

Comment from Senior Fellow Ronald M. Levin on *Public Engagement in Agency Rulemaking Under the Good Cause Exemption*

October 6, 2024

I wrote a blog post a few years ago about a case in which, in my judgment, both the CPSC and the D.C. Circuit misunderstood the mechanics and purpose of direct final rulemaking. <https://www.yalejreg.com/nc/the-d-c-circuit-undermines-direct-final-rulemaking-by-ronald-m-levin/>. The case was *Milice v. CPSC*, 2 F.4th 994 (D.C. Cir. 2021). Much of the post was written with an eye toward encouraging the court to grant rehearing in the case (which it did not do). Not all of the post is germane to the ACUS project. But some of it is. The claims that would be most relevant to the Committee's best-practice focus were summarized in this passage from the conclusion to the post:

The expected constraints on direct final rulemaking break down when an agency adopts a rule without notice and comment by claiming that such procedure is “unnecessary,” where the agency has received a serious, good-faith objection to the anticipated rule but happens to disagree with the objection. Similarly, the expected constraints break down when a court reads its judicial review statute to mean that an interested person's ability to file suit against a direct final rule in court may expire before the person has any way to know that the agency has rejected its objection to the rule.

I plan to raise questions as to whether the committee should address these points in its recommendation.