Recommendation 75-3

The Choice of Forum for Judicial Review of Administrative Action

(Adopted June 5-6, 1975)

This recommendation states criteria for use by the Congress in determining the appropriate forum for judicial review of federal administrative action.

The present forum for the review of most agency actions taken on formal evidentiary records is the court of appeals under specific statutory provisions. There are some exceptions. An important one concerns decisions of the Social Security Administration on claims of old-age, survivors' and disability benefits, which are reviewable in the first instance by district courts with subsequent recourse to the courts of appeals.

The jurisdictional picture is less clear with respect to informal administrative action, both notice-and-comment rulemaking and non-record adjudication.

Some recent statutes provide specifically for review by courts of appeals of rules of general applicability promulgated without an evidentiary hearing. There is much uncertainty, and conflicting authority, as to whether older statutes providing for direct appellate review of agency "orders" apply to such rules. In the case of agencies not subject to specific court of appeals review provisions, rules are ordinarily reviewed by district courts under the general review provisions of the Administrative Procedure Act.

Orders entered after non-record adjudications by agencies whose "orders" generally are subject to court of appeals review typically are reviewed in the courts of appeals, although there is some old and more-or-less neglected authority that casts doubt on the practice. Orders of other agencies entered after non-record adjudications are reviewed in the district courts under the general review provisions of the Administrative Procedure Act.

Legislation that conformed to the criteria set forth in this recommendation would not significantly alter the pattern described above but would clarify the pattern at its edges. Such legislation would eliminate the uncertainty and consequent needless jurisdictional litigation that have resulted from the ambiguity of existing statutory review provisions in their application to informal agency actions, rules and orders. It would have the additional desirable effect, particularly important now because of the acute and increasing caseload pressure on the

courts of appeals, of helping to avoid burdening these courts with administrative review cases that are less suitable for them than others.

This recommendation rests on three basic premises. First, direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system. The classic case for the courts of appeals is review of agency action taken on an evidentiary record. A second premise, however, is that direct review by the courts of appeals is not necessarily rendered unfeasible by the absence of such a record; the records generated by the processes of notice-and-comment rulemaking and of informal adjudication are frequently adequate to the purpose of judicial review and, also, can usually be supplemented without the necessity of a judicial trial. The third, and qualifying, premise is that review by the courts of appeals, even when review is of a purely appellate nature or, if not so, can feasibly be conducted by the courts of appeals, is not invariably desirable. The courts of appeals, burdened by rapidly increasing caseloads that threaten the quality of their decisions, constitute a scarce resource that should be reserved, to the extent possible, for the resolution of issues of law or policy issues of major impact; administrative review cases that do not present such issues and that would not ordinarily reach the courts of appeals unless brought there initially should be assigned instead to the district courts.

Before the study on which the recommendation is based was made the Conference necessarily passed upon particular questions of choice-of-forum for judicial review in connection with individual studies and the recommendations emanating therefrom. Instances are Recommendations 72-6 (court of appeals review of civil money penalties prescribed on a record); 72-7 (district court review of non-record selective service preinduction orders); 74-3 (court of appeals review of mining claims decided on a record). The Conference has not caused these recommendations to be restudied in the light of the new criteria but believes that the recommendations remain appropriate.

Recommendation

1. Adjudications based on trial-type hearings and rules required by statute to be based on a hearing with a determination on the record should generally be made directly reviewable by courts of appeals. For certain types of formal administrative action, however, initial district court review may be appropriate in the interest of conserving the scarce and over-extended resources of the federal appellate system. The district court should not be interposed unless the administrative action to be reviewed is of a type: (a) that rarely involves issues of law or of

broad social or economic impact warranting routine review by a multimember court, and (b) such that district court review would significantly reduce the workload of the appellate courts. The latter condition is met only where the class of orders to be reviewed is numerous and, if reviewed initially by district courts, would infrequently give rise to further appeal.

2. For any class of formal administrative action that, even after initial district court review, generates a large and burdensome volume of appeals, only a small proportion of which involve legal issues or issues of broad social or economic impact, Congress should consider the advisability of making appeals discretionary or of allowing appeals only upon certification by the district court. Under a system of discretionary appeals, leave to appeal, either by the agency or by an aggrieved party, should be granted only in cases where issues of law or of broad impact are involved.

3. Orders of the Social Security Administration with respect to claims for disability, health insurance, retirement or survivors' benefits should continue to be reviewed in the first instance by district courts. If the volume of social security appeals increases as dramatically as projected, Congress should consider the advisability of placing appellate review on a discretionary basis.

4. Orders of the Department of Labor Benefits Review Board with respect to black-lung compensation claims under the Black Lung Act of 1972 are now subject to direct review by courts of appeals in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Congress should consider the advisability of providing for initial district court review of such orders.

5. The appropriate forum for the review of rules promulgated pursuant to the notice-and-comment procedures of 5 U.S.C. § 553 should be determined in the light of the following considerations:

(a) Absence of a formal administrative record based on a trial-type hearing does not preclude direct review of rules by courts of appeals because: (i) compliance with procedural requirements of 5 U.S.C. § 553, including the requirement of a statement of reasons for the rule, will ordinarily produce a record adequate to the purpose of judicial review; and (ii) the administrative record can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.

(b) Direct review by a court of appeals is appropriate whenever: (i) an initial district court decision respecting the validity of a rule will ordinarily be appealed; or (ii) the public interest requires prompt, authoritative determination of the validity of the rule.

(c) Rules issued by agencies that regularly engage in formal adjudication and whose "orders" are subject by statute to direct review by the courts of appeals will normally satisfy the criteria of (b) above and in any event should be reviewable directly by the courts of appeals.

(d) Rules of other agencies that do not satisfy the criteria of (b) above should generally be reviewable in the first instance by the district courts.

6. (a) Informal administrative actions, other than rules, should generally be reviewable in the first instance by the district courts.

(b) The court of appeals is the appropriate reviewing forum for informal actions that, as a class, fulfill all of the following conditions:

(i) Typically involve issues of law or of broad social or economic impact;

(ii) Typically do not require an evidentiary trial at the judicial level to determine either the underlying facts or the grounds or evidence on which the agency based its action; and

(iii) Are either few in number or, if numerous, would in most cases be likely to reach the appellate courts eventually even if reviewed initially by district courts. Informal orders issued by agencies that mainly engage in formal adjudication and the formal orders of which are now subject by statute to direct review by the courts of appeals will normally satisfy these conditions and should therefore be reviewable by the courts of appeals. There is, however, at least one exception. Informal, discretionary orders of immigration officials related to deportation, but not issued as part of any formal deportation proceeding, should continue to be reviewable in the first instance by the district courts.

7. Statutes that give courts of appeals jurisdiction to review informal orders or rules should contain provisions, similar to that now contained in the Administrative Orders Review Act, 28 U.S.C. § 2347, authorizing transfer of proceedings to a district court where a factual issue requiring a judicial trial is presented.

8. A federal court which determines that it does not have jurisdiction of a judicial review proceeding should be authorized to transfer the proceeding, in the interests of justice and expedition, to a federal court appearing to have jurisdiction.

Citations:

40 FR 27926 (July 2, 1975)

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Separate Statement of Malcolm S. Mason and Robert L. Trachtenberg

This is, we believe, the first time the Conference has chosen to make an important recommendation without obtaining in advance the views of the agency most affected and best informed. Paragraph 3 of the recommendation deals specifically with review of Social Security cases. Paragraphs 1 and 2 are more general, but the discussion focused primarily on Social Security cases and did not have the benefit of specific comment by the Social Security Administration.

In a recent 4-week period that seems representative, over 95 percent of the litigated Social Security cases turned on factual issues of disability. The other 5 percent turn on issues of law often of constitutional dimension; as to these it is neither desirable nor useful that the review process be encumbered by a screening at district court or appeal court level.

The disability fact cases come to the courts under a substantial evidence test with the benefit of analysis by several levels of agency staff, an administrative law judge and possible appeals council review of fact findings on which the agency at several levels and a district court have concurred; the likelihood of reversal is extremely small. In the few cases in which the agency appeals, it is, by set policy, seeking review of a case in which there is an issue of broad consequence and in which there is a conflict between a conclusion of the agency at several levels of administration and a district court; the likelihood of reversal is presumably increased.

The proposal for appeal limited by discretion of the appeal court, or worse, by the district court, is bad in principle and probably unnecessary. If considered at all it should be viewed with due attention to these principal differences. Despite large volume, appellate review is ordinarily as quick and undemanding as a discretionary screening would be. The multi-tiered appeal process has had a beneficial effect on the program.

We believe that section 3 should have been deleted, particularly sentence 2 of section 3, and sections 1 and 2 should have been reconsidered in the light of that deletion to avoid reliance on impressions about Social Security cases without the benefit of such guidance as advance consultation with the agency might have given.