ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Clarifying Statutory Access to Judicial Review of Agency Action

Committee on Judicial Review

Proposed Recommendation | September 13, 2021

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

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

[1] 5 U.S.C. §§ 701–06.

[2] 28 U.S.C. §§ 2341–51.

[3] *See generally* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

[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 May 28, 2021).

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

This Recommendation is divided into two sections. The first section (Paragraphs 1–3) recommends a set of drafting principles for Congress when it writes or amends specific judicial review statutes. The second section (Paragraphs 4 and 5) recommends the preparation and passage of a general judicial review statute (referred to below as "the general statute") that would cure problems in existing judicial review statutes. The Conference's Office of the Chairman has announced that it will prepare and submit to Congress a proposed statute for consideration that would provide for the statutory changes in Paragraph 4. The specific topics covered in the Recommendation are described below.

Specifying the Time Within Which to Seek Review

Judicial review statutes typically specify the time within which a party may seek judicial review. The Conference's review revealed two problems that some such statutes cause. First, some specific judicial review statutes specify the time limit using an unusual formulation that results in a time period one day shorter than might be expected. In cases involving these statutes, some parties have lost their right to review because they sought review one day late. Such

[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).

denials of review serve no substantial policy interest.[8] Accordingly, Paragraph 1 provides that Congress, when specifying the time within which to seek judicial review of agency action, should use one of the usual forms of words and avoid the unusual forms.[9] Paragraph 4(a) provides that Congress should include in the recommended general judicial review statute a provision that would add one day to the review period whenever a specific judicial review statute uses one of the unusual forms, thus saving certain cases from dismissal.

The other problem relating to time limits is that some specific judicial review statutes do not clearly identify the event that starts the time within which to seek review. In particular, some specific judicial review statutes provide that the time for seeking review of an agency rule begins when the rule is "issued" or "prescribed," which has led to litigation about exactly what event constitutes the "issu[ance]" of a rule.[10] Paragraph 2 provides as a general matter that Congress should clearly specify what event starts the time for seeking review of agency action. Where an agency promulgates, amends, or repeals a rule after opportunity for participation by interested persons, Paragraph 2 also provides that in drafting specific judicial review statutes providing for review of an agency rule, Congress should provide that the time for review runs from the rule's publication in the *Federal Register*, where the rule is published in the *Federal Register*.[11] This Recommendation does not address situations in which rules do not have to be published in the

[8] SIEGEL, *supra* note 6, at 26–30.

[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] SIEGEL, *supra* note 6, at 31–32.

[11] This Recommendation addresses judicial review of rules that are issued through a process in which the agency solicits comments and then publishes a rule after consideration of those comments. This Recommendation does not address situations, such as direct final rulemaking, interim-final rulemaking, and temporary rulemaking, in which an agency publishes a rule in the *Federal Register* but invites post-promulgation comments or objections, which may raise unique issues regarding statutes of limitations in some circumstances. *See* Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43110 (Aug. 18, 1995). Those situations can present problems of determining the event date for purposes of judicial review of the rule. Parties should be aware that statutes of limitations may be construed to begin to run upon publication of any rule (whether styled as a direct final, interim final, temporary, or otherwise) notwithstanding the agency's maintaining a period for objections or comments to the rule after its publication. *See, e.g.*, Milice v. Consumer Prods. Safety Comm'n, 2 F.4th 994 (D.C. Cir. 2021).

Federal Register. Paragraph 4(b) provides that Congress should include in the general statute a provision that whenever a time period for seeking judicial review begins upon the issuance of a rule and the rule is published in the *Federal Register*, the time starts when the rule is published in the *Federal Register*.[12]

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

When review is to be sought in a court of appeals, most specific judicial review statutes provide that review should be sought by filing either a "petition for review" or a "notice of appeal." The term "petition for review" is more appropriate, as the term "appeal" suggests an appellate court's review of a decision by a lower court.[13] Paragraph 3 therefore provides that specific judicial review statutes should direct parties to seek review in a court of appeals by filing a petition for review. Problems sometimes arise when a party incorrectly titles the document. In most such cases, the reviewing court treats the incorrect form as the correct one, but occasional decisions refuse to save a party who has given the document the wrong name. Parties should not lose their right to review by filing an incorrectly styled document.[14] Paragraph 4(c) proposes to solve this problem consistent with Paragraph 3's preference for "petitions for review" in courts of appeals.

Paragraph 3 also provides that when review is to be sought in district court, Congress should provide that it be initiated by filing a complaint. District court litigators are accustomed to initiating proceedings with a complaint, and courts are also accustomed to this terminology because the Federal Rules of Civil Procedure contemplate the initiation of an action with the filing of a complaint.[15] Statutes calling for review to be initiated in district court by filing some other document, such as a petition for review or notice of appeal, might be confusing. Paragraph

[12] 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.

[13] SIEGEL, *supra* note 6, at 38–40; *see also* Garland v. Dai, 141 S. Ct. 1669 (2021).

[14] *Id*.

[15] FED. R. CIV. P. 3.

4(d) proposes a cure for this problem that is consistent with the Paragraph 3's preference for "complaints" in district courts.

Most specific judicial review statutes do not prescribe the content of the document used to initiate review. This salutary practice allows the content of the document to be determined by rules of court, such as Federal Rule of Appellate Procedure 15, which contains only minimal requirements. A few unusual specific judicial review statutes prescribe the content of the petition for review in more detail. These requirements unnecessarily complicate judicial review.[16] Paragraph 3 reminds Congress that specific judicial review statutes need not specify the required content of a petition for review and that Congress may allow the content to be governed by the applicable rules of court. Paragraph 4(e) provides that Congress should include in the general statute a provision generally allowing documents initiating judicial review to comply either with an applicable specific judicial review statute or an applicable rule of court.

Jurisdiction to Hear the Case

The Conference's review uncovered another potential difficulty: some specific judicial review statutes provide that parties should seek review of agency action in federal courts of appeals but do not specify that these courts will have jurisdiction to hear the resulting cases. In such a case, a court of appeals might question whether it has jurisdiction to consider the petition for review.[17] Accordingly, Paragraph 4(f) provides that Congress should include in the general statute a provision that whenever a specific judicial review statute authorizes a party to seek judicial review of agency action in a specified court, the court will have jurisdiction to consider the resulting case.

[16] SIEGEL, *supra* note 6, at 40–41.

[17] *Id*. at 35–37.

Simultaneous Service Requirements

Another potential problem is that some specific judicial review statutes provide that the party seeking judicial review of agency action must transmit the document initiating review to the agency "simultaneously" with filing the document. Such a provision could cause a court to question what should happen if a party seeking review serves the document initiating review on the agency, but not "simultaneously" with filing the document. Although the Conference's review has found no cases dismissed due to such circumstances, the Conference is concerned that a court might read the statutory text as requiring it to dismiss a petition for review based on the lack of simultaneous service.[18] Paragraph 4(g) therefore provides that whenever a specific judicial review statute requires a party seeking judicial review to serve a copy of the document initiating review on the agency involved "simultaneously" with filing it, the service requirement is satisfied if the document is served on the agency within the number of days specified in the recommended general statute.

Race to the Courthouse, Revisited

The Conference's Recommendation 80-5 addressed the "race to the courthouse" problem that arises when multiple parties seek judicial review of the same agency action in different circuits.[19] In accordance with that recommendation, Congress provided by statute that in such cases a lottery will determine which circuit will review the agency's action. The statute, however, provides that the lottery system applies only when an agency receives multiple petitions for review "from the persons instituting the proceedings."[20] This provision has been held not to apply to petitions for review forwarded to an agency by a court clerk, as some specific judicial review statutes require. Parties invoking judicial review under such specific

[18] *Id*. at 41–45.

[19] 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).

[20] 28 U.S.C. § 2112(a)(1).

judicial review statutes should be entitled to the benefit of the lottery system.[21] Paragraph 4(h) provides that Congress should amend the "race to the courthouse" statute appropriately.

RECOMMENDATION

Recommendations to Congress When Drafting Judicial Review Provisions

1. When specifying the time within which a party may seek judicial review of agency action, Congress should provide that a party may seek review "within" or "not later than" a specified number of days after an agency action. Congress should avoid providing that a party may seek review "prior to" or "before" the day that is a specified number of days after an agency action, or "within" or "before the expiration of" a period of a specified number of days beginning on the date of an agency's action. Examples of the recommended forms are:
    a. "A party seeking judicial review may file a petition for review within 30 days after" the agency's action.
    b. "A party seeking judicial review may file a petition for review not later than 30 days after" the agency's action.

    Examples of the forms to be avoided are:
    c. "A party seeking judicial review may file a petition for review prior to [or "before"] the 30th day after" the agency's action.
    d. "A party seeking judicial review may file a petition for review within [or "before the expiration of"] the 30-day period beginning on the date of" the agency's action.
2. Congress should clearly specify what event starts the time for seeking review. Where the event is the promulgation, amendment, or repeal of a rule by an agency following the opportunity for participation by interested persons, Congress should provide that the

[21] SIEGEL, *supra* note 6, at 42–45.

event date is the date of the publication of the final rule in the *Federal Register*, where the rule is so published.

3. When drafting a statute providing for review in a court of appeals, Congress should provide that review should be initiated by filing a petition for review. When drafting a statute providing for review in a district court, Congress should provide that review should be initiated by filing a complaint. With regard to either kind of statute, Congress should be aware that it need not specify the required content of the document initiating judicial proceedings because that matter would be governed by the applicable court rules.

General Judicial Review Statute

4. Congress should enact a new general judicial review statute that includes these provisions:
    a. Whenever a specific judicial review statute provides that a party may seek judicial review of an agency's action "prior to" or "before" the day that is a specified number of days after an agency's action, or "within" or "before the expiration of" a period of a specific number of days beginning on the date of an agency's action, review may also be sought exactly that number of days after the agency's action.
    b. Whenever a specific judicial review statute provides that the event that starts the time for seeking judicial review is the promulgation, amendment, or repeal of a rule by an agency following the opportunity for participation by interested persons, the event date shall be the date of the publication of the final rule in the *Federal Register*.
    c. Statutes authorizing judicial review in a court of appeals by the filing of a notice of appeal will be construed as authorizing judicial review by the filing of a petition for review, and whenever a party seeking judicial review in a court of appeals styles the document initiating review as a notice of appeal, the court will treat that document as a petition for review.
    d. Statutes authorizing judicial review in a district court by the filing of a notice of appeal, petition for review, or other petition will be construed as authorizing

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

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

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

g. Whenever a specific judicial review statute requires that a party seeking review serve the document initiating review on the agency that ~~issued the order~~took the action of which review is sought "simultaneously" with filing the document, this requirement is satisfied if the document is served on the agency within a reasonable but specific number of days, such as seven or fourteen days either before or after filing.

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

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

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