

Comment from Ron Levin on *Statutory Drafting Working Group Judicial Review Statute*
December 6, 2021

This is a comment on the question of whether the Conference's proposed statute embodying the rules of construction for judicial review legislation should be codified as part of the Administrative Procedure Act, rather than elsewhere in the United States Code. I recall that the Judicial Review Committee discussed this question at its most recent meeting, but I don't remember whether the committee seemed to have reached equilibrium on the question. Regardless, the draft that Mark Thomson circulated recently does adopt the APA approach. I was dubious about that approach at the time, and my doubts have increased now that I have seen the actual draft language of the proposed statute. In this memo I will elaborate on my critique and also offer an intermediate solution that might strike a better balance among the competing positions.

The draftsmanship of the proposed APA § 707 is excellent, and I do not mean to criticize it on its own terms. Nevertheless, the contrast between this provision and the rest of the APA is jarring. Most of the judicial review provisions in the APA are written in simple, broad terms that are intended to embody fundamental premises of the relationships between courts and agencies. They invite case law elaboration over time because they are, themselves, general in nature. The proposed § 707, on the other hand, consists mainly of technical details that relate to situations that administrative practitioners encounter only rarely, if at all.

Indeed, the APA is commonly regarded as a constitution-like document, a "superstatute" that looms large in the public mind by virtue of its deep historical roots and iconic nature. The proposed § 707 has none of this resonance. That's another reason why its juxtaposition with the rest of the judicial review chapter looks rather incongruous.

In addition, unlike the rest of chapter 7, which sets forth self-contained principles for courts and agencies, the proposed § 707 simply prescribes rules of interpretation for statutes that are themselves found elsewhere. From a functional point of view, therefore, it could readily be placed elsewhere in the U.S. Code.

To my mind, the logical location would be Title 28, commonly known as the Judicial Code. That title contains many provisions that are just as technical (but important!) as the proposed § 707. Examples that are particularly relevant to administrative law include the Hobbs Act, § 2342; the race-to-the-courthouse statute, § 2112(a); the default venue provision for actions against federal defendants, § 1391(e); and the Mandamus and Venue Act, § 1631.

As I recall the discussion of this issue at the previous meeting, the main reason members of the committee preferred the APA was a belief that an attorney or judge who is looking for guidance as to how to conduct administrative litigation would likely consult the APA, whereas Title 28 contains so many varied provisions that the new statute might get lost in the shuffle and thus be overlooked. I myself am not persuaded by this argument. To my mind the new provisions should simply be regarded as falling among the statutory requirements that one is just supposed to know about, or that one can find out about from typical secondary sources. After all, the

statutes that I mentioned in the preceding paragraph are surely no less important than the proposed § 707, yet I've never heard anyone lament that Congress, by not highlighting them in the text of the APA, has done too little to enable people to familiarize themselves with them.

Nevertheless, recognizing that some members of the committee had a different view at the previous meeting, I feel I ought to suggest a means of accommodating that view. To that end, I invite the committee to consider the alternative of codifying the proposed clarification statute in Title 28, but also adding a sentence to § 703 of the APA, to read as follows:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. **Statutes that provide for special statutory review proceedings shall be construed consistently with 28 U.S.C. § ____.** If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Under this plan, the actual clarification statute would not necessarily have to be revised. I suggest, however, that its caption should be changed from "Rules of construction" to "Rules of construction for statutes providing for judicial review of agency action."

Insofar as one desires to put the hypothetical reader on notice of the new rules of construction, I think this approach would serve that purpose just as adequately as the current draft would. At the same time, the amendment would be concise and direct, making it stylistically consistent with other language in the judicial review chapter of the APA.

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