ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Choice of Forum for Judicial Review of Agency Rules

Committee on Judicial Review

Proposed Recommendation for Plenary | June 13, 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 procedures used to promulgate those rules, the scope or impact of an agency's rules, and the completeness of the administrative record underlying 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 choosing the appropriate forum for judicial review of agency rules. 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 in the courts 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 District of Columbia Circuit exclusive jurisdiction to review agency

Commented [CMA1]: Proposed Amendment from Public Member Jennifer Dickey:

Propose striking sentence 2 of the proposed recommendation (lines 2-5). The sentence is too high-level and does not seem to prefigure what comes after it in this preamble. It would be stronger to proceed straight to the discussion of the Conference's work in this area and then to the points the Conference wishes to add to its body of work.

[1] *See* 5 U.S.C. § 702. This Recommendation does not address judicial review of adjudicative orders, including those that announced principles with rule-like effect or agency actions regarding petitions for rulemaking. Additionally, the Recommendation does not address suits challenging agency delay or inaction in promulgating rules. *See* Telecomms. Rsch. & Action Ctr. v. Fed. Commc'ns Comm'n, 750 F.2d 70, 72 (D.C. Cir. 1984).

~~[2] *See generally* Joseph W. Mead, Choice of Forum for Judicial Review of Agency Rules (May 9, 2024) (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).

rules,[5] and offered guidance to Congress on the factors it should consider in determining 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 a study 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. That Recommendation 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 revisits the principles that should guide Congress in choosing the appropriate forum for judicial review of agency rules and in drafting clear provisions that govern the choice of forum. While this Recommendation offers drafting advice to Congress, agencies may also find it useful in responding to congressional requests for technical assistance.[11] ~~The Conference also recommends that Congress amend 28 U.S.C. § 137 governing the assignment of certain cases to district judges.~~

Commented [CMA2]: Proposed Amendment from Public Member Jennifer Dickey. (See attached comment and parallel amendment at lines 50-65 and 95-97.)

[5] *Id.*

[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

Absent a statute providing otherwise, parties may seek judicial review of agency rules in a district court. Although this approach may be appropriate in some contexts, direct review by a court of appeals is often more appropriate. For one, district court proceedings are less necessary when an agency has already compiled an administrative record that is adequate for judicial review and further appeal of a district-court decision 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.[12] For these and other reasons, Congress has in many contexts provided for direct review of agency rules in the courts of appeals. And in a minority of statutes, Congress has required parties to seek review in a single, specified tribunal.

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. The Conference believes that this principle is particularly important for rules promulgated ~~after~~ through public notice and opportunity for comment. Such procedures produce a record that is conducive to review by an appeals court without need for additional development or factfinding, and drawing the line at rules promulgated after public notice and opportunity for comment provides a relatively clear jurisdictional rule.

Avoiding Judge Shopping

Rules specifying a forum for judicial review may have an effect on a potential litigant's ability to seek out a forum they believe will be most favorable to their arguments. Forum shopping has significant policy consequences. For example, it may cause the public to view the courts as partisan or to view litigation as just a game. The Conference recognizes that forum shopping is a complicated issue and does not seek to provide a full treatment of that issue in this Recommendation at this time.

[12] *See* Mead, *supra* note 2; Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980).

This Recommendation addresses one part of that complicated issue. Many districts are subdivided into divisions with a limited number of judges or, in some cases, even only one judge. The federal venue statute does not provide that district court cases must be brought in a particular division when a rule issued by a federal agency is challenged. This raises concerns that litigants will choose to bring a case in a division with a particular judge who might resolve their case favorably—a concern that Chief Justice Roberts acknowledged in the 2021 year-end report on the federal judiciary.[13] Consistent with the Chief Justice's report, the Judicial Conference of the United States recently announced a policy addressing these concerns and advocating that cases be assigned randomly to district judges.[14] The Conference recommends that Congress amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar, restrain, vacate, or mandate the enforcement of a federal agency rule or policy with regard to any person—that is, on a universal basis—not just the particular plaintiff who challenged the rule or policy in federal court. In this respect, it is consistent with, although not identical to, a policy of the Judicial Conference under which "[d]istrict courts should apply district-wide assignment to . . . civil actions seeking to bar or mandate nationwide enforcement of a federal law, including a rule, regulation, [or] policy . . . whether by declaratory judgment and/or any form of injunctive relief."[15]

As noted, the Conference recognizes that this recommendation forms only a small piece of the challenge of addressing forum shopping. The Conference also recognizes that discussions of forum shopping in this context often also implicate other complex issues, such as the use of nationwide injunctions. To "reduce unnecessary litigation in the regulatory process" and "improve the effectiveness of laws applicable to the regulatory process,"[16] the Conference encourages Congress to continue to consider these difficult and important issues.

Commented [SC3]: The Judicial Conference of the United States will publish the policy in May. The manager's amendment for the plenary session will propose modifying this footnote to cite the published policy and not the press release.

Commented [CA4]: Proposed Amendment from Council

Commented [CMA5]: Proposed Amendment from Public Member Jennifer Dickey to strike lines 50-65. (See attached comment and parallel amendments at lines 32-33 and 95-97.)

[13] U.S. SUPREME COURT, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[14] *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.

[15] *Id.*

[16] 5 U.S.C. § 591.

Courts have faced two sources of ambiguity in interpreting choice-of-forum provisions which this Recommendation addresses.[17] 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 from statutory silence or a choice-of-forum provision of uncertain scope.

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 rules, Congress ordinarily should provide that rules promulgated using notice-and-comment procedures are subject to direct review by a court of appeals.
2. Congress should amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar or mandate universal enforcement of a federal agency rule or policy.

[17] The Committee on Judicial Review, from which this Recommendation arose, identified a third source of ambiguity: Many statutes are unclear as to 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 delay or inaction in promulgating a rule or the grant or denial of a petition for rulemaking. This Recommendation does not address this ambiguity. The Committee on Judicial Review has suggested it for future study by the Conference.

[18] 5 U.S.C. § 551(6).

[19] This Recommendation provides advice to Congress in drafting future statutes. It should not be read to address existing statutes.

Commented [CMA6]: Comment from Special Counsel Jeffrey Lubbers:

A more substantive question I might raise has to do with singling out "rules promulgated using notice-and-comment procedures" for court-of-appeals review. If Congress were to use that dividing line in legislation, what would that mean for legislative rules that have been issued without N & C because they qualified for an exemption in section 553? Would those have to be challenged in district court? Would such a result lead agencies to feel they should gratuitously allow N & C simply to have the review forum be in the court of appeals?

Commented [CMA7]: Proposed Amendment from Public Member Jennifer Dickey to strike Recommendation 2. (See attached comment and parallel amendments at lines 32-33 and 50-65.) See also Comment from Senior Fellow Ronald M. Levin (attached) in response.

3. 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.

Proposed Amendments from Public Member Jennifer Dickey on *Choice of Forum for Judicial Review of Agency Rules*

Propose striking sentence 2 of the proposed recommendation (lines 2-5). The sentence is too high-level and does not seem to prefigure what comes after it in this preamble. It would be stronger to proceed straight to the discussion of the Conference's work in this area and then to the points the Conference wishes to add to its body of work.

Propose striking recommendation #2 (and lines 32-33 and 50-65) for several reasons. First, this has been a matter of significant controversy and discussion amongst Congress and the judiciary over the last few months. It is not an issue that has gone unnoticed and needs the Conference to shine a light on it or provide expertise. To the contrary, wading into this issue now could have negative consequences for the Conference's bipartisan support in Congress, which is necessary both for the Conference's budget and for action on some of its other projects (for example, our recommendation on legislation to increase proactive disclosure of agency legal materials).

Second, recommendation #2 seems to be at cross-purposes with recommendation #1. If the Conference believes that the best course of action is that judicial review of most agency rules should go straight to the federal courts of appeals, then why would the Conference suggest amending the assignment practices of such actions in district courts? The Conference should instead focus on encouraging Congress to send more cases involving judicial review of agency rules straight to the appellate court.

Third, the preamble does not adequately support recommendation #2. The sole rationale given seems to be avoiding judge shopping, but the preamble does not explain why judge shopping is of particular concern in this context as opposed to others—bankruptcy, patent suits, affirmative suits by the federal government, etc. Perhaps the argument is that the Conference's particular interest is administrative law, but recommendation #2 deals with only a subset of such cases. Indeed, the preamble is so sparsely reasoned that it is notable that the description of recommendation #2 in the preamble does not even match the recommendation text. Indeed, the preamble at line 59 seems to unwittingly take sides in the debate about the meaning of "vacatur" in the APA (i.e. does it mean universal vacatur or as to the person) by suggesting that universal vacatur is appropriate, contrary to the position the executive branch has taken in the Supreme Court under the last two Administrations. Worst of all, the judge shopping rationale seems to endorse the idea that our judges do not bring to each case their best efforts to apply the law to the facts, but rather a bias toward or against a particular plaintiff. Particularly given the current political discussions taking place about the American judicial system (recusal issues, trials of high-profile political figures), it does not seem wise for us to be wading into these waters.

Fourth, the preamble does not respond to the countervailing concerns that have been raised about division-specific assignments. For example, under the current special venue rules that apply to APA suits, lawsuits against the federal government may ordinarily be filed in any district in which at least one of the plaintiffs resides. Plaintiffs residing in compact districts will feel little effects from a rule requiring district-wide assignment. But plaintiffs residing in sprawling districts (typically in more rural areas or geographically larger states) will experience

significantly increased costs if they (and/or their attorneys) must travel hundreds of miles to appear in front of a far-flung judge for hearings. Such increased costs may be significant for the individuals and nonprofit organizations who typically bring these types of APA actions. Particularly given that APA suits can go up to appellate courts, it is not clear why a desire to eliminate perceived judge shopping in the district courts outweighs the very real impacts on plaintiffs.

For these reasons, I propose amending the recommendation to delete recommendation #2 and focus on the longstanding Conference policy of supporting more direct circuit review of agency actions and avoiding drafting ambiguities in judicial review statutes. Taking sides in the assignment controversy would only distract from those important points.

Comment from Senior Fellow Ronald M. Levin on *Choice of Forum for Judicial Review of Agency Rules*

This is a reply to Public Member Jennifer Dickey's comment. As relevant here, she calls for deletion of paragraph # 2 of the proposed recommendation. That paragraph reads: "Congress should amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar or mandate universal enforcement of a federal agency rule or policy."

Joseph Mead's consultant's report to the Conference discusses the background and rationale for this proposal, particularly at pages 39-42. I encourage interested members of the Conference to read that discussion. I will not attempt to cover the same ground here. However, Ms. Dickey makes a few arguments that the report did not discuss. I will offer some brief replies to those points.

1. Ms. Dickey's biggest concern seems to be that "the judge shopping rationale seems to endorse the idea that our judges do not bring to each case their best efforts to apply the law to the facts, but rather a bias toward or against a particular plaintiff." I recall no discussion of bias during the committee meetings that gave rise to the proposed recommendation. I cannot speak to what was in the minds of other committee members, but I responded directly to this argument in a recent article:

> It is difficult to conceive of any public policy that could justify allowing such stark judge-shopping. The practice is somewhat analogous to a hypothetical system in which an appellant at the court of appeals level were permitted to choose which three members of the court should hear its appeal. That procedure would surely be recognized as improper, and that recognition would not depend on an assumption that any of the circuit's judges, considered individually, would render a biased decision. Rather, it would be improper because an element of randomization in the assignment of judges to significant cases tends to promote stability and moderation in the legal system. Similarly, judge-shopping within the divisions of a district court subverts that safeguard.[1]

2. Ms. Dickey suggests that paragraph # 2 would "be at cross-purposes with" paragraph # 1, which urges Congress to provide that certain agency rules should be subject to direct review by a court of appeals. I can discern no sense in which these two measures would actually conflict with one another. It's true that, to the extent that Congress implements #1, the range of rules to which #2 would be relevant would be reduced. However, paragraph #1 would, by its terms, apply only to rules adopted through notice-and-comment procedures, and only to rules adopted under new legislation, not under existing legislation. Paragraph #2 would certainly not be superfluous with regard to other rules.

3. Ms. Dickey objects that "the preamble at line 59 seems to unwittingly take sides in the debate about the meaning of 'vacatur' in the APA (i.e. does it mean universal vacatur or as to the person) by suggesting that universal vacatur is appropriate, contrary to the position the executive branch has taken in the Supreme Court under the last two Administrations." It's not surprising that the Committee would have made this assumption, because ACUS has been on record as recognizing the legality of vacatur under the APA for more than a decade. ACUS

[1] *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2033-34 (2023).

Recommendation 2013-6, Remand Without Vacatur. To be more precise, that recommendation maintained that a court should have discretion *not* to vacate, but that proposition would have made no sense unless it assumed that vacatur was also an option. Indeed, the preamble noted that "[t]raditionally, courts have reversed and set aside agency actions they have found to be arbitrary and capricious, unlawful, unsupported by substantial evidence, or otherwise in violation of an applicable standard of review."

In case anyone wonders why the recommendation did not support the legality of vacatur under the APA more explicitly, the simple explanation is that in 2013 nobody questioned its legality. That's why the preamble, when summarizing the controversy about the legality of remand *without* vacatur, responded only to suggestions that vacatur must be *mandatory*. It's only in recent years that revisionists have called longstanding assumptions about the legality of APA vacatur into question.[2]

4. Finally, Ms. Dickey argues that, if the committee proposal were enacted, "plaintiffs residing in sprawling districts (typically in more rural areas or geographically larger states) will experience significantly increased costs if they (and/or their attorneys) must travel hundreds of miles to appear in front of a far-flung judge for hearings." Although, notoriously, some recent judge-shopping episodes have involved filings in strategically chosen divisions that were convenient to *neither* party, I would agree that in some instances a lottery among divisions in a judicial district would result in assignment of cases to inconvenient divisions. In such a case, however, the regular change of venue statute, 28 U.S.C. § 1404, would allow a party to move for transfer to a different division. The question then is: which judge should adjudicate that motion: The judge in the division in which the plaintiff originally filed (which the plaintiff may have strategically chosen), or the "lottery winner" judge to whom the case gets assigned under the reform proposal? Surely, the latter judge would be in no worse a position to make a disinterested ruling on the motion, and might well be in a better position to do so.

[2] I have responded to the revisionists' APA arguments in the article cited above. *Id*. at 2005-19.