

Comment from Public Member John F. Duffy on *Procedural Fairness in Judicial Review*
December 3, 2020

In general, I think that the proposal for a general statute governing the details of judicial review is an excellent one. I also compliment Professor Siegel on identifying some truly terrific targets for reform.

My own suggestions are below, but they are merely suggestions. I would support Professor Siegel's general project without regard to whether my suggestions are accepted.

Reforms 1 & 2:

I agree with the recommendations in 1 & 2, but I wonder whether ACUS should also take up another issue, which is the application of the general federal statute of limitations (28 U.S.C. § 2401(a)) to cases seeking judicial review. Though § 2401(a) is written as a statute of limitations measured from the time "the right of action first accrues" (which does not begin to run until the relevant plaintiff has standing to sue), many courts have read § 2401(a) as a statute of repose so that it runs from the time of the challenged government action. See, e.g., *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991). That interpretation might not survive if a textualist Supreme Court majority ever opines on it, and yet the government might have legitimate interests in being protected by a statute of repose (i.e., a statute like the Hobbs Act, 28 U.S.C. § 2344, which shuts the period of review after a set period from a time measured from the "entry" of the agency action).

There's also the issue that the Supreme Court dodged in *PDR Network, LLC v. Carlton & Harris Chiropractic Inc.*, 139 S.Ct. 2051 (2019), but perhaps that's outside the scope of this project.

Reform 3:

This is a very sensible recommendation.

Reform 4:

This suggestion is a good one. I would, however, try to gently push away from using the term "notice of appeal," which is really not correct. Judicial review initiated in a court of appeals is an exercise of original not appellate jurisdiction. The phrase "notice of appeal" gives the legally inaccurate (i.e., constitutionally wrong) impression that the court of appeals is exercising appellate jurisdiction.

I would prefer that the recommendation were something more like this:

Congress should include in the general statute a provision stating that statutes authorizing judicial review by the filing of a "notice of appeal" shall be construed as authorizing judicial review by the filing of a petition for review. Congress should also include a provision stating that, where a party seeking judicial review

styles the document initiating review as a “notice of appeal,” the court shall treat that document as a petition for review.

Reform 5:

I think that the suggestion is a good one. It should also note that, where judicial review is properly sought in district court, the Federal Rules of Civil Procedure should control. Special statutes of judicial review should generally refrain from adding additional requirements merely to commence the litigation.

I suggest that the recommendation be rephrased as:

When providing that a party may seek judicial review in a particular forum, Congress should not specify the required content of the petition for review, complaint, or other document initiating judicial proceedings but should instead allow that matter to be governed by the applicable rules of the court.

One other issue is what to do with the existing statutes (like the Hobbs Act) that currently do specify a particular content for the document initiating review. Could we recommend that plaintiffs could follow either the special statute or the applicable rules of the court? That would eliminate traps for the unwary (who might read the special statute and overlook the proposed new general statute that we are recommending Congress enact). The language for such an approach could be loosely patterned on § 703 of the APA as:

A party seeking judicial review may initiate review by filing either (i) a document complying the requirements of any special statute authorizing review or (ii) a document complying with the applicable rules of the court.

Reform 6:

This seems like a sensible change.

Reform 7:

The “reasonable promptness” standard seems likely to generate litigation. It also doesn't address two problems identified in the initial discussion of the issue: (i) the problem of parties “fail[ing] to serve a copy on the agency altogether” and (ii) the problem of serving the wrong agency official.

Comment 1: Should a service requirement be retained? If some parties are failing to serve agencies altogether and we view that as a problem, then perhaps we should ask why service of process is necessary in judicial review cases. Service of process in general litigation is sensibly demanded to give parties notice of the lawsuit, but in cases seeking judicial review of federal agency action, the filing of the complaint or “petition for review” itself gives notice of the lawsuit to the federal government, albeit that notice is to a branch of the government (Article III)

different than the one containing the agency being sued (Article II). Still, in an age of electronic filing, it would not be hard for the clerk of court to forward (or indeed, for the clerk's software to forward automatically) the complaint to DOJ or to the agencies named in the complaint. The Hobbs Act takes this approach (albeit with the archaic technology of snail mail), requiring that the "clerk" (which is defined as "the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed," § 2341(1)) "shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt." 28 U.S.C. § 2344.

2. If service of the Executive Branch is considered desirable, then it would seem best to require merely service of at least one of: (i) an agency named in the complaint; (ii) an official named in the complaint; (iii) an agency that employs one of the officials named in the complaint; or (iv) DOJ. The DOJ option seems reasonable because DOJ is typically involved in defending agencies and, even in those instances where DOJ is not involved (such as cases involving agencies with independent litigating authority), DOJ can easily distribute the document to the appropriate agency.

3. If service is going to be required, I would prefer a set number of days (7 or 14) rather than a reasonableness standard.

That's all!