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## NONREVIEWABLE ADMINISTRATIVE ACTION

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Despite Mr. Justice Frankfurter's recent insistence that "There is not such thing as a common law of judicial review [of administrative action] in the federal courts,"<sup>1</sup> this paper is an inquiry into one aspect of the common law, the statutory law, and the constitutional law of judicial review in the federal courts. For Supreme Court cases declaring a common law of judicial review can hardly be erased by remarks of a single Justice. A considerable part of the law of judicial review in the federal courts is common law in every sense—it is judge-made, it does not rest on constitutional or statutory interpretation, and it does not even purport to be anything but common law.

For instance, the law of the extraordinary remedies as methods for reviewing administrative action is usually unadulterated common law; this is true of holdings that mandamus may not be used to control administrative discretion,<sup>2</sup> that certiorari is not,<sup>3</sup> but that injunction

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1. *Stark v. Wickard*, 321 U. S. 288, 312 (1944). The remark is not a mere inadvertence, for the same idea dominates the opinion. In the preceding sentence the Justice says: "Apart from the text and texture of a particular law in relation to which judicial review is sought, 'judicial review' is a mischievous abstraction." And two pages later: "Judicial review when recognized—its scope and its incidence—was derived from the materials furnished by the particular statute in regard to which the opportunity for judicial review was asserted. This is the lesson to be drawn from the prior decisions of this Court on judicial review. . . ."

If Mr. Justice Frankfurter were speaking for the Court, he might be changing the law, or trying to change it. But he is speaking for himself alone, and draws his generalization from previous law.

2. *E. g.*, *United States ex rel. Greathouse v. Dern*, 289 U. S. 352, 359 (1933): "Although the remedy by mandamus is at law, its allowance is controlled by equitable principles . . ." Mandamus has been abolished by Rule 6 of the Federal Rules of Civil Procedure, but its substance lingers on. *Hammond v. Hull*, 131 F. 2d 23, 25 (App. D. C. 1942), *cert. denied*, 318 U. S. 777 (1942).

3. *Degge v. Hitchcock*, 229 U. S. 163 (1913). The Court specifically recognized that the problem was a common-law problem, pointing out that "no statute has been passed to enlarge the writ at common law," and that availability of equitable relief "is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded."

is,<sup>4</sup> the proper remedy for reviewing a fraud order, that habeas corpus may often be used to obtain review in draft cases<sup>5</sup> and in alien cases.<sup>6</sup> The law concerning exhaustion of administrative remedies is largely common law; key cases on the subject do not mention constitutional or statutory provisions.<sup>7</sup> In creating the negative-order doctrine Mr. Chief Justice White purported to be interpreting the Interstate Commerce Act,<sup>8</sup> but the opinion by Mr. Justice Frankfurter abolishing the doctrine neither rested on nor purported to rest on either Constitution or statute.<sup>9</sup> Refusal to review moot administrative action usually depends on common-law conceptions.<sup>10</sup> Standing to challenge administrative action is often governed by judge-made law which is independent of Constitution and statute.<sup>11</sup> The scope of review is worked out by courts when statutes are silent.<sup>12</sup> And, as we shall see,

4. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902).

5. *E. g.*, *Eagles v. United States ex rel. Samuels*, 329 U. S. 304 (1946).

6. *E. g.*, *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892); *Kessler v. Strecker*, 307 U. S. 22 (1939).

7. *E. g.*, *Petroleum Exploration, Inc. v. Public Serv. Comm.*, 304 U. S. 209 (1938) (expense of hearing "is not the sort of irreparable injury against which equity protects").

8. *Procter & Gamble Co. v. United States*, 225 U. S. 282 (1912). See p. 784 *infra*.

9. *Rochester Tel. Corp. v. United States*, 307 U. S. 125 (1939). The comprehensive opinion is not devoid of mention of constitutional and statutory provisions. But Mr. Justice Frankfurter frankly ascribes both the creation and the destruction of the negative order doctrine to considerations of judicially-determined policy: "The considerations of policy for which the notions of 'negative' and 'affirmative' orders were introduced, are completely satisfied by proper application of the combined doctrines of primary jurisdiction and administrative finality. The concept of 'negative orders' has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them." P. 142. Mr. Justice Frankfurter said that "the Court evolved" the doctrines of primary jurisdiction and administrative finality from "general considerations" relating to "the process of adjusting relations between the Interstate Commerce Commission and the courts," to "the place of administrative agencies in enforcing legislative policies," and to "the Commission's expertise." Pp. 137-39. The death blow was struck not because of anything statutory or constitutional, but because the negative-order doctrine "serves no useful purpose." P. 143.

10. *Royal Cadillac Service, Inc. v. United States*, 317 U. S. 595 (1942); *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498 (1911).

11. *E. g.*, *Tennessee Power Co. v. TVA*, 306 U. S. 118 (1939), turning largely on the common-law concept of "damnum absque injuria,—a damage not consequent upon the violation of any right recognized by law." Of course, the question of standing is often dependent upon statutory interpretation. *E. g.*, *Parker v. Fleming*, 329 U. S. 531 (1947).

12. *Eagles v. United States ex rel. Samuels*, 329 U. S. 304 (1946); *Kessler v. Strecker*, 307 U. S. 22 (1939); *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902). After the Supreme Court had held in *Shannahan v. United States*, 303 U. S. 596 (1938), that certain action of the Interstate Commerce Commission was not reviewable under the applicable statute, the question arose in *Shields v. Utah I. C. R. R.*, 305 U. S. 177 (1938), whether the action was "subject to judicial review by other procedure, a question which, as we said in the *Shannahan* case, we had no occasion there to consider." *Id.* at 183. The Court held that "respondent was entitled to resort to equity in order to obtain a judicial review." *Id.* at 184. The Court then discussed what the scope of review should be in absence of a governing statutory provision.

Similarly, in *American Federation of Labor v. NLRB*, 308 U. S. 401 (1940), a certification order was held not reviewable under the applicable provision of the

availability of judicial review by any method often depends on neither Constitution nor statute.

Whether common law or not, nearly all the law concerning reviewability of administrative action is judge-made. Both when statutes are silent concerning reviewability and when statutes provide that administrative action is "final and conclusive," the action is sometimes reviewable and sometimes not. Judicial ideas of desirability or undesirability of review usually play a larger role than legislative language or legislative history or both together. Of course the constitutional principles affecting reviewability are entirely judge-made.

Our inquiry is into *what* administrative action is judicially reviewable. Questions of *when* and *how* and *at whose instance* judicial review may be had are excluded. We are not here concerned with denial of judicial review for such reasons as failure to exhaust administrative remedies, lack of final order, lack of standing to challenge, or choice of the wrong judicial remedy. We are only incidentally concerned with the scope of review.

#### THE CONCEPTS OF REVIEWABILITY AND NONREVIEWABILITY

The universal assumption has been that all administrative action is either reviewable or not reviewable—that questions of scope of review can arise only with respect to reviewable action. The Attorney General's Committee, for instance, considered that problems of review involve area of review and scope of review; the assumption was that any particular case was either within or without the area of review, i. e., either reviewable or not reviewable.<sup>13</sup> In making this assumption the Committee was merely following the customary language of courts.<sup>14</sup> The assumption, after all, is both natural and simple.

But a close examination of the cases shows that the reality is not nearly so simple. Instead of the two categories of the reviewable and the nonreviewable, the cases reveal a large number of categories distinguishable from each other on the basis of the scope of review. For instance, the Supreme Court has held administrative action (1)

Act. In *Inland Empire Council v. Millis*, 325 U. S. 697 (1945), the Court said that in the AFL case "Decision was expressly reserved whether, apart from such proceedings, review of certification may be had by an independent suit brought pursuant to § 24 of the Judicial Code." The Court proceeded to dispose of the question of reviewability by an independent suit.

13. Report (1941) Ch. VI.

14. *Barr v. United States*, 324 U. S. 83, 94 (1945): "... non-reviewable ...". *Chicago & So. Air Lines v. Waterman Steamship Co.*, 68 S. Ct. 431, 437 (1948): "But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." The language is commonly in terms of power, as in *Welch v. Obispo Oil Co.*, 301 U. S. 190, 194 (1937): "But no court has power to review the grant or denial of a special assessment or the correctness of the computation made thereon."

nonreviewable unless fraudulent,<sup>15</sup> (2) nonreviewable unless clearly arbitrary or beyond the agency's jurisdiction,<sup>16</sup> (3) nonreviewable unless beyond the agency's jurisdiction,<sup>17</sup> (4) nonreviewable with respect to abuse of discretion but reviewable with respect to excess of jurisdiction,<sup>18</sup> (5) nonreviewable "in absence of fraud or other irregularities,"<sup>19</sup> and (6) nonreviewable "in the absence of a showing of clear abuse of discretion."<sup>20</sup> Obviously the various elements are susceptible of other combinations and permutations. Opinions are customarily silent with respect to one or more of the elements mentioned. When a court cryptically holds that administrative action is "not reviewable," the result may be to put the action into any one of these six categories, and many more such categories might easily be marked out. Furthermore, the courts in some cases, with light-hearted self-contradiction, at one and the same time review and refuse to review: (7) the court holds that the action is "not subject to review" but proceeds to announce that the action is "in full conformity with the statute,"<sup>21</sup> or (8) the court holds that it is without jurisdiction to review but writes an opinion on the merits which is almost the equivalent of a declaratory judgment.<sup>22</sup> Similarly somewhat paradoxical are three more categories: (9) the court declares that "it would be inappropriate . . . to determine the question of reviewability" unless the Board's action was unlawful—and the court proceeds to hold that the Board's action was not unlawful;<sup>23</sup> (10) the

15. *Auffmordt v. Hedden*, 137 U. S. 310 (1890); *Adams v. Nagle*, 303 U. S. 532 (1938). Cf. *Fahey v. Mallonee*, 332 U. S. 245, 256-67 (1947): "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies."

16. *Friedman v. Schwellenbach*, 159 F. 2d 22, 25 (App. D. C. 1946), *cert. denied*, 330 U. S. 838 (1947): ". . . the courts will not review managerial acts, not clearly arbitrary, of executive officials performed within the scope of their authority."

17. The courts generally respect the statutory scheme of denying, except in employees' suits for enforcement of awards, judicial review of decisions of the National Railroad Adjustment Board. *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (App. D. C. 1941), *aff'd*, 319 U. S. 732. But the Supreme Court held, five to four, that a question of jurisdiction was reviewable. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711 (1945), *mod. in rehearing*, 327 U. S. 661 (1946).

18. *Dakota Cen. Tel. Co. v. South Dakota*, 250 U. S. 163, 184 (1919): "But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power." The Court then considered on the merits a contention that the action was beyond the power given.

19. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 537, 562 (1928).

20. *United States v. Wrightwood Dairy Co.*, 127 F. 2d 907, 911 (C. C. A. 7th 1942).

21. *United States v. Geo. S. Bush & Co.*, 310 U. S. 371 (1940).

22. The Federal Communications Commission was given a taste of its own medicine in *Hearst Radio, Inc. v. F. C. C.*, — F. 2d — (App. D. C. 1948). Through its Bluebook the Commission regulated broadcasting but refrained from issuing a reviewable order. The Court of Appeals wrote an opinion which disapproved the Commission's action but entered no order against the Commission, thus preventing the Commission from obtaining a review of the Court's action.

23. *Inland Empire Council v. Millis*, 325 U. S. 697, 700 (1945).

court declares that since the action was "fair and reasoned" (thus reviewing to that extent) no inquiry is necessary as to whether arbitrary action may be set aside;<sup>24</sup> and (11) the court says the administrator has "absolute discretion" and that therefore the court cannot review, but the court discusses the merits and holds the case on its docket pending an administrative reconsideration which the court strongly recommends.<sup>25</sup>

Despite the complexity of the concept of "nonreviewable" action when minutely examined, the term is here used in the same loose way it is customarily used in judicial opinions. Action is called non-reviewable when the court may neither decide questions of law nor determine whether substantial evidence supports the findings.

### THE ADMINISTRATIVE PROCEDURE ACT

Questions of scope of review may easily be—and often are—phrased in terms of area of review, that is, in terms of the unavailability of review. A statement that the scope of review is governed by the substantial-evidence rule is the same in substance as a statement that findings of fact supported by substantial evidence are nonreviewable. The Supreme Court, in refusing to set aside an order fixing the maximum amount of cereal in sausage, said that "the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it."<sup>26</sup> Even when the scope of review is exceedingly broad, the Supreme Court may talk in terms of nonreviewability: the discretion of the Postmaster General in refusing a second-class mailing privilege "ought not to be interfered with unless the court be clearly of opinion that it was wrong."<sup>27</sup>

The interchangeability of language about refusal to review and language about scope of review is important to an understanding of the Administrative Procedure Act. Even though the only provision which

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24. *United States v. Carmack*, 329 U. S. 230 (1946).

25. The district judge held the Secretary of Labor had "an absolute discretion" to admit on bond an alien legally excludable. But the judge added: "The case is, however, one of the most deserving and pathetic ones that has come to my notice, and I strongly recommend his admission . . ." *United States ex rel. Ickowicz v. Day*, 18 F. 2d 962 (S. D. N. Y. 1926). The circuit court of appeals quoted this language with approval and said: "We will withhold our mandate 30 days to permit the appellant to apply to the Secretary of Labor for a reconsideration." 18 F. 2d 962, 963 (C. C. A. 2d 1927).

26. *Houston v. St. Louis Ind. Packing Co.*, 249 U. S. 479, 484 (1919). See also *Silberschein v. United States*, 266 U. S. 221, 225 (1924), wherein the Court upheld denial of veteran's claim for a benefit, declaring: "We must hold that [the administrator's] decision of such questions is final and conclusive and not subject to judicial review, at least unless the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law or is seen to be clearly arbitrary or capricious."

27. *Bates & Guild Co. v. Payne*, 194 U. S. 106, 108 (1904).

in terms deals with scope of review is section 10 (e),<sup>28</sup> the fact is that the introductory clause of section 10 affects scope of review. The key provisions on availability of review are: "Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—. . . (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."<sup>29</sup> The introductory clause modifies all that follows in section 10. The words "so far as" in the introductory clause permit particular administrative action to be partly reviewable and partly nonreviewable. The question is not always *whether* statutes preclude judicial review; the crucial question may be *to what extent* statutes preclude judicial review. Similarly, agency action may be by law committed entirely to agency discretion, or it may be only to some extent committed to agency discretion. *The introductory clause of section 10 thus may make the scope of review considerably more restricted than the scope of review prescribed in the unmodified subsection (e).* The natural tendency to read subsection (e) as if it stood alone—a tendency already manifest in some judicial opinions<sup>30</sup>—is clearly unsound. For example, when a statute has been interpreted as precluding review except for fraud, or excess of jurisdiction, or abuse of discretion,<sup>31</sup> the scope of review is narrower than it would be under the unmodified provisions of subsection (e). Similar considerations apply to the second part of the introductory clause of section 10; agency action may be in some aspects but not in other aspects committed by law to agency discretion, with a consequently narrower scope of review than that

28. "(e) Scope of Review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right; power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

29. Subsection (a) deals with persons entitled to judicial review, and subsection (b) with the form of proceedings for judicial review.

30. *E. g.*, O'Connell, J., dissenting in *Comm'r v. Church's Estate*, 161 F. 2d 11, 14 (C. C. A. 3d 1947): "Under the Act, the appellate jurisdiction of this court is to include not only decision of all relevant questions of law, but also the power to set aside conclusions and findings unsupported by substantial evidence." *See also* *Lincoln Elec. Co. v. Comm'r*, 162 F. 2d 379, 382 (C. C. A. 6th 1947); *Hargis v. Wabash R. R.*, 163 F. 2d 608, 611 (C. C. A. 7th 1947).

31. See the cases cited in the discussion of the eleven categories above, pp. 751-753.

prescribed in the unmodified subsection (e). An extended review of the cases is necessary to discover to what extent agency action is by law committed to agency discretion.<sup>32</sup>

### THE ACT'S LEGISLATIVE HISTORY

Probably the net effect of the legislative history is to aggravate the difficulties of interpretation. The Act of course was largely a compromise between two points of view, and the signs are rather clear that each side tried to lay a foundation in the legislative history for interpretations favorable to its view. For instance, one side relied heavily upon the various analyses of the Attorney General, who stated most emphatically that section 10 "in general, declares the existing law concerning judicial review."<sup>33</sup> In contrast is an exchange between Senators Austin and McCarran on the Senate floor:

MR. AUSTIN: Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide a review?

MR. MCCARRAN: That is correct.

MR. AUSTIN: And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

MR. MCCARRAN: That is true; the Senator is entirely correct in his statement.<sup>34</sup>

On the question of what "statutes preclude judicial review" the Attorney General asserted: "A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review."<sup>35</sup> But the House Committee said: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."<sup>36</sup> This question is of great importance, for when statutes on their face are silent concerning reviewability courts have frequently denied review;<sup>37</sup> the legislative history points in both directions on the question whether the law of such decisions is changed.

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32. See discussion below, pp. 775-783.

33. SEN. DOC. NO. 248, 79th Cong., 2d Sess. 229, 415 (1946).

34. *Id.* at 311.

35. *Id.* at 229.

36. *Id.* at 275.

37. See the discussion of many such cases below, pp. 757-767.

On the question when "agency action is by law committed to agency discretion," the legislative history is even more perplexing. The Senate Committee said: "The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statute conferring administrative powers . . ." <sup>38</sup> Referring to section 10, the House Committee said: "Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning." <sup>39</sup> These two committee statements strangely seem to assume that without its introductory clause, section 10 would provide for substitution of judicial for administrative discretion. Even a quick glance at subsection (e) will show the falsity of that assumption, for the review there provided does not require the court to supplant administrative discretion but merely requires the court to set aside action found to be an abuse of discretion.

More meaningful, although probably erroneous, was another exchange on the Senate floor:

MR. DONNELL: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

MR. MCCARRAN: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.

MR. DONNELL: I thank the Senator.<sup>40</sup>

Taking this language at face value would mean that courts would substitute their discretion for administrative discretion; if discretion must be "based on sound reasoning," courts may determine what is "sound." Congressman Walter's statement on the House floor seems preferable, even though it too is probably erroneous: "There have been much misunderstanding and confusion of terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily." <sup>41</sup> However reasonable this proposition may seem, if it means that courts may always set aside blind or arbitrary action, it is inconsistent both with tradition and with the unambiguous

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38. *Id.* at 212.

39. *Id.* at 275.

40. *Id.* at 311.

41. *Id.* at 368.



words of the Act providing for review "except so far as . . . agency action is by law committed to agency discretion. . . ." Frequently, as we shall see, administrative action is not reviewable for abuse of discretion.<sup>42</sup>

The legislative history confirms two points that seem clear on the face of the Act—that the introductory clause of section 10 modifies all the rest of section 10,<sup>43</sup> and that matters may be committed either wholly or partly to agency discretion.<sup>44</sup>

### TO WHAT EXTENT DO STATUTES PRECLUDE REVIEW?

The two parts of the introductory clause of section 10 provide the framework for the ensuing discussion. The two major questions are: (1) To what extent do statutes preclude judicial review? (2) To what extent is agency action committed by law to agency discretion? The first question requires examination of (a) statutes which contain no explicit provision concerning reviewability, (b) provisions making administrative action "final and conclusive," and (c) provisions withdrawing the power or jurisdiction of courts to review.

#### *Reviewability in Absence of Specific Governing Provision*

The one generalization that can be easily made about availability of judicial review when no statutory provisions specifically governs the question is that the cases go both ways. The courts decide each problem of reviewability on the basis of special circumstances, the nature of the administrative action, the interests adversely affected, and sometimes the structure, purpose, or history of the legislation.

A broad generalization the Court laid down in 1827 is sometimes followed and sometimes not: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts . . . It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse."<sup>45</sup> The holding was that the President's discretion is conclusive in acting pursuant to a statute empowering him to call out state militia "whenever the United

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42. See discussion below, pp. 775-783.

43. *Id.* at 38.

44. *Id.* at 230, where the Attorney General said: "Many matters are committed partly or wholly to agency discretion." *Id.* at 275, where the House Committee said: "In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein."

45. Mr. Justice Story for the Court in *Martin v. Mott*, 12 Wheat. 19, 31-32 (U. S. 1827).

States shall be invaded, or be in imminent danger of invasion."<sup>46</sup> Other cases have held that the courts will not review executive action recognizing a foreign government,<sup>47</sup> a determination that a foreign government is represented by particular diplomatic representatives,<sup>48</sup> a certification by the Secretary of State of awards by an international Mixed Claims Commission,<sup>49</sup> an order of the Comptroller of the Currency levying assessments against bank stockholders,<sup>50</sup> an order of the President taking possession of a telephone line in exercise of power to do so "whenever he shall deem it necessary for national security or defense,"<sup>51</sup> a remission by the Secretary of the Treasury of a penalty imposed in enforcing the revenue laws,<sup>52</sup> a seizure and sale of enemy property under the Trading with the Enemy Act,<sup>53</sup> a proclamation of the director of the mint fixing for guidance of customs officials the values of foreign coins,<sup>54</sup> the selection of a particular site for a

46. But the Supreme Court has held that the courts may review the discretion of a Governor in exercise of military power: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin*, 287 U. S. 378, 401 (1932). This view stands in contrast with that of *Martin v. Mott*, 12 Wheat. 19, 30 (U. S. 1827): "Authority to decide whether the exigency has arisen belongs exclusively to the President, and . . . his decision is conclusive upon all other persons."

47. *United States v. Pink*, 315 U. S. 203, 229 (1942), and cases there cited.

48. *Guaranty Trust Co. v. United States*, 304 U. S. 126, 138 (1938).

49. *Z. & F. Assets Corp. v. Hull*, 311 U. S. 470 (1941). The Court seemed to draw the conclusion partly from legislative intent: "Congress has expressly directed payments to be made from the special account of the awards 'so certified.' The literal and natural import of this provision is that finality is to be accorded to the certificate . . ." But the Court also relied on "the nature of the questions presented and their relation to the conduct of foreign affairs . . ." P. 489.

50. *Adams v. Nagle*, 303 U. S. 532 (1938). The Court's chief reason for the result was practical: "It would be intolerable if the Comptroller's decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done. It would be equally intolerable if stockholders as a class could call upon a court to review the Comptroller's exercise of his discretion." P. 540. The Court implied that a charge of fraud or bad faith would make judicial inquiry appropriate. No doubt an important factor in explaining the nonreviewability is that any surplus necessarily will be returned to stockholders. The Court also remarked: "If the Comptroller's decision . . . was erroneous as matter of law the stockholders may or may not have a remedy." P. 544. Cf. *Fahey v. Mallonee*, 332 U. S. 245 (1947).

51. *Dakota Cen. Tel. Co. v. South Dakota*, 250 U. S. 163 (1919). The Court refused to review for abuse of discretion but reviewed to determine excess of jurisdiction.

52. *Dorsheimer v. United States*, 7 Wall. 166 (U. S. 1868). The Court reasoned that since the power to remit was "not a judicial one," discretion was intrusted to the Secretary alone, and therefore could not be reviewed.

Many will doubt the soundness of letting reviewability depend on the difference between administrative remission of a penalty administratively imposed, and administrative determination of the amount of a penalty to be administratively imposed. The difference may be one of form and not of substance.

53. *United States v. Chemical Foundation*, 272 U. S. 1 (1926). The decision is a weak one because of partial reliance on concurrence in findings by two lower courts. But the Court did declare unequivocally: "The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts."

54. *Hadden v. Merritt*, 115 U. S. 25 (1885). The Court said the function of fixing the value is an executive one, "requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision." The only method of correcting error "is to appeal to the department itself." Pp. 27-28.

post office and custom house,<sup>55</sup> an order of the Secretary of Agriculture changing the base period for computing parity prices under a statute providing for such a change whenever the Secretary finds and proclaims that purchasing power cannot be satisfactorily determined from available statistics in his department,<sup>56</sup> a determination by the Secretary of Agriculture of the number of inspectors to be assigned to a market under the Tobacco Inspection Act,<sup>57</sup> an Interstate Commerce Commission award of federal funds to a railroad under a statute providing for reimbursement of deficits during federal control of railroads,<sup>58</sup> special assessments of excess profits and war profits taxes under a provision allowing the Commissioner to relieve exceptional hardship,<sup>59</sup> and adoption by the Postmaster General of a formula allowing less than five per cent additional compensation to railroads for carrying mails under a statute authorizing addition of not more than five per cent.<sup>60</sup>

A spectacular and controversial wartime case is *Employers Group of Motor Freight Carriers v. National War Labor Board*,<sup>61</sup> denying review of "a directive order" granting a wage increase. The court based its decision in part on a none-too-clear legislative history,<sup>62</sup> but the main reliance was on the argument that "No money, property, or opportunity has been taken or withheld from the appellants, and no

55. *United States v. Carmack*, 329 U. S. 230 (1946). The Court said it was unnecessary in this case to determine whether the Court could review for bad faith or arbitrary action, for no such issue was raised. The Court reviewed to the extent of finding that the action rested on a fair and reasoned conclusion.

56. *United States v. Wrightwood Dairy Co.*, 127 F. 2d 907 (C. C. A. 7th 1942). The court said it had no power to question the determination of adequacy of statistics. The court also held that the Secretary's action in fixing limits of a marketing area to omit cities and towns not having health standards comparable to Chicago is not reviewable "in the absence of a showing of a clear abuse of discretion." P. 911.

57. *Greer v. Cline*, 148 F. 2d 380 (C. C. A. 6th 1945).

58. *Butte, A. & P. Ry. v. United States*, 290 U. S. 127 (1933). "Since . . . Congress did not provide a method of review, we hold that it intended to leave the Government, as well as the carrier, remediless whether the error be one of fact or of law." Pp. 142-43. *But cf.* *United States v. Great Northern Ry.*, 287 U. S. 144, 152 (1932), where the Court reviewed the merits by saying: "We find no basis for a holding that the payment . . . was due to any mistake. . . ."

59. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551 (1928); *Heiner v. Diamond Alkali Co.*, 288 U. S. 502 (1933); *Welch v. Obispo Oil Co.*, 301 U. S. 190 (1937). But none of these cases upsets *Blair v. Oesterlien Machine Co.*, 275 U. S. 220 (1927), holding special assessments reviewable by the Board of Tax Appeals.

60. *United States v. Atchison, T. & S. F. Ry.*, 249 U. S. 451 (1919). The Court said the Act vested in the Postmaster General "a discretion which . . . has not been abused."

61. 143 F. 2d 145 (App. D. C. 1944), *cert. denied*, 323 U. S. 735 (1944). *Accord:* *NWLB v. Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C. 1944), *cert. denied*, 323 U. S. 774 (1944); *NWLB v. United States Gypsum Co.*, 145 F. 2d 97 (App. D. C. 1944), *cert. denied*, 324 U. S. 856 (1945). The result was the same both before and after enactment of the War Labor Disputes Act.

62. The court said: "It is clear and undisputed that no statute authorizes review . . . The legislative history of the War Labor Disputes Act implies a positive intention that these orders should not be reviewed." 143 F. 2d at 146-47.

one threatens any such act.”<sup>63</sup> The “possibility” that the President could enforce the Board’s order by taking possession of the employers’ businesses was said to be “irrelevant not only because it is speculative but also because it is independent of the Board’s order . . . Any action of the Board would be informative and ‘at most, advisory.’ . . . The correctness of administrative advice cannot be reviewed by the courts.”<sup>64</sup> The reasons assigned for the result seem to make clear that no review was available for lack of substantial evidence, erroneous determination of questions of law, abuse of discretion, or excess of jurisdiction. Even apart from presidential seizure of businesses for noncompliance with orders of the War Labor Board,<sup>65</sup> such orders had important effects, both practical<sup>66</sup> and legal.<sup>67</sup>

In *Switchmen’s Union v. National Mediation Board*,<sup>68</sup> the Supreme Court denied review even of a question of statutory interpretation on which the Board’s jurisdiction depended. The statute was silent concerning reviewability of certifications of unions for collective bargaining, although it provided for review for two other types of orders. In holding that the district court “did not have the power to review the action of the National Mediation Board in issuing the certificate,”<sup>69</sup> the Supreme Court spoke mainly the language of statutory interpretation, giving great weight to congressional recognition of the “explosive” quality of disputes between rival unions. Three of the seven participating Justices declared in dissent: “We cannot conclude that because no statutory review exists no remedy for misinterpretation of statutory powers is left. . . . The special competence of the National Mediation Board lies in the field of labor relations rather than in that of statutory construction. . . . By requiring a plain sanction for a judicial remedy, the court authorizes the Mediation Board to determine not only questions judicially found to be committed to its discretion . . . but the statutory limits of its own powers as well.”<sup>70</sup>

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63. *Id.* at 147.

64. *Id.* at 151.

65. Such a seizure was upheld in *United States v. Montgomery Ward & Co.*, 150 F. 2d 369 (C. C. A. 7th 1945), *rev’d for mootness, per curiam*, 326 U. S. 690 (1945). In this case no argument was made that the War Labor Board’s order was reviewable in the enforcement proceeding. If the court’s statement in the *Employers Group* case was correct, that presidential seizure was “independent of the Board’s order,” the Board’s order would not be reviewable in a proceeding in aid of the President’s enforcement through seizure.

66. Strikes and threatened strikes, of course, were a principal weapon of enforcement.

67. State law was held superseded by a War Labor Board order in *Paris v. Metropolitan Life Ins. Co.*, 68 F. Supp. 64 (S. D. N. Y. 1946).

68. 320 U. S. 297 (1943).

69. *Id.* at 300.

70. *Id.* at 316, 321.

In a companion case involving a jurisdictional dispute between two unions, which the Board had settled by a mediation agreement, the Supreme Court held the issues not reviewable because "not justiciable."<sup>71</sup> The Court in a third case refused to pass upon the question whether a provision of a collective agreement was invalid under the Railway Labor Act.<sup>72</sup>

In these various cases in which judicial review was denied in absence of statutory provisions governing judicial review, do the "statutes preclude judicial review" within the meaning of the introductory clause of section 10? In many of the opinions—the *Switchmen's Union* case,<sup>73</sup> for instance—the Court talked primarily of legislative intent. In some of the opinions the Court merely mentioned the intent of Congress, sometimes indirectly or obliquely.<sup>74</sup> In other opinions the Court did not even mention legislative intent.<sup>75</sup> In determining whether "statutes preclude judicial review," should anything hinge on the question whether opinions happened to be written in terms of legislative intent?

What is implicit is as much a part of a statute as what is explicit. Moreover, the meaning of a statute includes what courts find through processes of interpretation—whether the legislative intent found is real or fictitious. But a decision concerning reviewability, when the statute on its face is silent and when the court does not speak in terms of interpretation, is not necessarily statutory interpretation in any sense; both in fact and in theory the law may come from the court and not from the legislature. And so, from a strictly analytical standpoint, a denial of review not purporting to rest on statutory interpretation may be consistent with the idea that the statute does not preclude review.<sup>76</sup> Yet this sort of analytical reasoning is unsound and dan-

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71. *General Committee v. Missouri-Kansas-Texas R. R.*, 320 U. S. 323 (1943).

72. *General Committee v. Southern Pac. Co.*, 320 U. S. 38 (1943). See also *Order of Railway Conductors v. Pennsylvania R. R.*, 323 U. S. 166 (1944).

73. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943).

74. *E. g.*, *Martin v. Mott*, 12 Wheat. 19, 31-32 (U. S. 1827); *Z. & F. Assets Corp. v. Hull*, 311 U. S. 470 (1941); *Butte, A. & P. Ry. v. United States*, 290 U. S. 127 (1933).

75. In *Dakota Cen. Tel. Co. v. South Dakota*, 250 U. S. 163, 184 (1919), the essence of the Court's reasoning was: "As this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion." In *Adams v. Nagle*, 303 U. S. 532, 540 (1938), the Court reasoned: "In establishing the national banking system Congress has invested the Comptroller . . . with jurisdiction . . . to order an assessment . . . Plainly these are questions for the exercise of administrative discretion . . . It would be intolerable if the Comptroller's decision could be attacked collaterally. . . ." In *United States v. Pink*, 315 U. S. 203, 229 (1942), nonreviewability of recognition of a foreign government rests on the authority of *Kennett v. Chambers*, 14 How. 38 (U. S. 1852), which does not rest on statutory interpretation.

76. From this standpoint the legislative history might be helpful were it not self-contradictory. See notes 33-44 *supra*.

gerous unless supported by pragmatic judgments. To say that reviewability under the Administrative Procedure Act will depend upon historical accidents about whether or not courts in earlier cases happened to write opinions in terms of statutory interpretation is not good common sense. The reviewability question, whenever the command of the statute is susceptible of interpretation, should not be determined without taking into account the advantages and disadvantages of judicial review for the particular case. If a court in the past has considered practical reasons pro and con and has decided with little or no statutory guidance that courts should not review the President's action in calling out state militia<sup>77</sup> or an Interstate Commerce Commission award of federal funds to a railroad<sup>78</sup> or the Postmaster General's order increasing compensation for carrying the mails,<sup>79</sup> the decision under the Act should normally be the same. In determining whether or not a statute which is silent concerning reviewability precludes judicial review, a court necessarily will look to reasons for and against review, for such reasons provide the best guide to probable legislative intent.

In short, the pre-Act decisions denying review in absence of statutory provisions governing review should have substantially the same effect as precedents as they would have without the Act, whether or not the opinions happened to be written in terms of statutory interpretation.

These conclusions are equally applicable to decisions holding administrative action reviewable in absence of statutory provisions governing review. Perhaps the outstanding leading case is *American School of Magnetic Healing v. McAnnulty*,<sup>80</sup> holding a fraud order issued by the Postmaster General judicially reviewable. The Court put the question in terms of legislative intent: "Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General. . . ?"<sup>81</sup> But the Court gave a general answer which was quite independent of the particular statute: "The acts of all its [the Post Office Department's] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."<sup>82</sup> The Court reasoned that the question was one of law, ". . . and the courts, therefore, must have power in a proper proceedings to grant relief. Otherwise, the individual is left to the absolutely uncontrolled

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77. *Martin v. Mott*, 12 Wheat. 19 (U. S. 1827).

78. *Butte, A. & P. Ry. v. United States*, 290 U. S. 127 (1933).

79. *United States v. Atchison, T. & S. F. Ry.*, 249 U. S. 451 (1919).

80. 187 U. S. 94 (1902).

81. *Id.* at 108.

82. *Ibid.*

and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual.”<sup>83</sup> Two years later the Supreme Court held that the Postmaster General’s discretion in granting or denying a second-class mailing privilege “. . . ought not to be interfered with unless the court be clearly of opinion that it was wrong . . . The consequence of a different rule would be that the court might be flooded by appeals of this kind to review every decision of the Postmaster General in every individual instance.”<sup>84</sup> The results in both cases flowed from practical considerations, not from interpretation.

Cases involving exclusion and deportation of aliens shed considerable light on the whole subject of reviewability in absence of a governing statutory provision and are of importance even to those who are not interested in alien cases as such.<sup>85</sup> The first significant case was *Nishimura Ekin v. United States*.<sup>86</sup> The applicable statute provided: “All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.”<sup>87</sup> The statute was silent concerning finality of the Secretary’s decision. The Court held that the final determination of the facts “. . . may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.”<sup>88</sup> The following year, 1893, the Court seemed to extend this doctrine to deportation cases.<sup>89</sup> Then, in the *Lem Moon Sing* case of 1895 the Court held in a strong and unequivocal opinion that the question whether an alien who had acquired a domicile in the United States could reenter after leaving the country had been “. . . constitutionally committed by Congress to named officers of the executive department of the government for final deter-

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83. *Id.* at 110.

84. *Bates & Guild Co. v. Payne*, 194 U. S. 106, 108 (1904).

85. For an especially helpful review of the cases, see DIMOCK, MCINTIRE AND HART, REPORT OF THE SECRETARY OF LABOR’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (Immigration and Naturalization Service, 1939) (mimeographed).

86. 142 U. S. 651 (1892).

87. 26 STAT. 1084, 1085 (1891).

88. 142 U. S. 651, 660 (1892).

89. *Fong Yue Ting v. United States*, 149 U. S. 698 (1893).

mination.”<sup>90</sup> The holding of nonreviewability extended even to questions of law.<sup>91</sup> Until 1903 the law to the same effect was declared in several Supreme Court decisions.<sup>92</sup> Then came the *Japanese Immigrant Case*,<sup>93</sup> holding that in a habeas corpus proceeding the courts will review the fairness of the administrative hearing. This view was clinched in the *Chin Yow* case of 1908, in which the Court declared: “The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form.”<sup>94</sup> The Court was opening the door to expanding judicial review.<sup>95</sup> By 1932 the Supreme Court, with full support of the cases, summarized the law: “The action of the Secretary is, nevertheless, subject to some judicial review, as the court below held. The courts may determine whether his action is within his statutory authority, . . . whether there was any evidence before him to support his determination, . . . and whether the procedure he adopted in making it satisfied elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized.”<sup>96</sup> Perhaps the high water mark of review was reached in *Bridges v. Wixon*<sup>97</sup> in 1945, in which three dissenting Justices implied that the majority substituted their judgment for that of the Secretary on weight of the evidence.

The significance of the historical development of reviewability in alien cases lies in the ease with which the Supreme Court has created the law of reviewability according to the Court's own views of the desirability or undesirability of review—all quite independently of the statutes. At first the Court unequivocally denied review even of questions of law, resting the denial in part on statutory interpretation. Then when the court realized the need for requiring a fair adminis-

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90. *Lem Moon Sing v. United States*, 158 U. S. 538, 550 (1895). The statute provided that exclusions by immigration officers should be “final, unless reversed on appeal to the Secretary of the Treasury.” 28 STAT. 390 (1894). The Court said that by this statute “. . . the authority of the courts to review the decision of the executive officers was taken away.” 158 U. S. 538, 549.

91. The Court did not say so in the *Lem Moon Sing* opinion, but the sole question presented was apparently one of law.

92. *Li Sing v. United States*, 180 U. S. 486 (1901); *Fok Yung Yo v. United States*, 185 U. S. 296 (1902); *Lee Gon Yung v. United States*, 185 U. S. 306 (1902).

93. 189 U. S. 86 (1903). Apparently to the contrary was *Lee Lung v. Patterson*, 186 U. S. 168 (1902).

94. *Chin Yow v. United States*, 208 U. S. 8, 12 (1908).

95. Two important cases concerning constitutionality of cutting off judicial review are discussed below in connection with that subject. *United States v. Ju Toy*, 198 U. S. 253 (1905); *Ng Fung Ho v. White*, 259 U. S. 276 (1922).

96. *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329, 335-36 (1932). See also the summary in *Kessler v. Strecker*, 307 U. S. 22, 34 (1939). In *Gegiow v. Uhl*, 239 U. S. 3, 9 (1915), the Court had held that, “The conclusiveness of the decisions of immigration officers under [the statute] is conclusiveness upon matters of fact.”

97. 326 U. S. 135 (1945). The main question related to competency and probative effect of certain evidence.



trative procedure, the Court had no difficulty in repudiating its former stand, even though the statute remained the same. When in 1917 Congress passed a new Immigration Act which provided in unambiguous terms that in deportation cases ". . . the decision of the Attorney General shall be final,"<sup>98</sup> the practice with respect to judicial review remained the same; hardly a trace of the statutory change can be found in the opinions.

Those who think that the none-too-clear words in section 10 of the Administrative Procedure Act, confused by an ambiguous legislative history, will substantially change the habits of courts concerning reviewability will do well to study carefully the development of the law of reviewability in the alien cases.

Another instructive historical foray might be made into reviewability of decisions of the General Land Office.<sup>99</sup> In 1903 the Supreme Court said of the Secretary of the Interior: "Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction . . . The responsibility as well as the power rests with the Secretary, uncontrolled by the courts."<sup>100</sup> But that did not prevent the Court from boldly upsetting an administrative decision thought to be arbitrary.<sup>101</sup> The motivation lies neither in abstract doctrine nor in loose legislative language; the results in absence of explicit statutory command flow from judicial views concerning need or lack of need for review, influenced by the record in the particular case. Judges who are impressed with the high quality of the administrative performance write opinions in terms of nonreviewability. But unless their jurisdiction is unequivocally withdrawn, the courts may usually be counted upon to find some way to correct what they believe to be unjust administrative practices, especially when those practices are continued over a sustained period.

The Supreme Court has recently divided in several cases in which the majority held administrative action reviewable in absence of a specific statutory provision governing reviewability. In *Stark v.*

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98. 39 STAT. 874, 890 (1917), 8 U. S. C. § 155(a) (1940).

99. See the extended review of the cases in McClintock, *The Administrative Determination of Public Land Controversies*, 9 MINN. L. REV. 420, 542, 638 (1925).

100. United States *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324-25 (1903).

101. Lane v. Hogland, 244 U. S. 174 (1917). See also Santa Fe Pac. R. R. v. Fall, 259 U. S. 197 (1922).

Such nonreviewability as the courts marked out was limited to contests between the government and claimants. It was early established that a court of equity could compel a holder of a patent to convey to one having a superior equitable right. *Johnson v. Towsley*, 13 Wall. 72 (U. S. 1871).

*Wickard*,<sup>102</sup> where reviewability was interlocked with standing to challenge, the Court held that producers of milk were entitled to judicial review of an allegedly unlawful diversion of money from a fund ultimately belonging to the producers. The Court reasoned that "it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue".<sup>103</sup> Justices Black<sup>104</sup> and Frankfurter dissented.

In *Board of Governors v. Agnew*<sup>105</sup> the Court held that a question whether a partnership was "primarily engaged" in underwriting under the statute was judicially reviewable, rejecting the Board's contention that the order was not subject to review in absence of a charge of fraud. The Court said the district court could inquire whether "the Board transcends its bounds and acts beyond the limits of its statutory grant of authority."<sup>106</sup> Mr. Justice Rutledge, with Mr. Justice Frankfurter joining, emphasized the highly specialized and technical experience which gives the Board an advantage over judges in ascertaining the meaning of Congress and asserted: "If the question presented on the merits is reviewable judicially, in my opinion it is only for abuse of discretion . . ." <sup>107</sup>

Another seven-to-two division came in *RFC v. Bankers Trust Co.*<sup>108</sup> The Bankruptcy Act allowed the reorganization court to fix allowances for expenses and fees within maximum limits fixed by the Interstate Commerce Commission. The Act provided for review of the court's action but was silent concerning review of the Commission's action. The Court held the Commission's determination reviewable under the substantial-evidence rule. On the basis of an elaborate analysis of the statute and the legislative history, Mr. Justice

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102. 321 U. S. 288 (1944).

103. *Id.* at 309.

104. Mr. Justice Black dissented for the reasons given in the opinion of the Court of Appeals for the District of Columbia, reasons relating almost entirely to the question of standing.

105. 329 U. S. 441 (1947).

106. *Id.* at 444.

107. *Id.* at 449-50. The difficulty or impossibility of phrasing with some precision the meaning of "abuse of discretion" is indicated by the following sentences: "Accordingly their judgment in such matters should be overturned only where there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority . . . I cannot say that the Board's conclusion, in the light of those groundings, is wanting either for warrant in law or for reasonable basis in fact." *Id.* at 450, 451. The difference between majority and minority related more to scope of review than to reviewability, and the difference as to scope of review seems to be a rather narrow one. The majority said merely that the determination of the extent of the Board's authority is subject to judicial review; the minority inquired whether the Board "clearly" exceeded its authority. Despite lack of affirmative indication to that effect in the opinion, the majority probably would not upset the Board's judgment in this specialized field unless the excess of authority was thought to be clear. *Cf. Gray v. Powell*, 314 U. S. 402 (1941); *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111 (1944).

108. 318 U. S. 163 (1943).

Douglas, with Mr. Justice Black joining, said: "I do not think that the maximum allowance made by the Commission for fees and expenses is subject to review by the District Court."<sup>109</sup>

### *Action Made "Final" by Statute*

We have seen that in absence of specific statutory provision governing reviewability, some administrative action is reviewable and some is not, and that the opinions are not always written in terms of statutory interpretation. The law of reviewability when statutes are silent is largely judge-made. The same is true even when a statute explicitly provides that administrative action shall be "final" or "final and conclusive." Under the Supreme Court decisions, statutory provisions making action "final" sometimes mean that the action is final and sometimes mean that the action is judicially reviewable to whatever extent the courts see fit to review.

A clear-cut example is *United States v. Williams*,<sup>110</sup> involving adjusted compensation for veterans. The statute was unambiguous: "The decisions of the Secretary of War, the Secretary of the Navy, and the Director, on all matters within their respective jurisdictions under the provisions of this Act . . . shall be final and conclusive." In upholding the administrative decision, the unanimous Supreme Court announced that that decision "is final, at least unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious."<sup>111</sup> This language seems to involve a reading of the words "final and conclusive" as calling for the approximate equivalent of the substantial-evidence rule.<sup>112</sup> In *Reynolds v. United States*,<sup>113</sup> the Court reviewed and reversed a decision of the Director of the Veterans Bureau because of what the Court held to be a mistake of law. The statute, quoted and relied upon by the lower

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109. *Id.* at 171. Mr. Justice Douglas also declared: "My conclusion that the aggregate maximum allowances fixed by the Commission are not reviewable does not make [the statute] unconstitutional." *Id.* at 175.

In *Barr v. United States*, 324 U. S. 83 (1945), the Court held nonreviewable the certification of rates of exchange to the Secretary of the Treasury by the Federal Reserve Bank, but asserted that the Secretary's publication of such rates was "purely ministerial." Consequently, the Secretary's function "may not be exercised in such a way as to defeat the method of assessment which Congress has provided." Mr. Justice Frankfurter, with Mr. Justice Black, dissented, asserting that the Secretary's choice of rates for publication was a policy problem and therefore nonreviewable. The dissenting Justices also discussed the merits, taking the position that the Secretary had broad powers and that no intent of Congress was shown to withdraw power to do what he had done.

110. 278 U. S. 255 (1929).

111. *Id.* at 257-58.

112. The language gave the Court power to review or refuse to review in any particular case. In *Meadows v. United States*, 281 U. S. 271 (1930), the Court held the District Court to be without power to review a decision of the Director of the Veterans' Bureau.

113. 292 U. S. 443 (1934).

court,<sup>114</sup> but not even mentioned in the Supreme Court's opinion,<sup>115</sup> provided: "All decisions of questions of fact and law affecting any claimant to the benefits . . . of this act shall be conclusive, except as otherwise provided herein." The Supreme Court, after acknowledging that the lower court had held the courts to be without jurisdiction to review the question of veterans' benefits, declared: "Granting the correctness of this view, we are of opinion that it does not apply in this case."<sup>116</sup> The Court did not find the case to be within some statutory exception to the provision for conclusiveness. The Court's reasons added up to no more than an emphatic assertion that the Director was wrong on the law and therefore ought to be reversed, despite the statute making the Director's decisions of questions of fact and law conclusive: "The undisputed and indisputable facts bring the veteran within the requirements of the statute. Undoubtedly, therefore, as matter of law, he was entitled to the hospital facilities of St. Elizabeths, and if timely application had been made to the director of the bureau, a refusal upon his part to order the hospitalization would have been wholly without evidentiary support, clearly arbitrary and capricious, and would not, upon well settled principles, have concluded the courts."<sup>117</sup> For the last proposition the Court cited the *Silberschein* case,<sup>118</sup> in which the statute had no provision making the administrative decision conclusive, and the *Williams* case,<sup>119</sup> in which the Court upheld the administrative action. The statute was later amended to withdraw jurisdiction to review.<sup>120</sup>

Occasionally, of course, the Supreme Court respects the statutory words "final and conclusive." A leading case is *Auffmordt v. Hedden*,<sup>121</sup> giving effect to a statute providing that appraisals of imported goods should be final and conclusive. The Court held the appraisal "final in absence of fraud" and upheld the constitutionality of making the administrative determination final. Similarly, in *First Moon v. White Tail*,<sup>122</sup> where the statute provided that the determination of the Secretary of the Interior should be "final and conclusive" of an Indian

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114. *Reynolds v. United States*, 78 Ct. Cl. 401, 407-08 (1933).

115. Whether the Court's omission of any mention of the statute was inadvertent or whether quotation of the statute was merely inconvenient to the writing of the opinion does not appear. This series of cases does seem to inspire in the reader of the opinions an unusual degree of cynicism.

116. 292 U. S. at 446.

117. *Ibid.*

118. 266 U. S. 221, 225 (1924).

119. *United States v. Williams*, 278 U. S. 255 (1929).

120. 54 STAT. 1197 (1940), 38 U. S. C. § 11a-2 (1940).

121. 137 U. S. 310 (1890).

122. 270 U. S. 243 (1926).

allotment, the Supreme Court held that the statute had deprived the lower court of jurisdiction to review.<sup>123</sup>

The Selective Service Act of the Second World War provides that decisions of local draft boards "shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."<sup>124</sup> Since a similar provision of the Selective Draft Law of 1917<sup>125</sup> had been interpreted to permit review by habeas corpus,<sup>126</sup> the courts during the Second World War naturally allowed review by habeas corpus of draft boards' findings,<sup>127</sup> and this practice may have been in accord with congressional intent.<sup>128</sup> The troublesome problem has been whether or not decisions of draft boards may be challenged in defending criminal prosecutions.<sup>129</sup> In 1944 in the *Falbo* case<sup>130</sup> the Supreme Court denied review where the challenge was made before the administrative process was complete. Eight out of eight circuit courts of appeals refused review even in absence of any question of exhaustion of administrative remedies.<sup>131</sup> But in 1946, after the war had ended, the Supreme Court in the *Estep* case<sup>132</sup> interpreted the *Falbo* case as resting on lack of exhaustion of administrative remedies and held a local board's induction order reviewable in a criminal proceeding. After quoting the provision for finality, the Court pointed to the silence of the statute concerning the defenses in a criminal proceeding and declared: "Thus we start with a statute which makes

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123. In *United States v. Babcock*, 250 U. S. 328 (1919), the Court held with respect to claims against the Government for personal property lost during the war that the statutory words "any claim . . . shall be held as finally determined . . ." meant that the administrative determination should be conclusive and that the Court of Claims was without jurisdiction to review.

124. 54 STAT. 893 (1940), 50 U. S. C. § 310(a)(2) (1940).

125. 40 STAT. 79 (1917), 50 U. S. C. § 204 (1940).

126. *E. g.*, *Arbitman v. Woodside*, 258 Fed. 441 (C. C. A. 4th 1919). See the collection of a score of cases in Note 10 GEO. WASH. L. REV. 827, 829-30 (1942).

127. *United States ex rel. Filomio v. Powell*, 38 F. Supp. 183 (D. N. J. 1941). Apparently the Supreme Court did not so hold until *Eagles v. Samuels*, 329 U. S. 304 (1946), in which the propriety of habeas corpus was assumed.

128. In *Estep v. United States*, 327 U. S. 114, 146 (1946), Mr. Justice Burton quoted H. R. REP. NO. 36, 79th Cong., 1st Sess. 5 (1945), as follows: "In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issue by habeas corpus."

129. A disadvantage of allowing two remedies is brought out by *Sumal v. Large*, 332 U. S. 174 (1947).

130. *Falbo v. United States*, 320 U. S. 549 (1944). Part of the language did not sound like reliance on exhaustion of administrative remedies: "The narrow question . . . is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process. We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. . . ." *Id.* at 554. Cf. *Gibson v. United States*, 329 U. S. 338 (1946).

131. The cases are collected in the Frankfurter opinion in *Estep v. United States*, 327 U. S. 114, 139 (1946).

132. *Ibid.*

no provision for judicial review of the actions of the local boards or the appeal agencies.”<sup>133</sup> The Court proceeded to reason that “the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief. . . .”<sup>134</sup> Why the Court emphasized silence of Congress in the face of the words “shall be final” is difficult to understand. After further comments about the law “where Congress is silent,” the Court started on a new tack: “It is only orders ‘within their respective jurisdictions’ that are made final.”<sup>135</sup> Assuming the truth of this observation, the conclusion hardly follows that the administrative officers exceeded their jurisdiction in holding that the two Jehovah’s Witnesses were not “duly ordained ministers of religion.” To say that administrators have no jurisdiction to err in finding facts is the same in substance as saying that the reviewing court may substitute its judgment as to the facts. On the basis of this questionable reasoning, plus some stress upon the involvement of “personal liberty,” the Court concluded: “The provision making the decisions of the local boards ‘final’ means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.”<sup>136</sup> What the scope of review is under these straddling words seems impossible to determine. If local boards’ decisions are final even if erroneous but not final if without basis in fact, then one might suppose that the reviewing court will set aside a finding of fact only if it is unsupported by substantial evidence; yet the Court says Congress has withheld the customary scope of judicial review.<sup>137</sup> The realities seem to be that the result springs not from an

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133. *Id.* at 119.

134. *Id.* at 120.

135. *Ibid.*

136. *Id.* at 122-23.

137. The scope of review on habeas corpus is stated in *Eagles v. Samuels*, 329 U. S. 304, 311-12 (1946): “The function of habeas corpus is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. . . . Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary.” *But cf.* *Bridges v. Wixon*, 326 U. S. 135 (1945), where the scope of review on habeas corpus may have been broader.

If the scope of review in defending a criminal prosecution or in habeas corpus is any different from that prescribed by Section 10 (e) of the ADMINISTRATIVE PROCEDURE ACT, then the Act does not change the scope of review, because Subsection

inquiry into the intent of Congress in using the word "final," and not from the analytical reasoning set forth in the opinion, but from a strong judicial belief in the undesirability of cutting off judicial review in draft cases after the war had been won. The Court might have held that administrative finality on questions of personal liberty is unconstitutional, but Mr. Justice Murphy was alone in asserting that view.<sup>138</sup> Mr. Justice Rutledge, in the third opinion, said that using courts for enforcement while cutting off the defense of invalidity of the administrative action would be unconstitutional.<sup>139</sup> Mr. Justice Frankfurter in the fourth opinion said the Court in holding that the draft board's decision is not final violated "the expressed will of Congress" and contradicted the settled practice, but he concurred on the ground that the registrant had been denied opportunity to prove that the draft board had cut off his right to take an administrative appeal.<sup>140</sup> Mr. Justice Burton and Mr. Chief Justice Stone dissented on the statutory interpretation grounds stated in the first part of Mr. Justice Frankfurter's opinion.<sup>141</sup>

The Court's five opinions in the *Estep* case provide a good deal of instruction on the subject of nonreviewable administrative action. The one lesson which the five opinions teach when read compositely is that neither legislative language nor legislative history nor both in combination exert as much influence upon reviewability as the views of the judges concerning desirability or undesirability of reviewing.

With respect to the National Railroad Adjustment Board, the Railway Labor Act provides that "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money

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(e) is modified by the introductory words of Section 10: "Except so far as . . . statutes preclude judicial review . . ." In both the *Estep* case and the *Samuels* case the statutory word "final" is construed as limiting the scope of review (although the extent of the limitation is far from clear).

For an interpretation of the *Estep* opinion as to scope of review, see *Smith v. United States*, 157 F. 2d 176 (C. C. A. 4th 1946), *cert. denied*, 329 U. S. 776, discussed in note 234, *infra*.

138. 327 U. S. at 125: "To sustain the convictions of the two petitioners in these cases would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administration. That is a proposition to which I cannot subscribe. It violates the most elementary concepts of due process of law."

Mr. Justice Murphy said the word "final" in the statute "merely determines the point of administrative finality, leaving to the courts the ultimate and historical duty of judging the validity of the 'final' administrative orders . . ." *Id.* at 128.

139. *Id.* at 132. Yet Mr. Justice Frankfurter granted that the word "final" did not prevent challenge by habeas corpus. But he said that "issues in a habeas corpus proceeding are quickly joined, strictly limited and swiftly disposed of by a single judge," and that habeas corpus "could not, of course, serve as a revisory process of the determination of classification which Congress lodged with finality in the draft boards." *Id.* at 141.

140. *Id.* at 134.

141. *Id.* at 145.

award," and that in a proceeding to enforce an award the administrative findings "shall be prima facie evidence of the facts therein stated."<sup>142</sup> In the *Washington Terminal* case,<sup>143</sup> the Court of Appeals for the District of Columbia held that an award allowing some employees to do certain work was not reviewable in a declaratory-judgment proceeding brought by the employer, and an equally divided Supreme Court affirmed. In *Hargis v. Wabash Railroad*<sup>144</sup> a divided circuit court of appeals held that a board decision against an employee who claimed a money benefit was not reviewable, even though one judge regarded the question as "a pure question of law." But in *Dahlberg v. Pittsburgh & L. E. R. Co.*,<sup>145</sup> another circuit court of appeals held that in a suit to enforce awards of seniority rights, the court may substitute its judgment in interpreting the collective agreement. In the *Elgin* case,<sup>146</sup> four Justices of the Supreme Court took the view that the Act "precludes review"<sup>147</sup> of an order denying a claim for money, saying that the term "money award" does not include a denial of a claim for money. The majority, however, said that the questions of finality should not be determined unless the award was validly made,<sup>148</sup> and remanded the case for a determination whether the employees had authorized the union to represent them in the proceedings before the Board. On rehearing the majority weakened the requirement as to the showing of authorization but still rejected the minority view that the order was not reviewable.<sup>149</sup> When two divisions of the Board deadlocked over a question of jurisdiction, the majority of the Supreme Court had no difficulty in circumventing the statutory provision for finality; the Court merely said: "We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a juris-

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142. 48 STAT. 1189 (1934), 45 U. S. C. § 153, First, (m) and (p).

143. *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (App. D. C. 1941), *aff'd*, 319 U. S. 732, noted in 55 HARV. L. REV. 859 (1942), 51 YALE L. J. 666 (1942).

144. 163 F. 2d 608 (C. C. A. 7th 1947). The first and main opinion was by a judge who was dissenting from the holding of nonreviewability; in interpreting section 10(e) of the ADMINISTRATIVE PROCEDURE ACT this opinion overlooked the introductory clause of section 10.

145. 138 F. 2d 121 (C. C. A. 3d 1943).

146. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711 (1945).

147. *Id.* at 761. The opinion was written by Frankfurter, J., and joined in by Stone, C. J., and Roberts and Jackson, JJ.

148. *Id.* at 720.

149. *Elgin, Joliet & Eastern R. R. v. Burley*, 327 U. S. 661 (1946). The view of the majority was not that the order was generally reviewable but that the Court did not reach the question of reviewability if the award was invalid on account of lack of authorization of the union. The majority in the opinion on rehearing very significantly granted that the Board's "expertise is adapted not only to interpreting a collective bargaining agreement, but also to ascertaining the scope of the collective agent's authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage." *Id.* at 664.



dictional frustration on an administrative level."<sup>150</sup> The grounds for the decision were pragmatic, not analytical.<sup>151</sup>

### *Statutes Withdrawing Jurisdiction to Review*

Because courts may so easily interpret away provisions making administrative action "final" or "final and conclusive," Congress is increasingly resorting to language explicitly withholding power to review.

In a 1940 statute concerning veterans' benefits, Congress did not stop with the words "final and conclusive," but continued: ". . . and no other official or any court of the United States shall have power or jurisdiction to review any such decisions."<sup>152</sup> The courts have respected this and other similar provisions concerning veterans' benefits.<sup>153</sup> In one case a court even refused to inquire into an allegation that an amendment of an award was retroactive and was made without notice or hearing; the court said: "While it was at one time thought that review might lie if an award were wholly unsupported by evidence, wholly dependent upon a question of law, or clearly arbitrary or capri-

150. *Order of Railway Conductors v. Swan*, 329 U. S. 520 (1947). Mr. Justice Frankfurter wrote an opinion in which no other Justice joined, although he said he was "not alone" in his doubts. He said: "Not finding any command in the statute for judicial review of this controversy, it seems to me, therefore, appropriate to leave it to the mediatory resources of the Railway Labor Act." *Id.* at 530. The implication apparently is that absence of legislative command for review means no review. But one may confidently surmise (1) that no one connected with enactment of the Railway Labor Act anticipated a deadlock over jurisdiction between two divisions of the Board, and (2) that if such a possibility had been anticipated and if it had been thought worthwhile to include a provision concerning it, judicial review to break the stalemate would have been provided.

151. A highly unsatisfactory decision of a federal district court in 1948 deserves mention. In *Snyder v. Buck*, 75 F. Supp. 902 (D. D. C. 1948), a naval officer's widow sought a statutory allowance of six months' pay. The statute provided that the administrative determination of dependency "shall be final and conclusive upon the accounting officers of the Government." The Paymaster General of the Navy found the marriage invalid because it was preceded by an ineffective divorce. The court said: "It may be assumed, without deciding, that prior to the enactment of the Administrative Procedure Act . . . the action of the Navy Department would have been final and conclusive, and could not have been reexamined by the courts." *Id.* at 905. The court then proceeded to interpret the "final and conclusive" clause as meaning the determination shall be conclusive on the Comptroller General "but on no one else." The court accordingly held that the statute did not preclude judicial review, and that section 10 of the Administrative Procedure Act made the determination reviewable. The court might well have held that the words "conclusive upon the accounting officers" have the same meaning as the provisions of most state unemployment statutes—that if "the appeal board affirms the final decision of a referee, allowing such benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken." [Thirty-five state statutes are said to have such clauses. See 56 HARV. L. REV. 131 (1942).] If, as the court assumed, the courts before the Administrative Procedure Act could not reexamine an administrative decision, that was either because of legislative intent or because of pragmatic considerations indicating what the legislative intent would or should have been in absence of clear expression—reasons which are fully as persuasive after the Act as before.

152. 54 STAT. 1197 (1940), 38 U. S. C. § 11a-2 (Supp. 1942). The Economy Act of 1933 contained a similar provision.

153. *Barnett v. Hines*, 105 F. 2d 96 (App. D. C. 1939), *cert. denied*, 308 U. S. 573 (1939); *Killian v. United States*, 63 F. Supp. 748 (Ct. Cl. 1946).

cious . . . the . . . Act . . . seems to have removed the possibility of judicial relief even in such special circumstances." <sup>154</sup>

With respect to refund of certain processing and floor stock taxes a statute provided that the Commissioner's determination should be final "and no court shall have jurisdiction to review such determination." <sup>155</sup> The petitioners contended that Congress intended to commit to final determination only "such matters as findings of fact, computations, and the like." The Supreme Court pointed out that the record did not show why the claims were denied and said: "We hold that upon this record the determination of the Commissioner is final." <sup>156</sup> The case is consistent with allowing judicial review in an appropriate case. <sup>157</sup> But in *Swift & Co. v. United States*, <sup>158</sup> the Court of Claims held that the Commissioner's determination of a question of statutory interpretation was not reviewable, even though the Commissioner's decision was at variance with a previous decision of the Court of Claims. The court granted that "the Commissioner has denied to the plaintiff a right which in our opinion the statute creates, and to which the plaintiff upon the facts set out in its petition is entitled." <sup>159</sup> But the court analyzed the statutory language and the legislative history and "reluctantly" concluded that "Congress meant to deny jurisdiction to the courts for all purposes." <sup>160</sup>

Often a provision withdrawing power is necessary to cut off review. But the Dent Act, designed to compensate for certain kinds of war losses, vested power in the Secretary of the Interior and provided that "nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States." The Supreme Court interpreted this as meaning that the Secretary cannot be compelled by mandamus to pay a claim, thereby in effect holding the Secretary's decision nonreviewable. <sup>161</sup>

154. *United States v. Mroch*, 88 F. 2d 888, 890 (C. C. A. 6th 1937). See also *Lynch v. United States*, 292 U. S. 571, 587 (1934): "The purpose of the section appears to have been to remove the possibility of judicial relief in that class of cases even under the special circumstances suggested in *Crouch v. United States*, 266 U. S. 180; *Silberschein v. United States*, 266 U. S. 221; *United States v. Williams*, 278 U. S. 255; *Smith v. United States*, 57 F. 2d 998."

155. Revenue Act of 1936, § 601(e), 49 STAT. 1740 (1936).

156. *Wilson & Co., Inc. v. United States*, 311 U. S. 104, 106 (1940). The structure of the Act tends to support the proposition that the courts could not review even for fraud, for the provision cutting off judicial review was unqualified, whereas the provision cutting off review by administrative and accounting officers began with the words, "In the absence of fraud . . ."

157. Compare two cases allowing review: *Cudahy Bros. Co. v. La Budde*, 92 F. 2d 937 (C. C. A. 7th 1937); *Neuss, Hesslein & Co., Inc. v. United States*, 30 F. Supp. 595 (S. D. N. Y. 1939).

158. 38 F. Supp. 435 (Ct. Cl. 1941); accord, *Nolde & Horst Co. v. Helvering*, 122 F. 2d 41 (App. D. C. 1941), 30 GEO. L. J. 457 (1942).

159. *Swift & Co. v. United States*, 38 F. Supp. 435, 437 (Ct. Cl. 1941).

160. *Id.* at 438.

161. *Work v. United States ex rel. Rives*, 267 U. S. 175 (1925).

One of the most important statutes to cut off judicial review is the Renegotiation Act, which vests in the United States Tax Court exclusive power to decide questions of fact and law in renegotiation of war contracts, and provides that the Tax Court's determinations "shall not be reviewed or redetermined by any court or agency."<sup>162</sup> The Supreme Court has not yet passed upon the meaning or the validity of this provision, although it has denied review in two cases on the ground of lack of exhaustion of administrative remedies.<sup>163</sup> A circuit court of appeals has given full effect to the nonreviewability provision.<sup>164</sup>

Another especially important provision precluding review is a provision of the excess profits tax statute that if ". . . the determination of any question is necessary solely by reason of [designated sections] the determination of such question shall not be reviewed or redetermined by any court or agency except the Board . . ." <sup>165</sup> A circuit court of appeals has recently denied review of a question of law under this provision.<sup>166</sup> The court declared: "It is well settled that where statutes create special relief, credits, or the like, such concessions are matters of legislative grace . . . and that Congress may preclude judicial review of the determinations of an administrator in respect of them." <sup>167</sup>

#### ° AGENCY DISCRETION

The second part of the introductory clause of section 10 is: "Except so far as . . . agency action is by law committed to agency discretion— . . ." This clause modifies the five ensuing subsections, including subsection (e) on the scope of review. Irrespective of the scope of review prescribed by the unmodified subsection (e), the courts may not review when agency action is by law committed to agency discretion. For instance, subsection (e) provides that the reviewing court shall set aside agency action found to be "arbitrary, capricious . . ." But since subsection (e) must be read as modified by the introductory clause, the reviewing court may not set aside arbitrary or capricious action so far as agency action is by law committed to

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162. Revenue Act of 1943, § 701(d) (5), 58 STAT. 21, 86 (1943), amending the Sixth Supplemental National Defense Appropriation Act, 56 STAT. 245 (1942).

163. *Macaulay v. Waterman S. S. Corp.*, 327 U. S. 540 (1946); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752 (1947).

The Court's statement that ". . . Congress intended to endow the Tax Court's decisions with a very large degree of finality" sounds consistent with some degree of review. *Id.* at 769.

164. *Spaulding v. Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9th 1946).

165. 55 STAT. 26 (1941), 26 U. S. C. § 732(c) (Supp. 1942), as amended, 56 STAT. 917 (1942), 26 U. S. C. § 732(c) (Supp. 1945).

166. *Waters, Inc. v. Comm'r*, 160 F. 2d 596 (C. C. A. 9th 1947), *cert. denied*, 68 Sup. Ct. 77 (1947).

167. 160 F. 2d at 598.

agency discretion. All other clauses of subsection (e) are similarly modified by the introductory clause.<sup>168</sup>

One clause of subsection (e) requires special attention, because reading it together with the introductory clause produces this queer result: "Except so far as . . . agency action is by law committed to agency discretion . . . the reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion." The literal language seems to say that the reviewing court shall set aside an abuse of discretion except when the agency may exercise discretion; the exception consumes the whole power of the reviewing court, so that whenever the agency has discretion the court is prohibited from setting aside an abuse of discretion.<sup>169</sup> Nothing in the legislative history shows an intent to produce such a drastic change; probably no one during the Act's preparation put these words together in this juxtaposition. A practical interpretation which will carry out the probable intent and which will produce sound substantive results will emphasize the word "committed." When the action is by law "committed" to agency discretion, it is not reviewable—even for arbitrariness or abuse of discretion; it is not "committed" to agency discretion if it is reviewable. The two concepts "committed to agency discretion" and "non-reviewable" have in this limited context the same meaning. Both depend upon what is committed "by law" to agency discretion—both depend upon the statutes and the cases. When "the law" cuts off review for abuse of discretion, then the action is committed to agency discretion. The result is that the pre-Act law continues. And the courts of course remain free, except to the extent that other statutes are controlling, to continue to determine on practical grounds in particular cases what action should or should not be, in whole or in part, non-reviewable even for abuse of discretion.

Some administrative action is not, never has been, and from a practical standpoint cannot be subject to judicial review even to the

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168. Probably agency action cannot be committed by law to agency discretion to act contrary to constitutional right. Although acting beyond statutory jurisdiction logically cannot be within agency discretion, judicial power to review questions of jurisdiction is sometimes cut off. *E. g.*, *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943). Sometimes even a departure from the usual requirements of fair hearing may be within agency discretion. *E. g.* *United States ex rel. Von Kleczkowski v. Watkins*, 71 F. Supp. 429 (S. D. N. Y. 1947). Courts are commonly without power to inquire whether administrative findings are supported by substantial evidence.

169. Compare DICKINSON, *THE JUDICIAL REVIEW PROVISIONS, FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 546, 567 (1947): "That some discretionary acts are intended to be made reviewable seems clear from the provision of Subsection (e) which authorizes the reviewing court to set aside an administrative act found to constitute an 'abuse of discretion.' Clearly there could be no 'abuse of discretion' unless the act under review were to some extent discretionary."

extent of an inquiry into arbitrariness or abuse of discretion. For the "agency action" to which section 10 applies embraces far more than adjudication and rule-making. The term "agency" includes the President, cabinet members, and other executive officers.<sup>170</sup> It includes even the military, except "courts martial and military commissions," and "military or naval authority exercised in the field in time of war or in occupied territory."<sup>171</sup> "Agency action" is defined as including "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."<sup>172</sup> "Sanction" includes six categories and a catch-all in the seventh—"taking of other compulsory or restrictive action."<sup>173</sup> "Relief" includes two categories and a catch-all third—"taking of any other action upon the application or petition of, and beneficial to, any person."<sup>174</sup> Section 4 excepts from rule-making requirements "(1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." But no such exception is made for section 10.

Should the courts inquire whether a commanding officer of a domestic military post has abused his discretion in denying a requested leave? Should the courts inquire into possible abuse of discretion by the President or the State Department in conducting foreign affairs? Do we want courts inquiring into personnel management—salary increases, sick leave, office hours, allocation of parking spaces in the basement of the agency's building? Or into ordinary management of public property? Or into the President's capricious removal of a cabinet officer?

If a prosecuting attorney or the NLRB or the SEC abuses discretion in refusing to prosecute, should the courts review? If the Antitrust Division alters its prosecuting policies, or refuses to compromise, or chooses a criminal proceeding instead of an equity proceeding, or institutes an investigation—should the courts entertain actions asserting abuse of discretion? What if the Government Printing Office is unduly slow in answering mail, or the Library of Congress arbitrarily restricts use of books, or the Budget Bureau recommends a reduction of an appropriation, or the RFC makes a loan to A but not to B, or the Government buys X's land for a postoffice but not Y's? What if the President refuses to commute a sentence, or the Bureau

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170. The Act in section 2(a) provides: "'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the government of the possessions, Territories, or the District of Columbia."

171. Section 2(a).

172. Section 2(g).

173. Section 2(f).

174. *Ibid.*

of Marine Inspection and Navigation refuses to mitigate a penalty, or the Bureau of Immigration refuses a deportable alien an extra period of grace before leaving the country?

Since practical and traditional reasons fully support the complete nonreviewability of some administrative action, we turn to the case law to find the controlling materials—to find what action is “by law” committed to agency discretion. Whether or not the case law involves statutory interpretation is immaterial this time, for the words are “by law,” not “by statute.” Of course, the Act does not freeze the case law; it may continue to grow. Both pre-Act and post-Act case law will govern.<sup>175</sup>

The Supreme Court has held nonreviewable the President's exercise of discretion in calling out the state militia,<sup>176</sup> in taking possession of telephone lines,<sup>177</sup> and in recognizing foreign governments.<sup>178</sup> The courts have refused to review a certification by the Secretary of State of an award of an international mixed Claims Commission,<sup>179</sup> a remission of a penalty by the Secretary of the Treasury,<sup>180</sup> a determination by the Secretary of Agriculture of the number of inspectors assigned to enforce the Tobacco Inspection Act,<sup>181</sup> and action of the Comptroller of the Currency determining the necessity for an assessment of stockholders of a bank in liquidation<sup>182</sup> and determining the need for an assessment.<sup>183</sup>

175. Apparently nothing hinges on the frequent overlap of the two parts of section 10's introductory clause, that is, that statutes preclude judicial review and that the action is also committed to agency discretion.

176. *Martin v. Mott*, 12 Wheat. 19, 29, 30 (U. S. 1827). See also *Decatur v. Paulding*, 14 Pet. 497 (U. S. 1840), involving a pension claim by the widow of a naval officer, wherein the court declared: “The interference of the courts with the performance of the executive departments of the government would be productive of nothing but mischief.”

177. 250 U. S. 163, 184 (1919). But the Court passed upon the question whether the President's action was within his power.

178. *United States v. Pink*, 315 U. S. 203, 229 (1942).

179. *Z. & F. Assets Realization Corp. v. Hull*, 311 U. S. 470 (1941).

In *Work v. Rives*, 267 U. S. 175 (1925), judicial review of the “wide discretion” of the Secretary of the Interior under the Dent Act was denied. And in *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324-25 (1903), the Court held the discretion to be in the Secretary, “uncontrolled by the courts.” A similar result was reached with respect to an Interstate Commerce Commission determination concerning reimbursements for deficits during federal control of railroads, in *Butte, A. & P. Ry. v. United States*, 290 U. S. 127 (1933).

180. *Dorsheimer v. United States*, 74 U. S. 166, 174-75 (1868).

181. *Greer v. Cline*, 148 F. 2d 380, 384 (C. C. A. 6th 1945).

182. *Adams v. Nagle*, 303 U. S. 532, 544 (1938). The Court implied that it would review for bad faith or fraud.

183. See *Forrest v. Jack*, 294 U. S. 158, 162 (1935). See also *Hadden v. Merritt*, 115 U. S. 25, 28 (1885) (in administering customs laws, determining value of foreign coins involves “the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision”; the only remedy for error is “an appeal to the department itself”); *Queensboro Farms Products v. Wickard*, 137 F. 2d 969, 977 (C. C. A. 2d 1943) (Secretary of Agriculture has “unlimited discretion” as to a matter concerning administration of milk regulation); *United States v. Wrightwood Dairy Co.*, 127 F. 2d 907, 912 (C. C. A. 7th 1942) (determination of Secretary of Agriculture changing base period for making a computation because of inadequacy of

Nonreviewability of administrative action conferring special benefits is well illustrated by a line of excess-profits tax cases of which *Heiner v. Diamond Alkali Co.*<sup>184</sup> is a good example. The statute provided that "Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would . . . work . . . an exceptional hardship . . ." the Commissioner may levy a special assessment. A unanimous Supreme Court held: "The grant of special assessment and the ascertainment of the rate or ratio of tax to be applied to the net income of the taxpayer are indissolubly connected by the terms of the statute. The exercise of the discretion in both aspects is committed to the Commissioner and to the Board of Tax Appeals upon review of his action. That discretion cannot be reviewed by the courts. . . ." <sup>185</sup>

An unusually clear kind of judicially nonreviewable administrative discretion is exemplified in the administration of the immigration laws. An alien who is "liable to be excluded" may in the discretion of the Attorney General be conditionally admitted under bond; a court in refusing to review has characterized the power as "an absolute discretion."<sup>186</sup> Similarly, discretionary power of the Attorney General to allow a deportable alien to leave voluntarily has been held "not subject to review."<sup>187</sup> Where the discretion is of this kind, even an allegation of unfair procedure may fail to invoke judicial review.<sup>188</sup>

Exercise or failure to exercise the prosecuting power may be non-reviewable. In *Jacobsen v. NLRB*<sup>189</sup> a circuit court of appeals said that the Board could not be compelled to issue a complaint, because

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statistics in his department "is one of discretion and not a judgment which we have a power to question").

In *United States ex rel. Roughton v. Ickes*, 101 F. 2d 248 (App. D. C. 1938), a refusal by the Commissioner of the General Land Office, affirmed by the Secretary of the Interior, rejecting an application for a preferential right to lease certain lands was held discretionary and not controllable by mandamus. The case probably means no more than that mandamus can't control discretion, despite a different interpretation in *DICKINSON, THE JUDICIAL REVIEW PROVISIONS, FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 546, 569 (1947). In *Doehler Metal Furniture Co. v. Warren*, 129 F. 2d 43 (App. D. C. 1942), a declaratory judgment was denied because the court could not control the Comptroller General's discretion; the opinion did not make clear whether the court would review for abuse of discretion.

184. 288 U. S. 502 (1933).

185. *Id.* at 505, 507.

186. *United States ex rel. Ickowicz v. Day*, 18 F. 2d 962 (S. D. N. Y. 1926), *aff'd*, 18 F. 2d 962 (C. C. A. 2d 1927). Both courts wrote opinions recommending administrative reconsideration.

187. *United States ex rel. Zeller v. Watkins*, 72 F. Supp. 980 (S. D. N. Y. 1947); *accord: United States ex rel. Salvetti v. Reimer*, 103 F. 2d 777 (C. C. A. 2d 1939).

188. *United States ex rel. Von Kleczkowski v. Watkins*, 71 F. Supp. 429 (S. D. N. Y. 1947). The court held that the Attorney General in denying an application for review of a denial of discretionary relief could consider a report of military authorities in time of war classified in part secret and in part top secret, without disclosing the report to the alien.

189. 120 F. 2d 96 (C. C. A. 3d 1941).

"that discretion is not a legal discretion."<sup>190</sup> The same case, however, held that a statutory provision giving the Board power "in its discretion" to take further testimony confers "a legal discretion"<sup>191</sup> which if abused is subject to review. Another circuit court of appeals has held that the court is "without power" in certain circumstances to require the Securities and Exchange Commission to make an investigation or to institute injunction proceedings.<sup>192</sup>

The *Bush* case<sup>193</sup> is a reminder of the fundamental proposition that action may be *partly* committed to agency discretion, even though in some aspects the action is reviewable. The Tariff Act of 1930 provided for judicial review on "questions of law only." The President, on recommendation of the Tariff Commission, had power to adjust import duties within limits, to equalize differences in production costs. The Court of Customs and Patent Appeals set aside an order increasing a duty, on the ground that invoice prices for one period had been converted into United States dollars at the average rate of exchange for another period. The Supreme Court held: "The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us. . . . The judgment of the President . . . is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of facts calling for that action is not subject to review."<sup>194</sup> A powerful argument may be made that the courts should inquire into such questions as arbitrariness, abuse of discretion, and lack of substantial evidence, because such questions are normally deemed questions of law, and because the Tariff Act provides for review of questions of law. But that is not the interpretation the Supreme Court gave the Tariff Act in the *Bush* case, and the practical considerations which motivated the Court remain as strong as ever. The *Bush* case therefore remains good law. The Court's statement that the action was "not subject to

190. *Id.* at 100.

191. *Ibid.*

Perhaps the terminology "legal discretion" and "absolute discretion" would assist clarity.

192. *Crooker v. SEC*, 161 F. 2d 944 (C. C. A. 1st 1947).

Exercise of the prosecuting power is sometimes discretionary and sometimes mandatory. The prosecuting power of the Federal Trade Commission and National Labor Relations Board is wholly discretionary. But that of the Interstate Commerce Commission and the Federal Communications Commission is frequently mandatory. See the full discussion in Jaffe, *The Individual Right to Initiate Administrative Process*, 25 *IOWA L. REV.* 48 (1940).

193. *United States v. George S. Bush & Co.*, 310 U. S. 371 (1940).

194. *Id.* at 379-80.



judicial review" may possibly mean even that inquiry into reasonableness in the due process sense is cut off, for the Court emphasized that "No one has a legal right to maintenance of an existing rate or duty."<sup>195</sup> Yet one may surmise that judicial self-restraint has its limits; if action is sufficiently offensive to concepts of due process, courts have power at any time to permit review.<sup>196</sup>

In many cases in which plausible arguments may be made for nonreviewability, the Supreme Court has held administrative discretion reviewable to some extent. In *RFC v. Bankers Trust Co.*,<sup>197</sup> the Court held an ICC order fixing maximum limits for expenses and fees to be paid out of a debtor's estate in reorganization to be reviewable to the extent of determining whether substantial evidence supported the Commission's finding; two Justices took the view that the Commission's action was nonreviewable.<sup>198</sup> In *Board of Governors v. Agnew*,<sup>199</sup> the Federal Reserve Board contended its removal of a bank director was reviewable only for fraud, but the Court held it could inquire whether the Board acted in excess of statutory authority; two Justices asserted that the Board's action was reviewable only "for abuse of discretion," if at all.<sup>200</sup> In other comparable cases courts often inquire into arbitrariness or abuse of discretion.<sup>201</sup> Such authorities are probably unaffected by the Administrative Procedure Act.

Statutes providing that the administrator shall act "in his discretion" or when he "is satisfied" of certain conclusions seem to commit action to administrative discretion. Since courts have often reviewed in spite of such provisions, the question arises whether the Administrative Procedure Act changes the practice. In *United States v. Laughlin*,<sup>202</sup> the statute provided: "That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the Public Land Laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be

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195. *Ibid.*, quoted from *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 318 (1933).

196. Another case in which some review is possible even though what is committed to the agency's discretion is nonreviewable is *Perkins v. Elg*, 307 U. S. 325 (1939). The Court approved a declaratory judgment precluding the Secretary of State from denying a passport on the sole ground that the applicant had lost her American citizenship, but the Court said that its decree "would in no way interfere with the exercise of the Secretary's discretion." *Id.* at 350.

197. 318 U. S. 163 (1943).

198. *Douglas and Black*, JJ.

199. 329 U. S. 441 (1947).

200. *Rutledge and Frankfurter*, JJ.

201. In *United States v. Atchison, T. & S. F. Ry. Co.*, 249 U. S. 451 (1919); *Barr v. United States*, 324 U. S. 83 (1945); *United States v. Carmack*, 329 U. S. 230 (1946); *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902); *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904); *Friedman v. Schwellenbach*, 159 F. 2d 22 (App. D. C. 1946), *cert. denied*, 330 U. S. 838.

202. 249 U. S. 440 (1919).

repaid to such person or his legal representatives." The Supreme Court specifically rejected a contention that a favorable decision by the Secretary was a condition precedent to recovery. The Court reasoned: "In the case before us the facts were not and are not in dispute, and were shown to the Secretary's satisfaction; whether, as matter of law, they made a case of excess payment, entitling claimant to repayment under the Act . . . was a matter properly within the jurisdiction of the court of claims."<sup>203</sup> The Court proceeded to substitute its judgment on what it deemed to be the question of law. The reasoning seems specious, but it has been followed by a circuit court of appeals as recently as 1947.<sup>204</sup> The problem of interpreting the words "satisfaction of the Secretary" is the same after the Administrative Procedure Act as before. The proposition that the statute on its face shows that courts were not intended to have power to order repayments in absence of "satisfaction of the Secretary" has a good deal of force, but no more than it had when the *Laughlin* case was decided.

The Internal Revenue Code has many provisions committing questions to the Commissioner's discretion.<sup>205</sup> For instance, a taxpayer may deduct certain bad debts "or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts."<sup>206</sup> Probably the most desirable test of the scope of review under such provisions is that laid down by the Supreme Court in *Lucas v. Kansas City Structural Steel Co.*,<sup>207</sup> indicated by the Court's remark that "The company's case falls far short of meeting the heavy burden of proving that the Commissioner's action was plainly arbitrary."<sup>208</sup>

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203. *Id.* at 443.

204. *United States v. Ohio Oil Co.*, 163 F. 2d 633 (C. C. A. 10th 1947).

205. For a good 1930 review of such provisions and of interpretations under them, see Magill, *Finality of Determinations of the Commissioner of Internal Revenue* (II) 30 COL. L. REV. 147 (1930).

206. § 23(k) (1). See also § 41, providing for computing net income in accordance with the method of accounting regularly employed "but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income." Under this provision the Supreme Court has seemingly substituted its judgment for that of the Commissioner in determining the basis on which the computation should be made. *Lucas v. Ox Fibre Brush Co.*, 281 U. S. 115, 120 (1930).

207. 281 U. S. 264 (1930).

208. *Id.* at 271. See also *Lucas v. American Code Co.*, 280 U. S. 445, 449 (1930): "Much latitude for discretion is thus given to the administrative board [Commissioner] charged with the duty of enforcing the act. Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful."

The tribunal now known as the Tax Court may be less ready to substitute its judgment under such provisions than it used to be. *Contrast*, for example, *National Adjusting Ass'n*, 32 B. T. A. 314, 320 (1935), where the inquiry was whether the Commissioner's action was "erroneous," *with* *Jud Plumbing & Heating, Inc.*, 5 T. C. 127, 135 (1945), *aff'd on other grounds*, 153 F. 2d 681 (C. C. A. 5th 1946), where the language was "unreasonable and arbitrary."

The practice is by no means settled, but to an increasing extent reviewing courts are using as the test such phrases as "abuse of discretion,"<sup>209</sup> "unreasonable,"<sup>210</sup> "plainly arbitrary,"<sup>211</sup> "arbitrary or an abuse of discretion,"<sup>212</sup> "plainly arbitrary or capricious."<sup>213</sup>

The variability of both the theory and the practice in this group of cases reveals again the futility of attempting to use precise formulas to govern either the area or the scope of review. Whatever the formula, the special circumstances of particular cases usually influence judicial behavior. Nothing in section 10 is likely to change deeply rooted habits. The variability from case to case will surely continue.

### CONSTITUTIONAL LIMITS

Probably some administrative determinations must be judicially reviewable to satisfy constitutional requirements. But the law of this subject is uncertain and shifting. Although the law at both extremes is relatively clear, the problem area in the middle is wide and perplexing.

At the one extreme are cases involving grants or benefits which may constitutionally be denied altogether.<sup>214</sup> Similarly clear is the proposition that administrative determinations may often be final even when "rights" are involved. Possibly a labor union's most precious interest is its status as representative of employees for collective bargaining; yet the Supreme Court has held that certification orders are not judicially reviewable.<sup>215</sup> The Court has even so held when the question

209. *Schram v. United States*, 118 F. 2d 541, 544 (C. C. A. 6th 1941), *cert. denied*, 314 U. S. 695: "It is beyond the power of the courts to overturn his decision unless the evidence clearly shows that he has abused his discretion."

210. *In re Newman*, 94 F. 2d 108 (C. C. A. 6th 1938).

211. *United States v. Beckman*, 104 F. 2d 260, 263 (C. C. A. 3d 1939), *cert. denied*, 308 U. S. 593, *quoting from* *Lucas v. American Code Co.*, 280 U. S. 445, 449 (1930).

212. *Lenox Clothes Shops v. Commissioner*, 139 F. 2d 56, 58 (C. C. A. 6th 1943).

213. *Stokes v. Rothensies*, 61 F. Supp. 444, 449 (E. D. Pa. 1945), *aff'd*, 154 F. 2d 1022 (C. C. A. 3d 1946).

214. *Dorsheimer v. United States*, 74 U. S. 166 (1868) (no judicial review when administrative action concerns remission of a penalty); *Heiner v. Diamond Alkali Co.*, 288 U. S. 502 (1933) (special relief against hardship in computing excess profits taxes); *Wilson & Co. v. United States*, 311 U. S. 104 (1940) (voluntary refund of certain taxes); *United States v. Babcock*, 250 U. S. 328 (1919) (assumption by government of certain war losses); *Martin v. Mott*, 12 Wheat. 17 (U. S. 1827) (President's action in calling out state militia); *United States v. Pink*, 315 U. S. 203, 229 (1942) (recognition of a foreign government); *United States v. Geo. S. Bush & Co.*, 310 U. S. 371 (1940) (determination of tariff rates); *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940) (exercise of proprietary functions).

215. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943); *General Committee v. Missouri, K. T. Ry.*, 320 U. S. 323 (1943).

In *American Federation of Labor v. NLRB*, 308 U. S. 401 (1940), a certification by the NLRB was held nonreviewable by the procedure set up in §10(f) of the Act. In *Inland Empire District Council v. Millis*, 325 U. S. 697 (1945), where an independent suit was brought to challenge a certification, the Court held that it did not need to pass upon the question of reviewability because no showing was made that the Board had acted unlawfully. In holding that the Board had not acted unlawfully, the Court did review.

was one of statutory interpretation involving the scope of the agency's jurisdiction.<sup>216</sup> Questions of interpretation of collective agreements—contract “rights” concerning wages, hours, working conditions, pensions, right to work, seniority—are generally not judicially reviewable except to enforce money awards; an argument of a dissenting judge that “if the Labor Act is construed to bar all judicial relief to the carrier party to a collective bargaining agreement this would deny the carrier due process of law”<sup>217</sup> was rejected by the majority of a lower court, and the majority view seems likely to endure.<sup>218</sup> During the war an order of the National War Labor Board granting an increase of wages was held nonreviewable, although such an order was enforceable either through union weapons or through presidential seizure of the employer's business.<sup>219</sup>

Even questions of law concerning interests in property may be committed to final administrative determination.<sup>220</sup>

The now defunct negative-order doctrine<sup>221</sup> throws light on the constitutionality of denying judicial review even where rights, not mere privileges or gratuities, are involved. In the original 1912 decision,<sup>222</sup> the Procter & Gamble Company sought relief from allegedly

216. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943).

217. *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 276 (App. D. C. 1941), *aff'd* 319 U. S. 732 (1942) (the majority view was affirmed by an equally divided Court).

218. See notes 143 and 144 *supra*.

219. *Employers Group of Motor Freight Carriers v. National War Labor Board*, 143 F. 2d 145 (App. D. C. 1944), *cert. denied*, 323 U. S. 735 (1944).

220. *First Moon v. White Tail*, 270 U. S. 243 (1926). Lands had been allotted to an Indian who died, and the Secretary of the Interior after hearing determined who were the heirs. The appellant claimed to be the only surviving lawful wife, alleging that upon the facts found by him the Secretary had misapplied the law. The Supreme Court gave effect to the statutory provision making the Secretary's action “final and conclusive.” No mention was made of possible unconstitutionality.

In *Crane v. Hahlo*, 258 U. S. 142 (1922), a statute provided that administrative determination of damages to a landowner for changing the grade of a street should be “final and conclusive.” The New York Court of Appeals had held that the statute limited review to “questions of jurisdiction, fraud and wilful misconduct on the part of the officials composing the boards.” The Supreme Court held: “This afforded ample protection for the fundamental rights of the plaintiff in error, and the taking away of the right to have examined mere claims of honest error in the conduct of the proceeding by the Board did not invade any federal constitutional right. Even courts have been known to make rulings thought by counsel to be erroneous.”

Other cases of nonreviewability even though property rights are involved: *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163 (1919) (presidential seizure of telephone line during wartime); *Adams v. Nagle*, 303 U. S. 532 (1938) (assessment of bank stockholders); *United States v. Chemical Foundation*, 272 U. S. 1 (1926) (seizure of enemy property).

In *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U. S. 163 (1943), Justices Black and Douglas took the view that ICC determination of maximum limits for expenses and fees to be paid out of a debtor's estate in reorganization was not reviewable. They said this interpretation was constitutional because Congress could deny all fees, having plenary power. The majority interpreted the statute the other way, not reaching the constitutional issue.

221. The Supreme Court abolished the doctrine in *Rochester Telephone Co. v. United States*, 307 U. S. 125 (1939).

222. *Procter & Gamble Co. v. United States*, 225 U. S. 282 (1912).

"unjust and oppressive" demurrage regulations adopted by the railroads. The Commission denied relief and the Supreme Court held the Commission's decision nonreviewable. In the *Piedmont & Northern* case of 1930<sup>223</sup> the Court held that an administrative decision denying a certificate to extend a railroad's lines, "being negative in substance as well as in form, infringed no right of the railway,"<sup>224</sup> and therefore was not reviewable. This line of cases, in which the Court not merely upheld nonreviewability imposed by statute but manufactured its own doctrine to cut off review, shows that nonreviewability may be constitutional even when vital business interests are at stake.<sup>225</sup>

As revealing as any case to show the temper of the present Court is the 1948 decision in *Chicago & So. Airlines v. Waterman S. S. Co.*<sup>226</sup> The Civil Aeronautics Board granted to Chicago & Southern and denied to Waterman a certificate to engage in foreign air transportation. The statute required the President's approval of orders granting or denying such certificates. The statute explicitly subjected to judicial review "any order . . . except . . . in respect to any

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223. *Piedmont & Northern Ry. v. United States*, 280 U. S. 469 (1930).

224. *Id.* at 475.

225. Some of the largest business interests affected by nonreviewability of administrative action are those now involved in renegotiation of war contracts. Initial determination of excessive profits is reviewable *de novo* by the United States Tax Court. The 1944 Act provides that the Tax Court's determination "shall not be reviewed or redetermined by any court or agency." 58 STAT. 78, 86 (1944), 50 U. S. C. § 1192 (Supp. 1945). In *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U. S. 752, 771 (1947), the Court said in requiring exhaustion of administrative remedies before the Tax Court on a renegotiation question: "We do not express any opinion, indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters . . . We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition." The statutory interpretation question may be doubtful, but the language concerning the constitutional issue seems unduly cautious. In *United States v. Griffin*, 303 U. S. 226 (1938), railroads aggrieved at a denial by the Interstate Commerce Commission of an increase in mail pay were denied judicial review on the ground that the order was "negative," and the Court had no qualms about the constitutionality of cutting off review. Furthermore, if the language of *Dobson v. Commissioner*, 320 U. S. 489, 498 (1943), is taken seriously—that the Tax Court "is relatively better staffed for its task than is the judiciary"—one might well turn the tables and argue that Tax Court review of the work of the ordinary judiciary in the Tax Court's field is required by due process! The only sensible requirements are that the tribunal be qualified for its tasks and that procedural safeguards be adequate.

Of course, the holding in *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 725 (1929), that the Board of Tax Appeals was an administrative agency does not necessarily survive the tribunal's 1942 change of name.

A decision in the Ninth Circuit on renegotiation nonreviewability seems clearly sound. *Spaulding v. Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C. C. A. 9th 1946): "The 1944 amendment makes final and permits no appeal to the federal courts from the Tax Court's decision on the amount of excessive profits . . . The Constitution does not require the Congress to give to any litigant a right of appeal. Assuming that the Tax Court is no more than an administrative body, the finality of its decisions as to the amount to be recaptured violates no constitutional right."

226. 68 Sup. Ct. 431 (1948).

foreign air carrier subject to the approval of the President. . . .” No express exemption from judicial review was made for orders like the present ones concerning citizen carriers and requiring the President’s approval. The Court “conceded” that a literal reading of the statute subjected the orders to judicial review but nevertheless held that the orders were not reviewable “before they are finalized by Presidential approval,” and not reviewable after approval because they then “embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.”<sup>227</sup> Four Justices<sup>228</sup> in dissent argued that the orders should be reviewable after approval by the President but that review should be restricted to the action of the Board and the Board alone. The completeness of the nonreviewability was vividly stated by the minority: “No matter how substantial and important the questions, they are now beyond judicial review. Today a litigant tenders questions concerning the arbitrary character of the Board’s ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today’s decision.”<sup>229</sup> That neither opinion discussed the constitutionality of denying judicial review serves only to emphasize the weakness of the argument for unconstitutionality. A court which by its own action cuts off judicial review even while conceding that the literal words of the statute require review is not likely to invalidate a statutory prohibition of review of the same kind of question.

The constitutional line which limits nonreviewability is not drawn between rights and gratuities. To the extent that a line is perceptible at all in the recent case law, it may be between constitutional rights and other rights, or between constitutional rights involving personal or civil liberty and other rights, although this proposition is by no means definitively established. The vague concept of “constitutional rights,” of course, opens the Pandora’s box of issues concerning “constitutional facts” and “jurisdictional facts.”

As recently as 1935<sup>230</sup> the Supreme Court reaffirmed the *Ben Avon* doctrine<sup>231</sup> that due process requires not merely judicial review to check abuse of discretion or lack of substantial evidence, but opportunity for independent judicial determination of both law and fact in rate cases when confiscation was claimed. Although this doctrine has never been explicitly overruled, later decisions make clear that

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227. *Id.* at 437.

228. Douglas, Black, Reed, Rutledge, *JJ.*

229. *Id.* at 439.

230. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936).

231. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920).

it is no longer followed.<sup>232</sup> Similarly, *Crowell v. Benson*<sup>233</sup> in 1932 required in the name of the Constitution independent judicial determination of "jurisdictional facts," and the case has not been specifically overruled. But recent cases have grown away from that doctrine,<sup>234</sup> and Mr. Justice Frankfurter in a 1946 opinion approved by Mr. Chief Justice Stone and Mr. Justice Burton (with the rest of the Court not commenting on the point) said: "In view of the criticism which that doctrine, as sponsored by *Crowell v. Benson*, . . . brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose."<sup>235</sup> Probably in the original contexts of rate cases and workmen's compensation cases, the doctrine of the *Ben Avon* and *Crowell* cases is extinct and is unlikely to be revived. Yet the doctrine of those cases may at any time be given life in some other contexts.

Recent cases fully support the proposition that findings of trial courts, approved by the highest state courts, are not binding on the federal Supreme Court when certain kinds of constitutional transgressions are at issue. The Supreme Court makes its own independent determination of both law and facts when unconstitutional practices are asserted concerning exclusion of negroes from juries,<sup>236</sup> confessions induced by unlawful methods,<sup>237</sup> selection of "blue ribbon" juries,<sup>238</sup>

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232. *Railroad Commission v. Rowan & Nichols Co.*, 310 U. S. 573 (1940), 311 U. S. 570 (1941); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503 (1944); *New York v. United States*, 331 U. S. 284 (1947). But the New York Court of Appeals, four to three, has recently followed the *Ben Avon* case as if it were controlling. *Staten Island Edison Corp. v. Maltbie*, 296 N. Y. 374, 73 N. E. 2d 705 (1947).

233. 285 U. S. 22 (1932).

234. *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251 (1940); *Parker v. Motor Boat Sales Co.*, 314 U. S. 244 (1941); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469 (1947). Perhaps *Crowell v. Benson* should, after all, be attributed to peculiarities relating to the maritime jurisdiction under Article III of the Constitution. See *Gudmundson v. Cardillo*, 126 F. 2d 521, 523-24 (App. D. C. 1942).

Of unusual interest is *Smith v. United States*, 157 F. 2d 176 (C. C. A. 4th 1946), cert. denied, 329 U. S. 776 (1946). Smith was one of the selective service registrants who, along with *Estep*, won in *Estep v. United States*, 327 U. S. 114 (1946). On remand to the district court, the jury was allowed to decide on the evidence whether Smith was a minister. Even though the jury rendered a verdict against Smith, the circuit court of appeals reversed, partly on the ground that "the theory on which the case was tried was so fundamentally wrong that we should take notice of the mistake of our own motion, even in the absence of an exception below." *Id.* at 185. The court pointed out that the district judge had relied on *Crowell v. Benson*! *Id.* at 184. If the draft board had no "jurisdiction" to induct a minister, perhaps the question was a "jurisdictional fact." But trying to identify jurisdictional facts is a very unprofitable pursuit. The plain fact is that the circuit court of appeals regarded *Crowell v. Benson* as superseded, *pro tanto*, by the Supreme Court's language in *Estep v. United States*, 327 U. S. 114, 122-23 (1946).

235. *Estep v. United States*, 327 U. S. 114, 142 (1946).

236. See *Patton v. Miss.*, 332 U. S. 463, 465 (1947); *Norris v. Ala.*, 294 U. S. 587, 590 (1935).

237. See *Ashcraft v. Tenn.*, 322 U. S. 143, 148 (1944); *Lisenba v. Calif.*, 314 U. S. 219, 237-38 (1941).

238. See *Fay v. New York*, 332 U. S. 261, 272 (1947).

denial of equal protection through land laws,<sup>239</sup> and peonage under the Thirteenth Amendment.<sup>240</sup> If findings of state courts on such questions are not final, findings of administrative agencies on such questions are not likely to be final.

Yet specific authority forbidding administrative finality on such questions apparently cannot be found in recent Supreme Court decisions. Probably still good law is *Ng Fung Ho v. White*,<sup>241</sup> which held in 1922 that persons arrested in deportation proceedings are entitled to have the issue of citizenship decided by a court. Mr. Justice Brandeis in that case referred to "the difference in security of judicial over administrative action."<sup>242</sup> Mr. Justice Frankfurter recently quoted this language with approval, indicating, however, that it applies only in "rare instances."<sup>243</sup> The rare instances probably would involve civil liberties or personal freedom—probably not business or property rights. The present Court seems likely to follow at least in a general way the line of Mr. Justice Brandeis in his *St. Joseph* opinion of 1935: "A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. . . . But a multitude of decisions tells us that when dealing with property a much more liberal rule applies."<sup>244</sup>

In *Estep v. United States*,<sup>245</sup> two Justices asserted that criminal prosecution for violation of an order of a draft board would be unconstitutional unless the defendant had opportunity to challenge the validity of the order—even though all the Justices assumed availability of habeas corpus to test the validity of detention after conviction. Mr. Justice Murphy said that criminal prosecution without opportunity to prove the order's invalidity "violates the most elementary and fundamental concepts of due process of law. It condemns a man without a full hearing and a consideration of all of his alleged defenses."<sup>246</sup> Mr. Justice Rutledge, building on his earlier position in the *Yakus* case,<sup>247</sup> said that the courts could not be used for enforcement if a defense on constitutional grounds is cut off.<sup>248</sup> Three Justices (Stone, Frankfurter, and Burton) asserted that the more limited remedy

239. See *Oyama v. California*, 68 Sup. Ct. 269, 270 (1948).

240. See *Pollock v. Williams*, 322 U. S. 4, 14 (1944).

241. 259 U. S. 276 (1922).

242. *Id.* at 285. Also a reality is the difference in security of one administrative process over another—of that of the ICC or Tax Court over that of the Immigration Bureau or a draft board. Furthermore some administrative processes may provide greater security than some judicial processes. An example might be the whole Tax Court as compared with a single district judge.

243. *Stark v. Wickard*, 321 U. S. 288, 312 (1944).

244. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 77 (1936). Mr. Justice Brandeis reviewed the cases comprehensively.

245. 327 U. S. 114 (1946).

246. *Id.* at 125.

247. See *Yakus v. United States*, 321 U. S. 414, 460 (1944).

248. See 327 U. S. 114, 132 (1946).



through habeas corpus was sufficient.<sup>249</sup> The remaining four Justices (Black, Reed, Douglas, and Jackson) rested on statutory interpretation and took no position on the constitutional issue. One may surmise that none of the Justices would permit cutting off even the limited judicial review available through habeas corpus.

Not much is to be gained on this subject by separating cases into component parts—questions of law, fact, discretion, policy, jurisdiction. However appealing such concepts may seem on a superficial plane, experience shows the unsatisfactory results of heavy reliance on either the law-fact distinction or the distinction between jurisdictional facts and other facts. Apart from basic constitutional rights, the present Court is likely to follow the 1903 decision in *Reetz v. Michigan*,<sup>250</sup> which held that due process does not require judicial review of administrative determinations of questions of law. The Court said: “. . . we know of no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. . . . Due process is not necessarily judicial process.”<sup>251</sup> Even under the statutory substantial-evidence rule, the Supreme Court in recent times has often tended far in the direction of cutting off review of administrative determinations of questions of law.<sup>252</sup> And the logical idea that action in excess of jurisdiction is void is giving way to the practical idea that for carrying out some programs tribunals must have jurisdiction to err. Mr. Justice Frankfurter has recently pointed out that all agencies are implicitly limited to action within their respective jurisdictions, and that “if that inherent limitation opened the door to review of their action in every enforcement proceeding despite provisions for finality, a provision of finality is meaningless.”<sup>253</sup>

In final analysis the objective is determination of issues by qualified tribunals which provide procedural safeguards adequate for particular tasks. Opportunity for an independent check (either judicial or administrative) upon initial decisions is almost always practically desirable, although a right of appeal has never been a requirement of due process.<sup>254</sup> The Supreme Court in recent times has gone far to

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249. In the opinion by Frankfurter, J., *id.* at 134.

250. 188 U. S. 505 (1903).

251. *Id.* at 507.

252. *E. g.*, Gray v. Powell, 314 U. S. 402 (1941); *NLRB v. Hearst Publications*, 322 U. S. 111 (1944); *Dobson v. Commissioner*, 320 U. S. 489 (1943). *But cf.* *Social Security Board v. Nierotko*, 327 U. S. 358 (1946); *Norton v. Warner Co.*, 321 U. S. 565 (1944).

253. *Estep v. United States*, 327 U. S. 114, 142 (1946).

254. *McKane v. Durston*, 153 U. S. 684, 687 (1894): “A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law.” *Pittsburgh & C. Ry. v. Backus*, 154 U. S. 421, 427 (1894): “If a single hearing is not due process, doubling it will not make it so.” *Ohio v. Akron Park Dist.*, 281 U. S. 74 (1930).

encourage the movement toward nonreviewability. But the judges have not yielded and will not yield their residuum of power. Even when they close the door to judicial review, their continuing power to reopen the door when the occasion is deemed appropriate is understood by all.<sup>255</sup> For protection of constitutional rights of sufficient dignity, the higher security of the judicial process may sometimes be a necessity. But the boundary line need not be precise and firm. In 1935 Mr. Justice Brandeis wrote of administrative findings of fact involving the taking of property. His words are even more pertinent now for the broader subject of the constitutional minimum of review:

"... the Court has refused to be governed by a rigid rule. It has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action based on *ex parte* casual inspection or unverified information, where no record is preserved of the evidence on which the official acted, and formal, deliberate quasi-judicial decisions of administrative tribunals based on findings of fact expressed in writing, and made after hearing evidence and argument under the sanctions and the safeguards attending judicial proceedings. It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of government for prompt final decision. It has recognized that there is a limit to the capacity of judges; and that the magnitude of the task imposed upon them, if there be granted judicial review of the correctness of findings of such facts as value and income, may prevent prompt and faithful performance. It has borne in mind that even in judicial proceedings the finding of facts is left, by the Constitution, in large part to laymen. It has enquired into the character of the administrative tribunal provided and the incidents of its procedure."<sup>256</sup>

#### SUMMARY AND CONCLUSIONS

Administrative action which courts call nonreviewable is often reviewable to the extent of inquiring into fraud, excess of jurisdiction, abuse of discretion, or "other irregularities." Even courts having no jurisdiction to review sometimes comment on the merits in holding they cannot review. In marginal cases, the scope of review of so-called nonreviewable action is sometimes decisive.

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255. Mr. Justice Harlan uttered some words of realism in 1910: "The courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property." *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195 (1910). An especially good recent example of this is *Order of Railway Conductors v. Swan*, 329 U. S. 520 (1947).

256. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 81 (1936).

Under the Administrative Procedure Act reviewability depends in the main upon the extent to which "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. . . ." These two parts of the introductory clause of section 10 modify all the ensuing five subsections of section 10, including subsection (e) on the scope of review. The introductory clause often makes the scope of review considerably more restricted than it would be under the unmodified subsection (e). Action need not be entirely reviewable or entirely nonreviewable; statutes may partly preclude review, or action may be in some aspects but not in other aspects committed by law to agency discretion.

Both when statutes contain no provision specifically governing reviewability and when statutes provide that the administrative action shall be "final" or "final and conclusive," the courts permit or deny review as they see fit, usually giving more weight to special circumstances, the nature of the administrative action, and the interests adversely affected than to the statutory language or the structure, purpose, or history of the legislation. Indeed, the one theme that keeps recurring in nearly all branches of the inquiry into nonreviewability is the freedom with which the courts work out their own solutions of problems of reviewability, irrespective of statutes. Courts seldom deem themselves bound by statute except when their jurisdiction to review is explicitly withdrawn. The alien decisions of the Supreme Court provide one of the clearest demonstrations of this truth; the Court at first denied review even of questions of law but gradually swung around to a scope of review which is hardly distinguishable from the accustomed substantial-evidence rule, and in 1945 closely approached a judicial substitution of judgment on weight of evidence. While the Court was broadening review, the one significant legislative change moved in the opposite direction.

Under the second part of section 10's introductory clause agency action probably should be deemed to be "by law committed" to agency discretion whenever the case law denies review even for arbitrariness or for abuse of discretion. This interpretation seems to afford the best escape from undesirable consequences of the strange provision: "Except so far as . . . agency action is by law committed to agency discretion . . . the reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion."

Some administrative action always has been and for practical reasons should continue to be beyond the reach of judicial review even for arbitrariness or for abuse of discretion. Numerous Supreme Court decisions afford rather ample guides as to what action falls within

this category. Here again results hinge on pragmatic judgments, seldom on analytical interpretations. Even when statutes are quite unambiguous, as when the administrator may act "in his discretion," or when he "is satisfied," courts both permit and deny review in accordance with judicial views of desirability or undesirability of reviewing. Precise formulas concerning area or scope of review never have governed; some writers to the contrary notwithstanding, precise formulas laid down by the Administrative Procedure Act seem unlikely to change the courts' habitual freedom to weigh advantages and disadvantages of reviewing in particular cases.

Constitutional principles probably require opportunity for judicial review of some types of questions, but Supreme Court decisions during the past ten or twelve years do not draw the line clearly. Abundant authority shows that nonreviewability is not limited to gratuities or privileges but may extend to "rights." Although the constitutional requirement of opportunity for review once related to "constitutional" and "jurisdictional" facts in rate cases and in workmen's compensation cases, that requirement may now be limited—though by no means clearly—to cases involving personal freedom or civil liberties.