

ADMINISTRATIVE ARBITRARINESS— A FINAL WORD

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In section 28.16 of my *Administrative Law Treatise* I concluded that under section 10 of the Administrative Procedure Act, some administrative discretion is reviewable and some is not.

In a *Columbia Law Review* article,¹ Mr. Raoul Berger attacked that conclusion, and in section 28.16 of the *1965 Supplement* to my *Treatise* I replied, comprehensively reviewing the recent case law.

Now comes Mr. Berger with a continuation of his attack. His position is, as it was in his *Columbia Law Review* article, that administrative abuse of discretion is always judicially reviewable.²

The case law is *uniformly* against Mr. Berger. In section 28.16 of my *1965 Supplement* I discuss two Supreme Court cases and a dozen other federal decisions, all of which refuse review of administrative discretion. Mr. Berger quarrels with some of my interpretations, but after reading his arguments I find no reason to change any one of them. Although he grants that some decisions support my view, he asserts that that is because my *Treatise* has misled the courts.

I know of no case that supports Berger's position. In footnote 64 he says: "Again and again Professor Davis asserts that 'not a single case supports Mr. Berger's position.'" Then he says a district court case³ "belies the Davis assertions that I do not cite a 'single case.'" This single district court case is a sound and orthodox holding that approval by the Comptroller of the Currency of establishment of a branch bank is judicially reviewable. I agree both with the decision and with the opinion.

His single district court case has now been decided by the Fourth Circuit, which specifically adopts my analysis: "Any discretion vested

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¹ Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

² In my previous answer to Mr. Berger I wrote: "The most difficult problem about commenting on the Berger article is to discover its central thesis. Apparently his main idea is that administrative abuse of discretion is always judicially reviewable." 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1965, at 16). Mr. Berger now makes no protest against my interpretation of his position. He explicitly says, referring to me: "I was constrained to differ with his view that in some areas arbitrary action must be and is unreviewable." Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783, 784 (1966). This seems to confirm that Mr. Berger thinks administrative discretion is reviewable in all areas.

³ First Nat'l Bank v. First Nat'l Bank, 232 F. Supp. 725 (E.D.N.C. 1964).

in the Comptroller in passing upon applications for approval of bank branches is not the type of discretion to which action has been 'committed by law' but is rather one of the character expressly made reviewable by section 1009(e)(1). 4 Davis, *Administrative Law Treatise*, § 28.16" ⁴

Thus, the single case Berger relies upon turns out on appeal not only to give him no support but to be an outstanding authority in favor of the position I have asserted.⁵

Of course, the courts' unanimity is not an answer to Mr. Berger's strange charge that I have misled the courts. His naïve notion that judges obey when the treatise writer commands seems to me a long way from the reality that judges think for themselves. The courts' unanimity is based on something more than the three factors Mr. Berger discusses—statutory language, legislative history and my *Treatise*. The key to the courts' unanimity lies in their longstanding and universal understanding that some administrative discretion is intrinsically unsuited to judicial review.

Even if Mr. Berger's analysis of statutory words and legislative history were persuasive, as I believe it is not, he does not deny that the words are unclear or that the legislative history is conflicting. I think that nothing but the clearest and strongest congressional intent could induce the courts to undertake tasks which the judges deem inappropriate for judicial action.

As to what the law should be, as distinguished from what it is, my opinion is expressed both in my *Treatise* and in my *1965 Supplement* that the courts should review some administrative discretion now held unreviewable.⁶ And apart from review, I believe we can and should do a good deal that we are not doing to provide a better protection against arbitrary exercise of discretion; some ideas to that end are advanced in section 4.14 of my *1965 Supplement*.

Although I share Mr. Berger's passionate belief in a Supreme Court remark that "there is no place in our constitutional system for the exercise of arbitrary power,"⁷ I agree with the courts that they should not undertake to cure all arbitrariness in government.

⁴ First Nat'l Bank v. Saxon, 352 F.2d 267, 270 (4th Cir. 1965).

⁵ With the court's language, compare 4 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.16, at 80 (1958): "So far as the action is by law 'committed' to agency discretion, it is not reviewable—even for arbitrariness or abuse of discretion; it is not 'committed' to agency discretion to the extent that it is reviewable."

⁶ *Id.* § 28.21; *id.* § 28.16 (Supp. 1965, at 25-30).

⁷ Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249, 262 (1908).