



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

To: Members of the Committee on Judicial Review, Project Advisors, and Other ACUS Members

From: Bobby Ochoa, Attorney Advisor

Date: March 19, 2021

Re: Procedural Fairness in Judicial Review: Summary of Proposed Recommendations

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In 2021, ACUS's Office of the Chairman will publish a *Sourcebook of Federal Judicial Review Statutes*, which will catalog the key features of numerous provisions of the United States Code that govern judicial review of agency adjudicative orders and rules. To write the *Sourcebook*, the Office of the Chairman engaged Professor Jon Siegel, Professor of Law and the F. Elwood and Eleanor Davis Research Professor of Law at The George Washington University Law School, a leading scholar of the federal court system, the Conference's former Director of Research and Policy, and a Public Member. Much of the *Sourcebook's* contents will derive from extensive research conducted by the Office of the Chairman's staff in consultation with Professor Siegel.<sup>1</sup> The Office of the Chairman plans to publish this research on the Conference's website in an accessible format for future study.

In preparing the *Sourcebook*, Professor Siegel assembled a list of potential provisions that might be suitable to include in a "general judicial review procedure" statute (which Professor Siegel refers to as the "general statute") that Congress might pass, which would prospectively modify judicial review procedures across the board.

To aid the Committee's deliberations, this memorandum includes a chart briefly summarizing each recommendation and indicating the location in the *Sourcebook* where each potential recommendation is discussed. The remainder of this memo addresses the seven specific technical issues that Professor Siegel has identified, and his explanations are provided in accompanying text provided below.

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<sup>1</sup> ACUS staff identified and catalogued key characteristics of every federal statute governing the judicial review of agency rules and adjudicative orders.

<b>Recommendation</b>	<b>Sourcebook Location</b>	<b>Brief Description</b>
1. Specifying the Time within which to Seek Judicial Review	Section V(B)(2) Pages 24–28	<p>-If setting a specific time limit for judicial review, <b>use</b> “within” or “not later than” a specified number of days.</p> <p><b>-Avoid:</b> “prior to” or “before” a specified number of days; a period of a specified number of days “beginning on the date” of the agency’s action.</p> <p>-If a statute provides that a party may seek judicial review of an agency’s action “prior to” or “before the expiration of” a specific number of days after the action, review may also be sought exactly that number of days after the agency’s action. [General Statute]</p>
2. Specifying the Action that Starts the Time for Seeking Judicial Review	Section V(B)(2)(b) Pages 28–29	<p>-Specific judicial review statutes should <b>clearly specify the event</b> that starts the time to seek judicial review running.</p> <p>-Where the event is the promulgation of a <b>regulation</b>, Congress should provide that the time starts from the date the regulation is <b>published in the <i>Federal Register</i></b>. [General Statute]</p>
3. Jurisdiction to Hear the Case	Section V(C)(3) Pages 32–34	<p>-If a statute provides that a party may seek judicial review of an agency action in a specified federal court, the specified court <b>shall have jurisdiction</b> to hear the resulting case. [General Statute]</p>
4. The Document that Initiates Review	Section V(D)(1) Pages 34–36	<p>-A court shall treat a petition for review as a notice of appeal when necessary and vice versa. [General Statute]</p>
5. The Content of the Document that Initiates Review	Section V(D)(2) Pages 36–37	<p>-When providing that a party may seek judicial review by filing a petition for review, Congress <b>should not specify the required content</b> of the petition for review.</p>
6. Race to the Courthouse Revisited	Section V(D)(3) Pages 37–41	<p>-Congress should <b>amend 28 U.S.C. § 2112(a)(1)</b></p>
7. Service of the Document Initiating Review	Section V(D)(3) Pages 37–41	<p>-Whenever a specific judicial review statute requires that a party seeking review serve the document initiating review on the agency “<b>simultaneously</b>” with filing the document, this requirement is satisfied if the document is served on the agency with <b>reasonable promptness</b>. [General Statute]</p>

## **1. Specifying the Time within which to Seek Judicial Review**

One of the two methods commonly used by Congress to specify the time within which to seek review contains a potential trap for unwary counsel, by giving one fewer day to seek review than is normal. For example, if the statute provides that a party may seek review “prior to” or “before the expiration of” 30 days, they would only have 29 days (1 fewer day) compared to a statute permitting review “within” or “not later than” 30 days.

### *Recommendations:*

A. In 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 expiration of” a specified number of days after an agency’s action.

B. Congress should provide in the general statute that whenever a statute does provide that a party may seek judicial review of an agency’s action “prior to” or “before the expiration of” a specific number of days after the action, review may also be sought exactly that number of days after the agency’s action.

## **2. Specifying the Action that Starts the Time for Seeking Judicial Review**

Whatever number of days is available, a party seeking review needs to know which day is the first. Cases show that this can be a problem, particularly with regard to review of regulations.

### *Recommendations:*

A. Congress should clearly specify what event starts the time for seeking review.

B. Where the event is the promulgation of a regulation, Congress should provide that the time starts from the date the regulation is published in the *Federal Register*.

C. Congress should make the rule specified in (B) above a general rule, included in the general statute.

### **3. Jurisdiction to Hear the Case**

Some specific judicial review statutes, after providing that a party can seek review in a specified court, go on to provide that the court has jurisdiction to hear the resulting case, but some do not.

#### *Recommendation:*

Congress should include the following provision in the general statute: “Whenever a statute provides that a party may seek judicial review of an agency action in a specified federal court, the specified court shall have jurisdiction to hear the resulting case.”

### **4. The Document that Initiates Review**

Some review statutes provide that parties should seek review by filing a petition for review; others call for a notice of appeal. This gives rise to a potential problem if a party files the wrong document. Courts typically deal with this problem on their own based on Professor Siegel’s research. ACUS research assistance confirmed this finding and did not uncover any cases where this was a significant or dispositive issue.

#### *Recommendation:*

Congress should include in the general statute a provision that a court shall treat a petition for review as a notice of appeal when necessary and vice versa.

### **5. The Content of the Document that Initiates Review**

A few statutes specify the content of the document that initiates review. Federal Appellate Rule 15 takes care of this issue and has been held to supersede earlier statutes in cases where a party claimed that the document initiating review was improper because it complied with Rule 15 but not the statute. However, it is unclear what would happen if Congress included such a provision in a statute today.

#### *Recommendation:*

When providing that a party may seek judicial review by filing a petition for review, Congress should not specify the required content of the petition for review.

## 6. Race to the Courthouse Revisited

ACUS Recommendation 80-5, one of ACUS's most significant recommendations, solved the "race to the courthouse" problem by providing a lottery procedure for cases in which petitions for review are filed in multiple courts regarding the same agency action.<sup>2</sup> But some courts have read the implementing statute too literally, depriving parties of the benefit of the lottery procedure if the statute calls for the petition for review to be served on the agency by a court clerk rather than by the party seeking review.

### *Recommendation:*

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

### 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.

## 7. Service of the Document Initiating Review

Some judicial review statutes require the party seeking review to serve a copy of the document initiating review on the agency "simultaneously" with its filing. This could cause trouble. For example, a party might file the petition for review (or other document initiating review) but belatedly serve a copy on the agency. A party could also fail to serve a copy on the agency altogether. For statutes listing a specific agency official (rather than the agency generally), the failure to serve the petition for review (or other document initiating review) on the specific agency official listed in the statute could also cause problems.

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<sup>2</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. 84,954 (Dec. 24, 1980).

*Recommendation:*

Congress should provide in the general statute that whenever a specific judicial review statute requires that a party seeking review serve the document initiating review on the agency that issued the order of which review is sought “simultaneously” with filing the document, this requirement is satisfied if the document is served on the agency with reasonable promptness.