



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Choice of Forum for Judicial Review of Agency Rules

Committee on Judicial Review

Proposed Recommendation from 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 choosing the
8 appropriate forum for judicial review of agency rules. The most significant was
9 Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*,
10 which recommended that, in the case of rules adopted after notice and comment, Congress
11 should generally provide for direct review in the courts of appeals whenever “an initial district
12 court decision respecting the validity of the rule will ordinarily be appealed” or “the public
13 interest requires prompt, authoritative determination of the validity of the rule.”³ Subsequent
14 recommendations opposed altering the ordinary rules governing venue in district court actions
15 against the United States,⁴ set forth a principle for determining when it is appropriate to give the
16 Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review agency

¹ See 5 U.S.C. § 702. This Recommendation does not address judicial review of adjudicative orders, including those that announced 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).



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17 rules,⁵ and offered guidance to Congress on the factors it should consider in determining whether
18 to assign responsibility for review to a specialized court.⁶ The Conference also addressed the
19 choice of forum for judicial review of rules adopted under specific statutes.⁷

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

28 In this Recommendation, the Conference revisits the principles that should guide
29 Congress in choosing the appropriate forum for judicial review of agency rules and in drafting
30 clear provisions that govern the choice of forum. While this Recommendation offers drafting
31 advice to Congress, agencies may also find it useful in responding to congressional requests for
32 technical assistance.¹¹ The Conference also recommends that Congress amend 28 U.S.C. § 137
33 governing the assignment of certain cases to district judges.

⁵ *Id.*

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 Absent a statute providing otherwise, parties may seek judicial review of agency rules in
35 a district court. Although this approach may be appropriate in some contexts, direct review by a
36 court of appeals is often more appropriate. For one, district court proceedings are less necessary
37 when an agency has already compiled an administrative record that is adequate for judicial
38 review and further appeal is likely. Allowing parties to choose the district court in which to seek
39 review also creates opportunities for forum shopping to a greater extent than when review is
40 sought in a court of appeals.¹² For these and other reasons, Congress has in many contexts
41 provided for direct review of agency rules in the courts of appeals. And in a minority of statutes,
42 Congress has required parties to seek review in a single, 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 The Conference believes that this principle is particularly important for rules promulgated after
46 public notice and opportunity for comment. Such procedures produce a record that is conducive
47 to review by an appeals court without need for additional development or factfinding, and
48 drawing the line at rules promulgated after public notice and opportunity for comment provides a
49 relatively clear jurisdictional rule.

Avoiding Judge Shopping

50 Many districts are subdivided into divisions with a limited number of judges or, in some
51 cases, even only one judge. The federal venue statute does not provide that district court cases
52 must be brought in a particular division when a rule issued by a federal agency is challenged.
53 This raises concerns that litigants will choose to bring a case in a division with a particular judge
54 who might resolve their case favorably—a concern that Chief Justice Roberts acknowledged in
55 the 2021 year-end report on the federal judiciary.¹³ Consistent with the Chief Justice’s report, the

¹² See Mead, *supra* note 2; Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the “Race to the Courthouse” in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980).

¹³ 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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56 Judicial Conference of the United States recently announced a policy addressing these concerns
57 and advocating that cases be assigned randomly to district judges.¹⁴ The Conference
58 recommends that Congress amend 28 U.S.C. § 137 to provide that district courts apply district-
59 wide assignment to civil actions seeking to bar, restrain, vacate, or mandate the enforcement of a
60 federal agency rule or policy with regard to any person—that is, on a universal basis—not just
61 the particular plaintiff who challenged the rule or policy in federal court. In this respect, it is
62 consistent with, although not identical to, a policy of the Judicial Conference under which
63 “[d]istrict courts should apply district-wide assignment to . . . civil actions seeking to bar or
64 mandate nationwide enforcement of a federal law, including a rule, regulation, [or] policy . . .
65 whether by declaratory judgment and/or any form of injunctive relief.”¹⁵

Commented [SC1]: 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.¹⁶ 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.¹⁷ 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.

¹⁴ *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>.

¹⁵ *Id.*

¹⁶ The Committee on Judicial Review, from which this Recommendation arose, identified a third source of ambiguity: 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. This Recommendation does not address this ambiguity. The Committee on Judicial Review has suggested it for future study by the Conference.

¹⁷ 5 U.S.C. § 551(6).



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74 This Recommendation urges Congress, in drafting new or amending existing provisions
75 governing the choice of forum for the review of rules,¹⁸ 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
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.

¹⁸ This Recommendation provides advice to Congress in drafting future statutes. It should not be read to address existing statutes.