

Comment from Elaine Mittleman on *Procedural Fairness in Judicial Review*
March 31, 2021

This is a comment on Recommendation 3: Jurisdiction to Hear the Case. I think it would be useful to provide additional discussion about and emphasis on specific judicial review statutes. This comment is based on my experience with a case (which is described below) in the D.C. Circuit.

A 2013 law review article discussed the statutes relating to jurisdiction in the D.C. Circuit, including exclusive jurisdiction. The article explained:

One key reason for the concentration of administrative review in the D.C. Circuit is the Congress's choice to grant the D.C. Circuit jurisdiction over certain types of cases. For example, the Appendix [footnote omitted] contains more than 150 statutory provisions that specifically refer to the D.C. Circuit, with over 130 of these specifically relating to jurisdiction. In addition, over a third of those jurisdiction provisions grant exclusive jurisdiction to the D.C. Circuit.

Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence and Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 Cornell Journal of Law and Public Policy 131, 143 (2013).

<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1393&context=cjlpp>

One of the statutes that provides specific judicial review jurisdiction in the D.C. Circuit concerns the Postal Regulatory Commission. The direct-review statute, 39 U.S.C. § 3663, for the Postal Regulatory Commission provides:

A person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may, within 30 days after such order or decision becomes final, institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia. The court shall review the order or decision in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, on the basis of the record before the Commission.

(Added Pub. L. 109-435, title II, § 205, Dec. 20, 2006, 120 Stat. 3217.)

<https://www.law.cornell.edu/uscode/text/39/3663>

The draft version of the *Sourcebook of Federal Judicial Review Statutes*, dated March 17, 2021, mentioned 39 U.S.C. § 3663 at page 32 n.104. The Sourcebook explained that some statutes “permit review in the D.C. Circuit only.”

The Sourcebook draft cited *Carlson v. Postal Regulatory Comm'n.*, 938 F.3d 337, 348 (D.C. Cir. 2019), at 8 n.16. In *Carlson*, 938 F.3d at 343, the D.C. Circuit held that the Postal Accountability and Enhancement Act (PAEA) “grants this Court jurisdiction over orders or

decisions of the Commission and incorporates the APA as the framework for review. 39 U.S.C. § 3663.”

In sharp contrast, in *Mittleman v. Postal Regulatory Comm’n*, 757 F.3d 300 (D.C. Cir. 2014), the D.C. Circuit did not comply with the direct-review statute, 39 U.S.C. § 3663. Instead, the opinion followed the confusing and misleading arguments presented by the Department of Justice attorneys representing the Postal Regulatory Commission. The opinion stated, *id.* at 301, that two of the petitions for review “involve Commission decisions that are not subject to judicial review.”

The opinion (following Justice Department arguments) discussed cases involving the Postal Service and the *ultra vires* doctrine. The petitions for review in the D.C. Circuit concerned final orders of the Postal Regulatory Commission and not the Postal Service. The *ultra vires* doctrine is used to provide non-statutory review in district courts. That doctrine should not be involved in determining jurisdiction in the D.C. Circuit. Jurisdiction in the D.C. Circuit is based on the direct-review statute.

For purposes of this comment, I am not providing detailed analysis of the opinion. I believe that the *Mittleman* opinion is badly flawed in a number of respects. If it would be helpful, I would be glad to provide further analysis or discussion.

The *Mittleman* opinion is even more troubling because it has been cited as precedent or authority for the *ultra vires* doctrine in recent litigation involving the Postal Service and mailing of election ballots. In other words, the *Mittleman* opinion did not permit judicial review, but it is now used as precedent for the *ultra vires* doctrine.

https://scholar.google.com/scholar_case?case=13189814488840872854&q=mittleman+v+postal+regulatory+com%27n&hl=en&as_sdt=4,77,130,140

I think it would be useful to emphasize the imperative that courts recognize and comply with specific judicial review statutes. It is not clear what remedy is available when courts, such as the D.C. Circuit, deny judicial review of final agency orders, even though there is a specific judicial review statute that provides jurisdiction. The courts have a duty to conduct judicial review in most situations. They should not avoid that duty by failing to honor statutes that establish jurisdiction for judicial review.