ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Choice of Forum for Judicial Review of Agency Rules

Committee on Judicial Review

Draft Recommendation for Committee | April 3, 2024

Final rules adopted by federal agencies are generally subject to review in the federal courts.[1] Choosing the appropriate forum for judicial review of rules requires careful consideration of a number of factors, including the significance of an agency's rules, the completeness of the administrative record underlying such rules, and the volume of actions challenging validity of such rules.[2]

In a series of recommendations adopted in the 1970s, 1980s, and 1990s, the Administrative Conference sought to identify principles to guide Congress in making such choices. The most significant was Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*, which recommended that, in the case of rules adopted after notice and comment, Congress should generally provide for direct review by a court of appeals whenever "an initial district court decision respecting the validity of the rule will ordinarily be appealed" or "the public interest requires prompt, authoritative determination of the validity of the rule."[3] Subsequent recommendations opposed altering the ordinary rules governing venue in district court actions against the United States,[4] set forth a principle for determining when it is appropriate to give the Court of Appeals for the D.C. Circuit exclusive jurisdiction to review agency rules,[5] and offered guidance to Congress on the factors it should consider in determining

[1] *See* 5 U.S.C. § 702.

[2] *See generally* Joseph W. Mead, Choice of Forum for Judicial Review of Agency Rules (Mar. 15, 2024) (draft report to the Admin. Conf. of the U.S.).

[3] 40 Fed. Reg. 27,926 (July 2, 1975).

[4] Admin. Conf. of the U.S., Recommendation 82-3, *Federal Venue Provisions Applicable to Suits Against the Government*, 47 Fed. Reg. 30,706 (July 15, 1982).

[5] *Id*.

whether to assign responsibility for review to a specialized court.[6] The Conference also addressed the choice of forum for judicial review of rules adopted under specific statutes.[7]

Several years ago, the Conference undertook an initiative to identify and review all statutory provisions in the *United States Code* governing judicial review of federal agency rules and adjudicative orders.[8] Based on that initiative, ACUS adopted Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*,[9] which recommended that Congress address statutory provisions that create unnecessary obstacles to judicial review or overly complicate the process of judicial review. The initiative also prompted questions regarding "whether Congress should specify where judicial review should be sought with regard to agency actions that are not currently the subject of any specific judicial review statute."[10]

In this Recommendation, the Conference reconsiders the principles that should guide Congress in choosing the appropriate forum for judicial review of agency rules and in drafting provisions that govern the choice of forum. As described below, the Conference recommends that, in drafting such provisions, Congress clearly specify the court in which review may be sought and offers principles for choosing the appropriate forum. For actions filed in district courts, the Recommendation urges Congress to provide for the consolidation in a single district of multiple challenges to an agency rule and provide for the random assignment of cases to district judges. Finally, the Recommendation identifies several sources of ambiguity that Congress should avoid in drafting choice-of-forum provisions. While this Recommendation offers drafting advice to Congress, agencies may also find it useful in responding to congressional requests for technical assistance.[11]

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[6] Admin. Conf. of the U.S., Recommendation 91-9, *Specialized Review of Administrative Action*, 56 Fed. Reg. 67,143 (Dec. 30, 1991).

[7] Admin. Conf. of the U.S., Recommendation 76-4, *Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act*, 41 Fed. Reg. 56,767 (Dec. 30, 1976); Admin. Conf. of the U.S., Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 Fed. Reg. 33,851 (July 24, 1991).

[8] *See* JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES 33 (2021).

[9] 86 Fed. Reg. 53,262 (Sept. 27, 2021).

[10] *Id*. at 53,262, n.7.

[11] *See* Admin. Conf. of the U.S., Recommendation 2015-2, *Technical Assistance by Federal Agencies in the Legislative Process*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

Determining the Court in Which to Seek Review

By default, parties may seek review in a district court according to the usual rules governing venue. Although this approach may be appropriate in some contexts, direct review by a court of appeals is often more appropriate. For one, a district court proceeding is often unnecessary when an agency has already compiled a record that is adequate for judicial review, there are no disputed issues of fact, and further appeal is likely. Allowing parties to choose the district court in which to seek review also creates opportunities for forum shopping to a greater extent than when review is sought in a court of appeals. For these and other reasons, Congress has in many contexts provided for direct review of agency rules by a court of appeals. And in a minority of statutes, Congress has required parties to seek review in a single tribunal—either a specific district or appeals court or a specialized court.

In this Recommendation, the Conference generally reaffirms its earlier recommendations that Congress ordinarily should provide for direct review of agency rules by a court of appeals. However, the Conference believes that this principle should apply to all rules having the force and effect of law,[12] not just those adopted after notice and comment. This accounts for the fact that agencies may promulgate rules having the force and effect of law without prior notice and comment.[13] It also accounts for the fact that the Conference has encouraged agencies to provide notice and solicit public comment on significant interpretive rule and policy statements, which typically lack the force and effect of law.[14]

Commented [MAB1]: What do we recoomend about Trump Muslim ban, or DACA, wicih many thought wee rules (not labeled as such).? Discovery needed in some of those cases (also in census case), and so DC better. I am not pressing to include them in CA, but we should be clear. If agency wants CA, it can call its action a rule and get it.

Commented [MAB2]: Judicial review of agency agency, not venue.

Commented [MAB3]: If preliminary relief is sought, it will be decided in the first instance by three judges if the case must be filed in a court of appeals.

Commented [MAB4]: Is that correct? Ido you mean the Camp Jeuen cases now in EDNC?

Commented [JG5]: Question for committee: Should the preamble say anything about horizontal jurisdictional choices?

Commented [MAB6R5]: Not for CA because 2112 hanldes multiple appeals and we do not basis for other recommendations.

Commented [MAB7]: I would give some examples in text, such as good cause & military rules.

Commented [MAB8]: Not sure I understand import of last sentence. Does it mean that those cases go to CA? Even for guidance whih is generally not reviewable?

[12] Chrysler Corp. v. Brown, 441 U.S. 281, 301–03 (1979).

[13] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroverisal and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (Aug. 18, 1995); Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, 48 Fed. Reg. 31,180 (July 7, 1983).

[14] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

Assigning Challenges to District Courts

In 1980, the Conference recommended that Congress amend 28 U.S.C. § 2112 to provide for the consolidation of judicial proceedings in a randomly selected court of appeals when 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.[15] Congress made such amendments in 1988.[16] But no such mechanism exists for civil actions filed in the district courts. Recognizing that some statutes may provide for review of agency rules by district courts, this Recommendation urges Congress to amend the laws governing the assignment to district courts of actions challenging the validity of agency rules. It recommends that Congress adopt a mechanism, similar to the one provided for in 28 U.S.C. § 2112, for consolidating challenges to a single rule pending before multiple district courts.

This Recommendation also urges Congress, after consultation with the Judicial Conference of the United States, to direct that cases be assigned on a random basis to district judges. This approach is consistent with a policy recently announced by the Judicial Conference.[17]

Commented [MAB9]: Are there many situations in which there are a large number of these cases so that a lottery makes sense? Also 2112 is needed & it works, because there is statutory deadline (often 60 days) to file, whereas rules ending up in DCt rarely have such deadlines.

Commented [MAB10]: If I am right above, then not sure this is needed. Also, this is a much bigger and in some ways different problem than the main one we are addressing (patents and challenges to statutes etc)

Avoiding Drafting Ambiguities

Courts have faced at least three sources of ambiguity in interpreting choice-of-forum provisions. First, some statutes specify the forum for review of "orders" without specifying the forum for review of "rules" or "regulations." This can lead to uncertainty regarding whether "orders" includes rules, particularly because the Administrative Procedure Act defines an "order" as any agency action other than a rule.[18] Second, some statutes are unclear as to the forum in which a party may file an action challenging the validity of a rule. A lack of clarity may result

[15] 28 U.S.C. § 2112. The mechanism for consolidating multiple challenges in a single court of appeals was based on a prior recommendation of the Conference. *See* Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980).

[16] Pub. L. No. 100–236, 101 Stat. 1731 (1988).

[17] *Conference Acts to Promote Random Case Assignment*, JUD. CONF. OF THE U.S. (Mar. 12, 2024), https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment.

[18] 5 U.S.C. § 551(6).

from statutory silence or a choice-of-forum provision of uncertain scope. Third, many statutes are unclear whether choice-of-forum provisions regarding rules apply only to rules promulgated by an agency or whether they apply also to other rule-related actions such as withdrawal of a rule, delay or inaction in promulgating a rule, or the grant or denial of a petition for rulemaking.

This Recommendation urges Congress, in drafting new or amending existing provisions governing the choice of forum for the review of rules,[19] to avoid using the term "orders" to encompass rules; to state clearly the forum in which judicial review of rules is available; and to state clearly whether such provisions apply to rule-related actions other than the promulgation of a rule.

RECOMMENDATION

1. When drafting a statute that provides for judicial review of agency actions, Congress should state explicitly whether actions taken under the statute are subject to review by a district court or, instead, subject to direct review by a court of appeals. If Congress intends to establish separate requirements for review of rules, as distinguished from other agency actions, it should refer explicitly to "rules" and not use the term "orders" to include rules.
2. When drafting a statute that provides for judicial review of agency rules, Congress ordinarily should provide that generally applicable rules having the force and effect of law, whether or not promulgated after notice and comment, are subject to direct review by a court of appeals.
3. Congress, in consultation with the Judicial Conference of the United States, should amend 28 U.S.C. § 137 to provide that, when a district court has jurisdiction and venue over a civil action that calls into question the validity of an agency rule, the case must be assigned on a random basis to a district judge drawn from the entire pool of judges in that district.

[19] This Recommendation provides advice to Congress in drafting future statutes. It should not be read to address previously enacted statutes that courts have interpreted.

Commented [MAB11]: Withdrawal is clearly a rule – others less so – should all be treated the same by ACUS/Congress?

Commented [KN12]: Question for Committee: Should this recommendation specifically refer back to Rec. 75-3 and its language (below)?

Direct review by a court of appeals is generally appropriate whenever:
a)An initial district court decision respecting the validity of a rule will ordinarily be appealed,
b)The public interest requires prompt, authoritative determination of the validity of the rule, or
c)A statute provides for direct review of adjudicative orders by a court of appeals.

Commented [MAB13R12]: I think we need to say, probably in the preamble whether we are modifying 75-3 or re-stating its principles, but leaving the result unchanged. I think we are modifying it.

Commented [MAB14]: Does that incude senior judges.

Commented [MAB15]: I know we wre ACUS, but this problem is much bigger than agency rules.

4. Congress, in consultation with the Judicial Conference of the United States, should amend 28 U.S.C. § 1407 to provide (1) that an agency, board, commission, or officer shall notify the judicial panel on multidistrict litigation if civil actions are instituted in courts in two or more districts seeking review of the same rule within ten days after the date of the publication of the final rule in the *Federal Register*, where the rule is so published, and (2) that upon receiving such notice, the judicial panel on multidistrict litigation shall, by means of random selection, designate one district court, from among the district courts in which the civil actions have been instituted and received within the ten-day period, in which the record is to be filed, and shall issue an order consolidating the civil actions in that district court.

Commented [JG16]: Question for Committee: 28 U.S.C. 2112 provides a ten-day window. Given the differences in procedures between district courts and courts of appeals, is 10 days an appropriate amount of time?

Commented [MAB17]: I oppose this recommendation as an inappropriate use of 1407 for reasons I will explain.

Commented [KN18]: Questions for Committee:
(1) Should this just provide exact statutory language?
(2) Should venue transfer provision also be amended?