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ADMINISTRATIVE ARBITRARINESS—A REPLY TO PROFESSOR DAVIS

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Scholars are playing an ever widening role in shaping the law as courts increasingly look to them for guidance.¹ Faced with swollen dockets, and the novel and perplexing problems that unceasingly boil up in our troubled era, courts must perforce rely on those who alone find time to explore these problems in depth. To the ordinary burdens of scholarship, therefore, is added the heightened responsibility which judicial reliance must engender. Man, however, is fallible, and considering the encyclopaedic scope of some treatises, it is not surprising that a text writer occasionally nods.² Criticism performs the valuable function of uncovering such oversights, analytical errors or questionable conclusions.³ And the receptiveness of a text writer to criticism serves not only to strengthen and refine the details of his work but to assure

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¹ The growing tendency was already noted by Learned Hand in his article *Have the Bench and Bar Anything To Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466, 480 (1924), and by Mr. Chief Justice Hughes, *Dedication of Myron Taylor Hall*, 18 CORNELL L.Q. 1 (1932).

² "All human survey is unavoidably incomplete, and hence some relevant data escape attention. As these become known to later observers, the existing description has to be revised . . ." DUNHAM, *HEROES AND HERETICS* 325 (1964). Arguing for adoption of the Constitution in 1788, James Iredell, later a Justice of the Supreme Court, said, "There is nothing dishonorable in changing an opinion. Nothing is more fallible than human judgment. No gentlemen will say that his is not fallible. Mine, I am sure, has often proved so." 4 ELLIOT, *DEBATES* 14 (1881).

³ MULLER, *USES OF THE PAST* 32 (1953), emphasizes the advantage derived from the fact that "although every historian remains fallible and subject to bias, his work remains subject to correction and criticism by his fellows, in professional journals and congresses. The relative objectivity of contemporary social science, as Karl Popper points out, is due not to the impartiality of all the social scientists, but to the publicity and community of the scientific method."

the courts that their confidence is not misplaced. To adapt a remark of Professor Arthur Sutherland, "a social scientist who permits" his predilection for his own pronouncements "to minimize indications tending toward unwelcome conclusions impairs the integrity of his science."⁴ So too, he shakes confidence in the quality of his own scholarship when he restates criticism unfairly and thus disables his readers from judging its validity for themselves. A critic who cannot accept a portion of his Treatise as Holy Writ is not therefore to be excommunicated with bell, book and candle.⁵

These truisms are prompted by Professor Kenneth Culp Davis' Comment⁶ on my article "Administrative Arbitrariness and Judicial Review,"⁷ in which I was constrained to differ with his view that in some areas arbitrary action must be and is unreviewable.⁸ His critique gives rise to fresh differences which need to be brought into focus, particularly because the subject has not hitherto received the attention it deserves. And his great influence as a widely cited authority makes it important to notice grave deficiencies of scholarship exhibited by his Comment, and to test it by standards on which he insisted in a blistering attack on Dean Pound. His springboard will be mine:

The conclusions of such an illustrious legal scholar are naturally welcomed by the American Bar as the product of painstaking analysis and deep insight.⁹

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His disservice to sound scholarship is so egregious and his influence so powerful that I undertook to direct attention to the many errors that permeated his address¹⁰

⁴ Sutherland, *All Sides of the Question: Felix Frankfurter and Personal Freedom*, in MENDELSON, FELIX FRANKFURTER—THE JUDGE 109, 112 (1964).

⁵ Professor Jaffe has remarked that Professor Davis "throws his whole being into the pursuit and correction of heresy wherever he meets it." Jaffe, *English Administrative Law—A Reply to Professor Davis*, 1962 PUB. L. 407.

⁶ 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1965) [hereinafter cited as DAVIS SUPP. and referred to in text as Comment].

⁷ 65 COLUM. L. REV. 55 (1965) [hereinafter cited as Berger].

⁸ Professor Davis sent his manuscript to me, accompanied by a group of questions and solicited my answers and criticism. I replied that a careful reading of my article would disclose "the answer to your questions." And I added that he did not "present a true picture of my argument. Nor do you meet the real issue—the validity of your 'practical interpretation' but seek rather to discredit the author [Berger]" Back came a rejoinder: "I have read your article, I have reread it, and I have studied it. I think what I am saying about it is accurate. But if you think it is not, I shall much appreciate your telling me wherein I am mistaken."

To do so would have required a response of the dimensions of the article which appears here. And in all candor, I consider that the public is entitled to have Professor Davis' views in their pristine version, unfiltered by my criticism. The test of a scholar is his own accuracy, not as corrected by a disputant. And no disputant in a public debate owes his opponent a duty to correct his inaccuracies behind the scenes.

⁹ Davis, *Dean Pound and Administrative Law*, 42 COLUM. L. REV. 89 (1942) [hereinafter cited as Davis, *Pound I*].

¹⁰ Davis, *Dean Pound's Errors About Administrative Agencies*, 42 COLUM. L. REV. 804 (1942) [hereinafter cited as Davis, *Pound II*]. More recently he stated

The inimitable tone of the Davis Comment is exemplified by his statement of "the question":

Of course, everyone, including every court, shares Mr. Berger's opposition to administrative arbitrariness and abuse of discretion. Everyone would like to have arbitrariness and abuse corrected. In that overall attitude, everyone will agree with Mr. Berger. If that were the question, there would be nothing more to discuss. The question is whether *courts* should step in whenever they find arbitrariness or abuse, or whether some administrative action must be judicially unreviewable even to correct arbitrariness or abuse.¹¹

That is by no means the question; courts are not left at large to muse whether arbitrariness should be reviewable. The matter is governed by statute: APA section 10(e) directs that courts "shall . . . set aside agency action . . . found to be (1) arbitrary, capricious, an abuse of discretion" ¹² And the question is, why should the statutory mandate be curtailed. Professor Davis would bobtail the mandate by an artificial interpretation of the second exception to section 10,¹³ and it is the validity of this interpretation that is at issue.

Grave constitutional doubts would be raised by the Davis proposal selectively to shield arbitrary action from review. The due process test of a statute, as summarized by Mr. Justice Brandeis, is whether it is "unreasonable, arbitrary or capricious."¹⁴ Arbitrary *application* of a statute is as obnoxious to due process as is a statute that is arbitrary in terms.¹⁵ What is denied to the legislative-principal must be withheld from the administrative-agent. "[T]here is no place in our constitutional system," said the Supreme Court, "for the exercise of arbitrary power."¹⁶

Professor Davis merely notices the point and dismisses it summarily, saying: "No court has ever held that a federal statute cutting off all judicial review of administrative arbitrariness or abuse of discretion is unconstitutional."¹⁷ If there is no square holding, there are

that "because of the great influence of the Wigmore treatise, a protest seems not only fitting but essential." Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 73 (Pound, Griswold & Sutherland ed. 1964).

¹¹ DAVIS, SUPP. § 28.16, at 17.

¹² 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1964).

¹³ DAVIS, SUPP. § 28.16, at 25.

¹⁴ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410 (1932) (dissenting opinion). See also *Berger* 73 n.96.

¹⁵ *Id.* at 73 n.97. "The delegated power, of course, may not be exercised arbitrarily." *FCC v. Schreiber*, 381 U.S. 279, 292 (1965).

¹⁶ *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 262 (1908); see *Berger* 55, 57, 73-74, 88-89, 91.

¹⁷ DAVIS, SUPP. § 28.16, at 25. Perhaps the explanation may be that furnished by Professor Davis himself: "The question whether Congress could withdraw juris-

yet quite a few Supreme Court dicta that arbitrary action is unconstitutional,¹⁸ and Supreme Court dicta which reflect basic constitutional principles are deserving of more respect¹⁹ than Professor Davis accords them. Quite recently, *First Nat'l Bank v. First Nat'l Bank*, rejecting the view espoused by Professor Davis, declared that

[A]dministrative procedure . . . must conform to the requirements of procedural due process of law which requires at least . . . that the decision is not arbitrary, capricious or illegal. . . . Any provision of the National Banking Act that would deny procedural due process [which it is the judicial function "to determine"] would raise a serious constitutional question.²⁰

The reader of my article may judge for himself whether my views are sustained by the statutory exegesis and the legislative and constitutional materials there set forth. That analysis is not met by a parade of cases in which the court so well "understood what Mr. Berger misunderstands—that under § 10 of the Administrative Procedure Act some administrative discretion is reviewable and some is unreviewable" ²¹ The few cases which rely on "the passage of the Treatise . . . that Mr. Berger specifically rejects" ²² do not test the Davis reading by analysis of the relevant statutory terms, the legislative history or constitutional limitations—they accept it on faith. On the other hand, my rejection was elaborately documented. So "understanding" in Professors Davis' vocabulary must be equated with uncritical acceptance of his interpretation, recalling the tailors in

diction of the federal courts to pass upon questions of constitutionality is a largely academic one, for it has not arisen during the twentieth century, and if it did arise the Supreme Court would probably use all available ingenuity to avoid the constitutional issue." 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 28.18, at 95 (1958) [hereinafter cited as DAVIS, TREATISE]. Was not *Estep v. United States*, 327 U.S. 114 (1946), one such case? Of this army draft case, Professor Davis said that "conceivably it would be unconstitutional to make administrative determinations final in draft cases," but the "Supreme Court did not pass upon the constitutional question; instead, it dealt with the problem as a matter of statutory interpretation"—i.e., I would conclude, in order to avoid the constitutional issue. 4 DAVIS, TREATISE § 28.18, at 94. Even so, *Estep* declared that "judicial review may indeed be required by the Constitution And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses." 327 U.S. at 120. (Emphasis added.)

¹⁸ See notes 15-16 *supra* and accompanying text. See also notes 76, 105 *infra*.

¹⁹ Cf. *International Ry. v. Davidson*, 65 F. Supp. 58, 59 (W.D.N.Y. 1945); *Riverside Cement Co. v. Rogan*, 59 F. Supp. 401, 404 (S.D. Cal. 1945); *United States v. Roemig*, 52 F. Supp. 857, 861 (N.D. Iowa 1943).

²⁰ 232 F. Supp. 725, 730-31 (E.D.N.C. 1964). Where state administrators arbitrarily denied a liquor license, *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964), required "adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." See also *Berger* 95 n.217.

²¹ DAVIS, SUPP. § 28.16, at 22.

²² *Id.* at 20.

the fairy tale who pretended to clothe the naked king with costly garments which only fools could not perceive.

I. PROFESSOR DAVIS' "LITERAL" MEANING

Section 10 of the APA provides in relevant part that: "Except so far as . . . (2) agency action is by law committed to agency discretion [The reviewing court shall] (B) . . . set aside agency action . . . found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" ²³ "Unlike Mr. Berger," states Professor Davis, the courts "unanimously" read the "except" clause "literally"; ²⁴ they uniformly decide in "accord with the literal words" ²⁵ Even the Supreme Court "reads that clause literally, interpreting it according to the face value of its words," ²⁶ meaning apparently that if Congress "has left ['a matter'] to the discretion of the administrators," it is unreviewable. Only Berger allegedly "rejects a literal interpretation of the provision of § 10 The federal case law is uniformly against him." ²⁷

Now these statements are utterly misleading as a moment's reflection will disclose and as I shall prove by the Professor's own words. If the exception for review of "discretion" is given the "literal" effect Professor Davis claims for it then, in every case where discretion is conferred, review of *any* of the categories enumerated in section 10(e) is barred. Excess of jurisdiction, lack of substantial evidence, nonobservance of procedure required by law, as well as arbitrariness and abuse of discretion then become unreviewable. Such a construction is palpably unreasonable and would render the statute unconstitutional, as my article undertook to show. Despite the "except" clause the courts continue to review all categories of section 10(e), including arbitrary action and abuse of discretion, which phrases, parenthetically, are used interchangeably.²⁸

Indeed, after he wearies of belaboring me for rejecting a "literal" reading, Professor Davis himself condemns such a construction:

The *literal* language says a court shall set aside an abuse of discretion except so far as the agency may exercise discretion. But this *makes neither grammatical nor practical sense*, for the exception consumes the whole power of the

²³ 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

²⁴ DAVIS, SUPP. § 28.16, at 25.

²⁵ *Id.* at 17.

²⁶ *Id.* at 18. For an analysis of the cited Supreme Court case, see note 99 *infra*.

²⁷ DAVIS, SUPP. § 28.16, at 25.

²⁸ Berger 58-60.

reviewing court, and nothing in the legislative history supports an intent to deprive the courts of all power to correct any abuse of discretion.²⁹

But how is this analysis to be reconciled with his flaying me for disrespect of the "literal" words, except on the adage "any stick to beat a dog."

In fact, section 10 is not nearly as confused as would appear from the Davis analysis. The "clash" between the exception for "discretion" and the direction to set aside "abuse of discretion" derives from the mistaken assumption that because both employ the same word, "discretion," they are mere variants of the same thing. To the contrary, they are opposites: one posits the reasonable exercise of power, the other, unreason and oppression; one is lawful, the other is not.³⁰ There is no confusion: Congress wanted to safeguard one and bar the other. First, it desired to prevent the substitution of judicial judgment for the sound exercise of administrative discretion. The House report states that "matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning."³¹ Second, Chairman Walter, thoroughly alive to the "misunderstanding and confusion of terms respecting the discretion of agencies," explained that "they do not have authority in any case to act blindly or arbitrarily."³² Congress accordingly did not employ "discretion" to comprehend "abuse of discretion"; it did not "authorize" arbitrary action "in any case"; and it treated the two separately precisely because it was dealing with polar objectives. Thus viewed, Congress aptly expressed its intent to insulate the exercise of "discretion," *i.e.*, reasonable action, and to make oppressive and unreasonable action reviewable. Indeed, this antithesis is underscored by the very terms of section 10; "abuse of discretion" is by section 10(e) "not in accordance with law," whereas "discretion" is "by

²⁹ DAVIS, SUPP. § 28.16, at 21. (Emphasis added.)

³⁰ Berger 61. Though my article pointed out that Congress had these differences in mind, I did not sufficiently emphasize that the Davis "literal" reading turned on an assumption that Congress employed the statutory terms merely to represent different aspects of the same thing, and I was for the moment, in fact, seduced by his use of "literal." Berger 61-65.

³¹ S. Doc. No. 248, 79th Cong., 2d Sess. 275 (1946) [hereinafter cited as S. Doc. No. 248]. Compare the remark respecting declaratory orders under § 5(d): "The phrase 'sound discretion' means a reviewable discretion and will prevent agencies from . . . arbitrarily withholding such orders . . ." *Id.* at 25; *cf.* Jenkins v. Macy, 237 F. Supp. 60, 62 (E.D. Mo. 1964): "As long as the administrative agency . . . had a sound basis for the decision made, and the decisions were not arbitrary, capricious, or an abuse of discretion . . . the courts will not substitute their own decision for the one already made."

³² S. Doc. No. 248, at 368 (Emphasis added.); Berger 62. For this Representative Walter had judicial precedent. *Id.* at 61 n.33.

law committed" to the agency.³³ Patently, Congress did not consider that "abuse of discretion" was embraced within "discretion"; and by the "exception" for "discretion" it left the "abuse" reviewable. In the words of the House report, "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,"³⁴ *i.e.*, if the exercise of "discretion" was sound and not an "abuse."

It will profit us to dwell for a moment on some drafting alternatives to which Congress might have turned. If, contrary to fact, Congress regarded "discretion" and "abuse of discretion" as mere variants rather than opposites, it could have provided in the second exception from judicial review: "Except so far as . . . 2) agency action is by law committed to agency discretion, *provided, however, that abuse of discretion shall remain reviewable.*" Though clumsy, such a proviso would plainly have accomplished the congressional purposes. The separation of the "proviso" in space by placing it in section 10(e) would not require a diametrically opposed result, nor should replacement of such proviso by the present section 10(e) direction to set aside "abuse of discretion." Another alternative would have been to omit the "except" clause altogether and to rely on the negative implication of section 10(e), *i.e.*, the direction to set aside "abuse of discretion" negatives an intention to set aside "discretion": which is not abused. Congress cannot be blamed for acting with an excess of caution and spelling out the negative implication in the shape of the second "except" clause though purists might regard it as surplusage. But if we give "discretion" and "abuse of discretion" the plainly opposite meanings they had for Congress, the second exception and section 10(e) make both "practical and grammatical sense," they avoid the unreasonable consequences that flow from the Davis "literal" reading, and they obviate the necessity of escape from that reading by resort to his artificial interpretation of "committed by law."³⁵

When section 10 is so read, giving effect both to its terms and its legislative history, I am absolved of the charge, repeatedly made by Professor Davis, of reading the "except" clause right out of the Act.³⁶

³³ *Id.* at 61. See also p. 792 *infra*.

³⁴ S. Doc. No. 248, at 275. (Emphasis added.)

³⁵ See pp. 790-91 *infra*.

³⁶ DAVIS, SUPP. § 28.16, at 16-18. He states, for example, that Berger "realizes that . . . writing the 'except' clause out of the Act does violence to the plain words." *Id.* at 16. His "for instance" is my remark that "on a literal reading the exception for 'discretion' at the outset of Section 10 *may* be thought to exempt 'abuse of discretion' and 'arbitrary' action from review. But such a reading must be rejected because it produces unreasonable consequences and raises grave constitutional questions." *Ibid.* (Emphasis added.) It is novel doctrine that rejection of a "literal" reading on such grounds does "violence" to the plain words, still more when other

It is indeed strange that Professor Davis makes such charges, because his own interpretation reads ninety-seven or ninety-eight percent of the "except" clause "out of the Act." To avoid the difficulties that flow from his "literal" reading, he gives effect to the exception only in the few situations where, prior to adoption of the APA, statutes had allegedly been construed to render "abuse of discretion" unreviewable.³⁷ Finally, if common sense may intrude, the vast bulk of the cases involves a sound exercise of discretion which, on any reading of the "except" clause, continues to be insulated, so that as a practical matter the "reading out of the Act" charge is poppycock.

II. PROFESSOR DAVIS' OWN PRIVATE STOCK

Professor Davis, as we have seen, does not really espouse a "literal" reading of section 10, but perceiving that such a reading is impracticable, suggests "a solution," a "practical interpretation which will carry out the probable intent" of Congress.³⁸ His interpretation turns on a singular reading of the words "by law committed to agency discretion." Chairman McCarran, a chief architect of the APA, explained shortly after its enactment that these words mean "of course, that claimed discretion must have been intentionally given to the agency by Congress, rather than assumed by it." And, he continued, "abuse of discretion is expressly made reviewable [by section 10(e)]."³⁹ Early in the legislative process there was concern whether the "committed" phrase made clear that *only* abuse of discretion, not discretion, was reviewable,⁴⁰ thereby exhibiting an understanding that the "committed" phrase did not cut down review of "abuse of discretion" in whole or in part.

Without taking account of these and other materials, Professor Davis spins a recondite reading that has no support in the legislative history and is contradicted by the statutory terms. "To the extent," he says, "that 'the law' cuts off review for abuse of discretion, the action is committed to agency discretion." If "abuse of discretion" was unreviewable by virtue of antecedent statutes, it remained unreviewable

"plain words," the § 10(e) instruction that courts should set aside "abuse of discretion" and "arbitrary" action, also must be given effect.

Davis himself recognizes that a "literal" reading of the "except" clause "makes neither grammatical sense nor practical sense." *Id.* at 21. Moreover, my analysis of the statutory terms in truly literal terms, giving effect to the meaning Congress had in mind, Berger 60-61 (summarized pp. 788-89 *supra*, 791-92 *infra*), shows that the "realization" he would attribute to me was farthest from my mind.

³⁷ See pp. 790-91, 810-11 *infra*.

³⁸ See text accompanying note 29 *supra*.

³⁹ McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A.J. 827, 831 (1946).

⁴⁰ S. Doc. No. 248, at 36.

under the phrase "by law committed to agency discretion." Congress allegedly intended by the latter phrase to impose a duty on the courts to inquire whether a particular statute was designed to insulate "abuse of discretion" from review, and if they so find, "the pre-[APA] . . . law on this point continues."⁴¹

No case was called to Congress' attention which preserved "abuse of discretion" or "arbitrary action" from review. No one, of course, argued that such hypothetical cases required continued insulation from review or that existing statutes had been interpreted to insulate arbitrariness and that such statutory insulation was to be preserved.⁴² Professor Davis tacitly confesses that there is not a word in the legislative history to indicate that Congress had any such meaning in mind, for he advances his reading as a "*practical* interpretation which will carry out the *probable* intent."⁴³ His *surmise* as to the "probable intent" of Congress—for which he furnishes not a shred of evidence—is then transmogrified by him into a "clear expression of Congress in favor of preventing review."⁴⁴ To mention only one roadblock to his surmise, Chairman Walter stated that "discretion" conferred no "authority in any case to act blindly or arbitrarily."⁴⁵ If, according to *Shaughnessy v. Pedreiro*, "the ambiguous word 'final' " cannot under the "generous review provisions of the Administrative Procedure Act" be construed "as cutting off the right of judicial review in whole or in part,"⁴⁶ how can the express direction to set aside arbitrary action be limited by resort to the even more ambiguous word "committed"? A closer look at the statutory terms will fortify the implicit answer.

A. An "Abuse of Discretion" Is Not Comprised in "Discretion"

When courts talk of discretion, they exclude from its confines "abuse of discretion";⁴⁷ the two are antithetical. So it is difficult to read "by law committed to agency discretion" as if it included authority to "abuse" discretion. To show the "unsoundness on its face" of this analysis, Professor Davis says, "[Obviously] unreviewable discretion is [not] the same as authority to abuse discretion"⁴⁸—a barren play on words. Since we are testing Davis' "practical inter-

⁴¹ DAVIS, SUPP. § 28.16, at 21. See also p. 810 *infra*.

⁴² In striking contrast, the Attorney General, commenting on the first exception, called attention to cases which had interpreted statutes to preclude review. S. Doc. No. 248, at 229-30; see notes 155, 159 *infra*.

⁴³ DAVIS, SUPP. § 28.16, at 21. (Emphasis added.)

⁴⁴ *Id.* at 25.

⁴⁵ S. Doc. No. 248, at 368; Berger 62.

⁴⁶ 349 U.S. 48, 51 (1955).

⁴⁷ Berger 61 n.33.

⁴⁸ DAVIS, SUPP. § 28.16, at 21.

pretation," we are entitled to notice that in practical effect unreviewable discretion *permits* administrators to abuse it. When arbitrariness is permitted, it is empty rhetoric to maintain that it is not "authorized."⁴⁹ But such discussion leads us on false trails, for the point is that Congress and the courts employ "discretion" as the antithesis of "abuse of discretion" so that an exception for "discretion" cannot exempt its "abuse." That antithesis is expressed on the face of section 10 as will now appear.

B. An Abuse of Discretion Is "Not in Accordance With Law"

Section 10 excepts action "by law committed to agency discretion." Section 10(e) refers to action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." "That conjunction," my article stated, "shows that Congress regarded an 'abuse of discretion' as 'not in accordance with law,' and in consequence did not embody it within the exception for 'action . . . by law committed to agency discretion.'" ⁵⁰ Congress is not irrational; it did not intend by the phrase "by law committed" to comprehend what is "not in accordance with law." These interlocking phrases play havoc with Davis' theory that the exception of "discretion" selectively exempted some "abuse[s] of discretion." He attempts no explanation but describes the obvious sum of these statutory phrases as mere assertion—Berger "asserts."⁵¹

C. The Legislative History Bars Unreviewable Abuse of Discretion

The Davis reading is at war with Chairman Walter's statement that agencies "do not have authority in any case to act blindly or arbitrarily," ⁵² and other telling items of legislative history.⁵³ But all this is dismissed with the remark that in the Treatise "both sides of the legislative history are fully examined. One can quickly see from the

⁴⁹ This is the tenor also of the Senate and House reports: "It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of the authority granted or to the objectives [*e.g.*, "discretion" as opposed to "abuse of discretion"] specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks" S. Doc. No. 248, at 212, 275; Berger 62-63. In other words, the reports equate the absence of review with a "blank check," *i.e.*, unlimited authority. And compare Chairman Walter's remarks in dispelling the "confusion . . . respecting the discretion of agencies," that they "do not have authority in any case to act blindly or arbitrarily," again assimilating review of arbitrariness to limitation of authority. S. Doc. No. 248, at 368; Berger 62.

⁵⁰ *Id.* at 61. (Emphasis added.)

⁵¹ DAVIS, SUPP. § 28.16, at 16.

⁵² S. Doc. No. 248, at 368 (Emphasis added.); Berger 62.

⁵³ *Id.* at 62-64; see text accompanying note 158 *infra*.

discussion how Mr. Berger can *choose materials on one side* and support his argument.”⁵⁴ This is a none too adroit innuendo that I deliberately gave a one sided version of the legislative history which, according to Professor Davis, “is mixed and confusing, although the *strongest part of it supports* a literal reading.”⁵⁵ The fact is that I took pains to examine all portions of the history that bore on the “except” clause and on section 10(e). Further, I commented fully on Professor Davis’ various attempts to discount the effect of expressions adverse to his view as well as to probe what he considers “the strongest part” of the history.⁵⁶ Would that he had done as much for my arguments.

In raking Dean Pound over the coals, Professor Davis revealed an exquisitely refined conscience, to instance only two examples: “The quotation is accurate, but taking it out of its context and putting it into Pound’s context is as clearly misleading as if the words themselves were false.”⁵⁷ Again, he fulminated against a partial quotation because “without indicating the omission” Pound “however innocently, misled his readers.”⁵⁸ And there is more of the same kidney. These alleged lapses are not nearly so grave as Davis’ false innuendo that I deliberately presented a one sided picture without disclosing that “the strongest part” of the legislative history went the other way.

Professor Davis’ method of dealing with the legislative history, I suggest, muddies the waters. Certain portions of the legislative history, for example that dealing with section 10(a)—who is entitled to judicial review—are indeed “mixed and confusing,” as is set forth in detail in my article.⁵⁹ But in contrast, the history of the discretion exception seems quite clear,⁶⁰ and here it is Professor Davis who confuses analysis by drawing on general discussions of reviewability,⁶¹ which at best must yield to unequivocal statements about the particular question whether “abuse of discretion” was to be reviewable.

⁵⁴ DAVIS, SUPP. § 28.16, at 18. (Emphasis added.)

⁵⁵ *Ibid.* Professor Davis makes a puzzling statement in the course of discussing the first exception: “But the weakness is that the legislative history of the APA is not merely on one side but on both sides, and the strongest part of it—the abandonment of a proposal to eliminate reviewability—is on the other side [*i.e.*, against reviewability].” *Id.* at 24. The “abandonment of a proposal to eliminate reviewability” seems to evidence an intention to provide for reviewability. On what theory is this “on the other side” of reviewability?

⁵⁶ Berger 62-69.

⁵⁷ Davis, *Pound I* 97.

⁵⁸ *Id.* at 94-95.

⁵⁹ Berger 84-88.

⁶⁰ *Id.* at 62-64.

⁶¹ *Id.* at 65-69.

III. "THE LAW AS IT IS"⁶²—OR "IS" IT?

What "is" the law? Certainly the law "is" not that the "except" clause is given the "literal" effect that Davis now claims for it and now rejects. What he apparently means is that because his artificial (and untenable) reading of "by law committed" has been invoked by a few courts, that that reading has now become "the law"; that is what the law "is." The best evidence of what the law "is" is the terms of APA section 10, the legislative history of the "discretion" and "abuse of discretion" provisions, and the constitutional considerations that must guide interpretation. Instead of meeting the issues presented by this material and abundantly discussed in my article, Professor Davis would drown me in "cases." He rashly asserts that "scores of cases hold that action which is by law committed to agency discretion is unreviewable, contrary to Mr. Berger's main thesis,"⁶³ but, it should be added, before they had a chance to examine that thesis. The "case law," says Professor Davis, "is uniformly against" Berger; the "courts are unanimously giving the 'except' clause a literal interpretation,"⁶⁴

⁶² DAVIS, SUPP. § 28.16, at 17.

⁶³ *Id.* at 23. (Emphasis added.) I venture to doubt whether Professor Davis can muster even a dozen cases which have espoused his view that "action which is by law committed to agency discretion is unreviewable." In his Comment he cites only two, and unless I am mistaken there are very few more. And he utterly fails to take into account the many cases which, as in *Cobb v. United States*, 240 F. Supp. 574, 581 (W.D. Ark. 1965), say that "if the action of the governmental agency was arbitrary or capricious, then an action may be asserted under section 10 of the Administrative Procedure Act," without so much as a glance at the alleged limitations imposed by the "except" for "discretion" clause. See Berger 60. And if "delegated power, of course, may not be exercised arbitrarily," *FCC v. Schreiber*, 381 U.S. 279, 292 (1965), how *can* it be insulated from review?

⁶⁴ DAVIS, SUPP. § 28.16, at 25. Again and again Professor Davis asserts that "not a single case supports Mr. Berger's position," *id.* at 16, 17, 23, and that I "cite none," *id.* at 17, 25. This inaccuracy is particularly inexcusable because these very assertions were contained in the draft manuscript which Professor Davis sent for my comment prior to publication, accompanied, *inter alia*, by the question whether I could furnish "any case in agreement with . . . [my] thesis. You [Berger] don't cite any." I replied that if he would reread my article carefully he would "find the answer to [his] questions."

The answer is to be found in Berger 78 n.126, which quotes extensively from *First Nat'l Bank v. First Nat'l Bank*, 232 F. Supp. 725 (E.D.N.C. 1964), *rev'd on other grounds sub nom.* *First Nat'l Bank v. Saxon*, 352 F.2d 267, 270 (4th Cir. 1965), and states that portions of this opinion "serve as a convenient summary of my own analysis." The court rejected the view that arbitrary action by the comptroller on a national bank's application to establish a branch is not reviewable. That case belies the Davis assertions that I do not cite a "single case."

A view contrary to *First Nat'l Bank* had been taken in *Community Nat'l Bank v. Gidney*, 192 F. Supp. 514 (E.D. Mich. 1961), in reliance on the Davis *Treatise*. My article pointed out gently that the recantation of the district court after publication of its opinion had not been "generally noticed." Berger 75. *Gidney* had been cited at § 28.06 of the 1963 Davis Supplement as relying on the *Treatise*. In the 1965 Supplement it has disappeared without so much as a reference to the recantation for the benefit of those who had relied on the 1963 Supplement. More surprising is Davis' failure to call attention either at § 28.06 or § 28.16, which treat of review of "discretion," to *First Nat'l Bank*, *supra*, the recent case which rejected unreview-

and to make matters worse, "the passage of the Treatise on which the Ninth Circuit relied is one which Mr. Berger specifically rejects."⁶⁵

If I am not properly overawed by "the cases"—even the few which cite "The Treatise"—I only follow an example sanctified by Professor Davis himself. Addressing himself to a point of evidence respecting which he considers that Professor McNaughton produces "cloudy confusion," Professor Davis has said: "The ultimate principle is not what the American Law Institute has said it is Nor is it what the Supreme Court has said it is *The ultimate principle is . . .*"⁶⁶ what Professor Davis says it is. So should an *ipse dixit* peal forth. But the appeal to principle, I boldly maintain, is no less open to Berger than to Davis, even more the appeal to the statute, the legislative history and the Constitution.⁶⁷ He has called for "comprehensive re-examination" of Supreme Court law.⁶⁸ Shall the inferior

ability of arbitrariness in the banking field on constitutional grounds. The case does appear in the table of cases in the 1965 Supplement and is cited at §§ 24.04, 7.01, and 7.16 so that the omission does not seem inadvertent but smacks of suppression of views adverse to his own.

The holding in *Gidney*, after recantation, that the action taken by the comptroller was "not arbitrary, and capricious," Berger 75-76 n.109, assumes that the issue is reviewable, so that *Gidney II* may be taken as a second case in support of my view. These cases are not greatly outnumbered by the cases which cite Davis. As this article went to the printer, *Cappadora v. Celebrezze*, No. 29647, 2d Cir., Jan. 28, 1966, was handed down by the Second Circuit in an opinion by Judge Henry J. Friendly which may be thought to take a middle ground. Judge Friendly poses the question "whether the [Social Security] Act 'so far' commits decision to reopen agency discretion that a refusal would not be open to review even in case of abuse. S.o. at 845. And he concludes,

we do not believe that Congress would have wished to close the doors of the courts to a plaintiff whose claim for social security benefits was denied . . . because of a truly arbitrary administrative decision Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.

Id. at 846. With this quotation I am in fullest accord, and consider that it is buttressed by the legislative history of APA § 10 and by constitutional protection against administrative arbitrariness. The question remains, however, whether the § 10 exception for action "by law committed to agency discretion" was designed to bottom the inquiry Judge Friendly made.

⁶⁵ DAVIS, SUPP. § 28.16, at 20.

⁶⁶ DAVIS, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 94 (Pound, Griswold & Sutherland ed. 1964). (Emphasis added.) One might perhaps learn to ape the majestic inevitability of these cadences if one could only summon the awesome certitude they exhibit. But lesser mortals are haunted by last lingering doubts.

⁶⁷ DAVIS, TREATISE § 23.10, at 344. The fact, noticed by Professor Davis, that courts had spoken of a certain judicial opinion as "excellent," called it "a keen analysis of the problems" and a "most complete exploration of the authorities in this field" only wrings from him the exclamation "How strange that the federal courts should not only follow but should even acclaim such an unfortunate opinion." *Ibid.* By the same token, if Professor Davis is mistaken in his analysis, as I believe my article demonstrates, the occasional judicial citation of his view is no less "strange."

⁶⁸ *Id.* at 117. In his Comment, he states that a "number of confused courts have recently invoked the law of unreviewability" on another problem. DAVIS, SUPP. § 28.16, at 29. Courts have been no less "confused" in invoking the Davis "committed" interpretation.

courts now enjoy greater immunity because a few have "relied" on "The Treatise"?

IV. THE DAVIS CITATIONS

Let us now consider whether Professor Davis' analysis of "the cases" exhibits the "painstaking scholarship" which, he lectured Dean Pound, the American Bar expects of an "illustrious scholar."

A. *The Schilling Case*

In *Schilling v. Rogers*,⁶⁹ a German, resident in Germany during World War II and consequently an "enemy" by definition, sought to reclaim property seized by the Government, relying principally on APA section 10. The Court split five to four and the majority held that the first exception for statutory preclusion of review applied because the Trading with the Enemy Act made the relief provided therein the "sole . . . remedy" and Schilling could not as an "enemy" fit within its terms.⁷⁰ The Court also stated that "the permissive terms in which the section 32 return provisions are drawn persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch 'without the intervention of the courts.'"⁷¹ Section 32 provided that the administrator "*may* return any property" and for present purposes let it be assumed that an honest determination not to return was therefore not reviewable. Schilling, however had urged that:

judicial review is in any event available because the complaint, whose allegations as the case comes here must be taken as true, alleges that the administrative action was arbitrary and capricious. However, such conclusory allegations may not be read in isolation from the complaint's factual allegations and the considerations set forth in the administrative decision upon which denial of this claim was based. . . . So read, it appears that the complaint should properly be taken as *charging no more* than that the administrative action was erroneous.⁷²

Thus the Court read the charge of "arbitrariness" right out of the case; it construed the complaint to "charge no more" than "erroneous," not arbitrary, action. Nevertheless, Professor Davis states that "the effect of the holding was to *refuse* to determine whether the

⁶⁹ 363 U.S. 666 (1960).

⁷⁰ *Id.* at 670, 671.

⁷¹ *Id.* at 674.

⁷² *Id.* at 676. (Emphasis added.)

agency's action was arbitrary." ⁷³ The Court did not "refuse" to make that determination; rather it found that on the pleadings there was no occasion to make it. Did not the "painstaking scholarship" he demanded of Dean Pound also require Professor Davis to notice that in any event *Schilling* was limited factually to an enemy resident in enemy territory who, under the cases, is not protected by due process? ⁷⁴ Therefore, as was pointed out in my article, the case sheds no light upon whether an American resident who is protected by due process can be denied judicial review of official arbitrariness.

Having held that the Trading with the Enemy Act precluded review because it provided the "sole remedy," and therefore the case fell within the first section 10 APA exception—"where statutes preclude review"—the Court might easily have held with Professor Davis that such statutes provide for "unreviewability even for arbitrariness." ⁷⁵ That would have been the short way of disposing of the issue. Instead, the Court took pains to determine that the pleadings did not really charge arbitrariness, that they charged "no more than that the administrative action was erroneous." Does not this attempt to postpone decision suggest that the Court has yet to decide whether statutes precluding review shut off review of arbitrary action? ⁷⁶

B. The Arrow Case

Arrow Transp. Co. v. Southern Ry.,⁷⁷ it will appear, falls within the first exception of section 10, where "statutes preclude judicial re-

⁷³ DAVIS, SUPP. § 28.16, at 19. (Emphasis added.)

⁷⁴ Berger 71 n.79.

⁷⁵ DAVIS, SUPP. § 28.16, at 17.

⁷⁶ The frequent statements by the Court to the effect that the Constitution leaves no room for the exercise of arbitrary power, notes 15-16 *supra*, might well give the Court pause if a citizen protested that he could not constitutionally be deprived of review of arbitrary action. Although Professor Davis had earlier cited cases saying that a withdrawal of federal jurisdiction may cut off *all* review, even of the issue whether a decision is wholly unsupported by evidence, 4 DAVIS, TREATISE 78; *cf. id.* at 95, he left himself an escape hatch in the Comment: "Congress has power within *reasonable* limits to determine that 'administrative action shall be reviewable or unreviewable.'" DAVIS, SUPP. § 28.16, at 25. A statute which cuts off all review of constitutional claims has yet finally to be tested. At least one court has stated that the congressional power to withdraw federal jurisdiction is limited by the due process clause. *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948); *cf. Hart, The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

There are probably no more than half a dozen statutes, which like the veterans' benefits provision, discussed at p. 798 *infra*, expressly deprive the courts of jurisdiction to review. Most of them deal with "gratuities or benefits," a distinction upon which Professor Davis sets great store. DAVIS, SUPP. § 28.16, at 17. I concur with Professor Reich that the use by the government of "benefits" as an instrument of government has become so widespread as to call for a reevaluation of traditional attitudes towards "gratuities." Reich, *The New Property*, 73 YALE L.J. 733 (1964). Apart from such reevaluation, there are already cases holding that the government cannot discriminate in granting privileges, and by the same token it cannot be arbitrary. See Berger 88 n.177, 77 n.118; text accompanying note 105 *infra*.

⁷⁷ 372 U.S. 658 (1963).

view." Professor Davis himself remarked of another case that it "does not deal with the 'discretion' exception but with the other exception—'except as far as . . . statutes preclude review.'" ⁷⁸ He followed the distinction in the Treatise; ⁷⁹ it has been drawn in the cases; ⁸⁰ and it should be respected if only because Congress, by resorting to two exceptions, indicated its intention to deal with two different situations.

In *Arrow*, the Court held that Congress in the Interstate Commerce Act meant "to *withdraw* from the judiciary any pre-existing *power* to grant injunctive relief." ⁸¹ The dissenters, noting the majority disclaimer of "unambiguous evidence of a design to *extinguish* whatever judicial *power* may have existed," found no support in the statute or its history for "the *removal* of judicial *power* to act," saying that "whenever Congress wanted to oust the *jurisdiction* of the courts it not only knew how to do it but did it in no uncertain terms." ⁸² A clear example of such withdrawal of jurisdiction is furnished by Professor Davis; the statute governing veterans' benefits provides that "no other official or any court of the United States shall have *power* or *jurisdiction* to review any such [administrative] decisions." ⁸³ What this amounts to is a pro tanto withdrawal of the general jurisdiction conferred on district courts by the Judicial Code. The "discretion" exception, to the contrary, premises judicial jurisdiction to examine whether the administrative exercise of "discretion" was reasonable, or supported by evidence, and section 10(e) expressly instructs the courts to set aside action that is "arbitrary" or an "abuse of discretion."

Not a word in the *Arrow* case indicates that the Court addressed itself to the applicability of the "discretion" exception. Notwithstanding, Professor Davis, without explanation, asserts that "all nine Justices *assumed* that . . . if that Act commits the action to agency discretion, then it is unreviewable." ⁸⁴ An explanation is in order because the Court had no occasion to make any such assumption; its analysis was couched in terms of the first exception, and the statutory withdrawal

⁷⁸ DAVIS, SUPP. § 28.16, at 24.

⁷⁹ 4 DAVIS, TREATISE § 28.08, at 33, 38.

⁸⁰ *Hamel v. Nelson*, 226 F. Supp. 96, 97 (N.D. Cal. 1963); *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 689 (D.C. Cir.), cert. denied, 342 U.S. 849 (1951).

⁸¹ 372 U.S. at 667 (Emphasis added.); see DAVIS, SUPP. § 28.16, at 20.

⁸² 372 U.S. at 664, 677, 679. (Emphasis added.)

⁸³ DAVIS, SUPP. § 28.16, at 17-18; 72 Stat. 1115 (1958), 38 U.S.C. § 211(b) (1964). (Emphasis added.)

⁸⁴ DAVIS, SUPP. § 28.16, at 20. (Emphasis added.) On Professor Davis' reading, the Court overrules its long standing doctrine in the ICC cases, excepting cases from finality "(5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an *unreasonable manner*" *ICC v. Union Pac. Ry.*, 222 U.S. 541, 547-48 (1912). (Emphasis added.)

of "power or jurisdiction" to review was decisive by virtue of that exception for statutory preclusion. Accordingly the *Arrow* case furnishes dubious, if any, support for the Davis Thesis.⁸⁵

C. Ferry v. Udall

*Ferry v. Udall*⁸⁶ relies on the Davis "committed" formula, and he labels it "a well-considered and especially instructive case."⁸⁷ It is truly "instructive" for it illustrates the magnitude of the problems which the Davis "committed" formula dumps in the lap of the courts and which in *Ferry* led the court, despite its valiant efforts, into a labyrinth.

Under the statute the Secretary of the Interior was authorized to determine whether "in his judgment"⁸⁸ it would be proper to sell public lands at public sale. The regulation provided that: "[U]ntil the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold . . . any bidder has no contractual or other rights" ⁸⁹ Before issuance of the cash certificate the Secretary vacated the sale on the finding that the "true value of the land at the time the bids were received was several times higher than the bid price."⁹⁰ Thereupon *Ferry* brought suit. It is not clear whether *Ferry* was decided on the theory that the action was in mandamus, and that mandamus does not lie to control discretion, or whether it treated the action as an ordinary suit under section 10.⁹¹

The federal courts have long said that mandamus does not lie to control discretion *except* when discretion has been abused,⁹² nor "*in the absence* of anything to show that [the rulings] were capricious or arbitrary."⁹³ And it has been squarely held that where an Indian's name was "arbitrarily removed" from a roll, "relief in the nature of

⁸⁵ "It is timely again to remind counsel that words of our opinions are to be read in the light of facts of the case under discussion General expressions transposed to other facts are often misleading." *Armour & Co. v. Wanlock*, 323 U.S. 126, 132-33 (1944).

⁸⁶ 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

⁸⁷ DAVIS, SUPP. § 28.16, at 20.

⁸⁸ See text accompanying notes 142-44 *infra*.

⁸⁹ 336 F.2d at 709.

⁹⁰ *Ibid.*

⁹¹ At the outset the court states that review was sought under the APA, *id.* at 708; but then it seems to say that review is being sought by writ of mandamus, *id.* at 712. If the court relies solely on the rule that mandamus will not lie to control the exercise of discretion, its lengthy analysis of the application of APA § 10 seems gratuitous.

⁹² *Virginia v. Rives*, 100 U.S. 313, 323 (1879); see *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963); *Sleeth v. Dairy Prods. Co.*, 228 F.2d 165, 168 (4th Cir. 1955), *cert. denied*, 351 U.S. 966 (1956); *Goldberg v. Hoffman*, 226 F.2d 681, 682 (7th Cir. 1955).

⁹³ *Work v. United States ex rel. Rives*, 267 U.S. 175, 183 (1925). (Emphasis added.)

mandamus is proper.”⁹⁴ The great weight of state authority employs mandamus to review abuse of discretion or arbitrary action.⁹⁵ Consequently, if *Ferry* was intended to rule that because mandamus does not lie to control the exercise of discretion, it can therefore not be used to review abuse of discretion, the court was mistaken.

On the other hand, if the court sought to extend to an ordinary action under section 10 for review of arbitrary action the rule governing mandamus for control of “discretion,” it was importing limitations into an ordinary action which do not even obtain in mandamus. Suppose *arguendo* that mandamus cannot be invoked to review arbitrary action, Professor Davis should be the first to inveigh against importation of “the harmful and needlessly complex” limitations of mandamus into the liberalizing terms of section 10.⁹⁶

Viewed as an ordinary action, *Ferry* raises some perplexing problems. Certainly this was not a case of applying the “plain” or “literal” terms of section 10, for the court said that: “Almost every agency action involves some degree of discretion of judgment. Yet it cannot be said that, for this reason, every action is unreviewable.”⁹⁷ Rather, the court started with the *Treatise* without inquiring whether Davis’ “practical interpretation” of “by law committed” was tenable, and then proceeded to grapple with the problems to which application of the Davis formula gives rise. “The analytical problem,” it said, “is that of determining when the agency action is ‘committed to agency discretion’ . . . and when it ‘involves discretion which is nevertheless reviewable.’”⁹⁸ Then it decided that “the Secretary’s decision is ‘committed’ to his discretion” because that was “consistent with *Panama Canal Co. v. Grace Line, Inc.*”⁹⁹ The nub of *Panama*, the

⁹⁴ *United States v. Ickes*, 117 F.2d 769-72 (D.C. Cir. 1940), *cert. denied*, 313 U.S. 575 (1941).

⁹⁵ The cases are collected in 55 C.J.S. § 63, at 103 n.68 (1948).

⁹⁶ “The law of mandamus is both positively harmful and needlessly complex”; it is “burdened with intricacies having no relation to modern practical needs.” 3 DAVIS, *TREATISE* § 23.12, at 361, § 23.10, at 343. See also *id.* § 23.10, at 336-48.

⁹⁷ 336 F.2d at 711.

⁹⁸ Quoted in DAVIS, *SUPP.* § 28.16, at 20.

⁹⁹ 336 F.2d at 711. Because of the court’s reliance upon *Panama*, and because Professor Davis maintains that *Panama* read the “except” clause “literally, interpreting it according to the face value of its words,” DAVIS, *SUPP.* § 28.16, at 18, some account of *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958), is essential. Users of the Panama Canal sought to compel the administrator to prescribe new tolls. From the statute the Court concluded that the administrator was “‘authorized’ to prescribe tolls and to change them.” “[A]t heart,” said the Court, the conflict was over a question of “statutory construction and cost accounting . . . on which experts may disagree.” *Id.* at 317. Without more, it seems plain that there was no problem of abuse of discretion: “Merely to decide a question of law incorrectly is certainly not an abuse of discretion.” *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963).

The Court stated 1) that where the “duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction

court thought,¹⁰⁰ was its reliance upon *United States ex rel. McLennan v. Wilbur*,¹⁰¹ where the Supreme Court drew "the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion."¹⁰² *Ferry* made this distinction the test whether arbitrary action was reviewable under section 10.

In *McLennan*, an applicant sought a lease under a statute which "authorized" the Secretary "to grant to any applicant . . . a prospecting permit"; it was refused and applicant sought mandamus. Contrasting the "authorized" section, *inter alia*, with another section where under a claimant who had "complied" with certain requirements "shall be entitled . . . to a prospecting permit," the Court distinguished, for purposes of testing the right to a writ of mandamus, between a positive mandate to the Secretary and permission to take certain action in his discretion.¹⁰³ And it concluded that since issuance of a permit under the latter section was discretionary, mandamus would not lie to control the exercise of discretion. But *McLennan* had no occasion to decide and did not decide that abuse of discretion could not be reached by mandamus, let alone by some other remedy.

If *Ferry* was not decided as an action in mandamus, then the court converted the *McLennan* test whether "discretion" (not its abuse) is reviewable by mandamus into a test of whether arbitrariness is reviewable in an ordinary action. Proceeding from the differentiation between "mandatory" and "permissive" discretion *Ferry* concluded that if the statute makes the conferring of rights "mandatory" "it would be anomalous to allow a locator to lose rights" because administrative personnel "made erroneous or arbitrary decisions concerning compliance with the law."¹⁰⁴ But why should "permission" to grant a license be translated into license arbitrarily to deny it? Why

of the statute is a distinct and profound exercise of discretion," 356 U.S. at 318; and 2) that arguably "Congress to date has sided with" the Panama Canal Company, in the light of which the Court concluded that "the question is so wide open and at large as to be left at this stage to agency discretion." *Id.* at 319. (Emphasis added.) Thus the main thrust of the opinion is that relief in the nature of mandamus is unavailable "to compel petitioner to fix new tolls," *id.* at 318, where the matter is not "at this stage" sufficiently "clear for the courts to intrude." *Id.* at 319.

True it is that the Court stated that APA § 10 "excludes from the categories of cases subject to judicial review 'agency action' that is 'by law committed to agency discretion.' We think that the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." *Id.* at 317. But under the facts of the case this means merely that the decision was for the agency where reasonable men could differ, and then only "at this stage." Against this background, Professor Davis' praise of the case for a "literal" reading of the "except" clause sheds absolutely no light on reviewability of abuse of discretion, for the question of arbitrariness is not in the case.

¹⁰⁰ 336 F.2d at 712.

¹⁰¹ 283 U.S. 414 (1931).

¹⁰² *Id.* at 418.

¹⁰³ *Id.* at 416-18.

¹⁰⁴ 336 F.2d at 713.

should administrators be allowed arbitrarily to deprive citizens of potential rights or privileges merely because the statute "permits" them to grant rights? Several courts have held that even in the area of dispensing privileges, administrators cannot be arbitrary,¹⁰⁵ merely a reflection of the Supreme Court's statement that "there is no place in our constitutional system for the exercise of arbitrary power."¹⁰⁶

Then too, *speculation* as to congressional intent to preclude review was not designed by Congress to be the arch on which unreviewability would rest; and the *Ferry* conclusion that "permissive" statutes were intended to be unreviewable, even if the crabbed complexities of mandamus as a tool for controlling the exercise of "discretion" are put to one side, rests on the veriest speculation.¹⁰⁷ Chairman Walter, explaining the first exception to section 10, said: "Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill."¹⁰⁸ Having required such clear and unmistakable intent to shut off review under the first exception which is quite narrow in application, did Congress by the second exception mean to give the courts carte blanche to decide from the vaguest evidence that Congress intended to shut off review in the vast "discretion" domain?¹⁰⁹ A negative answer also seems to be indicated by another congressional statement: Congress, fully aware that unreviewability served to give a "blank check" to administrators, declared in both the House and Senate reports that "it has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of the authority granted [arbitrariness is never authorized] or to the objectives specified [*i.e.*, "discretion" reasonably exercised as opposed to "abuse of discretion"]."¹¹⁰ Blank checks that result in unreviewability are therefore contrary to congressional policy, as they are to judicial requirements: "Action challenged as a denial of due process—whether substantive in the sense of being arbitrary or by capricious classification . . . could

¹⁰⁵ *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961).

¹⁰⁶ *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 262 (1908).

¹⁰⁷ Compare Davis' remarks about a parallel line of cases in which reliance is placed "on a vague legislative intent that is never pinned down." DAVIS, SUPP. § 28.67, at 27.

¹⁰⁸ S. Doc. No. 248, at 368.

¹⁰⁹ As will appear, the Davis "committed" interpretation would read into the second exception a species of statutory preclusion of review of arbitrariness which preclusion is the generic subject of the first exception, so that the legislative history of the first exception is the more plainly applicable to the Davis reading. See text accompanying notes 159-61 *infra*.

¹¹⁰ S. Doc. No. 248, at 212, 275.

be immune from judicial review, if ever, only by the *plainest* manifestation of congressional intent to that effect."¹¹¹

Probably these and other problems were not mooted in *Ferry*, but Professor Davis found them discussed in my article, and it is no answer to my position to add another case that uncritically cites "The Treatise." Notwithstanding that *Ferry* has the imprimatur of Professor Davis, it would be premature to conclude that *Ferry* has said the last word as to "what the law is" on this score, and as will appear, he himself deviates from the *Ferry* rule in recommending a different decision in the *Cadillac* case.

D. Other Davis Citations

There is no need to tax the patience of the reader by examining the remaining Davis citations in equal detail, for summary treatment will suffice. First, there are the cases involving discretion to prosecute, a matter to which I spoke in my article.¹¹² Here it need only be noted that Professor Davis overlooks the fact that even in this area of broad discretion, the question whether an arbitrary refusal to prosecute is reviewable was carefully reserved in one of the very cases cited by him and probably reserved in one of the others.¹¹³ Next there are the *Cadillac* and *Pullman* cases which do not rely on Professor Davis but conclude that the discretion exception cuts off review of abuse of discretion on the ground that "we have no right to disregard this plain language."¹¹⁴ But what then becomes of the equally "plain" section 10(e) direction to set aside abuse of discretion? The "literal language" of the second exception read against section 10(e), Professor Davis said, "makes neither grammatical sense nor practical sense, for the exception consumes the whole power of the reviewing court"¹¹⁵ So the analysis of *Cadillac* which does not invoke the Davis "committed" doctrine is at odds with Davis' own view. Then there is *Freeman v. Hygeia Dairy Co.*, which merely involves the exercise of discretion as distinguished from abuse of discretion.¹¹⁶ Finally *Hamel v.*

¹¹¹ *Gonzalez v. Freeman*, 334 F.2d 570, 575 (D.C. Cir. 1964) (Emphasis added.); cf. *Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

¹¹² *Berger* 67-69.

¹¹³ "We need not here canvass whether . . . a court can correct an abuse of discretion by the general counsel in failing to issue a complaint," having found that there was in fact no abuse of discretion. *Retail Store Employees Union v. Rothman*, 298 F.2d 330, 332 n.1 (D.C. Cir. 1962). A somewhat less clear reservation was expressed in *Moses v. Kennedy*, 219 F. Supp. 762, 765-66 (D.D.C. 1963). Both cases are cited in DAVIS, SUPP. § 28.16, at 23.

¹¹⁴ *United States v. One 1961 Cadillac*, 337 F.2d 730, 733 (6th Cir. 1964); see *Pullman Trust & Sav. Bank v. United States*, 225 F. Supp. 860 (N.D. Ill. 1964). Both cases are cited in DAVIS, SUPP. § 28.16, at 22.

¹¹⁵ *Id.* at 21; see text accompanying note 29 *supra*.

¹¹⁶ 326 F.2d 271 (5th Cir. 1964); DAVIS, SUPP. § 28.16, at 22-23. The statute authorized the Secretary to "conduct a referendum of producers" He "con-

Nelson,¹¹⁷ like *Ferry v. Udall*, relies on the Davis "committed" interpretation, also taking it on faith. This odd mélange of cases falls far short of making out that the law "is" what Professor Davis says it "is," i.e., that "by law committed" was designed to perpetuate unreviewability of arbitrariness in selected areas.

V. "THE LAW AS IT OUGHT TO BE"

Professor Davis rigidly separates in watertight compartments "the law as it is" from "the law as it ought to be."¹¹⁸ In light of his search for a "practical interpretation which will carry out the probable intent" of Congress, one might consider the APA "ambiguous" and consequently conclude that "what the law ought to be" should be a most persuasive determinant of what the law "is," i.e., what the statute means. But no, segregation is his motto. And to teach Berger a proper respect for the separation between "what the law is" and "what the law ought to be," the same Professor Davis who, in this Comment alone, condemns one "ill-considered" dictum of the Supreme Court as "atrocious"¹¹⁹ and another Supreme Court concept as "pernicious";¹²⁰ who leaves several Supreme Court opinions drawn and quartered, in still quivering fragments;¹²¹ who rejects a principle formulated by

ducted a referendum on the question whether to include two new counties in a milk marketing area," *ibid.* It was contended that the latter were entitled to a separate referendum. The court said that "it must necessarily follow from the complexities of administration . . . that the details of a referendum, and the manner in which it is conducted, must be left exclusively in the hands of the Secretary." 326 F.2d at 273. The controversy revolved around the construction of the statute and the Secretary's construction of "producers" was respected. *Id.* at 274. Arbitrariness was not argued.

¹¹⁷ 226 F. Supp. 96, 98 (N.D. Cal. 1963); DAVIS, SUPP. § 28.16, at 23. *Hamel* makes no reference to arbitrariness.

¹¹⁸ *Id.* at 17, 25.

¹¹⁹ *Id.* at 24.

¹²⁰ *Id.* at 27.

¹²¹ These are deserving of notice. As an "ill considered" dictum, Professor Davis instances the "call for 'a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review.'" *Heikkila v. Barber*, 245 U.S. 229, 232-33. . . . *Id.* at 24. Since his "personal opinion . . . is that the presumption of reviewability should be a stronger one . . ." *id.* at 26, one would expect that he would eagerly embrace the Supreme Court's admonition that courts should be hospitable towards the "greatly expanded . . . availability of judicial review," for this puts wheels under what must otherwise remain a pious exhortation—given Davis' dim view of availability of review. Notwithstanding, *Heikkila* is consigned to the deepest pit: "[T]he *Heikkila* case cuts off review where review should be allowed; no other Supreme Court opinion is criticized so severely by the Treatise [1] which demonstrates in § 28.10 that the opinion 'revolved around four clear-cut misunderstandings.'" *Id.* at 24. Be it so, and yet the "hospitable" dictum can still have a virtue of its own, certainly as applied to arbitrariness, which Congress plainly intended should be reviewable.

That dictum was reiterated in *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955), *Berger* 70 n.77, so it too is blasted, but on the ground of a different, "atrocious" dictum. The Court, says Davis, had said that "section 10 of the Administrative Procedure Act provides that 'Any person who suffers legal wrong because of any agency action or is adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.'" He comments,

the Supreme Court and asserts that "the principle is" what *he* says it is;¹²² now strikes an unwontedly diffident pose and offers his "personal opinion" of what the "law ought to be"!¹²³

The "personal opinion" of Professor Davis is that "the presumption of reviewability should be a stronger one than the courts have made it."¹²⁴ The law is not quite as toothless as this might suggest. As the four dissenters in *Schilling* stated:

This Court has gone far towards establishing the proposition that preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred Generalizations are dangerous, but with some safety one can say that judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated.¹²⁵

Not alone has this statement the sanction of respectable authority,¹²⁶ but that truly "painstaking scholar," Professor Jaffe, found that "[J]udicial review is the rule. It rests on the congressional grant of general jurisdiction to the article III courts. It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest."¹²⁷ And such learning was caught up in the legislative

"of course, the APA provides nothing of the kind. The Court simply forgot about the 'except' clauses. The Court's remark is therefore of no significance, because it rests upon an obvious oversight." *Ibid.* One who delivers himself of such scathing criticism should be factually invulnerable. The "obvious oversight" is Davis' own. Discussing *Heikkila*, the Court said that it held that "the Administrative Procedure Act gave no additional remedy since § 10 *excepted statutes that precluded judicial review*"; that exception was relevant because the Court "had construed the word 'final' in the 1917 Act as precluding any review except by habeas corpus" *Shaughnessy v. Pedreiro*, *supra*, at 50. Thus the Court did not "forget" about the "except" clauses but rather discussed one of them.

Must the Court discuss every "except" in the APA at the risk of being charged with "oversights"? There are, for example, also the exceptions carved out from the act by § 2(a). By the time a case reaches the Court, particularly when the government is a party, the Court is entitled to assume that no exception is relevant or it would be among the questions assigned.

¹²² See text accompanying note 66 *supra*.

¹²³ DAVIS, SUPP. § 28.16, at 26.

¹²⁴ *Ibid.*

¹²⁵ *Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (Brennan, J., dissenting). (Footnote omitted.)

¹²⁶ In *Leedom v. Kyne*, 358 U.S. 184, 190 (1958), the Court said that where "absence of jurisdiction of the federal courts" would mean "a sacrifice or obliteration of a right . . ." conferred by Congress, it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." This is but the "presumption of reviewability" garbed in different rhetoric. And where the right to be protected from arbitrariness derives from the Constitution, the "presumption of reviewability" is even stronger. See *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); text accompanying note 111 *supra*. In *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902), the Court said that the courts must have the "power . . . to grant relief" to protect against "uncontrolled and arbitrary action . . ." Cf. Berger 90.

¹²⁷ Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 432 (1958). This was also the view of Judge Friendly in *Cappadora v. Celebrezze* (2d Cir. January 28, 1966), quoted in part, *supra* note 64.

history of the first section 10 "exception" in Chairman Walter's statement that "legislative intent to forbid judicial review must be . . . clear, convincing, and unmistakable."¹²⁸ So the "presumption of reviewability" is a living reality, the more so when constitutional rights are at stake. The unqualified direction in section 10(e) to set arbitrary action aside, coupled with Chairman Walter's statement that administrators do not have authority to act arbitrarily "in any case," goes far to strengthen that presumption.

In addition, Professor Davis adduces three "fundamentals" which strongly militate against his analysis. These "fundamentals" are:

(1) A limited judicial review [review whether action is arbitrary is limited] does not weaken the administrative process but strengthens it. . . . (2) Completely cutting off what the courts have to offer a governmental program may violate the cardinal principle that the functions should be allocated between courts and agencies on the basis of comparative qualifications of each tribunal. The judges are specialists in constitutional issues . . . [and] in the limits of fair procedure [and I would add in abuse of discretion and arbitrary action] A review which is limited to bringing into play these special judicial talents can be helpful in all respects to accomplishment of administrative objectives and harmful in no respects. (3) A third fundamental is the principle of check. When the interests affected are of sufficient magnitude, any initial exercise of power should be subject to check by an independent authority¹²⁹

In his Comment, Professor Davis concludes that "these three fundamentals ought to be the guide to reviewability of any subject matter that is intrinsically suitable for judicial review."¹³⁰ Each of these "fundamentals" exerts a powerful pull toward reviewability of arbitrariness, and each should make a court reluctant to conclude that a statute interposes an insuperable obstacle to review. And I would add a fourth "fundamental" of even greater magnitude: there is constitutional protection against administrative oppression and arbitrariness—

¹²⁸ S. Doc. No. 248, at 368.

¹²⁹ 4 DAVIS, TREATISE §28.21, at 112-13.

¹³⁰ DAVIS, SUPP. §28.16, at 28. He observes that these "fundamentals" would "[enlarge] . . . the area of reviewability," and yet I "ignored" them. *Id.* at 16. (Emphasis added.) This is yet another index of his indifference to accuracy. In his letter to me of February 23, 1965, he asked, "Why did you ignore my §28.21?"—*i.e.*, his three "fundamentals." My reply of March 2 stated that "you yourself lay down principles in §28.21 (which I did not "ignore" but inadvertently missed, much to my regret) which are at war with an easy assumption that arbitrariness should be insulated." But Professor Davis adheres to "ignore," doubtless to suggest that I had willfully neglected to mention something which I was under a duty to take into account, when, in fact, I would have eagerly cited his "fundamentals" for they fortify my analysis.

"delegated power may not be exercised arbitrarily."¹³¹ This "fundamental" was magnificently epitomized by Mr. Justice Wilson, after participating in the Convention and in the Pennsylvania Ratification Convention:

Every wanton, or causeless, or unnecessary act of authority, exerted or authorized, or encouraged by the legislature over the citizens, is wrong, and unjustifiable, and tyrannical: for every citizen is of right, entitled to liberty, personal as well as mental, in the highest possible degree, which can consist with the safety and welfare of the state.¹³²

Against this background let us now examine "why should not the law be what. . . [the utopian Berger] wants it to be? The principal answer," Professor Davis tells us, "is that Congress . . . has power within reasonable limits . . . to cut off review," and by the second exception of section 10 gave "clear expression . . . in favor of preventing review."¹³³ That "clear" expression proved on close examination merely to be Professor Davis' surmise as to Congress' "probable intent,"¹³⁴ so that the "principal answer" is no answer at all. "Another reason," he states, is that "much administrative discretion is intrinsically unsuited to judicial review," instancing the President's or State Department's conduct of foreign affairs.¹³⁵ Six pages of my article were devoted to this and other practical reasons adduced by Professor Davis against judicial review,¹³⁶ but of this he

¹³¹ See text accompanying note 15 *supra*.

¹³² 2 WILSON'S WORKS 393 (Andrews ed. 1896).

¹³³ DAVIS, SUPP. § 28.16, at 25.

¹³⁴ See text accompanying notes 43, 45 *supra*.

¹³⁵ DAVIS, SUPP. § 28.16, at 25. In his *Treatise*, Professor Davis proffered an arbitrary denial of military leave as an example of action which "from a practical standpoint cannot be subject to judicial review . . ." 4 DAVIS, TREATISE § 28.16, at 81-82. To test this proposition change the example to denial of all leave to one individual for a protracted period because he is a Negro. In my article, I set out materials which indicate that one who enters military services is not beyond the judicial pale. Berger 79-80. Since then, Gellhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1, 38 (1965), points out that Sweden created a separate military ombudsman "to guard citizens against abuses in military administration," citing among other prosecutions those of "a commissioned officer who had insulted a noncommissioned officer, a commander who had punished draftees for being drunk . . ." when off duty on nonmilitary premises, illustrating at least that one modern nation finds it entirely "practical" to have civilian supervision of such matters. And I would add that one who is asked to surrender several years of his life, perhaps life itself, should not be penalized by deprivation of judicial protection. We cannot ask men to bleed for human dignity who are themselves deprived of it.

¹³⁶ Berger 74-80. Referring to the statement in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936), that Congress left many matters "affecting foreign relations" to the President's "unrestricted judgment," the Court recently stated that "this does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). *Baker v. Carr*, 369 U.S. 186, 211 (1962), earlier pointed out in an analysis of "political questions" that no blanket insulation from judicial review obtained in foreign relations. Berger 79. If the President does not have "unrestricted rights," he is subject to judicial inquiry no less than any other officer of the United States. *Id.* at 90. See also Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044, 1103-07 (1965).

takes no account. Given a "presumption of reviewability" that rises to constitutional proportions, given the section 10(e) mandate to set "arbitrary action" aside, each such claim for exemption on practical grounds should at least be carefully scrutinized by a court rather than be accepted on a priori assertion. Professor Davis assumes that bare restatement of his position suffices to still criticism, and he stubbornly avoids the uncomfortable issues.¹³⁷ But assertion ex cathedra cannot take the place of reasoned refutation, even when it comes from Professor Davis.

At last we come to the example Professor Davis magistrally employs to illustrate "a point of view [his "personal opinion"] that might well be the law but is not the law,"¹³⁸ *United States v. One 1961 Cadillac*.¹³⁹ *Cadillac*, like *Ferry*, involved a permissive, not a mandatory, statute; the administrator was not ordered to act. The statute, Professor Davis states, provides "that the Secretary 'if he finds' specified facts 'may remit or mitigate . . .'" and it dealt with remission of forfeitures, resting heavily on the "act of grace" concept.¹⁴⁰ Here we have a full blown "permissive" statute, which, under the *Ferry* interpretation of the Davis "committed" formula, would not permit review of arbitrariness. Inasmuch as Professor Davis describes *Ferry* as a "well considered" case, one might expect that he would apply the "permissive" analysis to *Cadillac*. But his sympathies have been engaged, and he is not hog-tied by logic.

His analysis is a display of virtuosity which deserves study for its own sake. Of the statutory terms "if he finds" and "may remit," he tells us, "one can hardly deny that the words pull in the direction of unreviewability. Indeed, a bit of logic the Supreme Court used as early as 1825 has persuasive force; interpreting a remission statute it said: 'It would be a singular issue to present to a jury for trial, whether the facts . . . were sufficient or not to satisfy the secretary of the treasury . . .'"¹⁴¹ Unhappily the law has moved on since 1825. Today the formula "if he finds" certain facts is differentiated from formulae such as "if he is satisfied" or "if in his judgment" the facts warrant.¹⁴² "If he finds" formulae are generally reviewable to ascertain whether there is substantial evidence that the facts so found

¹³⁷ Professor Bailey, who rose to the defense of Dean Pound in 1942 and was then a colleague of Professor Davis at the University of Texas, commented on Davis' "own agility in avoiding contact with unpleasant facts." Bailey, *Dean Pound and Administrative Law—Another View*, 42 COLUM. L. REV. 781, 802 (1942).

¹³⁸ DAVIS, SUPP. § 28.16, at 26.

¹³⁹ 337 F.2d 730 (6th Cir. 1964).

¹⁴⁰ DAVIS, SUPP. § 28.16, at 26-27.

¹⁴¹ *Id.* at 26 (Emphasis added.); see *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825).

¹⁴² Cf. *Minichello v. Saxon*, 337 F.2d 75, 83 (3d Cir. 1964).

exist.¹⁴³ One may call them "objective." "In his judgment" or "if he is satisfied" are subjective; it is not easy to enter into the mind of the Secretary and to determine whether he is indeed "satisfied." Such formulae are exceptional, but even they do not shut off review. Professor Davis himself, referring to an "in his judgment" case, stated that "such words would not prevent the Court from reviewing if it felt strongly that its intervention was necessary to . . . correct a serious abuse of discretion An outstanding example of judicial disregard for such words of discretion is *United States v. Laughlin*." ¹⁴⁴ So the logical "pull" toward unreviewability of an "if he finds" formula is quite attenuated, as Professor Davis must know.

But I must not be unfair to him; having set up one logical "pull" he judiciously counterbalances it with another, "an opposing bit of logic that the grant of power to the secretary is conditioned upon his acting reasonably and without abuse of discretion. The question remains as to what is desirable in absence of a showing of historical intent of Congress to cut off review. . . . But apparently no such showing has ever been made." ¹⁴⁵ It is not merely logic but the Constitution which is the source of the proposition that "delegated power . . . may not be exercised arbitrarily." ¹⁴⁶ So the first pull of "logic" toward unreviewability is outweighed by a constitutional protection. And if "no showing has ever been made" of congressional "intent to cut off review," a judicial conclusion that action is unreviewable rests on shaky underpinning. The APA history requires a "clear . . . unmistakable" legislative intent to shut off review.¹⁴⁷ Reviewability is the rule, and "the intention to exclude it must be made specifically manifest." ¹⁴⁸ Given constitutional claims, review can be shut off, "if ever, only by the plainest manifestation of congressional intent to that effect." ¹⁴⁹

Professor Davis takes a different tack; in the area of "re-mission or mitigation," he says, the courts, as in *Cadillac*, stamp re-

¹⁴³ A statutory provision "if the Secretary . . . finds" requires him to make a finding, *Mahler v. Eby*, 264 U.S. 32, 43 (1924), and that finding serves, among other things, to facilitate review. *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554, 559 (D.C. Cir. 1938); *Florida v. United States*, 282 U.S. 194, 215 (1931); *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957). Professor Davis states that "findings help protect against careless or arbitrary action." 4 DAVIS, TREATISE § 16.05, at 446.

¹⁴⁴ 4 DAVIS, TREATISE § 28.16, at 85; Berger 71. Compare *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 100, 106 (1902), where the Court construed the formula "upon evidence satisfactory to him" to require a showing of "actual fraud."

¹⁴⁵ DAVIS, SUPP. § 28.16, at 26.

¹⁴⁶ See note 15 *supra* and accompanying text.

¹⁴⁷ See text accompanying note 128 *supra*.

¹⁴⁸ See text accompanying note 127 *supra*.

¹⁴⁹ See text accompanying note 111 *supra*.

mission as an "act of grace," often a "pernicious" concept, and he asks, "is it good government or good law to tell the finance company [which has made a loan on the forfeited car] that it is entitled to neither a hearing nor a limited judicial review"?¹⁵⁰ What, one asks, has been gained by shifting from a strong ground—the express terms of section 10(e), its legislative history, and constitutional injunctions against arbitrariness—to the vague ground of "good government and good law"? The "good" turns on considerations of justice and administration which equally fortify the argument for immediate application of section 10(e), thereby dispensing with Professor Davis' complicated minuet.

More important, his analysis, as I shall now show, deprives the courts of power to reconsider whether prior statutory interpretations are "good law." He has painted himself into a corner. Professor Davis reads the "committed" phrase to postpone consideration whether arbitrariness is reviewable to examination of what the primary statute, for example, the statute which sets up the agency, provides on this score.¹⁵¹ In the context of the second "except" clause, he states, "'committed to agency discretion' and 'unreviewable' have . . . the same meaning. . . . To the extent that 'the law' cuts off review for abuse of discretion . . . the *pre-Act law* on this point *continues*.'" ¹⁵² Allegedly, the "discretion" exception of section 10 represents a "clear expression of Congress *in favor of preventing review*." ¹⁵³ Now the "pre-Act law" was either an explicit statutory bar to review or a judicial interpretation having the same effect, *i.e.*, "a common law of unreviewability" ¹⁵⁴ which may be assimilated to "inexplicit preclusion" under the first exception. If Congress had in mind to "continue" the "pre-Act law," to "prevent review," how *can* a court reconsider the availability of review under the primary statute? Inexplicit statutory preclusion is then no more alterable than the explicit statutory bar.¹⁵⁵

¹⁵⁰ DAVIS, SUPP. § 28.16, at 27.

¹⁵¹ Davis states that "the court was clearly right in holding that the Administrative Procedure Act prevents review for abuse of discretion if the forfeiture statute commits the action to agency discretion, and although the court was clearly right in finding that the cases it relied upon interpret the forfeiture statute to cut off review," his "quarrel is with the whole batch of cases that so interpret the forfeiture statute." *Id.* at 26. In a word, whether arbitrariness should be reviewable must be reconsidered in the framework of the "forfeiture" statute, not in that of the APA. Under his reading, courts "examined" the particular statute under which an agency operates to discover whether or not the action is committed to agency discretion *Id.* at 25.

¹⁵² *Id.* at 21. (Emphasis added.)

¹⁵³ *Id.* at 25. (Emphasis added.)

¹⁵⁴ *Id.* at 27.

¹⁵⁵ With respect to the first exception for statutory preclusion, it was said that "when, as in the Switchmen's case, it had been held that *Congress manifested its intention* to exclude review the new [APA] legislation was *not* to be construed as *changing* the situation." *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 689 (D.C. Cir. 1951). (Emphasis added.) A fortiori no court could do so.

Under the Davis reasoning, section 10 froze the "pre-Act law" and put the prior interpretive statutory denials of review beyond the reach of the courts.

All this is of course in the realm of fantasy. There is no legislative history for support of Professor Davis' reading; it rests on his bare surmise, a "practical interpretation which will carry out the probable [*sic*] intent."¹⁵⁶ There is no shred of evidence that Congress intended to create a system of selective review of arbitrariness. To the contrary, Chairman Walter emphatically stated that under the APA arbitrariness would be reviewable "in any case."¹⁵⁷ And he said that the APA was meant

to be operative "across the board" in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. . . . Where one agency has shown that *some particular operation should be exempted* from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment.¹⁵⁸

Presumably Professor Davis would argue that the "committed" phrase constitutes just such an exemption; but I would maintain that the Walter statement demands more than a "practical interpretation" in search of a "probable intent" to give rise to an exemption from the general direction to set aside arbitrary action.

In essence, Professor Davis would read into the second exception a special type of statutory preclusion—where courts had construed primary statutes to preclude review¹⁵⁹ of "abuse of discretion" or "arbitrariness." But if a "statute precludes review," explicitly or implicitly, the situation is covered by the first exception. Congress well knew how to preserve existing statutory preclusion where it so in-

¹⁵⁶ DAVIS, SUPP. § 28.16, at 21.

¹⁵⁷ See S. Doc. No. 248, at 368.

¹⁵⁸ *Id.* at 250. (Emphasis added.) It scarcely needs saying that the "reenactment" rule has no application. Customarily it applies when a *particular* statute is reenacted under the fiction that Congress must be assumed to be familiar with interpretations of the existing statute. *But cf.* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). The APA was no reenactment but the initial enactment of a new code of practice, and we can not attribute to Congress by that enactment an intention to freeze into the APA a wilderness of interpretations of uncounted substantive statutes that govern the sprawling governmental functions and agencies. Such ratification also runs counter to the legislative history.

¹⁵⁹ I am aware of the Attorney General's statement that the first exception embraced inexplicit preclusion, *i.e.*, where a statute has been "interpreted as manifesting a congressional intention to preclude judicial review . . . [*e.g.*] Switchmen's Union of North America v. N.L.R.B., [308 U.S. 401]" S. Doc. No. 248, at 229-30. To begin with, it is significant that the Attorney General limited his example of inexplicit preclusion to the first exception; he did not refer to similar cases of statutory preclusion under the second exception.

Even as to the first exception, there is good reason not to receive the Attorney General's views as "legislative history" but rather as the "view of an interested member

tended and did so by the first exception. If a particular "abuse of discretion" was shielded from review by an antecedent statute, the first exception preserved the shield and there is no need to read into the second exception a shelter for a special brand of statutory preclusion. The fact that Congress felt it necessary to make express provision in the first exception for existing cases of statutory preclusion indicates a view that *but for* that express provision *all* antecedent statutory preclusion of review would have been repealed.¹⁶⁰ Consequently, a claim for statutory preclusion in special statutes allegedly shutting off review of "abuse of discretion" either comes within the first exception or it fails, for in such case the first exception is the "special" provision that governs. And if statutory preclusion is in fact involved, the House report states that "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."¹⁶¹ Professor Davis' surmise as to the "probable intent" of Congress to provide for selective unreviewability of certain cases of "abuse of discretion" is not an adequate substitute for the required showing.

CONCLUSION

Professor Davis states that "every one would like to have arbitrariness and abuse corrected";¹⁶² he would make the "presumption of reviewability . . . a stronger one";¹⁶³ and also has formulated three "fundamentals" which favor "enlarging the area of reviewability."¹⁶⁴ Why then search for a "probable intent" of Congress to shield arbitrariness from review in the guise of a "practical interpretation"? What

of the Executive Department whose activities were sought to be regulated and whose opposition the Congress overrode." Berger 65-67. And the entire concept of "in-explicit" preclusion needs to be reexamined in light of the House report statement that inexplicit preclusion requires that the statute "must upon its face give clear and convincing evidence of intent to withhold review." S. Doc. No. 248, at 275. See *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 689 (D.C. Cir. 1951). Where is that "clear and convincing evidence of intent" to withhold review in the "except" for discretion "by law committed," especially when read against the categorical and unqualified direction in § 10(e) to set aside arbitrary action and abuse of discretion.

¹⁶⁰ The House report states that "any inconsistent agency action or statute is in effect repealed." S. Doc. No. 248, at 281.

¹⁶¹ *Id.* at 275 (House report). (Emphasis added.) In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37, 41 (1950), Mr. Justice Jackson adverted to the fact that administrative decision had been "accorded considerable finality" and that there had been a growing conviction that administrative power was "sometimes put to arbitrary and biased use," and said that "it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."

¹⁶² DAVIS, SUPP. § 28.16, at 17.

¹⁶³ *Id.* at 26.

¹⁶⁴ *Id.* at 16.

is "practical" about an interpretation which proceeds from an a priori assumption that "much administrative discretion is intrinsically unsuited to judicial review" of arbitrariness,¹⁶⁵ thus sheltering conduct that all abhor. Constitutional protection against arbitrariness is not to be withheld on hypothetical grounds. And given Davis' three "fundamentals" and "presumption of reviewability," is it not necessary to inquire why they must yield to an assumption of "intrinsic unsuitability"? In no corner of American life can it be assumed that protection against official oppression is "intrinsically unsuitable."

His interpretation of the "discretion" exception, I submit, cannot survive a careful analysis of the statutory terms and of the unequivocal legislative history which bears directly on the issue. In view of the fact that an extensive explanation of this view was put before him in my article, one can only conclude that he "ignore[s] the full facts thus presented" and refuses to "face squarely all the available facts."¹⁶⁶ And I would add a failure for which he mercilessly harried Dean Pound, a failure of accuracy. His Comment is shot through with inaccuracy; and to borrow what he said about Dean Pound:

I do not suggest any reason for . . . [his] numerous mistakes. But it is fair to observe that his errors always run in one direction; they always aid his strictures about [Berger's analysis]¹⁶⁷

Yet another disturbing aspect of the Davis Comment is its exaggerated defensiveness. It is as if having once uttered his views they become infallible dogma from which there can be no retreat. Defensiveness is doubly dangerous in one upon whom the courts rely, for it not only prevents him from correcting his own mistakes but may clog the path of judicial self-correction. Of Bacon's three great mottoes for scholars—"patience to doubt, slowness to assert, readiness to reconsider"—the last is not the least.

¹⁶⁵ *Id.* at 25.

¹⁶⁶ Davis, *Pound I* 102.

¹⁶⁷ *Id.* at 101 n.18.