



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

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

6 In a series of recommendations adopted in the 1970s, 1980s, and 1990s, the
7 Administrative Conference sought to identify principles to guide Congress in making such
8 choices. The most significant was Recommendation 75-3, *The Choice of Forum for Judicial*
9 *Review of Administrative Action*, which recommended that, in the case of rules adopted after
10 notice and comment, Congress should generally provide for direct review by a court of appeals
11 whenever “an initial district court decision respecting the validity of the rule will ordinarily be
12 appealed” or “the public interest requires prompt, authoritative determination of the validity of
13 the rule.”³ Subsequent recommendations opposed altering the ordinary rules governing venue in
14 district court actions against the United States,⁴ set forth a principle for determining when it is
15 appropriate to give the Court of Appeals for the D.C. Circuit exclusive jurisdiction to review
16 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.*



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

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

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

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).



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Determining the Court in Which to Seek Review

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

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

Commented [JG1]: Question for committee: Should the preamble say anything about horizontal jurisdictional choices?

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 Noncontroversial 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).



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Assigning Challenges to District Courts

56 In 1980, the Conference recommended that Congress amend 28 U.S.C. § 2112 to provide
57 for the consolidation of judicial proceedings in a randomly selected court of appeals when
58 petitions to review the same agency order have been filed in two or more courts of appeals
59 within ten days after the order was issued.¹⁵ Congress made such amendments in 1988.¹⁶ But no
60 such mechanism exists for civil actions filed in the district courts. Recognizing that some statutes
61 may provide for review of agency rules by district courts, this Recommendation urges Congress
62 to amend the laws governing the assignment to district courts of actions challenging the validity
63 of agency rules. It recommends that Congress adopt a mechanism, similar to the one provided for
64 in 28 U.S.C. § 2112, for consolidating challenges to a single rule pending before multiple district
65 courts.

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

Avoiding Drafting Ambiguities

70 Courts have faced at least three sources of ambiguity in interpreting choice-of-forum
71 provisions. First, some statutes specify the forum for review of “orders” without specifying the
72 forum for review of “rules” or “regulations.” This can lead to uncertainty regarding whether
73 “orders” includes rules, particularly because the Administrative Procedure Act defines an “order”
74 as any agency action other than a rule.¹⁸ Second, some statutes are unclear as to the forum in
75 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).



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

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

RECOMMENDATION

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

Commented [KN2]: 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.

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.



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

Commented [JG3]: 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 [KN4]: Questions for Committee:
(1) Should this just provide exact statutory language?
(2) Should venue transfer provision also be amended?