



## Clarifying Statutory Access to Judicial Review of Agency Action

### Committee on Judicial Review

Proposed Recommendation | June 17, 2021

#### Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Judicial review of federal administrative action is governed by numerous statutes,<sup>1</sup>  
2 including two general statutes, the Administrative Procedure Act (APA)<sup>2</sup> and the Hobbs Act,<sup>3</sup>  
3 and hundreds of agency-specific statutes. Judicial review is also governed by judicially  
4 developed doctrines.<sup>4</sup> The APA's judicial review provisions govern judicial review of agency  
5 action generally and provide default rules that apply in the absence of any more specifically  
6 applicable rules.<sup>5</sup> Agency-specific statutes (referred to herein as "specific judicial review  
7 statutes") govern judicial review of actions of particular agencies (often, of particular actions of  
8 particular agencies) and may provide specifically applicable rules that displace the general  
9 provisions of the APA.<sup>6</sup> Certain procedural aspects of judicial review are governed by federal

Commented [CMA1]: Proposed Amendment from Senior Fellow Alan B. Morrison

<sup>1</sup> 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).

<sup>2</sup> 5 U.S.C. §§ 701–06.

<sup>3</sup> 28 U.S.C. §§ 2341–2351.

<sup>4</sup> See generally John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

<sup>5</sup> 5 U.S.C. §§ 701–706.

<sup>6</sup> 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."



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10 court rules that specify how to file a petition for review, the content of the record on review, and  
11 other matters.<sup>7</sup>

12 The Administrative Conference of the United States undertook an initiative to identify  
13 and review all statutory provisions in the *United States Code* governing judicial review of federal  
14 agency rules and adjudicative orders.<sup>8</sup> In the course of this initiative, the Conference observed  
15 various ways in which some of these statutes create unnecessary obstacles to judicial review or  
16 overly complicate the process of judicial review. The Conference recommends eliminating these  
17 obstacles and complications in order to promote efficiency and fairness and to reduce  
18 unnecessary litigation.<sup>9</sup>

19 This Recommendation is divided into two sections. The first section (**Recommendations**  
20 **Paragraphs 1–3**) recommends a set of drafting principles for Congress when it writes **new or**  
21 **amended or amends** specific judicial review statutes. The second section (**Recommendation**  
22 **Paragraphs 4 and 5**) recommends the **preparation and** passage of a general judicial review statute  
23 (referred to below as “the general statute”) that would cure problems in existing judicial review  
24 statutes. **The Conference’s Office of the Chairman has announced that it will prepare and submit**

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<sup>7</sup> See FED. R. APP. P. 15–20.

<sup>8</sup> See JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (draft May 17, 2021).

<sup>9</sup> 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).



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25 to Congress a proposed statute for consideration that would provide for the statutory changes in  
26 Paragraph 4. The specific topics covered in the Recommendation are described below.

Commented [CA2]: Proposed Amendment from Council  
(see parallel amendment at lines 175–177 below)

### Specifying the Time Within Which to Seek Review

27 Judicial review statutes typically specify the time within which a party may seek judicial  
28 review. The Conference’s review revealed two problems that some such statutes cause. First,  
29 some specific judicial review statutes specify the time limit using an unusual formulation that  
30 results in a time period one day shorter than might be expected. In cases involving these statutes,  
31 some parties have lost their right to review because they sought review one day late. Such  
32 denials of review serve no substantial policy interest.<sup>10</sup> Accordingly, Recommendation Paragraph  
33 1 provides that Congress, when specifying the time within which to seek judicial review of  
34 agency action, should use one of the usual forms of words and avoid the unusual forms.<sup>11</sup>  
35 Recommendation Paragraph 4(a) provides that Congress should include in the recommended  
36 general judicial review statute a provision that would add one day to the review period whenever  
37 a specific judicial review statute uses one of the unusual forms, thus saving certain cases from  
38 dismissal.

39 The other problem relating to time limits is that some specific judicial review statutes do  
40 not clearly specify-identify the event that starts the time within which to seek review. In  
41 particular, some specific judicial review statutes provide that the time for seeking review of an  
42 agency rule begins when the rule is “issued” or “prescribed,” which has led to litigation about  
43 exactly what event constitutes the “issu[ance]” of a rule.<sup>12</sup> Recommendation Paragraph 2 provides  
44 as a general matter that Congress should clearly specify what event starts the time for seeking  
45 review of agency action. Recommendation Paragraph 2 also provides that in drafting specific

<sup>10</sup> SIEGEL, *supra* note 68, at 24–28, 26–30.

<sup>11</sup> 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).

<sup>12</sup> SIEGEL, *supra* note 8, *id.* at 28–29, 31–32.



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46 judicial review statutes providing for review of an agency rule, Congress should provide that the  
47 time for review runs from the rule's publication in the *Federal Register*. **Recommendation**  
48 **Paragraph 4(b)** provides that Congress should include in the general statute a provision that  
49 whenever a time period for seeking judicial review begins upon the issuance of a rule, the time  
50 starts when the rule is published in the *Federal Register*.<sup>13</sup>

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

51 When review is to be sought in a court of appeals, most specific judicial review statutes  
52 provide that review should be sought by filing either a "petition for review" or a "notice of  
53 appeal." The term "petition for review" is more appropriate, as the term "appeal" suggests an  
54 appellate court's review of a decision by a lower court.<sup>14</sup> **Recommendation Paragraph 3** therefore  
55 provides that specific judicial review statutes should direct parties to seek review in a court of  
56 appeals by filing a petition for review. Problems sometimes arise when a party incorrectly titles  
57 the document. In most such cases, the reviewing court treats the incorrect form as the correct  
58 one, but occasional decisions refuse to save a party who has given the document the wrong  
59 name. Parties should not lose their right to review by filing an incorrectly styled document.<sup>15</sup>  
60 **Recommendation Paragraph 4(c)** proposes to solve this problem consistent with **the**  
61 **Recommendation Paragraph 3**'s preference for "petitions for review" in courts of appeals.

62 **Recommendation Paragraph 3** also provides that when review is to be sought in district  
63 court, Congress should provide that it be initiated by filing a complaint. District court litigators  
64 are accustomed to initiating proceedings with a complaint, and courts are also accustomed to this  
65 terminology because the Federal Rules of Civil Procedure contemplate the initiation of an action  
66 with the filing of a complaint.<sup>16</sup> Statutes calling for review to be initiated in district court by

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<sup>13</sup> 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.

<sup>14</sup> SIEGEL, *supra* note 68, at 34-3638-40; see also *Garland v. Dai*, 141 S. Ct. 1669 (2021).

<sup>15</sup> *Id.*

<sup>16</sup> FED. R. CIV. P. 3.



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67 filing some other document, such as a petition for review or notice of appeal, might be  
68 confusing. RecommendationParagraph 4(d) proposes a cure for this problem that is consistent  
69 with the RecommendationParagraph 3's preference for "complaints" in district courts.

70 Most specific judicial review statutes do not prescribe the content of the document used  
71 to initiate review. This salutary practice allows the content of the document to be determined by  
72 rules of court, such as Federal Rule of Appellate Procedure 15, which contains only minimal  
73 requirements. A few unusual specific judicial review statutes prescribe the content of the petition  
74 for review in more detail. These requirements unnecessarily complicate judicial review.<sup>17</sup>  
75 RecommendationParagraph 3 reminds Congress that specific judicial review statutes need not  
76 specify the required content of a petition for review and that Congress may allow the content to  
77 be governed by the applicable rules of court. RecommendationParagraph 4(e) provides that  
78 Congress should include in the general statute a provision generally allowing documents  
79 initiating judicial review to comply either with an applicable specific judicial review statute or an  
80 applicable rule of court.

### Jurisdiction to Hear the Case

81 The Conference's review uncovered another potential difficulty. Some specific judicial  
82 review statutes provide that parties should seek review of agency action in federal courts of  
83 appeals but do not specify that these courts will have jurisdiction to hear the resulting cases. In  
84 such a case, a court of appeals might question whether it has jurisdiction to consider the petition  
85 for review.<sup>18</sup> Accordingly, RecommendationParagraph 4(f) provides that Congress should  
86 include in the general statute a provision that whenever a specific judicial review statute  
87 authorizes a party to seek judicial review of agency action in a specified court, the court will  
88 have jurisdiction to consider the resulting case.

<sup>17</sup> SIEGEL, *supra* note 68, at 36-3740-41.

<sup>18</sup> *Id.* at 32-3435-37.



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### Simultaneous Service Requirements

89 Another potential problem is that some specific judicial review statutes provide that the  
90 party seeking judicial review of agency action must transmit the document initiating review to  
91 the agency “simultaneously” with filing the document. Such a provision could cause a court to  
92 question what should happen if a party seeking review serves the document initiating review on  
93 the agency, but not “simultaneously” with filing the document. Although the Conference’s  
94 review has found no cases dismissed due to such circumstances, the Conference is concerned  
95 that a court might read the statutory text as requiring it to dismiss a petition for review based on  
96 the lack of simultaneous service.<sup>19</sup> Recommendation Paragraph 4(g) therefore provides that  
97 whenever a specific judicial review statute requires a party seeking judicial review to serve a  
98 copy of the document initiating review on the agency involved “simultaneously” with filing it,  
99 the service requirement is satisfied if the document is served on the agency within the number of  
100 days specified in the recommended general statute.

### Race to the Courthouse, Revisited

101 The Conference’s Recommendation 80-5 addressed the “race to the courthouse” problem  
102 that arises when multiple parties seek judicial review of the same agency action in different  
103 circuits.<sup>20</sup> In accordance with that recommendation, Congress provided by statute that in such  
104 cases a lottery will determine which circuit will review the agency’s action. The statute,  
105 however, provides that the lottery system applies only when an agency receives multiple  
106 petitions for review “from the persons instituting the proceedings.”<sup>21</sup> This provision has been  
107 held not to apply to petitions for review forwarded to an agency by a court clerk, as some  
108 specific judicial review statutes require. Parties invoking judicial review under such specific

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<sup>19</sup> *Id.* at 37-4141-45.

<sup>20</sup> 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).

<sup>21</sup> 28 U.S.C. § 2112(a)(1).



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109 judicial review statutes should be entitled to the benefit of the lottery system.<sup>22</sup>  
110 **Recommendation Paragraph** 4(h) provides that Congress should amend the “race to the  
111 courthouse” statute appropriately.

### RECOMMENDATION

#### Recommendations to Congress When Drafting Judicial Review Provisions

- 112 1. When specifying the time within which a party may seek judicial review of agency  
113 action, Congress should provide that a party may seek review “within” or “not later than”  
114 a specified number of days after an agency action. Congress should avoid providing that  
115 a party may seek review “prior to” or “before” the day that is a specified number of days  
116 after an agency action, or “within” or “before the expiration of” a period of a specified  
117 number of days beginning on the date of an agency’s action. Examples of the  
118 recommended forms are:
- 119 a. “A party **desiringseeking** judicial review may file a petition for review within 30  
120 days after” the agency’s action.
  - 121 b. “A party **desiringseeking** judicial review may file a petition for review not later  
122 than 30 days after” the agency’s action.
- 123 Examples of the forms to be avoided are:
- 124 c. “A party **desiringseeking** judicial review may file a petition for review prior to  
125 [or “before”] the 30th day after” the agency’s action.
  - 126 d. “A party **desiringseeking** judicial review may file a petition for review within [or  
127 “before the expiration of”] the 30-day period beginning on the date of” the  
128 agency’s action.

<sup>22</sup> SIEGEL, *supra* note 68, at 38-4142-45.



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- 129 2. Congress should clearly specify what event starts the time for seeking review. Where the  
130 event is the promulgation, amendment, or repeal of a rule, Congress should provide that  
131 the event date is the date of the publication of the rule in the *Federal Register*.  
132 3. When drafting a statute providing for review in a court of appeals, Congress should  
133 provide that review should be initiated by filing a petition for review. When drafting a  
134 statute providing for review in a district court, Congress should provide that review  
135 should be initiated by filing a complaint. With regard to either kind of statute, Congress  
136 should be aware that it need not specify the required content of the document initiating  
137 judicial proceedings because that matter would be governed by the applicable court rules.

### **General Judicial Review Statute**

- 138 4. Congress should enact a new general judicial review statute that includes these  
139 provisions:
- 140 a. Whenever a specific judicial review statute provides that a party may seek judicial  
141 review of an agency's action "prior to" or "before" the day that is a specified  
142 number of days after an agency's action, or "within" or "before the expiration of"  
143 a period of a specific number of days beginning on the date of an agency's action,  
144 review may also be sought exactly that number of days after the agency's action.
  - 145 b. Whenever a specific judicial review statute provides that the event that starts the  
146 time for seeking judicial review is the promulgation, amendment, or repeal of a  
147 rule, the event date shall be the date of the publication of the rule in the *Federal*  
148 *Register*.
  - 149 c. Statutes authorizing judicial review in a court of appeals by the filing of a notice  
150 of appeal will be construed as authorizing judicial review by the filing of a  
151 petition for review, and whenever a party seeking judicial review in a court of  
152 appeals styles the document initiating review as a notice of appeal, the court will  
153 treat that document as a petition for review.
  - 154 d. Statutes authorizing judicial review in a district court by the filing of a notice of  
155 appeal, petition for review, or other petition will be construed as authorizing



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156 judicial review by the filing of a complaint, and whenever a party seeking judicial  
157 review in a district court styles the document initiating review as a notice of  
158 appeal, petition for review, or other petition, the court will treat that document as  
159 a complaint.

160 e. Whenever a specific judicial review statute specifies the required content of a  
161 document that initiates judicial review, a party may initiate review with a  
162 document that complies with the requirements of that statute or a document that  
163 complies with the applicable rules of court.

164 f. Whenever a specific judicial review statute provides that a party may seek judicial  
165 review of an agency action in a specified federal court, the specified federal court  
166 will have jurisdiction to hear the resulting case.

167 g. Whenever a specific judicial review statute requires that a party seeking review  
168 serve the document initiating review on the agency that issued the order of which  
169 review is sought “simultaneously” with filing the document, this requirement is  
170 satisfied if the document is served on the agency within a reasonable but specific  
171 number of days, such as [seven/fourteen] days.

172 h. Congress should amend 28 U.S.C. § 2112(a)(1) by striking the phrase “, from the  
173 persons instituting the proceedings, the” and inserting “a” in its place, in both  
174 places where the phrase occurs.

175 5. The Conference’s Office of the Chairman should prepare and submit to Congress a  
176 proposed general judicial review statute for consideration that would provide for the  
177 statutory changes in Paragraph 4.

Paragraph 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

**Commented [CA3]:** Proposed Amendment from Council (see parallel amendment at lines 21–26 above)

**Commented [ACU54]:** Note to Assembly: For Paragraph 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.



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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.