

Proposed Amendments from Public Member Jennifer Dickey on *Choice of Forum for Judicial Review of Agency Rules*  
June 3, 2024

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.