

RESPONSE TO *CHOOSING A COURT TO  
REVIEW THE EXECUTIVE*

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Professors Mead and Fromherz have written a very timely Article, *Choosing a Court to Review the Executive*,<sup>1</sup> with the problem they address being played out at this very moment in a high profile challenge to the recently adopted Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) rule defining “waters of the United States” for purposes of the Clean Water Act.<sup>2</sup> Direct challenges were filed in four different circuit courts of appeals<sup>3</sup> and in twelve different district courts.<sup>4</sup> The actions in the courts of appeals were consolidated in the Sixth Circuit, and it issued an order staying the effect of the rule pending the court’s decision as to its jurisdiction to hear the case.<sup>5</sup> A request by the defendants to have the district court cases centralized in the U.S. District Court for the District of Columbia was denied, largely because there were already differing jurisdictional determinations made in some of the courts, with two holding that exclusive jurisdiction is in the courts of appeals and one reaching the opposite conclusion.<sup>6</sup> The jurisdictional problem arises from 33 U.S.C. § 1369(b), which establishes the exclusive jurisdiction for review of certain EPA actions under the Clean Water Act in the Circuit Court of Appeals for the federal judicial district in which the plaintiff resides or does

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1. Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1 (2015).

2. Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015).

3. *See In re EPA*, 803 F.3d 804 (6th Cir. 2015).

4. *See In re Clean Water Rule: Definition of “Waters of the United States,”* MDL No. 2663, 2015 WL 6080727, at \*1 n.2 (J.P.M.L. Oct. 13, 2015).

5. *See In re EPA*, 803 F.3d at 808-09.

6. *See In re Clean Water Rule*, 2015 WL 6080727 (order denying transfer).

business.<sup>7</sup> This provision has been the subject of no less than twenty-five courts of appeals decisions and nine district court decisions. The history of this provision and this series of lawsuits alone would justify the examination that Mead and Fromherz have made. The question their Article raises, however, is whether their proposed solution is the answer to the problem.

Their solution is to require all challenges to agency action to be brought in federal district court. Thus, if they had their druthers, no challenges could be brought in courts of appeals in the first instance. I don't think they have made their case.

First, Mead and Fromherz suggest that there appears to be no rhyme or reason behind the current choices Congress has made in placing jurisdiction either in the district courts or the courts of appeal.<sup>8</sup> And they give several examples of seemingly contradictory choices. But, if we are talking about the future and what at least in theory could be done, then the answer might be to make decisions about jurisdiction pursuant to a theory of which type of cases should be in one court or another, rather than to throw up one's hands and say everything should begin in district court.

Second, Mead and Fromherz set up some strawmen arguments in favor of direct court of appeal review and then knock them down, such as Legitimacy/Seemliness, Workload Distribution, and the lack of fit between review of agency action and the Federal Rules of Civil Procedure.<sup>9</sup> I won't attempt to address them, as I think they are irrelevant to the comparative advantages of court of appeal review in certain cases.

Mead and Fromherz also attempt to refute any advantage of courts of appeal in certain areas in ways that do not convince me. For example, they recognize that a common argument in favor of court of appeal review is that it provides more authoritative resolutions because such courts are "fewer in number, generally cover a broader geographical region, and, under the law of the circuit doctrine, issue authoritative decisions, which are binding law on all judges in the circuit."<sup>10</sup> One could add that other circuits are more respectful of another circuit's decisions than district court judges are with respect to another district court judge's opinion, which isn't precedential even in the same district. Mead and Fromherz counter that by saying that such authoritativeness is unnecessary in the large number of cases involving denial of benefits to particular individuals.<sup>11</sup> Of course not, but that is why such cases almost uniformly do not get direct review in courts of appeal. Moreover, they argue that the "purported finality of

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7. 33 U.S.C. § 1369(b)(1).

8. See Mead & Fromherz, *supra* note 1, at 3.

9. *Id.* at 23–30.

10. *Id.* at 30–31.

11. *Id.* at 31.

circuit court rulings is, in many ways, illusory” because there are twelve different geographical circuits that can result in circuit splits.<sup>12</sup> But circuit splits are not that common regarding challenges to agency action, and more importantly, providing for cases to be brought in district courts instead of circuit courts would not decrease circuit splits; it would just further delay the ultimate resolution of the question because of the length of time spent in the district courts. Indeed, Mead and Fromherz ultimately conclude that, while “it is important not to overstate the conclusiveness of circuit precedent, circuit courts do issue more definitive statements of law than district courts, and this finality can be useful when an agency decision applies broadly and is susceptible to multiple challenges.”<sup>13</sup> Thus, at this point, Mead and Fromherz seem to concede the advantage to circuit court review, at least in certain types of cases.

Another argument they assess is that it is more efficient to have courts of appeal initially review those cases that would be appealed in any case because “it would be wasteful, redundant, and would delay final resolution of the matter” to have the challenge first considered by a district court.<sup>14</sup> The trick, of course, is identifying which kinds of cases are likely to be appealed in any case. For cases currently subject to district court review, finding classes of cases that are usually appealed is a rather simple empirical undertaking. For example, Mead and Fromherz state that “less than 5% of district court decisions in social security cases make it to the court of appeal”<sup>15</sup>—obviously not a good candidate for direct court of appeal review. For those cases currently subject to direct courts of appeal review, however, it would take an educated guess to determine which would have been appealed in any case from a district court decision. Challenges to agency rules are probably one good guess because if the government loses in a challenge to an agency rule in a district court, it almost invariably appeals, and if the challenger loses, they frequently appeal.

Mead and Fromherz argue that because a court of appeals has three judges and a district court only has one, the “cost” of review in a court of appeals is greater than that in a district court.<sup>16</sup> They estimate that the difference in such cost is so great that it would take an appeal rate of 33% to 42% to justify direct review in the courts of appeal.<sup>17</sup> But even if this estimate were accurate, and there is strong reason to believe it is not,<sup>18</sup> it

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12. *Id.* at 32.

13. *Id.* at 34.

14. Mead & Fromherz, *supra* note 1, at 35.

15. *Id.* at 36.

16. *Id.* at 37–38.

17. *Id.* at 38.

18. I believe Mead and Fromherz make an important methodological error in their analysis. They “assume that, on average, district and circuit judges spend an equal amount

would only establish that when the appeal rate is less, the “cost” of direct review at the court of appeals would exceed the cost of review in district courts. It would not address the time savings involved in having direct review at the court of appeals. For some reason Mead and Fromherz think there is time savings involved “only if an appeal is likely.”<sup>19</sup> Indeed, if a case were not appealed, there would be no time savings for that case, but Congress could guess wrong about which cases were likely to be appealed and still achieve considerable time savings. For example, assume that Congress provides direct review in courts of appeal in cases where an appeal is only 20% likely. There will be a total time savings compared to Mead and Fromherz’s solution of exclusive review in district courts because in 100% of the cases there will be only one court’s review, but under Mead and Fromherz’s system there would be review in two courts in 20% of the cases, a substantial waste of time.

Mead and Fromherz argue that the time saved by having direct review in courts of appeal could actually “translate to a *longer* process.”<sup>20</sup> Wrong again. They write, “As the Supreme Court has observed, there can be enormous delay if the circuit court has to remand an issue to the agency to develop facts.”<sup>21</sup> However, the Supreme Court has said no such thing. In the case they cite, *Harrison v. PPG Industries, Inc.*,<sup>22</sup> the Court said that it was the *plaintiffs’* “view that . . . the district court is the preferable forum, since the tools of discovery are there available to augment the record, whereas in a court of appeals a time-consuming remand to EPA might be required.”<sup>23</sup> The Court, however, expressed doubt about this assertion, stating, “It may be seriously questioned whether the overall time lost by court of appeals remands to EPA of those cases in which the records are inadequate would exceed the time saved by forgoing in every case initial review in a district court.”<sup>24</sup> The Court’s suspicion is well founded. First, it is almost unheard of for a court of appeals to remand to an agency to find facts, and Mead and Fromherz cite to no such cases, so the likelihood of this happening is

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of time on resolving cases (that is, judges in one tier are not lazier than another).” *Id.* One need not imagine that any judges are lazy but realize that appellate judges and trial judges are simply not doing the same job. Trial judges by and large handle trials and only occasionally write opinions, and even those opinions, because they are not precedent even in that district, tend to be shorter and less well developed than a typical court of appeals opinion. To equate the time both spend on a case, as Mead and Fromherz do, *see id.* at 38 n.216, is the equivalent of equating the time a carpenter and a plumber spend in the building of a house.

19. *Id.* at 39.

20. Mead & Fromherz, *supra* note 1, at 39.

21. *Id.*

22. 446 U.S. 578 (1980).

23. *Id.* at 592–93.

24. *Id.* at 593–94.

remote at best. Second, if the record is lacking and the review is in district court, the proper course of action is *not* to have the district court find facts; it is for the district court to remand the action to the agency to supplement the record.<sup>25</sup> Thus, the delay involved in such a remand is identical whether the review is initially in the courts of appeals or district courts.

Finally, Mead and Fromherz say that “even if efficiency favors direct circuit court review in some subsets of cases, the current system does a poor job in identifying the cases with strong appeal potential and those that lack it.”<sup>26</sup> Even if that were true, I believe the better response by scholars would be to refine how to identify those cases with strong appeal potential, rather than submitting all cases, including those with high appeal potential, to initial district court review. However, it is not at all clear that Congress has done such a poor job in identifying cases with strong appeal potential. Mead and Fromherz give only three examples of what they consider mistakes. The first is the placement of review of “immigration cases” in the courts of appeals, which they say “inundate circuit courts, despite the relative lack of care, and, often, merit, put into the challenges and the estimated low chance of appeal if they were . . . placed in the district court in the first instance.”<sup>27</sup> The authority for these characterizations is lacking because the cited source says no such thing.<sup>28</sup> Indeed, the placement of deportation orders, today removal orders,<sup>29</sup> in the courts of appeals was a very conscious choice by Congress to address a very real problem. As the Supreme Court noted in *Foti v. INS*,<sup>30</sup> “the fundamental purpose behind [direct review in the courts of appeals] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.”<sup>31</sup> The House Judiciary Committee had found that there was a “growing frequency of judicial actions being instituted by undesirable aliens whose

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25. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court remanded the case to the district court for it to supplement the record, if the existing record was lacking. The Court understood that the district court might require officials to testify to explain their actions, but neither in that case nor any others has that been done. *Id.* at 420–21. The proper course when the record is inadequate is to remand to the agency for it to supplement the record. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

26. Mead & Fromherz, *supra* note 1, at 40.

27. *Id.*

28. Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1326 (1986).

29. Mead and Fromherz use the term “deportation orders”; the correct appellation, however, is removal orders, rather than deportation orders.

30. 375 U.S. 217 (1963).

31. *Id.* at 224.

cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country.”<sup>32</sup> Thus, the placement of these appeals in the courts of appeals is hardly a mistake. Instead, it is a conscious choice to meet a real problem.

This is an element of efficiency that Mead and Fromherz completely ignore—direct review in the courts of appeal in order to avoid the use of a second appeal to delay the effect of agency action. Where government action imposes restrictions on persons or requires them to do something they oppose, such as leave the country, there are significant benefits to such persons in simply delaying the effect of the agency action. Consequently, it is no surprise that those who today are challenging the EPA and Corps’s rule defining “waters of the United States” have argued that the district courts, rather than the circuit courts, have jurisdiction to hear the challenges, while it is the government that seeks to have them in the circuit court, because while the cases are being litigated, the rule is not in effect.

The last issue Mead and Fromherz analyze is what they call “accuracy.”<sup>33</sup> Here, they say that direct review in district courts with a subsequent appeal to a court of appeals increases accuracy because “arguments are the better for having been screened by a district judge and matured during an added tier of litigation.”<sup>34</sup> And, of course, if providing for initial review in the district courts in all cases would be cost free in terms of time, resources, and the speed of a final, authoritative decision, there would be little reason to provide direct review in the courts of appeal. But, as described above, initial review in the district courts in all cases would not be cost free. It would impose substantial costs.

Mead and Fromherz attempt to rebut arguments that circuit courts have a comparative advantage in accuracy of decisions over district courts. Again, several of their attempts are less than convincing. They recognize that funneling particularly difficult cases to a particular court of appeals enables the judges of that circuit to gain some expertise that would be practically impossible to reproduce at the district court level.<sup>35</sup> But, they counter, this expertise has a downside: “judges who know an area may be more willing to second-guess the agency’s decision.”<sup>36</sup> However, it is difficult to square the agencies’ general support for such exclusive review with an expectation that the review will be more intense. But, even if this is true, I’m not sure why this is necessarily a downside. Much contemporary criticism of judicial review of agency action is that it is too deferential to

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32. *Id.* at 225 (quoting H.R. REP. NO. 87-1086, at 25 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2950, 2967).

33. Mead & Fromherz, *supra* note 1, at 41.

34. *Id.* at 42.

35. *Id.* at 44–45.

36. *Id.* at 45.

agencies.<sup>37</sup> Mead and Fromherz also piggyback on traditional criticisms of a possible specialized court to review agency action, but there is a world of difference between a court of general jurisdiction, like the D.C. Circuit, that also is the exclusive court to hear challenges to certain types of agency action, and a specialized court that does nothing other than review agency action.

Mead and Fromherz acknowledge that others have suggested that the collegial nature of courts of appeal decisionmaking gives such courts a comparative advantage over single-judge courts. They argue, however, that there may be no “meaningful deliberation over [a] case” because “in reality, panels often delegate primary responsibility for a case to a single authoring judge, with the other two members reading the opinion but giving the matter less than their full attention.”<sup>38</sup> But panels delegate primary responsibility for drafting the opinion *after* they have met in conference and decided—collegially—how the case should come out. And appellate judges tell us that in fact there is collegial decisionmaking.<sup>39</sup> While there may not be close attention given to every draft opinion by the other judges, one can presume that occasionally changes to a draft may be made in light of comments. In any case, this decisionmaking is infinitely more collegial than that of a single judge.

Mead and Fromherz go on to suggest that perhaps “the amorphous standards that govern agency decisions—most notably arbitrary and capricious review—are sufficiently without content that deliberation has no refining value.”<sup>40</sup> Yet, it is precisely when there are no bright standards to be applied that collegial decisionmaking plays a critically important role. If all you are doing is calling balls and strikes, one umpire is enough. However, when a decision requires assessing difficult choices, more heads are simply better than one. While there may be no way to prove this empirically, it is at the heart of why we have nine Supreme Court Justices, multi-member regulatory agencies responsible for deciding what is in the public interest or unfair trade practices, and multi-member juries.

Ultimately, Mead and Fromherz seem to concede that “using multiple judges to decide matters might improve decisionmaking,”<sup>41</sup> especially in

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37. See, e.g., Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433 (2010) (suggesting independent agencies should be given lower deference than executive agencies).

38. Mead & Fromherz, *supra* note 1, at 47.

39. See, e.g., Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1963–65 (2009) (stating judges deliberate in a collegial matter with factors influencing the group decisionmaking).

40. Mead & Fromherz, *supra* note 1, at 47.

41. *Id.* at 48.

“particularly complex cases where the judges engage in meaningful back and forth.”<sup>42</sup> But, they say, Congress has not done a good job in assigning cases for direct review in the courts of appeals, citing only two examples, where review of simple adjudications have been placed in courts of appeal—deportation orders and revocations of airline mechanics’ licenses.<sup>43</sup> As explained above, however, placement of the review of removal orders in courts of appeals was not made because Congress thought they would do a better job than district courts, but because Congress wished to eliminate the prior use of appeals to delay ultimate deportation. And the provision that authorizes direct review in courts of appeals of “airline mechanic licensure” is a general provision authorizing direct review in the courts of appeals of orders by the Administrator of the Federal Aviation Administration.<sup>44</sup> Whatever the merits or demerits of such direct review, the fact that there have apparently been only four airline mechanic license revocation cases in the past twenty years indicates it has little impact one way or another.

Mead and Fromherz argue that because district court judges are less ideologically biased than courts of appeals judges, their decisions, because they will have some residual impact at the appellate level, will lead to a less ideologically based decision on appeal. Thus, requiring all challenges to agency action to begin in district court “would lead to a less ideological decision on appeal.”<sup>45</sup> First, they provide scant evidence that ideology or bias for or against the government is less important at the district court level. Indeed, they acknowledge that the lack of evidence that ideology is important at the district court level “may simply be a reflection of the relative dearth of empirical scholarship focusing on these courts.”<sup>46</sup> Those who have litigated on behalf of the government at the district court level are well aware that there are many district court judges who have an underlying bias against agency regulation. Savvy lawyers representing those who regularly challenge agency regulation are equally aware. Their ability in many cases to choose the venue for their challenges at the district court level often means that “ideology” effectively governs any close case, and it is only on appeal that the government has a chance.

Mead and Fromherz trot out the usual suspects to support the notion that ideology plays an important role at the court of appeals level, but they concede, “Even the strongest evidence of ideology’s role finds a relationship only in a minority of decisions.”<sup>47</sup> And they admit that the empirical

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42. *Id.*

43. *Id.*

44. 49 U.S.C. § 46,110 (2012).

45. Mead & Fromherz, *supra* note 1, at 56.

46. *Id.* at 50.

47. *Id.* at 49.

studies suggesting ideological correlations to the voting behavior of circuit court judges “have been the subject of fierce criticism.”<sup>48</sup> Nevertheless, they conclude that “judicial ideology plays a role in a significant number of cases, at least at the circuit court level.”<sup>49</sup> However, no citation is given to support the claim that ideology plays a role in a *significant* number of cases. Or a significant role in any number of cases. At the same time, empirical studies have also shown that the presence of three judges on a court tends to diminish ideological bias in decisions because if only two of the three judges are appointed by a President of the same party, then the ideological leanings are dampened.<sup>50</sup> In short, however, while ideological bias may affect judicial decisionmaking, the case has not been made that having all challenges to agency action to begin in district courts will reduce the ideological impact. Even Mead and Fromherz eventually conclude that to the extent a case is important enough to be appealed, the benefits attributable to direct review in courts of appeals “would cut the other way.”<sup>51</sup>

It would be exhausting to try to rebut all of Mead and Fromherz’s arguments against any direct review in courts of appeals. The above is simply a sampling of the possible rebuttals, which I hope demonstrate that Mead and Fromherz have not made a convincing case that all challenges to agency action should begin in district courts. One can concede that some existing choices between circuit court and district court review are dubious or that the phrasing of exclusive circuit court review provisions is sometimes unclear without coming to the conclusion that line drawing should be forgone altogether. Rather than trying to make the case that all direct review in circuit courts should be eliminated, Mead and Fromherz could have better responded to the particular problems in the current law by considering with some rigor the factors that should lead to direct circuit court review<sup>52</sup> and by providing possible language changes that would eliminate some of the confusion as to which cases are to be directly reviewed in circuit courts. For example, they might have tried to update and improve upon the recommendation thirty years ago by the Administrative Conference of the United States on this subject, which

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48. *Id.* at 50.

49. *Id.* at 56.

50. CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FED. JUDICIARY 8–10 (2006).

51. Mead & Fromherz, *supra* note 1, at 52.

52. They do, almost as a throwaway, suggest some very general considerations that might suggest direct circuit court review, but almost invariably they undercut the suggestion with counter suggestions. *See, e.g., id.* (suggesting that perhaps challenges to rulemakings could be brought directly in circuit courts, but then in the next paragraph providing counter arguments).

attempted to describe which cases should receive direct review in the courts of appeal and which not.<sup>53</sup> However, while they cite it,<sup>54</sup> they cite it for a wholly different issue. They do not address its recommendations that agency actions made upon a formal record and rulemakings should be reviewed in the first instance by courts of appeals.<sup>55</sup>

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53. *See* Recommendation of the Admin. Conference of the United States (ACUS), 40 Fed. Reg. 27,925, 27,927 (July 2, 1975).

54. *See* Mead & Fromherz, *supra* note 1, at 25 n.152.

55. Recommendation of ACUS, 40 Fed. Reg. at 27,927.