

ADMINISTRATIVE ARBITRARINESS—A
REJOINDER TO PROFESSOR DAVIS'
"FINAL WORD"

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My Reply to Professor Davis' Comment was framed because I felt that 1) the Comment befogged the issues, and 2) it exhibited grave deficiencies of scholarship on the part of an influential commentator.¹ Although the pages of this *Review* were open to him for a detailed refutation, he chose, not surprisingly, to stand pat—*ipse dixit*. His "Final Word"² contains a fresh sprinkling of inaccuracies and distortions, of which a few examples must suffice. My statement that the heavily burdened "courts increasingly look to [scholars] for guidance" is twisted by him into my "naive notion that judges obey when the treatise writer commands."³ He attributes to me the view that "administrative *discretion* is reviewable in all areas"⁴ despite my statement that a "sound exercise of discretion . . . continues to be insulated" from review,⁵ and my demonstration that "discretion" and "abuse of discretion" are totally different and were treated as "opposites" by Congress.⁶ If the attribution is inadvertent, it is yet slipshod to attribute to me a view that is poles removed from mine. Again, Berger "does not deny that the words [of section 10] are unclear or that the legislative history is conflicting."⁷ Professor Davis is wrong on both counts. My article noted that the legislative history of section 10(a) (*not* of section 10(e) and the "discretion" exception) was indeed "mixed and confusing,"⁸ but as my Reply emphasized, "the

¹ Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783, 784, 787-88, 813 (1966) [hereinafter cited as Berger, *Reply*].

² Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966) [hereinafter cited as Davis, *Final Word*].

³ *Id.* at 815. He also comments on "Berger's strange charge that I have misled the courts." Nowhere did I state that he misled the courts, although he himself has not shrunk from charging the Supreme Court with "misleading generalizations" by which "lower courts are often misled." 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* viii (1958) [hereinafter cited as DAVIS, *TREATISE*]. And it is not "strange" to assert that courts have mistakenly relied upon his faulty analysis. Berger, *Reply* 795 nn. 67 & 68.

⁴ Davis, *Final Word* 814 n.2. (Emphasis added.)

⁵ Berger, *Reply* 790.

⁶ *Id.* at 788-89, 794-95.

⁷ Davis, *Final Word* 815.

⁸ Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 84-88 (1965) [hereinafter cited as Berger, *Administrative Arbitrariness*]. See also Berger, *Reply* 793.

history of the *discretion* exception seems quite clear, and here it is Professor Davis who confuses analysis by drawing on general discussions of reviewability, which at best must yield to unequivocal statements about the particular question whether 'abuse of discretion' was to be reviewable."⁹ My Reply also stated that there was not a shred of evidence in the legislative history for his view that arbitrary action was to be selectively unreviewable—all the evidence points the other way.¹⁰ So there is no conflict on this score in the legislative history. Nor do I concede that the words of section 10 are "unclear." My Reply stated, "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. . . .'"¹¹

Professor Davis repeatedly charged in his Comment that I could not summon a single case for my view. My Reply pointed out that *First Nat'l Bank v. First Nat'l Bank*¹² was such a case and was in fact discussed in my article.¹³ Now he triumphantly asserts that this "single case . . . turns out *on appeal* [*First Nat'l Bank v. Saxon*¹⁴] not only to give [me] no support but to be an outstanding authority in favor of the position [he has] asserted."¹⁵ His use of this case tellingly illuminates his methods. The district court held that the Comptroller's failure to grant an administrative hearing on the establishment of a branch bank was arbitrary. On appeal, this was reversed on the ground that no hearing was required by the APA except when some other statute required a hearing on the record, and such a requirement was lacking in the Banking Act.¹⁶

The Banking Act made establishment of a branch bank turn on the "approval of the Comptroller." The district court stated that "If the use of the word 'approval' is deemed to commit agency action to agency discretion within the meaning of the second exception to § 10, nevertheless it must be a sound discretion exercised in a manner that is not violative of procedural due process." Such due process, said the court, "requires at least . . . that the decision is not arbitrary." Since there had been no administrative "hearing" or record the court could not determine "whether his acts were arbitrary," which implies that arbitrary action is reviewable.¹⁷ Thus the district court in effect

⁹ Berger, *Reply* 793. (Emphasis added.)

¹⁰ *Id.* at 794.

¹¹ *Id.* at 789.

¹² 232 F. Supp. 725 (E.D.N.C. 1964).

¹³ Berger, *Reply* 794 n.64.

¹⁴ 352 F.2d 267 (4th Cir. 1965).

¹⁵ Davis, *Final Word* 815. (Emphasis added.)

¹⁶ 352 F.2d at 269-70.

¹⁷ 232 F. Supp. at 729-30.

rejected the Davis view that the "committed" phrase can shield arbitrary action from review, and it is this "opinion" with which Professor Davis now "agrees"!¹⁸ That "agreement," as will appear, blandly abjures his earlier view, on which a court relied, without acknowledging the recantation.¹⁹ So much for the district court—the "single case."

The Fourth Circuit said in passing that the district court "can set aside [the Comptroller's] determination if . . . it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion."²⁰ And it added that

Abundant authority, with which we agree, holds that the Comptroller's determination in the present area is not immunized from review by the exemption in the preface of § 1009 [APA § 10] . . . [for] agency discretion. Any discretion vested 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*, § 28.16.²¹

Professor Davis relies on the last sentence to show that the Fourth Circuit "specifically adopt[ed] [his] analysis."²² Were I a stickler for the distinction between "dictum" and "holding," on which Professor Davis laid much stress in his Comment,²³ I would point out that if there was no duty to hold a hearing there was no occasion to inquire whether it was arbitrarily denied, so that the court's remarks about what "type of discretion" is reviewable were the purest dictum. Instead, I cheerfully concede that the court unnecessarily assumed without discussion that the "committed" phrase authorizes courts to determine whether arbitrariness is reviewable or not. The Fourth Circuit does not tell us *why* the "committed" phrase cuts off the review which section 10(e) directs, for the very good reason that no decision on the issue was called for. It does not advert to the due process ground taken by the court below—which cannot be dismissed

¹⁸ He considers that "the 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 with both the decision and with the opinion." Davis, *Final Word* 814.

¹⁹ For a discussion of the *Gidney* case see Berger, *Administrative Arbitrariness* 75-78; pp. 819-20 *infra*.

²⁰ 352 F.2d at 272.

²¹ *Id.* at 270.

²² Davis, *Final Word* 814.

²³ See Berger, *Reply* 804 n.121; *cf. id.* at 785-86.

out of hand—because it agreed that arbitrariness was reviewable under the act. These are cardinal questions that call for an answer in terms of statutory and constitutional analysis which courts have yet to undertake, and for which still another uncritical citation of the *Davis Treatise* is no substitute.

But to assume that the “committed” phrase means what Professor Davis maintains it does is only the first step. There is still the question of how we are to determine when and whether the “committed” phrase cuts off review of arbitrariness—a formidable problem, as *Ferry v. Udall* illustrates.²⁴ Of course, the Fourth Circuit furnished no clue because the question was not presented. An attempt to make such a determination had led a court, in *Community Nat'l Bank v. Gidney*, in reliance on Professor Davis, to reject a complaint that the Comptroller had abused his discretion in authorizing a Detroit bank to establish a branch, and to hold that since agency action was “by law committed to the discretion of the Comptroller, such action is not reviewable—even for arbitrariness or abuse of discretion.”²⁵ *Gidney* was cited with approval in the *Davis Treatise*.²⁶ And *Gidney* found its basis for applying the Davis “committed” formula to the banking field in the *Davis Treatise* itself. For Professor Davis had declared, and was so quoted in *Gidney*, that

The critical process in the federal control of banking is the supervising power, not adjudication or rule-making. The supervising power is not and probably cannot be surrounded by procedural safeguards in formal hearings and it is largely immune from the checks of judicial review. Freedom from arbitrary or unfair administrative action must depend upon factors other than formal procedures or judicial review.²⁷

Presumably *Gidney* concluded, to borrow the Davis phrase, that “supervising” in the banking field is “intrinsically unsuited” to review. Now comes *Saxon*, in which Professor Davis heartily concurs and holds that such “supervising” is reviewable. Perhaps Professor Davis can explain why that which was “unsuitable” for review in the banking field in *Gidney* has now become reviewable in *Saxon*. Since *Gidney* has discreetly been dropped from the *Davis Treatise*,²⁸ and because he should not be charged with wilful inconsistency, one must conclude that he has repudiated *Gidney*, particularly since the *Gidney* court

²⁴ 336 F.2d 706 (9th Cir. 1964); for discussion see Berger, *Reply* 799-803.

²⁵ 192 F. Supp. 514, 517 (E.D. Mich. 1961); for discussion see Berger, *Administrative Arbitrariness* 75-76.

²⁶ 4 DAVIS, TREATISE § 28.06 (Supp. 1963).

²⁷ 192 F. Supp. at 518; 1 DAVIS, TREATISE § 4.04, at 251.

²⁸ See Berger, *Reply* 794 n.64.

itself recanted.²⁹ Consistency is no fetish of mine; a man who reconsiders in the light of experience at times must change his mind, but it does him honor to say so. To withhold acknowledgment of the change is to confuse those who vainly seek to reconcile irreconcilable opinions.

There is yet another test, formulated in *Ferry v. Udall*,³⁰ which Professor Davis characterizes as a "well considered" case:³¹ action is "committed by law to agency discretion" when the statute is "permissive," *i.e.*, when it permits rather than commands an administrator to do something. Since the *Ferry* statute was "permissive," review of arbitrariness would not lie. The Banking Act is also "permissive," providing that the Comptroller's approval "may be given or withheld in his discretion."³² How can Professor Davis approve *Ferry*, which would deny review under a "permissive" statute, and at the same time approve *Saxon*, which declares that arbitrariness is reviewable, despite the presence of a "permissive" statute?

Professor Davis finds that judicial "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 long standing and universal understanding that some administrative discretion is intrinsically unsuited to judicial review."³³ Whatever the courts' alleged unanimity is based on, it is crystal clear that it is *not* based upon an analysis of either the "statutory language" or its "legislative history." *No court has as yet undertaken to analyze either.* As to their "universal understanding that some administrative discretion [*sic*] is intrinsically unsuited to judicial review," it is a startling proposition, to which no amount of undocumented repetition by Professor Davis can accustom me, that constitutional protection against official oppression is "unsuited" to any corner of American life.³⁴ Selective shelter for arbitrariness is at war with the Supreme Court's statement that "there is *no* place in our constitutional system for the exercise of arbitrary power," my "passionate belief" in which Professor Davis now professes to "share."³⁵ Who but the courts insure that it finds *no* place in our constitutional system; and how can he "share" my belief and still maintain that "courts should not undertake to cure all arbitrariness in government"?³⁶

²⁹ Berger, *Administrative Arbitrariness* 75-76 n.109.

³⁰ 336 F.2d 706 (9th Cir. 1964).

³¹ 4 DAVIS, *TREATISE* § 28.16, at 20 (Supp. 1965).

³² Quoted in *First Nat'l Bank v. Saxon*, 352 F.2d 267, 270 (4th Cir. 1965).

³³ Davis, *Final Word* 815. (Emphasis added.)

³⁴ See Berger, *Reply* 813.

³⁵ Davis, *Final Word* 815.

³⁶ *Ibid.*

But if he can reconcile the irreconcilable, and “intrinsic unsuitability” is indeed the test, then we need to be told by him whether or not a “permissive” function is unsuited for review, whether or not “supervision” of a banking function—for example, establishment of a branch bank with official approval—is or is not “unsuited” for judicial review, and in both cases *why* they are suited or unsuited for judicial review. To play both sides of the street merely compounds confusion. Professor Davis did not hesitate to reprove the Supreme Court for issuing “holdings both ways” when it “should either have followed the 1947 case or it should have written an opinion overruling it. The Court seemed to act without any regard for the needs of law development.”³⁷ Physician cure thyself.

If my analysis of the statute, of its history and of constitutional imperatives be proven faulty, and we are to accept selective unreviewability, the test recently employed by the Second Circuit in *Cappadora v. Celebrezze*³⁸ is vastly to be preferred to Davis’ “intrinsic unsuited” standard. There Judge Friendly said:

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.³⁹

In other words, there is a presumption that arbitrariness is *reviewable* unless there is “evidence to the contrary” that Congress “wished to close the door.”⁴⁰

Professor Davis puts the shoe on the other foot: “nothing but the clearest and strongest congressional intent could induce the court to undertake tasks which the judges deem inappropriate for judicial action.”⁴¹ If there be judges who feel that official arbitrariness should be sheltered, the section 10(e) mandate that courts “shall set aside” arbitrary action, the legislative history which exhibits an unmistakable intention to make all arbitrary action reviewable—“in any case”—and

³⁷ 1 DAVIS, TREATISE vi, ix.

³⁸ No. 29647, 2d Cir., Jan. 28, 1966.

³⁹ *Id.* at S.O. 846. In a subsequent opinion, *Wong Wing Hang v. Immigration & Naturalization Service*, No. 29335, 2d Cir., Mar. 28, 1966, Judge Friendly, seeking to resolve the “conflict” between the preamble of § 10 and § 10(e), states that “only in the rare—some say non-existent—case” of a “discretion that ‘is not subject to the restraint of the obligation of reasoned decision’ . . . may review for ‘abuse’ be precluded.” *Id.* at S.O. 1331-32.

⁴⁰ See also Berger, *Reply* 805-06.

⁴¹ Davis, *Final Word* 815.

frequent Supreme Court pronouncements such as the 1965 statement that "the delegated power, of course, may not be exercised arbitrarily,"⁴² should lead them upon checking my analysis to conclude that arbitrariness was meant to be and should be reviewable across the board.

Professor Davis' use of cases, I submit, demonstrates that he is more interested in laying Berger low than in furthering a fruitful and coherent analysis, the "needs of law development" which he chided the Supreme Court for disregarding.⁴³ It is of no importance whether he or I scored a point in a debate; but it is of great importance that the growth of the law be uncluttered by faulty and confused analysis.

⁴² FCC v. Schreiber, 381 U.S. 279, 292 (1965).

⁴³ See text accompanying note 37 *supra*.