REPORT OF THE COMMITTEE ON JUDICIAL REVIEW IN SUPPORT OF RECOMMENDATION NO. 8

For historical reasons, procedures for review of orders of the Interstate Commerce Commission differ from the usual patterns which have developed governing judicial review of administrative action. Since 1903 orders of the Commission (other than those involving only the payment of money) have been reviewed by three-judge district courts specially constituted under authority of 28 U.S.C. 1336, 2284, and 2325. The decisions of these courts may be taken to the Supreme Court by direct appeal rather than by petition for certiorari.

The 1961–62 Administrative Conference of the United States considered the question fully and concluded that the reasons for conforming procedures for review of these orders to accepted concepts of judicial review far outweigh the reasons for perpetuating present procedures. In particular, substitution of the court of appeals for three-judge district courts and elimination of direct appeals to the Supreme Court would reduce the heavy strain on judicial resources imposed by the convening of three-judge district courts and lighten the docket of the Supreme Court. Recommendation 3 of the 1961–62 Administrative Conference proposed the elimination of the use of special three-judge district courts for review of these ICC orders and the substitution of review in courts of appeals as is generally the case with orders of other Federal regulatory agencies. Recommendation 4 proposed further procedures for improving judicial review of ICC orders, all of which were designed to increase efficiency and save time, effort, and expense in appellate procedures.

Identical bills incorporating the substance of Recommendations 3 and 4 were introduced in the 90th Congress, Second Session as S. 2687 and H.R. 13927. S. 2687 was passed by the Senate, 114 Cong. Rec. S10282 (Sept. 5, 1968), but no action was taken in the House of Representatives. It appears likely that the bills will be reintroduced in the next session of Congress.

The reasons that supported Recommendations 3 and 4 remain as valid today as they were six years ago. A detailed statement of those reasons is contained in the reports submitted by the Committee on Judicial Review to the previous Administrative

Conference in support of Recommendations 3 and 4, attached hereto as Appendix I. We urge the reaffirmation of these recommendations.

APPENDIX A

1961 RECOMMENDATIONS 3 AND 4 WITH SUPPORTING REPORT

RECOMMENDATION NO. 3

It Is Recommended That—

(1) review of Interstate Commerce Commission orders should be upon appeals to the United States Courts of Appeals in all cases where at present a special three-judge court is used; district courts should be relieved of their jurisdiction of such cases under 28 U.S.C. 1336, and the courts of appeals should have exclusive jurisdiction to review these orders of the Commission;

(2) final review of orders of the Interstate Commerce Commission by the Supreme Court of the United States should be only by petition for a writ of certiorari;

(3) review of Interstate Commerce Commission orders should be permitted in any judicial circuit wherein is the residence or principal office of the party or any of the parties filing the request for review.

RECOMMENDATION NO. 4

It Is Recommended That—

Procedures for judicial review of orders of the Interstate Commerce Commission by courts of appeals should incorporate the following features:

(1) A limit of 60 days should be imposed as the time within which a petition for review must be filed in any case for which the present statutory provisions do not fix a period for filing petitions for review, such 60-day period to run from the date of entry of the order appealed from or entry of an order denying reconsideration thereof where petitions for consideration are allowed by the Commission's rules, whichever is later.

(2) Appeals should be commenced by the filing of a petition for review in the form of a notice of appeal.

(3) Anyone seeking review should be required to serve notice of appeal upon all parties to the proceeding before the Commission, the Department of Justice, and the Commission.

(4) When several appeals are taken from the same order of the Commission, the venue should be determined by the first notice of appeal to be filed, and all subsequent appeals should be considered as taken to the same court, consolidated therewith, and handled as one appeal.

(5) The Commission should provide the record of its proceedings on appeal and should transmit the record to the court. Until such time as procedures are developed whereunder the Commission may use mechanical facilities and methods for the production of the record in its proceedings in such form as to obviate printing or other reproduction of the record for judicial review, and provision is made for the designation of record after the filing of briefs, as recommended by the Conference, the record on appeal should consist of

the entire record before the Commission, and should be transmitted to the court within the time allowed for the filing of briefs. The record should be returned to the Commission upon final decision of the appeal.

Supporting Report of the Committee on Judicial Review

We ask that the Administrative Conference of the United States adopt the following recommendations:

1. The Administrative Conference recommends that review of Interstate Commerce Commmission orders should be by appeal to the Courts of Appeal in all cases where at present a special three judge court is used. District Courts should be relieved of their jurisdiction under 28 U.S.C. 1336 and the Courts of Appeal should have exclusive jurisdiction to review these orders of the Commission.

2. The Administrative Conference recommends that final review by the Supreme Court of Interstate Commerce Commission orders should be only by petition for a writ of certiorari.

3. The Administrative Conference recommends that review of Interstate Commerce Commission orders should be permitted in any judicial circuit wherein is the residence or principal office of the party or any of the parties filing the request for review.

4. The Administrative Conference recommends that there should be a 60 day time limit on all appeals from Interstate Commerce Commission orders to the Courts of Appeal. Notice of appeal should be filed within 60 days after entry of the order appealed from or after entry of an order denying reconsideration of such order where petitions for reconsideration are alllowed by the Commission's rules, whichever is later.

5. The Administrative Conference recommends that the Interstate Commerce Commission should provide and transmit the record upon appeal. Until effectuation of the Recommendations in Group II, the record on appeal should consist of the entire record before the Commission and should be transmitted to the Court within the time allowed for submission of the final briefs of appellees on the appeal. The record should be returned to the Commission upon final decision of the appeal, or upon the printing of the record on appeal to the Supreme Court, whichever is earlier.

6. The Administrative Conference recommends that when several appeals are taken from the same order of the Interstate Commerce Commission, the venue should be determined by the first notice of appeal to be filed, and all subsequent appeals should

be considered as taken to the same court and consolidated therewith and handled as one appeal.

7. The Administrative Conference recommends that appeals from Interstate Commerce Commission orders should be commenced by the filing of a petition for review in the form of a notice of appeal.

8. The Administrative Conference recommends that anyone seeking review of an Interstate Commerce Commission order should be required to serve notice of appeal upon all of the parties to the proceeding before the Commission, and upon the Department of Justice, and the Commission. Anyone who is a party to the proceeding before the Commission may intervene as of right in the review proceeding by giving timely notice thereof to the Court, the Commission, the Department of Justice, and all the other parties within 30 days after receiving notice of the appeal. Thereafter, intervention may also be allowed at the discretion of the court.

Note: None of the above recommendations are intended to change the present law with respect to reviewable acts, the scope of review, or the existing allocation of responsibility and authority between the Commission and the Department of Justice in actions to review or set aside orders of the Commission.

Comments

1. Under the present system, orders of the ICC are reviewed by specially-constituted three-judge federal district courts. 28 U.S.C. 1336, 2284, 2325. It should be noted, however, that so-called reparation orders of the ICC are reviewable by single judge district courts, although these make up only a minor part of judicial review of ICC orders. For all other orders, exclusive jurisdiction for review rests with three-judge district courts; this system has been in effect since February, 1903, although its present statutory base is the Urgent Deficiencies Act of 1913.

2. To the best of our knowledge, the ICC is the sole agency of the United States Government the orders of which are reviewable by three-judge courts. The systems for orders of other agencies, such as the FCC, which formerly were so reviewable have now been changed to provide for review by the Courts of Appeals.

Note: We understand that, with respect to the Department of Agriculture, some use has been made of three-judge courts for review of some D/A programs pursuant to the provisions in 28 U.S.C. Secs. 2281–2282, in connection with injunctions. We are, however, of the opinion that this is a relatively minor problem and should be handled separately from the present problem.

3. The decisions on ICC orders by three-judge district courts now may be appealed directly to the United States Supreme Court. (This is *not* a certiorari proceeding.)

4. In the six-year period from July, 1955 to June, 1961, 398 actions challenging orders of the ICC were instituted. Of these, 159 came in the period of July, 1959 to June, 1961. Orders under attack most often were those involving: rate questions, the grant or denial of certificates of public convenience and necessity and permits; the interpretation of such certificates and permits; mergers and acquisitions; and abandonment and extension of railroad lines.

5. The average length of time from the filing of the complaint to the decision in the district courts, with respect to those cases terminated during the three-year period ending June, 1961, was approximately nine months. Several cases pending for more than two years make that figure somewhat misleading.

6. By and large, with some exceptions, review of the orders of federal administrative agencies is by the Courts of Appeals. This includes the Federal Communications Commission, the Federal Maritime Board, the Federal Power Commission, the Federal Trade Commission, the Securities and Exchange Commission, and the National Labor Relations Board.

Thus it would seem that the trend of modern review statutes is toward use of the several Courts of Appeal. Furthermore, while we understand that some trouble has resulted so far as the FCC is concerned, chiefly because of dual avenues of appeal, it would appear that this trend has been generally efficacious.

7. Although we do not as yet have access to complete data for all of the Courts of Appeals, it would seem that Court of Appeal review of administrative orders, as a general rule, may require a little longer period of time than does the three-judge system now in use for the ICC. For the Court of Appeals for the District of Columbia, which perhaps is the most important of the several circuits so far as review of administrative orders is concerned, the median length of time for review of such orders during the past three fiscal years is as follows:

Fiscal Year 1959	*Fiscal Year 1960*	*Fiscal Year 1961*
Approximately 9 months	Approximately 10.6 months	Approximately 10.5 months

In our judgment, however, this fact—even if it is borne out by data from the other Courts of Appeals—should not be considered conclusive of the question under discussion. At least the

following other factors must be weighed and evaluated before reaching a conclusion: (a) the differences, if any, in the type of orders reviewed by the Courts of Appeals from the other agencies as compared to those reviewed by three-judge courts; (b) the importance to be given to the most efficient use of the time of district judges; is the small gain worth the time and trouble of convening three-judge courts? (c) the possible greater degree of expertise in judges of the Courts of Appeals in reviewing administrative orders as compared with the district judges; and (d) the desirability of whether ultimate review by the Supreme Court should be by appeal or by the discretionary writ of certiorari. We believe that the possible—although not yet proved—saving in time for review is outweighed by the other factors mentioned.

8. There is the question whether final review by the Supreme Court should be by appeal as of right or by discretionary writ of certiorari. Although we recognize that arguments may be found on both sides, it is our belief that final review by the Supreme Court of ICC orders should be by writ of certiorari. Our reasons for this position include: (i) apparently, many appeals today from three-judge courts are handled strictly on the pleadings, with no more attention being given to them than for a denial of certiorari in other cases; (ii) the Supreme Court has been criticized of late for assuming too heavy a load; (iii) we perceive no reason why transportation is any more important to the American people than communications, labor relations or natural gas matters, all of which are now subject to final review only by certiorari.

9. Should all of the Courts of Appeal be utilized in review of ICC orders or only one (e.g., the Court of Appeals for the District of Columbia)? There are arguments both ways. Reference to a single Court of Appeals permits the judges of that court to become highly skilled in the intricacies of the agency and thus to render decisions and opinions of high quality. On the other hand, it seems that the ICC bar is relatively decentralized throughout the United States and it might place a burden upon litigants and their attorneys to have to resort to one Court of Appeals only.

We believe that it is in the interests of furthering progress while placing as minimal a strain on existing procedure as is possible to provide for resort to the several Courts of Appeals.

10. There is no statutory time limit for the institution of actions to review orders of the ICC, other than reparation orders,

but the doctrine of laches does apply. We believe that there should be a fixed time limit, and accordingly recommend the provision of 60 days as that limit.

11. Under present procedure, the party seeking review of an ICC order has to furnish a copy of the record before the Commission, get it certified by the Commission, and file it in court. This is at the expense of the party seeking review. Unlike other agencies, the ICC is not required to supply or file the record of its proceedings with the court.

Although we understand that the plaintiff need not file a certified copy of the entire record before the ICC unless he attacks the substantiality of the evidence to support the Commission's conclusions (as he usually does), and also that the record is not printed unless an appeal is taken to the Supreme Court and that Court consents to hear the case on oral argument, we believe that the ICC procedure with respect to the record should be brought into conformity with that of other agencies.

12. Under present procedure there is no provision for consolidating into a single court multiple suits against a single ICC order. We understand that it frequently happens that several actions are started in two or more districts. In our opinion, this practice should be brought into consonance with modern review statutes by a provision that the first notice of appeal to be filed should determine venue, and that all other appeals of that order should be consolidated therewith.

13. The form of review of ICC orders should be changed from the present, original action to that of an appeal, commenced by a petition for review in the form of a notice of appeal.

14. Under present procedure, in actions to set aside ICC orders, the United States is the only necessary party upon whom service of process is required. Other parties to the case before the ICC usually do not have actual notice that the case is being reviewed. We believe that all parties should be notified. Accordingly, we recommend that provision be made for the burden of giving notice of appeal from an ICC order to be placed upon the appellant, that party to be responsible for service of appropriate notice upon all parties to the proceeding before the ICC and upon the ICC and the Department of Justice.

15. The Judicial Conference adopted a resolution in 1943 to the effect that "review of orders of the Interstate Commerce Commission . . . now reviewable by a district court of three judges from whose decision an appeal lies to the Supreme Court, should be made upon petition to the appropriate circuit court of appeals

on the record made before the administrative body; that any further review should be by the Supreme Court on petition for writ of certiorari, and that the United States and the Commission should each have the right to petition for writ of certiorari." This action by the Judicial Conference was taken as a result of a representation by Chief Justice Harlan F. Stone in 1942 that, under existing law, the time of the Supreme Court was being taken in the consideration of appeals of right from three-judge district courts in relation to orders of the Interstate Commerce Commission which did not involve issues important enough to go to that Court, and that the method of review ought to be by certiorari, optional with the court, as is most other cases." (Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress, and Hearings before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress) (1949) (the chronology is set out therein on pages 78 et seq., in a letter dated January 23, 1947, from the Director of the Administrative Office of the United States Courts to the Speaker of the House of Representatives).