



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: December 1, 2020

Re: Sourcebook of Federal Judicial Review Statutes: Potential Recommendations

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.¹ The Office of the Chairman plans to publish this research on the Conference's website in an accessible format for future study. The *Sourcebook* will offer suggestions to improve the drafting of judicial review provisions.

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. The remainder of this memo addresses 7 specific problems that Professor Siegel has identified, and his explanations are provided in accompanying text provided in the sections below. These reforms may be included in the *Sourcebook*. ACUS's Chair, with the approval of the ACUS Council, may later submit the list and associated commentary to the Judicial Review Committee for the formulation of a proposed formal recommendation.

Professor Siegel's research has also identified a handful of additional topics that might potentially form the subject of a future Conference recommendation. Professor Siegel may suggest recommendations relevant to specification of the court in which judicial review is available, issue exhaustion requirements, and provisions for judicial review in the context of enforcement proceedings. Each of these issues is relatively complicated and has been addressed

¹ ACUS staff identified and catalogued key characteristics of every federal statute governing the judicial review of agency rules and adjudicative orders. The coding schema, which lists the numerous categories of interest and classification scheme, is appended to the end of this memorandum.

at least in part in prior ACUS recommendations, and any associated study would form the subject of a separate project and require additional research. After the discussion of the other issues and time permitting, Professor Siegel may briefly discuss these issues and obtain input thereon.

Members of the Judicial Review Committee, joined by other ACUS Members and the Project Advisors, will meet virtually on December 3, 2020, to comment on the list and propose additional candidates for inclusion. Advance written comments are welcome, especially by those unable to attend the meeting. **No votes will be taken during the December 3rd meeting.** The Chair and Council will consider the Committee's input in deciding whether to pursue a project, which would likely begin soon.

Professor Siegel's Summaries of Potential Reforms for the "General Statute":

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.² 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.

² 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.

Coding Schema for Judicial Review Project

May 29, 2019

A. **Citation:** The U.S. Code citation of the judicial review provision

Please cite in standard format: xx U.S.C. § yyy. If the judicial review provision is in a subsection, cite the subsection: xx U.S.C. § yyy(z).

[Important: If the provision contains two (or more) different provisions for judicial review, separate them into two (or more) separate lines on the spreadsheet.]

B. **Description:** A general description of what the statutory provision is about. If the description is inaccurate or confusing, please revise.

C. **Popular Name:** Popular name of the statute

D. **Agency:** The agency involved

E. **Agency Characteristics—Independence of President:** Whether the agency involved is executive or independent.

A. Executive—head(s) of agency serves at the pleasure of the President

B. Independent—head(s) of agency have some insulation from Presidential removal

[**Note:** For relevant information, consult Admin. Conf. of the U.S., Sourcebook of United States Executive Agencies (2d ed. 2018), available at <https://www.acus.gov/research-projects/sourcebook-united-states-executive-agencies-second-edition>. See Table 9 (Column 1) on page 97.]

F. **Agency Characteristic—Within EOP or Cabinet Departments**

A. Within the EOP or a cabinet department

B. Outside the EOP and the cabinet departments (use ACUS Sourcebook definitions, see Table 3 on page 42)

1. Administration

2. Independent commission (regulatory)

3. Board (non-regulatory)

4. Government corporation / other

G. **Text:** The text of the statutory provision

H. **Agency Action Characteristics:** What kind of agency action is involved (e.g., rulemaking, adjudication, licensing)

A. Rulemaking

B. Licensing

C. Adjudication

1. Grant award

2. Contract award

3. Benefits determination / award

4. Registration

5. Regulatory Approval
6. Monetary penalty
7. Suspension / Debarment [order not to act in some field, even lawfully]
8. Cease & Desist order [order to cease unlawful behavior]
9. Other behavioral penalty / order
10. Inter partes proceeding
11. Other

- I. **Judicial Review Provision Date:** The date on which the judicial review provision was first adopted

[**Note:** often not the same date as that on which the statute as a whole was first adopted. We suggest using the annotated USC, which contains detailed information about the legislative history and will help you 90% of the time.]

- J. **Appeals/District Court:** Whether the provision specifies in which level of court review should be sought

- A. District Court
- B. Three-Judge District Court
- C. Court of Appeals
- D. Supreme Court (or Justice thereof)
- E. Other

- K. **Jurisdiction/Venue:** Whether the provision identifies more particularly in which court review should be sought

- A. Specific Court:

1. U.S. Court of Appeals for the District of Columbia Circuit
2. U.S. Court of Appeals for the Federal Circuit
3. U.S. Court of Appeals for Veterans Claims
4. U.S. District Court for the District of Columbia
5. U.S. Court of Federal Claims
6. U.S. Court of International Trade
7. U.S. Tax Court
8. Other specific court (e.g., District Court for Eastern District of Virginia)

- B. Party-based description:

1. the court in the district/circuit in which the plaintiff resides/is located
2. the court in the district/circuit in which the plaintiff has his principal place of business
3. the court in the district/circuit in which the plaintiff has his principal office
4. the court in the district/circuit in which the plaintiff carries out his business
5. Other party-based description

- C. Event-based description:

1. the court in the district/circuit in which a hearing was held
2. the court in the district/circuit in which the violation occurred
3. the circuit/district in which the administrative adjudication occurred
4. the circuit/district in which the project is located
5. Other event-based description

- D. “any court of record . . . having general jurisdiction”

- E. “an appropriate” district/circuit court
 - F. Other (provision contains a specific description not listed above)
- L. **Record:** Whether the provision specifies what shall constitute the record on review
- A. Provision states that record shall be filed in accordance with 28 U.S.C. § 2112
 - B. Provision states in some other way that the record shall be filed with the court
 - C. Provision states that review shall be based solely on the agency record
 - D. Provision states that review shall be on agency record, but does not specify whether additional evidence possible
 - E. Provision authorizes additional evidence:
 1. Reviewing court authorized to gather additional evidence (possibly only under certain conditions)
 2. Reviewing court authorized to order agency to gather additional evidence (possibly only under certain conditions)
 3. Agency authorized to submit evidence ex parte / in camera
 - F. Other provision regarding record
- M. **Standard of Review:** Whether the provision specifies a standard of review [list all that apply, accept small variations]
- A. “arbitrary [or] capricious”
 - B. “abuse of discretion”
 - C. “beyond a reasonable doubt”
 - D. “clear and convincing”
 - E. “clearly erroneous”
 - F. “contrary to constitutional right” [or “infringes the Constitution” / “unconstitutional”]
 - G. “de novo”
 - H. “de novo, except”
 - I. “failed to comply with the statutory requirements”
 - J. “failed entirely to perform a regulatory analysis”
 - K. “full independent review”
 - L. “issued without due notice and reasonable opportunity for a hearing”
 - M. “jurisdiction” – either “in excess of,” “beyond,” “outside,” or similar
 - N. “not in accordance with law”
 - O. “procedures required by law [or statute]” – “in accordance with” / “not in accordance with” / “violates”
 - P. “preponderance of the evidence”
 - Q. “substantial evidence”
 - R. “supported [or unsupported] by evidence” [as distinct from “substantial evidence”]
 - S. “weight of the evidence”
 - T. Other

- N. **Deference:** Whether the provision specifies that the court shall or shall not give deference to any view [This code should be reserved for statutes that specify that deference shall be given on some question of law, such as interpretation of a statute or rule.]
- A. Statute provides for deference to be given to agency interpretations
 - B. Statute specifies that it does *not* affect the deference owed by the court
 - C. Statute specifies that for deference purposes the agency shall be treated as the only agency authorized to apply, enforce, or interpret the statute
 - D. Statute specifies that the court shall not give deference to the views of any of two or more agencies
 - E. Statute makes other express provision regarding deference
- O. **APA or Other Judicial Review Invoked:** The provision says that judicial review shall occur in accordance with the review provisions of some other law. If the other law is the APA, write “APA,” otherwise list what the other statute is. List more than one statute if appropriate. [This code need not indicate whether *further* review is available after the initial judicial review, e.g., by appeal or cert petition.]
- P. **Other Judicial Review Excluded:** Statute excludes other judicial review [list all that apply]
- A. Under other general statutes (e.g., APA, 28 U.S.C. § 1331)
 - B. Under other specialized statutes
 - C. Generally
- Q. **Time to File (e.g., file within XX days of the [agency’s] order):** Whether the provision provides a time within which to seek review [list specified time]
- R. **Stay/Preliminary Injunction:** Whether the statutory provision expressly allows, forbids, or otherwise regulates the granting of a stay, preliminary injunction, or other temporary relief [list all that apply]
- A. Statute contains provision regarding stay of *agency* action:
 - 1. Seeking review automatically stays agency action
 - 2. Preliminary relief against agency is allowed but is not automatic [e.g., seeking review “shall not operate as a stay unless the court so orders.”]
 - 3. Preliminary relief against agency limited to specified circumstances
 - 4. Preliminary relief against agency forbidden
 - B. Statute contains provision regarding stay of *private* action:
 - 1. Seeking review automatically stays private action
 - 2. Preliminary relief against private action is allowed but is not automatic [e.g., seeking review “shall not operate as a stay unless the court so orders.”]
 - 3. Preliminary relief against private party limited to specified circumstances
 - 4. Preliminary relief against private party forbidden

- S. **Fee Recovery/Costs:** Whether the provision provides for payment or recovery of fees or costs
The statute provides that a party seeking review:
- A. Must pay costs or fees
 - B. May have to pay costs or fees [e.g., if unsuccessful]
 - C. Shall not have to pay costs or fees
 - D. May be able to recover costs or fees [e.g., if successful]
 - E. Shall recover costs or fees
- T. **Security:** Whether the provision requires parties seeking review to post any bond [list all that apply]
- A. Security required to cover potential costs / fees
 - B. Security required to cover potential judgment
 - C. Other security required
- U. **Exhaustion:** Whether the provision states whether parties seeking review must have exhausted administrative remedies [list all that apply]
- A. Statute specifies that party seeking review must have exhausted administrative remedies
 - B. Statute specifies that exhaustion is excused under specified circumstances
 - C. Statute specifies that exhaustion is not required
 - D. Statute specifies that judicial review may proceed simultaneously with administrative proceedings
 - E. Statute specifies that administrative remedies are deemed exhausted in specified circumstances (e.g., agency exceeds time limit)
- V. **Objections Raised in Hearing:** Whether the provision limits the reviewing court to considering matters raised before the agency
- A. Statute wholly forbids consideration of objections not raised before agency
 - B. Statute forbids consideration of objections not raised before agency, but allows exceptions (e.g., for good cause)
 - C. Statute expressly allows consideration of objections not raised before agency without the need to show cause
 - D. Statute makes other statement regarding objections not raised before agency

W. Who May Seek Review: Whether the provision specifies who make seek review
[List all that apply]

The statute allows review:

- A. By “any person” [or equivalent phrase]
- B. By those “aggrieved” or “adversely affected”:
 - 1. Any “aggrieved” person or party
 - 2. Any “adversely affected” person or party
 - 3. “aggrieved” or “adversely affected” persons or parties, but with restrictions, e.g., must have participated in agency proceedings
- C. By those against whom the agency has acted:
 - 1. Those against whom the agency has imposed a monetary penalty
 - 2. Those against whom the agency has entered a behavioral order
 - 3. Those whom the agency has found to be in violation of some requirement
 - 4. Those whose application or request for benefits, approval, or other favorable action the agency has denied
 - 5. Other description of those against whom agency has acted
- D. By the agency (or the head or other officer of the agency) issuing the order reviewed (i.e., agency seeks enforcement of its own order)
- E. By some other federal agency
- F. By a state, state political subdivision, or state or local agency
- G. By an Indian tribe
- H. Other

X. Whom to Sue: Whether the provision specifies whom to sue (check all that apply)

- A. The United States
- B. The agency by name
- C. A specified officer of the agency
- D. A private party
- E. Other

Y. How to Seek Review: Whether the provision specifies how to seek review

- A. By “petition”
- B. By “complaint”
- C. By “notice of appeal”
- D. By “civil action”
- E. By “motion”
- F. Other

- Z. **Relief Court May Grant:** Whether the provision specifies the relief a court may grant [list all that apply, allow minor wording variations]
- A. “all necessary/appropriate relief”
 - B. “affirm”
 - C. “assess penalties”
 - D. “declaratory judgment”
 - E. “decree shall operate as an injunction”
 - F. “enforce”
 - G. “enjoin”
 - H. “equitable relief”
 - I. “injunction setting aside/enforcing the [order]”
 - J. “mandamus”
 - K. “modify” or “direct the [agency] to modify”
 - L. “monetary judgment, including attorneys fees and other expenses”
 - M. “order payment of the penalty imposed by [agency]”
 - N. “remand proceedings to agency”
 - O. “reverse”
 - P. “set aside”
 - Q. “stay”
 - R. “suspend”
 - S. “terminate”
 - T. “vacate”
 - U. Other

AA. **Expedited Review/Priority:** Whether the provision provides for expedited review [yes or blank]
 Statute may, e.g., provide that proceeding shall be “expedited,” given “priority, heard at the “earliest possible date,” or otherwise advanced on the court’s docket.

- BB. **Exclusive Jurisdiction:** Whether the provision provides for exclusive jurisdiction
- A. Statute provides that a specified court shall have exclusive jurisdiction
 - B. Statute provides that a court’s jurisdiction shall become exclusive upon some event’s occurring
 - C. Statute provides a mechanism for determining which court shall have exclusive jurisdiction if review is sought in multiple courts

- CC. **Preclusion of Review**
- A. Statute precludes all judicial review of actions taken under the statute
 - B. Statute precludes all judicial review of specified actions
 - C. Statute limits review to questions of law
 - D. Statute limits review to questions of fact
 - E. Statute otherwise limits issues subject to review or excludes issues from review

[**Note:** a phrase such as “review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence shall be conclusive” is really a standard of review, not a limit on review and should be coded accordingly.]

DD. Non-Redundant Provision: Mark this column if the statute contains provision that states something, other than the time within which to seek review or the place in which to seek review, that would not be true anyway. If the provision so providing is related to another column, indicate which column; otherwise, indicate what the provision does.

[Examples of provisions that would be true anyway:

“The findings of the agency with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.”

“The commencement of proceedings for judicial review under this paragraph shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency under this section.”]