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# SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES

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This report was prepared for the Office of the Chairman of the Administrative Conference of the United States. It does not necessarily reflect the views of the Office of the Chairman or the Conference (including the Conference's Council, committees, or members).

Note from ACUS Staff:

This revised version of the Sourcebook supports the recommendation project entitled Clarifying Statutory Access to Judicial Review of Agency Action. The recommendations are drawn mostly from pages 26–45 of the Sourcebook.

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## I. Introduction: the ACUS Judicial Review Sourcebook Project

Judicial review is a pervasive feature of administrative law in the United States. After a federal administrative agency takes an action, an aggrieved party may usually seek review of that action in a federal court.<sup>1</sup> In most cases, the court will determine whether the agency’s action complied with substantive legal requirements,<sup>2</sup> whether it followed required procedures,<sup>3</sup> and whether it was sufficiently rational.<sup>4</sup> If the court determines that the agency failed to meet these standards, the court may hold the action unlawful and set it aside.<sup>5</sup>

Judicial review of federal administrative agency action traces its history back to the founding of the nation.<sup>6</sup> During its early history, and continuing until the enactment of the Administrative Procedure Act (APA) in 1946, judicial review often took place with little statutory guidance. As a result, judicially developed, common-law doctrines play an important role in the law of judicial review.<sup>7</sup>

The law of judicial review is also, however, governed by federal *statutes*.<sup>8</sup> These statutes include both *general* judicial review statutes and *specific* judicial review statutes. As used in this Sourcebook, the term “general” judicial review statute refers to a statute that governs judicial review of agency actions at multiple federal agencies taken under multiple statutes. A “specific” judicial review statute applies only to actions taken by a particular agency<sup>9</sup> or only to actions taken under a particular statute.<sup>10</sup>

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<sup>1</sup> See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (referring to the “basic presumption of judicial review”); see also AMERICAN BAR ASSOCIATION, SECTION OF ADMINISTRATIVE LAW, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 6, 15 (Michael E. Herz, Richard Murphy & Kathryn Watts, eds., 2D ed. 2015) (hereinafter “Guide”); AMERICAN BAR ASSOCIATION, SECTION OF ADMINISTRATIVE LAW, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 49 (2D ed. 2013) (hereinafter “Blackletter Statement”).

<sup>2</sup> See 5 U.S.C. § 706(2)(A) (authorizing a court to set aside agency action that is “not in accordance with law”).

<sup>3</sup> See *id.* § 706(2)(D) (authorizing a court to set aside agency action taken “without observance of procedure required by law”).

<sup>4</sup> See *id.* § 706(2)(A) (authorizing a court to side aside agency action that is “arbitrary” or “capricious”).

<sup>5</sup> *Id.* § 706(2).

<sup>6</sup> Indeed, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), although best known for establishing that federal courts may review the constitutionality of federal statutes, *id.* at 176–80, was also important to administrative law. The case held that courts may review the actions of executive officers, even high officers such as the Secretary of State. *Id.* at 168–74. Federal courts have reviewed the actions of executive officers and agencies ever since.

<sup>7</sup> See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 114–20 (1998); see also Guide, *supra* note 1, at 1; LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 329 (1965); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2:18, at 140 (2d ed. 1978).

<sup>8</sup> See Duffy, *supra* note 7, at 119–20 (identifying four areas “where the law [of judicial review] is slowly evolving from a common-law method to a more rigorous statutory method based on the APA”); Guide, *supra* note 1, at 5–7.

<sup>9</sup> Specific judicial review statutes that apply only to actions of a particular agency may cover multiple, different kinds of action taken by that agency, e.g., 47 U.S.C. § 402 (providing for review of multiple, different kinds of actions taken by the Federal Communications Commission), or may be more specific still and apply only to a single, specific kind of action taken by the agency, e.g., 15 U.S.C. § 1825(b)(2) (providing for judicial review of penalties imposed by the Secretary of Agriculture pursuant to the Horse Protection Act of 1970).

<sup>10</sup> A specific judicial review statute that provides for review only of actions taken under a particular statute may provide for review of actions taken by multiple agencies under that statute. See, e.g., 33 U.S.C. § 1321(b)(6)(A),

The most prominent general judicial review statute is, of course, the APA, which applies to nearly every agency in the federal government and which covers many aspects of administrative law, including judicial review.<sup>11</sup> Another important, general judicial review statute is the Hobbs Act, which is not as broadly applicable as the APA, but which governs judicial review of certain actions of several federal agencies.

In addition to these general judicial review statutes, Congress has passed hundreds of specific judicial review statutes. These statutes can be found throughout the United States Code. They vary considerably. Some comprehensively regulate judicial review procedures; others specify only a single detail. Some govern review of only a specific type of agency action; others broadly govern review of many different kinds of actions that a certain agency might take. Some do no more than redundantly restate rules that would apply anyway; others provide for judicial review that notably differs from the review that would exist under the background principles provided by a general statute such as the APA or by administrative common law.

The purpose of this Sourcebook is to undertake a comprehensive study and analysis of all of the judicial review statutes in the United States Code. ACUS has attempted to identify every provision in the United States Code that governs judicial review of federal agency action. ACUS's review has identified over 650 such provisions.<sup>12</sup> This Sourcebook's author and ACUS staff reviewed and analyzed every such provision. The output of this project is twofold. One part is a "Statutory Analysis Spreadsheet" that catalogues numerous characteristics of each of the over 650 statutes governing judicial review. The spreadsheet will quickly answer many questions about any given statute, such as: In which court should review be sought? What is the time limit for seeking review? Must the party seeking review post bond? Is the court obliged to expedite review?

The other output of the project is this Sourcebook. This Sourcebook is the result of analyzing all of the provisions for judicial review in the United States Code and comparing and contrasting them. This Sourcebook attempts to draw useful lessons from this comprehensive review. It identifies best practices for crafting specific judicial review statutes. It also identifies ways in which some specific judicial review statutes have, probably unintentionally, created obstacles to judicial review. It provides recommendations as to how Congress can avoid creating such obstacles. It concludes with a "checklist" of advice to Congress with regard to the creation of specific judicial review statutes.<sup>13</sup>

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(G) (providing for review of penalties imposed under the Clean Water Act by the Administrator of the EPA, the Secretary of Transportation, or the Secretary of a department in which the Coast Guard is operating).

<sup>11</sup> See 5 U.S.C. §§ 701-706.

<sup>12</sup> The project did not attempt to identify or analyze review provisions not codified in the United States Code.

<sup>13</sup> This Sourcebook takes its place alongside the ACUS "Sourcebook of United States Executive Agencies." DAVID E. LEWIS & JENNIFER L. SELIN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2012). That project comprehensively catalogued and analyzed all federal executive agencies. Like this Sourcebook, that one produced comprehensive tabular information about the objects of its study and their characteristics and a narrative report that put the tabular information in context.

## II. Goals of the Judicial Review Sourcebook Project

In undertaking this project, ACUS seeks to serve two principal goals: (1) identifying the salient characteristics of existing statutory judicial review provisions and providing data that classifies them according to these characteristics, and (2) recommending improvements in existing judicial review statutes and in the process by which new ones are drafted.

### A. Providing Data

One key goal of this project is to provide data. As things stand, the numerous statutes governing judicial review of federal administrative action are strewn throughout the United States Code. No prior catalogue of them exists. Therefore, Congress, the courts, the executive, and private researchers have had no easy way to discover the characteristics of such statutes. If, for example, Congress were drafting a new specific judicial review statute and desired to follow the typical pattern set by existing statutes, how would it know what that typical pattern is? Currently, there is no easy way to tell.

This Statutory Analysis Spreadsheet that accompanies this Sourcebook provides data that can address this kind of question. It displays numerous characteristics of each existing specific judicial review statute in easily readable format. For each statute, the spreadsheet allows the reader to tell at a glance how long interested parties have to seek review, in which court they should seek review, what mechanism they should use to seek review, whether they must post bond, whether the court must expedite the proceedings, whether parties may seek review in the context of an enforcement proceeding, and so on. Researchers can use the data provided in the spreadsheet to determine the characteristics of any particular, specific judicial review statute and to identify general trends and patterns in the characteristics of such statutes overall.

### B. Recommending Improvements

Another goal of the project is to identify and recommend improvements needed in judicial review statutes. Review of the hundreds of specific judicial review statutes identified some problems with these statutes. Where necessary, this Sourcebook recommends improvements.

Many of the recommended improvements concern technical obstacles to the availability of judicial review. In recommending reforms that would eliminate these technical obstacles, this Sourcebook joins a decades-long line of ACUS recommendations regarding the availability of judicial review.<sup>14</sup> A central theme of these recommendations is the principle that *the availability of judicial review should turn on factors that serve rational policies*. It should not turn on factors unrelated to rational reasons why judicial review should or should not be available.

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<sup>14</sup> See, e.g., ACUS Recommendation 2012-6, *Reform of 28 U.S.C. § 1500*; ACUS Recommendation 82-3, *Federal Venue Provisions Applicable to Suits Against the Government*; ACUS Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*; ACUS Recommendation 69-1, *Statutory Reform of the Sovereign Immunity Doctrine*; ACUS Recommendation 68-7, *Elimination of Jurisdictional Amount Requirement in Judicial Review*.

This principle may seem obvious. However, as prior ACUS projects have revealed, the availability of judicial review of agency action sometimes turns on technicalities that bear no relation to rational policy. Such technical obstacles proliferate in part because of the imbalance that often exists between counsel who bring cases seeking judicial review of agency action and counsel who defend such cases. Government counsel who defend challenges to agency action are repeat players in the system, whereas counsel for plaintiffs challenging agency action may have less familiarity with the special doctrines that apply in suits against government. As a result, government counsel may succeed in getting courts to limit the availability of judicial review in ways that make little or no policy sense.

In such situations, ACUS plays a particularly important role. It is often said that the federal government's lawyers have a special duty to "seek justice" and should not simply try to win cases in any way possible.<sup>15</sup> Still, even government lawyers may feel a strong inclination to win cases. They may, therefore, seek to have cases dismissed for technical reasons that serve no rational policy. ACUS, however, does not litigate individual cases, and in addition ACUS is a public-private partnership designed to receive input from both the government and the private sector. ACUS is therefore well positioned to uncover and recommend elimination of irrational technical obstacles to judicial review. It has previously recommended improvements to make judicial review better align with rational policy. ACUS's prior recommendations on this topic include, most notably, ACUS Recommendation 69-1, *Statutory Reform of the Sovereign Immunity Doctrine*, which recommended that Congress waive sovereign immunity from suits for judicial review of agency action that sought relief other than money damages. Congress's implementation of this recommendation in 1976 eliminated the need for the confusing and convoluted system of challenging government action by fictionally pretending to sue a government officer. This system was so encrusted with technicalities that even the Department of Justice called it "bewildering" and recognized that its criteria failed "to bear any necessary relationship to the real factors which should determine when the Government requires special protection."<sup>16</sup>

ACUS Recommendation 69-1 and its subsequent implementation did not eliminate all barriers to judicial review of federal agency action. A suit for judicial review may still be dismissed for lack of standing, failure to exhaust administrative remedies, or numerous other non-merits reasons. The principle that judicial review's availability should turn on rational considerations does not require that judicial review of administrative action *always* be available. It requires only that the availability of judicial review should turn on factors that serve rational policies.

The comprehensive review of specific judicial review statutes contained in this Sourcebook has revealed some situations in which the availability of judicial review does not

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<sup>15</sup> *E.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); *Gray Panthers v. Schweiker*, 716 F.2d 23, (D.C. Cir. 1983) ("There is . . . much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large.")

<sup>16</sup> Letter from Antonin Scalia, Assistant Attorney General for the Office of Legal Counsel, to Senator Edward M. Kennedy, *reprinted in* S. Rep. 94-996, at 25 (1976).



comply with the principle that its availability should turn on factors that serve rational policies. This Sourcebook identifies these situations and recommends appropriate improvements.

### **III. Methodology**

To create this Sourcebook, ACUS followed a multi-stage methodology described in this section. The stages of the project are referred to below as Identification, Coding, Analysis, and Review.

#### **A. Identification of Judicial Review Provisions**

The first step was to identify provisions in the United States Code relating to judicial review of agency action. Each title of the Code was assigned to an ACUS attorney for review. Each attorney then identified provisions relating to judicial review of agency action within his or her assigned titles as follows:

1. First, the attorney used Lexis Advance to conduct the following search within each assigned title:

text (“judicial” or “review” or “court” or “appeal” or “civil” or “decision”) or  
rule (“judicial” or “review” or “court” or “appeal” or “civil” or “decision”)

2. Then, for each provision identified using the above search, the attorney entered into a spreadsheet the provision’s citation, a description of the provision, the popular name of the program or statutory regime of which the provision was a part, the agency involved, and the text of the relevant provision.

3. The attorney then reviewed the names of the parts, chapters, subchapters, and sections within the attorney’s assigned titles and reviewed any provisions that, based on their titles, were potentially related to judicial review of agency action. The attorney added to the spreadsheet any provisions discovered through this search method that were not already included by virtue of the Lexis search.

Following these steps, a second attorney reviewed the spreadsheet created by the first attorney to determine whether the identified provisions were provisions related to judicial review of agency action or were really about something else. The latter possibility arose particularly with regard to provisions identified by the Lexis search method, as that method flagged provisions that contained any of the specified keywords, even though some such provisions did not relate to judicial review of agency action.

The second attorney categorized each provision as either “includable” or “excludable” (i.e., either related to judicial review or really about something else) and also placed each provision into one of the following categories:

### Includable Categories

Provisions Specifying Judicial Review

Sue and Be Sued Clause

Provisions Related to Jurisdiction and Venue

Provisions Compelling Agency Action (i.e., Review of Agency Failure to Act)

Provisions Specifying Final Action for Judicial Review Purposes

Provisions Prohibiting Judicial Review

Provisions Preventing Disclosure in Connection with Judicial Review

### Excludable Categories

Provisions Providing for Administrative Appeal or Review, not Judicial Review

Provisions Relating to General Agency Powers or Structure

Provisions Relating Solely to Agency Enforcement Actions

After ACUS attorneys had carried out the above-stated process with regard to all titles of the United States Code (other than Title 28, which was treated specially), the provisions identified were compiled into a single, Statutory Analysis Spreadsheet.

## **B. Coding of Judicial Review Provisions**

ACUS staff, in consultation with a group of Project Advisors, then created a coding schema to code the provisions in the Statutory Analysis Spreadsheet for various characteristics. The characteristics included such things as whether each provision provided where judicial review should be sought (and if so, where), when judicial review should be sought (and if so, when), who could seek judicial review, whether bond was required, whether the standard of review was specified, and so on. The coding schema was revised by the Project Consultant. ACUS staff then coded all provisions in the Statutory Analysis Spreadsheet according to the coding schema.

## **C. Analysis of Judicial Review Provisions**

The project consultant reviewed the Statutory Analysis Spreadsheet, read all the judicial review provisions in the spreadsheet, reviewed their codings, and drafted this Sourcebook, which reports the consultant's findings based on the above research.

## **D. Review**

ACUS staff reviewed the initial draft of the Sourcebook and commented on it. The draft was also circulated to the Project Advisors. The Project Consultant revised the Sourcebook in response to comments received from ACUS staff and from the Project Advisors. The Project Consultant also discussed the project with the members of the ACUS Committee on Judicial Review and revised the Sourcebook in response to comments received from the members of that committee. The result is this Sourcebook.

## IV. General Judicial Review Statutes

Statutes governing judicial review may be *general* or *specific*. As noted earlier, a *specific* judicial review statute provides for review only of actions by a specific agency or under a specific statute. A *general* judicial review statute provides for judicial review of actions by multiple agencies under multiple statutes.

There are two notable general judicial review statutes. The most prominent, of course, is the APA. The judicial review provisions of the APA apply to nearly all federal executive agencies. Also significant, though of less wide-ranging application, is the Hobbs Act, 28 U.S.C. §§ 2342–2351, which governs judicial review of certain orders of several specified agencies.

The primary purpose of this Sourcebook is to explore the numerous *specific* judicial provisions found throughout the United States Code. Nonetheless, a basic understanding of the APA and the Hobbs Act will be helpful in exploring the specific judicial review provisions. Accordingly, these general judicial review statutes are discussed below. This discussion is not intended as a comprehensive treatment of these statutes; such treatment may be found in standard Administrative Law texts and treatises.<sup>17</sup> The purpose here is to provide background for the distinctive contribution of this Sourcebook, which is its detailed discussion of specific judicial review statutes.

### A. The Administrative Procedure Act

The APA governs not just judicial review, but administrative law generally. Chapter 7 of the APA, 5 U.S.C. §§ 701-706, governs judicial review of agency action. Its general judicial review provisions are used thousands of times every year.<sup>18</sup>

#### 1. The Relationship between the APA and Specific Judicial Review Statutes

The relationship between specific judicial review provisions and the general judicial review provisions of the APA is complex. For the most part, the judicial review provisions of the APA are default provisions. They apply when no specific statute applies in a given case. Where a specific statute does apply, its rule typically displaces whatever rule would apply under the APA.

The susceptibility of the APA's provisions to displacement by provisions of more specific judicial review statutes follows in some cases from the text of the APA's provisions. For example, § 704 provides a rule governing finality of agency action but states that this rule applies “[e]xcept as otherwise expressly provided by statute.” Similarly, § 703 provides that the form of proceeding for judicial review shall be “the special statutory review proceeding relevant to the subject matter in a court specified by statute,” and then provides an additional rule applicable only “in the absence or inadequacy” of such a specific statute. Thus, the text of both of these provisions shows that these provisions yield to those of other statutes that govern judicial review more specifically.

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<sup>17</sup> See, e.g., Guide, *supra* note 1; RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS (6th ed. 2014).

<sup>18</sup> Searches in the WESTLAW database of federal court decisions reveal that 5 U.S.C. § 706 alone has been cited in judicial decisions over 20,000 times. Of course, not every invocation of these statutes results in their being cited in a searchable court decision, so the true number of times in which the provisions are invoked is probably much larger.

Even where the APA’s provisions do not expressly provide that they apply only where no more specific statute governs, this result would follow from the usual principle of statutory interpretation that the specific controls the general.<sup>19</sup> The APA’s provisions are all general provisions that apply to the whole range of federal agencies, and they would normally yield to more specific statutes directed at specific agencies. Thus, for example, if Congress, in a specific judicial review statute, were to provide that a particular agency’s actions are to be subject to a more (or less) stringent standard of review than the standard provided in 5 U.S.C. § 706, then the review provisions of the specific judicial review statute would govern, notwithstanding that § 706, on its face, governs judicial review of any agency action.<sup>20</sup>

However, the relationship between the APA’s provisions and those of specific judicial review statutes is complicated by 5 U.S.C. § 559, which provides that a “[s]ubsequent statute may not be held to supersede or modify this subchapter [or] chapter 7 . . . except to the extent that it does so expressly.” Section 559 does not eliminate Congress’s ability to provide specific judicial review statutes that depart from the APA,<sup>21</sup> but it may require Congress to make such statutes clearer than they would otherwise have to be. Certainly, Congress, in a specific judicial review statute, may provide for a different rule than the corresponding APA rule that would otherwise apply, but in light of § 559, if a specific judicial review statute, passed after the APA, does not *clearly* provide such a different rule, a court may conclude that the APA provision still applies. Thus, for example, in a case in which a specific judicial review provision provided that an agency’s rulemaking proceedings would be subject to review for “substantial evidence” instead of only the “arbitrary or capricious” review that would normally apply under 5 U.S.C. § 706(2)(A), the D.C. Circuit, citing § 559 as one factor influencing its interpretation, held that the two standards were the same and that the specific judicial review statute did nothing to change the standard that would have applied in its absence.<sup>22</sup> The Court stated that “the import of the § 559 instruction is that Congress’s *intent to make a substantive change* [must] be clear.”<sup>23</sup>

Accordingly, the true rule is that: (a) the APA’s judicial review provisions are default provisions that apply where no specific judicial review statute governs the case at hand; (b) Congress may enact a specific judicial review statute that deviates from the APA’s otherwise applicable rules, but (c) in light of 5 U.S.C. § 559, a court may conclude that a specific judicial

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<sup>19</sup> *E.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). *But see id.* at 646–47 (noting that this canon is not an absolute rule).

<sup>20</sup> *See, e.g.*, *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1145 (10<sup>th</sup> Cir. 2010) (noting that the APA provides the “default” standard of review where “the legislation at hand doesn’t supply a standard of review for us to apply”).

<sup>21</sup> This is plain not only from the text of § 559, which does not purport to prohibit change by future Congress, but also from the general principle that “one legislature may not bind the legislative authority of its successors.” *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996).

<sup>22</sup> *Ass’n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 686 (D.C. Cir. 1984) (per Scalia, J.); *cf. Carlson v. Postal Regulatory Comm’n*, 938 F.3d 337, 348 (D.C. Cir. 2019). In *Dickinson v. Zurko*, 527 U.S. 150 (1999), the Supreme Court did not have occasion to apply § 559 to a post-APA statute (it considered, rather, whether pre-APA *judicial decisions* might establish a rule, different from a rule in the APA, that would be preserved under § 559’s provision that the APA does not “not limit or repeal additional requirements . . . recognized by law”), but the Court, similarly, emphasized that under § 559 “[e]xistence of the additional requirement must be clear.” *Id.* at 155.

<sup>23</sup> 745 F.2d at 686 (emphasis in original).

review provision does not override the more general provisions of the APA if it does not do so clearly.

## 2. The APA's Provisions

The APA governs numerous aspects of judicial review of agency action. Each of the APA's six sections devoted to judicial review is described briefly below.

### a) *Section 701: Limitations on Review*

The APA establishes that parties aggrieved by agency action are generally entitled to judicial review.<sup>24</sup> Section 701, however, states two important exceptions to this basic principle. It provides that the entire judicial review chapter of the APA does not apply if “statutes preclude judicial review” or if “agency action is committed to agency discretion by law.”

#### (1) *“Statutes preclude judicial review”*

The exception for cases where “statutes preclude judicial review” refers to cases in which a specific judicial review statute precludes judicial review of the kind of agency action involved. Accordingly, in determining whether this exception applies, it is necessary to consider the specific judicial review statutes applicable to the agency at issue. The question whether such a statute precludes judicial review is a question of statutory interpretation. In answering the question, courts are guided in part by general principles of statutory interpretation and in part by presumptions particular to the topic of judicial review.

The first step is the same as it would be in resolving any question of statutory interpretation, namely, consideration of the statutory text. Sometimes, careful consideration of statutory text will reveal that a statute's preclusive scope is narrower than might appear at first glance.<sup>25</sup> Courts also apply two important, special presumptions. First, courts presume that judicial review of agency action is available. Courts prefer to interpret ambiguous statutes so as to permit judicial review and will conclude that a statute precludes review only where there is “clear and convincing” evidence of congressional intent to preclude review.<sup>26</sup>

Second, courts are particularly reluctant to determine that a statute precludes review of *constitutional* challenges to agency action. Such an interpretation, courts typically note, would itself raise potential constitutional problems.<sup>27</sup> Therefore, in accordance with the general “principle of avoidance,” pursuant to which an ambiguous statute should, if possible, be interpreted in a way that avoids raising serious constitutional questions, courts prefer, where

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<sup>24</sup> See 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

<sup>25</sup> E.g., *Johnson v. Robison*, 415 U.S. 361 (1974) (holding that a statute precluding review of “the decisions of the Administrator [of Veterans Affairs] on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans” did not bar a constitutional challenge to a veterans benefits statute itself).

<sup>26</sup> *Johnson v. Robison*, 415 U.S. at 373–74; *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967).

<sup>27</sup> E.g., *Johnson v. Robison*, 415 U.S. at 366.

possible, to interpret a potentially preclusive statute in a way that does not bar assertion of constitutional challenges to agency action.<sup>28</sup>

Thus, courts prefer to avoid interpreting statutes so as to preclude judicial review of agency action. There is, however, an important distinction between cases in which a statute potentially bars *all* review of an agency action, and cases in which a statute provides for review of an agency action, but limits or channels that review. Although congressional preclusion of review is disfavored, congressional channeling of review is accepted. Thus, where Congress allows judicial review of an agency action, but provides that such review must be obtained in a specified way, a party that fails to seek review in the specified way may lose the right to seek review any other way, even where this leads to a harsh result such as denying the party the ability to raise a defense to a criminal charge.<sup>29</sup> Similarly, where Congress expressly provides for review of agency action by specified parties, an inference may arise that review by other parties is precluded.<sup>30</sup>

## (2) *Agency Action is Committed to Agency Discretion by Law*

Section 701 also provides that judicial review of agency action is precluded where “agency action is committed to agency discretion by law.” This exception, the Supreme Court has held, applies “in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.”<sup>31</sup> This exception therefore comes into play where a statute gives an agency complete discretion in choosing an action, such that “a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”<sup>32</sup>

Although the “no law to apply” standard is the one officially stated in the Supreme Court’s cases interpreting § 701(a)(2), the cases also hint that there is something more to the test. As Justice Scalia observed, virtually any agency action is subject to some legal constraint, even if that constraint is not found in an agency-specific statute.<sup>33</sup> So why should one infer, from the lack of any specific direction in any agency-specific statute, that Congress desired the agency’s action to be wholly free of judicial review? The cases suggest that courts resolve this paradox by considering the policy implications of allowing judicial review in the matter at hand<sup>34</sup> and tradition.<sup>35</sup>

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<sup>28</sup> *Id.*; *cf.* *Webster v. Doe*, 486 U.S. 592, 603 (1988).

<sup>29</sup> *E.g.*, *Yakus v. United States*, 321 U.S. 414 (1944).

<sup>30</sup> *E.g.*, *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984).

<sup>31</sup> *Webster v. Doe*, 486 U.S. 592, 599 (1988) (internal quotation omitted).

<sup>32</sup> *Id.* at 600.

<sup>33</sup> *Id.* at 608 (Scalia, J., dissenting).

<sup>34</sup> *See id.* at 601 (considering the “overriding need for ensuring integrity in the [Central Intelligence] Agency”).

<sup>35</sup> *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that an agency’s decision not to initiate a particular enforcement action is presumptively not subject to judicial review, in part based on an analogy to traditional prosecutorial discretion). Another paradox: how can the lack of a “meaningful standard against which to judge the agency’s exercise of discretion” signal that an agency is to have plenary authority to act and not even be subject to judicial review, *Webster v. Doe*, 486 U.S. at 600, when the same lack is supposed to indicate that the delegation of such broad authority to the agency violates of the nondelegation doctrine, *see, e.g.*, *Yakus v. United States*, 321 U.S. 414, 426 (1944)? The resolution may lie in the Court’s observation that there is an inverse relationship between the breadth of the power delegated and the degree of agency discretion with regard to the exercise of that power that can be tolerated. *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 475 (2001). Delegating authority without

## b) Section 702: The Right of Review

Section 702 of the APA establishes the basic principle pursuant to which most agency action is subject to judicial review. The first sentence of the section states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

At least two important principles are embedded in this sentence. First, this sentence establishes that agency actions are generally subject to judicial review. The Supreme Court has stated that § 702 “embodies the basic presumption of judicial review,”<sup>36</sup> and indeed, that the APA’s “generous review provisions must be given a hospitable interpretation.”<sup>37</sup> Section 702 evidently reflects the belief that in most circumstances our government will work best if actions of executive agencies, which are subject to direction by politically accountable officials, are checked by the neutral, apolitical courts.

Second, the sentence limits *who* is entitled to seek judicial review. A party seeking judicial review must be “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” The Supreme Court has interpreted this phrase to impose the “zone of interests” standing requirement. The party seeking review must be “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>38</sup> This requirement is in addition to the constitutional requirement that the plaintiff have suffered injury in fact from the challenged agency action.

The “zone of interests” test defies easy characterization, but in essence it requires that a plaintiff seeking judicial review of agency action not only be injured, but be seeking to advance interests that are properly aligned with the purposes of the statute allegedly violated. The Supreme Court has indicated that in applying the test a court should discern the interests arguably to be protected by the statutory provision at issue and then inquire whether the plaintiff’s interests are among them.<sup>39</sup> While it is not required that Congress have *intended* to benefit parties such as the plaintiff,<sup>40</sup> the plaintiff’s interests must not be so remote from those arguably to be protected by the statutory provision at issue that the plaintiff is a “merely incidental” beneficiary of the statute.<sup>41</sup> Thus, for example, a plaintiff claiming that an agency is being unlawfully lax in its enforcement of environmental protection laws would be within the

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meaningfully constraining the exercise of that authority may be tolerable when the authority delegated is narrow, and in such cases indicates that the authority is to be exercised without judicial review, but the same lack of constraint would be intolerable in connection with a broader authority.

<sup>36</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

<sup>37</sup> *Id.* at 141 (internal quotations omitted).

<sup>38</sup> *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998); *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 395–96 (1987).

<sup>39</sup> *Credit Union*, 522 U.S. at 492.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 494 n.7.

zone of interests if the plaintiff were allegedly suffering environmental injury as a result,<sup>42</sup> but a plaintiff that manufactured products that might be used to satisfy the environmental protection laws and that would likely sell more products if the agency enforced the laws more stringently would be outside the zone of interests.<sup>43</sup>

As originally enacted, § 702 consisted only of what is now its first sentence. The remainder of § 702, added in 1976, waives federal sovereign immunity from actions for judicial review that seek other than money damages.<sup>44</sup> Prior to the 1976 amendment, federal sovereign immunity frequently prevented parties seeking judicial review of agency action from suing the United States or an agency thereof and required them instead to resort to the mechanism of an “officer suit,” whereby they would bring a suit ostensibly against a federal officer personally, but really against the United States. The fictional nature of this suit form created numerous problems and sometimes thwarted judicial review. ACUS Recommendation 69-1 recommended waiving sovereign immunity in suits seeking judicial review of agency action, and the 1976 amendment to § 702 implemented this recommendation.<sup>45</sup> The happy result of implementing this ACUS recommendation is that a host of technical problems that thwarted actions for judicial review for reasons unrelated to their merits melted away.

### *c) Section 703: The Form of Review*

After § 702 gives the right of review, § 703 tells parties *how* to seek review. The first sentence provides that parties should use “the special statutory review proceeding relevant to the subject matter in a court specified by statute.” In other words, if the agency action in question is the subject of a specific judicial review statute that provides a specific mechanism for seeking review, then a party seeking review must use that mechanism. However, if there is no such special mechanism provided (“in the absence or inadequacy thereof”), then § 703 authorizes parties to seek review by “any applicable form of legal action.” The second sentence of § 703 further clarifies that in that circumstance, “the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.” Accordingly, in cases where no specific judicial review statute tells parties how to seek review, they would do so by bringing an ordinary civil action in federal district court, typically naming the agency that took the action of which review is sought as the defendant.

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<sup>42</sup> *E.g.*, *Klamath-Siskiyou Wildlands Center v. National Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1045 (N.D. Cal. 2015).

<sup>43</sup> *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921–25 (D.C. Cir. 1989); *Natural Resources Defense Council v. E.P.A.*, 755 F.3d 1010, 1018 (D.C. Cir. 2014); *cf.* *Twin Rivers Paper Company LLC v. Securities and Exchange Commission*, 934 F.3d 607 (D.C. Cir. 2019) (holding that a paper manufacturer did not have “zone of interest” standing to challenge an SEC rule permitting investment companies to post required reports online and send paper copies only to investors requesting them).

<sup>44</sup> *Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988) (“the 1976 amendment to § 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment).

<sup>45</sup> For more on the story of the 1976 amendment to section 702 and ACUS’s role in it, see Jonathan R. Siegel, *ACUS and Suits against Government*, 83 *Geo. Wash. L. Rev.* 1642 (2015). For the original article supporting ACUS Recommendation 69-1, see Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 *Mich. L. Rev.* 387 (1970).



The final sentence of § 703 provides that “[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.” Pursuant to this sentence, a party wishing to challenge an agency action may normally raise that challenge as a defense to an enforcement action by the government. Thus, for example, if an agency adopts a regulation to which the party is subject, the party, instead of affirmatively suing to challenge the regulation, may violate the regulation and then, when the government brings an enforcement action against the party, defend by alleging that the regulation is procedurally or substantively invalid.<sup>46</sup>

However, as the last sentence of § 703 indicates, Congress may provide by statute that a party wishing to challenge an agency action must do so in a specified manner prior to facing an enforcement action. If Congress provides a “prior [and] adequate” mechanism for seeking review, Congress may make that mechanism “exclusive,” i.e., Congress may require that parties desiring review use the mechanism provided and prohibit such parties from saving their challenges to the agency action and raising them as a defense in a subsequent enforcement proceeding.<sup>47</sup>

#### *d) Section 704: Which Actions are Reviewable*

Having established the right of review and the mechanism for review, the APA next describes which agency actions are reviewable. The first sentence of § 704 allows review of two categories of agency actions: those that are “made reviewable by statute” and “final agency actions for which there is no other adequate remedy in a court.” Like the first sentence of § 703, these provisions indicate that the general review provisions of the APA operate against the backdrop of the many specific judicial review provisions found elsewhere in the United States Code. If a specific review provision specifies which agency actions are reviewable, it is controlling. The second category, however, provides the general, default rule: agency action is subject to judicial review if it is final. The limitation in the second category that there must be “no other adequate remedy in a court” again indicates that this general rule applies where Congress has not provided a specific judicial review statute that governs the kind of agency action in question.<sup>48</sup>

An agency action is “final” when it “mark[s] the consummation of the agency’s decisionmaking process” and is “one by which rights or obligations have been determined, or from which legal consequences will flow.”<sup>49</sup> Thus, for example, an agency order that charges a private party with misconduct and contemplates a further agency proceeding at which the agency will determine whether to sustain the charge is not final, as such an order constitutes the beginning, not the end, of the agency’s decision-making process.<sup>50</sup> However, an agency order issuing a rule may be final even though the rule has not yet been enforced against any regulated party.<sup>51</sup>

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<sup>46</sup> *E.g.*, *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977).

<sup>47</sup> *E.g.*, *Yakus v. United States*, 321 U.S. 414 (1944).

<sup>48</sup> *See Bowen v. Massachusetts*, 487 U.S. 879, 902 (1988) (“§ 704 does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures”) (internal quotation omitted).

<sup>49</sup> *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016).

<sup>50</sup> *E.g.*, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

<sup>51</sup> *E.g.* *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

The second sentence of § 704 allows courts to review an agency’s “preliminary, procedural, or intermediate” action when reviewing the agency’s subsequent, final action.<sup>52</sup> This practice is similar to the practice used in civil litigation. A district court’s interlocutory orders are usually not appealable, but a court of appeals may review them when it hears an appeal of the district court’s subsequent, final judgment in the same case.<sup>53</sup>

The final, most complex sentence of § 704 establishes the relationship between finality and the availability of further agency review of an initial decision. It provides that if an agency’s action is “otherwise final,” the action is normally still final even if the party seeking judicial review could have sought reconsideration by the agency or could have appealed to a higher authority within the agency. Thus, this provision permits a party to seek judicial review of agency action without first seeking reconsideration by the agency and without first taking an available appeal to a higher agency authority. But this permission is subject to two exceptions: first, it applies only “[e]xcept as otherwise expressly required by statute.” Second, an agency may require a party to take an internal agency appeal before seeking judicial review, but the agency must do so by rule, and the rule must provide that during the pendency of the internal appeal, the agency action being appealed shall be inoperative.

This complicated final sentence requires careful attention by any party wishing to determine whether it may seek immediate judicial review of an agency order or whether it must first apply for further action by the agency. Such a party should consider:

- Is the agency’s order “otherwise final”? The first step is to consider whether the agency’s action would be final if none of the further steps mentioned in § 704 (application for a declaratory order, reconsideration, or internal agency appeal) were available. This determination is to be made using the criteria noted above, i.e., whether the order “mark[s] the consummation of the agency’s decisionmaking process” and is “one by which rights or obligations have been determined, or from which legal consequences will flow.”
- Does a specific review statute apply? The sentence applies only “except as otherwise expressly required by statute,” so Congress may override the provisions of § 704 and require that a party seek any specified degree of further agency action before seeking judicial review. Congress may, for example, require such a party to take an internal agency appeal even though the initial agency order would remain operative during the appeal.
- What form of further agency review is involved? An agency rule may never require a party to seek “any form of reconsideration,” that is, further review at the same level of agency authority, but an agency rule may require a party to seek “appeal to *superior* agency authority” if it provides that the agency action is meanwhile inoperative.

#### ***e) Section 705: Preliminary Relief Pending Review***

Section 705 authorizes a court to issue “all necessary and appropriate process” that may be necessary to prevent irreparable injury pending review. The court may postpone the effective

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<sup>52</sup> See, e.g., *Burns v. Director, Office of Workers' Compensation Programs*, 41 F.3d 1555 (D.C. Cir. 1994).

<sup>53</sup> E.g., *Water West, Inc. v. Entek Corp.*, 788 F.2d 627 (9th Cir. 1986) (reversing a district court’s final judgment because the district court had wrongly denied a motion to dismiss for improper venue); *Modern Woodmen of America v. Watkins*, 132 F.2d 352 (5th Cir. 1942) (reversing a judgment because of an erroneous evidentiary ruling made during trial).

date of agency action or otherwise “preserve status or rights.” An agency may also postpone the effective date of its own action pending judicial review when it finds that “justice so requires.”

A court’s order postponing the effective date of agency action pending review is analogous to the issuance of a preliminary injunction in ordinary civil litigation, and the test for whether the court should issue relief in the two situations is either the same,<sup>54</sup> or, at least, “closely similar.”<sup>55</sup> The court considers the likelihood of success on the merits, the likelihood of irreparable harm if preliminary relief is not issued, the likelihood that other parties will suffer if preliminary relief is issued, and the public interest.<sup>56</sup>

### *f) Section 706: The Scope of Review*

In any proceeding in which a reviewing authority reviews the decision of an initial decisionmaker, a critical question is the standard of review. Section 706 of the APA addresses this question and is therefore of great importance. However, the terms of § 706 must be considered in light of the voluminous body of judicial precedent interpreting it. When read in light of the judicial glosses that have been put on it, § 706 provides that while judicial review of agency action is generally available, that review is limited. It is limited procedurally, and it is limited substantively. Review is limited procedurally in that the reviewing court generally does not create its own record; rather, the reviewing court reviews the record already created by the agency. Review is limited substantively in that the reviewing court generally shows deference to the agency, on questions of both fact and law.

The first sentence of § 706 apparently confers broad powers on a reviewing court. It states that “[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” This sentence appears to suggest that any question of law arising in a proceeding for judicial review is a question for the court, and one might expect, for example, that a reviewing court would determine the meaning of any applicable statute *de novo*. Indeed, because the first sentence of § 706 directs the court to “determine the meaning or applicability of the terms of an agency action,” one might expect the same principle to apply to the interpretation of an agency regulation.

In fact, however, the Supreme Court has established “deference” doctrines under which a reviewing court may be required to defer to an agency’s interpretation of a statute that the agency administers or of one of agency’s own regulations. Most notably, the Court has held a court reviewing an agency’s interpretation of a statute that the agency administers must uphold any “reasonable” interpretation of an ambiguous provision within the statute (the principle of “*Chevron* deference”).<sup>57</sup> The Court has also indicated that under appropriate circumstances courts must defer to an agency’s reasonable construction of the agency’s own, ambiguous

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<sup>54</sup> *Corning Sav. & Loan Ass’n v. Federal Home Loan Bank Bd.*, 562 F. Supp. 279 (E.D. Ark. 1983).

<sup>55</sup> *Washington v. U.S. Dep’t of Homeland Security*, 408 F. Supp. 3d 1191, 1211 (E.D. Wash. 2019).

<sup>56</sup> *Id.*

<sup>57</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This rule is usually stated as having two “steps”: first, the reviewing court determines whether the statute clearly addresses the precise question at issue; if it does, then both the agency and the court are bound by the clear terms of the statute. Only if the statute is ambiguous does the court proceed to the second step, in which it upholds the agency’s interpretation as long as it is reasonable. 467 U.S. at 842–43.

regulation (“*Auer*” or “*Seminole Rock*” deference).<sup>58</sup> These deference doctrines substantially limit the broad power apparently conferred by the text of § 706.<sup>59</sup>

Recently, important legal actors, including at least two Supreme Court Justices, have attacked *Chevron* and *Auer* deference.<sup>60</sup> These deference doctrines have also been defended,<sup>61</sup> and *Auer* was recently reaffirmed,<sup>62</sup> but it is still possible that one or both doctrines will be abandoned or substantially modified in the near future—perhaps before this Sourcebook is published. Still, for now, these doctrines remain the law and limit the effect of the first sentence of § 706.

The remainder of § 706 further guides a reviewing court in judging an agency’s action. The next sentence states that the reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed.” This provision makes clear that a court may review an agency’s failure to act and may order the agency to take legally required action.<sup>63</sup>

Section 706 further provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be” improper in any of several different ways, the most important of which is the first: being “arbitrary, capricious, or otherwise not in accordance with law.” Some of the other categories are mostly, or perhaps entirely, redundant of this provision. The section goes on to state that a court shall set aside agency action found to be “contrary to constitutional right, power, privilege, or immunity”; “in excess of statutory

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<sup>58</sup> *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court reaffirmed this form of deference but listed several circumstances for its application.

<sup>59</sup> For assertions that *Chevron* deference is inconsistent with the language of § 706, see, e.g., *Perez v. Mortgage Banker’s Ass’n*, 575 U.S. 92, 109–10 (Scalia, J., dissenting); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152–54 (10th Cir. 2016) (Gorsuch, J., concurring); Duffy, *supra* note 7, at 194–95; Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294, 1313 (2015); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 788–89 (2010); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 507–26* (1989). For attempted reconciliations of *Chevron* deference with § 706, see, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019); Ronald M. Levin, *The APA and the Assault on Deference*, <https://ssrn.com/abstract=3761989>; Cass R. Sunstein, *Chevron as Law*, 107 Geo. L.J. 1613, 1641–57 (2019). On the question of whether *Chevron* actually makes a difference, see Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017) (“[A]gencies won significantly more in the circuit courts when *Chevron* deference applied, at least when the court expressly considered whether to apply *Chevron*.”); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 984 (1992) (“[T]here is no discernible relationship between the application of the *Chevron* framework [by the Supreme Court] and greater acceptance of the executive view.”).

<sup>60</sup> See *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712–14 (Thomas, J., concurring); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1217, 1219, 1224 (2015) (Thomas, J., concurring); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (Gorsuch, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring); see also H.R. 4768, 114th Cong. (2016) (the “Separation of Powers Restoration Act,” which if enacted would repeal *Chevron* legislatively); S. 909, 116th Cong. (2019) (same bill in a more recent Congress); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

<sup>61</sup> Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 Vand. L. Rev. 937 (2018); Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules*, 119 Colum. L. Rev. 85 (2019).

<sup>62</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

<sup>63</sup> E.g., *Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *Fanin v. U.S. Dep’t of Veterans Affairs*, 572 F.3d 868, 875 (11<sup>th</sup> Cir. 2009).

jurisdiction, authority, or limitations, or short of statutory right”; or “without observance of procedure required by law.” In all such cases, however, the agency’s action would almost certainly be “not in accordance with law.” Section 706 also provides that the reviewing court shall set aside agency action that is “unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute,” or “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”

Again, knowledge of the judicial glosses on these provisions is vital. The power of a court to set aside agency action that is “arbitrary [or] capricious” or, in certain cases, “unsupported by substantial evidence,” permits a court to review an agency’s factual findings and policy judgments, but, again, deferentially.<sup>64</sup> A court must not set aside an agency finding that is supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>65</sup> Thus, if the court believes that a reasonable person *might* have found the facts found by the agency, it must not disturb those facts. Judicial review of the agency’s factual findings is therefore deferential. A similar principle applies to judicial review of an agency’s policy judgments.<sup>66</sup>

Finally, § 706 provides that “[i]n making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.” As this provision implicitly recognizes, a reviewing court typically does not make its own record, but rather reviews the record already prepared by the agency. If the agency record is defective or inadequate for judicial review—if, for example, the agency improperly refused to receive proffered evidence, or if the record does not sufficiently show what action the agency took or what reason the agency had for its action—the usual remedy is not for the court to receive evidence on its own, but for it to remand the case to the agency for the construction of a better record, which the court can review in a subsequent judicial proceeding.<sup>67</sup>

## B. The Hobbs Act

The APA, covered in the previous section, is a truly general judicial review statute, which applies to virtually every agency in the executive branch. The other most notable general judicial review statute, the Hobbs Act, 28 U.S.C. §§ 2341-2351,<sup>68</sup> is more limited in its

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<sup>64</sup> See, e.g., *Motor Vehicle Manufacturer’s Ass’n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983) (“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (reiterating that “a court is not to substitute its judgment for that of the agency”).

<sup>65</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Strictly speaking, the definition quoted in the text above applies only to cases subject to the “substantial evidence” standard of review, but in cases where that standard does not apply, the same rule with regard to findings of fact governs the court’s power to set aside agency actions on the ground that they are “arbitrary [or] capricious.” See *ADAPSO v. Board of Govs. of Fed. Res. Sys.*, 745 F.2d 677 (1984) (holding that “substantial evidence” review and “arbitrary [or] capricious” review are equivalent with regard to review of factual findings).

<sup>66</sup> See *State Farm*, 463 U.S. at 43.

<sup>67</sup> *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985).

<sup>68</sup> The Hobbs Act relevant to this Sourcebook should not be confused with a criminal statute, 18 U.S.C. § 1951, also known as the Hobbs Act. The criminal statute is actually the more frequently cited Hobbs Act. A search of

application. It applies only to certain orders of certain agencies, namely, those specified in 28 U.S.C. §§ 2341-2342. The Hobbs Act is, however, well worth examining in some detail, as many features of the Hobbs Act recur in numerous other specific judicial review statutes covered later in this Sourcebook.

The Hobbs Act grew out of a recommendation from a committee of senior federal judges convened in 1942 by Chief Justice Harlan Fiske Stone.<sup>69</sup> Chief Justice Stone asked the committee to recommend improvements to the then-existing scheme of reviewing agency orders, which was provided by the Urgent Deficiencies Act (UDA) of 1913. At the time the UDA was originally passed, the only administrative agency of real importance was the Interstate Commerce Commission, and the UDA called for its orders to be reviewed by three-judge district courts. This procedure had several disadvantages: three-judge district courts were cumbersome to convene and awkward in operation; the UDA called for the three-judge district court to gather evidence by holding a trial, which was often duplicative of evidentiary proceedings already held at the agency level; the provisions of the UDA were uncertain, in part because it had repealed prior procedures only partially, leaving others in operation by inference; and appeal as of right lay from the decisions of three-judge district courts to the Supreme Court, which resulted in the Supreme Court's hearing many cases of only minor importance.

To cure these problems, the committee convened by Chief Justice Stone recommended that review of agency orders be conducted by courts of appeals rather than by three-judge district courts. Moreover, the committee recognized that in the great majority of cases, the agency issuing the order under review would have already held a hearing and would thereby already have created a record. Judicial review, the committee recommended, should take place on the basis of the existing agency record, not on the basis of a new record created by the reviewing court. However, the committee also included provision for the reviewing court to create a record in some cases, namely, those in which the agency issuing the order had not conducted a formal hearing. In such cases, the committee considered, there would be no agency "record" already in existence that a court could review.

In other words, the committee recommended implementing a key principle of modern administrative law, namely, that a court reviewing agency action should review the existing agency record rather than create a record of its own, but it did not foresee the even more modern development of applying this principle to agency proceedings that did not produce a formal record. Today, a court conducting review of an agency proceeding that is not "on the record" in the technical sense still conducts review on the basis of the agency "record," which consists of whatever materials the agency considered in making its decision.<sup>70</sup> The committee did not, however, anticipate this point, and as a result, some features of the Hobbs Act do not fit perfectly

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Westlaw's database of all federal cases for "Hobbs Act" in the same paragraph as a citation to 18 U.S.C. produces about 6500 cases; a search in the same database for "Hobbs Act" in the same paragraph as a citation to 28 U.S.C. produces only about 1500 cases.

<sup>69</sup> Details of the history of the Hobbs Act are drawn from the useful student note, Jason N. Sigalos, Note, *The Other Hobbs Act: An Old Leviathan in the Modern Administrative State*, 54 Ga. L. Rev. 1095 (2020).

<sup>70</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); Gordon Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On The Record"*, 10 Admin. L. J. Am. U. 179, 208 (1996).

with modern understandings of administrative law. The act raises some questions that remain unanswered more than 60 years after its passage.<sup>71</sup>

Nonetheless, the Hobbs Act was an important advance over the previously existing three-judge court procedure. It laid out a review process that is echoed in many specific judicial review statutes. These procedures are detailed below.

## 1. Covered Agencies and Procedures

The first two sections of the Hobbs Act, 28 U.S.C. §§ 2341-2342, specify which agency actions are covered by the act. The act applies to certain, specified rules, regulations, and orders of the Federal Communications Commission, the Federal Maritime Commission, the Atomic Energy Commission, the Surface Transportation Board, the Maritime Administration, the Secretary of Agriculture, the Secretary of Transportation, and the Secretary of Housing and Urban Development.

## 2. The Right of Review; How, When, and Where to Seek Review

Section 2344 allows for review of any final order covered by the act. It also, in conjunction with § 2343, provides for how, when, and where to seek review. An aggrieved party seeks review by filing a petition for review.<sup>72</sup> The action is filed against the United States.<sup>73</sup> The petition must be filed within 60 days after entry of the order of which review is sought.<sup>74</sup> The petition is to be filed in the court of appeals “where venue lies.”<sup>75</sup> Section 2343 permits venue in the circuit where the petitioner resides or has its principal office; it also permits venue in the U.S. Court of Appeals for the D.C. Circuit.<sup>76</sup>

Section 2344 also provides for the content of the petition. It states that the petition must contain a concise statement of the nature of the proceedings as to which review is sought, the facts on which venue is based, the grounds on which relief is sought, and the relief prayed. These requirements, however, have been superseded by Rule 15 of the Federal Rules of Appellate Procedure, which requires only that the petition for review name the parties seeking review, name the agency as a respondent, and specify the order or part thereof to be reviewed.<sup>77</sup> In recommending the adoption of Rule 15, the Advisory Committee on the Appellate Rules observed that the additional matters required by § 2344 to be included in a petition for review are “rarely useful either to the litigants or to the court.”<sup>78</sup> Because rules issued pursuant to the Rules

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<sup>71</sup> See, e.g., *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019) (remanding without resolving the question of whether a party that does not challenge a rule issued by an agency within the 60-day time period provided by the Hobbs Act may attack the validity of the rule in subsequent litigation between private parties).

<sup>72</sup> 28 U.S.C. § 2344.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Fed. R. App. P. 15(a)(2).

<sup>78</sup> Notes of Advisory Committee on Appellate Rules, reprinted following 28 U.S.C. App. Fed. R. App. P. 15 (1976).

Enabling Act supersede “all laws in conflict with such rules,”<sup>79</sup> the simpler requirements of Rule 15 of the Federal Rules of Appellate Procedure supersede the more elaborate requirements of 28 U.S.C. § 2344. The D.C. Circuit has confirmed that a petition for review that satisfies the requirements of Rule 15 may not be dismissed on the ground that it fails to comply with § 2344.<sup>80</sup>

Service of the petition is the responsibility of the clerk of the court, who, § 2344 provides, shall serve a copy of the petition on the agency and on the Attorney General.

### 3. Procedures for Review

The Hobbs Act goes on to provide procedures that the reviewing court shall apply.

*Prehearing Conference.* The court may hold a prehearing conference or direct one of its judges to do so.<sup>81</sup>

*The Record.* Section 2346 provides that the agency shall file the record on review with the clerk of the court, as provided in 28 U.S.C. § 2112.<sup>82</sup> In cases in which the agency held a hearing before taking the action under review, § 2347(a) provides that review shall be conducted on the basis of that record. In cases in which the agency did *not* hold a hearing, however, the procedure is more complicated. Section 2347(b) provides that in such cases the court of appeals shall determine whether a hearing was required by law. If so, the court is to remand the case to the agency to hold a hearing.<sup>83</sup> If a hearing was not required by law, and no hearing is required to resolve any genuine issue of material fact, the court of appeals shall decide the case.<sup>84</sup> But if a genuine issue of material fact requires evidentiary development, the Hobbs Act instructs the court of appeals to *transfer the case to a district court for a hearing.*<sup>85</sup>

As noted earlier, this last provision is in tension with modern practices in administrative law. In cases in which a court needs a more developed record upon which to conduct judicial review, modern practice calls upon the court to remand the case to the agency for creation of such a record, rather than for a court to receive evidence and develop the record itself.<sup>86</sup> Nonetheless, under the Hobbs Act, courts do in some cases invoke the procedure of transferring the case to a district court for further development of the record,<sup>87</sup> although usually only after

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<sup>79</sup> 28 U.S.C. § 2072.

<sup>80</sup> *American Paper Inst. v. I.C.C.*, 607 F.2d 1011 (D.C. Cir. 1979).

<sup>81</sup> 28 U.S.C. § 2345.

<sup>82</sup> Section 2112 is not part of the Hobbs Act, but is, rather, a more general statute regarding the record on judicial review of agency action. It is referenced in many specific judicial review statutes. It provides that the rules issued pursuant to the Rules Enabling Act (i.e., the Federal Rules of Appellate Procedure) may provide for the time and manner of filing the record and the contents thereof. It authorizes those rules to allow the common practice whereby the agency retains the actual record and files instead a certified list of the materials in the record.

<sup>83</sup> 28 U.S.C. § 2347(b)(1).

<sup>84</sup> *Id.* § 2347(b)(2).

<sup>85</sup> *Id.* § 2347(b)(3).

<sup>86</sup> *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985).

<sup>87</sup> *E.g.*, *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123 (9th Cir. 2001).



determining that the party seeking review has a colorable claim upon which relief might be granted after such factual development.<sup>88</sup>

The Hobbs Act procedure for record development is anomalous within modern administrative law. It seems intuitively likely that this procedure survives only out of inertia, the Hobbs Act having been passed before the modern practice of remanding cases to agencies for factual development became fully established. On the other hand, it is conceivable that the Hobbs Act procedure has special value in the proceedings to which it applies. Further study of this specific procedure would be needed before making a recommendation, but ACUS may wish to consider whether to recommend that the Hobbs Act procedure be conformed to the modern practice in this regard.

*Parties and Their Representation.* Section 2348 provides that the Attorney General shall have “control of the interests of the Government” in Hobbs Act proceedings, but it also allows “[t]he agency” to appear. Accordingly, in cases involving agencies covered by the Hobbs Act it is common to find the agency appearing by agency counsel, although Department of Justice counsel will usually also sign the agency’s brief.

*Jurisdiction.* The Act provides that upon the filing and service of a petition for review, the court of appeals in which the petition is filed has jurisdiction of the resulting proceeding.<sup>89</sup> Once the record is filed, the court of appeals in which it is filed has jurisdiction to vacate stay orders or interlocutory orders entered by any other court and has exclusive jurisdiction to enter a judgment determining the validity of the agency order.<sup>90</sup>

*Stays.* The filing of a petition for review does not automatically stay the agency action of which review is sought, but a court of appeals has discretion to order the agency action stayed pending review.<sup>91</sup>

*Supreme Court Review.* Orders granting or denying interlocutory injunctions and the final judgment of a court of appeals on a petition for review are subject to Supreme Court review by writ of certiorari as usual.<sup>92</sup>

### **C. Other General Judicial Review Provisions**

The sections above cover the most important general judicial review statutes, but there are some others. Most notably, 28 U.S.C. § 2112 provides that rules issued pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, may provide for the time and manner in which an agency shall file the record when review of its action is sought in a court of appeals. This provision is implemented by Federal Rule of Appellate Procedure 17, which provides that the agency shall,

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<sup>88</sup> *E.g.*, *Morgan v. Gonzales*, 495 F.3d 1084 (9th Cir. 2007) (holding that no transfer to district court is needed where the petitioner lacks such a colorable claim).

<sup>89</sup> 28 U.S.C. §§ 2342, 2349.

<sup>90</sup> *Id.* § 2349.

<sup>91</sup> *Id.* § 2349(b).

<sup>92</sup> *Id.* § 2350.

within 40 days of being served with a petition for review, file with the circuit court clerk either the original or a certified copy of the entire record or parts designated by the parties, or a certified list of all materials constituting the record or the parts designated by the parties. Section 2112 also addresses the “race to the courthouse” problem, which arises when multiple petitions for review of the same agency action are filed in different courts of appeals. In accordance with ACUS Recommendation 80-5, *Eliminating or Simplifying the “Race to the Courthouse” in Appeals from Agency Action*, § 2112 provides for a lottery to determine which court of appeals shall review the agency action in such a case.<sup>93</sup>

The Federal Rules of Appellate Procedure also provide some further general provisions regarding review of agency actions in courts of appeals. Notable among these are Rule 15, which provides simple requirements for the contents of a petition for review of agency action: such a petition must name each party seeking review, name the agency as respondent, and specify the order or part thereof to be reviewed. In addition, Rule 16 provides that the agency “record” on review shall consist of the order of which review is sought, any findings or report on which the order is based, and the pleadings, evidence, and other parts of the proceedings before the agency. Rule 18 allows a party to seek a stay of an agency’s action pending judicial review.

## V. Specific Judicial Review Statutes

In addition to the general judicial review statutes discussed above, the United States Code is filled with specific judicial review statutes. These specific statutes govern judicial review of actions taken by a particular federal agency and may govern only specific kinds of actions at a specific agency. These provisions vary widely. Some say no more than that judicial review of a specified agency action is available. Others provide considerable detail about when, where, and how such review is to be had. Among other things, a specific judicial review statute may regulate who may seek judicial review, when to seek review, where to seek review, the mechanism by which to seek review, the arguments that can be raised on judicial review, the record on review, the standard of review, and the relief available on review.

In preparing this Sourcebook, ACUS staff and researchers identified and examined over 650 specific judicial review provisions in the United States Code. The distinctive feature of this Sourcebook project is that it contains observations, insights, and recommendations derived from this comprehensive examination of all the provisions governing judicial review of agency action in the United States Code. This part of the Sourcebook contains these observations, insights, and recommendations.

Each section of this part considers a different aspect of specific judicial review statutes. Each section concludes with recommendations for improvement, if any. Some of these recommendations provide a suggested style or drafting practice to be used as Congress passes specific judicial review statutes in the future. Others suggest the passage of statutory amendments to alleviate problems with existing statutes. These latter recommendations, taken together, call for the passage of one statute, referred to herein as “the general statute,” or as “the

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<sup>93</sup> For further discussion of the “race to the courthouse” issue and a recommendation regarding a potential revision to this portion of § 2112, see Part V(D)(3), *infra*.

savings statute,” as many of its recommended provisions would have the effect of saving suits seeking judicial review of agency action from dismissal on technical grounds.

## A. Redundant Provisions

A striking feature of the hundreds of specific judicial review provisions found throughout the United States Code is how many of them are redundant. They do no more than state some rule that would apply anyway, by operation of a general judicial review statute (the APA or the Hobbs Act), federal rule of procedure, or common-law principle. If these redundant statutory provisions were omitted from the specific judicial review provision, no case would come out differently.

### 1. Representative Redundancies

A few examples give the flavor of these redundant provisions. Dozens of provisions for judicial review state that seeking judicial review of a specified agency action shall not, by itself, cause the action to be stayed while review is pending. These provisions typically state that the agency action will be stayed only if the court in which review is sought specifically orders a stay. Such provisions are strewn throughout the United States Code.<sup>94</sup>

However, there is no reason to imagine that in the absence of such a provision, the filing of an action for judicial review would automatically result in a stay of the agency action under review. Section 705 of the APA authorizes interim relief pending review, but it conspicuously states that a reviewing court “may,” not “must,” postpone the effective date of an agency action pending review.<sup>95</sup> More than 50 years ago, the Supreme Court noted that the filing of an action seeking judicial review of an allegedly unlawful regulation “does not by itself stay the effectiveness of the challenged regulation.”<sup>96</sup> Thus, the default rule, applicable where a specific review statute says nothing on the topic, is that seeking judicial review of an agency action does not automatically stay the agency action. Restating this rule adds nothing.

Innumerable other statutory provisions exhibit the same redundancy. For example, many specific review provisions state that an agency’s factual findings, if supported by substantial evidence, shall be conclusive.<sup>97</sup> Again, this is a standard, general principle of administrative law,

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<sup>94</sup> It would be tedious to list all the provisions in the United States Code that take this form, but for a sampling of such provisions, see, e.g., 8 U.S.C. § 1252(b)(3)(B) (“Service of the petition on the officer or employee does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.”); 12 U.S.C. § 1786(j)(3) (“The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the Board.”); 15 U.S.C. § 80a-9(f)(4)(C) (“The commencement of proceedings under subparagraph (B) of this paragraph shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order.”); 29 U.S.C. § 210(b) (“The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator’s order.”).

<sup>95</sup> 5 U.S.C. § 705; *see also* Fed. R. App. P. 18 (providing for stays of agency action pending review but requiring a motion for such a stay to state the reasons why such relief should be granted).

<sup>96</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967).

<sup>97</sup> Again, it would be tedious to list all the examples, but here is a sampling: 12 U.S.C. § 1848 (“The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.”); 15 U.S.C. § 80a-42 (“The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”); 19 U.S.C. § 1641

which would be true whether it were stated or not.<sup>98</sup> Similarly, innumerable specific review provisions state that after a private party invokes judicial review in a court of appeals, the agency shall file the administrative record with the court in which review is sought.<sup>99</sup> But Federal Rule of Appellate Procedure 17 says the same thing for all cases seeking judicial review of agency action in a court of appeals, so there is no need to say this in a particular judicial review statute providing for review in such a court. Or again, many judicial review provisions specify that after a federal court of appeals has reviewed an agency action, the Supreme Court may review the court of appeals' decision on a writ of certiorari,<sup>100</sup> but if they said nothing on this point, such review would be available anyway by virtue of the provision in Title 28 generally providing for Supreme Court review of cases in the courts of appeals.<sup>101</sup>

## 2. Is Redundancy Undesirable?

What to make of these redundant provisions? How do so many of them find their way into specific review statutes, and should Congress avoid them?

Some of the statutory appearances of these redundant phrases may be explained by their age. Some, particularly those that appear in statutes adopted prior to passage of the APA,<sup>102</sup> may have been adopted when it was less clear that they merely embodied general principles of

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("The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.") 42 U.S.C. § 1316 ("The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive."). Even the slight variation that occasionally relieves the tedium, *see, e.g.*, 15 U.S.C. § 77i ("The finding of the Commission as to the facts, if supported by *evidence*, shall be conclusive.") (emphasis added), makes no difference, as the requirement that an administrative finding be supported by evidence has long been judicially construed to mean that the finding must be supported by substantial evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (citing *Washington, V. & M. Coach Co. v. N.L.R.B.*, 301 U.S. 142, 147 (1937)). For an early compilation of statutes using the term "substantial evidence," with the observation that its use had become "virtually standard drafting practice," *see* E. Blythe Stason, "*Substantial Evidence*" in *Administrative Law*, 89 U. Pa. L. Rev. 1026, 1026–29 (1941).

<sup>98</sup> Section 706 of the APA generally provides that a court shall set aside agency action that is "unsupported by substantial evidence" if the agency proceeding was subject to §§ 556, 557 of the APA, thereby implying that an action supported by substantial evidence is not to be set aside. 5 U.S.C. § 706(2)(E). Agency actions to which this subsection does not apply are to be set aside if "arbitrary" or "capricious," § 706(2)(A), which, the D.C. Circuit has held, yields the same degree of review of facts found by the agency. *ADAPSO v. Board of Govs. of Fed. Res. Sys.*, 745 F.2d 677 (D.C. Cir. 1984). More searching factual review is available only in the unusual circumstance that the facts "are subject to trial de novo by the reviewing court." § 706(2)(F).

<sup>99</sup> Representative samples, again chosen from a much larger potential population: 7 U.S.C. 499g; 12 U.S.C. 1817; 15 U.S.C. § 21; 16 U.S.C. § 3373; 21 U.S.C. § 355; 25 U.S.C. § 4161.

<sup>100</sup> Representative samples, again chosen from a much larger potential population: 12 U.S.C. § 5563; 15 U.S.C. § 77i; 20 U.S.C. § 1416; 25 U.S.C. § 4161; 29 U.S.C. § 3247.

<sup>101</sup> 28 U.S.C. § 1254.

<sup>102</sup> *See, e.g.*, the statutes cited in Stason, *supra* note 97.

administrative law that would be true anyway.<sup>103</sup> However, the use of redundancy continues to the present day,<sup>104</sup> so some other cause or causes must also be involved.

It is possible that Congress includes redundant provisions in specific judicial review statutes in order to eliminate argument and to avoid the cost of deciding whether a general rule should be followed in the case of a particular statutory scheme. Certainly, if including a redundant provision in a specific judicial review statute avoids the costs of litigating some point that nettlesome parties would otherwise raise, then the provision will have served the public good.

Moreover, one might think, there can be no harm in statutorily stating something that would be true whether it is stated or not. Therefore, from a cost-benefit perspective, one might argue that including a redundant provision is justified because it has some potential benefit (the avoidance of needless argument) and hardly any cost—just the low cost of getting the provision into the draft statute.<sup>105</sup> To be sure, in the case of rules such as those noted above, the rules are so thoroughly ingrained that the benefit of avoiding argument about them is small. The likelihood, for example, that anyone would even argue that filing an action for judicial review automatically has the effect of staying the agency action of which review is sought seems very small, and the likelihood that a court would accept the argument seems smaller still, so there can be little benefit to avoiding litigation on this point. But if there is little benefit to these redundant provisions, they also have hardly any cost, so they may be justified from a cost-benefit perspective.

It also seems likely that many of them result from the tendency of legislative drafters to use existing statutes as models. Once a provision gets into the statute books, it gives rise to progeny, as counsel drafting new specific judicial review provisions look to existing ones to see what language such provisions “ought” to contain. If an existing specific review statute says that seeking judicial review of an agency action shall not automatically operate to stay the action, that provision will be dutifully copied into the next specific review statute. After all, it states a policy that the drafter of the new statute will likely want the new statute to embody, and indeed, the drafter of the new statute might even worry that if an existing specific review statute states this principle, but the new statute (perhaps nearby in the same title of the United States Code) does not, then a court might later draw the inference that Congress did not desire the principle to apply in the context of the new statute. Better safe than sorry, the drafter might reason, and so the redundant provision will be copied into yet another specific judicial review statute.

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<sup>103</sup> Of course, some general principles of administrative law were established before passage of the APA. Indeed, shortly after the Act’s passage, the Attorney General suggested that the APA was “a general restatement of the principles of judicial review embodied in many statutes and judicial decisions.” U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93 (1947). But others have challenged this view. *E.g.*, Duffy, *supra* note 7, at 130–33.

<sup>104</sup> *See, e.g.*, 29 U.S.C. § 3247 (adopted 2014) (providing that the filing of an action for review does not automatically stay the agency’s action).

<sup>105</sup> A more significant cost would arise if the routine inclusion of redundant provisions in specific judicial review statutes ever led a court to infer that when such provisions are *not* included, Congress intends that the background principle they would embody should not apply. However, this risk seems very small; courts have not, for example, ever inferred that filing a suit for judicial review should automatically stay an agency action where the relevant specific judicial review statute is silent on this point.

Should Congress make an effort to break free of this practice? Should ACUS recommend that Congress avoid including redundant provision in judicial review statutes? Such a recommendation seems unjustified from a cost-benefit perspective. As noted above, if redundant judicial review provisions do no great good, they also do little, if any, harm. Adding redundant provisions to specific judicial review statutes has little cost, whereas making a scrupulous effort to avoid stating any rule that would apply whether it is stated or not would entail costs for legislative drafters, as they would need to consider each provision in a specific judicial review statute and decide whether it should be excised as redundant. Probably the most that should be said is that Congress should be aware that many of the provisions routinely included in specific judicial review statutes are redundant and that such provisions could be safely omitted.

Of course, not all provisions in specific judicial review statutes are redundant. Many provisions of such statutes specify important details of review that make a difference. The following sections of this Sourcebook consider different categories of frequently recurring, non-redundant provisions of specific judicial review statutes.

**Recommendation: Congress should be aware that many provisions routinely included in specific judicial review statutes are redundant. While there is little harm in including such provisions, Congress should not make special efforts to include redundant provisions such as provisions stating that the filing of an action for review does not automatically stay the agency action of which review is sought, or that an agency’s factual determinations, if supported by substantial evidence, shall be conclusive.**

## **B. The Time within Which to Seek Review**

One of the most important functions performed by judicial review statutes is specifying the time within which a party may seek judicial review. In the absence of a time limit specific to the kind of agency action involved, the only applicable time limit would be the six-year statute of limitations generally applicable to suits against the United States.<sup>106</sup> If Congress desires that a shorter time limit apply to judicial review of a particular kind of agency action, it must say so. Evidently, Congress frequently does desire a shorter time limit, as many judicial review statutes provide for a much shorter time, such as 10, 30, or 60 days. While the expiration of the time limit does not necessarily foreclose all judicial review of the agency action involved,<sup>107</sup> a party that allows the time limit to lapse without seeking review will often limit its ability to get judicial

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<sup>106</sup> 28 U.S.C. § 2401; *see* Blackletter Statement, *supra* note 1, at 55.

<sup>107</sup> For example, where the agency action in question is a rulemaking, the expiration of a statutorily specified time within which to seek review may not bar all subsequent challenges to the rule. *See, e.g.,* Alvin Lou Media, Inc. v. FCC, 571 F.3d 1, 8 (D.C. Cir. 2009) (allowing “constitutional and statutory challenges to an agency’s application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired”); *see generally* Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 Cardozo L. Rev. 2203 (2011). Even in the context of an agency adjudication, the failure to seek judicial review within a statutorily specified time limit does not necessarily bar judicial review of the agency action in the context of a subsequent enforcement proceeding. *See, e.g.,* McKart v. United States, 395 U.S. 185 (1969); *United States v. Menendez*, 48 F.3d 1401 (5th Cir. 1995). This section of the Sourcebook deals with issues relating to the statutory specification of the time limit, not the question of what happens after the lapse of the time limit.

relief. Specification of the time limit for review is therefore an important feature of statutes governing judicial review.

## 1. Policy Considerations in Specifying the Time Limit

It seems fair to assume that there is little or no policy basis for the exact number chosen as the time limit. If a statute provides that an aggrieved party may seek judicial review of an agency action only within 60 days after the action is taken, it could hardly make much difference to anybody if the time limit were instead specified as 58, 59, 61, or 62 days. What matters is that (1) there should be *some* time limit, so that the agency and any other interested parties can know whether a given agency action is still subject to judicial challenge; (2) that the time be roughly appropriate for the nature of the action involved (presumably, Congress has some policy basis for desiring a short, medium, or long time period); and (3) that the time limit be clearly stated and easily calculated, so that no party loses its right to review through procedural error and no time is wasted arguing about the timeliness of a request for review.

## 2. Specifying the Time Limit

A time limit for seeking review generally consists of two parts: a *length of time* during which a proper party may seek review, and an *event* that starts the time running. While it may seem trivial to specify these two parts, review of the many statutes that perform this task shows that some statutes specify the time in an unfortunate way that causes some parties to lose their right to review.

### a) Specifying the Length of Time

Judicial review statutes use a variety of formulations to specify the length of time within which to seek review. The exact form of words used is not important. However, it is important to *avoid* certain forms of words. There is a usual way to set the time limit and an unusual way. If Congress sets the time limit in the usual way, experienced counsel know what to do. If Congress sets the time limit in an unusual way, it sets a trap into which even experienced counsel may fall and which may cause parties to lose their right to review. This seemingly small matter therefore has considerable significance. Congress should avoid setting the time limit in the unusual way.

The *usual* way to set the time limit is to provide that review may be sought “not later than” (or “within”) a specified number of days “after” the agency action being challenged. The drafting manuals of both Houses of Congress recommend this formulation,<sup>108</sup> and innumerable statutes use it or an equivalent formulation.<sup>109</sup> This form of setting the time limit is therefore

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<sup>108</sup> See U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL MANUAL ON DRAFTING STYLE 57 (1995); U.S. SENATE, SENATE LEGISLATIVE DRAFTING MANUAL 82 (1997). The cited pages of both Manuals caution against using the form “within [a specified number of] days of” the agency action, on the grounds of uncertainty, as the time period might refer to the period before the action, after the action, or both.

<sup>109</sup> Hundreds of statutes might be cited here. For just a few examples, see, e.g., 7 U.S.C. § 8(b) (allowing review to be sought “within 15 days after” suspension or revocation); 8 U.S.C. § 1324a (allowing review to be sought “within

familiar to counsel who practice federal administrative law. Moreover, a time limit using this formulation also governs the time within which to appeal a federal district court's judgment in any litigation,<sup>110</sup> and so it is familiar to counsel who engage in any kind of federal litigation, whether or not involving administrative law.

The *unusual* way to set the time limit requires that review be sought “prior to” or “before” a day that is a specified number of days after an agency's action. This form of words is used in far fewer federal statutes.<sup>111</sup> Another unusual but equivalent formulation allows review to be sought within a period of a specified number of days “beginning” on the date of the agency's action.<sup>112</sup> When a statute uses any of these unusual forms of words to specify the time limit for judicial review, the period allowed is *one day* shorter than when the governing statute uses the more usual form of words. Thus, for example, if an agency took reviewable action on June 1 of some year, a statute that allowed review to be sought “within 30 days after” agency action would give an aggrieved party until July 1 of that year to seek review. However, a statute that required review to be sought “prior to the 30th day after” agency action would give the party only until June 30. The unusual form of setting the time limit would provide 29 days, rather than 30, in which to seek review.

The difference is slight, but it creates a trap for unwary counsel. As noted above, most counsel are familiar with the usual formulation for setting the time limit. If, through habit and familiarity, counsel assumed that the usual method of calculating the due date applied and failed to notice that a case was governed by the unusual method, counsel might miscalculate the due date and seek review one day too late.

Experience shows that this is not an imaginary problem. As can be seen in the following table, when Congress uses the unusual formulation for setting the due date for seeking judicial review of agency action, some parties lose their right to appeal by filing one day late. This embarrassing fate befalls even corporate and other institutional parties, who presumably have access to sophisticated counsel.

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45 days after” the date of a final order); 8 U.S.C. § 1324b (allowing review “[n]ot later than 60 days after” entry of a final order); 15 U.S.C. § 57a(e) (allowing review “[n]ot later than 60 days after” a rule is promulgated).

<sup>110</sup> In civil cases, such appeals may be taken “within 30 days after” the entry of the district court's judgment. Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107(a), except that the time limit is “within 60 days after” the entry of judgment if any party to the case is the United States, an agency thereof, or an officer thereof sued in an official capacity or in an individual capacity in connection with official duties. Fed. R. App. P. 4(a)(1)(B); 28 U.S.C. § 2107(b). In criminal cases, the appeal time is usually “within 14 days after” the entry of the district court's judgment. Fed. R. App. P. 4(b)(1)(A)(i).

<sup>111</sup> See, e.g., 29 U.S.C. § 655(f) (allowing review to be sought “prior to the sixtieth day” after a standard is promulgated); 30 U.S.C. § 811(d) (same). This formula is reminiscent of the well-known case of *United States v. Locke*, 471 U.S. 84 (1985), in which a mining claim was lost because of the claimant's failure to comply with a requirement of filing a document “prior to December 31.” The claimant filed *on* December 31. *Id.* at 89–90.

<sup>112</sup> See, e.g., 33 U.S.C. § 1319(g).



Statute	Time Limit	Case
26 U.S.C. § 7476	“before the ninety-first day after the day after such notice is mailed to such person”	<i>Calvert Anesthesia Associates v. C.I.R.</i> , 110 T.C. 285 (1988) (dismissing petition for review filed one business day late)
29 U.S.C. § 655(f)	“prior to the sixtieth day”	<i>AFL-CIO v. OSHA</i> , 905 F.2d 1568 (D.C. Cir. 1990) (dismissing petition filed on the 60 <sup>th</sup> day)
29 U.S.C. § 655(f)	“prior to the sixtieth day”	<i>Nat’l Ass’n of Mfrs v. OSHA</i> , 2001 WL 376518 (D.C. Cir. 2001) (dismissing petition of the “Daubert Council,” filed on the 60 <sup>th</sup> day)
30 U.S.C. § 811(d)	“prior to the sixtieth day”	<i>UMW v. MSHA</i> , 900 F.2d 384 (D.C. Cir. 1990) (dismissing petition filed on the 60 <sup>th</sup> day)
33 U.S.C. § 1319(g)	“within the 30-day period beginning on the date the civil penalty order is issued”	<i>Slinger Drainage, Inc. v. E.P.A.</i> , 237 F.3d 681 (D.C. Cir. 2001) (dismissing petition filed on first business day after the correct due date)

To be sure, counsel bear much of the blame for these cases. Any counsel called upon to seek judicial review of any agency action should carefully read the applicable statute, ascertain the deadline set by the statute, and act accordingly. Moreover, there is, of course, no requirement that counsel wait until the last possible day to seek review. Counsel are free to seek review earlier, partly as a precaution against having miscalculated the deadline. Nonetheless, it would be better if statutes providing for judicial review did not create traps for unwary counsel. Counsel should be able to spot such a trap and avoid it, but it would be better still if the trap did not exist in the first place.

The great majority of statutes that set a deadline for seeking judicial review of agency action use the usual formulation noted above. Statutes that set the deadline in an unusual way are dangerous. Moreover, such statutes provide no compensating benefit. There is no policy advantage to using an unusual method of setting the deadline. No public policy is served by allowing, say, a 29- or 59-day period within which to seek review, rather than the more common 30- or 60-day period. If there were some public policy benefit to using the unusual method of setting the time limit, that benefit would have to be weighed against the cost of setting traps for unwary counsel and causing parties to lose their right of judicial review. Since, however, use of the unusual method yields no public benefit, but does have a cost, the clear conclusion is that it should be avoided.

One counterargument must be noted. Even with regard to statutes that set the time limit in the usual way, cases in which parties seek review one day late are surprisingly common.<sup>113</sup> These cases suggest the possibility that the problem of parties' losing their right to review by filing one day late does not arise from use of an unusual method of setting the deadline, but from general litigation sloppiness that would occur no matter how the deadline is set. So long as there is *some* deadline, there will be some parties that will just barely miss that deadline.

However, the parties losing their right to review under statutes that set the deadline in the usual way appear to be primarily individual parties, who, one would expect, are more likely to have counsel with less familiarity with federal practice and who are more likely to err.<sup>114</sup> By contrast, even corporate and other institutional parties, who presumably have access to more sophisticated counsel, have lost their right to seek review when statutes set the deadline the unusual way. This suggests that setting the deadline in the unusual way does create a special trap for unwary counsel.

Accordingly, Congress should avoid providing that review must be sought "prior to" a specified number of days after an agency action (or any equivalent formulation). In addition, Congress should pass a general "savings statute" that would alleviate the problem. Such a statute would provide that whenever a statute permits review of agency action to be sought "prior to" or "before" a day that is a specified number of days after the agency action, review may also be sought exactly that number of days after the agency's action. Such a generalized one-day extension of review periods that are stated in the unusual way would bring them in line with the usual formulation and would eliminate the pitfall created by these unusual statutes.

### **Recommendations:**

**1. Congress should avoid setting the time limit for seeking judicial review of agency action as "prior to" or "before" the day that is a specified number of days after the agency's action, or requiring review to be sought "within" or "before the expiration of" a period of a specified number of days beginning on the date of the agency's action.**

**2. Congress should pass a savings statute that includes a provision that whenever another statute allows judicial review to be sought "prior to" or "before" the day that is a specified number of days after an agency's action, or "within" or "before the expiration of" a period of a specified number of days beginning on the date of the agency's action, such review may also be sought exactly that number of days after the agency's action.**

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<sup>113</sup> See, e.g., *Mashack v. Merit Systems Protection Bd.*, 112 Fed. Appx. 34 (Fed. Cir. 2004) (MSPB); *Miccoli v. Department of Army*, 311 Fed. Appx. 337 (Fed. Cir. 2008) (MSPB); *Shalaby v. Gonzales*, 234 Fed. Appx. 692 (9th Cir. 2007) (asylum); *Velazquez v. Gonzales*, 185 Fed. Appx. 354 (5th Cir. 2006) (asylum); *Zacharczenko v. Department of Justice*, 193 Fed. Appx. 968 (Fed. Cir. 2006) (MSPB).

<sup>114</sup> As the cases cited in the previous footnote suggest, the vast majority of cases identified in researching this Sourcebook in which parties seek review one day late even though the statute sets the deadline in the usual way involve individuals seeking review either of immigration decisions or decisions of the federal Merit Systems Protection Board.

## b) *The Event that Starts the Time*

Whatever time period a statute allows for parties to seek judicial review, the statute must also specify the event that starts the time running. Like specification of the time, specification of the event that starts the time running seems simple, but may be done in a way that causes problems. Again, the overwhelming public policy consideration is that the statute be clear. It matters little to anyone exactly how long the review period is. What matters to everyone is that it be easy to determine when the period begins and when it ends.

This problem particularly arises with regard to review of regulations. In cases in which a statute governs judicial review of an agency rule or regulation, a difficulty may arise from the statement, found in multiple statutes, that judicial review must be sought within a specified number of days from the date the regulation is “prescribed” or is “issued.”<sup>115</sup> This formulation raises the question of when exactly a regulation is “prescribed” or “issued” so as to trigger the start of the time for seeking review.

Parties seeking judicial review of such regulations have generally assumed that a regulation is “prescribed” or “issued” on the date the regulation is published in the *Federal Register*. In some cases, however, agencies have argued that the time for seeking review should be measured from some earlier date. Agencies have claimed that they “issued” a regulation on a date prior to the date the regulation appeared in the *Federal Register* and that the time for seeking review should be measured from this earlier date, even if there was no public access to the regulation on the date the agency “issued” it, and such access became possible only via the *Federal Register*’s publication process.<sup>116</sup> Agencies have argued for dismissal of petitions for judicial review on this basis.

Courts have rightly rejected this unworthy argument.<sup>117</sup> The time to seek judicial review of an agency action should not be measured from the date of an event to which the public has no access.<sup>118</sup> Moreover, the question of when a regulation is “issued” should have a clear, uniform

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<sup>115</sup> See, e.g., 21 U.S.C. § 360kk(d); 42 U.S.C. § 6306(b); 49 U.S.C. § 32503(a).

<sup>116</sup> See, e.g., *Public Citizen, Inc. v. Mineta*, 343 F.3d 1159 (9th Cir. 2003). In this case, the agency claimed to have “issued” a regulation on December 6, 2001, but the regulation was not published in the *Federal Register* until December 18, 2001. What exactly happened on December 6 was not clear. *Id.* at 1165. The *Federal Register* publication on December 18 did state that the regulation was issued on December 6, but the public would have had no way to learn of the regulation’s existence until at least December 17, 2001, when, in accordance with the Federal Register’s publication procedures, the documents scheduled for publication in the next day’s *Federal Register* were made available for public inspection. See also *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F.3d 95 (2d Cir. 2018) (concerning a regulation published in *Federal Register* on July 12, 2017; the agency argued that the regulation was “prescribed” on July 7, when the agency delivered the regulation to the *Federal Register*).

<sup>117</sup> E.g. *Public Citizen, Inc. v. Mineta*, 343 F.3d at 1167–68; *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F.3d at 106.

<sup>118</sup> It is true that in the *Mineta* case discussed above, in which the agency argued that the time to seek review of a regulation should be measured from the date on which the regulation was “issued,” the “issue date” appeared (albeit rather inconspicuously) in the *Federal Register* notice concerning the regulation, which was published twelve days later. See *Federal Motor Vehicle Safety Standards; Occupant Crash Protection*, 66 Fed. Reg. 65376, 65421 (2001). Thus, if the “issue date” had been the event starting the running of the time within which to seek review, and the parties seeking review had understood this, they would have learned what the “issue date” was in ample time to seek review within the time limit. Still, this is not a good reason for using the “issue date” to start the time, for at least two reasons. First, as noted in the text above, the time should not be measured from an event to which the public

answer. As noted earlier, the exact length of the review period makes little difference to anyone, but it is very important that the amount of time available be clear.

Even the victories that the parties seeking review have won in these cases leave future parties vulnerable. While some courts have sensibly held that a regulation is “prescribed” or “issued” on the date the regulation is published in the *Federal Register*,<sup>119</sup> other cases have held that the critical date is the date on which the regulation is *made available for public inspection*,<sup>120</sup> which, under the *Federal Register*’s publication process, is the day *before* the regulation is published. While using this date is better than using the even earlier date of an event to which there was no public access, measuring the time to seek review from the date *one day before* the date on which a regulation is published in the *Federal Register* is obviously counterintuitive and sets yet another trap for parties seeking review.

There is no public interest in creating ambiguity regarding the time limit for seeking review. Congress, in passing the statutes discussed in this section, evidently desired that there be some time limit for seeking review of regulations. But it seems safe to assume that Congress did not intend to create a system whereby judicial review is available, but is subject to an ambiguous time limitation that causes unwary parties to lose the right to judicial review.

To solve the problem of ambiguity created by the statutes discussed in this section, Congress, when setting a time limit for parties to seek judicial review of regulations, should avoid creating ambiguity regarding the time limit. Having the time run from the date a regulation is published in the *Federal Register* is recommended as the clearest way of setting the deadline. Congress should avoid having the time to review a regulation run from the day the regulation is “issued,” and it should, in the general review statute recommended herein, clarify that for these purposes a regulation is “issued” on the date it appears in the *Federal Register*. Finally, lest there be any doubt about which date is the date on which a regulation is “published,” the date of publication should be defined as the date of the issue of the *Federal Register* in which the regulation appears (and not, for example, the date on which the regulation is made available for public inspection).

**Recommendation: Congress should ensure that a specific judicial review statute clearly specifies the event that starts the time to seek judicial review running. In the case of specific judicial review statutes providing for review of agency rules that must be published in the *Federal Register*, publication in the *Federal Register* should be the event that starts the time running, and the date of publication should be defined as the date of the issue of the *Federal Register* in which the rule appears.**

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has no access. Even if the public learns of the event before the time to seek review expires, so that they are not wholly deprived of the ability to seek review, they would lose some, and perhaps a considerable part of, the time Congress allowed. Second, there appears to be no limit to the amount of time that might elapse between the date when an agency “issues” a regulation and the date when the agency submits the regulation for publication in the *Federal Register*, so if the “issue date” were the critical date, there would appear to be nothing stopping an agency from “issuing” a regulation and then waiting until the number of days allowed for review has either nearly or entirely elapsed before submitting the regulation for publication in the *Federal Register*. The time to seek judicial review could then be greatly shortened or perhaps eliminated altogether.

<sup>119</sup> *E.g.*, *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F.3d 95 (2d Cir. 2018).

<sup>120</sup> *E.g.*, *Public Citizen, Inc. v. Mineta*, 343 F.3d 1159 (9th Cir. 2003).

## C. The Court in which to Seek Review

In addition to specifying when to seek review, many specific judicial review statutes specify *where* to seek review. By specifying the court in which to seek review, these provisions resolve two important issues: the level of court in which to seek review, and the geographical venue in which to seek review.

### 1. The Level of Court in which to Seek Review

A specific judicial review statute may specify the court in which a party should seek review. This is an important function of a specific judicial review statute. In the absence of any specific statutory instruction, a party seeking review would do so in federal district court.<sup>121</sup> Accordingly, if Congress desires that judicial review of a particular kind of agency action be sought in some other kind of court, such as a court of appeals or a specialized court, it must say so by statute.

This choice is significant because a suit for judicial review of agency action differs from most other lawsuits. In a typical federal lawsuit, the district court's role includes compiling an evidentiary record and determining the facts of the case.<sup>122</sup> The facts thus determined are reviewed deferentially on appeal,<sup>123</sup> whereas the district court's rulings on questions of law are reviewed *de novo*. In a typical case, therefore, the district court will often have its most important impact on the case by virtue of its determinations with respect to facts.

In a case seeking judicial review of agency action, however, the district court's role is different. Such a suit, even when it occurs in district court, is (with rare exceptions) essentially an appellate proceeding. The district court does not compile an evidentiary record or make findings of fact, but reviews the record already created and the facts already found by the agency, typically using a deferential standard of review. If the district court's judgment is appealed, it receives no deference on either fact or law.

Accordingly, starting a suit for judicial review of agency action in district court is usually not a productive use of a district court's time. Since the proceeding is essentially an appellate proceeding, and the district court's judgment will receive no deference on appeal, it would typically make sense to skip the district court proceeding and begin judicial review directly in a court of appeals. As the Supreme Court put it:

The factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking. Placing initial review in the district court . . . [has] the negative effect . . . of requiring duplication of the identical task in the district court and in the court of appeals; both courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review. One crucial purpose of . . . jurisdictional

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<sup>121</sup> This result would follow from the APA's provision that in the absence of a special statutory proceeding, a party seeking judicial review should use "any applicable form of legal action." 5 U.S.C. § 703.

<sup>122</sup> In appropriate cases, a jury plays a role in finding the facts. *See* U.S. Const., amend. VII.

<sup>123</sup> *See* Fed. R. Civ. P. 52.

provisions that place initial review in the courts of appeals is to avoid the waste attendant upon this duplication of effort.<sup>124</sup>

This reasoning likely explains the many specific judicial review statutes that instruct parties seeking review to do so in a court of appeals rather than in a district court.

To be sure, the preference for starting judicial review actions in a court of appeals is not universal. Some agency actions are reviewable in district court, and in some cases for good reason. In some cases the choice of district court review is likely because the volume of actions for review would be too large for appellate courts to handle.<sup>125</sup> In some cases, the explanation may be that Congress anticipated that many cases would not be appealed beyond the district court level.<sup>126</sup> Some agency actions are reviewable in a specialized court, presumably to take advantage of the specialized expertise that such a court may provide.<sup>127</sup> In some cases, however, the use of district court review may simply be an inferior choice, resulting in wasted effort leading up to the real review that occurs in a court of appeals.

ACUS previously considered issues relating to the forum in which Congress should provide for judicial review of agency action in ACUS Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*, which, in keeping with the above discussion, recommends that “[a]djudications based on trial-type hearings and rules required by statute to be based on a hearing with a determination on the record should generally be made directly reviewable by courts of appeals,” with the caveat that “[f]or certain types of formal administrative action, however, initial district court review may be appropriate in the interest of conserving the scarce and over-extended resources of the federal appellate system.”<sup>128</sup> This recommendation, although now more than 45 years old, retains its vitality.<sup>129</sup>

**Recommendation: In deciding where parties should seek review of agency action, Congress should consider placing review in a court of appeals rather than district court**

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<sup>124</sup> *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579–80 (10th Cir. 1994) (“[r]eviews of agency action in the district courts must be processed *as appeals*”)

<sup>125</sup> This consideration may, for example, explain why judicial review of Social Security Disability determinations begins in district court. Claimants sought judicial review of over 18,000 SSD decisions in FY2014. JONAH GELBACH & DAVID MARCUS, *A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS* 44 (2016). The same was true in more recent years. Social Security Administration’s FY2021 Congressional Budget Justification at 156 (available at <https://www.ssa.gov/budget/FY21Files/FY21-JEAC.pdf>). This number of cases would impose a substantial burden on courts of appeals.

<sup>126</sup> SSD determinations may be an example of this point as well. Of the 18,000 or so cases appealed from the agency to district court, only about 650 go on to a court of appeals in a typical year. Gelbach & Marcus, *supra* note 125, at 35.

<sup>127</sup> *See, e.g.*, 19 U.S.C. § 1516a (providing for review of certain actions in the United States Court of International Trade); 24 U.S.C. 420(b)(1)(C) (providing for review of certain actions in the United States court of Federal Claims); 38 U.S.C. § 7252 (providing for review of certain actions in the Court of Appeals for Veterans Claims).

<sup>128</sup> ACUS Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action* at Recommendation 1.

<sup>129</sup> *See also* ACUS Recommendation 88-6, *Judicial Review of Preliminary Challenges to Agency Action* (recommending that Recommendation 75-3 be applied with “special care” to the specification of the forum in which to bring a preliminary challenge to agency action); Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 451–55 (6th ed. 2018) (discussing Recommendations 75-3 and 88-6).

**and should do so unless special considerations such as the volume of cases make placing review in courts of appeals inappropriate. Further guidance may be found in ACUS Recommendation 75-3.**

## **2. The Geographical Venue in which to Seek Review**

Once the kind of court (district court, court of appeals, or specialized court) is determined, it still remains to specify the geographical venue in which a party may seek judicial review of agency action. Specific judicial review statutes commonly provide parties seeking review with multiple options. A common formulation allows a party seeking review to do so in the judicial district or circuit where the party resides or has its principal place of business *or* in the district court or circuit court in the District of Columbia.<sup>130</sup>

Because the government has attorneys everywhere in the country and can defend its actions with roughly equal convenience regardless of where a plaintiff brings suit, it makes sense to allow parties seeking review to choose a venue that will be convenient for them. Giving the party seeking review a choice of forum also allows issues to “percolate” in the lower courts; judges from different circuits can give their views, which may be helpful to the Supreme Court in ultimately resolving any conflicting rulings that arise. So the common practice of giving the party seeking review a choice with regard to venue seems appropriate.

On the other hand, modern technological advances mean that private parties, like the government, can litigate in geographically distant fora with little additional cost or other burden, so giving parties seeking review less choice with respect to venue may not be as burdensome today as it would have been decades ago. In addition, a party given a choice of venue that is meant to serve the party’s convenience may use the choice for strategic purposes, choosing to sue in a circuit that has, or is thought likely to create, favorable substantive law on the issue presented. Congress may also want to ensure that review of some actions is centralized in a particular court to promote uniformity. These considerations may underlie the minority of specific judicial review statutes that give parties seeking review little or no geographic choice in selecting the court in which to seek review. Some statutes, for example, permit review in the D.C. Circuit only,<sup>131</sup> in the Federal Circuit only,<sup>132</sup> or in some other specific court only.<sup>133</sup>

## **3. Jurisdiction**

Some specific judicial review statutes, after identifying the court in which a party may seek judicial review of agency action, go on to provide that that court will have *jurisdiction* to hear the resulting case. Other specific judicial review statutes contain no such jurisdictional provision. Is such a provision necessary?

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<sup>130</sup> *E.g.*, 7 U.S.C. § 2; 12 U.S.C. §§ 1786, 5113; 15 U.S.C. § 2618. For an unusual statute that allows suit in the usual places or in the U.S. Court of Appeals for the *Seventh* Circuit, see 45 U.S.C. § 355.

<sup>131</sup> *E.g.*, 12 U.S.C. §§ 4583, 4634; 15 U.S.C. § 2617; 39 U.S.C. § 3663; 42 U.S.C. § 9613.

<sup>132</sup> *E.g.*, 7 U.S.C. § 2461; 38 U.S.C. § 502.

<sup>133</sup> *E.g.*, 12 U.S.C. § 4632 (allowing review only in the U.S. District Court for the District of Columbia); 16 U.S.C. § 539m-10 (allowing review only in the U.S. District Court for the District of New Mexico); 35 U.S.C. § 32 (allowing review only in the U.S. District Court for the Eastern District of Virginia).

A federal court must, of course, have subject-matter jurisdiction to hear a case. This rule applies as much to cases seeking judicial review of agency action as to any other kind of case.<sup>134</sup> Federal courts are courts of limited jurisdiction,<sup>135</sup> and for all federal courts other than the Supreme Court, “two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it.”<sup>136</sup>

A case seeking judicial review of a federal agency action invariably involves a question arising under federal law, so such cases fall within the “arising under” category of judicial power provided by Article III of the Constitution. For the same reason, where review is sought in a federal district court, the general federal question jurisdiction statute, 28 U.S.C. § 1331, would provide the court with statutory jurisdiction.<sup>137</sup> Accordingly, where the specified court is a federal district court, provision of jurisdiction is superfluous. Even without such a provision the court could exercise jurisdiction pursuant to § 1331. The availability of a more specific statute under which the court might also exercise jurisdiction makes no difference.<sup>138</sup>

Where the specified court is a federal court of appeals, however, the situation is less clear. Courts of appeals usually lack jurisdiction<sup>139</sup> over original proceedings, and there is no appellate analogue to § 1331 on which the appellate court’s jurisdiction could rest.<sup>139</sup> Therefore, in most cases, where a statute authorizes a party to seek judicial review in a court of appeals but does not expressly confer jurisdiction on the court to hear the resulting case, the court of appeals would lack jurisdiction unless the statute implicitly confers jurisdiction on the court.

To be sure, when Congress instructs parties to seek judicial review of agency action in a specified court, the implication that Congress intends that court to have jurisdiction to hear the resulting case is strong, as otherwise seeking judicial review there would be futile. Still, one might imagine that federal courts would be reluctant to exercise jurisdiction conferred on them only implicitly. As noted above, it is a fundamental constitutional principle that federal courts are courts of limited subject-matter jurisdiction. An oft-stated corollary to this principle is that

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<sup>134</sup> See, e.g., *Califano v. Sanders*, 430 U.S. 99 (1977) (ordering that a suit seeking judicial review of agency action be dismissed for lack of subject-matter jurisdiction).

<sup>135</sup> E.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

<sup>136</sup> *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867).

<sup>137</sup> It is difficult to imagine a case where this would not be true. Conceivably, perhaps, a case might arise in which a party sought judicial review of federal agency action and federal law entered the case only as a *defense*, in which case the “well-pleaded complaint rule,” see *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908), would block jurisdiction under § 1331. But even that makes little sense as the federal government is generally not suable on state causes of action unless it consents, in which case the statute providing consent would raise a federal question that was an essential part of the plaintiff’s case.

<sup>138</sup> Conceivably, specific provision for district court jurisdiction in judicial review cases could make a difference if Congress ever repealed § 1331 or limited it by an amount-in-controversy requirement. In this regard, statutes expressly conferring jurisdiction on district courts in judicial review cases may be analogized to statutes that provide for district court jurisdiction over cases arising under specified federal statutes. E.g., 28 U.S.C. §§ 1339, 1340, 1343. Such statutes were significant so long as § 1331 jurisdiction was subject to an amount-in-controversy requirement, as it was before 1976, but they became redundant once § 1331 was amended to provide for district court jurisdiction over cases arising under *any* federal statute without regard to the amount in controversy. Still, Congress has retained these specific statutes, perhaps to guard against the possibility that the general § 1331 might be repealed or limited someday.

<sup>139</sup> 28 U.S.C. § 2342 provides for courts of appeals to have jurisdiction to conduct judicial review in multiple situations, but only with regard to review of the limited list of agency actions specified in the section.



statutes conferring jurisdiction on federal courts should be narrowly construed.<sup>140</sup> It is sometimes even said that federal courts “must find their jurisdiction in *express* provisions of federal statutes.”<sup>141</sup> One might imagine, therefore, that federal courts would demand that statutes confer jurisdiction on them expressly, not implicitly.

In fact, however, federal courts of appeals have exercised jurisdiction notwithstanding this potential problem. These courts are evidently content to conclude that a statute authorizing a party to seek judicial review of agency action in a court of appeals necessarily, albeit implicitly, confers jurisdiction on the court to hear the resulting case. Cases considering jurisdiction under such statutes typically conclude that it exists without even mentioning that the statute fails to confer such jurisdiction expressly.<sup>142</sup>

It would seem, therefore, that when a statute authorizes a party to seek judicial review of agency action in a specified court, the statute need not state expressly that the court shall have jurisdiction to hear the resulting case. Such jurisdiction will be inferred from the provision authorizing the party to seek judicial review.

Still, there would be no harm in conferring such jurisdiction expressly, and inasmuch as limited jurisdiction is a fundamental principle of federal courts, conferring jurisdiction expressly is probably the superior practice. Best of all, however, would be to settle the question as a general matter. Congress could, as part of the general judicial review statute recommended in this Sourcebook, include a provision that 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. Passing such a general statute would put the matter beyond argument and would relieve Congress of the necessity of remembering to include a jurisdictional provision in every judicial review statute.

**Recommendation: Congress should pass the general judicial review statute recommended by this Sourcebook, which should include the following provision: “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.”**

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<sup>140</sup> *E.g.*, *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10<sup>th</sup> Cir. 2005); *Phillips v. Osborne*, 403 F.2d 826 (9<sup>th</sup> Cir. 1968).

<sup>141</sup> *In re American Home Furnishers’ Corp.*, 296 F. 605, 608 (4<sup>th</sup> Cir. 1924) (emphasis added); *see also* *Harrington v. Mure*, 186 F. Supp. 655, 658 (S.D.N.Y. 1960) (“A federal court must find its jurisdiction in express provisions of federal statutes.”).

<sup>142</sup> For example, in *32 County Sovereignty Committee v. Department of State* (D.C. Cir. 2002), the court determined that it had jurisdiction under 8 U.S.C. § 1189, which authorizes organizations designated as “foreign terrorist organizations” by the Secretary of State to seek judicial review in that court but does not expressly state that the court shall have jurisdiction over the resulting case. *See also* *Bryson v. United States*, 381 F. Supp. 3d 124 (D. Mass. 2019) (holding that the court of appeals had exclusive jurisdiction over the case under 47 U.S.C. § 521, even though that statute does not expressly confer jurisdiction on any court). There appear to be no cases to the contrary, or indeed, cases in which a contrary argument is even put forward.

## D. The Mechanism by which to Seek Review

Specific judicial review statutes usually specify the mechanism by which a party desiring judicial review of agency action may seek it. Such statutes may specify the type of document that the party should file to initiate review, the required content of the document, and other procedural details.

### 1. The Style of the Document Used to Initiate Review

In specifying the mechanism by which a party may seek review, a specific judicial review statute typically indicates what kind of document a party should file to initiate review. Several different mechanisms for initiating review appear in the statutes. The two most common are that the party seeking review should file a petition for review or an appeal.

Slight variations in the wording are common. A specific judicial review statute may, for example, require a party to file “a petition for review”<sup>143</sup> of the agency’s order, a “petition praying”<sup>144</sup> that order be set aside, a “petition requesting”<sup>145</sup> that the order be set aside, or simply a “petition.”<sup>146</sup> Statutes providing instead for an “appeal” may require the party seeking review to “appeal”<sup>147</sup> or to file a “notice of appeal.”<sup>148</sup> One rare, hybrid statute requires the filing of a notice of appeal *and* a petition.<sup>149</sup>

Other mechanisms for seeking judicial review include instructing the party seeking review to “bring an action”<sup>150</sup> or “begin a proceeding.”<sup>151</sup> A small number of older statutes still state that the party seeking review should file a “bill in equity”<sup>152</sup>—a somewhat surprising formulation, as bills in equity were abolished by the merger of law and equity in 1938, which is more than 80 years ago, and it is no longer possible to file such a bill in federal court.<sup>153</sup>

From a policy perspective, it plainly makes no difference what name is used for the document that initiates review. Whether the document be styled a petition for review, a notice of appeal, or something else, has no effect on the substance of the case. Accordingly, one would hope to find that it makes no practical difference either. A party should suffer no penalty if it files a notice of appeal in a case in which it should have filed a petition for review, or vice versa.

Thankfully, this appears to be the case, at least most of the time. Courts are usually willing to overlook merely formal errors such as filing a notice of appeal when a statute calls for

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<sup>143</sup> *E.g.* 7 U.S.C. § 21; 12 U.S.C. §§ 3105, 5567; 15 U.S.C. §§ 766, 2056a; 16 U.S.C. § 1374; 30 U.S.C. § 804. These examples and those in the following footnotes are by no means exhaustive, but only illustrative.

<sup>144</sup> *E.g.*, 7 U.S.C. §§ 8, 194, 1600; 12 U.S.C. § 1786; 21 U.S.C. § 355; 27 U.S.C. § 204; 30 U.S.C. § 816; 42 U.S.C. § 3545.

<sup>145</sup> *E.g.*, 7 U.S.C. §§ 27d, 948; 12 U.S.C. § 4623; 15 U.S.C. § 78o; 52 U.S.C. § 30109.

<sup>146</sup> *E.g.*, 7 U.S.C. § 18; 16 U.S.C. § 824k(f); 21 U.S.C. § 877.

<sup>147</sup> *E.g.*, 19 U.S.C. § 1641; 23 U.S.C. § 131; 35 U.S.C. § 141; 42 U.S.C. § 291h.

<sup>148</sup> *E.g.*, 7 U.S.C. §§ 2621, 4314; 15 U.S.C. § 5408; 16 U.S.C. § 4016

<sup>149</sup> 7 U.S.C. § 499g(c).

<sup>150</sup> *E.g.*, 12 U.S.C. §§ 191, 203, 205; 15 U.S.C. §§ 2055, 4015.

<sup>151</sup> *E.g.*, 26 U.S.C. §§ 982, 6038.

<sup>152</sup> *E.g.*, 7 U.S.C. §§ 608c, 1365.

<sup>153</sup> *See* Fed. R. Civ. P. 7(a) (listing the pleadings permitted in federal court).

a petition for review,<sup>154</sup> or vice versa.<sup>155</sup> But this is not always true; courts do sometimes exercise what they regard as their discretion to decline to treat one as the other.<sup>156</sup>

Of course, a party's counsel, before initiating judicial review, should check the applicable statute, determine what form the request for review should take, and seek review using the proper form. But inasmuch as the style of the document by which review is sought can make no difference to anyone, the judicial practice of disregarding errors in the style and of being willing to treat a notice of appeal as a petition for review (or vice versa) is appropriate. Deviations from this practice appear to be rare, and accordingly the problem of parties losing their right to review by filing the wrong kind of document, if it exists at all, is at worst a small one. Therefore, it would probably not be worth asking Congress to pass a statute for no other purpose than to fix this problem, but if Congress passes a statute to address the various difficulties that this Sourcebook identifies in specific judicial review statutes, such a statute could appropriately include a provision ratifying the judicial practice described above by officially providing that a notice of appeal should be treated as a petition for review, or vice versa, where necessary to preserve a party's right to review.

Indeed, in considering this issue, Congress might also wish to observe that seeking judicial review of agency action by filing a "notice of appeal" is, at least usually, somewhat incongruous. The filing of a notice of appeal suggests the initiation of an appellate proceeding, and while it is true, as observed earlier,<sup>157</sup> that judicial review of agency action is, in substance, an appellate proceeding, it is technically an original proceeding. Although it reviews an action taken by a previous decisionmaker, a judicial action that reviews an administrative decision is not technically an "appeal," and the Supreme Court has therefore held that such review cannot be placed within its appellate jurisdiction.<sup>158</sup> Indeed, the characterization of judicial review of agency action as original, rather than appellate, jurisdiction was at the heart of the Supreme Court's decision in *Marbury v. Madison*.<sup>159</sup> The Supreme Court has approved its jurisdiction to hear "appeals" of tribunals other than Article III courts provided they are acting in a "judicial capacity,"<sup>160</sup> and thus a "notice of appeal" might sometimes appropriately initiate judicial review of agency action. However, specific judicial review statutes do not appear to confine the use of that term to situations in which it is appropriate, but use it in many situations where "petition for review" would be a superior term.<sup>161</sup> While no great harm is done by using the term "notice of

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<sup>154</sup> See, e.g., *Cassell v. F.C.C.*, 154 F.3d 478 (D.C. Cir. 1998) (treating a notice of appeal as a petition for review); see also *Paul v. I.N.S.*, 348 F.3d 43 (2d Cir. 2003) (treating a motion for extension of time as a petition for review); *Kosanowsky v. U.S. Dept. of Army*, 659 F. Supp. 872 (S.D.N.Y. 1987) (treating a letter to the clerk of a court as a petition for review).

<sup>155</sup> See, e.g., *Hydro Engineering v. U.S.*, 113 F.3d 1254 (Fed. Cir. 1997) (treating a petition for review as a notice of appeal); *Camien v. Commissioner*, 420 F.2d 283, 284 n.2 (8th Cir. 1970) (same).

<sup>156</sup> See, e.g., *Rodela v. Comfort*, 118 Fed. Appx. 358 (10<sup>th</sup> Cir. 2004) ("we decline to treat Rodela's habeas petition and notice of appeal as a petition for review").

<sup>157</sup> See Part V.C.1, *supra*.

<sup>158</sup> E.g., *Pope v. United States*, 323 U.S. 1, 13 (1944).

<sup>159</sup> 5 U.S. 137, 175–76 (1803).

<sup>160</sup> See *Pope*, 313 U.S. at 13 (approving appellate jurisdiction over decision rendered by the Court of Claims in its "judicial capacity").

<sup>161</sup> E.g. 7 U.S.C. § 6009 (allowing the filing of a "notice of appeal" from a penalty imposed by the Secretary of Agriculture); 30 U.S.C. § 1462 (allowing the filing of a "notice of appeal" from a penalty imposed by the Administrator of the National Oceanic and Atmospheric Administration).

appeal” for the document that initiates review of agency action in an inferior federal court (as inferior courts are not bound by the differentiation between original and appellate jurisdiction that the Constitution applies to the Supreme Court), it would probably be better to use the term “petition for review” uniformly for cases initiated in a court of appeals.

For cases initiated in a district court, however, it is probably best for Congress to require review to be sought by the filing of a complaint. A complaint is the document normally used to initiate a case in district court,<sup>162</sup> and requiring a case in district court to be initiated by a different kind of document, such as a petition for review, sets up a potential conflict with the Federal Rules of Civil Procedure, as Rule 7, which lists the permitted pleadings, allows a complaint but makes no provision for a “petition for review” or other document.<sup>163</sup> District courts and counsel bringing cases in them will be highly familiar with complaints and this familiar document is probably best for starting cases in district court.

### **Recommendations:**

**1. When providing for judicial review of agency action, Congress should normally use the term “petition for review” to describe the document that initiates review for cases to be brought in a court of appeals and the term “complaint” for the document that initiates review for cases to be brought in a district court.**

**2. If Congress passes the general statute recommended herein, the statute should include a provision stating that when necessary a court of appeals shall treat a notice of appeal as a petition for review, or vice versa, and more generally that an error in the style of the document that seeks judicial review of agency action that does not affect the substantive rights of the parties shall be disregarded.**

## **2. The Content of the Document Initiating Review**

The great majority of statutes that require the filing of a petition for review or a notice of appeal simply state that such a notice or petition is required without specifying the required content of the notice or petition. For cases brought in a court of appeals, this salutary practice allows the required content of the document initiating review to be determined by Federal Rule of Appellate Procedure 15, which requires only that the document name the parties seeking review, name the agency as the respondent, and specify the order or part thereof to be reviewed.

Some statutes do provide a required content for the notice of appeal or petition for review. As noted earlier, a provision of the Hobbes Act, 28 U.S.C. § 2344, contains specific requirements for petitions for review filed under that act. The most notable other provision of this kind is probably 47 U.S.C. § 402(c), which provides that in cases in which review of orders of the FCC is sought by appeal, the notice of appeal

shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends

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<sup>162</sup> Fed. R. Civ. P. 3.

<sup>163</sup> See Fed. R. Civ. P. 7.

to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission.<sup>164</sup>

A small number of other specific review statutes similarly provide requirements for the notice of appeal or petition for review.<sup>165</sup>

As noted earlier, by operation of 28 U.S.C. § 2072, Federal Rule of Appellate Procedure 15 superseded the more specific requirements of the Hobbs Act.<sup>166</sup> By similar reasoning, Rule 15 should have superseded all more specific statutory requirements in effect at the time of its adoption, such as 47 U.S.C. § 402(c). Therefore, although practice manuals still advise counsel seeking review of FCC decisions to include “a concise statement of the reasons” on which they intend to rely,<sup>167</sup> and although prudent counsel would probably choose to follow this advice, such a statement should, strictly speaking, be unnecessary.

The common statutory format of simply requiring a petition for review, without statutorily specifying the contents of the petition, should be preferred over statutes that specify particularized requirements for such petitions. Presumably, the purpose of a requirement for more specific content, and specifically for a requirement that the petition state the issues that form the basis of the petitioner’s challenge to the agency action, is to allow earlier identification of the issues that will come before the court. However, as the drafters of Federal Rule of Appellate Procedure 15 observed, such requirements are “rarely useful either to the litigants or to the courts” because “[t]here is no effective, reasonable way of obliging petitioners to come to the real issues before those issues are formulated in the briefs.”

Determining what content the petition should have is a matter best left to the judicial branch. The drafters of Rule 15 determined that it is best simply to require the petition to identify the parties seeking review and the order of which review is sought. Omitting any more particularized requirements for the petition from specific judicial review statutes allows Rule 15 to operate.

**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.**

### 3. Service of the Document Initiating Review

Once a party files a document initiating a judicial review proceeding, that document, like most litigation documents, must be served on the other parties to the litigation, which would typically include the agency that issued the order of which review is sought. Specific judicial review statutes provide two principal methods by which this service may be accomplished: Some

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<sup>164</sup> 47 U.S.C. § 402(c).

<sup>165</sup> *E.g.*, 7 U.S.C. § 499g (requiring that the petition “shall recite prior proceedings before the Secretary and shall state the grounds upon which the petitioner relies to defeat the right of the adverse party to recover the damages claimed, with proof of service thereof upon the adverse party”); 8 U.S.C. § 1252(c) (requiring a petition for review of an order of removal to state whether a court has upheld the validity of the order).

<sup>166</sup> *American Paper Inst. v. I.C.C.*, 607 F.2d 1011 (D.C. Cir. 1979).

<sup>167</sup> *E.g.*, 23A Am. Jur. Pleading & Practice Forms Telecommunications § 43.

require the party seeking review to serve the document on the agency;<sup>168</sup> others provide that the clerk of the court in which the document is filed shall forward a copy to the agency.<sup>169</sup> Statutes that require the party seeking judicial review to serve a copy on the agency that issued the order of which review is sought sometimes require that service be made “simultaneously” with the filing of the document that initiates the request for judicial review.<sup>170</sup>

There seems to be little if any rhyme or reason behind the decision whether the responsibility for serving the document on the agency falls to the party seeking review or to the clerk of the court in which review is sought. Some statutes require one and some the other, but the choice seems to follow no particular plan or rationale. Fortunately, in the great majority of cases it makes no practical difference who is responsible for notifying the agency that review has been sought; whether this task falls to the party seeking review or the clerk of the court, the agency receives notice and the case proceeds.

There is, however, at least one reason why it might matter who has the responsibility of notifying the agency that review of one of its orders has been sought. This apparently trivial detail has the potential to affect cases in which multiple parties seek review of the same agency order and engage in a “race to the courthouse” in which each party tries to file first so as to get the advantage of having review take place in that party’s preferred forum. In such cases, it might matter who transmits the document initiating the case to the agency, because of the wording of 28 U.S.C. § 2112(a), which is the statute that addresses the “race to the courthouse” situation.

ACUS is quite familiar with this statute. Decades ago, ACUS identified the “race to the courthouse” situation as undesirable. This situation arises when multiple parties seek review of the same agency order. Prior to ACUS’s involvement with this issue, 28 U.S.C. § 2112 provided that when multiple parties seek review of the same agency order in different courts, the court in which the *first* petition for review is filed has jurisdiction to the exclusion of the others. This rule led to unseemly “races to the courthouse,” in which parties vied to file the first petition for review of an agency order, so that they could gain the tactical advantage of having review take place in their preferred forum. Courts were required to conduct rather absurd investigations into which of multiple petitions for review had been filed first,<sup>171</sup> and the priority given to the first-filed petition favored wealthier parties, who could, for example, afford to pay agents to wait in an agency’s file room and in a courthouse to detect the exact moment an order was issued and to file a petition for review immediately thereafter.<sup>172</sup>

ACUS Recommendation 80-5, *Eliminating or Simplifying the “Race to the Courthouse” in Appeals from Agency Action*, addressed this situation. Calling the race to the courthouse an unedifying spectacle, ACUS recommended that Congress end it. ACUS recommended that where multiple petitions for review of the same order are filed in different courts, a random

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<sup>168</sup> *E.g.*, 8 U.S.C. § 1252(b)(3)(A); 12 U.S.C. § 2268(d); 33 U.S.C. § 1321(b)(6)(G).

<sup>169</sup> *E.g.*, 7 U.S.C. §§ 8(b), 194(b); 12 U.S.C. § 1786(j); 15 U.S.C. § 21(c).

<sup>170</sup> *E.g.*, 12 U.S.C. § 2268(d); 33 U.S.C. § 1321(b)(6)(G).

<sup>171</sup> *See, e.g.*, *City of Gallup v. FERC*, 702 F.2d 1116, 1124 (D.C. Cir. 1983) (noting that one petition was time-stamped seven seconds before another).

<sup>172</sup> *See id.* at 1119 (describing how parties had agents waiting in the agency’s file room with walkie-talkies, so they could send the word out as soon as an anticipated order was issued). The ACUS report that led to ACUS Recommendation 80-5 noted how the first-to-file rule created a systemic bias in favor of wealthier parties. Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. Pa. L. Rev. 302, 325 (1980).

selection process be used to decide which court would consider the case. Specifically, ACUS recommended:

Congress should amend 28 U.S.C. § 2112(a) to provide that, if petitions to review the same agency order have been filed in two or more courts of appeals within ten days after the order was issued, the agency is to notify an appropriate official body, such as the Administrative Office of the United States Courts, of that fact; that the appropriate official body, on the eleventh day after the issuance of the order, is to choose from among the circuits in which petitions have been filed according to a scheme of random selection and notify the agency of that choice; and that the agency is then to file the record of the proceeding in the court so chosen, which will take jurisdiction and conduct the review proceeding, subject to the existing power, which would not be changed, to transfer the case to any other court of appeals for the convenience of the parties in the interest of justice.

Congress implemented ACUS's recommendation in 1988.<sup>173</sup> However, the particular wording that Congress chose creates a potential problem. The current version of 28 U.S.C. § 2112 provides:

If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, *from the persons instituting the proceedings*, the 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 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.<sup>174</sup>

Paragraph (3) provides for the random selection recommended by ACUS. But the highlighted phrase in § 2112 suggests that the random selection process is triggered only if the agency involved receives multiple petitions for review *from the persons instituting the proceedings*. The negative implication of this phrasing is that a petition for review received by the agency within the 10-day period, but not from the party instituting the proceedings, does not count for purposes of the first sentence. Accordingly, if within the 10-day period the agency receives one petition for review from a party instituting proceedings for judicial review and another petition that is forwarded by the clerk of a court in which it is filed, then the second sentence, not the first, applies, and no random selection would occur. Only the court that

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<sup>173</sup> Pub. L. 100-236, § 1 (1988).

<sup>174</sup> 28 U.S.C. § 2112(a)(1) (emphasis added).

received the petition that was sent to the agency by the party seeking review would have jurisdiction.

Would a court read § 2112 so literally? Yes. Exactly the fact pattern hypothesized above occurred in a D.C. Circuit case in 2014,<sup>175</sup> and the court gave effect to the text of § 2112. It ruled that a petition for review received by the agency within the 10-day period, but only because it had been forwarded to the agency by a court clerk, did not count for purposes of the first sentence of § 2112(a)(1). Accordingly, the party that had filed that petition was deprived of the opportunity for its preferred forum to be chosen in a random selection process; the case was simply transferred to the court chosen by the party that had both filed a petition *and* sent it to the agency.

Although the court in that case said that requiring a petition to be sent to the agency by the party seeking review “makes a good deal of sense,”<sup>176</sup> the court’s reasoning was strained. The court said that § 2112’s requirement “alerts the agency that the petitioner cares about its chosen forum and, as the Board explains, imposes the burden of compliance on the party seeking to benefit from § 2112(a).”<sup>177</sup> But it is also possible that a party would be deprived of its chance at winning the random selection process simply because the party reads the specific judicial review statute applicable to its case, notes that it requires the court clerk to transmit the document initiating review to the agency, and therefore leaves it to the court clerk to do so, not realizing that this apparently trivial point will make a crucial difference for purposes of § 2112(a)(1).

ACUS made no suggestion in Recommendation 80-5 that a petition for review must be transmitted to the agency by the party initiating review in order for the petition to count for purposes of § 2112. Imposing such a requirement tends to reintroduce the bias in favor of wealthier, more sophisticated parties, who are more likely to be aware of the particulars of § 2112. Congress should eliminate the phrase “from the persons instituting the proceedings” from the statute.

As an additional point, the requirement in some statutes that a party seeking review must transmit the document initiating review to the agency “simultaneously” with filing it in court serves no discernible purpose. It could conceivably cause a court to dismiss an otherwise worthy case on the ground that the petition for review, although transmitted to the agency, was not transmitted “simultaneously.” While ACUS’s research has uncovered no such case, and so this problem would not be worth Congress’s attention by itself, if Congress passes the general savings statute recommended for solving the more significant problems noted in this Sourcebook, it should include a provision indicating that a requirement that a document be served “simultaneously” with its filing is satisfied if the document is served with reasonable promptness. But to avoid litigation over what constitutes reasonable promptness, it would be best if the statute required service within some set period, such as 14 days.

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<sup>175</sup> Remington Lodging & Hospitality, LLC v. N.L.R.B., 747 F.3d 903 (D.C. Cir. 2014).

<sup>176</sup> *Id.* at 905.

<sup>177</sup> *Id.*



## Recommendations:

1. 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.

2. When Congress requires the party seeking judicial review to serve the document initiating review on the agency that issued the order of which review is sought, it should refrain from requiring that such service be made “simultaneously” with the filing of the document.

3. Congress should provide 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 within a set number of days (perhaps 14) of the filing of the document.

## E. Relief Pending Review

A party seeking judicial review of agency action may desire interlocutory relief while the action for review is pending. As noted earlier, innumerable specific judicial review statutes provide that the filing of a suit for judicial review does not automatically stay the agency action of which review is sought.<sup>178</sup> These provisions do, however, typically permit the court in which review is sought to order a stay of the agency action pending review.<sup>179</sup> Such preliminary judicial relief is generically authorized by § 705 of the APA.<sup>180</sup> Section 705 also authorizes an agency to postpone the effective date of its own action pending judicial review when justice so requires.<sup>181</sup>

Granting a stay pending review is equivalent to granting a preliminary injunction, and therefore, on a motion for a stay, courts apply the same four-factor test that governs the granting of preliminary injunctions: they consider the movant’s likelihood of success on the merits; whether the movant will suffer irreparable harm if a stay is not granted; whether other parties will suffer irreparable harm if a stay is granted; and where the public interest lies.<sup>182</sup> An agency considering whether to stay its own order pending judicial review must balance the same equities, although it need not follow the judicial four-factor test exactly.<sup>183</sup>

Some specific judicial review statutes provide, contrary to the normal principles described above, that the filing of an action for judicial review *shall* automatically stay the agency action of which review is sought.<sup>184</sup> In some cases, the stay must operate until review is

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<sup>178</sup> See Part V.A.1, *supra*.

<sup>179</sup> For representative examples, see, e.g., 12 U.S.C. § 4583; 15 U.S.C. § 80a-9; 21 U.S.C. § 355(h); 29 U.S.C. § 655.

<sup>180</sup> 5 U.S.C. § 705.

<sup>181</sup> *Id.*

<sup>182</sup> *E.g.*, *Nken v. Holder*, 556 U.S. 418, 425–26 (2009).

<sup>183</sup> *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106–07 (D.D.C. 2018).

<sup>184</sup> See, e.g., 15 U.S.C. § 80a-42; 15 U.S.C. § 8302(c)(4); 20 U.S.C. 1234g, 23 U.S.C. § 131; 26 U.S.C. § 3310; 26 U.S.C. § 6213(a); 42 U.S.C. § 504.

no longer pending;<sup>185</sup> in others, the statute merely reverses the normal presumption and provides that the agency action shall be stayed unless the reviewing court orders otherwise.<sup>186</sup> Still others provide for some intermediate arrangement.<sup>187</sup> One common circumstance in which specific judicial review statutes provide for automatic stays is when the party seeking review of agency action is itself a governmental party,<sup>188</sup> but other statutes provide for automatic stays even outside this context.<sup>189</sup>

## F. Bond or Other Security

Provisions for judicial review of agency action typically say nothing about whether the party seeking review must be required to post bond or other security. Some specific judicial review statutes, however, provide that a party seeking review must post a bond. Such provisions most commonly occur when the action of which review is sought is the imposition of a penalty to be paid, especially to another private party.<sup>190</sup> In such cases a bond requirement assures the party to whom the penalty would be payable that the party seeking review will still have sufficient assets to pay the penalty if the agency action is upheld.

Some specific judicial review statutes provide that a court may require security when issuing preliminary injunctive relief.<sup>191</sup> Such a provision merely restates what would be true anyway under either Rule 65(c) of the Federal Rules of Civil Procedure or Rule 8(a)(2)(E) of the Federal Rules of Appellate Procedure. Indeed, even though § 705 of the APA, which generally provides for relief pending judicial review of agency action, says nothing about requiring security for such relief, a court may require a party seeking such relief to post an appropriate bond.<sup>192</sup>

## G. Expedition

Suits seeking judicial review of agency action typically have the same priority as any other kind of lawsuit. Some specific judicial review statutes, however, provide for expedition. Such provisions may take different forms. Some expedition provisions go so far as to require a

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<sup>185</sup> See, e.g., 15 U.S.C. § 8302(c)(4); 20 U.S.C. 1234g; 23 U.S.C. § 131; 26 U.S.C. § 6213(a); 27 U.S.C. § 204(h).

<sup>186</sup> See, e.g., 15 U.S.C. § 80a-42; 27 U.S.C. § 204(h).

<sup>187</sup> See, e.g., 26 U.S.C. § 3310 (providing for an automatic stay of at least 30 days, after which the court may order a further stay); 42 U.S.C. § 504 (same).

<sup>188</sup> See, e.g., 23 U.S.C. § 131 (concerning review sought by States); 26 U.S.C. § 3310 (same); 42 U.S.C. § 504 (same); 15 U.S.C. § 8302(c)(4) (concerning review of actions of the CFTC sought by the SEC or vice versa).

<sup>189</sup> See, e.g., 26 U.S.C. § 6213(a); 27 U.S.C. § 204(h). In one interesting case, a statute that on its face provides that the bringing of “any action” for judicial review shall trigger an automatic stay was judicially construed to provide for an automatic stay only when the U.S. Attorney General seeks judicial review, in light of indications to that effect in the statute’s legislative history. See 12 U.S.C. § 1849; *First Midland Bank & Trust Co. v. Chemical Financial Corp.*, 441 F. Supp. 414 (W.D. Mich. 1977). As the date of the opinion shows, that case occurred before the recent movement toward textualism within the federal judiciary; such a case might well come out differently today.

<sup>190</sup> E.g., 7 U.S.C. § 18 (requiring bond from a party seeking review of reparations ordered under the Commodity Exchange Act must file bond); 7 U.S.C. 499g (similar, with respect to the Perishable Agricultural Commodities Act).

<sup>191</sup> E.g., 30 U.S.C. 1270.

<sup>192</sup> E.g., *B&D Land & Livestock Co. v. Conner*, 534 F. Supp. 2d 891 (N.D. Io. 2008).

reviewing court to decide a case within a specified number of days.<sup>193</sup> Others, without specifying such a precise deadline, state that reviewing courts shall advance cases on their docket.<sup>194</sup> Still others simply state that courts conducting judicial review shall do so on an expedited basis, without specifying more particularly what that means.<sup>195</sup> In such a case, a court might impose an accelerated briefing schedule and/or move the case ahead in the queue of cases awaiting argument.<sup>196</sup>

As to the reasons for expedition, some provisions for expedition are found in statutes that provide for review to be sought by a government entity.<sup>197</sup> In such cases the provision for expedition may represent respect for the entity involved. Other statutes provide for expedition in matters evidently requiring urgent decision, such as those involving vital financial institutions.<sup>198</sup> In still other cases, statutes call for expedition for no very clear reason.<sup>199</sup>

## H. Provisions Regulating Permitted Arguments (“Issue Exhaustion” Provisions)

Some specific judicial review statutes expressly prohibit parties from seeking review of an agency action on the basis of an argument that was not raised in proceedings at the agency itself.<sup>200</sup> Such a prohibition is known as an “issue exhaustion” requirement. Other specific judicial review statutes contain no such express prohibition. Does stating this prohibition expressly make a difference, and if so, is the prohibition desirable?

### 1. The Background Rule on Issue Exhaustion Requirements

Do statutory issue exhaustion provisions make a difference? Or do they, like the statutory provisions discussed in Part V.A, *supra*, merely restate a rule that would apply

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<sup>193</sup> *See, e.g.*, 8 U.S.C. § 1535 (“the Court of Appeals shall issue an opinion not later than 60 days after the date of the issuance of the final order of the district court”).

<sup>194</sup> *See, e.g.*, 8 U.S.C. § 1252(e)(3)(D) (“It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.”).

<sup>195</sup> *See, e.g.*, 12 U.S.C. § 5382(a)(2)(A)(3) (“The Court of Appeals shall consider any appeal under this subparagraph on an expedited basis.”); 15 U.S.C. § 78o(j)(5)(A) (“Any proceeding to challenge any such rule shall be expedited by the Court of Appeals.”).

<sup>196</sup> Most courts of appeals have local rules or procedures providing for expedited cases. *See, e.g.*, 1st Circuit Internal Operating Procedure VII(B); 5th Circuit Rule 27-5; 9th Circuit Rule 27-12.

<sup>197</sup> *E.g.*, 7 U.S.C. § 27d (providing for expedition when review is sought by the Board of Governors of the Federal Reserve); 15 U.S.C. § 6714 (providing for expedition when review is sought by a state or federal regulator to resolve a conflict between them).

<sup>198</sup> *E.g.*, 12 U.S.C. § 5382 (providing for expedited appellate review of district court orders in cases seeking review of action taken with regard to financial companies that are in danger and the failure of which would have serious adverse effects on financial stability in the United States).

<sup>199</sup> *E.g.*, 7 U.S.C. 228b-3 (providing for expedition of cases in which a live poultry dealer seeks review of a penalty imposed under the Packers and Stockyards Act).

<sup>200</sup> A typical wording for such a prohibition is “No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do.” 15 U.S.C. § 80a-42. For a few other examples (from among many that might be chosen), see 16 U.S.C. § 8251; 27 U.S.C. § 204; 29 U.S.C. § 3247; 42 U.S.C. § 1320a-7.

anyway? The answers to these questions are complex. Statutory issue exhaustion provisions cannot be called redundant, but neither are they always essential.

In the absence of an express statutory provision prohibiting a party from challenging an agency action on a ground that the party did not argue before the agency, courts use a complex test in determining whether to permit such challenges. Sometimes courts impose an issue exhaustion requirement that is not statutorily imposed; indeed, the rule of issue exhaustion is sometimes said to be the general rule. But in at least some cases courts decline to impose an issue exhaustion requirement where the applicable statute does not contain one.

The Supreme Court considered the question at length in *Sims v. Apfel*.<sup>201</sup> The Court observed that issue exhaustion requirements “are largely creatures of statute.”<sup>202</sup> It also noted, however, that it had sometimes required issue exhaustion in the absence of a statutory issue exhaustion provision.<sup>203</sup> Indeed, the Court said that “courts require administrative issue exhaustion ‘as a general rule’”<sup>204</sup> for the same reason that appellate courts normally decline to review a district court’s judgments on the basis of arguments that a party did not present to the district court: litigation operates more efficiently if parties are required to bring all their issues forward in the initial proceedings.

The Court determined, however, that “the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.”<sup>205</sup> Social Security proceedings, a plurality of the Court held, are not sufficiently analogous to civil litigation to justify the imposition of an issue exhaustion requirement, because they are inquisitorial rather than adversarial. Both the Administrative Law Judge (ALJ) who initially conducts an evidentiary hearing regarding a claim for benefits and the Appeals Council that reviews ALJ decisions regard themselves, not the claimant, as having the principal responsibility for identifying and developing the issues. Accordingly, judicial imposition of an issue exhaustion requirement would be inappropriate for such proceedings. The Supreme Court recently applied the principle of *Sims* in determining that unsuccessful applicants for Social Security disability benefits could challenge the agency proceedings on the ground that the agency’s ALJs were unconstitutionally appointed even though the applicants had not raised this issue in the agency proceedings.<sup>206</sup>

In light of *Sims*, it is clear that if Congress wants to ensure that issue exhaustion is required with regard to a particular kind of agency action, it should say so in a specific judicial review statute. In many cases one might predict with a fair degree of confidence that courts would require issue exhaustion even in the absence of such a statutory requirement, but a statutory issue exhaustion provision would settle the matter.

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<sup>201</sup> 530 U.S. 103 (2000). The case concerned whether a claimant for Social Security benefits could seek judicial review of the denial of such benefits on the basis of an argument that the claimant did not make before the Appeals Council of the Department of Health and Human Services. *See id.* at 104–06.

<sup>202</sup> *Id.* at 107.

<sup>203</sup> *Id.* at 108.

<sup>204</sup> *Id.* at 109 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952)).

<sup>205</sup> *Id.*

<sup>206</sup> *Carr v. Saul*, 141 S. Ct. 1352 (2021).

## 2. Are Issue Exhaustion Requirements Desirable?

As the foregoing discussion suggests, the desirability of an issue exhaustion requirement depends on the characteristics of the agency proceeding of which review is sought. The more the agency proceeding resembles civil litigation, the more appropriate an issue exhaustion requirement will be. If agency proceedings are adversary proceedings in which parties are normally represented by counsel and are expected to develop the issues for decision, an issue exhaustion requirement makes sense. Such a requirement incentivizes the parties to bring forward all their issues in the initial proceeding and to alert the initial decisionmaker to any potential errors or objections, which in turn maximizes the probability that the initial decision will be correct. Allowing the parties to raise issues on judicial review that they did not raise before the agency increases the probability that the reviewing authority will overturn the initial decision and require costly additional proceedings. In some circumstances the absence of an issue exhaustion requirement might even incentivize “sandbagging”: a party that is aware of an error in an agency proceeding that cuts against it might deliberately avoid bringing the error to the agency’s attention, in the hope that either the party might prevail anyway or, if the party loses, the party could get the agency’s final ruling vacated on judicial review (because there would be no barrier to raising the issue on review even though the party had not raised it within the agency). Such deliberate sandbagging would promote inefficiency and added cost and therefore seems clearly undesirable.

As the Supreme Court recognized in *Sims*, however, the more an agency proceeding deviates from the adversary, civil litigation model, the less appropriate it may be to require issue exhaustion as a prerequisite for judicial review. Where the agency itself has the principal responsibility for raising issues and building a record, issue exhaustion is less appropriate.

It might seem from the foregoing discussion that issue exhaustion should apply only to agency adjudicatory proceedings and not to rulemaking proceedings. Rulemaking proceedings are quite different from adversarial, civil litigation proceedings. Rulemaking proceedings are not adversarial; indeed, they do not even involve “parties” in the same way as litigation proceedings. A party that has occasion to challenge a rule after the rule is issued may not even have participated in the rulemaking. Nonetheless, courts have sometimes imposed an issue exhaustion requirement on parties seeking judicial review of agency rulemaking, although they have suggested that such a requirement applies only to affirmative challenges to rules and would not limit the issues that may be raised as a defense when a rule is enforced.<sup>207</sup>

ACUS has previously considered issue exhaustion’s application to judicial review of rules. ACUS’s consideration, however, led only to an ACUS Statement on the topic, not an ACUS recommendation.<sup>208</sup> The Statement, moreover, does not fully resolve how issue

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<sup>207</sup> See, e.g., *Koretov v. Vilsack*, 707 F.3d 394 (D.C. Cir. 2013). In that case, the D.C. Circuit held that almond producers who challenged the lawfulness of an Almond Marketing Order could not argue that in issuing the order, the Department of Agriculture had failed to determine, as required by statute, that the order was “the only practical means of advancing the interests of the producers,” because that argument had not been raised in the notice-and-comment proceedings through which the order was issued. *Id.* at 397–99. The Court noted, however, that its holding did not mean that this challenge to the order could not be raised as a defense in an enforcement proceeding. *Id.* at 399.

<sup>208</sup> ACUS Statement # 19, *Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking* (2015).

exhaustion should apply in such cases; rather, it provides a list of factors that it “invites courts to consider” when they determine whether issue exhaustion applies to a pre-enforcement challenge to an agency rule.<sup>209</sup> Moreover, the Statement is addressed to how *courts* should consider issue exhaustion in the absence of statutory guidance, and the factors appropriate to such judicial consideration of the matter are not necessarily the same factors that should guide *Congress* in determining whether to impose an issue exhaustion requirement by statute.<sup>210</sup>

The application of an issue exhaustion requirement to judicial review of rulemaking proceedings can be justified by principles such as that of conducting review of an agency action on the basis of the record that was before the agency.<sup>211</sup> However, uncritical application of an issue exhaustion requirement to the rulemaking context may lead to perverse incentives, as for example by incentivizing “shotgun” comments to be filed by parties seeking to preserve every possible basis for judicial review.<sup>212</sup> Also, given that no one is required to participate in rulemaking proceedings, issue exhaustion requirements might be considered unfair if applied to parties that did not participate in rulemaking proceedings at all.<sup>213</sup>

In light of the conflicting scholarly arguments on this topic, which previously led ACUS to issue a fairly cautious statement rather than a recommendation, this Sourcebook simply recommends that Congress should be aware of this issue, should consider whether it desires to impose an issue exhaustion requirement when fashioning a judicial review statute, and should be aware that if it says nothing, courts will resolve the question of issue exhaustion on the basis of judicial doctrines.

### 3. The Wording of Issue Exhaustion Requirement Provisions

When it does impose issue exhaustion requirements, Congress has used inconsistent wording.<sup>214</sup> At least one court has commented on the “senselessness of the[] differences in

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<sup>209</sup> *Id.* at 7.

<sup>210</sup> Some scholars have taken an “essentially sympathetic view” of issue exhaustion requirements in judicial review of rulemaking, *see, e.g.*, Ronald M. Levin, *Making Sense of Issue Exhaustion in Rulemaking*, 70 *Admin. L. Rev.* 177, 180 (2018), whereas others are more skeptical, *see, e.g.*, Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 *Admin. L. Rev.* 109 (2018).

<sup>211</sup> *See* Levin, *supra* note 210, at 202.

<sup>212</sup> *See* Lubbers, *supra* note 210, at 137.

<sup>213</sup> *Id.* at 156–59. On the other hand, it might seem odd, and create different perverse incentives, if parties that did not participate in a rulemaking could thereby gain an advantage in judicial review over parties that did. *Id.*; Levin, *supra* note 210, at 202.

<sup>214</sup> Some issue exhaustion statutes provide simply that “[n]o objection to the order of the [agency] shall be considered by the court unless such objection shall have been urged before the [agency].” *E.g.*, 15 U.S.C. §§ 77i, 715d, 1710; 25 U.S.C. § 4161. Others state that “[n]o objection to the order of the [agency] shall be considered by the court unless such objection shall have been urged before the [agency] or unless there were reasonable grounds for failure so to do.” *E.g.*, 15 U.S.C. §§ 80a-42, 80b-13; 21 U.S.C. § 355. Still other statutes provide that “[n]o objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused for good cause shown.” *E.g.*, 30 U.S.C. § 811. And others provide that “[n]o objection that has not been urged before the [agency] shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” *E.g.*, 29 U.S.C. § 660. Yet another formulation provides that “[n]o objection to the order of the [agency] shall be considered by the court unless the objection was specifically urged, in a timely manner, before the [agency].” *E.g.*, 29 U.S.C. § 3247.

language” in the different provisions by which Congress has imposed an issue exhaustion requirement and inferred that Congress had “fail[ed] to give careful attention to the nuances of language that might, in another context, connote differences in intended meaning.”<sup>215</sup> That court concluded that Congress must have intended simply to codify the judicially developed doctrine of issue exhaustion.<sup>216</sup>

This decision calls attention to the danger that may arise from apparently trivial variations in the forms of words Congress uses to express similar concepts in different statutes. Courts usually “presume differences in language . . . convey differences in meaning,”<sup>217</sup> so Congress should take care not to use language that might imply a difference of meaning that it does not intend.

**Recommendation:** In passing a specific judicial review statute, Congress should consider whether it desires to impose an issue exhaustion requirement. Congress should understand that if it does not expressly state in a specific judicial review statute whether issue exhaustion is or is not required, courts will make that decision on their own. Congress should be aware that issue exhaustion is most appropriate for agency proceedings that resemble adversary civil litigation proceedings, but also that it may apply to rulemaking proceedings. Congress may wish to consider ACUS Statement # 19 for guidance in deciding whether to impose issue exhaustion requirements in review of rulemaking proceedings.

## I. Provisions Relating to the Record

The APA provides that in conducting judicial review, “the court shall review the whole record or those parts of it cited by a party,”<sup>218</sup> The APA does not define what constitutes “the whole record,” nor does it expressly prohibit courts from considering materials that are not part of the agency record. It also does not specify how the court shall receive the record from the agency.<sup>219</sup> Some further detail is, however, given in 28 U.S.C. § 2112, which provides that the federal rules of procedure developed in accordance with the Rules Enabling Act may provide for the time and manner of filing the record in proceedings for judicial review;<sup>220</sup> that the rules may permit agencies to file a certified list of the materials comprising the record rather than the record itself;<sup>221</sup> and that the record shall consist of “the order sought to be reviewed or enforced, the

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These statutes give rise to imponderable question such as whether there is a distinction between “reasonable grounds” for failure to have raised an argument and “good cause” for such a failure; when such cause or grounds would rise to the level of “extraordinary circumstances”; what it means for an objection to be “specifically urged” as opposed to merely “urged”; and what, if anything, justifies these fine distinctions among issue exhaustion requirements.

<sup>215</sup> *Washington Ass’n for Television and Children v. FCC*, 712 F.2d 677, 682 n.6 (D.C. Cir. 1983).

<sup>216</sup> *Id.* at 681–82.

<sup>217</sup> *Wisconsin Central, Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018).

<sup>218</sup> 5 U.S.C. § 706.

<sup>219</sup> *See, e.g.* Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 Kan. L. Rev. 1 (2018) (arguing that courts may order a record completed if an agency does not submit the whole record to the court, but that courts cannot order supplementation of the record).

<sup>220</sup> 28 U.S.C. § 2112(a).

<sup>221</sup> *Id.*

findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned,” or such portions thereof as are specified by the rules, the parties, or the court.<sup>222</sup>

Numerous special judicial review statutes contain some provision relating to the record that the reviewing court shall consider. By far the most common is a provision requiring that when the agency receives notice that a party has sought judicial review of an action taken by the agency, the agency shall file the record in the court in which judicial review has been sought “as provided in section 2112 of Title 28.”<sup>223</sup> Inasmuch as § 2112 applies of its own force to “all proceedings instituted in the courts of appeals to . . . review or enforce orders of administrative agencies, boards, commissions, and officers,”<sup>224</sup> and requires in such cases that the record “shall be certified and filed in or held for and transmitted to the court of appeals” by the agency “within the time and in the manner prescribed”<sup>225</sup> by the rules adopted in accordance with the Rules Enabling Act, a provision in a specific judicial review statute instructing an agency to file the record in accordance with § 2112 in a case in a court of appeals is redundant.

There is no comparable statute generally providing for an agency to file the record of its proceedings in a *district* court in which review of the agency’s final action is sought, so statutory provision for such filing is not redundant. Some specific judicial review statutes instruct agencies to file the record “as provided in section 2112” even though the review is to take place in a district court.<sup>226</sup> Strictly speaking, one might say that it is impossible to file a record in district court “as provided in section 2112,” as § 2112 applies only to cases in courts of appeals and requires the record to be filed in or held for a court of appeals, but of course the filing can be accomplished in the *manner* provided in § 2112 even though a case is in a district court.

As just noted, § 2112 requires the agency to file the record “within the time” prescribed by the rules adopted pursuant to the Rules Enabling Act. Federal Rule of Appellate Procedure 17 gives an agency 40 days to file the record after being served with a petition for review, unless the statute authorizing review provides otherwise. Numerous specific judicial review provisions require the agency to file the record “promptly.”<sup>227</sup> Such a requirement perhaps suggests that the agency should file the record in less time than 40 days, in which case it would not simply be redundant of what is already stated in 28 U.S.C. § 2112, but it seems unlikely that a requirement of “prompt” filing makes much practical difference as to when an agency actually files the record.

The other provision relating to the record most commonly found in specific judicial review statutes is one that allows the court to remand the case for the purpose of gathering new evidence. A common formulation of such a provision is:

The findings of fact by the [agency], if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to [the

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<sup>222</sup> *Id.* § 2112(b).

<sup>223</sup> Many statutes use this formulation. *See, e.g.*, 15 U.S.C. § 77i; 16 U.S.C. § 3142; 21 U.S.C. § 360kk; 42 U.S.C. § 263a.

<sup>224</sup> 28 U.S.C. § 2112(a).

<sup>225</sup> *Id.*

<sup>226</sup> 16 U.S.C. §§ 1858(b), 2437, 3142 (g)(2), 3373, 5507(d); 29 U.S.C. § 160(e); 30 U.S.C. § 1462(b).

<sup>227</sup> *E.g.*, 7 U.S.C. § 1446; 16 U.S.C. § 1858(b); 42 U.S.C. § 9152.



agency] to take further evidence, and [the agency] may thereupon make new or modified findings of fact and may modify [its] previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.<sup>228</sup>

These provisions are perhaps modeled on 28 U.S.C. § 2347(c), a portion of the Hobbs Act that sets forth this rule for review proceedings covered by that Act.

**Recommendation: When providing for judicial review of agency action in a court of appeals, Congress should be aware that it is not necessary to specify that the agency shall file the record of its proceeding in the reviewing court, as such filing is universally required by 28 U.S.C. § 2112 and Federal Rule of Appellate Procedure 17.**

## J. Provisions Prohibiting Review in Enforcement Proceedings

The APA provides that “[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.”<sup>229</sup> Accordingly, where no statute says otherwise, a party that disagrees with an agency action may choose not to institute an affirmative judicial challenge to the action. The party may instead wait until it becomes a defendant in some action brought by the agency, by another part of the government, or perhaps even by a private party, in which the agency action is implicated, and it may raise the invalidity of the agency action as a defense. This strategy is most commonly associated with challenges to agency rules,<sup>230</sup> but it is sometimes also used with respect to agency adjudicatory decisions.<sup>231</sup>

Congress may, however, block this strategy by requiring that challenges to an agency action be brought in a specified way and forbidding them in the enforcement context. If Congress provides a “prior” and “adequate” opportunity for judicial review of agency action and makes that opportunity “exclusive,” then the APA’s provision allowing parties to raise a challenge to an agency action defensively in an enforcement context does not apply.<sup>232</sup>

Numerous specific judicial review statutes contain such provisions. In cases where an agency, through individualized adjudication, imposes a fine or other civil penalty on a private party or orders that party to take specified action, a statute might authorize the private party to seek judicial review of the agency decision within a certain period and also provide that if no

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<sup>228</sup> Many statutes use this formulation or a variation thereof. *See, e.g.*, 19 U.S.C. § 2395; 20 U.S.C. § 1070c-3; 42 U.S.C. § 504 (all using the formulation above); 7 U.S.C. § 194(f); 7 U.S.C. § 1600; 15 U.S.C. § 687a (all allowing a similar procedure if “the court determines that the just and proper disposition of the case requires the taking of additional evidence”); 12 U.S.C. § 1701q-1; 15 U.S.C. § 77i; 21 U.S.C. § 360kk (all allowing a remand for the taking of further evidence if any party demonstrates “to the satisfaction of the court” that the additional evidence is material and that there were reasonable grounds for the failure to present such evidence before the agency).

<sup>229</sup> 5 U.S.C. § 703.

<sup>230</sup> *See, e.g.*, Guide, *supra* note 1, at 13–14; Blackletter Statement, *supra* note 1, at 55;

<sup>231</sup> *See, e.g.*, *United States v. Menendez*, 48 F.3d 1401 (5th Cir. 1995), in which a private party was assessed a civil penalty in an agency proceeding, did not pay it, and then challenged the validity of the agency proceeding defensively when the United States instituted a proceeding to collect the penalty.

<sup>232</sup> *See* 5 U.S.C. § 703.

such action is brought within that period (or if such an action is brought but is unsuccessful) and the government then brings an action to collect the fine or penalty or enforce the order, the fine, penalty, or order shall not be subject to judicial review in that action.<sup>233</sup> Similarly, with regard to agency regulations, a statute may provide that judicial challenges to regulations must be brought within a specified time period and that challenges to a regulation that might have been brought within that time may not be raised in an enforcement proceeding.<sup>234</sup>

At least three issues arise with regard to such statutory provisions. First, Congress needs to be aware of the APA rule that permits parties to raise challenges to an agency action defensively in the context of enforcement proceedings.<sup>235</sup> Congress must understand that this default rule will apply if it makes no contrary provision in a specific judicial review statute applicable to the matter at hand.

Second, if Congress desires to provide for a different rule with regard to a particular kind of agency action, it should take care to do so clearly. The numerous statutes alluded to above, in which Congress has prohibited judicial review of agency orders in the enforcement context, show that Congress knows how to prohibit such review when it wants to. As a result, anything less than a clear prohibition of such review may not be effective.

This point was highlighted in the recent Supreme Court case of *PDR Network, LLC v. Carlton & Harris Chiropractic*.<sup>236</sup> In that case, one private party sued another for allegedly violating a statutory prohibition on sending “unsolicited advertisements” by fax. The case implicated the validity of an FCC interpretation of the statute, under which a fax might constitute an “unsolicited advertisement” even if it offered a product or service at no cost. Because the Hobbs Act<sup>237</sup> gives courts of appeals “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of” certain FCC orders,<sup>238</sup> the plaintiff asserted that the district court in which it sued was bound to accept the FCC’s interpretation of the statutory prohibition.

The case reached the Supreme Court, which remanded for further proceedings on certain preliminary questions, as a result of which the Court did not pass on the ability of the district court to review the FCC’s interpretation in the context of a private action for enforcement. Justice Kavanaugh, however, in a concurring opinion joined by Justices Thomas, Alito, and Gorsuch, examined the question in detail.<sup>239</sup> Justice Kavanaugh noted that the Hobbs Act, which applied to the FCC order at issue, permitted interested parties to seek review of the order by filing a pre-enforcement, facial challenge to the rule in a court of appeals within 60 days.<sup>240</sup> Moreover, the Hobbs Act provides that “[t]he court of appeals . . . has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or to determine the validity of” the regulation at issue.<sup>241</sup> Nonetheless, Justice Kavanaugh concluded that the Hobbs Act did not displace a party’s

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<sup>233</sup> *E.g.*, 12 U.S.C. § 4636; 20 U.S.C. § 6083(f)(5), (6); 21 U.S.C. § 399d(b)(5), (6); 29 U.S.C. § 660(a), (b); 33 U.S.C. § 1369(b)(1), (2).

<sup>234</sup> *E.g.*, 33 U.S.C. § 2717(a); 42 U.S.C. § 300j-7(a); 42 U.S.C. § 4915(a).

<sup>235</sup> 5 U.S.C. § 703.

<sup>236</sup> 139 S. Ct. 2051 (2019).

<sup>237</sup> *See* Part IV.B, *supra*.

<sup>238</sup> 28 U.S.C. § 2342(1).

<sup>239</sup> 139 S. Ct. at 2057 (Kavanaugh, J., concurring).

<sup>240</sup> *Id.* at 2058–59.

<sup>241</sup> *Id.* at 2062–63.

ability to bring an as-applied challenge to the FCC order in the context of an enforcement proceeding. Justice Kavanaugh noted that “[w]hen Congress intends to eliminate as-applied judicial review of agency interpretation of statutes in enforcement actions, Congress can, must, and does speak clearly.”<sup>242</sup> The Hobbs Act, he concluded, gives courts of appeals exclusive jurisdiction to consider pre-enforcement, facial challenges to agency actions to which it applies, but it does not clearly negate (and therefore does not negate) a party’s ability to bring an as-applied challenge to an agency action in an enforcement proceeding.<sup>243</sup> Although Justice Kavanaugh’s opinion did not attract a majority of the Supreme Court, it did get four votes, which supports the view that Congress would be well-advised to speak clearly when it desires to prohibit review of agency action in the context of enforcement proceedings.

Finally, Congress should be aware that in some cases, even where Congress does clearly provide by statute that review is not to be had in an enforcement proceeding with regard to any issue that might have been raised in an earlier proceeding, courts may still be reluctant to hold that review is barred. This issue arises particularly with regard to review of agency rules. If Congress provides that review of a rule must be sought within a specified time limit and also that review may not be had in enforcement proceedings with regard to an issue that could have been reviewed previously, it would seem to follow that once the time limit is passed, the rule is immune from challenge even in the context of an enforcement proceeding. However, while the Supreme Court has approved such a scheme as constitutional,<sup>244</sup> it is evident that such a scheme has the potential to lead to a harsh result, as it could mean that a party that might not even have been aware of a rule at the time of its promulgation might later be penalized under the rule (perhaps even criminally) and have no right to challenge its lawfulness. Perhaps for this reason, in cases of this kind courts sometimes avoid the problem by giving a narrow construction to the statutory provision that might bar review.<sup>245</sup>

**Recommendation: Congress should be aware that if a special judicial review statute does not clearly negate the ability of parties to challenge agency action in the context of an enforcement proceeding, parties will have that ability. When Congress desires that parties not be permitted to challenge the validity of an agency action as a defense in an enforcement proceeding, Congress should say so clearly.**

## **K. Other Provisions Prohibiting Judicial Review**

The previous section concerned provisions that prohibit judicial review of agency actions in the context of enforcement actions, having provided other opportunity for such review. In addition, however, some statutes entirely prohibit judicial review of agency action. This

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<sup>242</sup> *Id.* at 2062.

<sup>243</sup> *Id.* at 2062–66.

<sup>244</sup> *See Yakus v. United States*, 321 U.S. 414 (1944).

<sup>245</sup> *E.g.*, *Adamo Wrecking v. United States*, 434 U.S. 275 (1978) (determining that a statute that provided a time-limited mechanism by which to seek judicial review of an EPA “emission standard” and also provided that no review could be had in a subsequent enforcement proceeding of any action that could have been reviewed by that mechanism did not apply because the EPA action at issue was not an “emission standard”); *see Levin, supra* note 107, at 2225–29.

possibility is contemplated in § 701 of the APA, which provides that the whole judicial review chapter of the APA applies “except to the extent that . . . statutes preclude judicial review.”<sup>246</sup>

Wholesale preclusion of judicial review is unusual and judicially disfavored. Courts presume that agency action is subject to judicial review.<sup>247</sup> Only “clear and convincing evidence” of congressional intent to preclude review will overcome this presumption.<sup>248</sup>

Preclusion of review, which is unusual and disfavored, must be distinguished from *channeling* of review, which is commonplace and usually uncontroversial. For Congress to preclude all judicial review of an agency action raises judicial hackles, but for Congress to provide for judicial review while requiring the party seeking it to seek it in a particular forum and in a particular way is routine.

Thus, it is common for specific judicial review provisions to state that review of the kind of agency action that is involved may not be obtained *except* as provided in the statute.<sup>249</sup> Such channeling of review should hardly be considered preclusion of review at all. Indeed, inasmuch as § 703 of the APA provides that “[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute”<sup>250</sup> and permits review to be sought “by any applicable form of legal action” only “in the absence or inadequacy” of a special statutory review proceeding, Congress’s provision of a specific judicial review statute normally precludes other forms of review whether the specific statute says so expressly or not.<sup>251</sup>

Still, statutes do occasionally appear to bar *all* judicial review of certain agency actions.<sup>252</sup> This kind of preclusion is, as noted above, judicially disfavored. The courts have long resisted fully specifying the degree to which the Constitution might limit Congress’s ability to preclude review of agency action.<sup>253</sup> Rather, applying the principle of constitutional avoidance,<sup>254</sup> a court will carefully parse the language of a statute that purports to preclude

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<sup>246</sup> 5 U.S.C. § 701(a)(1). Section 701 also excepts from the application of Chapter 7 cases where “agency action is committed to agency discretion by law.” *Id.* § 701(a)(2). However, statutes involving this exception would typically not refer specifically to judicial review. Rather, they would indicate that a matter is committed to agency discretion by granting the agency authority in such broad terms that there would be no law for a reviewing court to apply. *See, e.g.,* Webster v. Doe, 486 U.S. 592 (1988), in which a statute precluded review by authorizing the Director of the CIA to terminate employees “whenever he shall deem such termination necessary or advisable in the interests of the United States.” Because such statutes make no reference to judicial review, they would not be captured by the searches conducted to create the Statutory Analysis Spreadsheet that is at the heart of this project. Accordingly, cases involving this exception are beyond the scope of this Sourcebook.

<sup>247</sup> *E.g.,* Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

<sup>248</sup> *Id.*

<sup>249</sup> *E.g.,* 7 U.S.C. § 136w-8(g); 8 U.S.C. § 1160(e); 12 U.S.C. § 4623(d).

<sup>250</sup> 5 U.S.C. § 703.

<sup>251</sup> *See, e.g.,* Vander Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1065 (6th Cir. 2014) (“[W]here Congress establishes a special statutory review procedure for administrative action, that procedure is generally the exclusive means of review for those actions.”); General Finance Corp. v. FTC, 700 F.2d 366, 368 (7th Cir. 1983) (“You may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court under 1331 or 1337; the specific statutory method, if adequate, is exclusive.”).

<sup>252</sup> For an example, see note 255, *infra*.

<sup>253</sup> *See* Guide, *supra* note 1, at 16–18.

<sup>254</sup> This principle provides that where a statute is susceptible of alternative constructions, one of which is constitutional and one of which is not, the court will prefer the constitutional construction. Indeed, a court will sometimes prefer a clearly constitutional construction even where the alternative construction is not clearly

judicial review altogether in order to see exactly what agency actions it shields from review. On close examination the statutory language may turn out to be more limited than it might appear to be at first glance, particularly when the language is considered through the lens of constitutional avoidance as well as that of the presumption favoring judicial review.<sup>255</sup>

## L. The Standard of Review

Probably the most important issue in any appellate proceeding is the standard of review.<sup>256</sup> The standard of review determines whether the appellate tribunal gives plenary consideration to an issue and ultimately renders the decision on that issue that *it* thinks is correct, or whether the tribunal shows deference to the decision on that issue by the initial decisionmaker. In the administrative law context, the initial decisionmaker is the administrative agency that took the action under review.

In judicial review of administrative action, the standard of review is generally deferential. First, courts generally show deference to agencies regarding findings of fact.<sup>257</sup> Just as an appellate court shows deference to factual findings by trial courts,<sup>258</sup> a reviewing court shows deference to factual findings by administrative agencies. In a close case, a reviewing court will affirm a factual finding whether or not the court would have made the same finding had it been called upon to determine the facts initially.

Courts also show deference when reviewing agency decisions on questions of policy or other matters requiring the exercise of agency discretion. The APA empowers a court to

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unconstitutional, but raises a serious question as to its constitutionality. *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988).

<sup>255</sup> *See, e.g., Johnson v. Robison*, 415 U.S. 361 (1974). In that case, the Supreme Court narrowly construed 38 U.S.C. § 211 (later amended and renumbered as § 511), which then barred review of “the decisions of the Administrator [of Veterans Affairs] on any question of law or fact under any law administered by the Veterans’ Administration providing benefits for veterans and their dependents or survivors.” The Court held that this language did not bar review of a constitutional challenge to a veterans benefits statute, as the constitutionality of the statute was not a question of law or fact *under* the statute.

<sup>256</sup> *See, e.g., James F. Bogan III, Best Practices in Appellate Litigation*, 2013 WL 574532, \*3 (2013) (“One of the most important considerations (and perhaps the most important) is the standard of review.”); Noella Sudbury, *What Every Lawyer Should Know About Appeals*, 25-Dec Utah Bar. J. 60, 60 (2012) (“Probably the most important lesson I learned as an appellate clerk is that the standard of review matters and must often be litigated as fiercely as the substantive issues in the case.”); Daniel Real, *Appellate Practice in Nebraska: a Thorough, Though Not Exhaustive, Primer in How to Do It and How to Be More Effective*, 39 Creighton L. Rev. 29, 85 (2005) (“Beginning with a clear understanding of the appropriate standard of review governing each issue presented on appeal is one of the most important keys to more effective appellate advocacy.”)

<sup>257</sup> *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (holding that a court should approve an administrative factual finding that is supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”).

<sup>258</sup> *See, e.g. Fed. R. Civ. P. 52(a)(6)* (providing that federal appellate courts should set aside facts found by federal district courts only if they are “clearly erroneous”). The standard of review applied by reviewing courts to facts found by administrative agencies is sometimes said to be “somewhat less intense” than the standard applied by appellate courts to facts found by trial courts. *E.g., Blackletter Statement, supra* note 1, at 38. Whether or not this is true, the main point is that judicial review of agency factfinding is deferential; that is far more important than the precise degree of deference shown. *Cf. United States v. McKinney*, 919 F.2d 405, 422–23 (7th Cir. 1990) (Posner, J., concurring) (suggesting that reviewing authorities can really distinguish only two standards of review, *de novo* and deferential, and that efforts to further distinguish among deferential standards of review are pointless).

overturn an agency action that is arbitrary, capricious, or an abuse of discretion,<sup>259</sup> but the scope of review under this standard “is narrow and a court is not to substitute its judgment for that of the agency.”<sup>260</sup> When an agency’s decision requires the agency to make predictive, scientific judgments within its special area of expertise, a reviewing court should be especially deferential.<sup>261</sup>

Finally, courts also, under the *Chevron* doctrine, show deference to agency determinations on some questions of law.<sup>262</sup> Under *Chevron*, when a court reviews an agency’s interpretation of a statute that the agency administers, the court first determines whether the statute clearly addresses the precise question at issue.<sup>263</sup> If so, both the agency and the court are bound by Congress’s clear command.<sup>264</sup> If, however, the governing statute is silent or ambiguous as to the question at issue, the court determines only whether the agency’s interpretation of the statute is a permissible one.<sup>265</sup> The court must uphold a reasonable agency construction of a statute the agency administers even if the court does not regard it as the *best* construction of the statute.<sup>266</sup> Although this doctrine has come under attack in recent years<sup>267</sup> and might be the subject of judicial or legislative change,<sup>268</sup> it remains the law today.

If Congress says nothing about the standard of review applicable to an agency action, review will be governed by 5 U.S.C. § 706, which has been interpreted to provide for the kind of deferential review noted above. Numerous specific judicial review statutes do, however, contain a provision describing the standard of review that should apply to review of a particular kind of agency action. Surveying these provisions reveals that Congress takes a variety of approaches to specifying the standard of review. Some of the specific judicial review provisions contain a provision regarding the standard of review that is clearly redundant; others make a definite change in the standard of review, while still others fall into a questionable middle area, within which it appears that Congress may have attempted to alter the standard of review, but expressed itself with insufficient clarity, with the result that in at least some cases its efforts are negated by judicial construction. A survey of these provisions follows.

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<sup>259</sup> 5 U.S.C. § 706(2)(A).

<sup>260</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1989).

<sup>261</sup> *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

<sup>262</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See also* note 58, *supra*, and accompanying text (describing *Auer* deference).

<sup>263</sup> *Id.* at 842–43.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 843.

<sup>266</sup> *Id.* at 843 n.11.

<sup>267</sup> *See Michigan v. EPA*, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring) (arguing that “*Chevron* deference raises serious separation-of-powers questions”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* allows “executive bureaucracies to swallow huge amounts of core judicial and legislative power”); Philip Hamburger, *Chevron Bias*, 84 *Geo. Wash. L. Rev.* 1187 (2016) (providing an academic critique of *Chevron*). For an academic defense of *Chevron*, see Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 *Vand. L. Rev.* 937 (2018).

<sup>268</sup> Congress has considered overruling *Chevron* deference statutorily by passing a bill called the “Separation of Powers Restoration Act.” The bill passed the House of Representatives more than once but has not passed the Senate. *See* Siegel, *supra* note 267, at 939–40.

## 1. Redundant Provisions

The reader who has reached this point will not be surprised to learn that many specific judicial review provisions do no more than simply and redundantly state that § 706 of the APA shall apply to judicial review.<sup>269</sup> Of course, § 706 would apply even if the specific judicial review statute were silent as to the standard of review. Accordingly, these provisions accomplish nothing, although they also cause no particular harm.

Other provisions give the appearance of significance by taking the trouble to exclude the operation of some portions of § 706. However, on close examination some of these provisions do no more than exclude the operation of portions of § 706 that would, by their own terms, not apply anyway. This occurs primarily because some specific judicial review provisions state that § 706(2)(E) and/or § 706(2)(F) shall not apply, even though, by their own terms, § 706(2)(E) applies only to formal proceedings under §§ 556 and 557 of the APA or to cases “otherwise reviewed on the record of an agency hearing provided by statute,”<sup>270</sup> and § 706(2)(F) applies only “to the extent that the facts are subject to trial de novo by the reviewing court,” which is applicable only in rare cases. Accordingly, excluding the operation of these provisions in statutes providing for review of many typical agency actions, such as the promulgation of regulations made through the usual, informal, notice-and-comment process provided in § 553 of the APA is redundant, though it is sometimes done.<sup>271</sup>

## 2. Effective Provisions

Some specific judicial provisions make a definite change in the standard of review.

### a) De Novo Review

Most notably, some statutes provide that judicial review of an agency action shall take the form of a de novo trial. For example, the Perishable Agricultural Commodities Act, which prohibits those who deal in perishable agricultural commodities from refusing interstate shipments of such commodities without reasonable cause,<sup>272</sup> authorizes the Secretary of Agriculture to order those who violate the act to pay reparations to injured parties,<sup>273</sup> but it also allows those who become subject to a reparations order to seek judicial review in district court, and it provides that the suit for judicial review “shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated.”<sup>274</sup> Accordingly, on review of a reparations order under this statute, the district court, with the exception stated in the

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<sup>269</sup> See, e.g., 7 U.S.C. §§ 252(d)(2); 12 U.S.C. 1723i; 15 U.S.C. §78u; 16 U.S.C. § 359m-10; 19 U.S.C. § 1337(c); 42 U.S.C. § 3545.

<sup>270</sup> It is rare for a court to determine that this latter part of the section applies. For a rare instance in which it did apply, see *In re Gartside*, 203 F.3d 1305 (Fed. Cir. 2000).

<sup>271</sup> E.g., 15 U.S.C. § 57a(e)(1)(B)(3); 16 U.S.C. § 3636(c); 45 U.S.C. § 915(b)(2).

<sup>272</sup> 7 U.S.C. § 499b.

<sup>273</sup> 7 U.S.C. § 499g.

<sup>274</sup> *Id.*

statute, conducts a new trial “of the entire controversy, including the hearing of evidence as though no previous action had been taken.”<sup>275</sup>

Other agency actions subject to de novo judicial review include determinations by the Secretary of Agriculture that stores have violated the Food Stamp Act by illegally trafficking in food stamps;<sup>276</sup> denials of naturalization;<sup>277</sup> approvals of bank mergers alleged to violate the antitrust laws;<sup>278</sup> refusals to initiate rulemaking proceedings under the Toxic Substances Control Act;<sup>279</sup> and imposition of civil penalties for certain violations of the Controlled Substance Act.<sup>280</sup>

In cases subject to de novo review, the reviewing court makes an independent determination of the issues presented. Although one might argue that a statute calling for “review” inherently contemplates some deference to the initial agency decision, the key term in the phrase “de novo review” is “de novo” rather than “review.”<sup>281</sup>

### *b) Other Effective Variations on the Standard of Review*

In addition to statutes that provide for de novo review, some specific judicial review statutes provide for some other variation on the standard of review. Such statutes may provide for less stringent (i.e., more agency-favoring) review than would otherwise be available, or the reverse. A few examples:

The Immigration and Nationality Act, which provides for judicial review of final orders directing the removal of an alien from the country, provides that in cases of removal of aliens who have committed specified crimes, the reviewing court may review only “constitutional claims or questions of law.”<sup>282</sup> This restriction is not quite as strict as it appears at first, as it permits courts to determine whether the agency correctly applied a legal standard to undisputed or established facts.<sup>283</sup> Still, it precludes review of factual challenges to the final order of removal,<sup>284</sup> which would otherwise be available.

The Alaska Natural Gas Transportation Act (ANGTA) permits review of certain actions of the Federal Energy Regulatory Commission only to determine whether they “will deny rights under the Constitution of the United States,” or are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>285</sup> Cases have confirmed that under this statute courts

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<sup>275</sup> *E.g.*, *Tom Lange Co., Inc. v. A. Gagliano Co., Inc.*, 859 F. Supp. 356, 358 (E.D. Wis. 1994) (quoting *Spano v. Western Fruit Growers, Inc.*, 83 F.2d 150, 151 (10th Cir. 1936)), *rev'd on other grounds*, 61 F.3d 1305 (7th Cir. 1995).

<sup>276</sup> 7 U.S.C. § 2023. De novo review, however, extends only to the Secretary’s determination that a violation of the statute occurred. The Secretary’s choice of punishment is subject to review under a more deferential standard such as abuse of discretion. *E.g.*, *Affum v. U.S.*, 566 F.3d 1150 (D.C. Cir. 2009).

<sup>277</sup> 8 U.S.C. § 1421(c).

<sup>278</sup> 12 U.S.C. § 1828.

<sup>279</sup> 15 U.S.C. § 2620.

<sup>280</sup> 21 U.S.C. § 844a.

<sup>281</sup> *United States v. First City Nat. Bank of Houston*, 386 U.S. 361, 368 (1967).

<sup>282</sup> 8 U.S.C. § 1252(a)(2)(D).

<sup>283</sup> *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020).

<sup>284</sup> *Nasrallah v. Barr*, 140 S. Ct. 1683, 1688 (2020).

<sup>285</sup> 15 U.S.C. § 719h.



may not review covered agency actions for “reasonableness or substantial support on the record.”<sup>286</sup>

A provision of the Dodd-Frank Act expressly states that certain determinations by the Comptroller of the Currency shall receive only *Skidmore* deference.<sup>287</sup> Courts have given effect to this provision.<sup>288</sup>

### 3. Apparent but Possibly Ineffectual Variations on the Standard of Review

As the previous section showed, some specific judicial review statutes genuinely vary the standard of review applicable to agency action. Numerous specific judicial review statutes, however, contain other verbal formulas prescribing a difference in the standard of review that is more apparent than real. In such statutes, it appears that Congress has taken the trouble to provide a standard of review different from the default standard that would apply under the APA, but Congress’s action is unclear. As a result, in some such cases courts interpret the specific judicial review statute to provide for the same standard of review as the default APA standard.

#### a) *Specifying Only Some of the APA Standards in an Apparent Attempt to Limit the Scope of Review.*

Section 706 of the APA lists several bases upon which a court may “hold unlawful and set aside” agency action. Some specific judicial review statutes mention just one of the bases listed in § 706 and state that a court shall set aside an agency action if it fails to satisfy this basis. Of these statutes, some state expressly that the agency action shall be set aside *only* if it fails to satisfy the specified basis, thereby indicating that the other § 706 bases should not apply. Others state that the agency action shall be set aside if it fails to satisfy the specified basis, but do not expressly state that this is the *only* basis on which an agency action may be set aside. Still, where a specific judicial review statute states that a court may overturn an agency action on the basis of one of the bases listed in § 706 and says nothing about the other bases, one might imagine that this statute gives rise to the inference that the other bases do not apply, because otherwise the specific judicial review provision would accomplish nothing. However, courts are

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<sup>286</sup> *Earth Resources Co. v. FERC*, 617 F.2d 775, 777 (D.C. Cir. 1980).

<sup>287</sup> “*Skidmore* deference” is a reference to the pre-*Chevron* decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), in which the Supreme Court said:

[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Id.* at 140. Courts still sometimes apply *Skidmore* deference to an agency’s interpretation of its governing statute in cases in which the court determines that *Chevron* deference is inappropriate. *E.g.* *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001). Some judges, however, regard *Skidmore* as an “empty truism.” *Id.* at 250 (Scalia, J., dissenting).

<sup>288</sup> *Hymes v. Bank of America*, 408 F. Supp. 3d 171 (E.D.N.Y. 2019).

not always scrupulous in attending to these nuances, and if indeed these statutes are attempts to limit the available bases for review, in at least some cases courts have foiled these attempts.

### (1) “Not in Accordance with Law”

For example, 7 U.S.C. § 806c provides that handlers of agricultural products subject to orders of the Secretary of Agriculture may seek judicial review of such orders in district court, but it appears to limit such review to considering whether the Secretary’s action was “in accordance with law.”<sup>289</sup> This limited language, and particularly its inclusion of just one of the bases of review set forth in § 706 of the APA, might be taken to suggest that the district court is not empowered to set aside the Secretary’s action on the other bases specified in § 706. For example, § 706 allows courts to set aside agency action taken “without observance of procedure required by law,” but the phrase “in accordance with law” might be construed to apply only to agency actions that are substantively invalid, as opposed to those issued via some procedural irregularity. Similarly, it is not textually obvious whether an agency action would fail to be “in accordance with law” if the only defect in the action were that it was “unsupported by substantial evidence.”

However, courts applying § 608c have considered whether the Secretary’s actions were supported by substantial evidence<sup>290</sup> and whether the Secretary followed proper procedures in issuing an order.<sup>291</sup> Thus, even though the statutory standard might be construed to be more limited than that provided in § 706 of the APA, courts have in fact understood the requirement that the agency action be “in accordance with law” to incorporate the full range of potential bases of judicial review contained in § 706.<sup>292</sup>

### (2) “Substantial Evidence”

In a similar vein, some specific judicial review statutes authorize a court to review agency action to determine whether the action is supported by “substantial evidence” in a way that appears to *limit* the court’s power of judicial review, as the statute instructs the courts to set aside the agency’s action, or the agency’s findings, *only* if they are unsupported by substantial evidence,<sup>293</sup> or the statute says that the court *shall sustain* the agency’s action if it is supported by substantial evidence.<sup>294</sup> In other cases, the statute simply says that the court shall set aside the action if it is found not to be supported by substantial evidence, potentially giving rise to the inference that other bases of review are not available.<sup>295</sup>

Courts, however, do not always follow these potential variations in the standard of review. For example, the statute providing for penalties under the Magnuson-Stevens Fisheries Conservation and Management Act expressly mentions the substantial evidence test, and while it does not expressly disclaim the other bases stated in § 706 of the APA, it might be thought to do

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<sup>289</sup> 7 U.S.C. § 608c(15).

<sup>290</sup> *E.g.*, *Freeman v. Hygeia Dairy Co.*, 326 F.2d 271 (5th Cir. 1964).

<sup>291</sup> *E.g.*, *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992).

<sup>292</sup> Other statutes using this formulation include 7 U.S.C. §§ 2111, 2620, 2713, 3409; 12 U.S.C. § 4623(b).

<sup>293</sup> *E.g.*, 7 U.S.C. §§ 2621, 2714, 4314.

<sup>294</sup> *E.g.*, 7 U.S.C. § 136n(b); 16 U.S.C. §§ 470aaa-6, 470ff(b)(1).

<sup>295</sup> *E.g.*, 16 U.S.C. § 1858(b).

so by implication.<sup>296</sup> However, courts have not hesitated to conduct review under the entirety of § 706, including reviewing whether the agency action was “in accordance with law.”<sup>297</sup> Even more strikingly, the Federal Insecticide, Fungicide, and Rodenticide Act provides that when a court reviews the EPA Administrator’s registration of an insecticide, “[t]he order of the Administrator *shall be sustained* if it is supported by substantial evidence when considered on the record as a whole.”<sup>298</sup> Taken literally, this sentence might be understood to bar review of the Administrator’s order on any basis other than that the order is unsupported by substantial evidence. Nonetheless, courts have overturned such orders on legal grounds, such as failure to comply with the requirements of the Endangered Species Act.<sup>299</sup>

### (3) “Arbitrary or Capricious”

Other specific judicial review statutes appear to limit review to whether the challenged agency action is arbitrary or capricious. Again, such a provision might be thought to give rise to the inference that review on other bases listed in § 706 is prohibited. But cases do not necessarily support this interpretation.

For example, a provision of the Dodd-Frank Act provides that the Financial Stability Oversight Council may designate nonbank entities for supervision by the Board of Governors of the Federal Reserve if the entities are (in colloquial terms) “too big to fail,”<sup>300</sup> and the statute provides that judicial “[r]eview of such an action shall be limited to whether the final determination made under this section was arbitrary and capricious.”<sup>301</sup> Does this restriction mean that a court cannot overturn such a determination that is, for example, “not in accordance with law”? In the only reported decision under the statute, the court held that the agency’s action in designating a nonbank entity for supervision was arbitrary and capricious because the action departed without explanation from standards the agency had previously adopted.<sup>302</sup> Moreover, the court considered the argument by the nonbank entity that it was statutorily “ineligible” for designation, thereby implicitly indicating that the court could have overturned the agency’s action on the basis of legal error.<sup>303</sup> Thus, even where Congress specifically attempted to limit review to whether the agency action is “arbitrary or capricious,” such review was held to encompass a wide range of potential legal errors.

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<sup>296</sup> See 16 U.S.C. § 1858(b) (“The findings and order of the Secretary shall be set aside by such court if they are not found to be supported by substantial evidence, as provided in section 706(2) of Title 5.”).

<sup>297</sup> See *Pacific Ranger LLC v. Pritzker*, 211 F. Supp. 3d 196 (D.D.C. 2016); *H & L Axelsson, Inc. v. Pritzker*, 16 F. Supp. 3d 353 (D.N.J. 2014).

<sup>298</sup> 7 U.S.C. § 136n(b) (emphasis added).

<sup>299</sup> *Center for Biological Diversity v. EPA*, 861 F.3d 174 (D.C. Cir. 2017). One might justify this decision on the basis that there was not substantial evidence to show that the agency had complied with the ESA. The court, however, did not mention the concept of “substantial evidence” at all (those words do not appear in the court’s opinion); it simply went straight to the legal question of whether the agency had complied with the ESA.

<sup>300</sup> 12 U.S.C. § 5323. The actual statutory formulation is that the designation may be made “if the Council determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States.” *Id.*

<sup>301</sup> *Id.* § 5323(h).

<sup>302</sup> *Metlife, Inc. v. Financial Stability Oversight Council*, 177 F. Supp. 3d 219, 230 (D.D.C. 2016).

<sup>303</sup> *Id.* at 230–33.

## *b) Other Variations that Might Appear to Limit Review*

In some specific judicial review statutes, Congress provides a unique linguistic formula to guide review, and yet courts do not always treat the distinctive formulation as any different from the standard formulation. For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides that on judicial review of specified proceedings “the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”<sup>304</sup> This formidable-sounding language gives the appearance of severely limiting judicial review, beyond the usual principle that a court must uphold an agency’s factual determinations if they are supported by “substantial evidence.”<sup>305</sup> Yet courts, while acknowledging that this language “appears to be narrower” than the usual rule, have “declined to treat the 1996 amendment as working any material change to the standard of review.”<sup>306</sup> These decisions seem correct. The Supreme Court has long made clear that substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>307</sup> Hence, if a factual determination is not supported by substantial evidence, then no reasonable adjudicator could have reached that determination—i.e., any reasonable adjudicator would have been compelled to conclude to the contrary. Thus, the formidable-sounding language of the IIRIRA turns out, on close analysis, to be nothing more than a restatement of the ordinary substantial evidence standard.

Similarly, section 245A of the Immigration and Reform Control Act (IRCA) provides that in specified cases the findings of fact and determinations in the administrative record “shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.”<sup>308</sup> Courts regularly quote this language, and have noted that it provides for a “very narrow” scope of judicial review.<sup>309</sup> Still, as with the IIRIRA language, one may ask how different the standard really is from the ordinary APA standard. Again, an agency’s factual determinations normally need only survive review under the “arbitrary [or] capricious” or “substantive evidence” standards, which require only that the agency’s factual determinations be ones that a reasonable person *might* reach on the agency record.<sup>310</sup> If a factual determination could not survive review under the normal standard, then any reasonable person would have reached a different factual determination based on the record, making it likely that the factual determination could not survive review even under the apparently more agency-favoring standard stated in the IRCA.

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<sup>304</sup> 8 U.S.C. § 1252(b)(4)(B) (emphasis added).

<sup>305</sup> 5 U.S.C. § 706(2)(E).

<sup>306</sup> *Mendez-Donis v. Ashcroft*, 360 F.3d 915, 918 (2004); *see also Sevoian v. Ashcroft*, 290 F.3d 166, 171 (3d Cir. 2002) (noting that the language of IIRIRA is drawn from a Supreme Court case explaining the substantial evidence standard); *Celicopt v. Barr*, 980 F.3d 218, 221 (1st Cir. 2020) (treating the language of IIRIRA as an explanation of “the familiar and deferential substantial evidence standard”); *Suate-Orellana v. Barr*, 979 F.3d 1056, 1060 (5th Cir. 2020) (similarly using the IIRIRA language to explain the substantial evidence standard); *Morales Bribiesca v. Barr*, 979 F.3d 508, 512 (6th Cir. 2020) (same).

<sup>307</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

<sup>308</sup> 8 U.S.C. § 1255a(f).

<sup>309</sup> *E.g.*, *Siddiqui v. Holder*, 670 F.3d 736, 742 (7th Cir. 2012); *Ruginski v. I.N.S.*, 942 F.2d 13, 17 (1st Cir. 1991).

<sup>310</sup> *E.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

### c) *Apparent Attempts to Expand Review*

On the other hand, in some instances Congress provides a variant on the standard of review that appears to make review more stringent (i.e., less agency-favoring) than it would otherwise be, but this apparent distinction is not always judicially respected. The most notable example is *Association of Data Processing Service Organizations, Inc. (ADAPSO) v. Board of Governors of the Federal Reserve System*.<sup>311</sup> In that case, the D.C. Circuit considered a challenge to an agency regulation adopted through notice-and-comment rulemaking under § 553 of the APA. Such a challenge would normally be subject to “arbitrary or capricious” review under § 706 of the APA. The APA’s provision for “substantial evidence” review would not apply to such a case, as that provision applies only to formal agency proceedings conducted in accordance with §§ 556 and 557 of the APA and not to informal rulemaking under § 553.

However, a specific judicial review statute, 12 U.S.C. § 1848, subjected the regulation to “substantial evidence” review. This statutory provision might have been taken to suggest that Congress intended the regulation to be subject to a different, more stringent, standard of review than the usual “arbitrary or capricious” review, inasmuch as the statute would be redundant if it merely provided for the regulation to be subject to the same standard of review that would apply anyway under the APA. Nonetheless, the D.C. Circuit, in a decision written by one future Supreme Court Justice for a panel that included another,<sup>312</sup> determined that there was no distinction between the “arbitrary or capricious” review that usually applies to agency regulations and the “substantial evidence” review that applied by virtue of 12 U.S.C. § 1848. Although the court acknowledged that the “substantial evidence” standard had “acquired a reputation for being more stringent”<sup>313</sup> than the “arbitrary or capricious” standard, it held that “their operation is precisely the same,”<sup>314</sup> because it would necessarily be arbitrary or capricious for an agency to act on the basis of a factual determination that was not supported by substantial evidence.<sup>315</sup> The D.C. Circuit’s analysis has been widely, if not universally, followed.<sup>316</sup>

## 4. *Implications of the Above Analysis*

In light of the above survey of specific judicial review provisions concerning the standard of review, one thing is certainly clear: legislatively attempting to vary the standard of review is a tricky business. There seems to be a fairly strong judicial preference for following the usual standard of review. Even where Congress provides an unusual linguistic formula to govern the

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<sup>311</sup> 745 F.2d 677 (D. C. Cir. 1984).

<sup>312</sup> Then-Judge Antonin Scalia wrote the court’s opinion, and the panel included then-Judge Ruth Bader Ginsburg.

<sup>313</sup> 745 F.2d at 685.

<sup>314</sup> *Id.* at 683.

<sup>315</sup> *Id.* at 684.

<sup>316</sup> See Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 Chi.-Kent. L. Rev. 487, 540–41 (2019) (citing cases from every other circuit that favorably cite the D.C. Circuit’s *ADAPSO* opinion or otherwise acknowledge the equivalence of the “arbitrary or capricious” and “substantial evidence” standards). *But see id.* at 541 (“Occasionally, it is true, one can still find cases that assert that the substantial evidence test is a stricter standard than the arbitrary-and-capricious test.”); *Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1213 (5th Cir. 1991) (“[T]he arbitrary and capricious standard found in the APA and the substantial evidence standard found in TSCA are different standards, even in the context of an informal rulemaking.”).

standard of review in a specific proceeding for judicial review of administrative action, courts often end up applying the usual standard of review anyway. There are several potential reasons for this judicial tendency.

In part, the judicial reluctance to depart from the usual formulas for the standard of review may stem from practical difficulties in actually implementing different gradations within deferential review. As Judge Posner was fond of observing, “there are limits to the fineness of the distinctions that judges are able to make.”<sup>317</sup> While characterizing his view as “heretical[],”<sup>318</sup> Judge Posner maintained that “there are really only two standards of review—plenary and deferential.”<sup>319</sup> A reviewing court can decide what it thinks of a question, or it can decide whether a reasonable person might have ruled as did the initial decider, but any attempt to implement any finer gradations of review than that is impractical.<sup>320</sup> As then-Judge Scalia remarked in the *ADAPSO* case discussed above, “There is surely little appeal to an ineffable review standard that lies somewhere in-between the quantum of factual support required to go to a jury (the traditional ‘substantial evidence’ test) and the ‘preponderance of the evidence’ standard that would apply in de novo review.”<sup>321</sup> Not everyone agrees, to be sure,<sup>322</sup> but the practical difficulty of implementing bespoke standards of review, when their difference from the usual standards is almost indescribable, surely explains part of the judicial tendency to disregard congressional attempts to vary the usual standard of review.

An additional reason for the reluctance of courts to depart from the usual standards of review is that, to the extent a specific judicial review provision apparently provides less stringent judicial review than is usually available, it might run into the “presumption of reviewability,” which favors judicial review of agency action, and which can be overcome only by clear and convincing evidence of congressional intent to preclude review.<sup>323</sup> While a variation in the standard of review that allows some review to occur might appear to be a mere “channeling” of review, which is usually permissible,<sup>324</sup> the Supreme Court has cited the presumption of reviewability as a consideration causing it to give a narrow construction to apparently limiting language in a specific judicial review statute.<sup>325</sup> Thus, if the standard of review is too agency-favoring, at some point it implicates the presumption of reviewability.

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<sup>317</sup> *Reynolds v. City of Chicago*, 296 F.3d 524, 527 (7th Cir. 2002) (per Posner, J.).

<sup>318</sup> *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995) (per Posner, J.).

<sup>319</sup> *Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir. 1991); see also *Boyd*, 55 F.3d at 242 (“There are more verbal formulas for the scope of appellate review (plenary or de novo, clearly erroneous, abuse of discretion, substantial evidence, arbitrary and capricious, some evidence, reasonable basis, presumed correct, and maybe others) than there are distinctions actually capable of being drawn in the practice of appellate review.”).

<sup>320</sup> See *United States v. McKinney*, 919 F.2d 405, 422–23 (7th Cir. 1990) (Posner, J., concurring) (explaining de novo and deferential review and denying the existence of any intermediate standard of review between them).

<sup>321</sup> 745 F.2d at 685.

<sup>322</sup> See *Dickinson v. Zurko*, 527 U.S. 150 (1999) (holding that the Federal Circuit must review findings of fact made by the Patent and Trademark Office under the “arbitrary or capricious” standard, not the “clearly erroneous” standard (although noting that the difference “is a subtle one”)); *International Brotherhood of Electrical Workers v. NLRB*, 448 F.2d 1127, 1142 (D.C. Cir. 1971) (Leventhal, J., concurring) (referring to a case in which an agency’s factual findings are “supported by substantial evidence” and yet are “clearly erroneous” as “the case dreamed of by law school professors”).

<sup>323</sup> E.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

<sup>324</sup> See Section V(K), *supra*.

<sup>325</sup> *Guerrero-Lasprilla v. Barr*, 140 S. Ct. at 1069–70.

Some courts have also based their reluctance to depart from the standards of review specified in § 706 of the APA on § 559 of the APA. This section provides that subsequent statutes cannot “supersede or modify” the APA unless they do so expressly.<sup>326</sup> In light of this requirement, some courts have concluded that even if a specific judicial review statute includes an apparent variation on the standard of review, that variation should be given effect only if Congress’s “intent to make a substantive change” is clear.<sup>327</sup>

Finally, the usual standards of review are tried and true. Through application in innumerable cases over decades, courts have acquired great familiarity with them. The usual standards are, moreover, quite deferential to agencies—sufficiently so that agencies should not, at least usually, require more protection from judicial review than the usual standards give them.

One thing that certainly seems like a waste of effort is for Congress to impose an unusual statutory formula that, upon examination, is really only a different way of expressing the usual standard of review. As noted above, the IIRIRA formula, that courts should uphold factual findings in specified immigration cases “unless any reasonable adjudicator would be compelled to conclude to the contrary”<sup>328</sup> sounds formidable but is really only a restatement of the usual “substantial evidence” test. Inserting such an unfamiliar form of words that in the end only leads courts back to the usual standard can accomplish no great benefit, but gives rise to the risk that courts will assume that by using different language, Congress must have desired to work some real difference in the standard of review. It would be better to say nothing.

Finally, if Congress does desire to vary the usual standard of review, the above discussion shows that Congress needs to do so clearly and unequivocally. Otherwise it runs a distinct risk of having its desires thwarted by judicial construction.

### **Recommendations:**

**1. Congress should vary the standard of review for judicial review of agency action only when it has a compelling reason to do so.**

**2. Congress should be aware that courts prefer to conduct judicial review of agency action under the familiar standards of review provided in 5 U.S.C. § 706 and may disregard congressional attempts to vary the standard of review that are not sufficiently clear. When Congress desires to vary the standard of review, it should make its desire to do so unequivocally clear in the text of the specific judicial review statute. The statute should also make clear exactly what the difference between its desired standard of review and the usual standard of review is.**

**3. Congress should not, in a specific judicial review statute, use a different form of words to prescribe a standard of review that is the same as the standard that would apply anyway by virtue of 5 U.S.C. § 706.**

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<sup>326</sup> 5 U.S.C. § 559.

<sup>327</sup> Ass’n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 677, 685–86 (D.C. Cir. 1984).

<sup>328</sup> 8 U.S.C. § 1254(b)(4)(B).

## VI. A Checklist for Congress

Congress creates or amends judicial review statutes frequently. The Statutory Analysis Spreadsheet contains some 650 specific judicial review statutory provisions with dates ranging from 1910 to 2017, which suggests that Congress has on average created about 6 specific judicial review provisions every year. Moreover, the rate has accelerated. The table contains about 250 statutory provisions passed since 1990, so from 1990 to 2017 Congress created specific judicial review provisions at a rate of almost 9 per year. A single statute may contain multiple specific judicial review provisions, so these figures do not mean that Congress, on average, passes a statute containing a specific judicial review provision 6 or 8 separate times per year. Still, the point is that Congress acts in this area frequently.

It would therefore likely be useful to Congress to have a checklist of points to consider as it drafts specific judicial review statutes. Such a checklist would facilitate Congress's consideration of the necessary points and help Congress avoid forgetting to consider some important matter that needs to be considered in passing such a statute.

Work on this Sourcebook enables the provision of such a checklist for Congress. The Checklist appears below. When Congress is considering passing a specific judicial review statute, it should remember to consider the following points.

### **CHECKLIST FOR STATUTES PROVIDING FOR JUDICIAL REVIEW OF AGENCY ACTION**

- **What Provisions are Necessary?**

\_\_\_ Bear in mind that the Administrative Procedure Act (APA) automatically provides for judicial review of agency action even if the specific statute governing the action says nothing about judicial review.

\_\_\_ If specifying anything other than the time and place to seek review, consider whether what is being specified is necessary. A few common provisions that are unnecessary are provisions stating that:

- Seeking review does not by itself operate as a stay of the agency action.
- Factual determinations by the agency, if supported by substantial evidence, are conclusive.
- The agency shall file the record of its proceeding with the reviewing court (if the court is a court of appeals).
- After the reviewing court issues its decision, further review will be available in a court of appeals (if the initial court is a district court) and in the Supreme Court by writ of certiorari (if the initial court is a court of appeals).



- **Specifying the Time Within Which to Seek Review**

- \_\_\_ Specify the time within which a party must seek judicial review of the agency’s action. (Bear in mind that if the time is not specified, parties will normally have six years to seek review.)
- \_\_\_ Specify the time by stating that a party may seek review “within” or “not later than” a specified number of days after the agency action.
- \_\_\_ Avoid specifying the time by stating that a party must seek review “before” or “prior to” the expiration of a specified number of days from the agency action.
- \_\_\_ Ensure that the event that starts the time for seeking review is clear.
- \_\_\_ When providing for review of regulations, provide that the time for seeking review starts when the regulations are “published” in the *Federal Register*.

- **Specifying Where to Seek Review**

- \_\_\_ Bear in mind that placing initial review in a district court is often not a good use of judicial resources, as judicial review of agency action typically does not require the factfinding capacity of a district court.
- \_\_\_ Consider placing review in a court of appeals rather than district court unless special considerations such as the volume of cases make placing review in courts of appeals inappropriate.
- \_\_\_ For further guidance on this point, see ACUS Recommendation 75-3.

- **Specifying How to Seek Review**

- \_\_\_ If providing for review to be sought initially in a court of appeals, provide that parties may seek review by filing a “petition for review” with the court in which review is sought. Avoid providing that parties shall file a “notice of appeal” or other document.
- \_\_\_ If providing for review to be sought initially in a district court, provide that parties may seek review by filing a “complaint” with the court in which review is sought. Avoid providing that parties shall file a “notice of appeal,” “petition for review,” or other document.
- \_\_\_ Do not specify the required content of the document used to initiate review.

- **Service of the Document Initiating Review**

\_\_\_ Provide either that the party initiating review or the clerk of the court in which review is initiated shall serve the document initiating review on the agency that made the decision of which review is sought.

\_\_\_ Do not provide that service must be made “simultaneously” with filing.

- **Issue Exhaustion**

\_\_\_ Consider whether to provide that a party seeking review may not raise any issue in court that the party has not raised before the agency. If a statute says nothing on this point, courts will decide it by applying judicially developed doctrines.

\_\_\_ In determining whether to impose an issue exhaustion requirement, bear in mind that such requirements are most appropriate with regard to agency proceedings that are adjudicatory and that closely resemble adversarial judicial proceedings.

\_\_\_ Issue exhaustion requirements may be less appropriate for rulemaking proceedings. Consider ACUS Statement # 19 for guidance on whether it is appropriate to impose an issue exhaustion requirement for a rulemaking proceeding.

- **Prohibition of Review in Enforcement**

\_\_\_ Bear in mind that an agency action is usually subject to challenge in the context of an enforcement proceeding

\_\_\_ If desiring to prohibit challenge in the context of enforcement, do so clearly.

- **Standard of Review**

\_\_\_ Bear in mind that the APA provides a standard of review, *see* 5 U.S.C. § 706, and that it is usually unnecessary for a specific judicial review statute to say anything about the standard of review.

\_\_\_ Alter the standard of review only for compelling reasons.

\_\_\_ Bear in mind that attempts to alter the standard of the review are often the subject of judicial resistance.

\_\_\_ If desiring to alter the standard of review, do so clearly.

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