Missouri Law Review

Volume 42
Issue 3 *Summer 1977*

Article 4

Summer 1977

Administrative Law-Veterans' Benefits-Judicial Review of Administrative Procedural Policies in Light of the No-Review Clause

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RECENT CASES

ADMINISTRATIVE LAW—VETERANS' BENEFITS —JUDICIAL REVIEW OF ADMINISTRATIVE PROCEDURAL POLICIES IN LIGHT OF THE NO-REVIEW CLAUSE

Plato v. Roudebush[1]

Marion Plato, the wife of a World War II veteran, applied for veterans' widows' benefits following her husband's death in 1973.[2] Her application was approved, and she began receiving monthly widows' benefits as of July 1, 1973. During the spring of 1974, the Veterans' Administration (VA) learned, from a form completed by Mrs. Plato, that while separated from her husband in 1962, she had given birth to a son by a man other than her husband. On the basis of this information, the VA made a decision to suspend her benefits.[3] On May 28, 1974, the VA notified Mrs. Plato by letter that her benefits had been suspended effective June 1, 1974, pending further investigation of her eligibility. The letter did not mention a hearing, but it did inform her that she would have to submit various certified statements by her and third persons to support any claim for further benefits.[4] Mrs. Plato sued in federal court challenging the agency's failure to provide her with a pretermination hearing as a violation of her constitutional right to procedural due process. The VA contended that the court did not have jurisdiction to hear the claim. The VA reasoned that 38 U.S.C. section 211(a)[5] prohibited judicial review of a VA decision of any question of law or fact under any law administered by the VA in providing benefits. The agency further argued that the prohibition against review of a question of law included review of the constitutionality of the VA hearing procedure. The court held that section 211(a) did not bar judicial review of the constitutionality of the VA hearing procedures.

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1. 397 F. Supp. 1295 (D. Md. 1975).
2. *See* 38 U.S.C. § 541 (1970).
3. *See* 38 U.S.C. §§ 541, 101(3), 103 (1970).
4. *Plato* was a class action. Robert Trail intervened as a named party plaintiff and class representative along with Mrs. Plato. Mr. Trail was a veteran who had been receiving a monthly pension for a non-service-connected disability. In December 1974, he was notified by letter that his disability pension would be suspended or terminated soon because of the possibility that he was not married and was receiving too large an income from outside sources. Mr. Trail requested a hearing but he was not accorded a pre-suspension hearing.
5. 38 U.S.C. § 211(a) (1970).

Section 211(a), the "no-review" clause, provides that:

> the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision. . . .

To appreciate the significance of *Plato,* it is necessary to examine the history surrounding and the purpose underlying the no-review clause. The clause was adopted as a part of the Economy Act of 1933.[6] It was designed to give the executive complete control over the disposition of benefits.[7] Congress stated its purpose was twofold: (1) to insure veterans' benefits claims would not burden the courts and the VA with expensive and time-consuming litigation and (2) to insure that the technical and complex determinations of agency policy connected with benefits decisions would be adequately and uniformly made.[8]

The litigation history of the clause documents the courts' intent to carry out this stated purpose. In 1934 the United States Supreme Court established in *Lynch v. United States*[9] that VA benefits were not rights but mere gratuities. The Court reasoned that Congress could bar judicial review because a gratuity did not rise to the level of a constitutionally protected property right. The right/gratuity dichotomy was subsequently rejected by the Supreme Court,[10] but it was supplanted by another theory.

6. Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 9.

7. *See* Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government,* 39 IND. L.J. 183 (1964). The Depression set the mood in which the provision was adopted. Times were difficult and the country could not afford to waste time and money quibbling over legal technicalities. So Congress gave one man the final say. The fact that he might make a mistake was unimportant because no one had the right to live off of the government. *Id.* at 188.

8. *Hearings on H. R. 360, 478, 2442 & 6777 Before the Subcomm. of the House Comm. on Veterans' Affairs,* 82d Cong., 2d Sess. 1962-63 (1952). The House Report on the 1970 amendment to the clause expressed a desire to keep the day-to-day agency determinations out of the courts. H.R. REP. NO. 91-1166, 91 Cong., 2d Sess. 101 (1970). Comparison of the Social Security Administration with the Veterans' Administration indicates that the mischief the no-review clause was designed to remedy may be just as effectively remedied by the type of limited review provided in the Social Security Administration. *See* Morris, *Judicial Review of Non-Reviewable Administrative Action: Veterans Administration Benefits Claims,* 29 AD. L. REV. 65 (1977).

9. 292 U.S. 571 (1934). Administrative lawlessness is condoned by labeling the claimant's interest in a benefits program a mere gratuity, the right to which is beyond constitutional protection. *See* Flemming v. Nestor, 363 U.S. 603 (1960); Miller v. United States, 294 U.S. 435 (1935); Slocumb v. Gray, 179 F.2d 31 (D.C. Cir. 1949). The legislative history and litigation surrounding the Veterans' Benefit Act suggests that in the Anglo-American legal system, the Protestant ethic denigrates the interest of the legitimate benefits claimant. That ethic condemns the receipt of an economic advantage unless the recipient has given a corresponding economic advantage in exchange. *See* Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government,* 39 IND. L.J. 183 (1964).

10. Goldberg v. Kelly, 397 U.S. 254 (1970); Wheeler v. Montgomery, 397 U.S. 280 (1970).

Courts found that the United States had created claims against itself when Congress passed the VA legislation. The sovereign power to impose a condition upon those claims was exercised when Congress, under the no-review clause, limited the veteran to administrative remedies.[11]

Recent legislative history demonstrates congressional intent to carry out the purpose of the no-review clause by means of amendment. In 1958 the District of Columbia Court of Appeals circumvented the no-review clause in *Wellman v. Whittier,*[12] a termination of benefits case. That court found that the no-review clause terminology "claim for benefits" did not apply to termination of benefits. The consequence was that although the clause barred judicial review of an original grant of benefits, it did not bar review of subsequent action regarding the grant. In 1970 Congress responded to a series of cases that had employed this judicially created exception to review the Administrator's decisions.[13] It amended the no-review clause by eliminating the word "claim"[14] to make it perfectly clear that the Congress intends to exclude from judicial review all determinations with respect to . . . benefits provided for veterans. . . ."[15]

In 1974 the Supreme Court imposed a major limitation upon the veterans' benefits legislation. In *Johnson v. Robison*[16] a veteran challenged the constitutionality of the statutory provisions that disqualified conscientious objectors from eligibility for education benefits.[17] He argued that this statutory disqualification violated his constitutional guarantee of religious

11. Milliken v. Gleason, 332 F.2d 122 (1st Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965); Van Horne v. Hines, 122 F.2d 207 (D.C. Cir.), *cert. denied*, 314 U.S. 689 (1941); Steinmasel v. United States, 202 F. Supp. 335 (D.S.D. 1962); Strong v. United States, 155 F. Supp. 468 (D. Mass. 1957), *appeal dismissed,* 356 U.S. 226 (1958). There is a split of authority as to whether the denial of access to the court system is a violation of due process. *Compare* Jaffe, *The Right to Judicial Review,* 71 HARV. L. REV. 401 (1958) (some judicial process is mandatory) *with* Davis, *Administrative Arbitrariness—A Final Word,* 114 U. PA. L. REV. 814 (1966) (judicial process is not always necessary). *See also* Berger, *Administrative Arbitrariness: A Sequel,* 51 MINN. L. REV. 601 (1967) (a continuation of a debate with Professor Kenneth Culp Davis concerning judicial review of administrative arbitrariness); Davis, *Administrative Arbitrariness Is Not Always Reviewable,* 51 MINN. L. REV. 643 (1967) (a response to Berger's attack).

12. 259 F.2d 163 (D.C. Cir. 1958).

13. DiSilvestro v. United States, 405 F.2d 150 (2d Cir. 1968), *cert. denied,* 396 U.S. 964 (1969); Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967); Thompson v. Gleason, 317 F.2d 901 (D.C. Cir. 1962). *See also* Comment, *Judicial Review and the Governmental Recovery of Veterans' Benefits,* 118 U. PA. L. REV. 288 (1969); Note, 81 HARV. L. REV. 1861 (1968.)

14. Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 790. The amended statute was applied to preclude judicial review of an award of counsel fees arising out of a proceeding seeking resumption of terminated benefits. De Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), *cert. denied* 409 U.S. 949 (1972).

15. H.R. REP. NO. 91-1166, 91st Cong., 1st Sess. 8, 11 (1970).

16. 415 U.S. 361 (1974).

17. 38 U.S.C. §§ 1652(a)(1), 101(21), 1661(a), 1651-97 (1970).

freedom and equal protection. The Court held that the no-review clause did not bar judicial review of the constitutionality of the statute itself.[18]

The court in *Plato* relied heavily on *Robison* as authorizing judicial review of constitutional questions.[19] However, *Plato* went beyond *Robison.* In *Robison* the Court had pointed out that it was reviewing the statutory language only. It stressed that it was not reviewing any policy of the VA.[20] *Plato* expressly focused its review upon the policy established under the VA regulations. However, the court was careful to distinguish procedural policy from substantive policy.[21] *Plato* confined its review to the constitutionality of the VA procedural policy of not affording a pretermination hearing.

The VA procedural policy is found in the regulations and the manner in which the regulations are applied. The regulations outline a procedural policy that is *ex parte* in nature.[22] They provide for notice to the claimant of a decision to terminate his benefits. The notice must specify the date the termination "will be effectuated" and inform the claimant of his right to a hearing "at any time" upon request.[23] The court did not review the constitutionality of these regulations. Providing notice to the claimant of his right to a hearing on the agency's decision was not constitutionally questioned. Instead, the court reviewed whether the absence of a pretermination hearing was unconstitutional. The regulations did not expressly prohibit a pre-termination hearing, they simply did not expressly provide for such a hearing. Thus, it was not the language of the regulations which was questioned, but rather the manner in which the regulations were applied.

The VA's manner of applying the regulations was to make an *ex parte* decision to terminate a claimant's benefits and then notify him of the decision. Although the claimant could demand a hearing at any time, the practical effect of this policy was that the only time the claimant was aware

18. The Court pointed out that the no-review clause did not bar judicial review because "appellee's constitutional challenge is not to any such decision of the Administrator, but rather to a decision of Congress . . . ." 415 U.S. at 367. The Court appeared to be saying that it had power to review a decision of Congress, but it did not have power to review whether a decision of an administrator is beyond statutory or constitutional authority. Thus, the *Robison* decision can be read as making the anomalous rule that while Congress is bound by the Constitution, an administrator, because of the no-review clause, is not. *But see* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) (Congress cannot escape judicial review by making the findings and conclusions of its legislative agencies final).

19. "Congress did not intend to bar judicial review of constitutional questions." Johnson v. Robison, 415 U.S. 361, 368 (1974).

20. *Id.*

21. "[P]laintiffs do not challenge an 'interpretation or application of a particular provision of a statute to a particular set of facts . . .' [r]ather plaintiffs seek constitutional review of a generally applicable procedural policy. Such review is not barred by the language of § 211(a) . . . ." Plato v. Roudebush, 397 F. Supp. 1295, 1303 (D. Md. 1975).

22. 38 C.F.R. § 3.103(a) (1976).

23. 38 C.F.R. § 3.103(c), (e) (1976).

of a need to request a hearing was after the decision had been made. Even if he was accorded a hearing prior to the time that the decision took effect, he still would not have an opportunity to be present at the time the decision was made. Relying on the leading case of *Goldberg v. Kelly,*[24] the court held that the failure to provide an opportunity to be heard at the time of the decision to terminate violated procedural due process. Whether a pre-termination hearing is constitutionally required at present is subject to serious doubt. The Supreme Court in *Mathews v. Eldridge*[25] has since held that a hearing is not constitutionally required prior to terminating social security disability benefits. However, the significance of *Plato* lies not in the *product* of the court's review, but in the *fact* of review. Prior to *Plato*, the courts had not reviewed VA regulations or procedural policies established under the regulations.[26] In deciding to review the agency's procedure for terminating benefits, the court found it necessary to construe the no-review clause.

The no-review clause bars judicial review of the *decisions* of the Administrator *under* any law administered by the VA. Using statutory construction, two possibilities exist for reviewing the agency's procedure of not allowing a pre-termination hearing. The first possibility focuses upon the phrase "under any law administered by the VA." The failure to provide a pre-termination hearing is a procedural due process issue. It could be said to arise "under" the *Constitution*, not under the VA *statute*. Thus, it would not be proscribed by the no-review clause.[27] The court in *Plato* chose to utilize the second possibility which focuses upon the word "decisions". The court found that the "decisions" of the Administrator which were exempted from review under the statute were his determinations "on the merits." A determination "on the merits," the court said, was the Administrator's application of a provision of the VA statute to the facts of individual benefits claims.[28] The court in *Plato* stated that it was not reviewing such a decision "on the merits," but rather the *procedure* the Administrator used to arrive at that decision. In other words, the court was saying that it was not the substantive decisions of the VA that it was reviewing, but rather it was the manner in which those decisions were made. Furthermore, if that manner violated procedural due process, the court had jurisdiction to review.

24. 397 U.S. 254 (1970).

25. 96 S. Ct. 893 (1976). *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28 (1976).

26. *See* Langston v. Johnson, 478 F.2d 915 (D.C. Cir. 1973). Because the plaintiff in *Langston* failed to present the issue properly, the court did not pass on the contention that § 211(a) could not foreclose the court's power to decide whether the Administrator's procedure complied with due process. *See also* Note, *Judicial Review of Federal Administrative Decisions Concerning Gratuities*, 49 VA. L. REV. 313 (1963).

27. This was the line of reasoning employed by the Court in Johnson v. Robison, 415 U.S. 361 (1974).

28. Plato v. Roudebush, 397 F. Supp. 1295, 1302 (D. Md. 1975).

If this is a correct analysis of the court's reasoning, a second conclusion regarding the court's jurisdiction under the no-review clause seems warranted. In asserting its power to review the manner but not the substance of the Administrator's decisions, the court is necessarily assuming a more fundamental power. The court appears to be adopting the rule that while it does not have power to review the decisions of the VA, it does have power to determine whether a particular action is, in fact, a decision at all. Applying this fundamental power in the context of *Plato*, the court found that administrative action which fails to comply with constitutionally required procedures is not a decision within the meaning of the no-review clause. Thus, the clause did not prohibit judicial review of administrative action which violated procedural due process.

Notwithstanding a no-review clause, some courts have allowed actions against an administrator where he exceeds his statutory authority.[29] At least one court has characterized judicial review of an administrator's actions in excess of his authority as "judicial control," not "judicial review."[30] The distinction is that judicial review refers to a court's examination of an administrator's decision on the merits, whereas "judicial control" refers to a court's examination of an administrator's procedure or manner of arriving at his decision, notwithstanding the fact that an administrator's decision on the merits may be supported by substantial evidence. A court has power to reverse and remand if the manner of arriving at the decision

29. Holley v. United States, 352 F. Supp. 175 (S.D. Ohio 1972); Siegel v. United States, 87 F. Supp. 555 (E.D.N.Y. 1949). *Accord*, Steinmasel v. United States, 202 F. Supp. 335 (D.S.D. 1962) (dictum). An agency may not finally decide the limits of its statutory power; that is a judicial function. Social Security Board v. Nierotko, 327 U.S. 358 (1946). Where the intent of Congress is to preclude judicial review, limited jurisdiction exists in courts to review actions plainly in excess of statutory authority. Briscoe v. Levi, 535 F.2d 1259 (D.C. Cir. 1976).

30. *See* Siegel v. United States, 87 F. Supp. 555 (E.D.N.Y. 1949). In *Siegel,* the plaintiff was a widow of a United States soldier killed in action in Germany. She sought restitution of widow's death compensation for a two-year period during which she received no compensation because of misinformation given her by a VA representative. The representative had incorrectly advised her that she was ineligible for compensation. Relying on this misinformation, she failed to furnish proof of her marriage within the statute of limitations provided in the VA legislation. The effect of this was to preclude her from receiving compensation up until the time she discovered she was actually eligible, reapplied and her claim was approved. The court found that, notwithstanding the no-review clause, all relief was not precluded. The facts of the case, if sufficiently alleged, would support a conclusion that the VA had acted arbitrarily and capriciously in denying plaintiff's claim. The court conceded that it did not have the power to determine the effective date of the award. However, it did have the power to order a rehearing upon a showing that the administrative officer acted in excess of the jurisdiction conferred upon him in statute. The court characterized its action as judicial control rather than judicial review. Judicial control is the function of keeping administrators within their statutory authority. Where the administrator exceeds his statutory authority courts have the power to exercise control over his actions to the extent of confining him to his jurisdiction as statutorily prescribed. *See also* Dismuke v. United States, 297 U.S. 167 (1936).

was procedurally defective. In spite of the availability of the "judicial control" characterization, the weight of authority has been that the no-review clause prohibits all actions against the administrator, even ones where arguably the administrator exceeded his authority under the statute.[31]

In the final analysis, a concern more fundamental than legal characterization or statutory construction appears to underlie the court's disposition of the no-review clause. The separation of powers constitutional mandate underlies judicial reluctance to interfere with the clause. Under the Constitution, Congress is empowered to create the lower federal courts. Having exercised that power, the question is whether Congress can limit their judicial function by prohibiting review of the actions of administrators. The teaching of *Plato* is that where an administrator's action violates the constitutional guarantee of due process, the courts will intervene in spite of the no-review clause.[32]

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31. Sinlao v. United States, 271 F.2d 846 (D.C. Cir. 1959); Hahn v. Gray, 203 F.2d 625 (D.C. Cir. 1953); Steinmasel v. United States, 202 F. Supp. 335 (D.S.D. 1962). One reason why the judicial control theory has not won widespread acceptance is that, once accepted, the no-review clause probably would fall. The government would have to argue that administrative action in defiance of statutory standards is somehow not arbitrary and capricious, and that the no-review clause continues to bar judicial appraisal of administrative action which, although allegedly illegal, is not arbitrary and capricious.

32. Language in the no-review clause specifying that the "decisions of the Administrator . . . shall be final and conclusive . . ." is labeled finality language. Courts have asserted jurisdiction to review constitutional violations in spite of the finality language of enabling statutes of administrative agencies. The benchmark for the scope of judicial review of finality language is flagrant constitutional violation. United States v. Augenblick, 393 U.S. 348 (1969); Fountain v. United States, 427 F.2d 759 (Ct.Cl. 1970); Caulfield v. United States Dept. of Agriculture, 293 F.2d 217 (5th Cir. 1961). See also Justice Douglas' concurring opinion in Clark v. Gabriel, 393 U.S. 256, 259-60 (1968) in which he indicated that the no-review clause of the Military Selective Service Act might be disregarded where the Board violated a registrant's free speech or religious freedom.