



## Recommendation 88-6

### Judicial Review of Preliminary Challenges to Agency Action

(Adopted September 16, 1988)

The Administrative Conference of the United States has long had an interest in forum allocation in administrative cases. In Recommendation No. 75-3, "The Choice of Forum for Judicial Review of Administrative Action" (1975), the Conference stated criteria for determining the appropriate judicial forum for the review of final administrative action. The Recommendation urged that agency actions taken on the basis of a formal evidentiary record should normally be directly reviewable by courts of appeals, and that rules and other informal orders issued by agencies whose formal orders are subject to review in the courts of appeals should be reviewable by those same courts.

Building upon the principles underlying that recommendation, the Conference now addresses the proper forum for judicial review where an agency has issued no final order, but agency action (or inaction) is nevertheless considered reviewable by a court.<sup>1</sup> For example, a party may allege that agency action has been "unlawfully withheld or unreasonably delayed" within the meaning of 5 U.S.C. 706. What level of court—trial or appellate—should have jurisdiction over such a preliminary challenge? Most direct review statutes do not specifically address this question, and difficult jurisdictional questions have arisen as a result.

The leading decision on this subject is *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*), a case involving a challenge to allegedly unreasonable agency delay. In *TRAC*, the United States Court of Appeals for the District of Columbia Circuit concluded that when the relevant statute assigns review of final agency action (when and if it occurs) exclusively to the court of appeals, then a preliminary challenge also will be subject to exclusive appellate review so long as relief in relation to it might affect the court's ultimate jurisdiction. Based on a court's authority to issue writs in aid of its jurisdiction under the All Writs Act, *TRAC's* holding strongly favors consolidating preliminary challenges in the courts of appeals even when the agency's organic statute does not settle the point.

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<sup>1</sup> The Administrative Conference takes no position in this recommendation on whether and under what circumstances such preliminary actions should be deemed judicially reviewable before issuance of a final order by an agency.



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However, some confusion has followed the *TRAC* decision. Subsequent opinions have grappled at length with the question of what "might affect" the court's jurisdiction and, in some cases, have carved out exceptions to the *TRAC* doctrine. Some district courts, for example, have distinguished certain constitutional claims, for which they have upheld district court jurisdiction.

In addition, some problems have remained because *TRAC* cannot readily be applied to situations in which the agency's final action might take different forms, with different jurisdictional consequences. For example, in some cases the Occupational Safety and Health Administration may decide to issue "standards", which are reviewable in the courts of appeals, or "regulations," which are reviewable in district court. Jurisdictional uncertainty can also occur in preliminary challenges involving Food and Drug Administration approval of new drug applications under the Food, Drug and Cosmetic Act, 21 U.S.C. 355. When the FDA refuses to approve an application, the statute authorizes the applicant to appeal directly to the courts of appeals; this special review provision does not apply, however, to parties challenging FDA approval of a new drug application, who thus must proceed in district court. In cases like these, the *TRAC* rule may require courts to make premature jurisdictional analyses based on speculation about the nature of the action the agency may ultimately take in order to determine whether they can hear the preliminary challenge.

The Conference believes that there is a need for greater clarity in this area. Unless Congress has reason to believe otherwise in a specific statute, jurisdiction over all such preliminary challenges should follow the principle of *TRAC*. The requirement that preliminary challenges be heard exclusively by the court that will ultimately review final agency action may influence a litigator's decision whether to raise an issue preliminarily and thus discourage the bringing of preliminary review proceedings that have little merit but offer some potential for creating delay. In addition, the courts that review final agency action may be more familiar with the substantive programs administered by an agency, and thus better able to evaluate the issues raised in preliminary challenges. To avoid further confusion over proper jurisdiction, the *TRAC* rule should be interpreted to include all cases in which final action would be reviewable in the courts of appeals, and the exceptions that have been carved out by the district courts should be rejected. Where jurisdiction over the final action is unclear, however, preliminary challenges should be cognizable in either the district courts or the courts of appeals.

Some special consideration may be necessary where preliminary challenges involve allegedly unlawful delay by an agency. For these challenges, by definition, time is generally of the



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essence; moreover, they usually do not require elaborate analysis of the relevant facts or applicable law. Frequently these claims may be resolved more easily and expeditiously through the use of simpler or less formal approaches than through the ordinary course of briefing and oral argument. The courts of appeals should develop techniques for dealing with these cases promptly and practically when they arise. While the most effective measures may vary depending upon the procedural rules applicable in individual courts, possible approaches might include rules permitting, in appropriate cases, decision on the briefs without oral argument, the filing of petitioners' briefs simultaneously with the notice of appeal, expedited calendaring of delay cases, informal status or settlement conferences involving a single judge, and, where the record may require expansion through factfinding, prompt assignment to a district court, magistrate, or other official for that purpose.

Accordingly, the Conference offers the following recommendation.

### **Recommendation**

1. In considering legislation that would assign jurisdiction to review agency action to either district courts or courts of appeals, Congress should:

(a) Follow the principles stated in ACUS Recommendation 75-3, *The Choice of Forum for Judicial Review of Agency Action*; and

(b) Take special care to consider where preliminary challenges to agency decisionmaking should be brought, specifying whether the district courts or the courts of appeals or both have jurisdiction over such challenges. As a general rule, jurisdiction over reviewable preliminary challenges should be assigned to the forum that would have jurisdiction if an appeal were taken from final agency action growing out of the proceeding.

(c) Provide that when the proper forum for judicial review of final agency action may be either the district courts or the courts of appeals, depending upon matters such as the form the agency's action will eventually take or the outcome of the proceeding, any of the courts that might have jurisdiction over final agency action should have jurisdiction over reviewable challenges to the agency's preliminary action (or inaction).

2. In the absence of Congressional direction, the principles identified in paragraph 1 (b) and (c) of this recommendation should govern the choice of forum for otherwise reviewable preliminary challenges to agency action.



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3. Where jurisdiction over claims involving unlawful delay by an agency lies in the courts of appeals, those courts should assure that their procedures provide adequately for prompt and efficient disposition of such claims.

### **Citations:**

53 FR 39585 (October 11, 1988)

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