



## **Recommendation 80-5:**

### **Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action**

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(Adopted December 11, 1980)

Many agency actions subject to direct review in the courts of appeals involve more than one private party that may legitimately consider itself aggrieved by the agency action. In most such cases, a single court of appeals is not specified by statute as the reviewing court, and venue may lie in more than one such court. Many lawyers believe that one court of appeals is likely to be more receptive than another to their clients' arguments in an agency review proceeding. The choice of the reviewing court has therefore assumed large importance in the review of some actions of some agencies.

A statute, 28 U.S.C. §2112(a), provides that, when petitions for appellate review of the same order are filed in two or more courts of appeals, the record of the agency proceeding is to be filed by the agency in the court in which the first petition was filed, and that court then has jurisdiction of the review proceeding to the exclusion of others. This provision has become less and less useful as the choice of forum has become more significant in lawyers' minds, and races to the courthouse have proliferated and methods of conducting the races have become more refined. Races are now sometimes decided by seconds or fractions of seconds, if they can fairly be said to have been decided at all. (There is no single finish line to cross or tape to break; time stamping machines in clerks' offices are not synchronized.) Moreover, races will be even harder to judge as agencies adopt regulations, designed to make the races fairer and more civilized, specifying the date and time at which agency orders are deemed to have been issued.

The spectacle of the race to the courthouse is an unedifying one that tends to discredit the administrative and judicial processes and subject them to warranted ridicule. It will require congressional action to bring the final curtain down on the spectacle. Our first and principal recommendation is addressed to Congress. It calls for simple random selection of the reviewing court when a race ends in a dead heat or near dead heat. Pending congressional action, there are actions that the agencies and the courts themselves can take to ameliorate the present sorry situation, and we also make recommendations addressed to the agencies and to the Judiciary for such interim actions.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Part A. Recommendation to Congress**

1. 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.

2. The amended Section 2112(a) should provide further that a court of appeals in which a petition for review has been filed that has jurisdiction to entertain the petition may, in a case of pressing need, issue a stay of the agency order during the period in which no court has been chosen to take jurisdiction of the proceeding, the stay to remain in effect for no more than 15 days, unless extended by the chosen court or a transferee court, and subject to revocation or modification by the chosen court or a transferee court; and that, if the court in which the record is filed determines that it lacks jurisdiction or venue is improperly laid but that jurisdiction and venue may be proper in another circuit, the court is to notify the official body administering the system of random selection of that fact, and that body then will choose from among the remaining courts in which petitions have been filed according to the same scheme of random selection.

### **Part B. Recommendation to the Agencies**

In the absence of legislation, those agencies whose actions have resulted or are likely to result in races to the courthouse should specify in advance a time at which their orders are to be deemed issued or their actions are otherwise ripe for judicial review. Such agencies should do this by generic regulation if possible and, if that is not possible, by specifying times of issuance or ripeness case by case.

### **Part C. Recommendation to the Judiciary**

In the absence of further legislation, the Supreme Court should promulgate a rule under which, if petitions to review the same agency order are filed in two or more courts of appeals



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

simultaneously (for example, within one minute of one another), the Administrative Office of the United States Courts is to be informed of that fact, and the Administrative Office is then to choose one court, according to a scheme of random selection, from among the circuits in which such simultaneous petitions are pending, which court shall then determine where the record is to be filed pursuant to 28 U.S.C. §2112(a).

### **Citations:**

45 FR 84954 (December 24, 1980)

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### **Note:**

This recommendation has been implemented by Pub. L. 100-236.