



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Choice of Forum for Judicial Review of Agency Rules

Committee on Judicial Review

Draft Recommendation for Committee | April 25, 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 and the
4 completeness of the administrative record underlying such rules.²

5 In a series of recommendations adopted in the 1970s, 1980s, and 1990s, the
6 Administrative Conference sought to identify principles to guide Congress in making such
7 choices. The most significant was Recommendation 75-3, *The Choice of Forum for Judicial*
8 *Review of Administrative Action*, which recommended that, in the case of rules adopted after
9 notice and comment, Congress should generally provide for direct review by a court of appeals
10 whenever “an initial district court decision respecting the validity of the rule will ordinarily be
11 appealed” or “the public interest requires prompt, authoritative determination of the validity of
12 the rule.”³ Subsequent recommendations opposed altering the ordinary rules governing venue in
13 district court actions against the United States,⁴ set forth a principle for determining when it is
14 appropriate to give the Court of Appeals for the D.C. Circuit exclusive jurisdiction to review
15 agency rules,⁵ and offered guidance to Congress on the factors it should consider in determining

¹ See 5 U.S.C. § 702. This Recommendation does not address judicial review of adjudicative orders that announce principles with rule-like effect or agency actions regarding petitions for rulemaking. Additionally, the Recommendation does not address suits challenging agency delay or inaction in promulgating rules. See *Telecomms. Rsch. Action v. Fed. Commc’ns Comm’n*, 750 F.2d 70, 72 (D.C. Cir. 1984).

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

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

26 In this Recommendation, the Conference reconsiders the principles that should guide
27 Congress in choosing the appropriate forum for judicial review of agency rules and in drafting
28 provisions that govern the choice of forum. As described below, the Conference recommends
29 that, in drafting such provisions, Congress clearly specify the court in which review may be
30 sought and offers principles for choosing the appropriate forum. The Recommendation identifies
31 several sources of ambiguity that Congress should avoid in drafting choice-of-forum provisions.
32 While this Recommendation offers drafting advice to Congress, agencies may also find it useful
33 in responding to 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

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

44 In this Recommendation, the Conference generally reaffirms its earlier recommendations
45 that Congress ordinarily should provide for direct review of agency rules by a court of appeals.
46 However, the Conference now believes that this principle should apply to all rules having the
47 force and effect of law,¹² not just those adopted after notice and comment. This accounts for the
48 fact that agencies may promulgate rules having the force and effect of law without prior notice
49 and comment, such as those involving a military or foreign affairs function of the United States
50 or those subject to the good cause exception.¹³ It also accounts for the fact that the Conference
51 has encouraged agencies to provide notice and solicit public comment on significant interpretive
52 rule and policy statements, which typically lack the force and effect of law.¹⁴

Commented [MAB1]: What do we recommend about Trump Muslim ban, or DACA, which many thought were rules (not labeled as such)? Discovery needed in some of those cases (also in census case), and so DC better. I am not pressing to include them in CA, but we should be clear. If agency wants CA, it can call its action a rule and get it.

Commented [MAB2]: If preliminary relief is sought, it will be decided in the first instance by three judges if the case must be filed in a court of appeals.

Commented [JG3]: Question for committee: Should the preamble say anything about horizontal jurisdictional choices? E.g., Recs. 82-3 (Fed. Venue Provs. To Suits Against the Gov'n't), 91-9 (Specialized Review), 76-4 (JR Under CAA and FWPCA), 91-5 (NLRB).

Commented [MAB4]: Not sure I understand import of last sentence. Does it mean that those cases go to CA? Even for guidance which is generally not reviewable?

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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Avoiding Judge Shopping

53 Many districts are subdivided into divisions with a limited number of judges or, in some
54 cases, even only one judge. The federal venue statute does not dictate what particular division of
55 a district cases must be brought, allowing a litigant to choose the division. This raises concerns
56 that litigants can choose to bring a case in a division with a particular judge that might resolve
57 their case favorably—a concern that Chief Justice Roberts acknowledged in the 2021 year-end
58 report on the federal judiciary. In response, the Judicial Conference of the United States recently
59 announced a policy addressing these concerns and advocating that cases be assigned randomly to
60 district judges.¹⁵ This Recommendation urges Congress to amend 28 U.S.C. § 137, consistent
61 with the Judicial Conference’s policy.

Avoiding Drafting Ambiguities

62 Courts have faced two sources of ambiguity in interpreting choice-of-forum provisions
63 which this Recommendation addresses.¹⁶ First, some statutes specify the forum for review of
64 “orders” without specifying the forum for review of “rules” or “regulations.” This can lead to
65 uncertainty regarding whether “orders” includes rules, particularly because the Administrative
66 Procedure Act defines an “order” as any agency action other than a rule.¹⁷ Second, some statutes
67 are unclear as to the forum in which a party may file an action challenging the validity of a rule.
68 A lack of clarity may result from statutory silence or a choice-of-forum provision of uncertain
69 scope.

¹⁵ U.S. SUPREME COURT, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>; *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>.

¹⁶ The Committee identified a third source of ambiguity which was beyond the scope of this Recommendation and suggested as a future area of study for the Administrative Conference. Many statutes are unclear as to whether choice-of-forum provisions regarding rules apply only to rules promulgated by an agency or whether they apply also to other rule-related actions such as delay or inaction in promulgating a rule or the grant or denial of a petition for rulemaking.

¹⁷ 5 U.S.C. § 551(6).



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70 This Recommendation urges Congress, in drafting new or amending existing provisions
71 governing the choice of forum for the review of rules,¹⁸ to avoid using the term “orders” to
72 encompass rules; to state clearly the forum in which judicial review of rules is available; and to
73 state clearly whether such provisions apply to rule-related actions other than the promulgation of
74 a rule.

RECOMMENDATION

- 75 1. When drafting a statute that provides for judicial review of agency rules, Congress
76 ordinarily should provide that the following rules are subject to direct review by a court
77 of appeals: (a) rules required to be promulgated after notice and comment under 5 U.S.C.
78 § 553; (b) rules for which an agency finds for good cause under 5 U.S.C. § 553(b) that
79 notice and public procedure thereon are impracticable, unnecessary, or contrary to the
80 public interest; and (c) rules involving a military or foreign affairs function of the United
81 States.
- 82 2. Congress should amend 28 U.S.C. § 137 to provide that district courts apply district-wide
83 assignment to civil actions seeking to bar or mandate nationwide enforcement of a federal
84 agency rule, regulation, or policy, whether by declaratory judgment and/or any form of
85 injunctive relief.
- 86 3. When drafting a statute that provides for judicial review of agency actions, Congress
87 should state explicitly whether actions taken under the statute are subject to review by a
88 district court or, instead, subject to direct review by a court of appeals. If Congress
89 intends to establish separate requirements for review of rules, as distinguished from other
90 agency actions, it should refer explicitly to “rules” and not use the term “orders” to
91 include rules.

¹⁸ This Recommendation provides advice to Congress in drafting future statutes. It should not be read to address previously enacted statutes that courts have interpreted.