



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Clarifying Statutory Access to Judicial Review of Agency Action

Committee on Judicial Review

Proposed Recommendation for Committee | April 22, 2021

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

10 The Administrative Conference of the United States undertook an initiative to identify
11 and review all statutory provisions governing judicial review of federal agency rules and
12 adjudicative orders that appear in the *United States Code*.⁵ In the course of this initiative, the
13 Conference observed various ways in which some of these statutes create unnecessary obstacles
14 to judicial review or overly complicate the process of judicial review. The Conference

¹ Judicial review may also be governed by judicially developed doctrines. *See generally* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

² 5 U.S.C. §§ 701–706.

³ 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.”

⁴ *See* Fed. R. App. P. 15–20.

⁵ *See* JONATHAN R. SIEGEL, SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (forthcoming 2021).



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15 recommends eliminating these obstacles and complications in order to promote efficiency and to
16 reduce unnecessary litigation.

17 This Recommendation is divided into two parts. The first (Recommendations 1–4)
18 provides a set of drafting recommendations for Congress as it writes new specific judicial review
19 statutes. The second (Recommendation 5) recommends the passage of a general judicial review
20 statute (referred to below as “the general statute”) that would cure problems in existing judicial
21 review statutes. The specific topics covered in the Recommendations are listed below.

Specifying the Time within which to Seek Review

22 Judicial review statutes typically specify the time within which a party may seek judicial
23 review. The Conference’s review revealed two problems that some such statutes cause. First,
24 some specific judicial review statutes specify the time limit using an unusual form of words that
25 results in a time period one day shorter than might be expected. In cases involving these statutes,
26 some parties have lost their right to review because they sought review one day late. Such
27 denials of review serve no substantial policy interest. Accordingly, Recommendation 1 provides
28 that Congress, when specifying the time within which to seek judicial review of agency action,
29 should use one of the usual forms of words and avoid the unusual forms. Recommendation 5(a)
30 provides that Congress should include in the recommended general judicial review statute a
31 provision that would add one day to the review period whenever a specific judicial review statute
32 uses one of the unusual forms, thus saving certain cases from dismissal.

33 The other problem relating to time limits is that some specific judicial review statutes do
34 not clearly specify the event that starts the time within which to seek review. In particular, some
35 specific judicial review statutes provide that the time for seeking review of an agency regulation
36 begins when the regulation is “issued” or “prescribed,” which has led to litigation about exactly
37 what event constitutes the “issu[ance]” of a regulation. Recommendation 2 provides as a general
38 matter that Congress should clearly specify what event starts the time for seeking review of
39 agency action. Recommendation 2 also provides that in drafting specific judicial review statutes
40 providing for review of an agency regulation, Congress should provide that the time for review

Commented [ACUS1]: Staff Inquiry:
Should we retain these recommendation previews in each section of the preamble? Should we include this connection in the section’s title (for example: “Specifying the Time within which to Seek Review (corresponds to Recommendations 1, 2, and 5(a)-(b)).”). Is there a better alternative approach?



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41 runs from the regulation’s publication in the *Federal Register*. Recommendation 5(b) provides
42 that Congress should include in the general statute a provision that whenever a time period for
43 seeking judicial review begins with the issuance of a regulation, the time starts when the
44 regulation is published in the *Federal Register*.

Specifying the Mechanism by which Review is Sought

45 Most specific judicial review statutes provide that review should be sought by filing
46 either a “petition for review” or a “notice of appeal.” The term “petition for review” is more
47 appropriate, as the term “appeal” suggests an appellate court’s review of a decision by a lower
48 court. Recommendation 3 therefore provides that specific judicial review statutes should direct
49 parties to seek review by filing a petition for review. Problems sometimes arise when a party
50 incorrectly titles the document. In most such cases, the reviewing court treats the incorrect form
51 as the correct one, but occasional decisions refuse to save a party who has given the document
52 the wrong name. Parties should not lose their right to review by filing an incorrectly styled
53 document. To cure this problem, while maintaining the preference for “petitions for review,”
54 Recommendation 5(c) provides that Congress should include in the general statute a provision
55 that any specific judicial review statute authorizing parties to initiate judicial review of agency
56 action by filing a notice of appeal shall be construed to authorize the filing of a petition for
57 review, and in any case in which a party initiates review by filing a notice of appeal, the court
58 shall treat the document as a petition for review.

Commented [ACUS2]: Staff Inquiry:
Is there a simpler way to say this?

Specifying the Content of the Document Used to Initiate Review

59 Most specific judicial review statutes do not prescribe the content of the document used
60 to initiate review. This salutary practice allows the content of the document to be determined by
61 rules of court, such as Federal Rule of Appellate Procedure 15, which contains only minimal
62 requirements. A few unusual specific judicial review statutes prescribe the content of the petition
63 for review in more detail. These requirements unnecessarily complicate judicial review.
64 Recommendation 4 provides that Congress should understand that specific judicial review
65 statutes need not specify the required content of a petition for review and Congress may allow



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66 the content to be governed by the applicable rules of court. Recommendation 5(d) provides that
67 Congress should include in the general statute a provision generally allowing documents
68 initiating judicial review to comply either with an applicable specific judicial review statute or an
69 applicable rule of court.

Protecting Against Potential Problems

70 The Conference’s review uncovered two other potential difficulties that some specific
71 judicial review statutes might cause. One is that some specific judicial review statutes provide
72 that parties should seek review of agency action in federal courts of appeals but do not specify
73 that these courts shall have jurisdiction to hear the resulting cases. In such a case, a court of
74 appeals might question whether it has jurisdiction to consider the petition for review. The other
75 potential problem is that some specific judicial review statutes provide that the party seeking
76 judicial review of agency action shall transmit the document initiating review to the agency
77 “simultaneously” with filing the document. Such a provision could cause a court to question
78 what should happen if a party seeking review serves the document initiating review on the
79 agency, but not “simultaneously” with filing the document. Although the Conference’s review
80 has found no cases dismissed because of these issues, in these days when courts pay closer
81 attention to statutory text, a court might dismiss a petition for review based on these potential
82 problems. Accordingly, Recommendation 5(e) provides that Congress should include in the
83 general statute a provision that whenever a specific judicial review statute authorizes a party to
84 seek judicial review of agency action in a specified court, the court shall have jurisdiction to
85 consider the resulting case. Recommendation 5(f) provides that whenever a specific judicial
86 review statute requires a party seeking judicial review to serve a copy of the document initiating
87 review on the agency involved “simultaneously” with filing it, the service requirement shall be
88 deemed satisfied if the document is served on the agency within a specified number of days.

Race to the Courthouse, Revisited

89 The Conference’s Recommendation 80-5 addressed the “race to the courthouse” problem
90 that arises when multiple parties seek judicial review of the same agency action in different

Commented [ACUS3]: Staff Inquiry:
Is there a more cohesive title for these two ideas, or should we break up this section into two smaller sections?



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91 circuits. In accordance with that recommendation, Congress provided by statute that in such
92 cases a lottery shall determine which circuit shall review the agency’s action. The statute,
93 however, provides that the lottery system applies only when an agency receives multiple
94 petitions for review “from the persons instituting the proceedings.”⁶ This provision has been held
95 not to apply to petitions for review forwarded to an agency by a court clerk, as some specific
96 judicial review statutes require. Parties invoking judicial review under such specific judicial
97 review statutes should be entitled to the benefit of the lottery system. Recommendation 5(g)
98 provides that Congress should amend the “race to the courthouse” statute appropriately.

RECOMMENDATION

General Drafting Recommendations to Congress

- 99 1. When specifying the time within which a party may seek judicial review of agency
100 action, Congress should provide that a party may seek review “within” or “not later than”
101 a specified number of days after an agency action. Congress should avoid providing that
102 a party may seek review “prior to” or “before” the day that is a specified number of days
103 after an agency action, or “within” or “before the expiration of” a period of a specified

Commented [ACUS4]: Staff Inquiry:
Is this title clear enough to indicate that we’re referring to
prospective legislating?

⁶ 28 U.S.C. § 2112(a)(1).



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- 104 number of days beginning on the date of an agency’s action. Examples of the
 105 recommended forms are:
- 106 a. “A party desiring judicial review may file a petition for review within 30 days
 107 after” the agency’s action.
 - 108 b. “A party desiring judicial review may file a petition for review not later than 30
 109 days after” the agency’s action.
- 110 Examples of the forms to be avoided are:
- 111 c. “A party desiring judicial review may file a petition for review prior to [or
 112 “before”] the 30th day after” the agency’s action.
 - 113 d. “A party desiring judicial review may file a petition for review within [or “before
 114 the expiration of”] the 30-day period beginning on the date of” the agency’s
 115 action.
- 116 2. Congress should clearly specify what event starts the time for seeking review. Where the
 117 event is the [issuance/adoption/]promulgation [or amendment/repeal] of a rule, Congress
 118 should provide that the time starts from the publication date for the regulation in the
 119 printed version of the *Federal Register*[, that date being the latest date appearing on the
 120 issue/pages of the *Federal Register* in/on which the regulation appears].
 - 121 3. When drafting a specific judicial review statute, Congress should provide that review
 122 should be initiated by filing a “petition for review.”
 - 123 4. When providing that a party may seek judicial review, Congress [should be aware that it
 124 need not/]should not specify the required content of the petition for review, complaint, or
 125 other document initiating judicial proceedings [because that matter would be governed
 126 by/]but should instead allow that matter to be governed by [the applicable court rules/the
 127 rules of the court in which judicial review is sought].

Commented [ACUS5]: Staff Comment:
Bracketed language from April 1 committee meeting preserved for further discussion. This occurs in Recommendations 2, 4, and 5(f).

General Judicial Review Statute

- 128 5. Congress should enact a new general judicial review statute that includes these
 129 provisions:

Commented [ACUS6]: Staff Inquiries:
Should we include a draft bill as an appendix?
Do we anticipate a new provision in or amendment to Title 5, Title 28, or elsewhere?
Are any definitions or additional guidance needed? (for example, “general judicial review statute”, “agency action”, “notice of appeal”)
Is “agency action” too broad/vague?



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- 130 a. Whenever a specific judicial review statute provides that a party may seek judicial
131 review of an agency’s action “prior to” or “before” the day that is a specified
132 number of days after an agency’s action, or “within” or “before the expiration of”
133 a period of a specific number of days beginning on the date of an agency’s action,
134 review may also be sought exactly that number of days after the agency’s action.
- 135 b. Whenever a specific judicial review statute provides that the event that starts the
136 time for seeking judicial review is the promulgation of a regulation, the time starts
137 from the date the regulation is published in the *Federal Register*.
- 138 c. Statutes authorizing judicial review by the filing of a “notice of appeal” shall be
139 construed as authorizing judicial review by the filing of a petition for review, and
140 whenever a party seeking judicial review styles the document initiating review as
141 a “notice of appeal,” the court shall treat that document as a petition for review.
- 142 d. Whenever a specific judicial review statute specifies the required content of a
143 document that initiates judicial review, a party may initiate review with a
144 document that complies with the requirements of that statute or a document that
145 complies with the applicable rules of court.
- 146 e. Whenever a specific judicial review statute provides that a party may seek judicial
147 review of an agency action in a specified federal court, the specified federal court
148 shall have jurisdiction to hear the resulting case.
- 149 f. Whenever a specific judicial review statute requires that a party seeking review
150 serve the document initiating review on the agency that issued the order of which
151 review is sought “simultaneously” with filing the document, this requirement is
152 satisfied if the document is served on the agency within a reasonable but specific
153 number of days, such as [seven/fourteen] days.
- 154 g. Congress should amend 28 U.S.C. § 2112(a)(1) by striking the phrase “, from the
155 persons instituting the proceedings, the” therefrom and inserting “a” in its place,
156 in both places where the phrase occurs.

Commented [ACUS7]: Staff Inquiry:
Should the variation in the language used in the first half and
the second half of the recommendation be revised to be
consistent/identical?



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Recommendation 5(g): 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.

Commented [ACUS8]: Staff Comment:
For Recommendation 5(g), this struck-through text is provided for clarity and convenience. This struck-through text is not included in line numbering and will not appear in the final recommendation.