



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Clarifying Statutory Access to Judicial Review of Agency Action

Committee on Judicial Review

Proposed Recommendation | June 17, 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,² 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.³ Agency-specific statutes (referred to herein as “specific judicial
6 review statutes”) govern judicial review of actions of particular agencies (often, of particular
7 actions of particular agencies) and may provide specifically applicable rules that displace the
8 general provisions of the APA.⁴ Certain procedural aspects of judicial review are governed by
9 federal court rules that specify how to file a petition for review, the content of the record on
10 review, and other matters.⁵

11 The Administrative Conference of the United States undertook an initiative to identify
12 and review all statutory provisions in the *United States Code* governing judicial review of federal
13 agency rules and adjudicative orders.⁶ In the course of this initiative, the Conference observed

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 28 U.S.C. §§ 2341–2351.

³ 5 U.S.C. §§ 701–706.

⁴ 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.”

⁵ *See* FED. R. APP. P. 15–20.

⁶ *See* JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (draft Mar. 17, 2021).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

14 various ways in which some of these statutes create unnecessary obstacles to judicial review or
15 overly complicate the process of judicial review. The Conference recommends eliminating these
16 obstacles and complications in order to promote efficiency and fairness and to reduce
17 unnecessary litigation.⁷

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

Specifying the Time Within Which to Seek Review

24 Judicial review statutes typically specify the time within which a party may seek judicial
25 review. The Conference’s review revealed two problems that some such statutes cause. First,
26 some specific judicial review statutes specify the time limit using an unusual formulation that
27 results in a time period one day shorter than might be expected. In cases involving these statutes,
28 some parties have lost their right to review because they sought review one day late. Such
29 denials of review serve no substantial policy interest.⁸ Accordingly, Recommendation 1 provides
30 that Congress, when specifying the time within which to seek judicial review of agency action,

⁷ This Recommendation is not intended to address all issues related to access to judicial review. For example, it does not address the time of accrual of a right of action under the general statute of limitations in 28 U.S.C. § 2401(a) (*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”). The Conference has addressed some of these issues in past recommendations. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings*, 47 Fed. Reg. 58208 (Dec. 30, 1982); Admin. Conf. of the U.S., Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*, 40 Fed. Reg. 27926 (July 2, 1975).

⁸ SIEGEL, *supra* note 6, at 24–28.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

31 should use one of the usual forms of words and avoid the unusual forms.⁹ Recommendation 4(a)
32 provides that Congress should include in the recommended general judicial review statute a
33 provision that would add one day to the review period whenever a specific judicial review statute
34 uses one of the unusual forms, thus saving certain cases from dismissal.

35 The other problem relating to time limits is that some specific judicial review statutes do
36 not clearly specify the event that starts the time within which to seek review. In particular, some
37 specific judicial review statutes provide that the time for seeking review of an agency rule begins
38 when the rule is “issued” or “prescribed,” which has led to litigation about exactly what event
39 constitutes the “issu[ance]” of a rule.¹⁰ Recommendation 2 provides as a general matter that
40 Congress should clearly specify what event starts the time for seeking review of agency action.
41 Recommendation 2 also provides that in drafting specific judicial review statutes providing for
42 review of an agency rule, Congress should provide that the time for review runs from the rule’s
43 publication in the *Federal Register*. Recommendation 4(b) provides that Congress should include
44 in the general statute a provision that whenever a time period for seeking judicial review begins
45 upon the issuance of a rule, the time starts when the rule is published in the *Federal Register*.¹¹

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

46 When review is to be sought in a court of appeals, most specific judicial review statutes
47 provide that review should be sought by filing either a “petition for review” or a “notice of
48 appeal.” The term “petition for review” is more appropriate, as the term “appeal” suggests an
49 appellate court’s review of a decision by a lower court.¹² Recommendation 3 therefore provides
50 that specific judicial review statutes should direct parties to seek review in a court of appeals by

⁹ The recommended forms conform to those recommended by the drafting manuals of each house of Congress. See U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE 57 (1995); U.S. SENATE, OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL 81–82 (1997).

¹⁰ *Id.* at 28–29.

¹¹ If the relevant judicial review statute is silent with regard to computing or extending the time within which to seek review, the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure apply. See FED. R. CIV. P. 6; FED. R. APP. P. 26.

¹² SIEGEL, *supra* note 6, at 34–36.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

51 filing a petition for review. Problems sometimes arise when a party incorrectly titles the
52 document. In most such cases, the reviewing court treats the incorrect form as the correct one,
53 but occasional decisions refuse to save a party who has given the document the wrong name.
54 Parties should not lose their right to review by filing an incorrectly styled document.¹³
55 Recommendation 4(c) proposes to solve this problem consistent with the Recommendation’s
56 preference for “petitions for review” in courts of appeals.

57 Recommendation 3 also provides that when review is to be sought in district court,
58 Congress should provide that it be initiated by filing a complaint. District court litigators are
59 accustomed to initiating proceedings with a complaint, and courts are also accustomed to this
60 terminology because the Federal Rules of Civil Procedure contemplate the initiation of an action
61 with the filing of a complaint.¹⁴ Statutes calling for review to be initiated in district court by
62 filing some other document, such as a petition for review or notice of appeal, might be
63 confusing. Recommendation 4(d) proposes a cure for this problem that is consistent with the
64 Recommendation’s preference for “complaints” in district courts.

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

¹³ *Id.*

¹⁴ FED. R. CIV. P. 3.

¹⁵ SIEGEL, *supra* note 6, at 36–37.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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 will 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.¹⁶ 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 will 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 must 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 due to such circumstances, the Conference is concerned
89 that a court might read the statutory text as requiring it to dismiss a petition for review based on
90 the lack of simultaneous service.¹⁷ Recommendation 4(g) therefore provides that whenever a
91 specific judicial review statute requires a party seeking judicial review to serve a copy of the
92 document initiating review on the agency involved “simultaneously” with filing it, the service
93 requirement is satisfied if the document is served on the agency within the number of days
94 specified in the recommended general statute.

¹⁶ *Id.* at 32–34.

¹⁷ *Id.* at 37–41.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Race to the Courthouse, Revisited

95 The Conference’s Recommendation 80-5 addressed the “race to the courthouse” problem
96 that arises when multiple parties seek judicial review of the same agency action in different
97 circuits.¹⁸ In accordance with that recommendation, Congress provided by statute that in such
98 cases a lottery will determine which circuit will review the agency’s action. The statute,
99 however, provides that the lottery system applies only when an agency receives multiple
100 petitions for review “from the persons instituting the proceedings.”¹⁹ This provision has been
101 held not to apply to petitions for review forwarded to an agency by a court clerk, as some
102 specific judicial review statutes require. Parties invoking judicial review under such specific
103 judicial review statutes should be entitled to the benefit of the lottery system.²⁰ Recommendation
104 4(h) provides that Congress should amend the “race to the courthouse” statute appropriately.

RECOMMENDATION

Recommendations to Congress When Drafting Judicial Review Provisions

105 1. When specifying the time within which a party may seek judicial review of agency
106 action, Congress should provide that a party may seek review “within” or “not later than”
107 a specified number of days after an agency action. Congress should avoid providing that
108 a party may seek review “prior to” or “before” the day that is a specified number of days
109 after an agency action, or “within” or “before the expiration of” a period of a specified

¹⁸ 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).

¹⁹ 28 U.S.C. § 2112(a)(1).

²⁰ SIEGEL, *supra* note 6, at 38–41.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

General Judicial Review Statute

- 131 4. Congress should enact a new general judicial review statute that includes these
132 provisions:
- 133 a. Whenever a specific judicial review statute provides that a party may seek judicial
134 review of an agency’s action “prior to” or “before” the day that is a specified
135 number of days after an agency’s action, or “within” or “before the expiration of”



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 136 a period of a specific number of days beginning on the date of an agency’s action,
137 review may also be sought exactly that number of days after the agency’s action.
- 138 b. Whenever a specific judicial review statute provides that the event that starts the
139 time for seeking judicial review is the promulgation, amendment, or repeal of a
140 rule, the event date shall be the date of the publication of the rule in the *Federal*
141 *Register*.
- 142 c. Statutes authorizing judicial review in a court of appeals by the filing of a notice
143 of appeal will be construed as authorizing judicial review by the filing of a
144 petition for review, and whenever a party seeking judicial review in a court of
145 appeals styles the document initiating review as a notice of appeal, the court will
146 treat that document as a petition for review.
- 147 d. Statutes authorizing judicial review in a district court by the filing of a notice of
148 appeal, petition for review, or other petition will be construed as authorizing
149 judicial review by the filing of a complaint, and whenever a party seeking judicial
150 review in a district court styles the document initiating review as a notice of
151 appeal, petition for review, or other petition, the court will treat that document as
152 a complaint.
- 153 e. Whenever a specific judicial review statute specifies the required content of a
154 document that initiates judicial review, a party may initiate review with a
155 document that complies with the requirements of that statute or a document that
156 complies with the applicable rules of court.
- 157 f. Whenever a specific judicial review statute provides that a party may seek judicial
158 review of an agency action in a specified federal court, the specified federal court
159 will have jurisdiction to hear the resulting case.
- 160 g. Whenever a specific judicial review statute requires that a party seeking review
161 serve the document initiating review on the agency that issued the order of which
162 review is sought “simultaneously” with filing the document, this requirement is
163 satisfied if the document is served on the agency within a reasonable but specific
164 number of days, such as [seven/fourteen] days.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

165 h. Congress should amend 28 U.S.C. § 2112(a)(1) by striking the phrase “, from the
166 persons instituting the proceedings, the” and inserting “a” in its place, in both
167 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 [A1]: Note to Assembly: For Recommendation 4(h), this stricken text is provided for clarity and convenience. It is not included in line numbering and will not appear in the final recommendation.