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 Then he says a district court case³ “belie the Davis assertions that I do not cite a ‘single case.’”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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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.

in the Comptroller in passing upon applications for approval of bank
branches is not the type of discretion to which action has been ‘com-
mitted by law’ but is rather one of the character expressly made review-
able 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 Supple-
ment 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 pro-
tection 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.

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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).