

Comment from Elaine Mittleman on *Clarifying Statutory Access to Judicial Review of Agency Action*

April 16, 2021

This is a second 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.

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 for review in the D.C. Circuit of a final order or decision of the Postal Regulatory Commission.

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 noted, *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 *Mittleman* opinion has been cited as precedent concerning judicial review.

In *American Fed'n of Labor v. NLB*, 471 F.Supp.3d 228 (D.D.C. 2020), Judge Ketanji Brown Jackson discussed the importance of judicial review. Judge Jackson explained that “[t]his principle—*i.e.*, judicial review of agency actions that are procedurally arbitrary or capricious—is fundamental to our democratic system of government.” *Id.* at 238.

https://scholar.google.com/scholar_case?case=13495376162186567133&hl=en&as_sdt=5,77,130,140&scioldt=4,77,130,140&as_ylo=2020

Further, Judge Jackson wrote “[i]n other words, the common law prohibition against arbitrary decisionmaking is a well-established background requirement of discretionary administrative action that the APA codifies and that courts have traditionally enforced.” Judge Jackson then noted that “Congress is ordinarily *explicit* in its intention to displace APA review.” *Id.* at 238 n.3.

However, Judge Jackson then cited the *Mittleman* opinion, *id.* at 238 n.3, as follows:

see also, e.g., Mittleman v. Postal Regulatory Comm'n, 757 F.3d 300, 305 (D.C. Cir. 2014) (holding that APA review is not available because the statute specifically provides that “no Federal law dealing with public or Federal contracts, property,

works, officers ... *including the provisions of chapters 5 and 7 of title 5*, shall apply to the exercise of the powers of the Postal Service” (emphasis added)).

The statute referred to in this passage is the statute, 39 U.S.C. § 410(a), relating to the Postal Service. This statute about the Postal Service was cited in the *Mittleman* opinion on the assumption that it was “an analogous statutory section” to 39 U.S.C. § 404(d)(5). Thus, it was asserted in the opinion that “§ 404(d)(5) precludes judicial review under the APA” and that conclusion “is supported by precedent regarding an analogous statutory section.” *Mittleman*, 757 F.3d at 305.

However, judicial review for final orders of the Postal Regulatory Commission is based on the direct-review statute, 39 U.S.C. § 3663. Judicial review is not based on the APA or a statute relating to the Postal Service. The *Mittleman* opinion is confusing when it referred to APA review or judicial review under the APA. Jurisdiction for judicial review is based on the direct-review statute and not on the APA.

An emphasis in Recommendation 3 on direct-review statutes and specific judicial review statutes would be helpful. This might help address the confusion between jurisdiction under the APA in contrast with jurisdiction under specific judicial review statutes.