Committee on Judicial Review

Minutes

October 17, 2012

Members Attending
Ron Levin (Chair)
Bill Allen
Lisa Bressman (via telephone)
Betty Jo Christian
Rebecca Fenneman (via telephone)
Paul Kamenar (via telephone)
Peter Keisler (via telephone)
Rebecca MacPherson (via telephone)
Jeff Minear
Alan Morrison
Jill Sayenga
David Shonka
Allison Zieve
Helgi Walker (via telephone)

ACUS Staff Attending
Gretchen Jacobs, Director of Research
Emily Bremer, Attorney Advisor and In-House Researcher, Section 1500
Stephanie Tatham, Staff Counsel
Matthew Bisanz, Legal Intern

Invited Guests Attending
Jonathan Siegel, Special Counsel and Researcher, Section 1500
Lee Beck, Consultant, Administrative Record Project
Jim Tozzi, ACUS Member
Edmund Amorosi, Smith Pachter (via telephone)
John Prairie, Wiley Rein, on behalf of the ABA Section of Public Contract Law (via telephone)
Dan Syrdal, Attorney (via telephone)
Donald Grove, Nordhaus Law Firm (via telephone)
Nancie Marzulla, Marzulla Law (via telephone)

Mr. Levin called the meeting to order at 2:04 pm. Attendees introduced themselves. Mr. Levin identified David Shonka, Acting General Counsel at the FTC, as Will Tom's alternate and replacement on the Committee and introduced new committee member: Christopher Meade,

Department of Treasury. Mr. Levin noted that Mr. Meade was not participating in the Section 1500 discussion. Mr. Levin clarified that Judge Starr is not a member of the committee on Judicial Review, as announced at the last meeting. The committee consented to public participation in the meeting, time permitting. The committee approved the October 03, 2012 meeting minutes, with minor revisions from Mr. Minear.

The committee began discussions on the 28 U.S.C. Section 1500 (Section 1500) project. Mr. Levin summarized the committee's decision to adopt a recommendation that included a presumptive stay provision in most cases, though subject to exceptions. He explained that this would prevent claims from being forfeited altogether, with some recognition of the Department of Justice's interests in not litigating two related cases at once and which the Supreme Court recognized as a purpose of Section 1500. He explained that the sense of the committee was that this middle ground approach had an intrinsic appeal and might make the recommendation easier to sell to Congress.

Mr. Levin introduced the revised draft recommendation and edits to the same proposed by Alan Morrison, as well as public comments from Dan Syrdal. Mr. Levin stated that Professor Gregory Sisk, who has previously commented on the project, could not attend the meeting but conveyed his availability to assist the committee if desired. Mr. Levin also observed that Judge S. Jay Plager could not attend the meeting but that he had expressed his sense that the recommendation is on the right track. Judge Plager asked that the committee pay close attention to the issue of pendency, and the question of whether the draft recommendation made adequate provision for when the first case was dismissed or whether there needed to be express provision made for lifting the stay in the proposal.

Mr. Levin noted the ambiguity on the question of whether the recommendation would take the form of a proposed statute or a description of a statute and explained that the draft recommendation retained both but that the committee could choose to retain one or the other, or both. Mr. Morrison strongly supported providing actual statutory language to enable people to precisely see the committee's recommendation and to avoid future confusion. Ms. Zieve pointed out that the statute and text are substantively the same. Ms. Christian supported drafting a proposed statute. Mr. Levin suggested that if the full Conference didn't agree on statutory text, then this text could be moved into the consultant's report but suggested provisionally proceeding with drafting statutory text.

Mr. Levin asked whether the recommendation should apply to pending cases or whether the Conference should recommend that Congress consider applying the statute to pending cases. Mr. Morrison suggested that Congressional action was unlikely to depend on the distinction in the recommendation. Ms. Zieve suggested that the reason for making a recommendation was to address the unfairness and the trap and that the way to resolve this unfairness for more people would be to apply the recommendation to pending cases to correct the problem. Mr. Levin suggested that additional preamble text could clarify that the recommendation would apply to

pending cases and that it would be better to spell it out. Mr. Morrison commented that this would do no more than offer a plaintiff an opportunity to make the case and wouldn't assure the outcome, neither party would lose by forfeiture. Mr. Levin urged spelling out the applicability in the preamble. Mr. Keisler agreed with the sentiment of the discussion and observed that if, on the floor, there were disagreement about this issue that the next best alternative would be to specify that the provision did not apply to pending cases. He opined that the worst alternative would be to have a statue that was silent on retroactivity or applicability, as this would create wasteful litigation. Mr. Kamenar agreed.

Mr. Kamenar then brought the committee's attention to the language regarding pending cases suggested by Dan Syrdal and reminded the committee of the case presented by Mr. Edmund Amorosi, where he had a quiet title action and a takings action and the quiet title action was complete but the temporary takings claim was dismissed under Section 1500. Mr. Kamenar asked whether the temporary taking claim could be revived and suggested that the committee would want to include those sorts of pending cases and asked if the Syrdal language would be the best way to do that.

Before turning to the Syrdal language, Mr. Levin summarized the committee's sentiment that the statute should apply to pending cases and suggested that the preamble indicate that Congress should not leave the issue open to the vagaries of the litigation process.

The committee moved on to discussion of the related issue of cases in which one case has been dismissed and the other one is not pending because of the jurisdictional bar and read Mr. Syrdal's proposed language. Mr. Siegel suggested striking the part of provision stating the intent of Congress. Ms. Zieve asked if Mr. Syrdal was trying to restore cases that had been dismissed. Mr. Siegel suggested changing the language to simply specify that the jurisdictional bar was not applicable to pending cases. Mr. Morrison and Ms. Zieve asked for additional clarification of the Syrdal provision. Mr. Syrdal explained that his client's case was an Administrative Procedure Act action followed by a takings case. In their situation, the client won in the 9th Circuit Court of Appeals. When *Tohono* was decided, the DOJ moved to dismiss the case that was remaining in the Court of Federal Claims based on Section 1500. The DOJ's motion is pending. Mr. Syrdal explained that the proposed language required both cases to be active but in his client's case, one of the cases had already been resolved. Mr. Morrison explained that if the effective date was specified as upon enactment then there would be no basis for dismissal of actions that were still pending. Mr. Syrdal responded that 1 U.S.C. § 109 could raise the possibility that the provision was not remedial and this could bring litigation regarding the retroactivity of the repeal.

Mr. Morrison suggested a transition provision specifying that the repealed Section 1500 no longer applies to any case that is still pending at the time of enactment. Mr. Siegel offered an alternative, which would add at the end of the existing sentence following "as adopted" ", and such cases shall not be subject to dismissal based on the jurisdictional bar previously imposed by this section." Mr. Syrdal expressed concern that the initial sentence applied to pending cases in

two courts and asked the committee to specify that the repeal would apply even where one case had already been dismissed. Mr. Morrison suggested specifying that "no case" shall be subject to dismissal and the committee concurred. Mr. Kamenar asked whether the proposed language would cover claims that had been dismissed. Mr. Morrison and Ms. Zieve responded no, and Mr. Morrison clarified that it would not offer relief unless the case was on appeal, because *Plaut* prevents relief in the case of a final judgment.

Mr. Siegel asked if the committee resolved the issue of which case should be stayed. The current version was based on the report, which suggested that the second case ought to be stayed. Mr. Siegel raised a second possibility, that the plaintiff ought to designate which case ought to be stayed. He suggested that this might be the better solution and read proposed language "two actions with substantially the same operative facts, the plaintiff shall designate one action as the lead action and the court presiding over the other action shall stay the other action in whole or in part until the lead action is no longer pending." Mr. Siegel added that this would make the next provision in the draft, regarding simultaneous filing, unnecessary. He also suggested separating out the point regarding retroactivity. Mr. Morrison agreed with the notion that the plaintiff should get at least a presumptive choice and raised the possibility that the Department of Justice would raise the argument that it at least ought to be heard and the stay shouldn't automatically be set by the plaintiff because there might be some good reasons why the Department of Justice doesn't want the stay in that forum and the court would need to decide. Second, he explained that the phrase "until the action is no longer pending" suggests that the court might not have the authority to lift the stay if circumstances change at some point." Ms. Zieve indicated that the first point applied equally to the existing language. Mr. Levin suggested that the committee had concluded at the last meeting that it should be the second court that presumptively stays. Ms. Christian suggested that this approach still made sense and that the Department of Justice would make a major issue over allowing the plaintiff to choose, and that there was no good reason to fight over this issue. She explained that she saw no principled reason to choose one approach over the other and therefore suggested the pragmatic approach of picking the option least likely to provoke a firestorm of opposition. Ms. Zieve added that in the majority of cases either outcome would mean the same thing for plaintiffs.

Ms. Zieve inquired about when the stay ends, and the committee discussed language to address ending the stay and agreed that judges should have discretion to end the stay.

Mr. Morrison suggested some minor stylistic changes to the recommendation. Mr. Morrison asked to discuss the first to file rule. He said that the presumption shouldn't automatically apply where an appeal is on review from an agency. Mr. Levin suggested that this would open a wide group of cases in which there was no presumption. Ms. Bremer clarified that that intention was to avoid staying an appeal after completion of a trial. Ms. Zieve suggested that there should be a transition provision and the committee restructure the recommendation accordingly. Ms. Bremer expressed concern that excepting appeals on review from an agency

would exclude a broad set of cases. The committee discussed various factual scenarios. Ms. Zieve suggested that the interests of justice could address the concern and the preamble could address the specific scenario. Mr. Levin suggested that the preamble should contain a more extensive discussion of scenarios where a stay might not be in the interests of justice. Mr. Morrison suggested including additional examples.

Mr. Siegel inquired why the language "or on appeal from the Court of Federal Claims" was added. Ms. Tatham stated that the language came from the report [please note: this was in error, the language was added based on staff discussions]. The committee agreed to keep the language.

Mr. Morrison suggested structuring the recommendation so that part A was repeal, part B was the stay provision, and part C would be a transition provision.

The committee made minor revision to improve the language of the new transition provision. Mr. Allen asked why the language addressed "an appeal" pending. Ms. Tatham clarified that the intention was to deal with situations where an action was originally filed in an appellate court. Mr. Morrison suggested changing the language to Court of Appeals and the committee agreed. Mr. Allen asked that second filed be changed to later filed, Mr. Levin added that this would address situations with more than two cases.

Mr. Kamenar inquired whether the proposed language would address the case he mentioned earlier and suggested restoring jurisdiction "to the extent that jurisdiction can be restored." Mr. Levin said that Section 1500 would no longer be a bar but the provision would not address a claim that had been dismissed. Ms. Bremer agreed, if the dismissal were final. Ms. Bremer suggested that the language be changed to "no claim" should be dismissed from "no case."

The committee added "or the Supreme Court" after "a court of appeal" to clearly indicate that the presumption would not apply to the Supreme Court.

The committee briefly addressed the preamble and left the requested revisions and other necessary technical changes to the committee on style and the staff.

Mr. Levin requested a vote on whether to adopt the recommendation and forward it to the Assembly. The committee approved the draft recommendation.

Mr. Morrison observed that the Administrative Conference is in Suite 706, which is the appropriate division for the Committee on Judicial Review.

The committee then moved to discuss the Administrative Record Project. Mr. Levin provided an overview of potential discussion topics. The committee discussed whether the project should address informal adjudication. Mr. Morrison expressed concern that informal adjudication addresses many different types of agency action. Ms. Christian suggested that the

Committee first examine informal rulemaking and then have a second study examining informal adjudication with the same consultant. She suggested that the same individuals at agencies would work on both rulemaking and adjudication and proposed interviewing both at the same time. She expressed concern that the project scope would be too big without narrowing. Mr. Morrison suggested that the committee should address informal rulemaking first and see if it could derive a recommendation there, prior to turning to recommendations for a broader variety of adjudicatory decisions.

Mr. Lubbers expressed his view that the informal adjudication aspect of the study was the most interesting part of the study. He explained that courts review these decisions on the record that there is, and that only if there is not much there do they remand cases to the agencies. He explained that this occasionally leads attorneys to try to introduce new evidence at the court level, and that sometimes courts will allow that. He described the case study approach used in Chairman Verkuil's study for the Administrative Conference on adjudication.

Mr. Beck observed that the courts do not appear to make large legal distinctions between rulemaking and adjudication cases in terms of what constitutes the administrative record, what the exceptions are, and how you supplement. Mr. Beck said that there have been developments in rulemaking worth studying.

Mr. Lubbers explained that there are a lot of cases on the border of adjudication and rulemaking. He said that he thinks it's a great project and that he hopes both aspects are covered.

Mr. Levin suggested that one option would be to gather information on both stages in the survey instrument. Another would be to only gather information and do analysis with respect to rulemaking with every intention of coming to the other later. Mr. Morrison suggested that it may make sense for Mr. Beck to do the legal research on informal adjudication and consider including a recommendation suggesting that agencies adopt the recommendations where they are applicable. Mr. Levin agreed that at the level of judicial doctrine the two are treated similarly but suggested that agency procedures may be very different. Ms. Christian expressed support for doing the legal research.

Ms. Tatham suggested a possible middle ground of moving forward with a study of adjudication focused on a smaller subset of agencies. Ms. Christian said that first one would have to pick the agencies and justify that distinction, which would require considerable study. Mr. Levin suggested that even that sort of approach would apply a bifurcation. The committee continued the discussion and agreed to focus on rulemaking.

Ms. Christian suggested that the Committee might define the administrative record.

Mr. Shonka suggested taking a subset of adjudication and using that to inform the project. Mr. Levin suggested that we would not want a model informal adjudication statute, but did feel that you could prepare some examples that did not take the form of generalized guidance.

Mr. Morrison asked if Mr. Beck would include an examination of legal standards applicable to adjudication.

Mr. Tozzi expressed his thoughts on how agencies presently compile their records, including the problem of fragmentation of administrative records among multiple federal actors, and advised broadening the scope of the survey to include recommendations on how agencies manage record creation before court challenges. He also suggested that the committee study the differences between the administrative record provided by an agency upon request and the administrative record available in court. Ms. Tatham pointed out that the survey addresses this question.

Mr. Morrison raised the question of what it means to consider a record; Mr. Levin asked if the point was covered in the survey. Mr. Tozzi pointed out that there were good source materials in Circular A-130.

The meeting was adjourned at 5:10 pm.