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Playing Chicken with the CRA

By: Bridget C.E. Dooling | June 4, 2021

In brief…

When an agency fails to send a rule to Congress—as required by the Congressional Review Act—can private parties sue? The Act has a special provision that bars review by the courts. The Supreme Court is considering whether to take a case that would clarify the scope of this bar on judicial review.

The Supreme Court is considering whether to grant a writ of certiorari in *Kansas Natural Resource Coalition v. Department of the Interior*, a case that would test the scope of the Congressional Review Act (CRA or the Act) provision that bars judicial review. This commentary summarizes the case and explains where it is in the review process. We could know as soon as Monday whether the Court will take the case.

Tenth Circuit Decision

The U.S. Court of Appeals of the Tenth Circuit affirmed a district court's dismissal of a complaint against the Department of Interior for allegedly failing to submit a rule to Congress as required by the Congressional Review Act. The Act requires that "[b]efore a rule can take effect, the Federal agency promulgating such rule *shall submit to each House of the Congress and to the Comptroller General* a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule." 5 U.S.C. § 801(a)(1)(A) (emphasis added). The Act does not specify any consequences for an agency's failure to submit the rule. Instead, the Act permits Congress to disapprove a rule using special legislative procedures.

The rule in question in this case, the *Policy for Evaluation of Conservation Efforts When Making Listing Decisions*, or the PECE Rule, was issued in 2003 by the Fish and Wildlife Service, which is part of Interior. The PECE Rule was invoked in a matter to determine whether the lesser prairie-chicken was endangered. At the district court, the plaintiff Kansas Natural Resource Coalition (KNRC) filed a complaint that the agency's failure to submit the PECE Rule to Congress was "agency action unlawfully withheld or unreasonably delayed" under the Administrative Procedure Act. Interior moved to dismiss on three grounds: plaintiff's lack of standing, expiration of the statute of limitations, and the CRA's bar on judicial review. The district court granted the motion based on the argument that the CRA itself bars courts from reviewing the agency's failure to submit the rule. That provision says: "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. The plaintiff appealed.

The majority opinion issued by in the Tenth Circuit agreed with the district court that the Congressional Review Act barred review under 5 U.S.C. § 805. It also questioned the KNRC's standing, but did not remand on that issue. The dissent would have granted standing and interpreted § 805 narrowly. In the dissent's view, § 805 prohibits judicial review of determinations by Congress after agencies submit their rules for review, but does not prohibit judicial review of an agency's failure to submit the rule to Congress.

Supreme Court Filings

KNRC filed a petition for a writ of certiorari on February 25, 2021. Interior responded on May 14, 2021. KNRC replied on May 18, 2021. While the parties would frame the questions presented differently, in both parties' filings the first question presented is about standing and the second is about the CRA's bar on judicial review.

Focusing on the judicial review question for purposes of this Commentary, KNRC argues that the Court should take the case because the Tenth Circuit's opinion failed to reflect the "strong presumption favoring judicial review of agency action, which requires limits on review of agency action to be construed narrowly." Petition at 19. KNRC asserts that the presumption favoring review should control because "the rest of the statute's text, its structure, its objectives, unambiguous and uncontroverted statements from the CRA's sponsors, and the nature of the administrative action" show that § 805 is narrower than it appears in isolation, and that even in isolation the CRA's language barring judicial review is ambiguous. *Id*. at 21-22. KNRC also argues that the Court should resolve a split of opinion between the Tenth Circuit and the U.S. Courts of Appeals for the Second Circuit and Federal Circuit. *Id*. at 20. Finally, KNRC argues that failure to take the case will "worsen the already significant problem of agencies ignoring the CRA." *Id*.

In response, Interior argues that the Court need not take the case because the presumption favoring judicial review can be—and is—overcome by the CRA's specific language barring judicial review. Response at 11. Interior notes that agency submission of more than 78,000 rules to Congress show that the bar on judicial review has not rendered the CRA "ineffectual." *Id*. at 11. Further, Interior notes that Congress can disapprove a rule even if the agency fails to submit a rule—using procedures that I've written about involving the Government Accountability Office—and that judicial review is only one form of oversight. *Id*. at 11-12. Interior also disagreed that a circuit split exists, citing decisions from the U.S. Courts of Appeals for the D.C. Circuit and the Ninth Circuit that accord with the Tenth Circuit, and distinguishing the Second and Federal Circuit cases listed by KNRC.

Next Steps

The Supreme Court is scheduled to conference about this case yesterday. While it is not guaranteed, the Court typically issues its decisions the Monday following the conference, so we could know as soon as Monday whether the Court will take the case. If they do, this will be one to watch. If the Court ultimately finds that an agency's failure to submit a rule to Congress is reviewable by Courts, it could create incentives for agencies to comply—or overcomply—with the CRA's mandates and also create a new pathway for litigants to challenge an agency's action in court.