.



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32 provision that would add one day to the review period whenever a specific judicial review statute
33 uses one of the unusual forms, thus saving certain cases from dismissal.

34 The other problem relating to time limits is that some specific judicial review statutes do
35 not clearly specify the event that starts the time within which to seek review.⁸ In particular, some
36 specific judicial review statutes provide that the time for seeking review of an agency rule begins
37 when the rule is “issued” or “prescribed,” which has led to litigation about exactly what event
38 constitutes the “issu[ance]” of a rule.⁹ Recommendation 2 provides as a general matter that
39 Congress should clearly specify what event starts the time for seeking review of agency action.
40 Recommendation 2 also provides that in drafting specific judicial review statutes providing for
41 review of an agency rule, Congress should provide that the time for review runs from the rule’s
42 publication in the *Federal Register*. Recommendation 4(b) provides that Congress should include
43 in the general statute a provision that whenever a time period for seeking judicial review begins
44 with the issuance of a rule, the time starts when the rule is published in the *Federal Register*.

Specifying the Name and Content of the Document by which Review is Sought

45 When review is to be sought in a court of appeals, most specific judicial review statutes
46 provide that review should be sought by filing either a “petition for review” or a “notice of
47 appeal.” The term “petition for review” is more appropriate, as the term “appeal” suggests an
48 appellate court’s review of a decision by a lower court.¹⁰ Recommendation 3 therefore provides
49 that specific judicial review statutes should direct parties to seek review in a court of appeals by
50 filing a petition for review. Problems sometimes arise when a party incorrectly titles the
51 document. In most such cases, the reviewing court treats the incorrect form as the correct one,
52 but occasional decisions refuse to save a party who has given the document the wrong name.

⁸ The Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure apply in computing and extending time periods if any judicial review statute does not specify a method of computing time. *See* Fed. R. Civ. P. 6; Fed. R. App. P. 26.

⁹ SIEGEL, *supra* note 5, at 28–29.

¹⁰ *Id.* at 34–36.



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53 Parties should not lose their right to review by filing an incorrectly styled document.¹¹
54 Recommendation 4(c) proposes to solve this problem while maintaining the preference in courts
55 of appeals for “petitions for review.”

56 [Recommendation 3 also provides that when review is to be sought in district court,
57 Congress should provide that it be initiated by filing a complaint. District court litigators are
58 accustomed to initiating proceedings with a complaint, and courts are also accustomed to this
59 procedure because the Federal Rules of Civil Procedure contemplate the initiation of an action
60 with the filing of a complaint.¹² Statutes calling for review to be initiated in district court by
61 filing some other document, such as a petition for review or notice of appeal, might be
62 confusing. Recommendation 4(d) proposes a cure for this problem while maintaining the
63 preference in district courts for “complaints.”]

64 Most specific judicial review statutes do not prescribe the content of the document used
65 to initiate review. This salutary practice allows the content of the document to be determined by
66 rules of court, such as Federal Rule of Appellate Procedure 15, which contains only minimal
67 requirements. A few unusual specific judicial review statutes prescribe the content of the petition
68 for review in more detail. These requirements unnecessarily complicate judicial review.¹³
69 Recommendation 3 therefore also provides that Congress should understand that specific judicial
70 review statutes need not specify the required content of a petition for review and Congress may
71 allow the content to be governed by the applicable rules of court. Recommendation 4(e) provides
72 that Congress should include in the general statute a provision generally allowing documents
73 initiating judicial review to comply either with an applicable specific judicial review statute or an
74 applicable rule of court.

Commented [ACUS1]: Highlighted text about potential recommendation about preference for complaints in district courts appearing here, at lines 124-126 (Recommendation 3), and at 145-150 (Recommendation 4(d)), to be discussed and resolved during committee meeting.

¹¹ *Id.*

¹² Fed. R. Civ. P. 3.

¹³ SIEGEL, *supra* note 5, at 36–37.



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Jurisdiction to Hear the Case

75 The Conference’s review uncovered another potential difficulty. Some specific judicial
76 review statutes provide that parties should seek review of agency action in federal courts of
77 appeals but do not specify that these courts shall have jurisdiction to hear the resulting cases. In
78 such a case, a court of appeals might question whether it has jurisdiction to consider the petition
79 for review.¹⁴ Accordingly, Recommendation 4(f) provides that Congress should include in the
80 general statute a provision that whenever a specific judicial review statute authorizes a party to
81 seek judicial review of agency action in a specified court, the court shall have jurisdiction to
82 consider the resulting case.

Simultaneous Service Requirements

83 Another potential problem is that some specific judicial review statutes provide that the
84 party seeking judicial review of agency action shall transmit the document initiating review to
85 the agency “simultaneously” with filing the document. Such a provision could cause a court to
86 question what should happen if a party seeking review serves the document initiating review on
87 the agency, but not “simultaneously” with filing the document. Although the Conference’s
88 review has found no cases dismissed because of these issues, in these days when courts pay
89 closer attention to statutory text, a court might dismiss a petition for review based on these
90 potential problems.¹⁵ Recommendation 4(g) provides that whenever a specific judicial review
91 statute requires a party seeking judicial review to serve a copy of the document initiating review
92 on the agency involved “simultaneously” with filing it, the service requirement shall be deemed
93 satisfied if the document is served on the agency within a specified number of days.

¹⁴ *Id.* at 32–34.

¹⁵ *Id.* at 37–41.



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Race to the Courthouse, Revisited

94 The Conference’s Recommendation 80-5 addressed the “race to the courthouse” problem
95 that arises when multiple parties seek judicial review of the same agency action in different
96 circuits.¹⁶ In accordance with that recommendation, Congress provided by statute that in such
97 cases a lottery shall determine which circuit shall review the agency’s action. The statute,
98 however, provides that the lottery system applies only when an agency receives multiple
99 petitions for review “from the persons instituting the proceedings.”¹⁷ This provision has been
100 held not to apply to petitions for review forwarded to an agency by a court clerk, as some
101 specific judicial review statutes require. Parties invoking judicial review under such specific
102 judicial review statutes should be entitled to the benefit of the lottery system.¹⁸ Recommendation
103 4(h) provides that Congress should amend the “race to the courthouse” statute appropriately.

¹⁶ Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the “Race to the Courthouse” in Appeals from Agency Action*, 45 Fed. Reg. 84954 (Dec. 24, 1980).

¹⁷ 28 U.S.C. § 2112(a)(1).

¹⁸ SIEGEL, *supra* note 5, at 38–41.



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RECOMMENDATION

Recommendations to Congress When Drafting Judicial Review Provisions

- 104 1. When specifying the time within which a party may seek judicial review of agency
105 action, Congress should provide that a party may seek review “within” or “not later than”
106 a specified number of days after an agency action. Congress should avoid providing that
107 a party may seek review “prior to” or “before” the day that is a specified number of days
108 after an agency action, or “within” or “before the expiration of” a period of a specified
109 number of days beginning on the date of an agency’s action. Examples of the
110 recommended forms are:
- 111 a. “A party desiring judicial review may file a petition for review within 30 days
112 after” the agency’s action.
 - 113 b. “A party desiring judicial review may file a petition for review not later than 30
114 days after” the agency’s action.
- 115 Examples of the forms to be avoided are:
- 116 c. “A party desiring judicial review may file a petition for review prior to [or
117 before] the 30th day after” the agency’s action.
 - 118 d. “A party desiring judicial review may file a petition for review within [or before
119 the expiration of] the 30-day period beginning on the date of” the agency’s action.
- 120 2. Congress should clearly specify what event starts the time for seeking review. Where the
121 event is the promulgation, amendment, or repeal of a rule, Congress should provide that
122 the event date shall be the date of the publication of the rule in the *Federal Register*.
- 123 3. When drafting a statute providing for review in a court of appeals, Congress should
124 provide that review should be initiated by filing a petition for review. [When drafting a
125 statute providing for review in a district court, Congress should provide that review
126 should be initiated by filing a complaint.] With regard to either kind of statute, Congress
127 should be aware that it need not specify the required content of the document initiating
128 judicial proceedings because that matter would be governed by the applicable court rules.



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General Judicial Review Statute

- 129 4. Congress should enact a new general judicial review statute that includes these
130 provisions:
- 131 a. Whenever a specific judicial review statute provides that a party may seek judicial
132 review of an agency’s action “prior to” or “before” the day that is a specified
133 number of days after an agency’s action, or “within” or “before the expiration of”
134 a period of a specific number of days beginning on the date of an agency’s action,
135 review may also be sought exactly that number of days after the agency’s action.
- 136 b. Whenever a specific judicial review statute provides that the event that starts the
137 time for seeking judicial review is the promulgation, amendment, or repeal of a
138 rule, the event date shall be the date of the publication of the rule in the *Federal*
139 *Register*.
- 140 c. Statutes authorizing judicial review in a court of appeals by the filing of a notice
141 of appeal shall be construed as authorizing judicial review by the filing of a
142 petition for review, and whenever a party seeking judicial review in a court of
143 appeals styles the document initiating review as a notice of appeal, the court shall
144 treat that document as a petition for review.
- 145 d. [Statutes authorizing judicial review in a district court by the filing of a notice of
146 appeal, petition for review, or other petition shall be construed as authorizing
147 judicial review by the filing of a complaint, and whenever a party seeking judicial
148 review in a district court styles the document initiating review as a notice of
149 appeal, petition for review, or other petition, the court shall treat that document as
150 a complaint.]
- 151 e. Whenever a specific judicial review statute specifies the required content of a
152 document that initiates judicial review, a party may initiate review with a
153 document that complies with the requirements of that statute or a document that
154 complies with the applicable rules of court.



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- 155 f. Whenever a specific judicial review statute provides that a party may seek judicial
156 review of an agency action in a specified federal court, the specified federal court
157 shall have jurisdiction to hear the resulting case.
- 158 g. Whenever a specific judicial review statute requires that a party seeking review
159 serve the document initiating review on the agency that issued the order of which
160 review is sought “simultaneously” with filing the document, this requirement is
161 satisfied if the document is served on the agency within a reasonable but specific
162 number of days, such as [seven/fourteen] days.
- 163 h. Congress should amend 28 U.S.C. § 2112(a)(1) by striking the phrase “, from the
164 persons instituting the proceedings, the” therefrom and inserting “a” in its place,
165 in both places where the phrase occurs.

Recommendation 4(h): Struck-Through Text of § 2112(a)(1) for Clarity:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, ~~from the persons instituting the proceedings, the~~ [a] petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, ~~from the persons instituting the proceedings, the~~ [a] petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

Commented [ACUS2]: Staff Comment:
For Recommendation 5(g), this struck-through text is provided for clarity and convenience. This struck-through text is not included in line numbering and will not appear in the final recommendation.