



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Choice of Forum for Judicial Review of Agency Rules

Committee on Judicial Review

Draft Recommendation for Committee | May 2, 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 procedures used to promulgate those rules,
4 the scope or impact of an agency’s rules, and the completeness of the administrative record
5 underlying 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. 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. Comm’n 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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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 revisits the principles that should guide
28 Congress in choosing the appropriate forum for judicial review of agency rules and in drafting
29 clear provisions that govern the choice of forum. While this Recommendation offers drafting
30 advice to Congress, agencies may also find it useful in responding to congressional requests for
31 technical assistance.¹¹ The Conference also recommends that Congress amend 28 U.S.C. § 137
32 governing the assignment of cases to district judges.

Determining the Court in Which to Seek Review

33 By default, parties may seek review in a district court according to the usual rules
34 governing judicial review of agency rules. Although this approach may be appropriate in some

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).

Commented [KN1]: Question for Committee:

Do you want to include more specific language on how this recommendation differs or builds on recommendation 75-3?



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

43 In this Recommendation, the Conference generally reaffirms its earlier recommendations
44 that Congress ordinarily should provide for direct review of agency rules by a court of appeals.
45 However, the Conference now believes that this principle should apply to all rules promulgated
46 after public notice and opportunity for comment, as provided in 5 U.S.C. § 553 or another,
47 similar statute. Such procedures produce a record that is conducive to review by an appeals court
48 without need for additional development or factfinding, and drawing the line at rules
49 promulgated after public notice and opportunity for comment provides a relatively clear
50 jurisdictional rule.

Avoiding Judge Shopping

51 Many districts are subdivided into divisions with a limited number of judges or, in some
52 cases, even only one judge. The federal venue statute does not dictate what particular division of
53 a district cases must be brought, allowing a litigant to choose the division. This raises concerns
54 that litigants can choose to bring a case in a division with a particular judge that might resolve
55 their case favorably—a concern that Chief Justice Roberts acknowledged in the 2021 year-end
56 report on the federal judiciary.¹² In response, the Judicial Conference of the United States
57 recently announced a policy addressing these concerns and advocating that cases be assigned

¹² U.S. SUPREME COURT, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>.



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58 randomly to district judges.¹³ The Conference recommends that Congress amend 28 U.S.C.
59 § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar,
60 restrain, vacate, or mandate the enforcement of a federal agency rule or policy with regard to any
61 person—that is, on a universal basis—not just the particular plaintiff who challenged the rule or
62 policy in federal court. In this respect, it is consistent with a policy of the Judicial Conference
63 under which “[d]istrict courts should apply district-wide assignment to . . . civil actions seeking
64 to bar or mandate nationwide enforcement of a federal law, including a rule, regulation, [or]
65 policy . . . whether by declaratory judgment and/or any form of injunctive relief.”¹⁴

Commented [KN2]: JCUS will publish the official policy in May at which point we will update this citation to the actual policy and not the press release.

Avoiding Drafting Ambiguities

66 Courts have faced two sources of ambiguity in interpreting choice-of-forum provisions
67 which this Recommendation addresses.¹⁵ First, some statutes specify the forum for review of
68 “orders” without specifying the forum for review of “rules” or “regulations.” This can lead to
69 uncertainty regarding whether “orders” includes rules, particularly because the Administrative
70 Procedure Act defines an “order” as any agency action other than a rule.¹⁶ Second, some statutes
71 are unclear as to the forum in which a party may file an action challenging the validity of a rule.
72 A lack of clarity may result from statutory silence or a choice-of-forum provision of uncertain
73 scope.

74 This Recommendation urges Congress, in drafting new or amending existing provisions
75 governing the choice of forum for the review of rules,¹⁷ to avoid using the term “orders” to
76 encompass rules; to state clearly the forum in which judicial review of rules is available; and to

¹³ *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>.

¹⁴ *Conference Acts to Promote Random Case Assignment*, *supra* note 13.

¹⁵ 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.

¹⁶ 5 U.S.C. § 551(6).

¹⁷ 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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77 state clearly whether such provisions apply to rule-related actions other than the promulgation of
78 a rule.

RECOMMENDATION

- 79 1. When drafting a statute that provides for judicial review of agency rules, Congress
80 ordinarily should provide that rules promulgated using notice-and-comment procedures
81 are subject to direct review by a court of appeals.
- 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 universal enforcement of a federal
84 agency rule or policy.
- 85 3. 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.

Commented [KN3]: Include language in preamble about promulgation under 553 and similar statutes

Commented [KN4]: Comment from Special Counsel Matthew L. Wiener:

A technical question for the Committee, assuming paragraph 2 is retained: Should paragraph 2 be expanded—or made explicit—to include “universal” vacatur/set aside? Which raises another question about paragraph 2: Will the scope of the relief—that is, whether, in the Judicial Conference’s phrasing, the “remedy sought has implications beyond the parties before the court”—always/usually be sufficiently obvious at the assignment stage (presumably from the complaint) to administer a statute along the lines of the statute recommended in paragraph 2?

Commented [KN5R4]: Add note of universal relief to preamble