



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~~ May 3, 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

¹ Judicial review is also 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, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (forthcoming Mar. 17, 2021). ~~The APA provides for a right of judicial review of agency action by aggrieved parties in courts of competent jurisdiction when there is no statutory provision either expressly granting or precluding judicial review. This Recommendation does not address where such actions may be filed.~~



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14 to judicial review or overly complicate the process of judicial review. The Conference
15 recommends eliminating these obstacles and complications in order to promote efficiency and
16 fairness, and to reduce unnecessary litigation.⁶

17 This Recommendation is divided into two partssections. The first section
18 (Recommendations 1–43) provides a set of drafting recommendations for Congress as it writes
19 new specific judicial review statutes. The second section (Recommendation 54) recommends the
20 passage of a general judicial review statute (referred to below as “the general statute”) that would
21 cure problems in existing judicial review statutes. The specific topics covered in the
22 Recommendations are listed below.

Specifying the Time within which to Seek Review

23 Judicial review statutes typically specify the time within which a party may seek judicial
24 review. The Conference’s review revealed two problems that some such statutes cause. First,
25 some specific judicial review statutes specify the time limit using an unusual form of
26 wordsformulation that results in a time period one day shorter than might be expected. In cases
27 involving these statutes, some parties have lost their right to review because they sought review
28 one day late. Such denials of review serve no substantial policy interest.⁷ Accordingly,
29 Recommendation 1 provides that Congress, when specifying the time within which to seek
30 judicial review of agency action, should use one of the usual forms of words and avoid the
31 unusual forms. Recommendation 54(a) provides that Congress should include in the

⁶ The proposals and recommendations made herein are not intended to address all issues related to access to judicial review. The Conference makes no recommendations relating to, among other issues, the application of statutes of limitations to rights of judicial review (*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.”)).

⁷ SIEGEL, *supra* note 5, at 24–28.



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32 recommended general judicial review statute a provision that would add one day to the review
33 period whenever a specific judicial review statute uses one of the unusual forms, thus saving
34 certain cases from dismissal.

35 The other problem relating to time limits is that some specific judicial review statutes do
36 not clearly specify the event that starts the time within which to seek review.⁸ In particular, some
37 specific judicial review statutes provide that the time for seeking review of an agency
38 ~~regulation~~rule begins when the ~~regulation~~rule is “issued” or “prescribed,” which has led to
39 litigation about exactly what event constitutes the “issu[ance]” of a ~~regulation~~rule.⁹
40 Recommendation 2 provides as a general matter that Congress should clearly specify what event
41 starts the time for seeking review of agency action. Recommendation 2 also provides that in
42 drafting specific judicial review statutes providing for review of an agency ~~regulation~~rule,
43 Congress should provide that the time for review runs from the ~~regulation~~rule’s publication in
44 the *Federal Register*. Recommendation 54(b) provides that Congress should include in the
45 general statute a provision that whenever a time period for seeking judicial review begins with
46 the issuance of a ~~regulation~~rule, the time starts when the ~~regulation~~rule is published in the
47 *Federal Register*.

Specifying the ~~Mechanism~~Name and Content of the Document by which Review is Sought

48 ~~Most~~When review is to be sought in a court of appeals, most specific judicial review
49 statutes provide that review should be sought by filing either a “petition for review” or a “notice
50 of appeal.” The term “petition for review” is more appropriate, as the term “appeal” suggests an
51 appellate court’s review of a decision by a lower court.¹⁰ Recommendation 3 therefore provides

⁸ The Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure apply in computing and extending time periods if any judicial review statute does not specify a method of computing time. See Fed. R. Civ. P. 6; Fed. R. App. P. 26.

⁹ STIEGEL, *supra* note 5, at 28–29.

¹⁰ *Id.* at 34–36.



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52 that specific judicial review statutes should direct parties to seek review in a court of appeals by
53 filing a petition for review. Problems sometimes arise when a party incorrectly titles the
54 document. In most such cases, the reviewing court treats the incorrect form as the correct one,
55 but occasional decisions refuse to save a party who has given the document the wrong name.
56 Parties should not lose their right to review by filing an incorrectly styled document. ~~To cure this~~
57 ~~problem, while maintaining the preference for “petitions for review,” Recommendation 5(e)~~
58 ~~provides that Congress should include in the general statute a provision that any specific judicial~~
59 ~~review statute authorizing parties to initiate judicial review of agency action by filing a notice of~~
60 ~~appeal shall be construed to authorize the filing of a petition for review, and in any case in which~~
61 ~~a party initiates review by filing a notice of appeal, the court shall treat the document as a~~
62 ~~petition for review.¹¹ Recommendation 4(c) proposes to solve this problem while maintaining the~~
63 ~~preference in courts of appeals for “petitions for review.”~~

Specifying the Content of the Document Used to Initiate Review

64 [Recommendation 3 also provides that when review is to be sought in district court,
65 Congress should provide that it be initiated by filing a complaint. District court litigators are
66 accustomed to initiating proceedings with a complaint, and courts are also accustomed to this
67 procedure because the Federal Rules of Civil Procedure contemplate the initiation of an action
68 with the filing of a complaint.¹² Statutes calling for review to be initiated in district court by
69 filing some other document, such as a petition for review or notice of appeal, might be
70 confusing. Recommendation 4(d) proposes a cure for this problem while maintaining the
71 preference in district courts for “complaints.”]

72 Most specific judicial review statutes do not prescribe the content of the document used
73 to initiate review. This salutary practice allows the content of the document to be determined by
74 rules of court, such as Federal Rule of Appellate Procedure 15, which contains only minimal

¹¹ *Id.*

¹² Fed. R. Civ. P. 3.



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75 requirements. A few unusual specific judicial review statutes prescribe the content of the petition
76 for review in more detail. These requirements unnecessarily complicate judicial review.¹³
77 Recommendation 43 therefore also provides that Congress should understand that specific
78 judicial review statutes need not specify the required content of a petition for review and
79 Congress may allow the content to be governed by the applicable rules of court.
80 Recommendation 5(4)(e) provides that Congress should include in the general statute a
81 provision generally allowing documents initiating judicial review to comply either with an
82 applicable specific judicial review statute or an applicable rule of court.

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Protecting Against Potential Problems

Jurisdiction to Hear the Case

83 The Conference's review uncovered ~~two other~~another potential ~~difficulties that some~~
84 ~~specific judicial review statutes might cause. One is that some~~difficulty. ~~Some~~ specific judicial
85 review statutes provide that parties should seek review of agency action in federal courts of
86 appeals but do not specify that these courts shall have jurisdiction to hear the resulting cases. In
87 such a case, a court of appeals might question whether it has jurisdiction to consider the petition
88 for review. ~~The other~~¹⁴ Accordingly, Recommendation 4(f) provides that Congress should
89 include in the general statute a provision that whenever a specific judicial review statute
90 authorizes a party to seek judicial review of agency action in a specified court, the court shall
91 have jurisdiction to consider the resulting case.

Simultaneous Service Requirements

92 Another potential problem is that some specific judicial review statutes provide that the
93 party seeking judicial review of agency action shall transmit the document initiating review to
94 the agency "simultaneously" with filing the document. Such a provision could cause a court to

¹³ SIEGEL, *supra* note 5, at 36–37.

¹⁴ *Id.* at 32–34.



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95 question what should happen if a party seeking review serves the document initiating review on
96 the agency, but not “simultaneously” with filing the document. Although the Conference’s
97 review has found no cases dismissed because of these issues, in these days when courts pay
98 closer attention to statutory text, a court might dismiss a petition for review based on these
99 potential problems. ~~Accordingly, Recommendation 5(e) provides that Congress should include in~~
100 ~~the general statute a provision that whenever a specific judicial review statute authorizes a party~~
101 ~~to seek judicial review of agency action in a specified court, the court shall have jurisdiction to~~
102 ~~consider the resulting case. Recommendation 5(f)¹⁵ Recommendation 4(g)~~ provides that
103 whenever a specific judicial review statute requires a party seeking judicial review to serve a
104 copy of the document initiating review on the agency involved “simultaneously” with filing it,
105 the service requirement shall be deemed satisfied if the document is served on the agency within
106 a specified number of days.

Race to the Courthouse, Revisited

107 The Conference’s Recommendation 80-5 addressed the “race to the courthouse” problem
108 that arises when multiple parties seek judicial review of the same agency action in different
109 circuits.¹⁶ In accordance with that recommendation, Congress provided by statute that in such
110 cases a lottery shall determine which circuit shall review the agency’s action. The statute,
111 however, provides that the lottery system applies only when an agency receives multiple
112 petitions for review “from the persons instituting the proceedings.”¹⁷ This provision has been
113 held not to apply to petitions for review forwarded to an agency by a court clerk, as some
114 specific judicial review statutes require. Parties invoking judicial review under such specific

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¹⁵ *Id.* at 37–41.

¹⁶ 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).

¹⁷ 28 U.S.C. § 2112(a)(1).



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115 judicial review statutes should be entitled to the benefit of the lottery system.¹⁸ Recommendation
116 5(g)(h) provides that Congress should amend the “race to the courthouse” statute appropriately.

¹⁸ SIEGEL, *supra* note 5, at 38–41.



RECOMMENDATION

Recommendations to Congress When Drafting Judicial Review Provisions

- 117 1. When specifying the time within which a party may seek judicial review of agency
118 action, Congress should provide that a party may seek review “within” or “not later than”
119 a specified number of days after an agency action. Congress should avoid providing that
120 a party may seek review “prior to” or “before” the day that is a specified number of days
121 after an agency action, or “within” or “before the expiration of” a period of a specified
122 number of days beginning on the date of an agency’s action. Examples of the
123 recommended forms are:
- 124 a. “A party desiring judicial review may file a petition for review within 30 days
125 after” the agency’s action.
 - 126 b. “A party desiring judicial review may file a petition for review not later than 30
127 days after” the agency’s action.
- 128 Examples of the forms to be avoided are:
- 129 c. “A party desiring judicial review may file a petition for review prior to [or
130 ~~“before”~~] the 30th day after” the agency’s action.
 - 131 d. “A party desiring judicial review may file a petition for review within [or ~~“before~~
132 the expiration of”] the 30-day period beginning on the date of” the agency’s
133 action.
- 134 2. Congress should clearly specify what event starts the time for seeking review. Where the
135 event is the promulgation, amendment, or repeal of a rule, Congress should provide that
136 ~~the time starts from~~ event date shall be the date of the publication ~~date~~ of the rule in the
137 *Federal Register*.
- 138 ~~3.~~ When drafting a statute providing for review in a court of appeals, Congress should
139 provide that review should be initiated by filing a ~~“petition for review” or a “complaint”~~
140 ~~rather than a “notice of appeal.”~~



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141 4. ~~When drafting a statute providing for review in a district court, Congress should~~
142 ~~provide that review should be initiated by filing a “complaint” rather than a “petition for~~
143 ~~review.”]~~

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144 5.3 ~~When providing that a party may seek judicial review,]~~ With regard to either kind of
145 ~~statute~~, Congress should be aware that it need not specify the required content of the
146 document initiating judicial proceedings because that matter would be governed by the
147 applicable ~~court’s~~court rules.

General Judicial Review Statute

148 6.4 Congress should enact a new general judicial review statute that includes these
149 provisions:

150 a. Whenever a specific judicial review statute provides that a party may seek judicial
151 review of an agency’s action “prior to” or “before” the day that is a specified
152 number of days after an agency’s action, or “within” or “before the expiration of”
153 a period of a specific number of days beginning on the date of an agency’s action,
154 review may also be sought exactly that number of days after the agency’s action.

155 b. Whenever a specific judicial review statute provides that the event that starts the
156 time for seeking judicial review is the promulgation, amendment, or repeal of a
157 rule, the event date shall be the date of the publication of the rule in the *Federal*
158 *Register*.

159 c. Statutes authorizing judicial review in a court of appeals by the filing of a “notice
160 of appeal” shall be construed as authorizing judicial review by the filing of a
161 petition for review, and whenever a party seeking judicial review in a court of
162 appeals styles the document initiating review as a “notice of appeal,” the court
163 shall treat that document as a petition for review.

164 d. Statutes authorizing judicial review in a district court by the filing of a notice of
165 appeal, petition for review, or other petition shall be construed as authorizing
166 judicial review by the filing of a complaint, and whenever a party seeking judicial
167 review in a district court styles the document initiating review as a notice of



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168 ~~appeal, petition for review, or other petition, the court shall treat that document as~~
169 ~~a complaint.]~~

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

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

177 ~~f.g.~~ Whenever a specific judicial review statute requires that a party seeking review
178 serve the document initiating review on the agency that issued the order of which
179 review is sought “simultaneously” with filing the document, this requirement is
180 satisfied if the document is served on the agency within a reasonable but specific
181 number of days, such as [seven/fourteen] days.

182 ~~g.h.~~ Congress should amend 28 U.S.C. § 2112(a)(1) by striking the phrase “, from the
183 persons instituting the proceedings, the” therefrom and inserting “a” in its place,
184 in both places where the phrase occurs.

Recommendation 4(h): 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 [ACUS1]: 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.