

Comment from Special Counsel Jeffrey S. Lubbers on *Clarifying Statutory Access to Judicial Review of Agency Action*

April 21, 2021

I will have to break away from the Judicial Review Committee to attend a law school budget committee meeting from 12:00 to 12:50.

But I thought I'd share a few thoughts:

1. As I was reading the recommendation, I wondered why there was no mention of statutes that seek to channel judicial review of certain types of rules into a time-limited pre-enforcement period. Numerous environmental statutes have such provisions and they can be worded rather definitively.

As Ron Levin put it, "Some of these statutes go on to provide that such a rule is immune from challenge after the expiration of the stated period (except on grounds arising after that period), even if the challenge is asserted in a proceeding to enforce the rule." Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2214 (2011). For an example see the RCRA provision in 42 U.S.C. § 6976(a)(1). See also Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L.J. 279, 307-08 (report done for ACUS listing express preclusion statutes).

The problem with this is that courts do not completely honor these strict provisions and allow enforcement review at the behest of someone who missed the deadline if certain types of issues are raised at that stage, such a constitutional claims, defenses to a criminal enforcement, and (sometimes) ultra vires claims.

In its Recommendation 82-7, ACUS addressed the following recommendations to Congress:

2. When Congress decides to limit the availability of judicial review of rules at the enforcement stage, it should ordinarily preclude review only of issues relating to procedures employed in the rulemaking or the adequacy of factual support for the rule in the administrative record. Judicial review of issues relating to the constitutional basis for the rule or the application of the rule to a particular respondent or defendant should be permitted when these issues are raised in subsequent suits or as defenses to subsequent enforcement actions (subject to the principles of collateral estoppel and stare decisis). Judicial review of issues relating to the statutory authority for the rule should be precluded at the enforcement stage only where Congress has concluded that there is a compelling need to achieve prompt compliance with the rule on a national or industry-wide basis.

3. When Congress limits the availability of judicial review of rules at the enforcement stage as described in paragraph 2, it should provide that, in an exceptional case when foreclosure of issues will work a severe hardship or otherwise produce a manifestly unjust outcome, a court may either dismiss or stay the proceedings and refer the rule to the affected agency for its reconsideration.

So I guess I wonder why we don't allude to this. These are statutory provisions that potentially mislead litigants into thinking they are completely precluded from bringing rule challenges in enforcement actions when they are not.

2. Staff queries—Some ideas

- a. Lines 56-58, how about shall be construed to allow the reviewing court to consider any “notice of appeal” to be a “petition for review.”
- b. Lines 70-88, I think this should be broken into two separate topics: (1) “Simultaneous Filing Provisions” and (2) “Missing but Implied Jurisdictional Provisions”
- c. First heading in the Recommendation itself: “Recommendations to Congress when Drafting or Amending Judicial Review Provisions”
- d. Staff inquiry “ACUS 7”—I would try to conform the language as closely as possible

3. A few other nits:

- a. Line 118 (same on line 137): “Starts from the publication date” still seems a bit too ambiguous. Should it be “starts on the publication date”? In other words, that that is day one of whatever deadline we are talking about.
- b. Line 153—“Shall be deemed to have jurisdiction”