ADMINISTRATIVE ARBITRARINESS—A POSTSCRIPT

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Although my last statement was intended to be "A Final Word," Mr. Berger's latest pronouncement convinces me that I should say more. His three presentations are unsound both in all fundamentals and in many details, and I now think that I should demonstrate that this is so.

Mr. Berger is asserting that all administrative discretion is judicially reviewable under section 10 of the Administrative Procedure Act.[1] I am asserting that some is and some is not. Our debate is about what the law is, not what it ought to be.

I shall discuss (1) the statutory words, (2) the legislative history, (3) the case law, (4) the constitutional principles, (5) the practical needs, and (6) other ways to correct arbitrary discretion.

The Statutory Words

In his latest statement, Mr. Berger denies categorically that the statutory words are unclear.[2] I can hardly believe my eyes, because I had supposed that no reasonable person could find the words clear.

The introductory clause of section 10 says in part: "Except so far as . . . agency action is by law committed to agency discretion . . . ." [3] I think these words are clear, and I have pointed out that the courts have consistently given them what I consider to be a literal interpretation.

When the words of the introductory clause are combined with some of the words of subsection (e), the provision reads as follows: "Except so far as . . . agency action is by law committed to agency discretion . . . the reviewing court shall . . . set aside agency

[1] Mr. Berger says that a sound exercise of discretion continues to be insulated from review, but he wants review of abuse of discretion. Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' Final Word*, 114 U. PA. L. REV. 816 (1966) [hereinafter cited as Berger, *Rejoinder*]. As a matter of language, it seems to me unsound to say that discretion is not reviewable but that abuse of discretion is. When a court reviews to determine whether or not discretion has been abused and finds that it has not been, I think it has reviewed the discretion. My form of statement is the one that the courts almost always use, although a few opinions use Mr. Berger's form. He condemns my form of statement as "slipshod," but I prefer the form the courts almost always use.

[2] Berger, *Rejoinder* 816-17.

[3] Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

action . . . found to be . . . an abuse of discretion." [4] These are the words involved when Mr. Berger says in his latest statement: "Nor do I concede that the words of section 10 are 'unclear.' " [5] The reader will, I hope, look at the words to see if they provide a clear answer to the question whether agency action committed to agency discretion may be set aside for abuse of discretion. Is the provision clear or unclear?

My answer is that the words of the "except" clause are clear, and that the words of subsection (e) are clear, but that when the two are put together the meaning is extremely unclear, because the two oppose each other. The literal language says that the reviewing court may set aside an abuse of discretion except so far as the agency may exercise discretion; the exception consumes the whole power of the court, so that whenever the agency has discretion the court is prohibited from setting aside an abuse of discretion. But following the literal language could not possibly be what Congress intended, for the result would be to foreclose all review of all discretion, and all the history shows that that was not the purpose.

In denying that the words are unclear, Mr. Berger does not read them literally. After all, he finds that "the 'discretion' exception does not bar review of 'abuse of discretion,' " [6] a conclusion not warranted by a literal reading of the words, as Mr. Berger himself asserts.[7] Near the beginning of his *Columbia Law Review* article he said: "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 . . . ." [8] Can the words be clear if a literal reading must be rejected?

Now let me point out, parenthetically, the kind of thinking Mr. Berger uses in attacking me. He quotes me for the proposition that the courts unanimously read the "except" clause literally. He says this is "utterly misleading . . . as I shall prove by the Professor's own words." [9] Then, *without saying that he is moving from a discussion of the "except" clause to a discussion of a combination of the "except" clause and a part of subsection (e)*, he quotes me as saying that the literal language makes neither grammatical nor practical

[4] *Ibid.*

[5] Berger, *Rejoinder* 817.

[6] Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 63 (1965) [hereinafter cited as Berger, *Administrative Arbitrariness*].

[7] Berger, *Administrative Arbitrariness* 58.

[8] *Ibid.*

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

sense.[10] He thus leads the reader to believe that I both favor and oppose a literal reading of the same provision. He builds a whole structure on this base, including such statements as: "Certainly the law 'is' not that the 'except' clause is given the 'literal' effect that Davis now claims for it and now rejects." [11]

Now let me state how I interpret the combination of the "except" clause with a part of subsection (e). For me the problem has been difficult. The legislative history being conflicting and unhelpful (as I shall show), I have sought what I have called "a practical interpretation which will carry out the probable intent and which will produce sound substantive results." [12] The main idea is to emphasize the word "committed." 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. This means that the two concepts "committed to agency discretion" and "unreviewable" have in this limited context the same meaning. Both depend upon the statutes and the common law. To the extent that "the law" cuts off review for abuse of discretion, the action is committed to agency discretion. The result is that the pre-act law on this point continues.[13]

I do not say that the statutory words require my interpretation. Nor do I say that the legislative history must be interpreted my way. I do say that my interpretation is consistent with the statutory words and with the legislative history taken as a whole, and that it is a sound and workable interpretation. It is the best solution that I have been able to find for a difficult problem. Rightly or wrongly, this solution has been adopted by every court that has considered it, so far as the reported opinions reveal.

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[10] *Ibid.*

[11] *Id.* at 794.

[12] DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16, at 80 (1958) [hereinafter cited as DAVIS, TREATISE].

[13] Mr. Berger's misunderstandings are too numerous for me to try to correct and many of them are obvious enough that I need not. One that is unsound on a subtle basis and reaches the heart of my interpretation may well be dealt with. He says that my analysis "deprives the courts of power to reconsider whether prior statutory interpretations are 'good law.'" He says I have "painted" myself "into a corner," and he writes most of a page on this subject, concluding: "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." Berger, *Reply* 811.

Of course, if my analysis had any such effect, I would reject it. But the act did not freeze any prior practice. The act can codify pre-existing law and still leave the courts free to go on developing the codified law. Furthermore, if Mr. Berger had read § 28.16 of my *Treatise* more carefully, he would have found the following sentence: "And the courts remain free, except to the extent that other statutes are controlling, to continue to determine on practical grounds in particular cases to what extent action should or should not be unreviewable even for abuse of discretion." DAVIS, TREATISE § 28.16, at 80-81.

The Legislative History

In his latest statement, Mr. Berger specifically denies that the legislative history is conflicting.[14] Of all the strange Berger positions, this is the strangest. The legislative history is all in print, and any reader can examine it for himself and see that it points in both directions.

My *Treatise* in section 28.08 reviews the legislative history, but the focus there is on the broad question whether Congress intended to change the law of reviewability. The conclusion is that "the background materials of the Act show an abandonment of the early extreme position of trying to eliminate unreviewability [Berger's position], and the specific legislative history is conflicting and confusing." [15]

I shall now present the legislative history opposed to Mr. Berger's position. My purpose is not to show that it leads to a conclusion against Berger; my purpose is to show that it is conflicting.

Attorney General Robert H. Jackson, in an analysis of the Walter-Logan bill of 1940, prepared at the President's request, said that the bill

> sweeps into the judicial hopper all manner of questions which have never before been considered appropriate for judicial review.
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> For example, such matters as the awarding of contracts, the acceptance or rejection of supplies, the granting or withholding of compensation or hospitalization from a veteran . . . may become subject to judicial review were this bill to become law, but which have never been regarded as so reviewable.[16]

This position was incorporated into the President's message vetoing the bill. The majority of the Attorney General's Committee recommended no change in availability of review. The minority of the Committee took care to provide that statutory provisions precluding review should remain valid and binding; this showed that even the minority rejected the Walter-Logan view (which is essentially what Mr. Berger advocates). The minority position was carried into section 10 of the administrative procedure bill. The view asserted by the document supporting the President's veto message prevailed.

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[14] Berger, *Rejoinder* 816-17.

[15] DAVIS, TREATISE § 28.08, at 41 (1958).

[16] 86 CONG. REC. 13945 (1940) (report to the President from Attorney General Robert H. Jackson accompanying veto message).

At the time the bill was before Congress, two groups were opposing each other, one led by Mr. Carl McFarland, Chairman of the ABA Special Committee on Administrative Law, and the other by Attorney General Tom C. Clark. When the two groups compromised, both houses unanimously passed the compromise bill. Although the two sides were at odds on most issues, on the question of reviewability the Attorney General and Mr. McFarland agreed. The Attorney General said that section 10 "in general, declares the existing law concerning judicial review." [17] Mr. McFarland said: "We do not believe the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved." [18]

The Senate Judiciary Committee Print said of section 10: "The introductory exceptions state the two present general or basic situations in which judicial review is precluded—where (1) the matter is discretionary or (2) statutes withhold judicial powers." [19] The word "present" seems to me to indicate an intent to have previously-existing law continue with respect to review of discretion, and this is the interpretion the courts have given.[20]

The Senate Committee said: "Section 10 on judicial review does not apply in any situation so far as . . . agency action is by law committed to agency discretion . . . . The basic exception of matters committed to agency discretion would apply even if not stated at the outset." [21]

The House Committee said: "Section 10 on judicial review does not apply in any situation so far as . . . agency action is by law committed to agency discretion. . . . Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act . . . ." [22]

This, then, is some of the legislative history against Mr. Berger's position. It seems to me rather substantial, just as the legislative history in support of Mr. Berger's view is rather substantial.

Mr. Berger in his latest pronouncement says that the legislative history is not conflicting.[23] *In his Columbia Law Review article, he has three pages under the title "The Legislative History" and those three pages do not mention any single statement I have quoted from*

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17 S. Doc. No. 248, 79th Cong., 2d Sess. 229 (1946).

18 *Id.* at 84.

19 *Id.* at 36.

20 See DAVIS, TREATISE § 28.16 (Supp. 1965), presenting the case law.

21 *Id.* at 212. (Emphasis in original omitted.)

22 *Id.* at 275. (Emphasis in original omitted.)

23 Berger, *Rejoinder* 816-17.

the legislative history.[24] Is he unwilling to look at the history that is against him?

For clarity, let me repeat that I do not base my position upon the legislative history; it seems to me too conflicting and confusing. My position is based upon an effort to find a sound solution. The legislative history, because it is so conflicting, does not compel any one interpretation. Under these circumstances, I am satisfied that, taken as a whole, it is not inconsistent with my solution.

The Case Law

In section 28.16 of the 1965 Supplement to my *Administrative Law Treatise*, I have comprehensively reviewed the case law on the subject of reviewability of administrative discretion for arbitrariness or abuse, and I see no reason to repeat that analysis. The analysis covers two Supreme Court cases and a dozen other federal decisions, all of which refuse review of administrative discretion for arbitrariness or abuse.

Since that Supplement was published, the Supreme Court has rendered a decision denying review to an exercise of administrative discretion,[25] and the Fourth Circuit[26] and a district court[27] have specifically adopted my analysis.

I know of no case that supports Mr. Berger's position.

In addition, the case law on the much broader question whether the Administrative Procedure Act changed any of the law of reviewability is reasonably uniform. The law remains essentially the same as the pre-act law, as chapter 28 of my *Treatise* and Supplement shows. Professor Jaffe reaches essentially the same conclusion: "The Administrative Procedure Act has had a negligible effect on the basic right to judicial review."[28]

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[24] Berger, *Administrative Arbitrariness* 62-65.

[25] Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965). The Court reviewed to determine whether the Mediation Board complied with the statute but refused to review the exercise of discretion.

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

[27] Vucinic v. United States Immigration & Naturalization Serv., 243 F. Supp. 113 (D. Ore. 1965). The court quotes the combination of the introductory clause of § 10 with a part of subsection (e) and says, as I have said: "The foregoing quotation . . . produces an unacceptable result if read literally. By its terms, the statute grants a court power to review an abuse of discretion except so far as the agency may exercise discretion. The exception altogether consumes the power." *Id.* at 116. The court then quotes from my *Administrative Law Text* and adopts my analysis. It concludes that power to deny an alien a parole is not "committed" to the District Director's discretion. *Ibid.* Both the decision and the opinion seem to me sound.

[28] JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 372 (1965). When Professor Jaffe says that "there are statutory discretions which are not subject to judicial review," he takes a position directly opposed to Berger's. *Id.* at 359-60.

Mr. Berger's principal claim of support in the case law is a dictum in a district court case that has now been decided by the Fourth Circuit.[29] The dictum does not seem to me to support him, but in view of the Fourth Circuit's opinion along another line, that question matters little.[30]

Mr. Berger spends many pages trying to tear down my analysis of cases. I have studied all he has written, and I find no reason to change my analysis of any case. In analyzing a case, Mr. Berger often argues against the court that has decided it. For instance, he says: "Next there are the *Cadillac* and *Pullman* cases which . . . 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.' But what then becomes of the equally 'plain' section 10(e) direction to set aside abuse of discretion?" [31] When he does this kind of thing, he implicitly acknowledges that the law of the cases is against him. And of course the specific answer to his specific question is that section 10(e) gives no "direction to set aside abuse of discretion." Section 10(e) gives a direction to set aside abuse of discretion except so far as agency action is by law committed to agency discretion. Mr. Berger repeatedly goes wrong by reading portions of section 10 without taking into account the "except" clause. For instance, he says without qualification: "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 . . . .' " [32] He says without qualification that "section 10(e) expressly instructs the courts to set aside action that is 'arbitrary' or an 'abuse of discretion.' " [33] In the act as written, what he quotes in

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[29] 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 (4th Cir. 1965).

[30] Mr. Berger spends three pages in his first article, Berger, *Administrative Arbitrariness* 75-78, and two pages in his third, Berger, *Rejoinder* 819-20, on Community Nat'l Bank v. Gidney, 192 F. Supp. 514 (E.D. Mich. 1961). The court first held that approval by the Comptroller of the Currency of establishment of a branch bank was not reviewable and later changed its mind. Granting and denying licenses has traditionally been reviewable, and therefore the holding that it was not seemed worthy of mention in the 1963 Supplement to my *Treatise.* It seemed wrong but unimportant, and I cited it with no word of approval or disapproval. Mr. Berger says falsely that I cited it "with approval." Berger, *Rejoinder* 819. When the court backtracked, the case was no longer noteworthy and I did not keep it in the 1965 Supplement. Mr. Berger implies that I have done something especially sinister in discarding this unimportant case. He further attempts to demonstrate inconsistency *on my part* by showing that what the court says is inconsistent with something I have said! He also seems to say that the court's backtracking supports his position; if a case holding that licensing is reviewable supports him, then any good law clerk can give him ten thousand cases that will support him.

[31] Berger, *Reply* 803.

[32] *Id.* at 785.

[33] *Id.* at 798.

these passages is modified by the "except" clause, which he completely ignores in such statements as the ones I have quoted.

The whole introductory clause of section 10 has two parts: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . ." Mr. Berger tries to distinguish some of my cases by saying that they come under the first part, not the second.[34] He apparently does not realize that whenever a statute precludes review of discretion, agency action is by law committed to agency discretion. That a statute precludes review does not mean that the discretion exception is inapplicable, for the two parts of the introductory clause overlap.

I do not know what Mr. Berger's main position about the case law is, for he never says.[35] His main point, though not clearly articulated, seems to be that the case law is wrong. This is apparently what he means when he says: "If I am not properly overawed by 'the cases' . . . I only follow an example sanctified by Professor Davis himself." [36] Then he quotes my statement that the ultimate principle (about judicial notice) is different from what the Supreme Court has said. He says he, too, can make an appeal to principle, to the statute, to the legislative history and to the Constitution. I agree that he can. But when he does, he seems to be acknowledging that the case law is against him, even though he refuses to make that acknowledgment directly and clearly.

My opinion is that the case law is (a) sound, and (b) uniform.

Constitutional Principles

Mr. Berger relies throughout his three presentations on the idea that the Constitution requires judicial review to protect against arbitrariness or abuse. For instance, he says that "in my view, the right to be protected against arbitrariness is rooted in the Constitution.

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[34] Berger, *Reply* 796-99.

[35] I am pleased with his statement near the end of his latest pronouncement that "there is a presumption that arbitrariness *is reviewable* unless there is 'evidence to the contrary' that Congress 'wished to close the door.'" Berger, *Rejoinder* 821. (Emphasis in original.) This is my position, too, and has been since I first wrote about reviewability in terms of "presumption" in 1954. I said in § 28.07 of my *Treatise*: "The decisions of the past two or three decades fit reasonably well the idea of a presumption of reviewability that may be rebutted by affirmative indication of legislative intent in favor of unreviewability, or by some special reason for unreviewability growing out of the subject matter or the circumstances." 4 DAVIS, TREATISE § 28.07, at 31. But Mr. Berger asserts that the idea of a presumption of reviewability "is vastly to be preferred to Davis' 'intrinsically unsuited' standard." Berger, *Rejoinder* 821. He misunderstands when he goes on to say: "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.'" *Id.* at 821. He fails to note that that statement is limited to "tasks which the judges deem inappropriate for judicial action." I still believe in a presumption of reviewability and I want to strengthen it.

[36] Berger, *Reply* 795.

. . ." [37] And he says: "It is not merely logic but the Constitution which is the source of the proposition that 'delegated power . . . may not be exercised arbitrarily.' " [38]

My opinion is that these Berger statements would be sound if they were properly limited. Cutting off judicial review of some administrative action in some circumstances would be unconstitutional. One reason we have so much judicial review of discretion is that our constitutional tradition calls for it.

But Mr. Berger's position is that *all* discretion must be reviewable for arbitrariness or abuse, and that position is not at all supported by constitutional doctrine. My position—challenged by Mr. Berger—is that *some* administrative discretion is unreviewable for arbitrariness or abuse, both under the APA and under the Constitution.

The case law is overwhelmingly in support of my position. For instance, when an officer was buying steel for the government, the Supreme Court in holding that the officer's determination was not judicially reviewable did not even mention the possibility that a constitutional question might be involved.[39] When in 1943 and again in 1965 the Supreme Court held administrative discretion unreviewable with respect to determining a unit for collective bargaining, neither the majority nor the dissenters in either case disclosed awareness of any constitutional question.[40]

The Practical Needs

My opinion is that making all administrative discretion judicially reviewable would be impracticable and that this is the reason that neither Congress nor the courts have done it.

Consider the young man during this Viet Nam period whose preference is for the nonmilitary. Discretion creates an international trouble spot. No judicial review. Discretion resorts to military power. No review. Discretion calls up more draftees. No review. Discretion changes a physical requirement so as to include the young man. No review. Discretion sends his unit to the trouble spot. No review. Discretion orders him into enemy fire. No review. Discretion, after he is wounded, keeps him and uses him again. No review. Discretion denies him the commission he seeks. No review. Discretion withholds the medal or other recognition he wants. No review. Discretion denies him money he thinks he is entitled to as a disabled

[37] Berger, *Administrative Arbitrariness* 57-58.
[38] Berger, *Reply* 809.
[39] Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).
[40] Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943); Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965). Section 28.19 of my *Treatise* entitled "What Is the Constitutional Principle Governing Unreviewability?" is devoted to the question.

veteran. No review. Discretion refuses him admission to St. Elizabeth's Hospital. No review. Discretion denies him burial at Arlington. No review.

In contemplating the foregoing paragraph, let us recall that the term "agency" in the APA includes the President, cabinet members and other executive officers.[41] It includes the military, except "courts martial and military commissions" and "military or naval authority exercised in the field in time of war or in occupied territory." [42] As I understand it, the technical law is that we are not at war in Viet Nam.

Do we want the courts to review for possible abuse of discretion all the determinations made by all officers of the army, navy and air force in *domestic* military posts?

Should any court have had the authority to decide whether President Kennedy abused his discretion in the Bay of Pigs venture? Should a court determine whether President Johnson is abusing his discretion in conducting the Viet Nam war, or in refusing to recognize China? The APA was fully applicable in 1955 when the Supreme Court held: "The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court." [43]

Should a court review for abuse of discretion such administrative action as: the President's appointment to a federal court in Massachusetts of one thought by some to be unqualified; a warden's assignment of a prisoner to a cell in the old and unpleasant part of the prison; an FBI agent's choice of an old enemy for investigation when the facts and circumstances surrounding five others who might be investigated are the same; the President's refusal of a pardon; a secret service agent's choice not to make an arrest that might properly be made; a decision by the Antitrust Division of the Justice Department to bring a proceeding against one company when half a dozen others would also be appropriate defendants; an antipoverty worker's decision denying use of government money to straighten a woman's teeth; a prosecutor's refusal to make a deal for a lesser charge in return for a plea of guilty?

The courts may be doing very well in their refusal to review some administrative discretion.

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[41] Section 2(a), 60 Stat. 237 (1946), 5 U.S.C. § 1001(a) (1964). Section 2(a) defines "agency" as "each authority . . . of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia."

[42] *Ibid.*

[43] National City Bank v. Republic of China, 348 U.S. 356, 358 (1955). In Ludecke v. Watkins, 335 U.S. 160, 164 (1948), the Court said: "The very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion."

Other Ways To Correct Arbitrary Discretion

I am as much against the arbitrary exercise of discretion as Mr. Berger is. Both in my *Treatise* and in the 1965 Supplement I have advocated enlargement of reviewability. But because I agree with the courts that some discretion is intrinsically unsuited to judicial review, I think the principal hope in a fight against the arbitrary exercise of discretion lies in measures other than judicial review. Vast discretionary power seems to me inevitable, but I think we need to cut back a great deal of *unnecessary* discretionary power; an outstanding example is the great power of our city police departments to modify or to nullify, through lack of enforcement or through selective enforcement, the criminal law enacted by legislative bodies. Many other officers of our federal, state and local governments have discretionary power that is broader than it should be. Even when the discretionary power is properly broad, we can do much more than we are doing to protect against arbitrariness. We need more rule making—and earlier rule making—as a means of confining discretion. When hearings are inappropriate, we need more findings of fact, reasoned opinions and respect for precedents as a means of greater consistency. We need more administrative checks on administrative discretion. Above all, we need to enlist much more than we do the natural ally of fairness and the natural enemy of arbitrariness—openness. The findings, the opinions and the results of discretionary decisions—even when hearings are not held—should be open to public inspection except when a special reason requires secrecy. As Brandeis said, sunlight is a good disinfectant. We need a greater ingenuity in developing better systems to check, to confine and to structure administrative discretion.

I hope Mr. Berger will direct his talents to fighting against arbitrariness on the front where the main hope lies.*

*EDITORS' NOTE: Mr. Berger has not been granted an opportunity to reply; following receipt of his second piece, the editors decided and communicated to both authors that Professor Davis' second response would conclude the debate.