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## The Place and Function of Judicial Review in the Administrative Process

Robert Kramer

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# The Place and Function of Judicial Review in the Administrative Process

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Professor of Law, Duke University, School of Law.

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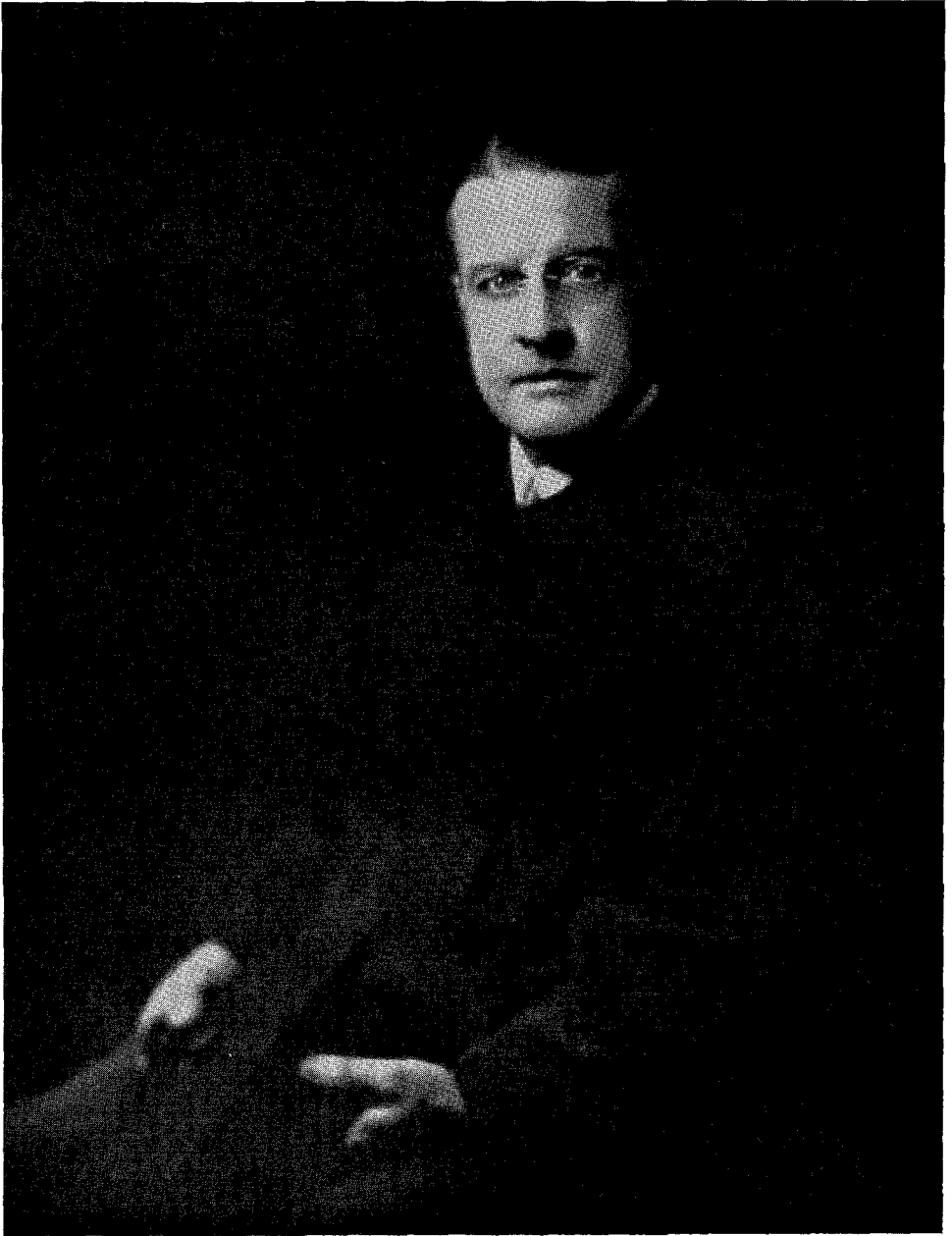
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PROFESSOR ARTHUR A. MCGIVNEY

ARTHUR A. MCGIVNEY

1890 - 1958

A distinguished career ends with the death of Professor Arthur A. McGivney.

He was a great lawyer, teacher, gentleman and friend. His tireless guidance and selfless devotion earned him the admiration of the community, the legal profession and the Fordham University School of Law.

The Editors of FORDHAM LAW REVIEW respectfully dedicate this issue to the memory of Professor Arthur A. McGivney.

## In Memoriam

For thirty-three years the scholarly teaching and resolute disposition of Professor Arthur A. McGivney were an inspiration to Fordham Law School. His unseasonable loss was mourned not only by his family and friends, but also by the community-at-large to which he unselfishly devoted his services.

The recognition he attained in his chosen field was merited by his authoritative presentation of the law, intellectual prowess, unimpeachable integrity and by his ability to convey exacting concepts. During his career, he ably and conscientiously trained future judges, lawyers and civil officials in the intricate legal principles of Trust, Estate and Tort law. His warm-hearted manner and Gaelic wit earned him the loyal affection of his students and colleagues.

He was a favorite son of New York and generously devoted his time and energy to many public service organizations. He was a member of the Committee on Legal Education, a member of the Board of Governors of the Guild of Catholic Lawyers and a director of the New York County Lawyers Association.

In appreciation of his able and devoted service, Fordham University was proud to confer on him its honorary degree of Doctor of Laws in 1956.

We yield to the inevitable with faith and a fervent prayer that the Lord will grant the departed eternal rest and peace.

THE EDITORS



# THE PLACE AND FUNCTION OF JUDICIAL REVIEW IN THE ADMINISTRATIVE PROCESS

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Administrative Process is an experiment with 'human nature'. In the sheer scope and the nobility of its effort, it has reason to expect more patience and tolerance, and more careful study, than it has received in some quarters.<sup>1</sup>

## INTRODUCTION

Today we are witnessing a period of intensive criticism and reappraisal of the entire administrative process. The immediate cause no doubt of the furor of study, writing, and speech-making in this area is the now famous 1955 Reports of the Second Hoover Commission and its Task Force.<sup>2</sup> These Reports, with modifications, have become the basis for a legislative program sponsored by the American Bar Association, which, if enacted substantially in its present form, will, if the aims of its sponsors are fulfilled, have effects perhaps as drastic and far reaching

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1. Redmount, *Psychological Views in Jurisprudential Theories*, 107 U. Pa. L. Rev. 472, 512 (1959).

2. Commission on Organization of the Executive Branch of the Government, *Report to the Congress on Legal Services and Procedure* (1955). See Commission on Organization of the Executive Branch of the Government, *Task Force Report on Legal Services and Procedure* (1955) [hereinafter referred to as *Task Force Report*]. See the Symposium on these reports in 30 N.Y.U.L. Rev. 1267-1417 (1955). See also Arpaia, *The Independent Agency—A Necessary Instrument of Democratic Government*, 69 Harv. L. Rev. 483 (1956); Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 Wis. L. Rev. 95; Buttle, *A Long Quest: The Search for Administrative Justice*, 44 A.B.A.J. 450 (1958); Carrow, *Administrative Adjudication: Should Its Role be Changed?*, 27 Geo. Wash. L. Rev. 279 (1959); Cole, *Administrative Agencies and Judicial Powers*, 44 A.B.A.J. 953 (1958); Cooper, *Administrative Law: The Process of Decision*, 44 A.B.A.J. 233 (1958); Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A.J. 945 (1958); Fuchs, *The American Bar Association and the Hoover Task Force Administrative Code Proposals*, 23 ICC Prac. J. 870 (1956); Fuchs, *The Hoover Commission and the Task Force Reports on Legal Services and Procedure*, 31 Ind. L.J. 1 (1955); Goff, *Views on the American Bar Association Proposed Code of Administrative Procedure*, 25 ICC Prac. J. 1097 (1958); Kinter, *The Trade Court Proposal: An Examination of Some Possible Defects*, 44 A.B.A.J. 441 (1958); Kinter, *Voluntary Improvement of Administrative Processes in Lieu of Statutory Changes*, 25 ICC Prac. J. 1081 (1958); Sellers, *The American Bar Association's Legislative Proposals Respecting Legal Services and Procedure*, 24 ICC Prac. J. 1115 (1957); Symposium—*The Growth of the Administrative Process: A Reappraisal*, 16 Fed. B.J. 443-570 (1956); Thomas, *The American Bar Association's Legislative Proposals as They Affect the Interstate Commerce Commission and its Practitioners*, 24 ICC Prac. J. 1129 (1957); Thomas, *The Proposed Code of Federal Administrative Procedure*, 25 ICC Prac. J. 518 (1958).

on federal administrative law as did the Administrative Procedure Act of 1946.<sup>3</sup>

### I. THE ADVENT OF BIG GOVERNMENT

There are perhaps more fundamental factors which give rise to this vigorous contemporary debate over the administrative process. Most Americans have an almost instinctive distrust and dislike of government, especially big government. While grateful for the bounties it renders to us, we resent the ever increasing governmental intrusions into so many aspects of our private lives. Everywhere we look, everything we read or hear, portends more, not less, government; bigger, not smaller, bureaus, on every level—local, state, and federal.

There are those<sup>4</sup> who counsel that democracy, as we know it, is wholly incompatible with social and economic planning by the state, with big government, and with a multitude of administrative agencies. They would have us believe that unless we can somehow arrest this ominous and seemingly inevitable trend toward greater government control, there is no escape from complete destruction of many of the most cherished ideals underlying our legal and political institutions. Their thesis is that administrative agencies necessitate the delegation of wide discretionary powers to state officials, a delegation contrary to any rule of law, for it means government at the unchecked whim of the individual exercising these powers. Such discretion makes it impossible to predict future government decisions, since they depend solely upon the unbridled will of the administrator. Others, more hopeful, despite disagreement among themselves as to specific methods, believe that we may yet, though time be short and the task difficult, control the many novel and explosive forces confronting modern civilization without sacrificing the essentials of our traditional personal freedoms.

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3. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1952). See A.B.A. Special Committee, Final (April 13, 1957) Draft of Proposed New Code of Administrative Procedure, 9 Ad. L. Bull. 184 (1957) (introduced in Congress as S. 4094, 85th Cong., 2d Sess. (1958)) [hereinafter cited as A.B.A. Proposed Code]; Administrative Practice Act Introduced in the 85th Congress, 43 A.B.A.J. 425 (1957) (introduced as H.R. 3349, H.R. 3350, S. 932, 85th Cong., 1st Sess. (1957)) [hereinafter cited as Proposed Practice Act]; for the A.B.A. legislative program, see Proceedings of the House of Delegates: Midyear Meeting, Feb. 20-21, 42 A.B.A.J. 371, 372-77 (1956).

4. See Hayek, *The Road to Serfdom* (1944). Cf. Cowan, *Group Interests*, 44 Va. L. Rev. 331 (1958); Cowan, *The Impact of Social Security on the Philosophy of Law: The Protection of Interests Based on Group Membership*, 11 Rutgers L. Rev. 688 (1957); Fuller, *Freedom—A Suggested Analysis*, 68 Harv. L. Rev. 1305 (1955); Fuller, *Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom Through Law"*, 54 Colum. L. Rev. 70 (1954); Kramer, *Values in Land Use Controls: Some Problems*, 7 Am. U.L. Rev. 1 (1958); M. Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (1951).



## II. THE ADVENT OF THE ADMINISTRATIVE PROCESS: ITS MERITS AND LIMITATIONS

At the very heart of these shattering dilemmas is the administrative process. Through it the state has extended its controls into every aspect of our individual and collective activities. The reasons why the administrative agency was the chosen instrument for the vast increase in government functions include: (1) The feeling that all relevant matters, not merely those specially chosen by private adverse parties, should be considered in cases involving the public interest; (2) the need for continuous, consistent, integrated regulation and control; (3) the necessity for intelligent coordination of policy making and law enforcement; (4) the demand for the full-time services of experts, with large staffs of many skills—skills enhanced by constant work in a specialized field; (5) the patent inability of legislatures to do more than set forth broad standards and policies; (6) the seeming failure of the judiciary, passive at best, to come to grips with so many of these problems; (7) the tremendous volume of cases involved; (8) the demand for an active, not passive organ to carry out the will of Congress; (9) the need for swift, inexpensive action; and (10) the often imperative requirement for the wise exercise of great amounts of flexibility and discretion. But today, perhaps, we are more conscious than ever that the administrative process possesses inherent defects and limitations. It does not solve all problems. Other tools, both old and new, are also available to do certain jobs as well or even better.<sup>5</sup> Agencies, for example, may become so industry-oriented as to neglect individual or public interests, or allow themselves to be used by one group to dominate another. The regulator, especially when his mission to eradicate an existent evil is accomplished, or when Congress fails to give him specific statutory policy mandates, often is so influenced by the potent economic, political, and social forces he regulates that he becomes their champion and defender, rather than their controller. On the other hand, a newly-created agency may be imbued with such an overwhelming zeal to realize its purpose that it disregards or destroys

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5. See 1 Davis, *Administrative Law Treatise* §§ 1.03, 1.05-.07 (1958) [hereinafter cited as *Treatise*]; Buttle, *A Long Quest: The Search for Administrative Justice*, *A.B.A.J.* 450 (1958); Carrow, *Current Problems in Administrative Law*, 9 *Va. L. Weekly Dicta Comp.* 1 (1958); Cole, *Administrative Agencies and Judicial Powers*, 44 *A.B.A.J.* 953 (1958); Jaffe, *The Effective Limits of the Administrative Process: A Re-evaluation*, 67 *Harv. L. Rev.* 1105 (1954); Kramer, *Values in Land Use Controls: Some Problems*, 7 *Am. U.L. Rev.* 1, 26 (1958); Parker, *Why Do Administrative Agencies Exist? A Reappraisal*, 45 *Geo. L.J.* 331 (1957); B. Schwartz, *Administrative Justice and its Place in the Legal Order*, 30 *N.Y.U.L. Rev.* 1390 (1955); L. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 *Harv. L. Rev.* 436, 473 (1954); Symposium—*The Growth of the Administrative Process: A Reappraisal*, 16 *Fed. B.J.* 443 (1956); Jaffe, *Book Review*, 65 *Yale L.J.* 1068 (1958).

anyone or anything which delays or obstructs it, regardless of the effect upon individual rights and liberties. Thus, there may be a notable lack of objectivity in an agency because of its industry orientation or its crusading purpose. The short tenure of office and need for annual appropriations plus a constant fear of legislative investigations make administrators most receptive to political pressures. The executive, too, can influence their actions greatly. Many policy changes are so subtle that the appointment of sympathetic administrators, rather than statutory amendment, is the most effective way to achieve them.

Furthermore, administrators, as experts, have their limitations. Pre-occupied with their narrow specialty, they tend to see only its problems and to overlook its over-all place in a democratic state. They almost unconsciously assume that the remedy for failures is more controls, more restrictions, not more freedom for individuals and groups. In many instances, also, administrators are called upon to make basic managerial decisions regarding pricing, production, marketing, and capital expenditures, without having to bear the ultimate responsibility for the correctness of such decisions by facing angry stockholders or bankruptcy. Their interference, then, is apt to be irresponsible, to discourage private initiative and private responsibility by the company management.

In many ways agencies are not as efficient, expeditious, or inexpensive, as originally hoped. For one thing, it becomes increasingly difficult for them to hire and retain capable personnel. Moreover, to insure due process and fair play, administrators must follow certain basic procedural safeguards, all of which slow down and augment the cost of administrative action. At the same time, business, society, and our individual lives change at an ever swifter pace, demanding bold and imaginative innovations. Yet, administrative rules must, of necessity, often be based largely upon a static structure. The very formulation and promulgation of rules and regulations for any activity requires a certain minimum period of time, during which the assumption is made that no drastic changes will occur in the problems to be solved.

Even if the administrative process lacks judicial objectivity and bears other defects, its advantages cannot be lightly dismissed. One cannot deny the need for its expertness and discretionary powers, its ability to develop policies derived from an over-all experience and the impact of continuous first-hand grappling with tough issues. This expertness of the agency represents the combined total knowledge of all its staff members obtained from daily contact with various specialized problems. An agency is often the most effective means of fact-gathering and can dispose most efficiently of large numbers of controversies within the areas of its special competence, pursuant to policies laid down by legislatures, the

electorate, and the courts. It surely needs much freedom to carry out these functions. Although we are beginning to grasp both the limitations and virtues of the administrative process, we are yet far from the development of rational standards—indeed, we often do not even appreciate the factors to be considered—in determining whether or not to use this process to cope with a given social, economic, or political problem.

The truth is that not too much should be expected from our courts and administrators. Too often, one believes that a complex problem can be solved simply by passing a law delegating to an agency full power to deal with it. This type of statute is manifestly unfair to the agency, which has a right to expect some form of workable indications of legislative preferences on major policies. Yet, many enabling statutes have a radical lack of any meaningful statutory policies regarding the area in which the agency is to operate;<sup>6</sup> others impart confusing and even conflicting policy standards;<sup>7</sup> and some contain policy criteria long made obsolete by the rapid changes in the American economy.<sup>8</sup> An agency cannot make policy fairly, consistently, and vigorously, in accord with the wishes of the people and their elected representatives, when there is no congressional mandate or popular support or preference for any particular policy in the agency's field of operation. Given a mandate to act, to eradicate a specific evil or control it, an agency will fight and fight hard to carry out its mission—perhaps so much so that it may even be blind to resulting injuries upon the liberty and property of individuals. But when a given mission is ended, the agency necessarily settles down, views its handiwork as good, defends the status quo, for which it is partly responsible, and is no longer creative. Policy making is political and demands creative ability of the highest order when broad issues and problems arise. If Congress, the People, and even the President are muddled and at a loss to give any real statutory policy standards to the agency, one can hardly blame the latter for failure to evolve a rational and workable policy. Nor can a court be expected upon judicial review,

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6. For example, the FCC has simply been directed to regulate "in the public interest" a field with tremendous and complex problems with abundant competitors seeking a limited number of valuable and highly prized government-awarded channels for TV stations. See H.R. Rep. No. 1141, 85th Cong., 2d Sess. 37, 62 (1959). See also the statutes involved in *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Carlson v. Landon*, 342 U.S. 524 (1952); *Lichter v. United States*, 334 U.S. 742 (1948); *Fahey v. Mallonee*, 332 U.S. 245 (1947).

7. For example, Congress has simultaneously favored a national policy in the antitrust laws of competition and a policy of monopoly in many regulatory statutes, such as those administered by the ICC, CAB, Maritime Board, etc.

8. For example, the ICC was ordered in the 1930's to apply a coordination policy to a static depressed economy apparently needing allocation of fixed resources. Today this policy is obsolete in our rapidly growing and changing society.

to determine if the agency has exercised its powers within the limits set by Congress, when Congress has failed to specify any workable limits or policies to be followed.

### III. THE FUNCTION OF JUDICIAL REVIEW IN THE ADMINISTRATIVE PROCESS

The crux of any discussion of the administrative process is the question of judicial review, to which most of the tremendous business of administrators is never subjected. At best, only an insignificant fraction of all administrative acts will or can ever be reviewed by the courts, or even be the subject of a request for judicial review.<sup>9</sup> Nor is judicial review itself a wholly beneficial thing, for it, too, has grave shortcomings. Courts may add greatly to the delays and costs of administrative action, suspend essential activities, block programs desired by the overwhelming majority of the voters, and obstruct both the legislative and executive branches in carrying out most efficiently their duties. Judges may also err in deciding cases or substitute an amateur's guess for an expert's intuition. Why then this demand for judicial review? Perhaps it is simply the howling of those who distrust and fear all government, who object to the substantive programs of the agency rather than the administrative process, and who refuse to believe administrators can be objective and reasonable. There seems, however, to be more at issue here.

Courts are relied upon to guarantee the constitutional and legislative limits set upon executive power. Therefore, embedded in the emphasis upon judicial review are some of the most basic principles of a democratic society. To some, judicial review is a reflection of the American ideal of a "government of laws rather than of men." But a government cannot exist which does not function through and upon human beings. The fundamental issue here perhaps is how to control the individual whims and subjective factors present in men. We desire objectivity in government, to prevent arbitrary exercise of power, and yet preserve mercy with justice. This is not an easy ideal to attain when vast powers are given administrators to handle the complexities of contemporary civilization. To others, the real basis of judicial review is found in the doctrine of separation of powers. The very checks and balances of the Constitution, however, negate any ideal, rigid allocation of powers. Adjudication is not purely judicial since judges can and frequently do make law in deciding cases. Here, the basic factor may be the fear of unlimited, unchecked power in any governmental branch. Power must be divided and its exercise kept in restraint. Still others stress separation of func-

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9. See Gellhorn & Byse, *Administrative Law—Cases and Comments*, 61, 641-43, 660-66 (1954); 1 Davis, *Treatise* § 1.02.

tions. No man should be legislator, prosecutor, jury, and judge. Yet an administrative agency is not one man, but a group of men often faced with rigid internal separation of functions imposed by design or necessity. Again, the fear of too much unlimited power in the hands of one group seems basic. The need to preserve due process of law in both procedure and substance, and the desire to keep the judicial power inviolate from alien encroachments, are other arguments often voiced.

We can perhaps best sum up the need for judicial review under the ancient phrase, "rule of law." This phrase more accurately reflects the real threat posed by the administrative process with which judicial review seeks to cope: how to make certain that there are definite limits, effectively enforced, upon the tremendous powers exercised by the modern state through the administrative process which affect the lives, properties, and fortunes of its individual citizens.

By "rule of law"<sup>10</sup> is meant the thesis (which is not necessarily either what the actual law has been, is, or will be) that: (1) no government official may or should possess or exercise arbitrary power (as opposed to power to exercise discretion reasonably) over the person, interests or liberties of an individual; (2) everyone, be he private citizen or government official, is so far as possible, equally responsible before the law and may be sued for damages or compelled by a suitable tribunal to account for his acts; and (3) although protection of individual rights against state power may be given in many ways—by constitutional guarantees in abstract form, by alert legislatures, by conscientious executives—experience has shown that judicial remedies are often the most effective.<sup>11</sup> The executive seldom dissents from the administrative action; the legislature is often too busy to watch closely enough and too partisan. We turn to our courts, therefore, to protect our individual liberties and to insure our economic, political, and social rights, including our gratuities and bounties, free of arbitrary restraints. The comparatively rigid procedures in courts are actually designed to create as much objectivity as possible and to restrain the individual wills of the judges by technical

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10. See Jones, *The Rule of Law and the Welfare State*, 58 *Colum. L. Rev.* 143 (1958). See also 1 Davis, *Treatise* §§ 1.08-09.

11. See 1 Davis, *Treatise* § 1.08, at 55 (1958): "[S]ome of the meanings of the rule of law or supremacy of law that are most common include; (1) law and order, as distinguished from settlement of controversies by resort to force; (2) a preference for fixed rules of law as compared with broad discretionary power; (3) the elimination of all discretionary power from processes of government; (4) the reverse of arbitrariness, of tyranny, of dictatorship, of totalitarianism; (5) due process of law, or equality, or the law of the land, or a higher law against which statutes are judged; (6) preference for judges of regular courts as compared with administrative officers; and (7) judicial review of all governmental action, or of all administrative action, or of some administrative action, or of determination involving constitutional issues."

rules, delays, and formalities. We recognize that power may be beneficial, when wisely used, and absolutely essential. Even so, it is always capable of abuse and of becoming dangerous, destructive, and terrifying. Initial exercise of power should always, therefore, if of any importance, be subject to check by an independent authority which has no power of *de novo* review. The legislature set limits on administrative power which are enforced by the judiciary.

Minimal effective checks on administrative power require that: (1) each individual whose interests are directly affected by government action shall, if he wishes, have a meaningful day in court (not necessarily a court of law), where he is allowed to present his case upon the assumption that someone with real authority will in good faith seriously consider his statement before deciding the case; (2) the deciding officers shall be independent and objective—inwardly free from influences of personal gain or partisan or popular bias, and outwardly free from external direction by political or administrative superiors—in deciding individual cases on their merits; and (3) decisions shall be reasoned, taking into account both general principles and the particular situation, and revealing, so far as possible, the relevant factors and theories upon which the decisions are based, thus avoiding either arbitrary departures from general rules or unfair application of general rules to particular facts contrary to their true spirit and intent.

To provide effective power checks within the administrative process itself is difficult. In some cases, there may be adequate administrative check on the initial action, but this is rarely true. Private persons, moreover, will not usually have confidence in administrative checks and reviewers. They want judicial inquiry regarding questions of law, fair procedure, and the substantiality of the evidence. Moreover, for an agency, the most vital question usually concerns finding a positive solution for the problems entrusted by the legislature, rather than preoccupation about the legitimacy or legality of agency actions. If judicial review is limited in scope to illegality and arbitrariness, there is then a proper functional division between judge and administrator. The administrator gains in public confidence because his is not the final say on legality, or on questions arising in the large area of legitimate doubt and dispute over the limits of his discretionary powers.

There is another important factor in the administrative process which shows the need for judicial review. Administrative orders and decisions are obeyed and accepted in part because they are supported and enforced by the power of the state. They are also accepted because regarded as fair and just in their own right, and because viewed as the product of a government or agency which is regarded as serving a common need and

indispensable function in our society. There are certain attributes which we usually look for in determining the fairness and justice of a decision in its own right, so far as procedure is concerned. We ask if the judgment was arrived at (1) only on the basis of the evidence and arguments offered by the parties, (2) after all parties had a chance to present their case fully, (3) in a real controversy, (4) where the decider lacked any interest in the outcome of the case, (5) where he acted not on his own initiative, but at the request of the parties, and (6) where he decided only the controversy before him. Administrative decisions often depart widely from these standards for what are deemed compelling reasons. Thereby they may forfeit public confidence in their fairness and justice and rely for acceptance instead upon public respect for government and the state, as well as fear of the possible invocation of police force. For example, administrators may rely partly on evidence and arguments not offered by the parties, without affording a full hearing. Administrators may act upon their own initiative frequently and even have an interest in the outcome. Such factors greatly weaken the moral force, so to speak, of their decisions. But the availability of judicial review in those cases where these conditions are present may do much to restore the moral force otherwise lacking and thus secure public acceptance of the fairness and justice of administrative actions.

The existence of judicial review is a constant reminder to the official that excessive actions risk judicial inquiry and reversal. It is a constant source of assurance and security to the individual citizen that he has this method of vindicating his rights against the state before an independent tribunal. Moreover, it is, if properly limited and exercised (so as not to substitute judicial for administrative judgment on matters within the agency's special competence), an actual source of strength to the administrative process. Public confidence in government is increased, and courts are allowed to contribute their special talents to the administrative process in such areas as constitutional issues, statutory interpretations, establishment of procedural standards for fair play and due process, and determinations that administrative findings are supported by substantial evidence.

In addition, there are times when the expert may be blind to values and factors beyond the purview of his particular competence or specialty which merit consideration. There are broader policies found elsewhere than in the agency's enabling statute. An agency must be brought by judicial review into harmony with all law—its own enabling statute and other statutes, the Constitution, and common law. For example, the peaceful settlement of labor disputes may prove too costly if free speech is thus sacrificed; the fostering of a strong railroad or air carrier industry may clash with the maintenance of a truly competitive economy; the

needs for a vigorous munitions industry may run counter to the values of small business in our economy. The administrative expert immersed in solving his own problem may not see how his apparently efficient solution impairs even more important values in our society. The judge is often far better equipped to fit the specialized agency into its proper place in the over-all pattern of our law and society.<sup>12</sup>

An administrative agency is neither fully representative in the sense that a legislature is, nor free from all bias. It is created for specific purposes and has a statutory command predisposing it towards certain interests—labor, industry, etc. An agency finds it difficult to be, or appear to be, as objective as a court, for policy-making involves a choice of one interest over others, if the policy is to have force and stability. Thus an agency must constantly prefer and choose, make enemies and allies, and represent some interests more than others. There is no escape.

Courts are needed to protect those regulated by the agency or not fully represented by the agency, and to protect minority groups in the regulated class from pressures the majority may exert upon the agency to exploit or minimize minority interests. Judges are experts of synthesis. Their perspective is wide, and they are usually cognizant of conflicting societal goals. On the other hand, courts cannot provide a constant check to bad administration or a positive spur to creative administration. Hence the area of discretion and policy-making is not for them. Good administration is basically achieved within the organization itself. We look to the courts, not the agency, therefore, primarily for ultimate protection against government abuse, because a guarantee of legality by an organ independent of the executive is desirable.

If the administrative process is part and parcel of an imperative delegation of power to government officials to enable them to handle adequately the problems of modern society, then judicial review seems essential to insure that this power be exercised conscientiously, within the limits set by the legislature and the Constitution, and in accord with the minimum demands of procedural fair play. The delegation of discretionary powers to individuals, is neither new nor foreign to a "rule of law." Judges have long exercised wide discretion in deciding cases. What is novel is the enormous amount of discretion entrusted to modern administrators. Judicial review preserves the essentials of due process inherent in a government of laws, and not of men, by restraining arbitrary and illegal exercises of administrative discretion. A delegation of power implies some limit. Action beyond that limit is illegal. Judicial

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12. Cf. *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) (seamen strikers on ship may not be reinstated by NLRB); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952) (retroactive change in NLRB policy on back pay not allowed).



review constitutes an attempt to make administrative action legitimate, just, and nondiscriminatory, both in procedure and substance.

So far as judicial review of administrative action is concerned, what is perhaps the most difficult and least explored question of the rule of law does not present itself in an acute form. This is the problem of determining which controversies are appropriate and amenable to solution through the judicial process, and which are not. When the matter is *originally* presented to the administrative agency, this is frequently the key issue, and so too when the question is raised whether the matter shall be handled at all through the use of an administrative body. If the administrative process is appropriate, the type of procedure and hearing, if any, and the nature of the hearing the administrator shall use must be determined. But assuming the administrator has acted or reached a decision, as a rule there can be no question about the availability of judicial review being appropriate save in extraordinary situations. Whether the matter should ever have been referred at all to the administrator in the first place, and whether the administrator followed the procedure best adapted to its fair solution, are quite different matters.

The enormously difficult problem today is how to extend judicial review to new areas of state action employing administrative process without crippling the administrator and negating his valuable qualities, or placing demands upon our judicial system which cannot be met without impairing the essential attributes of an independent judiciary. This calls for many things: realistic procedural standards, meaningful statutory standards, and, above all, discriminating techniques for judicial review. We cannot expect every administrative error to be corrected by a court. We cannot rightly look to judges to reverse major policies embodied in statutes by legislators, or to obviate all the effects of poor agency appointments. Judicial review must be utilized with discrimination and confined to those areas where it will accomplish the most good, where judges have the most to contribute, and where its merits clearly outweigh its disadvantages.

#### IV. THE RELATION OF AVAILABILITY OF REVIEW TO SCOPE OF REVIEW

There is no need here to embark upon a detailed study of all, or even some, aspects of judicial review, since others have done so superbly, leaving little to add.<sup>13</sup> Yet, in this field, as in so many others, there is great danger in abstractions and generalities divorced from concrete applications. Indeed, an examination of case law emphasizes the fact that perhaps the gravest error committed in judicial review has been the

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13. My debt to Professors Davis and Jaffe is tremendous. I have availed myself freely of their research and conclusions in this field, as must anyone who now labors in it.

attempt of judges and lawyers, in an understandable effort to insure desirable predictability of future cases, to lay down hard and fast rules admitting of no future exceptions or qualifications. Such attempts are almost always doomed to failure. It is only a matter of time until these rules are qualified, exceptions are created, and ways are found to circumvent their rigidity. Dogmas and absolutes are deceptive and dangerous here. There is as much need to allow discretion to judges in fashioning techniques of judicial review as to give discretion to administrators. We must face up to the fact that pinpointing rules of judicial review with mathematical precision is both unwise and impossible. If judicial review is to be effective, we must be prepared to put our confidence in the wisdom and restraint of both judges and administrators, and to give them latitude to use their valuable experience, expertness, and qualities.

The first major problem is availability of judicial review. The general statement that no rule, legislative or judge-made, should exclude *all* judicial review in any given type of case at *all* times<sup>14</sup> is not likely to be challenged. Only rarely has Congress attempted to enact sweeping bans on all judicial review of administrative action in a case. Still more rarely have courts either created a judge-made ban of this type or given their complete assent—without leaving a possible loophole—to such a legislative ban.

As indicated, the problem has two aspects: legislative rules for availability of judicial review, and judicially created rules. Often the two interblend, but so far as possible, it is helpful to consider them separately. More important, the problem of availability of review becomes really meaningful only if broken down into several different questions. In a concrete case, the question raised is not apt to be whether *any* judicial review *at all* is available for this administrative action. Instead, the questions asked are: (1) may this party, (2) at this time, (3) in this kind of proceeding, (4) in this particular court, obtain (5) any review of these specific issues about this administrative proceeding, and if so, (6) how much review on each issue will this court give? These questions in turn give rise to further inquiries, such as: (1) what type of hearing, (2) what type of record, and (3) what type of decision, have been given by the agency in this case? The last three issues raise the critical problem of what are the basic prerequisites for meaningful exercise of judicial review.

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14. See 4 Davis, *Treatise* §§ 28.05-21; Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 421, 451-52 (1954); Jaffe, *The Right to Judicial Review* (pts. 1-2), 71 *Harv. L. Rev.* 401, 420, 769 (1958). See also Carrow, *Types of Judicial Relief from Administrative Action*, 58 *Colum. L. Rev.* 1 (1958); Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 *Rutgers L. Rev.* 449, 476-81 (1958).

In reality, the broad question of the availability of review may be divided into two major phases. First, to what specific matters or issues, if any, is review limited in this particular case: will there be review of all or only some or none of the (1) constitutional issues, (2) jurisdictional issues, (3) issues of statutory interpretation, (4) issues of law, and (5) issues of fact. Review may extend to every kind of issue of law or fact. Review may be limited to certain specified factual or legal matters, such as fraud, gross mistake, malice, citizenship, confiscation of property, fairness of the procedure, etc. Review may be decreed on all issues of a specified kind only, such as constitutional ones. These problems are usually considered as aspects of the problem of availability of review rather than scope: is review available on this specific issue of law or fact? The second phase of availability of review—the one customarily discussed as scope—is *how much* review is to be given on a particular issue or matter which is subject to judicial review. Review may range from trial de novo, substitution of the court's judgment for that of the administrator, to a far more limited test such as reasonableness or the presence of substantial evidence, warrant in the record, or a basis in fact.

Our discussion will first focus upon availability of review in the sense of whether review may be obtained of *all* or only *some* or *none* of the concrete issues or matters of fact or law raised by the parties. Then we shall briefly take up, in turn, who may obtain review, in what kind of proceeding, and at what time. Subsequent attention will be given to certain basic conditions for meaningful judicial review, such as an adequate administrative hearing, record, and decision. Finally we shall consider the usual problems of scope of review: how much review should be given by a court of any specific issue of law or of fact which is subject to its review.

Actually, the two aspects of what has been here termed availability of review—availability and scope or amount—are interwoven. Whether or not a court will grant any review at all of a specific issue or matter may well be decisively influenced by the scope or amount of review that will be given if review is made available. If a court makes review available on a specific matter, such as fraud, it may restrict the review to only some of the many issues raised by that matter, such as problems of constitutionality, jurisdiction, statutory interpretation, and fair procedure. The amount of review also on any issue or matter may be limited to reasonableness or substantial evidence. There seems no reason for judicial hesitation to make available review of almost any agency action to a limited extent, absent some powerful reason to the contrary. By limiting the *amount* of review, when review is made available on a specific issue

or matter, courts will not usurp the functions of agencies or unduly interfere with the administrative process.

Therefore, it is proper to begin with a very strong presumption that there should always be *some* limited judicial review of any administrative action, negative or affirmative, available to one who has an interest immediately and acutely affected by the administrative act, so that at some point, he can test the validity of the act. The review may be limited in two respects. First, only certain issues (constitutional, procedural, statutory interpretation) or certain matters (citizenship, fraud, malice) will be reviewed by the court. Second, these issues or matters will be reviewed only to a limited degree (reasonableness or substantial evidence). The second type of limitation is usually warranted. The first type is exceptional and far less easy to defend. Limitations on review should usually be those of the second type (how much), rather than those of the first type (availability), if judicial review is to fulfill its legitimate role in the administrative process. The second type of limitations adequately prevents overextension of judicial review and resulting impairment of the administrative process. Limitations of the first type prevent adequate independent checks by the judiciary upon administrative power. Judicial review, of course, is not an unmixed blessing. If unwisely exercised, it can do great harm to vast numbers of persons. If not highly selective, it can overwhelm our judicial system by its sheer bulk. Administrators may be far better qualified than judges to perform certain governmental tasks, and judicial review may add to delay and expense and be far from the most efficient system which can be devised. In spite of all these factors, judicial review, properly limited in amount or scope, is one of the most effective methods yet devised to protect an individual's life, property, and liberty against arbitrary or harsh or unreasonable exercise of government power.

Generally, therefore, some amount of judicial review should be the rule for all administrative acts affecting legal rights absent special reasons to the contrary, such as an express legislative mandate barring it. Deferring consideration of the *amount* of review on any specific issue or matter until later, our problem now is whether in some cases review should be restricted to certain types of issues, such as procedural or constitutional ones, or certain matters as fraud, or altogether banned on *all* issues and *all* matters. Here there are certain areas which, though unusually difficult, may cast more light on this problem if examined in more detail.

## V. SOVEREIGN IMMUNITY, MANDAMUS, AND RULE MAKING

One doctrine that often causes trouble is sovereign immunity.<sup>15</sup> If a sovereign may not be sued without its consent, how can an individual petition a court to review at all any action taken by the government through an administrative agency? If a statute expressly or by implication allows judicial review of the administrative action, there is no problem because the government has thereby consented to the suit. Suppose there is no statute of this type? Suit may still be allowed on the artificial theory that acts of a government official, if illegal because unconstitutional or beyond the scope of his statutory power or jurisdiction, are not those of the government. If an official exceeds his authority, he has thereby lost sovereign immunity by ceasing to act as a government representative.<sup>16</sup>

A more forthright attitude is that in all cases the doctrine of sovereign immunity, which is based on historical tradition and not logic, should be sharply and narrowly limited. To order an administrator to do what a statute requires is to implement, not coerce, the will of the sovereign, the People. Even a legal act of an official may be improper if done for an improper or personal motive. Where judicial review of an administrative action is requested by a private party, money damages are not usually sought. There seems little reason, therefore, apart from an express legislative prohibition against judicial action, to preserve the sovereign immunity doctrine. This is true whether the administrator is acting unconstitutionally,<sup>17</sup> in excess of his authority,<sup>18</sup> committing illegal acts

15. See 3 Davis, *Treatise* chs. 25-27; Davis, *Administrative Officer's Tort Liability*, 55 *Mich. L. Rev.* 201 (1956); Davis, *Tort Liability of Governmental Units*, 40 *Minn. L. Rev.* 751 (1956); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 *Cornell L.Q.* 3 (1954); Jaffe, *Developments in the Law—Remedies Against the United States and Its Officials*, 70 *Harv. L. Rev.* 327 (1957); Jaffe, *The Right to Judicial Review* 1, 71 *Harv. L. Rev.* 401, 432-37 (1958). Section 1009(c) of the A.B.A. Proposed Code states: "Proceedings for review may be brought against (1) the agency by its official title, (2) individuals who comprise the agency, or (3) any person representing the agency or acting on its behalf in the matter sought to be reviewed in the judicial district where the defendant resides or wherein the act or omission complained of occurred." This seems a waiver of sovereign immunity.

16. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) (excess of statutory authority); *Ex parte Young*, 209 U.S. 123 (1908) (Constitution). But cf. *Mine Safety Appliances Co. v. Forrester*, 326 U.S. 371 (1945); *Morrison v. Work*, 266 U.S. 481 (1925).

17. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ex parte Young*, 209 U.S. 123 (1908). The unconstitutionality need not relate to a statute. *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *United States v. Lee*, 106 U.S. 196, 218 (1882).

18. *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912).

while within his valid authority,<sup>19</sup> or whether property, tort, or contract is involved, or some affirmative or negative relief is being sought.<sup>20</sup> There should be no government infringement of an individual's legal rights without judicial relief in such circumstances. Of course, the administrator's discretionary powers, especially if he be a high government official or the head of state, may be so great as to enable him to reach erroneous results with which a court may not properly interfere. Understandably, no court is likely to command the President to do an act.<sup>21</sup> Even here, the test should be the character of the question and its suitability for judicial review. Many presidential acts are routine, or presidential action may be only ultimately possible, but not certain. Instead of relying, however, upon the doctrine of sovereign immunity to deny relief in a proper case, the court should frankly state that the real rationale for its decision is that the official in question actually has discretionary power great enough to allow him to reach erroneous as well as correct statutory interpretations.<sup>22</sup> This is a different idea than sovereign immunity, and rests, within proper limits, upon the availability or amount of judicial review in such cases. The acts of a head of state may often be so political in nature as to be totally unsuitable for any judicial review.

There is more difficulty when the aim of the suit is to obtain something from the government, such as land, coal, property, or money. Where money damages are sought, the fifth amendment may well give relief for property damage, a concept liberalized by recent decisions.<sup>23</sup> A rule allowing damages for every injurious government action is obviously undesirable, since every statute to some degree injures some one, be it only the taxpayers. Nor is mere invalidity of the law or action sufficient when legislation for public welfare is involved, because some losses and damages are the price one pays for living in modern society. Perhaps

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19. But cf. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *International Postal Supply Co. v. Bruce*, 194 U.S. 601 (1904). Compare *Land v. Dollar*, 330 U.S. 731 (1947); *Goltra v. Weeks*, 271 U.S. 536 (1926); *United States v. Lee*, 106 U.S. 196 (1882).

20. *Miguel v. McCarl*, 291 U.S. 442 (1934); *Roberts v. United States ex rel. Valentine*, 176 U.S. 221 (1900); *Clackmas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *rev'd per curiam*, 349 U.S. 909 (1955). Cf. *West Coast Exploration Co. v. McKay*, 213 F.2d 582 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954).

21. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866). But cf. *United States v. Sharpnack*, 355 U.S. 286 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). See Gibson, *The President's Inherent Emergency Powers*, 12 Fed. B.J. 107 (1951).

22. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840).

23. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (fifth amendment applies to temporary governmental seizure of coal mine because of strike or threat of one); *United States v. Causby*, 328 U.S. 256 (1946) (owner of farm recovered damages caused to chickens by low flying planes).

monetary relief here should be limited to very exceptional losses, not widely spread, which could well be anticipated in advance.

In any event, sovereign immunity has little justification as an abstract doctrine today. Its abrogation will not force courts to assume the burden of operating the government under current restrictions on the availability and amount of judicial review. To deny relief when a government official admittedly infringes another's legal rights is manifestly unjust and unfair. Courts are certainly better suited to settle many of these matters than mere naked force or political power and legislative action.

A closely related idea is the reluctance of many courts to issue a writ of mandamus or a mandatory affirmative order to a state official, unless the act to be commanded by the court is purely ministerial, involving no discretion on the part of the official.<sup>24</sup> This is based partly upon the sovereign immunity concept, partly upon the idea of separation of powers. What is remarkable is the facility with which a court can find a clear command allowing no discretion in a highly ambiguous statute.<sup>25</sup> More realistically, courts today do issue mandamus, even if the statutory language is ambiguous or considerable discretion is given the government agency. The decisive factor is whether the court believes there has been an arbitrary abuse of or refusal to exercise the discretion, or an unwarranted interpretation of the statute.

Another troublesome question is the availability and amount of judicial review in what is roughly termed rule-making by administrative agencies. Judicial review to some extent should ordinarily be *available* here. The problem really is: first, what specific issues are reviewable, and the amount of review on the issues subject to review, in view of the delegations of broad discretionary powers which are usually involved; and second, the nature of the procedure (its fairness, the extent to which it will afford a firm basis for review by a court) to be followed by the agency.

## VI. AVAILABILITY OF JUDICIAL REVIEW IN SPECIFIC SITUATIONS

Traditionally, certain areas have been relatively immune from some or even all judicial review. Review has been restricted sharply to only

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24. *Work v. United States ex rel. Rives*, 267 U.S. 175 (1925); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). Cf. 3 Davis, *Treatise* §§ 23.09-.12; Davis, *Mandatory Relief From Administrative Action in the Federal Courts*, 22 U. Chi. L. Rev. 585 (1955); Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 426-28 (1958).

25. *Robertson v. Chambers*, 341 U.S. 37 (1951); *Dismuke v. United States*, 297 U.S. 167 (1936); *Miquel v. McCarl*, 291 U.S. 442 (1934); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930); *Roberts v. United States ex rel. Valentine*, 176 U.S. 221 (1900).

a very few, if any, specific issues or matters, and even on these, the amount of review may be far less than normally expected. The critical factor here is the increasing willingness of courts to grant at least some review, but to concentrate upon the limited availability or amount of the review.

### A. *Military Matters*

Civilian courts have long been reluctant to interfere with the internal discipline and control of the armed forces, which have their own unique system of command and courts. There are certainly the strongest possible reasons for civilian judges not to interfere with the raising, training, deployment, discipline, and mustering out of military forces, especially in times of national emergency. Yet, even grave threats to national security may not always justify harsh measures conflicting with individual liberty and property. The large size of our armed forces is apparently a permanent part of our society, not a temporary phenomenon. So it is not too surprising to find the civil courts willing to exercise some limited power of judicial review to make certain that even the armed forces do not exceed their tremendous powers and jurisdiction.

The range of judicial review of a court martial is still uncertain. That there is some review available on certain issues, as when a claim of invasion of constitutional rights and due process is made, is clear. The amount of review on these issues is not clear. It is disputed whether the court ascertains if the military tribunal erroneously decided the constitutional issue or only checks to see if the military court gave fair consideration to the matter.<sup>26</sup> The Supreme Court has recently held reviewable to some extent the question of the army's power to give other than an honorable discharge for conduct occurring prior to military service; there was no question of the amount of review, or of the issues subject to review, for government counsel conceded the illegality of the discharge if any right at all to judicial review existed.<sup>27</sup> So, too, the Court has permitted limited review of draft board classification orders

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26. *Burns v. Wilson*, 346 U.S. 137 (1953); *Hiatt v. Brown*, 339 U.S. 103 (1950). Cf. *Jackson v. Taylor*, 353 U.S. 569 (1957); *Humphrey v. Smith*, 336 U.S. 695 (1949); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *United States v. Brown*, 206 U.S. 240 (1907); *Carter v. Roberts*, 177 U.S. 496, 498 (1900). See *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947), for an especially outrageous court martial set aside by a civilian court. But cf. *Day v. Wilson*, 247 F.2d 60, 63 (D.C. Cir. 1957); *Krivoski v. United States*, 145 F. Supp. 239 (Ct. Cl.), cert. denied, 352 U.S. 954 (1956). On the general supremacy of civilian courts over military tribunals, see *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 12 (1866); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Cf. *Sterling v. Constantin*, 287 U.S. 378 (1932); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

27. *Harmon v. Brucker*, 355 U.S. 579 (1958). Cf. *Robertson v. Chambers*, 341 U.S. 37 (1951), reversing 183 F.2d 144 (D.C. Cir. 1950); *Reaves v. Ainsworth*, 219 U.S. 296 (1911);



immediately prior to actual induction into the army.<sup>28</sup> True, review here was initially limited to determining only whether there was any "basis in fact" for the classification,<sup>29</sup> but later decisions, however, have extended review to questions of law<sup>30</sup> and fairness of procedure<sup>31</sup> and approximated review of even fact questions to the substantial evidence test customarily used in judicial review.<sup>32</sup> Indeed, there has even been review by habeas corpus of the army's power to refuse to commission a dentist draftee in lieu of discharging him, but the extent of this review is far from clear since the Court upheld the denial of the commission upon the merits as warranted by evidence and the statute.<sup>33</sup> No doubt, assignments in the armed forces may often seem arbitrary from the standpoint of individuals. Yet, there is need for judicial restraint here lest national security be threatened by impairment of the efficiency of the armed forces through unwise judicial meddling. On the whole, it is salutary that even the powers of the armed forces, great though they may be, should be subject to some limited measure of judicial review in order to determine if they have been exercised with unnecessary harshness, arbitrarily, without fair procedure, or beyond the scope of the authority or jurisdiction conferred by Congress.

### B. *Immigration and Treatment of Aliens*

Another problem area is immigration and the treatment of aliens. The Supreme Court has sometimes indicated that the powers of Congress and the Executive over aliens are so plenary that judicial review here may be entirely barred.<sup>34</sup> Thus, the exclusion of aliens has at times been

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Jones, *Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges*, 57 Colum. L. Rev. 917 (1957); Note, *Judicial Review of Discharge Classifications Determined in Military Administrative Proceedings*, 70 Harv. L. Rev. 533 (1957). But cf. *Patterson v. Lamb*, 329 U.S. 539 (1947); *United States ex rel. French v. Weeks*, 259 U.S. 326 (1922); *Gentila v. Pace*, 193 F.2d 924 (D.C. Cir. 1951), cert. denied, 342 U.S. 943 (1952).

28. *Gibson v. United States*, 329 U.S. 338 (1946); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946); *Estep v. United States*, 327 U.S. 114 (1946).

29. *Ibid.*

30. *Sicurella v. United States*, 348 U.S. 385 (1955).

31. *Gonzales v. United States*, 348 U.S. 407 (1955); *Simmons v. United States*, 348 U.S. 397 (1955); *United States v. Nugent*, 346 U.S. 1 (1953). Cf. *Cox v. United States*, 332 U.S. 442 (1947).

32. *Witmer v. United States*, 348 U.S. 375 (1955); *Dickinson v. United States*, 346 U.S. 389 (1953).

33. *Orloff v. Willoughby*, 345 U.S. 83 (1953). Cf. *Nelson v. Peckham*, 210 F.2d 574 (4th Cir. 1954); *Deak v. Pace*, 185 F.2d 997 (D.C. Cir. 1950); *Levin v. Gillespie*, 121 F. Supp. 239 (N.D. Cal. 1954). But cf. *Bland v. Hartman*, 245 F.2d 311 (9th Cir. 1957).

34. *United States v. Ju Toy*, 198 U.S. 253 (1905) (citizenship issue); *Lee Lung v. Patterson*, 186 U.S. 168 (1902); *Lem Moon Sing v. United States*, 158 U.S. 538, 546-47 (1895) (no review); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (deportation);

said to be almost free of any judicial review or restraint so far as the Constitution is concerned, even if the alien claimed to be an American citizen.<sup>35</sup> On the other hand, the Court in a notable opinion denied that the Executive or perhaps even Congress had the power under the Constitution to deport alleged resident aliens claiming citizenship without judicial trial or review of the matter of citizenship.<sup>36</sup> Recent opinions have

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*Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). Cf. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). An alien entering illegally may not be imprisoned without a judicial trial. *Wong Wing v. United States*, 163 U.S. 228 (1896). An alien subject to exclusion may be detained in custody indefinitely pending deportation when no country will accept him. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). But cf. *Barton v. Senter*, 353 U.S. 963 (1957), affirming 145 F. Supp. 569 (E.D. Mo. 1956) (an alien which no country will take cannot have his actions restricted except to insure availability for deportation); *United States v. Witkovich*, 353 U.S. 194 (1957) (a deportable alien whom no country will take cannot be made to tell the Attorney-General about possible communist activities except those related to his availability for deportation).

35. *United States v. Ju Toy*, 198 U.S. 253 (1905). But cf. *Lloyd Sabauo Societa v. Elting*, 287 U.S. 329, 335-36 (1932); *Kwock Jan Fat v. White*, 253 U.S. 454, 457-58 (1920) (dicta); *Chin Yow v. United States*, 208 U.S. 8 (1908). Compare *Carmichael v. Delaney*, 170 F.2d 239 (9th Cir. 1948) (former resident), with *United States ex rel. Chu Leung v. Shaughnessy*, 176 F.2d 249 (2d Cir. 1949) and *United States ex rel. Medeiros v. Watkins*, 166 F.2d 897 (2d Cir. 1948).

36. *Ng Fung Ho v. White*, 259 U.S. 276 (1922). But a resident alien is protected only by procedural, not substantive, due process. *Galvan v. Press*, 347 U.S. 522 (1954); *Jordan v. De George*, 341 U.S. 223 (1951); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950). Cf. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). If lawfully ordered deported, a resident alien is entitled to a hearing before an unbiased tribunal if he seeks, as an act of statutory grace, suspension of deportation. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). He is not entitled then to a trial-type hearing, and secret evidence may be used to refuse suspension. *Jay v. Boyd*, 351 U.S. 345 (1956). If this hearing is unbiased, there will be no further review, *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955), except: (1) if there is an erroneous holding that the alien is not eligible for suspension under the statute, *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77-78 (1957); *McGrath v. Kristensen*, 340 U.S. 162 (1950) (eligibility); or (2) suspension is denied because of an erroneous view of law; or (3) an arbitrary standard has been imposed; or (4) there is error about the danger to the alien if he is deported to the foreign country in question. See *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715 (2d Cir. 1955) (persecution); *Miyagi v. Brownell*, 227 F.2d 33 (D.C. Cir. 1955); *United States ex rel. Watts v. Shaughnessy*, 107 F. Supp. 613 (S.D.N.Y. 1952), aff'd, 206 F.2d 616 (2d Cir. 1953) (persecution); *United States ex rel. Partheniades v. Shaughnessy*, 146 F. Supp. 772 (S.D.N.Y. 1956) (arbitrary standard); *Dickhoff v. Shaughnessy*, 142 F. Supp. 535 (S.D.N.Y. 1956) (erroneous view of law). Cf. *Dessalernos v. Savoretti*, 356 U.S. 269 (1958); *United States ex rel. Brzovich v. Holton*, 222 F.2d 840 (7th Cir. 1955); *United States ex rel. Adel v. Shaughnessy*, 183 F.2d 371 (2d Cir. 1950). An order denying an alien leave to depart voluntarily is similarly reviewable. *United States ex rel. Frangoulis v. Shaughnessy*, 210 F.2d 572 (2d Cir. 1954); *United States ex rel. Bartsch v. Watkins*, 175 F.2d 245 (2d Cir. 1949). But cf. *Anderson v. Holton*, 242 F.2d 596 (7th Cir. 1957); *United States ex rel. Leong Choy Moon v. Shaughnessy*, 218 F.2d 316 (2d Cir. 1954); *United States ex rel. Dolenz v. Shaughnessy*, 107 F. Supp. 611 (S.D.N.Y.), aff'd, 200

adhered to this rather unsatisfactory distinction between deportation and exclusion,<sup>37</sup> in spite of its lack of justification where an alien has actually reached this country or even lived here for many years before losing his resident status by temporarily departing for a trip abroad. Actually, in cases involving aliens seeking release by habeas corpus, the Court has often reviewed, to the usual extent, questions of statutory interpreta-

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F.2d 288 (2d Cir. 1952), cert. denied, 345 U.S. 928 (1953). Discretion to allow bail pending a deportation hearing is judicially reviewable. *Carlson v. Landon*, 342 U.S. 524, 540 (1952); *United States ex rel. Belfrage v. Shaughnessy*, 212 F.2d 128 (2d Cir. 1954); *United States ex rel. De Geronimi v. Shaughnessy*, 187 F.2d 896 (2d Cir. 1951). An error of law in either a deportation or exclusion hearing is reviewable to a limited extent. *McGrath v. Kristensen*, 340 U.S. 162 (1950) (deportation); *Gegiow v. Uhl*, 239 U.S. 3 (1915) (exclusion). The fairness of any administrative hearing is also subject to judicial review in an exclusion case, as in deportation. *Chin Yow v. United States*, 208 U.S. 8, 13 (1908). Cf. *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958) (exclusion), noted in 45 Va. L. Rev. 283 (1959). Under the Immigration Act of 1917, an exclusion or deportation order was reviewable only by habeas corpus. *Tom We Shung v. Brownell*, 207 F.2d 132 (D.C. Cir.), vacated, 346 U.S. 906 (1953) (exclusion); *Heikkila v. Barber*, 345 U.S. 229 (1953) (deportation).

Under the Immigration and Nationality Act of 1952 either type of order is reviewable in a declaratory judgment. *Brownell v. Tom We Shung*, 352 U.S. 180 (1956) (exclusion); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) (deportation). On the other hand, a person claiming admission as a citizen to this country under the Immigration Act of 1917 could obtain a declaratory judgment as to his status even if not in this country, or could obtain admission, pending the outcome of a declaratory judgment to determine his status, after having secured a certificate of identity from a consul, which certificate could not be refused solely on the ground that he had lost his status. Under the Immigration Act of 1952, review may usually be obtained by such a person only by habeas corpus after he is in the United States and has secured the consul certificate, which may be denied solely because of lost status and which only entitles him to apply for admission in the same way as an alien. Without the certificate he cannot seek a judicial determination of his status. *D'Argento v. Dulles*, 113 F. Supp. 933 (D.D.C. 1953). Refusal of the certificate has been held non-reviewable unless arbitrary or capricious. *Ching Ming Mow v. Dulles*, 117 F. Supp. 108 (S.D.N.Y. 1953); *Wong Fon Haw v. Dulles*, 114 F. Supp. 906 (S.D.N.Y. 1953); *Eng v. Acheson*, 108 F. Supp. 682 (S.D.N.Y. 1952). So is refusal of a visa. *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir.), cert. denied, 279 U.S. 868 (1929). Cf. authorities cited note 42 *infra*, regarding refusal of passports to foreign residents claiming citizenship.

37. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (not true of alien resident here twenty-five years who left for nineteen months to visit dying mother abroad and wishes to reenter); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (alien seaman is resident, despite temporary absence from country, if on an American ship); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (not true of non-resident alien—war bride—actually in this country); *Bridges v. Wixon*, 326 U.S. 135, 156 (1945); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 156-57 (1923); the Japanese Immigrant Case, 189 U.S. 86 (1903) (resident alien entitled to hearing prior to deportation). Merely holding an alien at the door does not make him a resident. Thus, aliens temporarily admitted under a claim of right or for other reasons are treated as non-residents. *Rogers v. Quan*, 357 U.S. 193 (1958); *Leng May Ma v. Barber*, 347 U.S. 185 (1958). But cf. *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958).

tion, of law, and of fact in both exclusion and deportation matters, as well as the issue of procedural due process.<sup>38</sup> There seems to be no reason why friendly aliens should be denied such limited judicial review as a protection against arbitrary, unduly harsh acts, unreasonable decisions, or the excessive exercise of administrative power, provided judicial self-restraint is imposed. Certainly a claim of citizenship should be subject to judicial review, even if made by one who may not technically be a resident in the legal sense. Even more difficult, perhaps, is the extent of judicial review over action taken against so-called enemy aliens present in this country in time of war. The leading case,<sup>39</sup> while upholding the action taken, may be interpreted as giving some, though limited, judicial review. The courts did pass upon the fairness of the procedure, the substantiality of the evidence, the interpretation and constitutionality of the statute, and the issue of whether petitioner was an alien enemy. The Supreme Court, however, disapproved of the lower court's passing upon the issues of procedure and evidence. It is hard to see why there should not be limited judicial review on such key issues as a claim of American citizenship or of citizenship in a non-enemy state, despite the emergencies of war.

### C. *Foreign Affairs*

Power over aliens leads to a consideration of the larger related issue of judicial review in the realm of foreign affairs. Admittedly, judicial review is restricted because of the broad constitutional authority granted the President in this field. These are powers which courts should be most reluctant to question or interfere with, because they involve factors not appropriate to judicial review.<sup>40</sup> Yet, one may question the wisdom of a complete denial of all right of judicial review on all issues and all matters when the cloak of executive power over foreign affairs is waved. In one case,<sup>41</sup> for example, granted the President's discretionary powers

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38. See note 36 *supra*.

39. *Ludecke v. Watkins*, 335 U.S. 160 (1948). Cf. *United States ex rel. Hack v. Clark*, 159 F.2d 552 (7th Cir. 1947); *United States ex rel. Schlueter v. Watkins*, 158 F.2d 853 (2d Cir. 1946) (both reviewing question whether petitioner was enemy alien).

40. Cf. *Wilson v. Girard*, 354 U.S. 524 (1957); *National City Bank v. Republic of China*, 348 U.S. 356 (1955); *Chicago & So. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States v. Pink*, 315 U.S. 203 (1942); *Eastern States Petroleum & Chem. Corp. v. Seaton*, 163 F. Supp. 797, 165 F. Supp. 363 (D.D.C. 1958) (allow review of oil import order). Even here there are dicta that when the plenary power of the President over foreign affairs is involved, there will be judicial review for procedural due process. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

41. *Chicago & So. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (no review of an order granting one domestic airline and denying another a certificate to engage in certain overseas operations when order of CAB here is subject to review by President). See H.R. Rep. No. 1141, 85th Cong., 2d Sess. 12 (1959). Cf. *Panama Canal Co. v. Grace Line*,

to reject, modify, or approve the award of the Civil Aeronautics Board, there could be limited judicial review at least of the procedure, and perhaps the recommendations, of the CAB, even if not of the problem as to whether the President exceeded his wide powers over foreign affairs in acting as he did. So, too, the advent of limited judicial review over the issuance and denial of passports, with the apparent recognition of a right to travel abroad, is a welcome step.<sup>42</sup> Of course, judicial review here should not delve into questions of foreign policy or conditions existing abroad. It can, however, deal with factual and legal matters personal to the applicant, such as his qualifications or any lack thereof, and the threat his travel abroad poses. Passports involve not only executive power over foreign affairs, but also the basic personal right of a citizen to his freedom of movement.

#### D. *Political Issues*

Closely related to foreign affairs is the category one may term, for lack of a better phrase, political issues. These are matters where, perhaps, the Court feels executive or legislative discretion is so complete as to preclude any judicial review. Where the action is directly taken by Congress or the President, policy considerations may well exclude judicial review. If the action is in fact that of a subordinate to whom power has been allegedly delegated, there seems far less reason for disallowing some judicial review which could determine whether the power has been clearly and fairly exercised within the confines of the delegated authority.<sup>43</sup>

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Inc., 356 U.S. 309, 317 (1958) (Panama Canal tolls subject to review by President not judicially reviewable until fixed by agency; may be judicially reviewable then); McGrath v. Kristensen, 340 U.S. 162, 167-68 (1950); United States Overseas Airlines, Inc. v. CAB, 222 F.2d 303 (D.C. Cir. 1955) (deny judicial review for procedural violation). See Carrington, *Political Questions: The Judicial Check on the Executive*, 42 Va. L. Rev. 175 (1956).

42. Dayton v. Dulles, 357 U.S. 144 (1958); Kent v. Dulles, 357 U.S. 116 (1958); Cf. Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956); Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952); Jaffe, *The Right to Travel: The Passport Problem*, 35 Foreign Affairs 17 (1956). Refusal to grant a passport to a foreign resident claiming citizenship may be reviewable. Yung Jin Toung v. Dulles, 229 F.2d 244 (2d Cir. 1956); Tom Mung Ngow v. Dulles, 122 F. Supp. 709 (D.D.C. 1954). Not so the refusal to grant a visa to enter this country. United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), cert. denied, 279 U.S. 868 (1929).

43. Cf. Wiener v. United States, 357 U.S. 349 (1958); South v. Peters, 339 U.S. 276 (1950); Chicago & So. Air Lines, Inc. v. Waterman S.S. Co., 333 U.S. 103 (1948); Colegrove v. Green, 328 U.S. 549 (1946); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926). But cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851). See Hart & Wechsler, *infra* note 71 at 192-210; Carrington, *Political Questions: The Judicial Check on the Executive*, 42 Va. L. Rev. 175 (1956); Gibson, *The President's Inherent*

### E. *Government Programs*

Perhaps the most controversial area of judicial review today involves the so-called gratuities allegedly bestowed by a generous government upon its citizens. Formerly, government was a comparatively minor part of men's lives, doing little more than preserving law and order and safeguarding the national defense. Then it may have been wise to view government jobs, government contracts, the disposal of government property, government pensions, government relief assistance, and government hospital and medical care, as mere privileges, mere emergency measures, of little general importance, to which no one had any legally protected rights. Today, it would be folly to take this approach. Many industries depend upon government contracts for a major portion of their business. Government is one of the largest employers, and denial of government employment may well mean denial of the right to pursue a chosen profession. Social security, pensions, medical, welfare, unemployment and relief benefits are regarded not as gifts or bounties, but as something to which men are entitled as a matter of right. Many of these programs, such as social security or the G.I. Bill of Rights, involve obligations as well as benefits to the individuals involved. In addition, many programs confer benefits on some, but at the expense of the rights of others (employers are taxed by social security). Also, a distinction is possible between rights given beneficiaries—low rates for consumers, workmen's compensation for employees, certification for unions—and the rights of those subjected to legal disadvantages because of these programs—employers ordered to bargain with unions or to pay workmen's compensation, utilities subject to low rates, etc.

True, there are areas of vast executive discretion in hiring, promoting, and firing employees, selling and buying property for the government, determining eligibility for social security and veterans' benefits, with which judicial review should not interfere. One may well distinguish cases where the state grants a person something from those where the state reaches out to damage some one, allowing more judicial review in the latter. Yet, this does not mean that harsh or grossly unreasonable exercise of this discretion, unfair procedural policies, or attempts to exceed the wide limits of discretionary power should not be subject to judicial check. Privileges and rights are often interwoven. Even if one has no right to a bounty, he may have a right to fair treatment in the distribution of it. Denial of a bounty may damage one's reputation if done for certain reasons, as security. Indeed, one suspects that for most people, these rights are among the most important ones today, perhaps

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Emergency Powers, 12 Fed. B.J. 107 (1951); Wagner, Political Questions in the Federal Judiciary—A Comparative Study, 32 Temp. L.Q. 135 (1959).

far more significant to many in their daily lives than the older rights of free speech and a free press. The problem here, as elsewhere, is two fold: on what issues and matters, if any, is review available, and how much review is to be allowed.<sup>44</sup>

44. For example, postal orders barring use of the mails for fraud or obscenity are reviewable: *United States ex rel. Milwaukee Pub. Co. v. Bursleson*, 255 U.S. 407 (1921); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). See *Summerfield v. Sunshine Book Co.*, 221 F.2d 42 (D.C. Cir. 1954), cert. denied, 349 U.S. 921 (1955); *Stanford v. Lunde Arms Corp.*, 211 F.2d 464 (9th Cir. 1954); *Door v. Donaldson*, 195 F.2d 764 (D.C. Cir. 1952); *Jeffries v. Olesen*, 121 F. Supp. 463 (S.D. Cal. 1954). Cf. *Cates v. Haderlein*, 342 U.S. 804 (1951); *Reilly v. Pinkus*, 338 U.S. 269 (1949); *Donaldson v. Read Magazine, Inc.*, 233 U.S. 178 (1948); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946).

Denial of a passport may be reviewable. See note 42 *supra*. Cf. *Perkins v. Elg*, 307 U.S. 325, 349-50 (1939).

Suspension of deportation of an alien is reviewable. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Revocation of parole is reviewable to see if it is a total nullity. *Compagna v. Hiatt*, 82 E. Supp. 295 (N.D. Ga. 1948), rev'd, 178 F.2d 42 (5th Cir. 1949), aff'd by an equally divided Court, 340 U.S. 880 (1950). Cf. *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935); *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946); Note, 65 *Harv. L. Rev.* 309 (1951); But cf. *Dunbar v. Cranor*, 202 F.2d 949 (9th Cir. 1953); *Nave v. Bell*, 180 F.2d 198 (6th Cir. 1950).

There may be review of disputed facts as to character, morals, or reputation where a license to practice before an agency is revoked or denied. *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926). Cf. *Konigsberg v. State Bar of Calif.*, 353 U.S. 252 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). A land grant bounty is reviewable. *Lane v. Hoglund*, 244 U.S. 174 (1917).

The hiring and firing of government employees is reviewable, at least if unconstitutional discrimination is alleged. *Service v. Dulles*, 354 U.S. 363 (1957); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Peters v. Hobby*, 349 U.S. 331 (1955); *Wieman v. Updegraff*, 344 U.S. 183 (1952). Cf. *Ritter v. Strauss*, 261 F.2d 767 (D.C. Cir. 1958); *Vitarelli v. Seaton*, 253 F.2d 338 (D.C. Cir. 1958), cert. granted, 358 U.S. 871 (1958); *Taylor v. McElroy (D.D.C.)*, cert. granted, 358 U.S. 918 (1958) (whether there may be judicial review of revocation of security clearance by the Defense Department for an employee of a government contractor resulting in the employee's discharge or transfer); *Hargett v. Summerfield*, 243 F.2d 29 (D.C. Cir.), cert. denied, 353 U.S. 970 (1957); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951). See also *Elder v. Brannan*, 341 U.S. 277 (1951); *Hilton v. Sullivan*, 334 U.S. 323 (1948).

Review of orders involving pensions, grants, and bounties has been allowed. *Dismuke v. United States*, 297 U.S. 167 (1936) (retirement benefit); *Reynolds v. United States*, 292 U.S. 443 (1934) (veteran's benefit); *Hormel v. United States*, 123 F. Supp. 806 (S.D.N.Y. 1954) (government's counterclaim against veteran). Cf. *RFC v. Bankers Trust Co.*, 318 U.S. 163 (1943) (review order fixing allowances for services in railroad reorganization); *Wilkinson v. United States*, 242 F.2d 735 (2d Cir.), cert. denied, 355 U.S. 839 (1957). *Contra*, *United States v. Gudewicz*, 45 F. Supp. 787 (E.D.N.Y. 1942). Usually, however, review is denied in these cases when a statute so provides, at least where a pure bounty is involved. See *Lynch v. United States*, 292 U.S. 571 (1934); *Klein v. Lee*, 254 F.2d 188 (7th Cir. 1958); *American & European Agencies, Inc. v. Gilliland*, 247 F.2d 95 (D.C. Cir.), cert. denied, 355 U.S. 884 (1957); *Magnus v. United States*, 234 F.2d 673 (7th Cir. 1956); cert. denied, 352 U.S. 1006 (1957); *De Vegvar v. Gilliland*, 228 F.2d 640 (D.C. Cir. 1955),

F. *Negative Agency Orders*

Another difficult problem is posed by the negative order. This involves a refusal of an agency to act, to issue a complaint, or to exercise its powers.<sup>45</sup> Here, the feeling is that, like the public prosecutor, the agency

cert. denied, 350 U.S. 994 (1956); 1 Davis, *Treatise* §§ 7.11-20; Davis, *The Requirement of a Trial-Type Hearing*, 70 *Harv. L. Rev.* 193, 222-80 (1956); note 46 *infra*. Cf. *Hall v. United States*, 258 F.2d 61 (4th Cir. 1958); *Ford v. United States*, 230 F.2d 533 (5th Cir. 1956); *Longenecker v. Higley*, 229 F.2d 27 (D.C. Cir. 1955); *Acker v. United States*, 226 F.2d 575 (5th Cir. 1955), cert. denied, 350 U.S. 1008 (1956); *Cyrus v. United States*, 226 F.2d 416 (1st Cir. 1955); *United States v. Houston*, 216 F.2d 440 (6th Cir. 1954); *Hobby v. Hodges*, 215 F.2d 754 (10th Cir. 1954); *Calderon v. Tobin*, 187 F.2d 514 (D.C. Cir.), cert. denied, 341 U.S. 935 (1951); *Slocumb v. Gray*, 179 F.2d 31 (D.C. Cir. 1949); *Van Horne v. Hines*, 122 F.2d 207 (D.C. Cir.), cert. denied, 314 U.S. 689 (1941); *Barnett v. Hines*, 105 F.2d 96 (D.C. Cir.), cert. denied, 308 U.S. 573 (1939). But cf. *Hines v. United States ex rel. Marsh*, 105 F.2d 85 (D.C. Cir. 1939); *Carlin v. United States*, 100 F. Supp. 451 (Ct. Cl. 1951). This is also usually true of dismissal of government employees, apart from unconstitutional discrimination. Cf. *Elder v. Brannan*, 341 U.S. 277 (1951); *Hilton v. Sullivan*, 334 U.S. 323 (1948); *Eberlein v. Woods*, 257 U.S. 82 (1921). See *Richardson, Problems in the Removal of Federal Civil Servants*, 54 *Mich. L. Rev.* 219 (1955); *Note, Review of Removal of Federal Civil Service Employees*, 52 *Colum. L. Rev.* 787 (1952).

So, too, there is very limited, if any, review of the making of government contracts to buy or sell property, often on the ground that a disappointed bidder has no standing to sue since the statutory protections are solely for the government's benefit. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). Defeated bidders for government contracts have been denied review for procedural defects, following the *Lukens* case. This has been changed by 66 Stat. 308 (1952), 41 U.S.C. § 43(a) (Supp. V, 1958). *Friend v. Lee*, 211 F.2d 96 (D.C. Cir. 1955); *Fulton Iron Co. v. Larson*, 171 F.2d 994 (D.C. Cir. 1948), cert. denied, 336 U.S. 903 (1949). But cf. *Capitol Coal Sales v. Mitchell*, 164 F. Supp. 161 (D.D.C. 1958); *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (1956). See also the Task Force Report, *Recommendation No. 50*, at 206-12.

45. Both the ICC and the National Mediation Board may be ordered to take jurisdiction if the refusal to do so is due to an error of law. *Louisville Cement Co. v. ICC*, 246 U.S. 638 (1918); *Air Line Dispatcher Ass'n v. National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.), cert. denied, 342 U.S. 849 (1951). The power of the SEC to refuse jurisdiction may not be reviewable. *Leighton v. SEC*, 221 F.2d 91 (D.C. Cir.), cert. denied, 350 U.S. 825 (1955). Dismissal of a complaint or petition by the NLRB is reviewable. *Local 11, Office Employees International Union v. NLRB*, 353 U.S. 313 (1957); *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951). Refusal of the general counsel of the NLRB to issue a complaint may be reviewable to a limited extent only. *Hourihan v. NLRB*, 201 F.2d 187 (D.C. Cir. 1952), cert. denied, 345 U.S. 930 (1953). But cf. *NLRB v. Local 1976, United Brotherhood of Carpenters*, 241 F.2d 147 (9th Cir. 1957), *aff'd*, 357 U.S. 93 (1958); *NLRB v. Stoller*, 207 F.2d 305 (9th Cir. 1953), cert. denied, 347 U.S. 919 (1954); *Haleston Drug Stores, Inc. v. NLRB*, 187 F.2d 418 (9th Cir.), cert. denied, 342 U.S. 815 (1951). A labor union may not obtain review of a refusal by the Board to seek enforcement of its order. *Amalgamated Util. Workers, CIO v. Consolidated Edison Co.*, 309 U.S. 261 (1940). Cf. *FTC v. Klesner*, 280 U.S. 19, 25 (1929). There is no statutory review of a union's request for certification. *NLRB v. Falk Corp.*, 308 U.S. 453 (1940); *AFL v. NLRB*, 308 U.S. 401 (1940). But the union may obtain review in an equity action in a district court. *Leedom v. Kyne*, 358 U.S. 184 (1958). Cf. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697 (1945); *International Union of Mine Mill & Smelter Workers v.*



should be given wide, if not total, discretion. The soundness of this view is questionable. The public prosecutor is often an elected official, serving a short term and directly responsible to the electorate for his performance in office. The administrator works less in the forum of public opinion. Discretion he must have. There should, however, be judicial scrutiny of its arbitrary or excessive exercise.<sup>46</sup> Even absolute discretion may be exercised in an arbitrary manner.

In discussing judicial review, the need for an intra-agency hierarchy of review should not be overlooked. Review, also, should not be unlimited. Generally, review should focus upon arbitrary, harsh, or illegal acts or procedure, letting administrators fix policy within the limits of the discretion conferred by Congress. Administrators need latitude to be creative and flexible, but not unlimited power. However, while judges should be concerned with validity rather than policy, we should not lightly dismiss the great creative abilities of our courts.

One may argue that in certain areas any judicial review at all may create too much delay, expense, and administrative inefficiency, without sufficiently compensating benefits of protection of individual lives, properties, and liberties. Thus, in the fields of work injuries, pensions or social

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Farmer, 226 F.2d 780 (D.C. Cir. 1955), aff'd, 352 U.S. 145 (1956); *Farmer v. United Elec. Radio & Mach. Workers*, 211 F.2d 36 (D.C. Cir. 1953), cert. denied, 347 U.S. 943 (1954). An employer obtains review if he refuses to bargain with the certified union. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941). See Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 Harv. L. Rev. 720 (1946); Note, 71 Harv. L. Rev. 527 (1958).

Negative orders as such are reviewable. *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939); *Shields v. Utah I.C.R.R.*, 305 U.S. 177 (1938).

46. A non-member producer can obtain review of an agency order giving a milk cooperative the right to part of the price of all the milk it handles, even for non-members. *Stark v. Wickard*, 321 U.S. 288 (1944). Cf. *United States v. ICC*, 337 U.S. 426, 433-35 (1949) (shipper obtains review of order denying reparations); *Board of Governors of the Fed. Reserve Sys. v. Agnew*, 329 U.S. 441, 444 (1947) (Board order removing national bank director from office reviewed). But review of an order denying payment of a mere moral claim against the government has been denied pursuant to a statutory ban. *Work v. United States ex rel. Rives*, 267 U.S. 175 (1925). Cf. *Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941); *Adams v. Nagle*, 303 U.S. 532 (1938); *Butte, A. & P. Ry v. United States*, 290 U.S. 127 (1933). Congress itself may allow review if it is denied by the Court. See *United States v. Moorman*, 338 U.S. 457 (1950). The result of the decision in *United States v. Wunderlich*, 342 U.S. 98 (1951), was changed by 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (Supp. V, 1958) which allow review of decisions on facts by government officers under clauses in government contracts covering disputes between the government and the contractor. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), which was also overruled by 66 Stat. 308 (1952), 41 U.S.C. § 43(a) (1952), as amended, 66 Stat. 308 (1952), 41 U.S.C. § 43(a) (Supp. V, 1958), allowing any interested person to obtain review of a legal question about wage determinations under government contracts. Cf. *United States v. Barnett*, 230 F.2d 926 (5th Cir. 1956). See H.R. 272, 85th Cong., 1st Sess. (1957), providing for judicial review of determinations of the Administrator of Veterans Affairs, now barred by 71 Stat. 92 (1957), 38 U.S.C. § 2211(a) (Supp. V, 1958).

security, one may contend that the vast volume of claims, the requirements for quick payments and low costs, the usually undisputed nature of the facts, the limited areas of discretion and policy making involved when rules are often clear-cut and mechanically applied, the likelihood that the agency will favor the applicants in all doubtful cases of any possible merit, outweigh possible advantages of even very limited judicial review. This is a powerful argument for limiting the availability and amount of judicial review, and for using different techniques for review, but not for completely eliminating it. There is still the possibility of an occasional arbitrary or unreasonable decision to be reckoned with.

## VII. LEGISLATIVE ATTEMPTS TO BAR JUDICIAL REVIEW

What is the role of Congress here? If the previous argument is sound that there should be a strong presumption in favor of some review of certain issues or matters, then Congress should be held to have intended to bar all judicial review on all issues and matters or even all review on specific issues or matters only when it has said so in clear and unambiguous terms. There should be no exclusion of review by implication, or simply because wide discretion has been conferred upon the administrator. Amendment of the Administrative Procedure Act to make this clear beyond all doubt, and to reject such cases as *Switchmen's Union v. National Mediation Bd.*<sup>47</sup> seems desirable and necessary.<sup>48</sup> There is still much uncertainty over the meaning and effect of the language of the present Act on this point,<sup>49</sup> although the Supreme Court has indicated

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47. 320 U.S. 297 (1943) (review held precluded by implication though not barred by express language of statute). Accord, *Brotherhood of Ry. & S.S. Clerks v. United Transp. Serv. Employees*, 320 U.S. 715 (1943). Cf. *Slocum v. Delaware L. & W. R.R.*, 339 U.S. 239 (1950); *General Comm'n of Adjustment v. Missouri K.T. R.R.*, 320 U.S. 323 (1943). But cf. *Leedom v. Kyne*, 358 U.S. 184 (1958); *Conley v. Gibson*, 355 U.S. 41 (1957); *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd* on rehearing, 327 U.S. 661 (1946).

48. Section 1009(a) of the A.B.A. Proposed Code, provides: "Every agency action made reviewable by statute and every other final agency action which is not subject to judicial review in an action brought by a person adversely affected or aggrieved shall, except as expressly precluded by Act of Congress hereafter enacted, be subject to judicial review under this Act." A.B.A. Proposed Code 194-95. Also, Section 1001(a) omits the provisions of Section 2(a) of the present Act exempting completely therefrom the Selective Service Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944, and adds: "No agency or function shall be exempt from any provision of this Act, except by express statutory reference hereto." A.B.A. Proposed Code 184. The proposed Code exempts fully the Tax Court and the Court of Military Appeals. A.B.A. Proposed Code 184. In Section 1012 it expressly repeals the present exemptions from the present Act now found in some fourteen statutes, to the extent they authorize special procedures. A.B.A. Proposed Code 198.

49. The language of § 10 gives a right of review except "so far as (1) statutes preclude

that this language usually creates a strong presumption in favor of judicial review.<sup>50</sup> Indeed, the Court has recently stated that if Congress confers "a right," there is a strong inference that this indicates the right shall be enforced and protected by judicial review where agency action is taken in excess of delegated powers or contrary to a specific statutory prohibition.<sup>51</sup> Unfortunately, at times, whether or not the right exists seems to turn in large part upon whether there exists judicial review to protect it. It is not clear if the "right" creates review, or review creates the "right."

The courts have gone to great lengths—some would even say to extreme lengths—to avoid legislative language which on its face apparently bars all judicial review on all issues and matters. A legislative command that administrative action shall be deemed "final and conclusive" is interpreted to mean only that it shall be administratively final, that is, subject to no further administrative modification or review, or that judicial review is thereby limited but not barred.<sup>52</sup> The availability of review may be limited to questions of law or constitutionality. The amount of review may be limited to reversal of acts clearly arbitrary or capricious, or entirely unsupported by evidence. This has occurred in cases interpreting statutory commands involving pensions,<sup>53</sup>

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judicial review or (2) agency action is by law committed to agency discretion." 60 Stat. 243, 5 U.S.C. § 1009 (1952). Arguably, this overrules the Switchmen's case, *supra* note 47. Cf. *Air Line Dispatcher's Ass'n. v. National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.), cert. denied, 342 U.S. 849 (1951). But cf. *Kirkland v. Atlantic Coast Line R. Co.*, 167 F.2d 529 (D.C. Cir.), cert. denied, 335 U.S. 843 (1948). See also 4 Davis, *Treatise* § 28.08; Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 427-33 (1954); note 53 *infra*.

50. *Brownell v. Tom We Shung*, 352 U.S. 180 (1956); *Heikkila v. Barber*, 345 U.S. 229, 232-33 (1953).

51. *Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958). See *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958).

52. Cf. *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *Order of Ry. Conductors of America v. Swan*, 329 U.S. 520 (1947) (Railway Labor Act allows review when two divisions of Board are deadlocked over which has jurisdiction of case); *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd* on rehearing, 327 U.S. 661 (1946) (provision of Railway Labor Act that all awards "shall be final and binding" allows review of issue of whether union is the authorized representative of an employee); *Ellerd v. Southern Pac. R.R.*, 241 F.2d 541 (7th Cir. 1957) (review for procedural defect). But cf. *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. Cir. 1941), *aff'd* by an equally divided Court, 319 U.S. 732 (1943) (no review of adjustment proceeding except in enforcement proceeding).

53. In *United States v. Williams*, 278 U.S. 255, 257-58 (1925), concerning a veteran's claim for adjusted compensation, "final and conclusive" was construed as meaning final unless "wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious." Cf. *Silberschein v. United States*, 266 U.S. 221, 225 (1924); *Gutnayer v. McGranery*, 100 F. Supp. 290 (D.D.C. 1952), modified, 212 F.2d 462 (D.C. Cir. 1954). But cf. *Adams v. Nagle*, 303 U.S. 532 (1938); *Butte A. & P. Ry. v. United States*, 290 U.S. 127 (1933); *Heiner v. Diamond Alkali Co.*, 288 U.S. 502 (1933) (hardship relief for tax); *First Moon v. White Tail*, 270 U.S. 243 (1926) (determination of heirs for land

aliens,<sup>54</sup> and draftees.<sup>55</sup> Going further, a legislative mandate that administrative action "shall not be reviewed by any court" may still not preclude all review. By a magic feat of statutory interpretation the language may be revised so as not to bar review of at least constitutional, and perhaps even jurisdictional, issues, since to bar this much review might violate the Constitution. The concept of jurisdictional issues, broadly construed, of course, may open all questions of law and fact to some review.

To date, the courts have largely sidestepped the difficult question of whether the Constitution guarantees some judicial review of certain issues or matters by interpreting statutes to allow any review that might be demanded by the Constitution.<sup>56</sup> For example, in cases involving statutes requiring renegotiation of profits of government contractors, despite the most express preclusion of judicial review by Congress, the Court has allowed judicial review of a refusal to redetermine profits because of an erroneous statutory interpretation which held the contract not covered. This would seem to allow review of an erroneous interpretation allowing coverage,<sup>57</sup> as well. Non-reviewability here is largely based on the special competence of the agency regarding business and accounting practices. This is a factor not present perhaps when the issue is whether the language of the Act covers the contract in question. The Court may also be reluctant to allow the agency to determine the outer limits of its jurisdictional powers. This is a task usually and properly assumed by courts in order to serve as a check on agency power.

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grant bounty not reviewable); *United States v. Babcock*, 250 U.S. 328 (1919) (war loss claim non-reviewable); *Auffmordt v. Hedden*, 137 U.S. 310 (1890) (valuation of import claim non-reviewable); *First Nat'l Bank v. First Fed. Sav. & Loan Ass'n.*, 225 F.2d 33 (D.C. Cir. 1955) (establishment of branch bank not reviewable); *Lansden v. Hart*, 180 F.2d 679 (7th Cir.), cert. denied, 340 U.S. 824 (1950) (presidential proclamation closing area to hunting geese not reviewable); *Sellas v. Kirk*, 101 F. Supp. 237 (D. Nev. 1951), aff'd, 200 F.2d 217 (9th Cir. 1952), cert. denied, 345 U.S. 940 (1953) (grazing). Compare *George Kemp Real Estate Co. v. Commissioner*, 182 F.2d 847 (2d Cir.), cert. denied, 340 U.S. 852 (1950), with *Dowd-Feder, Inc. v. Commissioner*, 173 F.2d 673 (6th Cir. 1949) and *Stimson Mill Co. v. Commissioner*, 163 F.2d 269 (9th Cir.), cert. denied, 332 U.S. 824 (1947).

54. *Brownell v. We Shung*, 352 U.S. 180, 185 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *The Japanese Immigrant Case*, 189 U.S. 86 (1903).

55. *Dickinson v. United States*, 346 U.S. 389 (1953); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946); *Estep v. United States*, 327 U.S. 114 (1946).

56. *Lichter v. United States*, 334 U.S. 742 (1948). Cf. *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938); *Lynch v. United States*, 292 U.S. 571, 586-87 (1934); *Lipke v. Lederer*, 259 U.S. 557 (1922). See *Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362 (1953).

57. *United States v. California E. Line, Inc.*, 348 U.S. 351 (1955).

## VIII. THE CONSTITUTION AND JUDICIAL REVIEW

Does the Constitution preclude Congress from barring all judicial review of issues involved in specific administrative acts? Certainly, there are strong judicial expressions to this effect in *Crowell v. Benson*,<sup>58</sup> *Ohio Valley Water Co. v. Ben Avon Borough*,<sup>59</sup> *St. Joseph Stockyards Co. v. United States*,<sup>60</sup> and *Ng Fung Ho v. White*,<sup>61</sup> so far as certain issues, such as constitutional or jurisdictional facts, are concerned. Indeed, these cases went further and required independent judicial judgment or even trial de novo on matters such as confiscation or citizenship. The opinions leave unanswered such questions as what are jurisdictional or constitutional facts, and how does one differentiate them from other kinds of facts. Logically, there seems no standard. Yet, perhaps there may be some facts which seem of the very essence of the agency's power, which the statute stresses. There may be areas where the discretion of the administrator is unusually narrow and limited. There may be administrative errors so grave in nature, and so drastic in consequences, as to call for unusual judicial intervention. There may simply be no other way to obtain judicial review in a given case. Facts which are relatively objective in nature, about which the answer is either yes or no, black or white, as with citizenship, may require a different approach than such issues as reasonableness of rates, where hard and fast lines cannot be drawn objectively. Certain areas, e.g., civil liberties, may be deemed so crucial as to demand the closest judicial scrutiny and the narrowest limits for administrative discretion.

We are in a shadowy area here, where judicial discretion is great. Certainly it is hard to imagine a court lending itself, and its great powers and prestige, to the *enforcement* of an administrative order or the *execution* in any way of an administrative program, without some independent, albeit limited, inquiry into the validity of that order or program. Courts, it may be predicted, despite an imposition of self-restraint in deference to legislative commands, are not likely to allow themselves to become mere rubber stamps automatically enforcing the administrative process. The requirements of due process of law, the preservation of the judicial power conferred by article III, the constitutional guarantee of habeas corpus, and the respect for separation of powers as a check on the potential dangers of unlimited power, all operate to give some judicial review on certain issues and matters. Under article III, the federal judicial power should include the power to review

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58. 285 U.S. 22 (1932). See Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 Harv. L. Rev. 953 (1957).

59. 253 U.S. 287 (1920).

60. 298 U.S. 38 (1936).

61. 259 U.S. 276 (1922).

(perhaps even render an independent determination) vital facts relevant to constitutional, and perhaps statutory, limitations on administrative power and discretion.<sup>62</sup> This category includes facts basic to the constitutional exercise of power. The use of courts, therefore, to enforce administrative orders, at least where such orders deprive men of liberty or property, or involve criminal prosecutions,<sup>63</sup> is surely always open to the exercise of limited judicial scrutiny of the order involved. The refusal or revocation of a license, where the license be a condition to exercising a freedom otherwise legal, and its lack subjects one to criminal penalties or fine or imprisonment, should fall within these categories. Even if courts are not relied upon to enforce administrative orders, if those orders result in imprisonment, the writ of habeas corpus<sup>64</sup> will afford some judicial review. If the administrative order seizes an individual's property, without compensation, the fifth amendment would similarly demand judicial review.<sup>65</sup> In some cases, of course, there may be provisional seizure or even provisional imprisonment, with subsequent judicial review by habeas corpus or other procedures.<sup>66</sup>

There should be review whenever the judicial process is employed to enforce an obligation on a reluctant person, e.g., when a utility is ordered to lower its rates or an employer to bargain with his employees or to pay workmen's compensation. In addition, any substantial interference with fundamental individual rights and liberties should be subject to constitutionally-guaranteed judicial review, although limited to a review of certain issues and matters, and no doubt only to a limited extent of these. Review should be required here at least to determine if the interference violates constitutional guarantees and rights. Whether review should

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62. See notes 56-61 *supra*.

63. Of course, Congress could impose reasonable restrictions here. A defendant who failed, without good grounds, to attack the agency order in a specified court within a specified reasonable time might be precluded from raising the issue otherwise. *Yakus v. United States*, 321 U.S. 414, 446-47 (1944). Cf. *Lipke v. Lederer*, 259 U.S. 557 (1922).

64. *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946) (draftee). Cf. *We Shung v. Brownell*, 346 U.S. 906 (1953); *Heikkila v. Barber*, 345 U.S. 229 (1953) (under Immigration Act of 1917 review of deportation or exclusion of aliens may be had only by habeas corpus); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927) (deportation); *Chin Yow v. United States*, 208 U.S. 8 (1908) (exclusion); *Wong Wing v. United States*, 163 U.S. 228 (1896) (detention). Compare *Johnson v. Eisen-trager*, 339 U.S. 763 (1950), with *Ahrens v. Clark*, 335 U.S. 188 (1948). Cf. note 39 *supra*. See Note, 51 *Colum. L. Rev.* 368 (1951).

65. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Lee*, 106 U.S. 196 (1882).

66. *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937); *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930). Compare *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) and *United States v. Ruzicka*, 329 U.S. 287 (1946), with *Stark v. Wickard*, 321 U.S. 288 (1944). See 1 *Davis, Treatise* §§ 7.08-10.

extend to other issues, such as other constitutional or statutory questions, or perhaps all questions of law or even all questions of fact, is not so clear. Nor is it plain how much review of those issues subject to review should be required. The concepts of judicial power and habeas corpus shade off into due process. The problems often involve unfair discrimination in the hiring or firing of government employees, and in the denying or granting of government bounties, pensions, and contracts. Whenever the administrative adjudication seriously affects property interests or others of great moment, perhaps due process should then require judicial scrutiny.<sup>67</sup>

#### IX. STANDING AND METHODS

Even if judicial review is available, it may be denied because sought by the wrong person, or at the wrong time, or by the wrong method. Judicial review is of little value when denied to those most likely to undertake the cost and effort required to obtain it. As a general principle, it might be wise to allow review to anyone able to show a sufficient probability of a real and serious threat to or interference with his life, liberty, property, constitutional or statutory rights.<sup>68</sup> True, sham cases

67. See *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).

68. Usually a party may challenge the regulation affecting him. But problems often arise here. Cf. *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123 (1951) (organization placed on list of "subversive organizations" by Attorney-General may challenge listing); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (denying review to government employees affected by Hatch Act until they in fact acted contrary to challenged regulations); *Parker v. Fleming*, 329 U.S. 531 (1947) (tenants may obtain review of order allowing landlords to proceed with eviction); *Stark v. Wickard*, 321 U.S. 288 (1944) (producer may challenge order deducting amounts from payments to him for milk); *CBS v. United States*, 316 U.S. 407 (1942) (network may challenge regulation denying licenses to stations making certain contracts with networks); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) (employer may not challenge order regulating wages paid his employees if he obtains government contract); *Atchison T. & S.F. Ry. v. Summerfield*, 229 F.2d 777 (D.C. Cir.), cert. denied, 351 U.S. 926 (1956) (railroads can challenge 3-cent airmail because of their investment in special mail equipment); *Fulton Iron Co. v. Larson*, 171 F.2d 994 (D.C. Cir. 1948), cert. denied, 336 U.S. 903 (1949) (disappointed bidder for government contract cannot challenge government failure to sell to highest bidder); *Robert Hawthorne, Inc. v. United States Dep't. of Interior*, 160 F. Supp. 417, 421 (E.D. Pa. 1958). Compare *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151 (1957) and *American Power & Light Co. v. SEC*, 325 U.S. 385 (1945), with *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946). Cf. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958). But cf. *Capitol Coal Sales v. Mitchell*, 164 F. Supp. 161 (D.D.C. 1958). Cases liberally giving standing include: *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951) (certificate for gas pipe line construction may be challenged by coal association, coal miners' union, railway labor union); *American President Lines v. Federal Maritime Bd.*, 112 F. Supp. 346 (D.D.C. 1953) (competitors may challenge award of subsidies). But cf. *Public Serv. Comm'n v. FPC*, 257 F.2d 717 (3d Cir. 1958), petition for cert. filed, 27 U.S.L. Week 3168 (U.S. Nov. 24, 1958) (No. 536); *Reade v. Ewing*, 205 F.2d 630 (2d

should be eliminated, since we want to be sure there are opposing parties sufficiently interested in presenting forcefully their differing viewpoints. If, however, one is actually adversely affected by government action, he should have sufficient standing, if the action is judicially reviewable to some extent (it may not be if it lies wholly within the discretionary power of the administrator).<sup>69</sup> There is no reason to shy away here from declaratory judgments to remove real "clouds" not upon title to property, but upon the exercise of one's legal rights or his business activities. When asserting the rights of others, one should be able to do so as a defense to government action.<sup>70</sup> Even as a plaintiff, he should be allowed to do so if he is also adversely affected by the administrative action.<sup>71</sup> However, in any case, we may well require a far more immediate definite threat of harm where others, rather than the plaintiff, are likely to seek review, if adequate grounds therefor exist, and be more liberal in granting a plaintiff standing if there is no one having a more direct stake in the controversy who is apt to request review.

Rigid rules lead to either inequitable or contradictory results. The absolute federal ban on taxpayers' suits<sup>72</sup> certainly needs thorough study

Cir. 1953) (consumer may challenge non-disclosure in oleomargarine label of use of synthetic vitamins); *Isbrandtsen Co. v. Federal Maritime Bd.*, 159 F. Supp. 884 (D.D.C. 1958). Cases denying standing include: *Atlantic Freight Lines, Inc. v. Summerfield*, 204 F.2d 64 (D.D.C. Cir.), cert. denied, 346 U.S. 828 (1953); *American Lechithin Co. v. McNutt*, 155 F.2d 784 (2d Cir.), cert. denied, 329 U.S. 763 (1946); *United States Cane Sugar Ref. Ass'n v. McNutt*, 138 F.2d 116 (2d Cir. 1943). Compare *Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295 (1940), with *Alton R.R. v. United States*, 315 U.S. 15, 19 (1942). See 3 Davis, *Treatise* ch. 22.

69. One need not always have a "legal right." *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (plaintiff lacked legal right to be free of competition but may challenge grant of license which in fact injures his existing business). Cf. *Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77, 83-84 (1958); *United States ex rel. Chapman v. FCC*, 345 U.S. 153, 155 (1953). But cf. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1938).

70. *Barrows v. Jackson*, 346 U.S. 249 (1953) (white defendant may assert right of Negro as defense to suit for damages for breach of a restrictive covenant). Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958); *Hanson v. Denckla*, 357 U.S. 235, 245 (1958); *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264 (1956); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951) (employer may assert lack of non-communist oath by CIO officials as defense in suit by NLRB seeking to enforce its order against employer.)

71. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) (non-resident motorist served personally with process may assert rights of those not so served); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (private school may assert rights of parents and children). Contra, *Tileston v. Ullman*, 318 U.S. 44 (1943) (physician may not assert rights of patients to contraceptives); *Standard Stock Food Co. v. Wright*, 225 U.S. 540 (1912) (large business cannot assert rights of small business). Cf. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940). See Hart & Wechsler, *The Federal Courts and the Federal System*, 160-92 (1953); Note, 72 *Harv. L. Rev.* 723, 726-27 (1959); Note, 34 *N.Y.U.L. Rev.* 140 (1959).

72. *Massachusetts v. Mellon*, 262 U.S. 447 (1923). Cf. *Doremus v. Board of Educ.*, 342



and reappraisal in the light of the current heavy burden of federal taxes on most people, especially where denial of a taxpayer's suit forecloses for all practical purposes any judicial review at all of vast federal spending projects. The concept of the individual "private attorney general" seeking enforcement of the law<sup>73</sup> is one that could be shaped by the courts to give needed relief when no one else is likely to challenge the administrative action. The proposed substitutes<sup>74</sup> on the problem of standing which will clarify the ambiguity of the present language<sup>75</sup> of the Administrative Procedure Act seem highly desirable.

Similarly, there seems little justification for courts in the twentieth century to return to the niceties of common law pleading to compel plaintiff at his peril to stipulate the correct writ or method for judicial review. An explicit legislative command as to the method of review—in a special court, before three judges—should undoubtedly be adhered to, for there are often valid reasons for centralizing review in one court or requiring more than one judge. Absent an explicit legislative com-

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U.S. 429 (1952); *Coleman v. Miller*, 307 U.S. 433, 445 (1939). State courts freely allow such suits, even on nonfiscal matters. See 3 Davis, *Treatise* § 22.10; Davis, *Standing to Challenge Governmental Action*, 39 *Minn. L. Rev.* 353, 391-96 (1955). It is not clear when a case comes from the state courts whether the state or federal rule on standing, especially in taxpayer's suits, controls. Compare *Doremus v. Board of Educ.*, 342 U.S. 429 (1952) (federal rule; suit not allowed), with *Adler v. Board of Educ.*, 342 U.S. 485 (1952) (state rule; suit allowed). See also 3 Davis, *Treatise* § 22.17.

73. *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir.), dismissed as moot, 320 U.S. 707 (1943) (association of consumers may challenge order increasing minimum coal prices). But cf. *Atlanta v. Ickes*, 308 U.S. 517 (1939), affirming 26 F. Supp. 606 (D.D.C.) (contrary result when suit brought in equity and not based upon statutory "person aggrieved" provision). Cf. *FCC v. NBC*, 319 U.S. 239 (1943); *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958), cert. denied, 358 U.S. 946 (1959) (non-communications competitor of parent corporation whose subsidiary operated station may challenge license), noted in 72 *Harv. L. Rev.* 770 (1959). Cf. *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955) (newspaper may challenge license for station). But cf. *Southwestern Publishing Co. v. FCC*, 243 F.2d 829 (D.C. Cir. 1957) (parent may not challenge license to subsidiary's competitor); *Seaboard & W. Airlines, Inc. v. CAB*, 181 F.2d 515, 518-19 (D.C. Cir. 1949), cert. denied, 339 U.S. 963 (1950) (petitioner cannot challenge when another party already represents same interests as petitioner).

74. Section 1009(b) of the A.B.A. Proposed Code reads: "Any person adversely affected or aggrieved by any such reviewable agency action shall have standing to seek judicial review thereof, except where expressly precluded by Act of Congress hereafter enacted." A.B.A. Proposed Code 195.

75. Section 10(a) now provides: "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1952). This was probably intended to let anyone adversely affected in fact obtain review. See 3 Davis, *Treatise* § 22.02.

mand, a general provision such as now proposed in substitutes<sup>76</sup> for the Administrative Procedure Act, whose present language on this point is not free from ambiguity,<sup>77</sup> seems entirely proper. If the legislature desires a special form of judicial review in any case of administrative action, let it say so in unmistakable terms. Otherwise, there should be one simple uniform method for obtaining judicial review for any agency action.

## X. TIMING OF JUDICIAL REVIEW

### A. *Final Orders*

If available, review may also be denied because sought either too soon or too late. This problem as to when judicial review should be sought is one that often calls for the most delicate balancing of individual hardship, agency power, legislative purpose, public interest, and judicial experience and self-restraint. Here, situations, which in and of themselves reflected serious and legitimate concern over actual or potential crippling or paralysis of a particular administrative process through premature or excessive judicial intervention, gave rise to inflexible dogmas and rules which have greatly hindered an intelligent approach to these problems in subsequent cases. Rigid rules banning judicial intervention have obscured the crucial issues in the problem and led to arbitrary, extreme, and even contradictory results.

The statement that judicial review should not be allowed until the agency has issued a final order<sup>78</sup> is undoubtedly sensible. This principle obviates the delays and expense of countless direct appeals of interlocutory orders when review of the final order can give adequate relief against an improper interlocutory order. There are situations, however, where an interlocutory order, unless immediately reviewed, can

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76. Section 1009(c) of the A.B.A. Proposed Code states: "A person so adversely affected or aggrieved may obtain judicial determination of the jurisdiction of the agency in a civil or criminal case brought by the agency, or in its behalf, for judicial enforcement of such agency action, regardless of the availability or pendency of administrative review proceedings with respect thereto, except where expressly precluded by Act of Congress. All other cases for review of agency action shall be commenced by the filing of a petition for review in the United States district court of appropriate jurisdiction, except where a statute provides for judicial review in a specified court." A.B.A. Proposed Code 195.

77. Section 10(b) provides that review may be obtained by any special statutory proceeding "or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction." 60 Stat. 243 (1946), 5 U.S.C. § 1009(b) (1952). See Carrow, *Types of Judicial Relief from Administrative Action*, 58 Colum. L. Rev. 1 (1958); 3 Davis, *Treatise* ch. 23.

78. *SEC v. Otis & Co.*, 338 U.S. 843 (1949); *FPC v. Metropolitan Edison Co.*, 304 U.S. 375 (1938). See 3 Davis, *Treatise* § 20.05; Davis, *Administrative Remedies Often Need Not Be Exhausted*, 19 F.R.D. 437, 460-70 (1957). See also Carrow, *supra* note 77.

cause damage to a party far outweighing other factors. Sometimes this damage can never be alleviated by later review. The decisive factor should be whether the alleged harm to plaintiff is repairable or irreparable unless immediate review is granted.<sup>79</sup> Even if the injury is repairable, there may remain the problem of which leads to more cost and delay: immediate court review or court review only after an agency hearing.<sup>80</sup>

### B. *Exhaustion of Remedies*

Similarly, few will doubt the general proposition that usually a party should be required to exhaust his administrative remedies before a court should attempt to handle the matter. This gives the agency a chance to correct any error, render the right decision, or decide the case upon other grounds. It allows the administrator to make the required investigation, find the necessary facts, and determine the policy questions, as the legislature presumably intended him to do.<sup>81</sup> Otherwise, a court will often duplicate the work of the agency, covering exactly the same ground as an agency hearing, adding to the expense and delay, and transferring responsibility from the agency to the court. Yet, there are instances when all these factors may be counterbalanced by other considerations. There may be a great need for swift, definitive judicial decision upon the constitutionality or validity of an entire program or for an authoritative statutory interpretation. This is especially true where questions are clear-cut, free of factual determinations, and involve vital problems as to the constitutional or statutory limits of an agency's discretion, powers, or jurisdiction.<sup>82</sup> Absolute rules inhibit the prudent use of judicial discretion and conceal the real policy questions involved.

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79. See, e.g., *Robertson v. Chambers*, 341 U.S. 37 (1951) (agency decision about to be made on record which included reports allegedly improperly admitted); *SEC v. Otis & Co.*, 338 U.S. 843 (1949) (agency decision about to be made on improperly included reports); *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56 (1939) (review threatened agency disclosure of confidential data); *Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir.), cert. denied, 347 U.S. 990 (1954) (review of temporary order allowing immediate effect to proposed dual rate system); *Atlantic Seaboard Corp. v. FPC*, 201 F.2d 568 (4th Cir. 1953) (temporary rate order reviewed). Cf. *United States ex rel. Kansas City So. Ry. v. ICC*, 252 U.S. 178 (1920); *Waite v. Macy*, 246 U.S. 606 (1918). But cf. *Eastern Util. Associates v. SEC*, 162 F.2d 385 (1st Cir. 1947) (no review of refusal to change place of hearing until after hearing over).

80. Cf. *Riss & Co. v. ICC*, 179 F.2d 810 (D.C. Cir. 1950) (no immediate review of refusal to assign competent examiner to case; error judicially rectified by reversal on this ground after agency hearing, *Riss & Co. v. United States*, 341 U.S. 907 (1951)).

81. *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 868 (1953); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752 (1947); *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540 (1946); *Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209 (1938). See 3 Davis, *Treatise* ch. 20; Davis, *Administrative Remedies Often Need Not Be Exhausted*, 19 F.R.D. 437 (1957).

82. *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954) (jurisdiction doubtful, de-

The key factors should be: (1) the extent of the possible injury to plaintiff if the administrative remedy must be pursued; (2) the degree of doubt or clarity about the jurisdiction and power of the agency in the instant case; and (3) the need for the specialized experience and knowledge of the agency in deciding the jurisdictional issues raised in the case. Thus in some cases, the administrative hearing may involve abnormally heavy costs or irreparable injury to the plaintiff; the jurisdiction of the agency may be very doubtful or even clearly lacking; and the jurisdiction may depend solely upon constitutional questions on which courts specialize and have the final say.<sup>83</sup> In other cases, the administrative remedy may be as fully adequate as the judicial one; the administrative hearing may involve no unusual expense or great harm; and the jurisdictional issues may fall clearly within the specialized competence of the agency.<sup>84</sup> Particularly where the constitutionality of the basic enabling statute of the agency is involved, rather than the constitutionality of the statute's application to a particular plaintiff (which may depend on

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pendent on statutory interpretation; company alleged irreparable injury to its bank credit; seems *contra* to Franklin case, *supra* note 81); *Order of Ry. Conductors v. Swan*, 329 U.S. 520 (1947) (stalemate between two divisions of board which were equally divided as to which had jurisdiction of the case); *Public Util. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456 (1943) (agency hearing alleged to cost company \$100,000; agency orders plainly invalid on face; jurisdiction of agency depended on constitutional issues); *Illinois Commerce Comm'n v. Thomson*, 318 U.S. 675 (1943) (federal court or ICC, not state agency, should decide applicability of ICC order). Cf. *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955) (irreparable injury here—seamen barred by government as security risks were unable to work at trade, had to travel to Washington for agency hearing; issue one of law and constitutionality—legality of agency's procedure). But cf. *Harmon v. Brucker*, 355 U.S. 579 (1958); *Smith v. Duldner*, 175 F.2d 629 (6th Cir. 1949). The final order-rule does not seem to prevent review here either. Cf. *Public Util. Comm'n v. United Fuel Gas Co.*, *supra*. State courts often do not require exhaustion of administrative remedies if a question of constitutionality or jurisdiction is present. 3 Davis, *Treatise* § 20.09.

83. *Public Util. Comm'n v. United States*, 355 U.S. 534, 539-40 (1958); *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954) (query whether any injury was caused by agency hearing to bank credit as company asserted); *Public Util. Comm'n v. United Fuel Gas Co.*, *supra* note 82. The problem differs if the administrative order is attacked by way of defense in an enforcement action, for here the defendant does not control the timing of court action. *United States v. McCrillis*, 200 F.2d 884 (1st Cir. 1952).

84. See, e.g., *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 868 (1953) (no real injury from agency hearing; jurisdictional question very confused); *Arkansas Power & Light Co. v. FPC*, 156 F.2d 821 (D.C. Cir. 1946), *rev'd per curiam*, 330 U.S. 802 (1947) (state agency had prescribed method of accounting: FPC issued show cause order to require changes in these methods; no harm to plaintiff yet, since FPC might never issue order, or might issue one in accord with state agency); *Petroleum Exploration, Inc. v. Public Serv. Comm'n*, *supra* note 81 (no substantial injury from agency hearing); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (Court's earlier decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), settled issue of NLRB jurisdiction over manufacturing; only issue here was factual nature of Bethlehem's business; alleged injury called for specialized skill of NLRB).

facts to be adduced at an agency hearing), will courts intervene immediately.<sup>85</sup> A court, however, may still refuse to act here because the agency may decide the case for the plaintiff on nonconstitutional grounds.<sup>86</sup> Inadequacy or improbability of obtaining appropriate relief from the agency may be considered decisive.<sup>87</sup> The proposed substitutes for the Administrative Procedure Act seem unsound since they would preclude, or at least attempt to preclude, the exercise of judicial discretion on this problem.<sup>88</sup>

### C. *Ripeness*

The rather vague test of ripeness, which demands a mature case before judicial review, has undoubtedly led to contradictory, confusing, and unsound decisions. Yet, the basic rule is sound. It entrusts responsibility and discretion primarily to those who ought to have it, the judges. This discretion is essential. Any standard must allow it. One that fails to do so is deceptive, for it is an invitation to judges for evasions and concealment of the real factors at play. Judges may err or act unwisely, but it is doubtful if any legislative formulation of a standard would be an improvement.

The fundamental principle, after all, is correct: courts should not

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85. *Public Util. Comm'n v. United States*, 355 U.S. 534, 539-40 (1958) (constitutionality of state PUC order prohibiting carriers from carrying federal property at rates below those fixed by PUC); *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954) (Court passed on constitutionality of presidential creation of various wartime agencies, but not upon other constitutional issues also raised by fifth, sixth, seventh and eighth amendments); *Lichter v. United States*, 334 U.S. 742 (1948) (constitutionality of Renegotiation Act; plaintiff barred by lapse of time from seeking Tax Court ruling); *United States v. Kissinger*, 250 F.2d 940 (3d Cir.), cert. denied, 356 U.S. 958 (1958). But cf. *Miller v. United States*, 242 F.2d 392 (6th Cir.), cert. denied, 355 U.S. 833 (1957).

86. *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752 (1947) (constitutionality of Renegotiation Act).

87. *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945) (FTC remedy inadequate); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587 (1926).

88. Section 1009(g) of the A.B.A. Proposed Code reads: "Upon a showing of irreparable injury, any federal court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency." A.B.A. Proposed Code 196. There is also a provision for (1) expediting the decision of the court at the request of the Attorney General; and (2) assessing costs and attorney's fees against petitioner in a suit that is frivolous or brought for the purpose of delay. A.B.A. Proposed Code 196. Section 1005(a) provides for judicial review upon a showing of irreparable harm, in the case of any investigation, where the agency action is clearly beyond the constitutional jurisdiction or statutory authority of the agency, while § 1005(b) gives a court, in the proceedings to order enforcement of an agency subpoena, power to quash it if it is unreasonable in terms, irrelevant in scope, beyond the jurisdiction of the agency, not competently issued, or not in accordance with law. A.B.A. Proposed Code 189-90.

waste their time and energy on anything but actual problems, and should avoid deciding remote, abstract, or hypothetical questions. There must be clear-cut concrete issues for a court to decide. The danger, of course, is that a court can thus evade its duty to decide a difficult or complicated case.

Normally a court should not intervene if there is no substantial, adverse effect upon the plaintiff now or in the immediate future.<sup>89</sup> An absolute requirement that no one may challenge a statute until it has been concretely applied by an official ignores several facts. Many laws, and particularly administrative rulings, are either self-enforcing (withholding of benefits, denial of licenses, passports, jobs, or mail delivery) or enforced by private persons. Furthermore, an individual may be faced with this Hobson's choice: on the one hand, compliance, with forfeiture of his chance to challenge the administrative action, as well as loss of his property or liberty; or on the other hand, defiance, with the risk of a criminal prosecution or other severe penalties for violating the statute or agency order.<sup>90</sup> Often, if one waits until men are ready to risk

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89. See, e.g., *United States v. Harriss*, 347 U.S. 612 (1954); *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952) (relief denied against state agency where no proof agency ever threatened or took action against interstate plaintiff, and since issues still general and vague, no controversy existed between agency and plaintiff); *Toomer v. Witsell*, 334 U.S. 385 (1948) (relief denied against imposition of state tax beyond three mile limit on shrimp where no indication tax would be so imposed on plaintiff); *Employers Group of Motor Freight Carriers, Inc. v. National War Labor Bd.*, 143 F.2d 145 (D.C. Cir.), cert. denied, 323 U.S. 735 (1944) (no review of NWLB "order" which consisted of advice to President about terms for settlement of labor dispute even if President might possibly order seizure of employer's business unless dispute thus settled). Accord, *National War Labor Bd. v. United States Gypsum Co.*, 145 F.2d 97 (D.C. Cir. 1944), cert. denied, 324 U.S. 856 (1945); *National War Labor Bd. v. Montgomery Ward & Co.*, 144 F.2d 528 (D.C. Cir.), cert. denied, 323 U.S. 774 (1944). But cf. *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948); *Clark v. Allen*, 331 U.S. 503 (1947) (hypothetical issue closely interwoven with others). In *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954), all the parties desired review of FCC regulations concerning "give away" programs; clear-cut issues were well presented about an uncertain law. Although criminal sanctions were possible, none of the plaintiffs had sought a license hearing until after which no such sanctions were possible. See also Hart & Wechsler, *op. cit. supra* note 71, at 140-56; 3 Davis, *Treatise* ch. 21; Davis, *Ripeness of Governmental Action for Judicial Review* (pts. 1-2), 68 *Harv. L. Rev.* 1122, 1326 (1955).

90. See, e.g., *Evers v. Dwyer*, 358 U.S. 202 (1958); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Parker v. Brown*, 317 U.S. 341 (1943)—all involving risk of criminal prosecution. Cf. *Public Util. Comm'n v. United States*, 355 U.S. 534 (1958). But cf. *Albertson v. Millard*, 345 U.S. 242 (1953); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450 (1945) (Court refused to consider constitutional attack on state statute for vagueness until state court construed statute in criminal prosecution of plaintiff); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Beal v. Missouri Pac. R.R.*, 312 U.S. 45 (1941). Cf. *Parker*, *The Execution of Administrative Acts*, 24 *U. Chi. L. Rev.* 292 (1957).

their liberty, property, or employment to test an order, it never will be tested.

A rigid principle that a declaratory order, as opposed to a coercive one, may not be judicially challenged is unfortunate. The same is true in the case of a rule or finding which merely fixes one's status, or the simple announcement of an administrative policy. The crucial issue is whether the agency action, regardless of its nature, inflicts or threatens to inflict, substantial and imminent injury on petitioner. Government action can seriously affect private interests even before it is specifically applied to them by coercive orders.<sup>91</sup> This may be true even of informal administrative action.<sup>92</sup> Nor is it accurate to argue that it is not part of the judicial function to resolve debilitating uncertainties. Often, an authoritative clarification of legal doubts is essential for one immediately confronted with a real and present dilemma. For example, should an alien risk leaving this country for a seasonal job if on his return he

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91. In *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942), FCC regulations concerning the licensing of stations affiliated with networks were held subject to review before being actually applied to any station or network since the networks had been harmed by the refusal of stations to affiliate with networks. See also *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 (1938) (ICC declaratory order reviewed). Cf. *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Nukk v. Shaughnessy*, 350 U.S. 869 (1955), reversing per curiam 125 F. Supp. 498 (S.D.N.Y. 1954) (validity of parol regulations for aliens prior to any actual violations); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (listing of plaintiff as "subversive organization" reviewable where substantial injury sustained); *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18 (1949) (state certification of labor union reviewable); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (declaratory order). But cf. *Shannahan v. United States*, 303 U.S. 596 (1938); *United States v. Atlanta B. & C.R.R.*, 282 U.S. 522 (1931) (mere formal finding of fact not reviewable); *United States v. Los Angeles & S.L.R.R.*, 273 U.S. 299 (1927) (review denied of ICC property valuation, held a mere declaratory order, despite injury to carrier's credit).

92. But cf. *Local 37, Int'l L. & W. Union v. Boyd*, 347 U.S. 222 (1954) (review denied of informal advice that resident aliens going to Alaska for temporary summer employment would be treated on return as aliens entering the United States for the first time, and so subject to exclusion); *Public Util. Comm'n v. United Air Lines, Inc.*, 346 U.S. 402 (1953) (agency "instruction" to airline held not reviewable even though violation thereof constituted criminal offense and airline had immediate choice whether or not to comply); *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571 (1919) (agency "specifications" for scales not reviewable despite injury to plaintiff's business); *Hearst Radio, Inc. v. FCC*, 167 F.2d 225 (D.C. Cir. 1948) (no review of Blue Book stating FCC policy on program content in license cases); *Miles Laboratories, Inc. v. FTC*, 140 F.2d 683 (D.C. Cir.), cert. denied, 322 U.S. 752 (1944) (no review of tentative agency finding that advertising was deceptive); *Helco Prods. Co. v. McNutt*, 137 F.2d 681 (D.C. Cir. 1943) (advice that seed coloring was illegal adulteration not reviewable despite necessity for criminal prosecution or confiscation of seeds to test legality of advice); *Houston Post Co. v. United States*, 79 F. Supp. 199 (S.D. Tex. 1948) (no review of dicta in FCC decision about license renewals and censorship of political speeches).

may be treated as a nonresident alien and therefore denied readmittance. A cloud on one's business,<sup>93</sup> or even commercial uncertainty, especially in a regulated industry, may cause substantial harm and create a real controversy. The mere fact that government action depends on other events is not a fair test. The petitioner may simply have the choice of obeying the agency order or risking a criminal prosecution; and obedience to the agency order may substantially injure him.

#### D. *Primary Jurisdiction*

The doctrine of primary jurisdiction merits attention, for it is sometimes too rigidly applied. The problem is whether court and agency shall exercise *concurrent* original jurisdiction, or whether the initial exercise of jurisdiction is *exclusively* the agency's right and duty. Primary jurisdiction determines only whether court or agency makes the initial decision. Even if primary jurisdiction belongs to the agency, there still may be judicial review of the agency's decision. The judicial decision is merely postponed.<sup>94</sup> There may be various reasons for postponement of judicial action. In some instances, it is clear that the legislature meant to exclude the courts until some prior resort has been had to the agency. In other cases, prior resort to the agency is imperative to carry out the agency's statutory functions, or to obtain an essential uniformity or coherence of results or rates or a nationwide policy, or to make the best use of the agency's expert staff.<sup>95</sup> Delay of judicial action until after

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93. See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (review of FCC rules regulating multiple ownership of stations, which plaintiff asserted hampered future plans for expansion, prior to actual application of rules in license proceeding); *Frozen Food Express v. United States*, 351 U.S. 40 (1956) (review of ICC declaratory order refusing exemption as agricultural commodities of items carried by plaintiff, non-compliance carrying threat of criminal prosecution); *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953) (review granted of regulations affecting promotions, etc., of trial examiners, despite lack of showing of application to any specific examiners; a cloud over professional status of all examiners); *Adler v. Board of Educ.*, 342 U.S. 485 (1952) (review allowed of New York statute threatening discharge of teachers for treasonable or seditious words prior to administrative clarification of statutory language or threat against teachers; statute's existing vagueness caused serious harm to academic freedom); *Amshoff v. United States*, 228 F.2d 261 (7th Cir. 1955), cert. denied, 351 U.S. 939 (1956). But cf. *Eccles v. Peoples Bank*, 333 U.S. 426 (1948) (no review of public cloud over bank's status in Federal Reserve System due to violation of condition attached to bank's membership in the system); *FPC v. Union Producing Co.*, 230 F.2d 36 (D.C. Cir.), cert. denied, 351 U.S. 927 (1956); *Magnolia Petroleum Co. v. FPC*, 236 F.2d 785 (5th Cir. 1956), cert. denied, 352 U.S. 968 (1957).

94. Cf. *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

95. See, e.g., *United States v. Chesapeake & O. Ry.*, 352 U.S. 77 (1956) (prior resort to ICC necessary if construction of tariff's meaning involves inquiry into technical cost



the decision of the agency gives the court the full benefit of the agency's expertness. It also prevents imposing on the parties uncoordinated and even conflicting requirements.<sup>96</sup> Here, primary jurisdiction eliminates confusion, wastefulness, and contradiction. For example, frequently the problem arises as to the relationship between anti-trust policy and a regulatory policy which is semi-monopolistic. Until an agency has formulated the specific regulatory policy in a given case, a court can hardly determine the proper relationship between the regulatory and anti-trust policies. Judicial review after the agency has set forth its regulatory policy can more intelligently determine whether the agency has inadequately considered the needs for competition. The agency can first appraise the need for monopoly because of such factors as service, safety, and costs. The court can then, upon review of the agency decision, substitute its judgment for that of the agency on questions of law and determine the reasonableness of the agency's exercise of discretion and policy, if the court believes more competition is needed (unless a statute clearly deprives the court of this power).<sup>97</sup> The mere fact that the agency cannot grant the relief sought or that some, but not all, parts of the problem are beyond administrative jurisdiction is not decisive.

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allocation factors within special competence of ICC); *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956) (prior resort to ICC needed if questions of reasonableness and meaning of tariff complex and interwoven); *Far E. Conference v. United States*, 342 U.S. 570 (1952) (government cannot, without prior resort to agency having power to immunize conference rates from anti-trust laws, bring anti-trust action against shipping conference and its rate system); *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932) (prior resort to Shipping Board required where anti-trust suit alleged conspiracy by conference carriers); *Loomis v. Lehigh Valley R.R.*, 240 U.S. 43 (1916) (need for uniformity in fixing railroad rates precludes resort to courts before ICC has ruled on reasonableness of rates); *Texas & Pac. Ry. v. American Tie & Lumber Co.*, 234 U.S. 138 (1914) (only ICC to decide if oak railroad ties included under tariff category of "lumber." But cf. *W. P. Brown & Sons Lumber Co. v. Louisville & N.R.R.*, 299 U.S. 393 (1937)); *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951) (prior CAB determination needed over reasonableness of tariff rule that carrier assumed no liability for lost jewelry). Cf. *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958) (shipping conference rates approved by Board held invalid on merits as matter of statutory interpretation); Comment, 58 *Colum. L. Rev.* 1069 (1958). See Convisser, *Primary Jurisdiction: The Rule and its Rationalizations*, 65 *Yale L.J.* 314 (1956); Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws*, 102 *U. Pa. L. Rev.* 577 (1954); L. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 *Harv. L. Rev.* 436 (1954); von Mehren, *The Anti-Trust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 *Harv. L. Rev.* 929 (1954); Note, 25 *U. Chi. L. Rev.* 192 (1957). See also 3 Davis, *Treatise* ch. 19.

96. Cf. *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 767 (1947).

97. Cf. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959); *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).

The agency may still be able to make a valuable contribution on those parts of the case within its powers.<sup>98</sup>

In some instances, however, more is lost than gained by sending plaintiff to the agency first. The legislature may have clearly meant to preserve original judicial jurisdiction when it created the agency. Judicial flexibility and discretion here are a prerequisite to an intelligent formulation of rules. Blind automatic deference to so-called agency expertness ignores the vital questions of: (1) the extent to which the issues involved may not be as well, if not better, handled by a local court than a distant or overburdened agency; (2) the extent to which the question may involve factors not purely technical, which need the broader viewpoint and experience of a judge, unwarped by specialization of interest and responsibility; (3) how suitable is the question at issue for the exercise of the discretionary powers of the agency; (4) will court action seriously jeopardize the statute's purposes; and (5) will resort to the agency for relief greatly inconvenience the parties by added delay or expense. A court decision may often avoid later clashes between the agency and the courts, especially if a question of law not dependent on factual issues is involved.<sup>99</sup> Frequently, also, the fact that the agency may have so identified itself with a particular group or policy or the status quo as to prevent its giving adequate consideration to other factors may influence a court. Primary jurisdiction should operate to give the administrator the power needed for a rational, integrated execution of the agency's enabling statute, including implied powers based upon its special competence. More than this is neither required nor wise.

## XI. ADMINISTRATIVE HEARING PROBLEMS AND JUDICIAL REVIEW

Judicial review of administrative action is so intimately related to certain aspects of the internal administrative organization and procedure that these questions require discussion at this point.

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98. See, e.g., *Far E. Conference v. United States*, 342 U.S. 570 (1952); *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940).

99. See, e.g., *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945) (no prior resort to FTC required in anti-trust action against export association whose acts partly immunized under agreements when and if the agreements were ever approved by FTC); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (state may file anti-trust suit to enjoin conspiracy of carriers in fixing rates); *Great No. Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) (judicial interpretation of agency regulation—a specific tariff—allowed where special facts not needed). Cf. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959); *Seatrains Lines, Inc. v. Pennsylvania R.R.*, 207 F.2d 255 (3d Cir.), cert. denied, 345 U.S. 916 (1953). Compare *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941), with *Order of R. Conductors v. Pitney*, 326 U.S. 561 (1946) and *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239 (1950). See also *Conley v. Gibson*, 355 U.S. 41 (1957); *Transcontinental & W. Air, Inc. v. Koppal*, 345 U.S. 653 (1953); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952).

Quite obviously, if there has been no hearing of any kind before the agency, judicial review, to be at all meaningful, must be broad. The same is true if there is no record for a court to review other than the bare announcement of the agency's final decision on the matter. Similar problems arise if the agency has not issued a reasoned decision setting forth its findings of fact and a rationale of its legal and policy conclusions. In the first two situations, little less than a complete trial *de novo*, at least on any factual issues subject to review, will enable the court to determine whether the agency has acted arbitrarily or harshly, denied procedural due process, or exceeded its powers or jurisdiction.<sup>100</sup> On these questions of disputed fact, then, the court must and should independently reach a decision based on the evidence adduced before it. On questions of law, the absence of a hearing or record may not be so fatal, unless facts, as often happens, are needed to decide the questions of law. On some legal questions, the court may need only to consider the statutory purpose to see if the agency's interpretation of law is within the range of the choices made available by the legislature.

Even if there has been a hearing, it may have been too perfunctory or limited to produce and develop the relevant issues and facts, or to afford procedural due process to the parties. A formal record also may be of little value if the decision was based mainly on facts not in the record. A lengthy administrative decision may fail to disclose sufficiently the rationale of the agency's conclusions and findings. The extent and nature of judicial review clearly must be viewed in the light of how the agency reached and made its decision.

It may be better in the interests of swift and inexpensive agency action, particularly where the agency usually is favorably disposed toward claims of individuals, to provide simply for a trial *de novo* upon judicial review of issues subject to review rather than to attempt to formalize agency procedures. An alternative, perhaps, would be to provide an agency

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100. Section 1009(e) of the A.B.A. Proposed Code states that in a case where there is judicial review of agency action which was taken without a formal trial type hearing, "the record on review shall be made by trial in the reviewing court." A.B.A. Proposed Code 196. Section 1004(b) states that in cases of adjudication in which neither a statute nor the Constitution requires a hearing, there may be provided an intra-agency system of appeals. If requested, the reviewing agency body must furnish a copy of the reasons for its decisions, which decisions (or those of the subordinate officer if there is no appellate body) are subject to judicial review, with the record on appeal to be made by trial in the reviewing court. This applies only to private rights, claims or privileges, including (but not limited to): (1) proprietary functions such as use or disposal of public property; (2) public contracts; (3) determinations based on inspections, tests, or examinations. A.B.A. Proposed Code 188-89. If the agency does actually grant a full hearing here, why should there be trial *de novo* in judicial review? See Note, *Judicial Review of Administrative Adjudicatory Action Taken Without a Hearing*, 70 Harv. L. Rev. 698 (1957).

hearing only when requested by the claimant, or only if the claimant protested the agency's initial decision. To require agency hearings with a formal record and reasoned decision in the thousands of claims processed for social security, veterans' pensions, or unemployment compensation, seems an expensive way to satisfy those relatively few cases where a claim may be unreasonably or arbitrarily denied. Certainly, if an agency hearing is required at some stage by the claimant, it need not be a formal court-type hearing. Informal procedure should be allowed so long as the record adequately contains the evidence and facts relied on by the administrator in rejecting the claim. An informal decision should suffice so long as it adequately reveals the rationale for the result reached.

Another largely unresolved question is the extent to which judicial review may be desirable and effective where the lack of a hearing and judicial process before the agency resulted from the total unsuitability of the matter for judicial trial. If this is true, the matter hardly becomes more suitable for judicial trial—often trial *de novo*—upon review. Review must be sharply restricted to a few issues and to a limited extent even here if courts are not to be involved in inappropriate functions. Review so limited, though, may not be effective where there is no agency record. How do we decide what matters are not suited to a judicial hearing?

There are agencies whose functions closely resemble those of courts in adjudication. There are also agencies who, principally or in part, exercise rule-making, rate-making, or other legislative powers. Here, one feels the need for some type of hearing—not necessarily a courtroom type—to develop a record for review and to give all interested persons a chance to present their case.

This problem concerning the type of hearing and procedure to be followed by an agency—the extent to which it should or must conform to court-like adversary methods—is one that continually causes trouble and is closely related to judicial review. We cannot draw hard and fast lines here, since we do not yet know enough about the types of controversies that are unsuited for judicial process. We must still recognize that however compelling the need for departure in administrative hearings from judicial standards, such departures may involve a serious loss in public confidence as to the fairness and justice of the administrative decisions. This loss may result in obedience to the administrative order not because of its inherent moral force, but mainly because of fear of the threat of police action for disobedience, or because of respect for the government and the state, of which the administrator is but a part. Men will distrust decisions rendered without a full hearing or based upon

evidence and arguments not offered by the parties, or those reached by persons who have an interest in the outcome since it may enhance their power and authority. We must weigh the need for any administrative action in this manner against the resulting loss in public confidence and acceptance. Broad judicial review may be desirable to regain public trust.

In legislative work and rule-making, advisory committees,<sup>101</sup> consultations, conferences, and written presentations are often more useful than hearings (unless there are actual disputes over adjudicative facts). If a hearing is held, it may often accomplish far more if it is of an argument-type instead of the formal, trial-adversary type, so long as all interested parties are given a chance to state their arguments, present their evidence, and rebut opposing contentions. Credibility is seldom vital, so confrontation and cross-examination may serve no useful purpose. While trial hearings are unsuitable for developing opinions about policy issues, they may be proper at times for the presentation of disputed legislative facts. On the other hand, in adjudicative hearings, a trial-type hearing is essential. This is also true of legislative hearings which involve disputed adjudicative facts. Here there is a need to develop facts bearing on individual things, persons, and rights, especially about the past, and to resolve such factual issues and disputes, rather than to consider policy making, legal issues, and discretionary powers, which involve general ideas and data. We need confrontation and cross-examination when facts are in dispute which involve the credibility of witnesses, their memories, and perceptions. The difficulty is not so much the right to a hearing, but the problems relating to the evidence, the record, and the basis relied upon by the agency in making its decision.

There is serious objection, therefore, to the advisability of substitutes<sup>102</sup> for the Administrative Procedure Act which would impose courtroom requirements for all agency adjudicative hearings and all rule-making

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101. Cf. *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941).

102. Section 1003(b) of the proposed Code provides: "Where rules are required under the Constitution or by statute to be made on a record after opportunity for hearing, the proceedings shall also be in conformity with sections 1006 and 1007 of this Act [hearings in adjudications, decisions, and agency review] except that the provision in section 1005(c) requiring separation of functions shall not be applicable and that, in lieu of an initial decision pursuant to section 1007, an intermediate decision may be issued which shall be subject to exceptions before promulgation of the rule." A.B.A. Proposed Code 187. Cf. 2 Davis, *Treatise* § 13.08. However, § 1001(c), unlike § 2(c) of the present Administrative Procedure Act, does not include in rule-making an agency statement of "particular applicability and future effect" or "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting. . . ." 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1952). Thus, under the proposed Code, rate-making and rule-making of particular applicability would be adjudication and require a trial-type hearing. See A.B.A. Proposed Code 184-85. Cf. 1 Davis, *Treatise* ch. 6.

where there is a right to a hearing. All hearings required by statute in rule-making should not be of the formal adversary type.

It also seems unsound to require the application of judicial rules for pleading and evidence in formal agency hearings.<sup>103</sup> Agency records may sometimes be too long because of failure to exclude irrelevant evidence. Parties may sometimes be denied the right to introduce relevant evidence or be unfairly restricted in the scope of cross-examination. Such errors can be adequately corrected, when needed, upon judicial review, as at present. The proposal seems to lose sight of the fact that there is no uniform scientific way to evaluate evidence. There also is often no need or justification to police, with the rules of evidence, fact findings of a well-informed technical staff. Let the agency stress weight, not admissibility (except for privileges). Let it emphasize relevance and materiality.<sup>104</sup> The judge-made rules of evidence, even in non-jury civil cases in the federal courts, are much too vague, and in many cases, far too restrictive because of antiquated policies, to be forced upon administrative agencies. There is no need to inflict all the nuisances of the judicial hearsay rules upon the administrative process.

Equally troublesome are recent proposals<sup>105</sup> to restrict agency review of findings of fact or evidentiary fact made by trial examiners or those who initially preside at the agency hearings. Actually, the proposals seem based largely upon the unwarranted belief that most hearings before trial examiners involve oral testimony to a large extent, where credibility

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103. Section 1006(d) of the proposed Code states that "the rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil non-jury cases in the United States district courts." A.B.A. Proposed Code 192. This does not apply to any "rule making" as defined in the Code (see note 102 *supra*) or to "approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, or practices" bearing upon these, where any "reliable and probative evidence" may be received. A.B.A. Proposed Code 192. Section 1004(a) requires that "pleadings, including the initial notice, shall conform with the practice and requirements of pleading in the United States district courts, except to the extent that the agency finds conformity impracticable. . . ." A.B.A. Proposed Code 188. Cf. note 167 *infra* for similar provision in the Taft-Hartley Act.

104. See 2 Davis, *Treatise* ch. 14; Davis, *Evidence*, 30 N.Y.U.L. Rev. 1309 (1955). But cf. Pace, *Current Problems in Administrative Law*, 9 Va. L. Weekly Dicta Comp. 88 (1958).

105. Section 1007(c) of the A.B.A. Proposed Code provides: "The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the presiding officer shall not be set aside by the agency on review of the presiding officer's initial decisions unless such findings of evidentiary fact are contrary to the weight of the evidence." A.B.A. Proposed Act 193-94. Cf. Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 Cornell L.Q. 281 (1955); Fuchs, *Hearing Commissioners*, 30 N.Y.U.L. Rev. 1342 (1955); Thomas, *The American Bar Association's Legislative Proposals as They Affect the Interstate Commerce Commission and its Practitioners*, 24 ICC Prac. J. 1129 (1957).

of witnesses is decisive. In fact, proponents of the change say it will not apply at all to non-oral testimony.<sup>106</sup> Nor, apparently, will it apply to the drawing of inferences of ultimate facts from basic facts, or to forward fact finding in rate cases.<sup>107</sup> Actually, credibility is a minor factor in the hearings and work of many agencies, such as the Federal Trade Commission, or the Securities and Exchange Commission. Often it is difficult to separate evidentiary facts from questions of law and of policy, where the agency must continue to exercise full responsibility. Policy and facts are often interwoven. If the issue involves credibility of witnesses, the trial examiner's views are certainly entitled to great weight. Even here credibility seldom stands alone and often is affected by other nonoral evidence. At present, moreover, reviewing courts have indicated in clear terms that the agency must give much weight to the views of a trial examiner on credibility of oral testimony.<sup>108</sup> This seems sufficient. True, Professor Cooper, in a recent study<sup>109</sup> of decisions of four agencies, the NLRB, the FTC, the CAB, and the FPC, reaches the conclusion that in few instances, if any, would the final decision of the agency have changed if the findings of facts of the trial examiner had been reversible by the agency only if clearly erroneous. Rarely was the trial examiner reversed by the agency on closely balanced issues of fact in these cases. Unfortunately, this study was made when the trial examiners were subject to reversal on factual findings by the agency. One cannot be sure the examiner would have acted as wisely or reached the same factual findings if he had known before his decision of his greater degree of independence under the rule favored by Professor Cooper. Moreover, everyone might not reach the same conclusions as to what were factual findings and what were not.

## XII. SEPARATION OF FUNCTIONS, INSTITUTIONAL DECISIONS, AND JUDICIAL REVIEW

Separation of the internal functions of an agency poses further issues. There are really two different problems here. One is the separation of

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106. See Sellers, *The American Bar Association's Legislative Proposals Respecting Legal Services and Procedures*, 24 ICC Prac. J. 1115, 1156 (1957).

107. Fuchs, *The American Bar Association and the Hoover Task Force Administrative Code Proposals*, 23 ICC Prac. J. 870, 874 (1956).

108. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955) (agency may overrule examiner's findings even if latter not "clearly erroneous"). *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (examiner's findings on credibility bear upon substantiality of evidence supporting agency's findings of fact). But cf. *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951), petition for cert. dismissed, 344 U.S. 206 (1952) (examiner's findings unrelated to credibility given decisive weight by reviewing court).

109. Cooper, *Administrative Law: The Process of Decision*, 44 A.B.A.J. 233 (1958).

functions. Certainly, some internal separation of functions as under the present Administrative Procedure Act is desirable and necessary, and this should be extended to licensing and rate-making. Investigative and prosecutory functions ought to be separated from adjudication. In fact, prosecuting should be broadened to include advocacy in general, even if no accusing is involved. Testifying, negotiating settlements, or instituting proceedings, however, should not usually be separated from judging. A second problem is not the improper combination of functions but the institutional decision. This is the handling of cases by anonymous persons, the agency staffs, which prepare and write opinions for the deciders. Consultation between trial examiners and the agency staff other than prosecutors and investigators, between such staff and agency heads and members, may lead to a separation of decision-making from opinion-writing and a denial of access by the parties to those who influence or decide the outcome of cases. This is true even if there is no question of the introduction of factual materials not found in the formal record. Such consultation, however, seems both desirable to utilize the expertise of agency staffs, and necessary to obtain the prompt and efficient handling of the tremendous number of cases requiring agency action.

Proposals<sup>110</sup> to apply the present separation of functions of the Administrative Procedure Act to all formal rule-making on a record seem unsound. Much formal rule-making is non-adversary in character, dealing largely with prognosis, political judgments, compromises of competing interests, and problems of feasibility. All of these demand expert staff work, special knowledge, continuity of experience, and political wisdom. We have here a legislative, rather than a judicial, function since evaluation of the pros and cons of a wide variety of competitive interests is involved.

On the other hand, it seems desirable, as pointed out previously, to extend separation of internal functions<sup>111</sup> to licensing and rate-making. This is true despite the absence of an accusatory element and the

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110. Task Force Report, Recommendation No. 35, at 164. The A.B.A. Proposed Code modifies substantially these proposals of the Task Force. See note 102 *supra*. It would not apply separation of functions to "rule-making," but defines rule-making far more narrowly than the present Act—rule- or rate-making of particular applicability are adjudication under the ABA Proposed Act.

111. Section 5 of the Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1952), now exempts from separation of functions "applications for initial licenses" or "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers." See 2 Davis, *Treatise* § 13.09 at 230. See also note 102 *supra*, where the A.B.A. Proposed Code excludes formal rule-making and general rate and price fixing, but has no exemption for licensing and rate-making of particular applicability which are still included as adjudication and must have separation of functions.



presence frequently of technical problems requiring staff expert knowledge. The need for independence of decision, especially in licensing, seems to call for such separation of functions.

There are also: (1) proposals<sup>112</sup> to isolate the trial examiners completely from the *entire* agency staff on *all* matters, rather than just the investigatory and prosecutory personnel, as at present;<sup>113</sup> and (2) proposals<sup>114</sup> to extend their isolation from the staff beyond disputed questions of fact, as at present,<sup>115</sup> to *all* matters of fact, law, and policy. These are objectionable because they place an unfair burden on the trial examiner, who needs the help of the expert agency staff. Other proposals<sup>116</sup> would isolate the agency heads completely from the entire

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112. Section 1005(c) of the A.B.A. Proposed Code stipulates that no "presiding or deciding officer . . . shall be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigatory or prosecuting functions for any agency. . . . [N]o such presiding or deciding officer or agency . . . shall consult with any person or party on any issue of fact or law in the proceeding, except that in analyzing or appraising the record for decision, any agency member may (1) consult with other members of the agency in cases in which the agency is making the decision, (2) have the aid and advice of one or more personal assistants, (3) have the assistance of other employees of the agency who have not participated in the proceeding in any manner, who are not engaged for the agency in any investigative functions in the same or any currently factually related case, and who are not engaged for the agency in any prosecutory functions." A.B.A. Proposed Code 190. See 2 Davis, Treatise §§ 11.08-.12, 13.03.

113. Section 5(c) of the Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1952), provides that no trial examiner shall "be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency." See 2 Davis Treatise §§ 13.07, 13.10. This does not apply to the actual members of the agency. Section 5(c) further provides that no trial examiner "shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate." This also does not apply to actual members of the agency. Different views have been expressed as to whether it bars consultation with non-investigating or non-prosecuting agency staff. Compare 2 Davis, Treatise § 11.17, with Fuchs, Hearing Commissioners, 30 N.Y.U.L. Rev. 1342, 1368-69 (1955).

114. See note 112 *supra*. Note that the ban extends to "any issue of fact," not "any fact in issue," as under § 5(c) of the present Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1952). This would include all facts, even those not disputed. Unlike the present Act, the ban also extends to questions of law. Moreover, § 1007(b) of the Code makes it mandatory for the trial examiner to make the initial decision, unless the agency presided at the hearing, except when all parties waive this right, and except for rule-making required to be made upon a record under § 1003(b). See A.B.A. Proposed Code 187, 193. For the definition of rule-making, see note 102 *supra*.

115. See note 113 *supra*.

116. At present, the separation of functions required by § 5(c) of the Administrative Procedure Act does not apply in any manner to the agency or any member or members of the body comprising the agency. See note 113 *supra*. However, § 5(c) prohibits any officer, employee or agent engaged in performing investigative or prosecutory functions in any case participating or advising in the decision of that or a factually related case, except as

staff on all matters; or from investigatory and prosecutory staff members only on all matters. This kind of isolation should be required as to the investigatory and prosecutory staff only. The expert staff of the agency is its chief reason for existence.

The concept of the agency as a one-man judge, prosecutor, investigator, jury, and lawmaker is, of course, far from the truth. Agency heads, in authorizing prosecution or investigation, may more fairly be likened perhaps to a judge ruling upon a demurrer or a motion to dismiss before all the evidence is in, or issuing a temporary restraining order, or the Supreme Court ruling upon a request for certiorari. Nor do agency members stand to gain or lose personally by their decisions. They are more in the role of a head of personnel at a large corporation who, after investigating, fires a worker for loafing on the job. The gain in public confidence, however, if there is separation of functions here, may well compensate for some resulting inefficiency to the agency.

There are also proposals for a rigid external division of agency functions.<sup>117</sup> These seem to vary in purpose and method, some<sup>118</sup> stressing complete isolation of investigatory and prosecutor personnel in an

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counsel or witness in a public hearing. Thus agency heads, even if engaged in investigations or prosecutory functions to some extent, may still decide cases. However, other employees, agents or officers engaged in investigating or prosecutory functions in any case or a factually related case may not participate or advise in the decision or recommended decision or review of such cases. Cf. 2 Davis, Treatise § 13.06. The A.B.A. Proposed Code would apply separation of functions to agency heads. See A.B.A. Proposed Code § 1005(c), at 185. Thus, unlike the present Act, any agency member in any way connected with prosecutory or investigatory functions in a case or a factually related one could not sit or participate in any adjudicative aspect of that case. The Task Force Report favored complete separation of all deciding officers, including agency heads and members, from all the staff, except for special review assistants, along the lines of the present FCC organization. Task Force Report, Recommendation No. 41, at 176-82.

117. There are no such requirements in the present Administrative Procedure Act. The American Bar Association has drafted bills to (1) make the Tax Court an article III one; (2) establish a Trade Court, also an article III one, with original jurisdiction over all Clayton Act proceedings, and all unfair trade practice proceedings by the FTC and other agencies; and (3) a Labor Court, an article III one, with original jurisdiction over all unfair labor practices and labor representation cases of the NLRB. See Sellers, The American Bar Association's Legislative Proposals Respecting Legal Services and Procedures, 24 ICC Prac. J. 1115 (1957). See H.R. 8751, S. 2292, and S. 3796, S. 3797, S. 3798, 85th Cong., 2d Sess. (1958). The Task Force favored an administrative court with two sections, one for taxes, one for trade regulation. Task Force Report, Recommendations Nos. 62-65, at 242-56. Some of the Task Force also favored a labor section and an immigration section in this court. *Id.* at 435-42. The Commission recommended labor, tax, and trade regulation sections. Task Force Report, Recommendation No. 51, at 84-88.

118. See 61 Stat. 139 (1947), 29 U.S.C. §§ 153(d), 154 (1952). Cf. 66 Stat. 712, 721 (1952), 47 U.S.C. §§ 154(f)(2), 155, 409 (1952). See 2 Davis, Treatise, §§ 11.13-14, 13.04-05. The FTC has a review staff which assists the agency members in adjudication and may not engage in other functions. Trial examiners must render all initial decisions

independent branch, as in the present NLRB, others<sup>119</sup> emphasizing transfer of adjudicative agency functions to a special administrative court. Logically, an agency should be divided into three independent parts: (1) a court for adjudicatory functions, (2) an independent investigatory and prosecution part, and (3) an independent rule-making part. Proposals for administrative courts seem to ignore any alleged harm from a mixture of investigatory and rule-making functions. Many agencies have power to handle a given problem either by rule-making or by adjudication. Proposals for an independent prosecutor only ignore alleged defects of mixing adjudicative and legislative functions. Yet, the difference between the legislator and the judge is often deemed fundamental. Moreover, it is sometimes argued that ultimately all adjudicative functions should be given to regular courts. This should occur when policies have been made sufficiently definite by the administrative agency and administrative court to have moved from the realm of discretion to routine decision under definite rules of law.<sup>120</sup> If this is true, then all investigation and prosecution would eventually go to the Department of Justice, and all rule-making and legislative activity (of which very little would ultimately be required when agency policies had been fully worked out) could be returned to Congress itself.

Perhaps the answer is that logic will not prevail here over certain hard facts. The continual rise of new problems caused by the rapid growth and changes of the American economy promises little hope that the need for wide discretion, expertness, flexibility, rule-making, and policy-making, will ever disappear in the fields entrusted to administrative control. The idea of even substantially eliminating administrative dis-

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and may consult with no one (except other examiners) in making decisions on any issue of law or of fact—not even with the Commissioners. The Commissioners in making adjudicative decisions may not consult with (1) anyone who participated in any way with the preparation or presentation of the case; (2) anyone in investigatory or prosecuting work; (3) anyone in the Office of General Counsel, Chief Engineer, and Chief Accountant. Each Commissioner also has legal and engineering assistants with whom he may consult. See H.R. Rep. No. 1141, 85th Cong., 2d Sess. 12 (1959), recommending an amendment to allow consultation with the General Counsel.

119. These are to be article III courts of original jurisdiction. The agencies, such as the NLRB and FTC, will continue to handle the investigation and prosecution of cases, and the formulation of rules, but all hearings on these matters will be in these courts. It is not clear whether the general counsel of the NLRB will continue to retain his independent status.

120. Cf. B. Schwartz, *Administrative Justice and its Place in the Legal Order*, 30 N.Y.U.L. Rev. 1390 (1955); L. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 Harv. L. Rev. 436, 473 (1954); Sellers, *The American Bar Association's Legislative Proposals Respecting Legal Services and Procedures*, 24 ICC Prac. J. 1115 (1957): But cf. Ginnane, *The Future of Administrative Law*, 19 Ohio St. L.J. 432 (1958).

cretion is a chimera. Discretion has a continuous function. Limited clear-cut delegations of power by Congress, or literal prescriptions by the legislature, are usually impossible, even if desirable. Regulation always requires much discretion. There is no way to reduce the large and ever-increasing number of variables to precise statements which can be mechanically applied. We must recognize the continuous need for a sensitive response to the dynamism of American business and society.

Nor is it true that a rigid body of law should always be given to the courts. It may still be impossible to carve out the agency's judicial functions without seriously impairing its work.<sup>121</sup> The agency may need to retain control over enforcement of even fully-developed rules to continue development of its program. Adjudication frequently is closely tied up with the entire regulatory scheme. This is particularly true when the threat of adjudication may often lead to compromise and informal settlement, as in FTC and NLRB proceedings. Here informal settlements are often made because of the agency's power to issue cease and desist orders in contested cases and thus define unfair practices.<sup>122</sup> Each adjudication has a twin aspect: (1) it fixes rights of the individual parties; and (2) fills in statutory gaps, as when it defines what are unfair trade or labor practices. Where prosecution and adjudication are separated too much, the prosecution will often ignore or be unaware of the policies of the deciders. Giving adjudication to courts or a separate agency creates too much division of power and too many checks and balances, which lead to paralysis, inefficiency, conflict, and confusion.

Proposals to create independent administrative courts appear to ignore the legislative activities of the "independent agencies." They assume that if the agency's judicial functions are severed, the remaining part of the agency can be fully coordinated with and submerged in the executive branch of the government. Indeed, the assumption seems to be that this will greatly increase the operating efficiency of that part of the agency not transferred to the administrative court.<sup>123</sup> These arguments seem-

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121. See Carrow, *Administrative Adjudication: Should its Role be Changed?*, 27 *Geo. Wash. L. Rev.* 279, 294-99 (1959); Farmer, *An Administrative Labor Court: Some Observations on the Hoover Commission Report*, 24 *Geo. Wash. L. Rev.* 656 (1956); Nutting, *The Administrative Court*, 30 *N.Y.U.L. Rev.* 1384 (1955).

122. See H.R. Rep. No. 1141, 85th Cong., 2d Sess. 77-79, 81-85; 2 Davis, *Treatise* § 13.05; Freer, *The Case Against the Trade Regulation Section of the Proposed Administrative Court*, 24 *Geo. Wash. L. Rev.* 637, 646-48 (1956); Gatchell, *The Impact of the Administrative Process on the Judicial Branch of the Government: A Defense of the Status Quo*, 16 *Fed. B.J.* 482 (1956); Kinter, *The Trade Court Proposal: An Examination of Some Possible Defects*, 44 *A.B.A.J.* 441, 493-94 (1958); Minor, *The Administrative Court: Variations on a Theme*, 19 *Ohio St. L.J.* 380 (1958).

123. See B. Schwartz, *Administrative Justice and Its Place in the Legal Order*, 30 *N.Y.U.L. Rev.* 1390, 1408-10 (1955). But cf. Schubert, *Legislative Adjudication of Ad-*

ingly ignore the fact that Congress has deliberately chosen to make many of these agencies independent of the executive branch. The reason for so doing was that the agency was a delegate of legislative as well as judicial power.<sup>124</sup> It is unlikely that Congress, upon creation of an administrative court, would then supinely allow complete executive control of the remaining functions of an independent agency. This would be particularly true when much of the agency's work consists of the creation of rules, a subordinate kind of law-making requiring the exercise of policy judgments. The current intense interest of Congress in the functioning of these agencies indicates an unfavorable attitude toward these proposals.

### XIII. ADMINISTRATIVE HEARING RECORDS AND JUDICIAL REVIEW

#### A. *Official Notice*

The nature of judicial review depends not only on the type of hearing, if any, previously allowed before the agency, but also upon the kind of record transmitted from the agency to the reviewing court. If the record is scant and fragmentary, failing to contain all the facts and evidence relied upon by the agency in reaching its decision, it will be difficult, if not impossible, for the court to determine whether there is an adequate basis in fact for the agency's decision, without a trial *de novo* or at least a reopening of the record to admit the missing data and evidence. Three questions in particular have arisen here.

First is the matter of so-called judicial notice by the agency of facts and matters not in the record or contained in evidence presented at the agency hearing.<sup>125</sup> On the one hand, there is a strong feeling of unfairness when the agency decision for the first time makes findings of fact upon the basis of data not in the hearing record. This means that the interested parties have had no chance, prior to the agency's final decision, to meet this data, explain or refute it, or even to argue about its relevancy and accuracy. On the other hand, to confine an agency, with its expert staff having wide knowledge of the technical problems with which the agency constantly deals, to judicial notice of indisputable facts may

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ministrative Legislation, 7 J. Pub. L. 135 (1958); B. Schwartz, Legislative Oversight: Control of Administrative Agencies, 43 A.B.A.J. 19 (1957); B. Schwartz, The Administrative Process and Congressional Control, 16 Fed. B.J. 519 (1956); B. Schwartz, Legislative Control of Administrative Rules and Regulations: The American Experience, 30 N.Y.U.L. Rev. 1031 (1955); B. Schwartz, Current Problems in Administrative Law, 9 Va. L. Weekly Dicta Comp. 8 (1958).

124. See 1 Davis, Treatise § 1.03; Arpaia, The Independent Agency: A Necessary Instrument of Democratic Government, 69 Harv. L. Rev. 483 (1956); Priest, The Independent Regulatory Agencies, 24 ICC Prac. J. 796 (1957); Priest, Current Problems in Administrative Law, 9 Va. L. Weekly Dicta Comp. 11 (1958).

125. See 2 Davis, Treatise ch. 15; Davis, Judicial Notice, 55 Colum. L. Rev. 945 (1955).

greatly delay and add to the expense of hearings. It may make unavailable much of the expert knowledge of the agency which is based upon unconscious intuitive judgments, without any corresponding benefits to private parties.

The agency cannot be confined to indisputable facts. Policy choices, which must be based on all relevant factors, often are the result of data too elusive to be captured in a record. They are based upon an understanding of general facts, prior experience with similar problems, logic, guesswork, imagination, intuition, emotions—the whole cumulative experience of the administrator. One can hardly testify or be cross-examined on such matters in a satisfactory manner. The agency thus needs its expert data to formulate policy, to create law, and to exercise discretion wisely. It also may need this to infer facts from data, and even perhaps to check credibility of witnesses. It needs often to use its resources and knowledge, the material in its files, and the data in the minds of its staff, after the hearing has ended. The access of the agency to its accumulated experience and wisdom should not be unduly blocked or hampered.

An agency, however, should permit anyone who desires to challenge facts judicially noticed to do so at some time prior to final decision. All parties should have a fair chance to apply their testing processes to any facts that significantly influence or bear closely and critically upon the findings or decision. They should have adequate and full opportunity to meet in an appropriate fashion all these facts that influence the disposition of the case. What is an appropriate fashion depends on such factors as: (1) whether the facts are at the heart or edge of the dispute; (2) whether there is much or little doubt about them; and (3) whether they relate to policy or other matters. Here, again, the attempt to establish absolute rules is a mistake. Much must be left to the discretion and good sense of administrators and judges.

Some facts may be collateral ones, on the periphery of the decisive issues in the case. If there is little possibility of doubt about them, and if they are legislative and policy-making, there seems little need or desirability of an absolute rule that no notice may be taken of them without prior warning to the parties and without the calling of witnesses to testify and be cross-examined about them. At the other extreme, there are facts which are at the very heart of the controversy and the subject of doubt and bitter dispute. If they are adjudicative and relate to the immediate parties, not to give those parties full opportunity to cross-examine and to rebut all evidence relied upon by the agency in its findings on these facts is a manifest denial of justice. When legislative facts are disputed, a chance to know and meet, to explain or rebut,

the data relied upon should be given all parties, but this does not often require a trial with cross-examination. Evidence should not be substituted for argument here. For legislative facts, we usually need written briefs or oral arguments and discussions, not sworn testimony at a trial.

On the whole, the present relevant provisions of the Administrative Procedure Act are satisfactory.<sup>126</sup> The agency should have discretion, subject to judicial review for abuse or arbitrary or harsh exercise, (1) as to when to notify parties before notice is taken of facts not in the hearing record, and (2) as to when it will permit the parties to dispute or challenge facts already noticed. The proposed substitutes<sup>127</sup> for the Administrative Procedure Act provide that no material fact of any kind may be judicially noticed by an agency without prior notice to the parties. This seems unwise and perhaps unworkable.

There are proposals<sup>128</sup> which would require inclusion in the record of all memoranda prepared by the agency staff and used by the agency

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126. Section 7(d) states: "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." 60 Stat. 241 (1946), 5 U.S.C. § 1006(d) (1952). See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946). In drawing inferences from proven facts, the Board may rely upon its specialized knowledge so long as its inferences and conclusions reasonably relate to these facts. In choosing between two equally possible inferences, the Board may use its special experience. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548 (1945). Compare *Erie R.R. v. United States*, 59 F. Supp. 748 (S.D. Ohio 1944), with *Chicago B. & Q. Ry. v. Babcock*, 204 U.S. 585, 598 (1907), and *American Airlines, Inc. v. CAB*, 192 F.2d 417 (D.C. Cir. 1951). But cf. *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937); *West Ohio Gas Co. v. Public Util. Comm'n*, 294 U.S. 63 (1935); *United States v. Abilene & So. Ry.*, 265 U.S. 274 (1924); *ICC v. Louisville & N.R.R.*, 227 U.S. 88 (1913).

127. Section 1006(e) of the A.B.A. Proposed Code provides: "Agencies may take notice of judicially cognizable facts and in addition may take official notice of general, technical, or scientific facts within their specialized knowledge. Such additional official notice of a material fact beyond the evidence appearing in the record may be taken only if (1) the fact so noticed is specified in the record or is brought to the attention of the parties before final decision, and (2) every party adversely affected by the decision is afforded an opportunity to controvert the fact so noticed." A.B.A. Proposed Code 192.

128. Section 1007(b) of the A.B.A. Proposed Code provides that the record for decision by the trial examiner shall include all the pleadings, "evidence received or considered, including testimony, exhibits, and matters officially noticed," offers of proof and rulings thereon, and the findings proposed by the parties. A.B.A. Proposed Code 193. "No other material shall be considered by the agency or by the presiding officer." A.B.A. Proposed Code 193. Section 1007(c) provides that on review by the agency of the examiner's decision the record shall include the above items and the examiner's decision and the exceptions and briefs filed. A.B.A. Proposed Code 193. "No other material shall be considered by the agency upon review." A.B.A. Proposed Code 193. Sections 1007(a) and (c) state that the grounds for decisions by the examiner and agency shall be within the scope of the issues presented on the record. A.B.A. Proposed Code 193.

in any way in making its decision. There seems no good reason why an agency should be far more restricted here than a judge. It is one thing to insist that all factual evidence relied upon be in the record. It is very different to insist that both memoranda of law or policy, and summaries or analyses of arguments, briefs, and even evidence already in the record, prepared by assistants, should also be incorporated into the formal record. Judges rely on secretaries and law clerks to prepare similar memoranda and summaries. No doubt, as Professor Cooper points out,<sup>129</sup> counsel often would be delighted and find it most helpful to have copies of such documents (and the agency might well benefit from briefs of counsel thereon, pointing out vital facts in the record overlooked, etc.). The same reasons, however, that operate to deny access to them in the case of judges apply to administrators. The benefits to the parties are outweighed by the added expense and delay, and the hampering of free interchange of views among the deciders. Even courts have been known to decide cases upon grounds not argued by counsel, and though the wisdom of this is doubtful, a statutory mandate is not the solution. As Professor Cooper admits,<sup>130</sup> prohibition of oral discussion might also be necessary to enforce this rule. Enforcement then would virtually necessitate invasion of every conference of agency staff members about a case. The real thrust, perhaps, of the critics here is at the so called institutional decision, because of the feeling that an agency decision is the product of many anonymous staff members rather than of the agency heads.

### B. *Secret Evidence*

A second serious problem is the deliberate publicly acknowledged concealment from the parties, and even from the reviewing courts, of crucial evidence on the ground that disclosure thereof would be detrimental to national security or the best interests of the government.<sup>131</sup>

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129. Cooper, *Administrative Law: The Process of Decision*, 44 A.B.A.J. 233 (1958). But cf. Goff, *Views on the American Bar Association Proposed Code of Administrative Procedure*, 25 ICC Prac. J. 1097 (1958).

130. Cooper, *supra* note 129, at 235-36.

131. See 1 Davis, *Treatise* § 8.15; Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. Pa. L. Rev. 166 (1958); Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193 (1956); Timbers & Cohen, *Demands of Litigants for Government Information*, 18 U. Pitt. L. Rev. 687 (1957); Symposium—*Executive Privilege: Public Right to Know and Public Interest*, 19 Fed. B.J. 1 (1959); Comment, *The Use of Undisclosed Evidence by Government Officials in Administrative and Judicial Proceedings*, 45 Calif. L. Rev. 524 (1957). Section 1002(f) of the A.B.A. Proposed Code exempts from the requirements of publication for proposed rule-making, data required to be kept secret for the protection of national security, data submitted in confidence to an agency relying upon a statute or agency rule, or data whose secrecy is specifically authorized by statute or disclosure of which is a clearly unwarranted invasion of personal privacy. A.B.A.



Thus, the basic rights of confrontation, cross-examination, and rebuttal are denied, often in cases involving the adjudication of disputed facts about individuals. The problems usually are not those of policy-making, issues of law, discretion, future prophecy, or of rates and profits. Instead of legislative rule-making, involving general data and ideas, we deal with facts about individuals, and their rights, liberties, and property. In criminal trials, we have pretty well concluded that the government must either disclose to the defense all relevant and crucial evidence in its possession which is *essential* to its case, in spite of the effect upon national security, or dismiss the prosecution.<sup>132</sup> A rule so absolute is probably not suitable for all administrative hearings. Few would argue that the government must be forced to disclose national defense secrets in order to remove a suspected employee from highly secret work on atomic energy or from an important policy-making post, even if the government may not secure a conviction for espionage of the suspect without this disclosure.

There are two different phases to this problem. First, there is the government's claim of a special privilege to keep secret or withhold certain documents or data in a proceeding, such as a criminal prosecution, where undeniably a regular trial-type hearing is ordinarily required

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Proposed Code 186. There is a similar exemption for national security under Section 1003(f) for such data so far as the rule-making requirements are concerned. A.B.A. Proposed Code 188. Section 1005(f) provides: "In the case of agency proceedings or actions which involve the national security of the United States and for that reason must be kept secret, the agency shall provide by rule for such procedures parallel to those provided in this Act as will effectively safeguard and prevent disclosure of classified information to unauthorized persons with minimum impairment of the procedural rights which would be available if classified information were not involved." A.B.A. Proposed Code 190-91. Section 1006(d) gives in hearings, "except as otherwise provided by statute," a right to each party "to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." A.B.A. Proposed Code 192.

132. *Jencks v. United States*, 353 U.S. 657 (1957); *Roviaro v. United States*, 353 U.S. 53 (1957); *Gordon v. United States*, 344 U.S. 414 (1953); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944). In *United States v. Reynolds*, 345 U.S. 1 (1953), the Court upheld a refusal to give access to an Air Force accident investigation report in a suit under the Federal Tort Claims Act. In *United States v. Nugent*, 346 U.S. 1 (1953), it was held that in a criminal prosecution for refusal to submit to induction, the defendant was entitled to a fair resumé of the FBI report upon which his draft classification was made, but not the report itself. Perhaps Congress has modified the rule in providing that refusal to disclose relevant statements of government witnesses in criminal cases shall cause the elimination of all testimony of the witnesses rather than dismissal of the case (unless the court declares a mistrial in the interests of justice). See 71 Stat. 595 (1957), 18 U.S.C. § 3500(d) (Supp. V, 1958). Cf. *Palermo v. United States*, 258 F.2d 397 (2d Cir. 1958), cert. granted, 358 U.S. 905 (1958); *Lev v. United States*, 258 F.2d 9 (2d Cir. 1958), cert. granted, 358 U.S. 903 (1958); *Rosenberg v. United States*, 257 F.2d 760 (3d Cir. 1958), cert. granted, 358 U.S. 904 (1958).

by statute or the Constitution. In the second situation, the government withholds documents or data on the ground that there is no requirement that a full trial-type hearing be provided. Instead, something less than such a hearing is sufficient to meet any statutory and constitutional requirements for fair procedure and due process. The line between the two types of situations is not always clearly drawn, and often they tend to overlap and merge into each other. A criminal trial is a clear example of the first kind. Perhaps an exclusion hearing for an alien, a classification hearing for a draftee, or a security hearing for a government employee, are examples of the second type.

Nondisclosure in a case where normally a trial-type hearing is required is based: (1) in part upon a common law privilege for nondisclosure of "state secrets"; (2) in part upon an executive privilege growing out of separation of powers,<sup>133</sup> and (3) in part upon statutory provisions.<sup>134</sup> The decisive factors are clearly the type of information withheld and the nature of the interest affected, civil or criminal. In addition, the courts differentiate among kinds of civil interests, such as government employment, admission of aliens, or the suspension of deportation of aliens, on the ground that some of these interests demand less procedural due process than others. The type of information varies and includes secrets of state; identity of and data obtained from informers; data secured by government investigators; and so-called internal management data. Top secrecy is usually given to the first category, which involves public security, international relations, and military plans and organizations.<sup>135</sup> The informer privilege has been sharply limited in criminal cases<sup>136</sup> and

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133. See Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 *Yale L.J.* 477 (1957).

134. Cf. *United States ex rel. Touhy v. Ragan*, 340 U.S. 462 (1951); *Boske v. Comin-gore*, 177 U.S. 459 (1900). In both these cases subordinate officials were allowed to obey orders of their superiors, based upon statutes, to withhold data. The Court did not rule whether the superior officials could be compelled to reveal the secret data. See *Appeal of SEC*, 226 F.2d 501 (6th Cir. 1955); *Universal Airline, Inc. v. Eastern Air Lines, Inc.*, 188 F.2d 993 (D.C. Cir. 1951) (both cases upholding non disclosure in civil suits between private persons).

135. Cf. *Totten v. United States*, 92 U.S. 105 (1875) (upholding in civil action secrecy of espionage agreement made with spy by President). See *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-21 (1936). All these cases involved the President himself. A lower court has applied this privilege to the Secretary of State in passport cases. *Dayton v. Dulles*, 254 F.2d 71 (D.C. Cir. 1957), rev'd on other grounds, 357 U.S. 144 (1958); *Briehl v. Dulles*, 248 F.2d 561, 574-75 (D.C. Cir. 1957), rev'd on other grounds, 357 U.S. 116 (1958).

136. *Roviaro v. United States*, 353 U.S. 53 (1957) (no privilege if informer is one who took active part in the investigation itself). There is no privilege if the informer's identity is once disclosed, nor does the privilege extend to the informant's disclosures if they do not reveal his identity. And if the informer's identity is essential for a fair trial, it must

also in civil actions brought by the government.<sup>137</sup> A privilege has been denied government investigators in criminal actions<sup>138</sup> and also in civil proceedings.<sup>139</sup> The issue of secrecy for data transmitted by one official to another in the course of his duty—the so-called internal management category—is confused. This includes exchanges of advice,<sup>140</sup> a rather sensitive category, and government files containing other pertinent data which private litigants desire.<sup>141</sup>

Thus far, in these cases and also in situations of the second type (where a trial-type hearing is not required) there has often been a failure to work out alternative solutions between absolute disclosure and absolute concealment of everything asserted to be vital for national security. It seems questionable that all government employees, even those not engaged in defense or secret work or in policy-making jobs, should be subjected to this type of hearing.<sup>142</sup> Sometimes, instead of discharge, the proper remedy may be a transfer to another government position in some non-defense, non-critical area. If the object is to keep secret the identity of spies or agents, perhaps adequate summaries of their evidence or reports could be furnished. If the identity of actual government secret agents may be concealed, the same non-disclosure policy does not seem applicable to names of former associates, neighbors, casual informers, etc. Often the latter accusers are motivated by malice or mistake, unknown to the investigator. The accused can quickly expose the distortion or falsehood here, if given the chance. Where the secrecy of FBI reports is at stake, full disclosure could be required except for data whose secrecy is essential for security. If speed is deemed essential,

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be disclosed or the case dismissed. But cf. *United States v. Gernie*, 252 F.2d 664 (2d Cir.), cert. denied, 356 U.S. 968 (1958); *Amaya v. United States*, 247 F.2d 947 (4th Cir. 1957), cert. denied, 355 U.S. 916 (1958); *United States v. Colletti*, 245 F.2d 781 (2d Cir. 1957), cert. denied, 355 U.S. 874 (1957).

137. Cf. *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958).

138. *Roviaro v. United States*, 353 U.S. 53 (1957); *Jencks v. United States*, 353 U.S. 657 (1957). Congress has tried to modify the rule of the *Jencks* case by statute. See note 132 *supra*.

139. *NLRB v. Adhesive Prod. Corp.*, 258 F.2d 403 (2d Cir. 1958); *Communist Party v. Subversive Activities Control Bd.*, 254 F.2d 314 (D.C. Cir. 1958). Cf. *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220 (1927).

140. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

141. Cf. *Communist Party v. Subversive Activities Control Bd.*, 254 F.2d 314 (D.C. Cir. 1958) (sharply limiting this privilege). But cf. *Petrowicz v. Holland*, 142 F. Supp. 360 (E.D. Pa. 1956); *Universal Airline, Inc. v. Eastern Airlines, Inc.*, 188 F.2d 993 (D.C. Cir. 1951).

142. In *Cole v. Young*, 351 U.S. 536 (1956), it was held that a government employee in a non-sensitive position could not, under present federal regulations and statutes, be discharged as a security risk. Congress, of course, may amend the present laws to confer this power.

full disclosure of FBI reports in draftee cases could be required, even if cross-examination is denied or curtailed in respect to adverse informants.<sup>143</sup> A vague claim of public security should not always be allowed to override all personal rights and freedoms short of criminal prosecutions, as it would eliminate any check on the otherwise unlimited power of officials to conceal weak evidence, and permit them to hide the real basis for their decisions behind the facade of security from the private parties adversely affected and the reviewing courts. To avoid this result, there should be, if possible, some objective independent appraisal here—perhaps by a judge<sup>144</sup>—as to the validity of the pleas for secrecy because of security. Private disclosure to a judge could be required in most cases, at least to an extent sufficient for him to decide if the plea of secrecy is warranted. Subsequent events and investigations<sup>145</sup>

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143. In *United States v. Nugent*, 346 U.S. 1 (1953), the Court imposed the requirement of a fair resumé of all the adverse evidence in the investigator's report for conscientious objectors under the Selective Service Act's provisions granting them a "hearing." Why not require disclosure of all of the FBI report here except what must be concealed for national security? How can the judge determine if the resumé is fair unless he sees the full FBI report? In *Simmons v. United States*, 348 U.S. 397, 405 (1955), the Court ruled the resumé unfair, saying that it must allow the objector to defend against adverse evidence by explaining, rebutting, or qualifying it. In *Gonzales v. United States*, 348 U.S. 407 (1955), the objector was held entitled to see the recommendations of the Justice Department to his appeal board, if they contained factual data not otherwise available to him, so that he could know and meet all the facts in the file sent by the Department to the appeal board. Why not reveal to him all the facts except those whose concealment is essential for national security? See notes 146 and 188 *infra*.

144. Apart from the President, it is not clear what showing must be made and how much revealed to the judge and counsel, to uphold a claim of secrecy. Cf. *United States v. Reynolds*, 345 U.S. 1, 8-11 (1953); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (Attorney General's claim upheld); *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958). The problem of requiring disclosure to the judge, and if so, also to all counsel is an undecided one. See *United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd* by equally divided Court, 339 U.S. 940 (1950); *Appeal of SEC*, 226 F.2d 501 (6th Cir. 1955); *Petrowicz v. Holland*, 142 F. Supp. 369 (E.D. Pa. 1956). Cf. *Rosenberg v. United States*, 257 F.2d 760 (3d Cir. 1958), cert. granted, 358 U.S. 904 (1958).

145. Thus, Mrs. Knauff, after the decision in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), upholding the right of the Attorney General to exclude her as an alien whose admission was prejudicial to the United States, without any hearing or disclosure (even to a court) of the evidence upon which this ruling was based, was in fact given a hearing by the Attorney General before a special board, which board ruled against her admission after the presentation of hearsay evidence charging her with sending confidential and secret government data to Czechoslovakian agents while employed by the American Government in Germany. On appeal, the Board of Immigration Appeals found a lack of substantial evidence to support this charge. The Attorney General then approved this finding and ordered her admission. See *Knauff, The Ellen Knauff Story* (1952).

Similarly, *Mezei*, after the decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), upholding the right of the Government to keep him as an excludable alien

indicate that it is all too easy for an official to cover up mistakes or the weakness of a case by suppressing evidence on the pretext of security. Moreover, in case of doubt, the official decision is almost always in favor of secrecy.

Agreement is general that we should endeavor to give the individual the maximum confrontation possible consistent with national security. The difficulty comes when this principle is applied concretely. There seems, however, no real justification for shielding most informers, at least nonprofessional ones, and no need for concealment of any but the most top secret data, whose revelation might cause grave harm to the interest of the state as a whole. There are serious doubts that security is imperiled if: (1) full disclosure is made to conscientious objectors in draft classification hearings of FBI reports;<sup>146</sup> (2) in passport<sup>147</sup> or licensing proceedings<sup>148</sup> the passport or license is granted unless full

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indefinitely in custody until a country could be found willing to receive him, without a hearing and upon the basis of confidential data (not even disclosed to the courts) that his admission would be prejudicial to the United States [although he had already resided in the United States for 25 years before returning to Europe for 19 months], was finally paroled on the recommendation of a special board which upheld his exclusion on the basis of revealed evidence of past membership in the communist party. See 1 Davis, *Treatise* § 7.15, at 482; Davis, *The Requirement of a Trial-Type Hearing*, 70 *Harv. L. Rev.* 193, 251 (1956).

146. In *United States v. Nugent*, 346 U.S. 1 (1953), the Court ruled the statutory hearing did not require that the registrant be shown the FBI report or told the names of those giving the FBI evidence. Nor did due process. Thus, no opportunity to cross-examine those giving adverse evidence is given. For the extent of a party's rights to a fair resumé of adverse evidence, see note 143 *supra* and note 188 *infra*. But cf. *Bouziden v. United States*, 251 F.2d 728 (10th Cir.), cert. denied, 356 U.S. 927 (1958); *Blalock v. United States*, 247 F.2d 615 (4th Cir. 1957).

147. In *Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955), *aff'd* on other grounds, 235 F.2d 532 (D.C. Cir. 1956), the district court reversed a denial of a passport because it was based solely upon confidential, undisclosed data and so was not supported by substantial evidence. The district court ordered that all evidence relied upon for the agency decision must appear in the record so that the applicant might meet it and the court review it. This rule no doubt should be limited to facts concerning the applicant and not matter dealing with foreign relations. In *Dayton v. Dulles*, 357 U.S. 144 (1958), a similar situation, the Court reversed a passport denial on the ground that it had been made for an improper reason, and thus avoided ruling upon the question of the use of the secret evidence. Cf. *Dulles v. Nathan*, 225 F.2d 29 (D.C. Cir. 1955), where the court ordered either the issuance of the passport or disclosure to the applicant and the court of the particular reasons for the denial, or a statement of cause for not supplying the reasons. The passport was issued. See also *Kent v. Dulles*, 357 U.S. 116 (1958), reversing 248 F.2d 561 (D.C. Cir. 1957); *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955); *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952). See *Boudin*, *The Constitutional Right to Travel*, 56 *Colum. L. Rev.* 47 (1956); *Comment*, 23 *U. Chi. L. Rev.* 260 (1956); *Comment*, 61 *Yale L.J.* 171 (1952); *Note*, 43 *Minn. L. Rev.* 126 (1958).

148. See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (procedural due process required for bar examination applications); *Minkoff v. Payne*, 210 F.2d 689,

disclosure is made of the evidence allegedly justifying a denial; (3) exclusion or deportation or non-suspension of deportation of aliens is denied unless the evidence relied upon is disclosed;<sup>149</sup> (4) revocation of a

691 (D.C. Cir. 1953) (liquor license renewal; full opportunity to rebut evidence must be given); *In re Carter*, 177 F.2d 75 (D.C. Cir.), cert. denied, 338 U.S. 900 (1949), on rehearing in banc, 192 F.2d 15, 25 (D.C. Cir.), cert. denied, 342 U.S. 862 (1951) (revocation and renewal of license for surety on bonds in criminal cases requires a hearing and full revelation of all data, including an FBI report, on which agency decision is based); *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 123 (1926) (dictum that accountant's application for admission to practice before Board may not be denied on charges of unfitness without a hearing because of due process and a chance to rebut and explain adverse evidence). Cf. *Brooks v. Laws*, 208 F.2d 18, 30 (D.C. Cir. 1953) (denial of admission to bar; dicta that confidential inquiry is allowed); *Columbia Auto Loan, Inc. v. Jordan*, 196 F.2d 568 (D.C. Cir. 1952) (denial of renewal of insurance agent's license requires trial-type hearing or trial de novo in court). Of course, a trial-type hearing is unsuitable and should not be required if the question is related to an applicant's technical training and competence, instead of his character or morals. Nor is a trial-type hearing always needed or required if general legislative facts are in dispute. Cf. *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), where the Court refused to review an award for overseas air transportation to one applicant and its denial to another by the President, who using confidential data, revised the CAB recommended decision. The complete refusal of all review seems questionable.

149. In exclusion proceedings, when the alien is a nonresident seeking admission, there may be, under recent decisions, no constitutional barrier to denying him a hearing or using secret data to exclude him. This is true even if the alien is actually in the country, "knocking at the door." The only protection given is what Congress provides by statute. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Hariades v. Shaughnessy*, 342 U.S. 580 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Wong Wing v. United States*, 163 U.S. 228 (1896); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). In exclusion cases there may be no right to a judicial hearing even if a claim of citizenship is made. *United States v. Ju Toy*, 198 U.S. 253 (1905). But cf. contrary holdings cited in note 34 supra. The fairness of an administrative hearing on this point is, however, judicially reviewable. *Tod v. Waldman*, 266 U.S. 113 (1924), modified, 266 U.S. 547 (1925); *Chin Yow v. United States*, 208 U.S. 8 (1908). Resident aliens are entitled to procedural due process in deportation proceedings, *The Japanese Immigrant Case*, 189 U.S. 86 (1903), but not to substantive due process, *Galvan v. Press*, 347 U.S. 522 (1954). The line between exclusion and deportation may be a very fine one. Compare *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), with *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (resident alien seaman out of country on American ship held subject only to deportation, and not exclusion procedures, and so entitled to a hearing). On the issue of alleged citizenship a resident alien is entitled by due process to a full trial-type hearing. *Kessler v. Strecker*, 307 U.S. 22, 34-35 (1939); *Ng Fung Ho v. White*, 259 U.S. 276 (1922). If ordered deported, an alien is entitled by statute to a hearing before an unbiased tribunal on the issue if, as an act of grace, his deportation will be suspended. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). If the hearing is unbiased, he is not entitled to know and meet adverse evidence, for secret data may be relied upon to deny suspension. *Jay v. Boyd*, 351 U.S. 345 (1956); *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955). Full hearings on a stay of deportation application are not required. *Namkung v. Boyd*, 226 F.2d 385 (9th Cir. 1955); *Chiu But Hao v. Barber*, 222 F.2d 821 (9th Cir.), vacated and remanded for dismissal as moot, 350 U.S.

parole is suspended unless the grounds and evidence therefor are revealed;<sup>150</sup> and (5) except in a comparatively few instances of employees engaged in highly secret work, discharge for security (instead of transfer or reassignment) is denied unless a reasonably full disclosure of the evidence bearing upon fitness and loyalty is made.<sup>151</sup> Today, not only all

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878 (1955). An order to an alien not to depart from this country has been held subject to a trial type hearing. *Han-Lee Mao v. Brownell*, 207 F.2d 142 (D.C. Cir. 1953). See Comment, 20 U. Chi. L. Rev. 547 (1953). See notes 34-37 supra, note 189 infra. Cf. *United States v. Matles*, 154 F. Supp. 574 (E.D.N.Y. 1957).

150. It is very doubtful if there is any non-statutory right to a hearing on an application for parole, probation, or pardon. Cf. *Berman v. United States*, 302 U.S. 211 (1937); *Loiseau v. Hunter*, 193 F.2d 41 (D.C. Cir. 1951). There may be a statutory right to a hearing before revocation of a parole on the factual issue of whether its conditions have been violated. *Escoe v. Zerbst*, 295 U.S. 490 (1935). One court has found a due process requirement for a hearing of some kind here. *Fleenor v. Hammond*, 116 F.2d 982 (6th Cir. 1941) (pardon). Cf. *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946) (right to counsel under a statute). But cf. *Dunbar v. Cranor*, 202 F.2d 949 (9th Cir. 1953). The statutory hearing perhaps does not include the right to know and meet adverse evidence. *Hiatt v. Compagna*, 178 F.2d 42 (5th Cir. 1949), aff'd by an equally divided Court, 340 U.S. 880 (1950). Cf. *Williams v. New York*, 337 U.S. 241 (1949). See Note, 65 Harv. L. Rev. 309 (1951); note 44 supra.

151. In *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951), the Court held a government employee had no right to a hearing before discharge as a security risk, nor to judicial review thereof. On this point the opinion seems no longer the law, since due process would require a hearing and limited judicial review here. *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (dictum). Cf. *Cole v. Young*, 351 U.S. 536 (1956); *Peters v. Hobby*, 349 U.S. 331 (1955); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123 (1951); *Communist Party v. Subversive Activities Control Bd.*, 254 F.2d 314 (D.C. Cir. 1958) (registration under Subversive Activities Control Act; use of secret data denied). The Bailey opinion also held there was nothing improper in the reliance upon secret data. Cf. *Vitarelli v. Seaton*, 253 F.2d 338 (D.C. Cir. 1958), cert. granted, 358 U.S. 871 (1958). Other courts have reached a contrary conclusion when merchant seamen were declared security risks and, hence, ineligible for employment as seamen. *Parker v. Lester*, 98 F. Supp. 300 (N.D. Cal.), appeal dismissed, 191 F.2d 1020 (9th Cir. 1951) (entitled to resumé of all evidence if identity of informer must be kept secret; identity of informers not secret agents must be disclosed); *Parker v. Lester*, 112 F. Supp. 433 (N.D. Cal. 1953), modified, 227 F.2d 708 (9th Cir. 1955) (entitled to know and rebut all evidence). Cf. *United States v. Gray*, 207 F.2d 237 (9th Cir. 1953). An injunction against interference with their employment was then issued. *Lester v. Parker*, 141 F. Supp. 519 (N.D. Cal.), aff'd, 235 F.2d 787 (9th Cir. 1956). In *Greene v. McElroy*, 254 F.2d 944 (D.C. Cir. 1958), cert. granted, 358 U.S. 872 (1958), an office employee of a company engaged in work on a government defense contract was held to have no right to secret data causing the revocation of his security clearance. The loss of clearance resulted in his transfer from an \$18,000 a year job (with access to classified data) to a \$4,400 job (without such access). Cf. *Jencks v. United States*, 353 U.S. 657 (1957); *Deak v. Pace*, 185 F.2d 997 (D.C. Cir. 1950); *McTernan v. Rogers*, 113 F. Supp. 638, 640 (N.D. Cal. 1953). But cf. *Bland v. Harman*, 245 F.2d 311 (9th Cir. 1957). See O'Brien, *National Security and Individual Freedom* (1955); Brown & Fassett, *Security Tests for Maritime Workers: Due Process Under the Port*

government employees (including those in the armed forces), but also several million employees in private industry working on government contracts, as well as merchant seamen,<sup>152</sup> are subjected to government security requirements. Perhaps the point has been reached where we are taking away rights as essential as those at stake in criminal proceedings without requiring the same safeguards for individual property and liberty. What job, profession, or calling will one be able to pursue without a state license and security clearance in these days of continual mobilization to meet threats of war?

One with a real interest at stake should have a chance to know and to meet by rebuttal evidence, cross-examination, and argument all unfavorable evidence on disputed facts, except in the rare case where national security overrides his rights. The labels, legislative and judicial, are not helpful. Often a hearing involves both types of tasks. A court may handle legislative facts. A legislative hearing may involve adjudicative facts.<sup>153</sup> In licensing cases, the issue may be adjudicative (the fitness of one applicant) or legislative (the general rule to be applied to all applicants when facts about them are not disputed).<sup>154</sup> If the issue is

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Security Program, 62 Yale L.J. 1163 (1953); Garrison, *Some Observations on the Loyalty-Security Program*, 23 U. Chi. L. Rev. 1 (1955).

152. From 1939 to 1955, over 4,750,000 government employees or applicants for government jobs had been investigated for loyalty and security. N.Y.C.B.A., *Report of the Special Committee on the Federal Loyalty-Security Program*, 114 (1956). The program covered 2,371,373 persons on June 30, 1955. *Ibid.* In 1955, almost 3,000,000 industrial employees of private companies were under the Defense Department's Industrial Security Program. *Id.* at 115. Over 800,000 seamen had been investigated in the government's Port Security Program by 1955. *Ibid.* Thus there are about 6,000,000 persons now covered by the federal civilian security programs, plus another 3,000,000 covered by the military personnel security program. *Id.* at 116. There are over 2,000,000 names in government files of persons, probably not now employed by the government who have been investigated. *Id.* at 115.

153. See, e.g., *Morgan v. United States*, 298 U.S. 468 (1936), where the statute required only a hearing, and the Court required a trial-type hearing, for the fixing of future rates for stockyard services—a legislative function. Cf. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50 (1936); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). See *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 152-53 (1941); Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making*, 27 Wash. U.L.Q. 1 (1941).

154. Compare *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 123 (1926) (*dicta*), with *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) and *Albert v. Public Serv. Comm'n*, 209 Md. 27, 120 A.2d 346 (1956).

Under the OPA the Supreme Court indicated that a trial type hearing—a full oral hearing—need not always be given as a matter of due process. *Yakus v. United States*, 321 U.S. 414 (1944). Lower courts then required such hearings for disputes over essential facts only. *United States v. McCrillis*, 200 F.2d 884 (1st Cir. 1952). But cf. *Bowles v. Willingham*, 321 U.S. 503 (1944) (not clear if complaint attacked a statute and general regulation or a



character or moral fitness, a full hearing is needed with cross-examination. If the issue is training or ability or competence in a profession, an examination, not a hearing, is usually best suited to decide the issue.

### C. *Ex Parte Influences*

Finally, there is the charge that many agency heads and staffs are receptive to the off-the-record *ex parte* pressures and persuasions of lobbyists, petitioners, five-per-centers, and others of similar ilk.<sup>155</sup> Here is probably one of the strongest arguments for an administrative court. Judges, so it is said, are seldom if ever exposed to such influences. No congressman presumably would dream of calling a federal judge on behalf of a litigant in a case pending before the judge (state politicians and state judges may not always be so insulated), but the same congressman would not hesitate to call an agency member about a pending matter. The congressman feels that the agency is engaged, in part at least, in performing the same type of work, and making the same policy decisions and rules, as a legislator. It is well-recognized that there is nothing improper—indeed, it is the accepted thing—for legislators to discuss pending bills with interested persons. If the administrator performs legislative as well as judicial functions, we can hardly expect him to be treated solely as a judge and not at all as a legislator. Perhaps complete divorce of functions may be the only remedy here, but other, less drastic, approaches should first be tried.

Canons of ethics for administrators and the bar in these matters are badly needed. The canons should lucidly cover these matters in outspoken, direct language. Congress itself can forcefully and clearly expound its views as to the proper role of the administrator here.

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specific order reducing rents; no trial-type hearing required). Compare *Londoner v. Denver*, 210 U.S. 373 (1908) (assessment of amount of tax on individual property demands trial-type hearing), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (no trial-type hearing needed for order increasing valuation of all taxable property in Denver). See *Opp Cotton Mills, Inc. v. Administrator*, *supra* note 153.

A hearing, not a trial-type one, may be required by due process for legislative-type facts. *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937). Usually a trial-type hearing is not suitable for such facts. Cf. *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933). But cf. *Philadelphia Co. v. SEC*, 175 F.2d 808 (D.C. Cir. 1948), vacated as moot, 337 U.S. 901 (1949) (trial-type hearing required on issue of change in SEC rules involving no question of fact); *L. B. Wilson, Inc. v. FCC*, 170 F.2d 793 (D.C. Cir. 1948); *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948).

155. See *Sangamon Valley TV Corp. v. United States*, 358 U.S. 49 (1958); *WIRL Television Corp. v. United States*, 358 U.S. 51 (1958); *WORZ, Inc. v. FCC*, 358 U.S. 55 (1958); *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55 (D.C. Cir. 1958); *WKAT, Inc. v. FCC*, 258 F.2d 418 (D.C. Cir. 1958); H.R. Rep. No. 1141, 85th Cong., 2d Sess. (1959); Newman, *The Supreme Court, Congressional Investigations, and Influence Peddling*, 33 N.Y.U.L. Rev. 796 (1958).

Punishment both for the erring administrator and for the pressure applier and influence peddler is needed. Perhaps when large favors to be dispensed by agencies are at stake, there is little hope for any solution except one which makes the award of the favor largely nondiscretionary, based upon the objective application of fixed criteria to easily ascertainable facts. The hardships of such mechanical rules would be a necessary price to pay for the elimination of influence and corruption. First, however, other methods should be tried. In most areas, Congress cannot eliminate administrative discretion and set definite mechanical standards, short of adopting a lottery or drawing-of-straws technique. An obvious approach is to improve the selection of personnel in administrative agencies, as well as fostering the development of professional ethics and standards. Perhaps the use of external and internal checks should be encouraged in many cases. Judicial review and legislative investigations can perform useful functions. Full publicity of all actions, with periodic public reports, rotation of personnel, insistence upon written explanation of all actions, internal review within the agency and definite allocations of responsibility—all these can help. There is also needed a statutory requirement for mandatory disclosure by all agency personnel of any off-the-record approaches, enforced by suspension or dismissal of personnel for failure to disclose; and similar sanctions on any counsel<sup>156</sup> or parties involved (disbarment of counsel, disqualification of the party).

In the last analysis, the most difficult problems presented are in non-adjudicative matters, such as rule-making, loan and contract making. Here, codes of ethics are needed, but of themselves they will avail little. Integrity cannot be legislated or compelled. If Congress, however, is really disturbed, as well it should be, it can assume the lead by enacting strong measures which will elicit equally vigorous administrative measures to combat trafficking and compromise by appropriate acts of self-restraint and discipline.

#### XIV. REASONED AGENCY DECISIONS AND JUDICIAL REVIEW

Another factor bearing upon the type of judicial review is the extent to which the agency has explained the reasons for its decision. A judge

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156. See the Proposed Practice Act, 43 A.B.A.J. 425 (1957). Section 403 of this Act prohibits any attorney or representative of a party in an agency hearing from communicating or having discussion, without reasonable notice to or in the absence of his adversary, with any agency or employee, representative, official or presiding officer of an agency about the results or disposition of a contested adjudicatory proceeding before the agency. Section 408 provides for disciplinary proceedings against attorneys for violations of this and other rules. See Nutting, *Legislative Ethics*, 45 A.B.A.J. 79 (1959), and the recommendations in H.R. Rep. No. 1141, 85th Cong., 2d Sess. 9-10, 12, 15, 85-91 (1959).

or private person will have great difficulty in appraising the adequacy and the reasonableness of an order if the agency fails to state clearly the rationale for its action. Often there is no way for a court to decide if the agency has followed an admissible theory of law or has acted within its total delegation of power. The agency decision, therefore, should show its logical connection with the legislative policy of the statute. We want the administrator to rationalize and announce a general rule or policy which provides a comprehensible basis capable of being tested for its relevance to the enabling statute. Since a statute may allow several theories for an order, the agency must show which theory it followed to the exclusion of others.<sup>157</sup> This does not mean that all decisions should be in the rigid mold of formal findings. Indeed, such decisions, when phrased simply in terms of statutory language and standards, are often the worst offenders so far as failure to reveal the real grounds for the action taken. There is a real need for courts to insist upon brief, precise articulation by the agency of decisive facts and issues and the governing policies and reasons therefor.

Of course, there is a strong temptation to write agency opinions which deliberately fail to articulate policy, because a lucid articulation of issues and policy, with a frank statement of reasons in a particular case, leads to two results. First, the opinion is far more vulnerable upon judicial review since the judge can readily ascertain if the agency has exceeded its powers, has considered irrelevant or improper factors or reasons, or has failed to take into account crucial matters. Second, the agency's discretion in future cases will be narrowed, unless it is prepared openly to change its policies. It is no wonder then that an agency either tries to write an opinion in the statutory language, or one that is little more than a statement of the result reached for the reason that it was "fair and just," or goes to the other extreme. In lieu of brevity, another technique to baffle real judicial scrutiny and review is to recite *all the evidence* and *arguments* advanced by *all* parties, and then, without indicating any

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157. *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), 3332 U.S. 194 (1947); *New York v. United States*, 331 U.S. 284 (1947); *ICC v. Mechling*, 330 U.S. 567 (1947); *North Carolina v. United States*, 325 U.S. 507 (1945); *Colorado-Wyo. Gas Co. v. FPC*, 324 U.S. 626 (1945); *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945); *Eastern Cent. Motor Carriers Ass'n v. United States*, 321 U.S. 194 (1944); *City of Yonkers v. United States*, 320 U.S. 685 (1944); *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942); *Atchison T. & S.F. Ry. v. United States*, 295 U.S. 193 (1935); *United States v. Chicago M. St. P. & P.R.R.*, 294 U.S. 499 (1935); *Florida v. United States*, 282 U.S. 194 (1931). Cf. *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953); *Old Colony Bondholders v. New York, N.H. & H. R.R.*, 161 F.2d 413 (2d Cir.), cert. denied, 331 U.S. 858 (1947); *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554 (D.C. Cir. 1938), cert. denied, 305 U.S. 613 (1938).

preference or choice, state that on the basis of *all* the evidence and *all* the arguments pro and con and *all* the policy factors present, the following decision is made. A reviewing court can hardly condemn an agency for not considering *any one* factor, when all are referred to in the opinion; nor can it say that an improper factor was responsible for the decision, when so many other factors were also considered. Indeed, many agency decisions deliberately recite huge masses of fact, mainly as assertions of the parties and witnesses, and ignore reasoning, policy, or any indication of the relative importance of the issues, facts, and policies. Such decisions deliberately conceal value judgments which may be the actual basis for the decision.

Thus, an effective check on the arbitrary, foolish or dishonest exercise of power requires that every action taken be fully explained and its relevance to the agency's statutory powers and policies elucidated in a reasoned manner. On the other hand, nothing causes greater distrust of agency policy than a belief that each case is decided by new rules fashioned solely to rationalize a preconceived result in the particular case, so that the decision does not state the real reasons, which may well have been kept secret because improper. This encourages recourse to off-the-record promises and influences. When litigants look in vain to past decisions for clues as to how their similar case will be decided, or when they discover conflicting and arbitrary results in prior judgments, they conclude that personal influence rather than evidence and reasoning will decide the controversy. If an agency in granting licenses for valuable rights is found in the past to have sometimes ignored without explanation factors at other times deemed decisive, few will believe that the past decisions establish any relevant criteria or standards for agency awards. Here is a possible objection to the institutional decision. If agency heads do not decide cases but permit anonymous subordinates to do so, the whims or individual views of the subordinates, if not fully coordinated and even eliminated by a strong hand and control, may result in inconsistent and vacillating policies.

Stare decisis, of course, is virtually impossible without reasoned decisions which develop a system of principles and rules. The desirability of some stare decisis in the administrative process is undeniable. We want policy-making that is both fair and consistent. Trial examiners are at a loss in reaching decisions if the agency's policies are unknown, conflicting, or unpredictable. The agency itself, to be fair, must re-examine every argument in every case if it completely ignores stare decisis. The effectiveness of the agency is further increased by stare decisis because, through it, private persons can obtain standards and guides to enable them voluntarily to conform their conduct to the norms set by the administrator. These norms also give the agency a firm basis

upon which to negotiate, reason, and informally settle many cases. On the other hand, slavish adherence to the past can lead to decisions based not upon right, but upon technical rules of law. *Stare decisis* is desirable, but not to the point of making it absolutely mandatory.

Little more can be done by legislation than the present mandate<sup>158</sup> of the Administrative Procedure Act on this question. Here, again, much must be left for the discretion of judges, who can insist upon adequate rationalization of agency orders and judgments. Moreover, the nature and extent of the rationalization will vary widely, depending upon the statutory discretion given the agency by Congress (an explicit narrow mandate requires explicit findings) and the nature of the issues. Some decisions are largely a matter of informed expert judgment, based upon long experience, the reasons for which cannot be expressed precisely.<sup>159</sup> To insist upon a clear rational explanation for a result where impossible will often distort the result and conceal the real grounds for it. Frequently, an agency is called upon to act as a legislature, to compromise competing claims, or to predict future consequences on the basis of past experience. Here we can insist only that the agency state frankly its theory, even if exactness is impossible because of the breadth of the order, so that criteria can only be partially formulated.

One final matter is whether an agency should always be required to proceed according to previously established rules and to make new policy by a rule prospective in operation only, or whether it should be allowed to choose between announcing a new policy by a prospective rule or making it by a case decision retroactive in operation. Generally, where the agency has a choice, it should use the rule or announcement to avoid the harsh results of retroactive operation. It may even announce a new policy prospectively in a decision. But an inflexible mandatory requirement to this effect, such as is proposed by some,<sup>160</sup> seems unwise.

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158. Section 8(b) provides: All decisions shall "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." 62 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1952). The same language is found in § 1007(a) of the A.B.A. Proposed Code, which requires that the "grounds for any decision shall be within the scope of the issues presented on the record." A.B.A. Proposed Code 193. See also § 1007(c) of the proposed code. A.B.A. Proposed Code 193-94.

159. See H.R. Rep. No. 1141, 85th Cong., 2d Sess. 38-39, 41 (1959); 2 Davis, *Treatise* ch. 16; Dobin, *Current Problems in Administrative Law*, 9 Va. L. Weekly Dicta Comp. 71 (1958); Jaffe, *Administrative Findings of the Ameer in America*, 34 Cornell L.Q. 473 (1949); Keenan, *The Assertive Administrative Agency Report*, 25 ICC Prac. J. 525 (1958).

160. Section 1002(e) of the A.B.A. Proposed Code states that no "rule, order, opinion, or public record shall be relied upon or cited against any persons unless it has been duly published or made available to the public in accordance with this section." A.B.A. Proposed Code 186. Under § 1001(c), "rule" includes "every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy . . . ."

Rule-making may even have disadvantages for those affected, since it may give them far less chance than a case decision of a full hearing on the merits of the agency's policy.<sup>161</sup> No agency, moreover, can always foresee all the special problems of the future. Courts often announce new policies in retroactive decisions. It seems unwarranted to prohibit an agency from ever applying a legislative standard until it has enough experience to formulate a regulation.<sup>162</sup> The policy announced in the case, of course, may be too harsh or arbitrary, or not within the discretionary power of the agency. These are different matters. The injury to private interests caused by retroactive application and the extent of reasonable reliance on former policies must be weighed against the injury to public interests caused if only a prospective rule is made.<sup>163</sup>

#### XV. THE RIGHT TO COUNSEL AND JUDICIAL REVIEW

Another factor important to judicial review is the right to counsel, both in court and before the agency. All too often in the past, agencies have looked upon lawyers as a costly delaying nuisance to be avoided so far as possible.<sup>164</sup> Yet, adequate records, full hearings, and reasoned decisions are less probable if counsel is denied private parties. The proposed legislation to handle this problem seems a long step forward, although there may be questions raised as to some of its details.<sup>165</sup> This legislation also places a heavy responsibility on the bar. It is not enough to require agencies to recognize the rights of private persons to counsel for agency hearings. There remains the difficult problem of assuring that a person

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A.B.A. Proposed Code 184. Sections 1007(a) and (c) require the grounds for any decision to be within the scope of the issues presented on the record. A.B.A. Proposed Code 193-94. It is not clear if this will overrule the principle enunciated in *SEC v. Chenery Corp.*, supra note 157. The Task Force was quite specific. See Task Force Report, Recommendation No. 55, at 222-25.

161. Cf. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954).

162. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Optical Workers Union v. NLRB*, 227 F.2d 687 (5th Cir. 1955), cert. denied, 351 U.S. 963 (1956); *NLRB v. National Container Corp.*, 211 F.2d 525 (2d Cir. 1954); *Shawmut Ass'n v. SEC*, 146 F.2d 791 (1st Cir. 1945). See 2 Davis, *Treatise* §§ 17.07-08; Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 *Colum. L. Rev.* 374 (1953); Note, 68 *Harv. L. Rev.* 1251 (1955); 62 *Harv. L. Rev.* 478 (1949).

163. Cf. *SEC v. Cogan*, 201 F.2d 78 (9th Cir. 1952); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952); *NLRB v. Mall Tool Co.*, 119 F.2d 700 (7th Cir. 1941).

164. Cf. Haas, *Current Problems in Administrative Law*, 9 *Va. L. Weekly Dicta Comp.* 53 (1958); vom Baur, *Representation Before Administrative Agencies*, 30 *N.Y.U.L. Rev.* 1297 (1955).

165. See the Proposed Practice Act, 43 *A.B.A.J.* 425 (1957); Deale, *A Major Reform Proposed: The Administrative Practice Reorganization Act*, 44 *A.B.A.J.* 133 (1958). See also *Professional Responsibility: Report of the Joint Conference*, 44 *A.B.A.J.* 1159 (1958).

who needs and desires trained counsel may obtain this help. In certain instances, litigants with unpopular causes have experienced real difficulty, even if there are no financial obstacles, in securing the services of able and experienced counsel. More frequently, a person lacks sufficient financial means to pay for legal assistance. An applicant for a pension or some other government relief payment would undoubtedly be willing to pay his lawyer a share of any money obtained from the agency. Many agencies, however, by rule limit the amount of a lawyer's fee, and federal statutes and contract provisions often prohibit contingent fee agreements.<sup>166</sup>

The basic question here is: if Congress has determined that taxpayers shall finance payments to the aged, the sick, or the veteran in certain amounts, how much of these monies may be expended for legal services? If Congress decides that a certain minimum amount is needed for weekly subsistence, may the bar appropriate part of this amount? Perhaps Congress should provide for government payment of a reasonable attorney's fee in such cases over and above the amount payable to the applicant, or else allow the agency or court to do so. But, counsel fees are but a part of the story. Proper presentation of a client's case before the agency may require the expenditure of substantial sums to trace witnesses, locate evidence, or investigate clues. Security hearings are an excellent example of this problem, the solution of which demands the attention of the bar.

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166. See also Haas, *Current Problems in Administrative Law*, 9 Va. L. Weekly Dicta Comp. 53 (1958). Among various statutes limiting attorney's fees or giving an administrator power to do so are: 39 Stat. 742 (1916), 5 U.S.C. § 751 (1952) (Federal Employees Compensation Act); 66 Stat. 173 (1952), 8 U.S.C. § 1103(a) (1952); 66 Stat. 235 (1952), 8 U.S.C. § 1362 (1952) (aliens); 71 Stat. 139-41, 158 (1957), 38 U.S.C. §§ 445, 3601-05 (Supp. V, 1958) (veteran's benefits); 52 Stat. 1099 (1938), 45 U.S.C. § 355(i) (1952) (Railroad Unemployment Insurance Act); 8 CFR § 292.6(a) (1958). Cf. *Gostovich v. Valore*, 153 F. Supp. 826 (W.D. Pa. 1957), appeal dismissed, 355 U.S. 608 (1958). Section 402 of the Proposed Practice Act provides that every participant in an agency matter shall be entitled to be represented by an attorney in any matter (and only by an attorney if the matter involves the practice of law, which is defined as a hearing which by statute or the Constitution must be decided on a record subject to judicial review). But cf. *Niznik v. United States*, 173 F.2d 328 (6th Cir.), cert. denied, 337 U.S. 925 (1949) (no constitutional right to counsel for registrants in draft board hearings); *United States v. Pitt*, 144 F.2d 169, 172 (3d Cir. 1944) (dictum) (same). See also 1 Davis, *Treatise* § 8.10. As to aliens, cf. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 156 (1923) (no right); *Low Wah Suey v. Backus*, 225 U.S. 460, 470 (1912) (same); *United States ex rel. Castro-Louzan v. Zimmerman*, 94 F. Supp. 22 (E.D. Pa. 1950) (hearing unfair for lack of counsel). Section 6(a) of the Administrative Procedure Act gives a right to counsel in many situations, both (1) to any "party," and (2) to every person "compelled to appear in person" before an agency. 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1952). Compare the approach taken in investigations by administrative agencies, which are likened to grand jury hearings or legislative hearings, where no constitutional right to counsel exists. Cf. *In re Groban*, 352 U.S. 330 (1957); *Bowles v. Baer*, 142 F.2d 787 (7th Cir. 1944).

Thus, the availability and amount of judicial review may be largely dependent upon what has transpired before the agency, including such factors as the nature of the hearing, the adequacy of the record, the fullness of the reasoning in the agency's opinion, the presence or absence of counsel, and the extent of the separation of the agency's functions.

#### XVI. JUDICIAL REVIEW OF QUESTIONS OF FACT

In a discussion of judicial review of questions of fact, three key points should be constantly kept in mind. First, a court will often label a question of law one of fact (the converse, however, is seldom true, for questions of fact are not apt to be called questions of law). This is particularly so of mixed questions of law and fact, where statutory terms are applied to facts. Second, there are, as previously pointed out, two distinct matters here. One is whether *all* questions of fact or only certain specified questions should be judicially reviewed. It is not unusual, as we have seen, to have judicial review available for certain types of cases involving, for example, enemy aliens, government contracts, and pensions, on only specified factual matters as fraud, gross mistake, malice, and citizenship. This problem as to *what* factual issues may be judicially reviewed is discussed in the previous sections on availability of review. It should be noted, however, that even if judicial review is limited solely to questions of law (constitutional issues, statutory interpretation, jurisdictional issues, due process, and fair procedure) these in turn often involve factual determinations (was the defendant actually denied counsel, could he understand English, did the agency act with malice, etc.). Third is the problem discussed in this section, the scope or amount of review of evidence on disputed factual issues. If a given factual question is judicially reviewable, then the problem is whether the judge may substitute his judgment for that of the agency, or whether he is restricted to a lesser role, such as the substantial evidence test.

A common error is the belief that one can devise a precise mathematical rule which will give objective certainty, so that all judges will apply identical tests and reach identical results in reviewing any agency action. This not only is impossible, but it is also a deceptively dangerous idea. This result might appear to be achieved by an extreme rule that there is no review at all, or that there is a trial de novo on review, or that the court will independently reach a decision on the basis of the record of the agency hearing. Even here judges would differ as to the results in a trial de novo or in making an independent judgment. A rule in the middle ground between the two extremes of *all* or *nothing* must be phrased in broad terms which leaves much to the discretion and good sense of the individual judge. The rule can give the conscientious judge some leads as to what to do, but it cannot give him a precise measuring tool which can



be automatically used to test the agency order. Attempts to do this are unwise and fraught with peril. Rigid formulas only place a court in an apparent strait jacket and blind it and counsel to the real nature of the problem.

The residuum test requires the flat rejection of any agency finding of fact based on hearsay alone. This is a good example of the dangers present in this sort of rigidity.<sup>167</sup> First, it is deceptive since it is not as tight a test as would appear, for seldom is any finding based only on hearsay. There is almost always other non-hearsay evidence which can be deemed to support the finding or not, depending on the attitude of the individual judge.<sup>168</sup> Second, the critical issue is not hearsay, but such factors as: (1) the availability of non-hearsay evidence on the matter and the alternatives to using the hearsay; (2) the presence or absence of trustworthy supporting or opposing evidence on the point at issue;<sup>169</sup> (3) whether the hearsay evidence is mere fifth-hand rumor and gossip or reliable testimony;<sup>170</sup> (4) the extent to which cross-examination would be effective, because of the probable deficiencies in the declarant's memory and perception; (5) the issues at stake,<sup>171</sup> since the use of hearsay to grant a government pension is unlike its use to revoke a license, fire an employee for security reasons, or deport an alien; and (6) whether the hearsay is

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167. *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507 (1916). See 2 *Davis*, *Treatise* §§ 14.10-.12; *Davis*, *The Residuum Rule in Administrative Law*, 28 *Rocky Mt. L. Rev.* 1 (1955). The status of the rule in the federal courts is not clear. Some decisions seem to support it. *Bridges v. Wixon*, 326 U. S. 135 (1945); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938); *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 691 (9th Cir.), cert. denied, 338 U.S. 860 (1949); *NLRB v. Illinois Tool Works*, 119 F.2d 356, 364 (7th Cir. 1941); *Union Drawn Steel Co. v. NLRB*, 109 F.2d 537, 592 (3d Cir. 1940); *NLRB v. Bell Oil & Gas Co.*, 98 F.2d 406, 409-10 (5th Cir. 1938). But cf. *NLRB v. Cantrall*, 201 F.2d 853, 855 (9th Cir.), cert. denied, 345 U.S. 996 (1953); *Montana Power Co. v. FPC*, 185 F.2d 491, 497-98 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951); *NLRB v. Southern Wood Preserving Co.*, 135 F.2d 606 (5th Cir. 1943). The Taft-Hartley Act may prohibit admission or use of hearsay. 61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1952). Cf. *NLRB v. Haddock-Engineers*, 215 F.2d 734 (9th Cir. 1954); *NLRB v. Amalgamated Meat Cutters*, 202 F.2d 671 (9th Cir. 1953). But cf. *NLRB v. Imparato Stevedoring Corp.*, 250 F.2d 297 (3d Cir. 1957).

168. Cf. *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927) (hearsay plus silence and refusal to explain by subject of hearsay evidence); *NLRB v. Ohio Calcium Co.*, 133 F.2d 721 (6th Cir. 1943).

169. Cf. *American Rubber Prods. Corp. v. NLRB*, 214 F.2d 47 (7th Cir. 1954).

170. Cf. *Martel Mills Corp. v. NLRB*, 114 F.2d 624 (4th Cir. 1940); *In re Rath Packing Co.*, 14 N.L.R.B. 805, 817 (1939).

171. Cf. *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 460 (1952); *The New England Divs. Case*, 261 U.S. 184, 197-99 (1923) (use of typical evidence by ICC); *Rhodes Pharmaceutical Co. v. FTC*, 208 F.2d 382 (7th Cir. 1953), modified, 348 U.S. 940 (1955); *American Airlines, Inc. v. CAB*, 192 F.2d 417, 419-22 (D.C. Cir. 1951). But cf. *Tri-State Broadcasting Co. v. FCC*, 96 F.2d 564 (D.C. Cir. 1938).

being used where factual disputes are few, and speed and low cost are essential, as in social security matters.<sup>172</sup>

The present tests for judicial review of questions of fact used by the courts and drawn in part from the language of the Administrative Procedure Act<sup>173</sup> are probably as satisfactory as can be hoped for. Perhaps if the past could be wiped out, a better phrased test could be devised. Courts and lawyers, however, have struggled for years with the language of the present tests and the Act. Any changes will mean a new period of great uncertainty while the courts attempt to delineate the extent of the changes. Moreover, changes are not needed. The present tests give both agency and court sufficient discretion so that each can perform well the function for which it is best suited, and still guarantee an adequate independent check on administrative power by judicial review.

For most findings of fact, the current test is whether there is substantial evidence upon the whole record to support the findings. If so, the court may not set the findings aside.<sup>174</sup> This means that the court is to make certain there is record evidence providing a rational basis for the finding. The judge determines whether the finding could be made from this evidence by reference to the logic of experience, or whether the evidence is sufficient to find the legally needed fact by reasoning from the evidence. Fundamentally, this boils down to the fact that the judge is to reverse if he conscientiously feels the finding is not supported by the entire record. The fact that the trial examiner disagreed with the agency finding, when that finding is based in part at least on credibility of witnesses, is certainly a factor to be taken into account by the court here. The trial examiner, however, is not to be considered as a master reporting to a court, whose findings are reversible by the agency only if clearly

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172. Cf. *Marmon v. Railroad Retirement Bd.*, 218 F.2d 716 (3d Cir. 1955); *Ellers v. Railroad Retirement Bd.*, 132 F.2d 636 (2d Cir. 1943).

173. Section 10(e) provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party . . ." 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1952). Section 7(c) provides that "no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence." 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1952).

174. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). See 4 Davis, *Treatise* ch. 29; Jaffe, *Judicial Review: Question of Fact*, 69 *Harv. L. Rev.* 1020 (1956); Jaffe, *Judicial Review: Substantial Evidence on the Whole Record*, 64 *Harv. L. Rev.* 1233 (1951); Stason, "Substantial Evidence" in *Administrative Law*, 89 *U. Pa. L. Rev.* 1026 (1941); Stern, *Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis*, 58 *Harv. L. Rev.* 70 (1944).

erroneous.<sup>175</sup> On issues not involving credibility, the trial examiner's report may be given very little weight.<sup>176</sup>

This seems to be the same test as that applied to review of a jury's verdict (either what is required to prevent a directed verdict or to prevent setting aside a verdict). A jury may be given more leeway as a rule by judges, for a verdict stands if there is any evidence at all in the record to support it.<sup>177</sup> It is doubtful if this is the same test as that applied to the appellate review of the decision of a trial judge sitting without a jury. Here, the rule is usually phrased as allowing a reversal of the trial judge's findings only if they are clearly erroneous. Many believe this is the same as the substantial evidence test.<sup>178</sup> Others think not. Proponents of substitutes<sup>179</sup> for the Administrative Procedure Act seeking to replace the "substantial evidence" test with the "clearly erroneous" one seem to be on both sides of the fence. Often, they<sup>180</sup> argue that the two tests are identical, so that no change would result except the elimination of the confusion caused by asking judges to apply two differently-worded, but

175. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Pierce v. SEC*, 239 F.2d 160 (9th Cir. 1956); *American Flint Glass Workers v. NLRB*, 230 F.2d 212 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956); *Utica Observer-Dispatch, Inc. v. NLRB*, 229 F.2d 575 (2d Cir. 1956); *NLRB v. Pacific Intermountain Express Co.*, 228 F.2d 170 (8th Cir. 1955), cert. denied, 351 U.S. 952 (1956). See 2 Davis, *Treatise* § 10.04. As to the attitude of the Supreme Court in reviewing decisions of the lower courts which have reviewed agency decisions, see *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 410 (1952); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951). But see also *Rowoldt v. Peretto*, 355 U.S. 115 (1957); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 363 (1955); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 505-06 (1951).

176. But cf. *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951), petition for cert. dismissed, 344 U.S. 206 (1952).

177. Cf. *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949); *NLRB v. Southland Mfg. Co.*, 201 F.2d 244 (4th Cir. 1952); *NLRB v. Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952), cert. denied, 345 U.S. 906 (1953); *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F.2d 637 (6th Cir.), cert. denied, 344 U.S. 897 (1952).

178. Cf. *NLRB v. Southland Mfg. Co.*, 201 F.2d 244, 250 (4th Cir. 1952); *Vanderbilt, Hoover Commission and Task Force Reports on Legal Services and Procedure-Symposium: Introduction*, 30 N.Y.U.L. Rev. 1267, 1268 (1955). But cf. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 485, 492 n.21 (1951); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *District of Columbia v. Pace*, 320 U.S. 698, 701-02 (1944); *NLRB v. Southland Mfg. Co.*, supra at 246; *Orvis v. Higgins*, 180 F.2d 537, 540 (2d Cir.), cert. denied, 340 U.S. 810 (1950).

179. Section 1009(f) of the A.B.A. Proposed Code provides that a reviewing court shall set aside agency orders if it finds they are "based upon findings of fact that are clearly erroneous on the whole record . . ." A.B.A. Proposed Code 196.

180. See *Cooper, Judicial Review*, 30 N.Y.U.L. Rev. 1375, 1380-81 (1955); *B. Schwartz, Administrative Justice and its Place in the Legal Order*, 30 N.Y.U.L. Rev. 1390, 1392-93 (1955).

essentially identical, tests. At other times, they<sup>181</sup> argue that the proposed change is not a mere semantic gesture, but designed to broaden the amount of review. There seems little point to the proposal unless it enlarges review, as it apparently would. Exactly *how much* the review would be broadened is very difficult to determine.

Under the substantial evidence test there is a presumption that the agency is correct because of its experience in the special field. The finding of the trial judge, however, lacks this presumption because from the standpoint of the appellate court, he has no expertness or special experience in the particular field. Furthermore, a trial judge may be clearly erroneous and yet not necessarily unfair in the sense of a willful attempt to achieve a preconceived result by warping findings of fact. An agency is not to be reversed for mere error, but only for error plus unfairness in this sense. An agency is not an inferior tribunal or a lower court judge, but rather an autonomous body, applying specialized knowledge and experience to regulate areas demanding flexibility and complex judgments. Courts cannot and should not be made to guarantee the correctness of every agency decision. Rather it is their task to review the decision to see that it is consonant with the law.

The effort here is to insure that the agency decision is based upon law and upon legal evidence, instead of the mere will of the finder. The great danger is not that the agency will, like a trial judge, err in weighing testimony, since long experience in the special field may give the agency added skill in this regard, but rather that the agency will appraise the testimony by extra-legal standards, such as the exigencies of social policy. All necessary facts should be found by reasoning from the evidence alone. The criterion is whether the evidence gives rise to an appreciable probability that conduces to the conclusion reached. If there are two fairly conflicting views or inferences, the agency may choose either, even if the reviewing court would choose the other or thinks the other more probable. The reviewing court is not to weigh the evidence itself, to decide upon credibility, to second-guess the agency, or to substitute one rationally sustainable inference for another. Speculation and inference are necessary and proper, but only if based upon a reasoned view of the effect of the evidence.

Therefore, so far as drawing inferences from the facts is concerned, the test is reasonableness rather than rightness. The issue is whether the agency's conclusions may be reasonably based upon the proven facts.

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181. See Holtzoff, *Current Problems in Administrative Law*, 9 Va. L. Weekly Dicta Comp. 92 (1958); Sellers, *The American Bar Association's Legislative Proposals Respecting Legal Services and Procedures*, 24 ICC Prac. J. 1115, 1121 (1957). Cf. Carrow, *Administrative Adjudication: Should its Role be Changed?*, 27 Geo. Wash. L. Rev. 279, 299 (1959).

Many inferences, however, may become questions of law. This may occur when either a court has once found them not merely permissive but *required* if certain facts are proven; or a court has found it *unreasonable* to draw them from certain proven facts.<sup>182</sup> In such cases, the issue may then become whether the agency has correctly exercised the discretionary powers conferred on it by statute. Also, of necessity, the line is often hard to draw and in many close cases it may be impossible to distinguish reasonableness from rightness.<sup>183</sup>

### A. *Narrow Tests*

Are there situations where narrow review is justified? Actually, except for the draft board classification cases, the usual attempt to limit review does not consist of formulating a narrower test than substantial evidence for questions of fact. Instead, the availability of review is restricted to certain factual questions only, such as fraud, want of power, gross mistake, or bad faith. On any review of these specified issues of fact, however, the test used is the substantial evidence one. This is what occurs in the government bounty<sup>184</sup> and government contract<sup>185</sup> cases. Review of all other factual questions is then entirely denied. However, the number of factual issues subject to review in these cases is often increased by statute<sup>186</sup> or judicial decision<sup>187</sup> to the point where review is available on virtually all disputed questions of fact.

In the draft cases,<sup>188</sup> and possibly in the immigration cases,<sup>189</sup> the

182. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 48-50 (1954); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 477-78 (1947).

183. See, e.g., *Burton-Dixie Corp. v. FTC*, 240 F.2d 166 (7th Cir. 1957); *Friend v. Britton*, 220 F.2d 820 (D.C. Cir.), cert. denied, 350 U.S. 836 (1955); *Victor Prods. Corp. v. NLRB*, 208 F.2d 834 (D.C. Cir. 1953); *Farmers Co-op. Co. v. NLRB*, 208 F.2d 296 (8th Cir. 1953); *Robinson v. Bradshaw*, 206 F.2d 435 (D.C. Cir.), cert. denied, 346 U.S. 899 (1953). See notes 193 and 197 *infra*.

184. See note 44 *supra*. Here review, if Congress so orders, may be very restricted. See, e.g., *Work v. United States ex rel. Rives*, 267 U.S. 175 (1925).

185. See note 44 *supra*.

186. See note 46 *supra*.

187. See notes 52-57 *supra*.

188. In *Estep v. United States*, 327 U.S. 114, 122 (1946), the Court limited review to a determination of whether there was "no basis in fact" for the Board's findings of fact. Cf. *Cox v. United States*, 332 U.S. 442 (1947). Later decisions as to what is a "basis in fact" make it difficult to distinguish this test from the substantial evidence rule, unless perhaps it is sufficient if there be any substantial evidence at all in the record to support the findings, without considering the effect of the opposing evidence in the whole record. *Witmer v. United States*, 348 U.S. 375 (1955); *Dickinson v. United States*, 346 U.S. 389 (1953). See 4 *Davis*, *Treatise* § 29.07. Since review may be made by habeas corpus here, *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946), the Court may have tried to limit the scope of review to that of habeas corpus. But, in fact, except for review of a

Court has attempted to formulate a test which purports to give a lesser amount of review on reviewable factual questions than would the substantial evidence test. The draft test permits reversal of a finding of fact only if there is no basis in fact for the finding. Actually, decisions applying this test indicate that it is virtually as broad as the substantial evidence criterion. Attempts to limit the amount of review of questions of fact in this manner seem unwise if judicial review is to serve as an effective check upon administrative power or its abuse. If a court allows any review at all of a question of fact, it is difficult to render the review meaningful short of a test as broad as substantial evidence on the whole record. A possible narrower test might be one which did not take the *whole* record into account in appraising the substantiality of the evidence. Such a test seems undesirable.

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military court martial the scope of review on habeas corpus is almost as broad as the substantial evidence rule. Cf. *Wiggins v. United States*, 261 F.2d 113, 114-15 (5th Cir. 1958), cert. denied, 27 U.S.L. Week 3259 (U.S. Mar. 23, 1959); *Pate v. United States*, 243 F.2d 99 (5th Cir. 1957); *Capehart v. United States*, 237 F.2d 388 (4th Cir. 1956), cert. denied, 352 U.S. 971 (1957); *Olvera v. United States*, 223 F.2d 880 (5th Cir. 1955); *Rowell v. United States*, 223 F.2d 863 (5th Cir. 1955); *United States v. Ransom*, 223 F.2d 15 (7th Cir. 1955); *Weaver v. United States*, 210 F.2d 815 (8th Cir. 1954); *Jewell v. United States*, 208 F.2d 770, 771 (6th Cir. 1953); *United States v. Pekarski*, 207 F.2d 930, 931 (2d Cir. 1953); *Bejelis v. United States*, 206 F.2d 354 (6th Cir. 1953). See 3 Davis, Treatise § 23.08; Note, 56 Colum. L. Rev. 551 (1956); notes 143, 146 *supra*.

189. The scope of judicial review may be trial de novo only on the issue of citizenship in deportation cases. *Ng Fung Ho v. White*, 259 U.S. 276 (1922). But cf. *Kessler v. Strecker*, 307 U.S. 22, 34-35 (1939); *Tod v. Waldman*, 266 U.S. 113 (1924), modified, 266 U.S. 547 (1925); *Chin Yow v. United States*, 208 U.S. 8 (1908) (all indicating that a trial de novo is seldom proper on other issues). Cf. *Frank v. Rogers*, 253 F.2d 889 (D.C. Cir. 1958) (trial de novo allowed). On other issues in deportation cases, except perhaps those involving review of a suspension of deportation, the scope of review seems to be the substantial evidence rule (see the *Ng Fung Ho* case, *supra*), but in exclusion cases the scope of review perhaps may be less. See notes 34-37 *supra*. Here, too, there is an attempt to use the scope of review for habeas corpus as the test, but in fact the scope there is usually as broad as the substantial evidence rule. See note 188 *supra*. Thus, in alien cases the Court first denied review entirely. *Lem Moon Sing v. United States*, 158 U.S. 538 (1895). Then review of procedural fairness was allowed even in an exclusion case. *Chin Yow v. United States*, 208 U.S. 8, 13 (1908). Then review of questions of law by habeas corpus was allowed. *Gegiow v. Uhl*, 239 U.S. 3 (1915). Gradually the scope of review has been extended to the evidence itself. Cf. *Hekkinen v. United States*, 355 U.S. 273 (1958); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Lloyd Saubauda Societa v. Elting*, 287 U.S. 329 (1932); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927); *Yiannopoulos v. Robinson*, 247 F.2d 655 (7th Cir. 1957); *Mar Gong v. Brownell*, 209 F.2d 448 (9th Cir. 1954); *Carmichael v. Wong Choon Ock*, 119 F.2d 173 (9th Cir. 1941); *Nagle v. Eizaguirre*, 41 F.2d 735 (9th Cir. 1930); *Gung You v. Nagle*, 34 F.2d 848 (9th Cir. 1929). Also see *Kessler v. Strecker*, *supra*; 3 Davis, Treatise § 23.08; notes 34-37, 149 *supra*. But cf. *Heikkila v. Barber*, 345 U.S. 229 (1953); note 149 *supra*.

*B. Broad Tests*

Is wider review warranted? In studying some 188 decisions reviewing agency orders in the federal courts during a five year period, Professor Cooper<sup>190</sup> has reached the conclusion that in amending the Administrative Procedure Act, the clearly erroneous test should be substituted for the present substantial evidence test. He argues, first, that the substantial evidence test is not a precise, uniform, or objective one, because the different circuits apply it differently; and even the same circuit varies its application to different agencies.<sup>191</sup> However, this may be a merit instead of a defect, because the test should and must leave much to the discretion of individual judges. Moreover, it is unlikely that the clearly erroneous test would be any more precise, uniform, or objective if applied by courts to agencies. Some agencies would still be more strictly reviewed than others, and some circuits would still be more strict on judicial review than others. Thus, Professor Cooper points out that some circuits, especially the fifth, are far more strict on review than others, such as the second, in the case of agencies such as the NLRB.<sup>192</sup> This difference would hardly vanish under the clearly erroneous test. Possibly the Second Circuit would expand its review then, but the Fifth Circuit, however, instead of retaining its present standard, might expand its review even further. Moreover, Professor Cooper seems to assume that the scope of review now applied by such courts as the Fifth Circuit is preferable to that of the Second Circuit. Others would disagree. The Fifth Circuit sometimes appears to weigh the evidence for itself, and frequently rejects the experience and expertness of the agency in a special field, ignoring the particular competence of the agency.<sup>193</sup> If an amendment to the Administrative Procedure Act could reduce the scope of review in the Fifth Circuit to that in the Second Circuit, perhaps it should be adopted. Statutory language is unlikely to do this. Probably another opinion by the Supreme Court is the only remedy.

Professor Cooper<sup>194</sup> also points out the difficulty of distinguishing the substantial evidence test from the clearly erroneous one. Amendment of the Administrative Procedure Act by insertion of the clearly erroneous test would be followed by a long period of confusion while the courts

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190. Cooper, *Administrative Law: the Substantial Evidence Rule*, 44 A.B.A.J. 945 (1958).

191. *Id.* at 948.

192. *Ibid.*

193. See Jaffe, *Judicial Review: Substantial Evidence Upon the Whole Record*, 64 *Harv. L. Rev.* 1233, 1251-55 (1951), criticizing the decision of the Sixth Circuit in *Pittsburg S.S. Co. v. NLRB*, 180 F.2d 73 (6th Cir. 1950), *aff'd*, 340 U.S. 498 (1951). Cf. *NLRB v. Pool Mfg. Co.*, 339 U.S. 577 (1950); *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563 (1950); *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206 (1940).

194. Cooper, *supra* note 190, at 946-47.

determined to what extent, if at all, review had been broadened by the amendment. Professor Cooper believes that the courts often apply the substantial evidence test not only to findings of fact, but also to the reasonableness of inferences from these findings.<sup>195</sup> The test for inferences, he believes, is simply whether they are clearly unreasonable or palpably unjustifiable. The real problem, perhaps, as Professor Cooper points out,<sup>196</sup> is that it is often hard to separate facts from inferences drawn from facts, or from questions of law or discretion. Some courts, whose approach he admires, often confuse the drawing of inferences from facts with the problem of whether an agency has correctly exercised discretion conferred upon it.<sup>197</sup> The approach of these courts, contrary to the views of Professor Cooper,<sup>198</sup> does not seem always proper for statutory sanction. Where it is possible to draw fairly conflicting rational inferences from the evidence, the choice made by the agency should usually bind the reviewing court. This follows because the choice depends on judgments based on long experience in a special field, such as the relation of a given fact pattern or occurrence to characteristic patterns in the special field (e.g., was a worker fired for incompetence or for union leadership?). Inferences often reflect policy choices, on which the agency often should have final say, so long as its determination is reasonable.<sup>199</sup> Professor Cooper also believes the substantial evidence test was designed especially for the NLRB and is not suitable for other agencies.<sup>200</sup> In fact, the substantial evidence test was developed long before the advent of the NLRB<sup>201</sup> and in a remarkable manner has been adapted by courts to almost all agencies, regardless of differing statutory language.

There may be some special needs for broader review. First, certain agencies perform a vast volume of business, mostly routine, which is handled mechanically. Here speed, low costs, quick payment and decision are essential. Proceedings are seldom adversary, for the agency exists to help the claimant. There is often a system of intra-agency appeals. In

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195. *Id.* at 948-49, 1001.

196. *Id.* at 949.

197. *Cf.* *NLRB v. West Point Mfg. Co.*, 245 F.2d 783 (5th Cir. 1957); *American Brake Shoe Co. v. NLRB*, 244 F.2d 489 (7th Cir. 1957); *NLRB v. Raymond Pearson, Inc.*, 243 F.2d 456 (5th Cir. 1957); *NLRB v. Coats & Clark, Inc.*, 231 F.2d 567, 572 (5th Cir. 1956). See notes 183, 193 *supra*.

198. *Cooper, supra* note 190, at 949.

199. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). *Cf.* *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

200. *Cooper, supra* note 190, at 1001.

201. The test dates from at least 1913. *ICC v. Louisville & N.R.R.*, 227 U.S. 88, 94 (1913) (statute silent as to any test at all). *Cf.* 38 Stat. 720 (1914), 15 U.S.C. § 45 (1952) (FTC).



the rare case of rejection of a disputed claim of any merit, judicial review by trial de novo may be preferable to any hearing, record, and reasoned decision by the agency (unless the intra-agency appeal has established a record for judicial review). There also may be cases where broad review is needed to overcome an agency bias in favor of a group which dominates it.

Should there be broader review of constitutional or jurisdictional fact questions?<sup>202</sup> The first problem here is how to separate such facts from

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202. The leading cases are: (1) *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (independent judicial judgment required for due process on issue of confiscation in public utility rate-making; the doctrine of the case is virtually obsolete in the federal courts due to decisions as *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) and *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942)). (2) *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 (1936) (following but modifying the *Ben Avon* rule: all findings of fact on issue of excess of constitutional authority, which involves denial of the constitutional right respecting persons or property, are subject to independent judicial review, but judicial review must consider administrative findings and reasoning which are presumed correct and not to be disturbed unless plainly shown to be overborne. Cf. *American Trucking Ass'n v. United States*, 344 U.S. 298, 320-23 (1953); *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941); *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940); *Acker v. United States*, 298 U.S. 426 (1936); *Safe Harbor Water Power Corp. v. FPC*, 179 F.2d 179, 201 (3rd Cir. 1949), cert. denied, 339 U.S. 957 (1950); *Cities Serv. Gas Co. v. FPC*, 155 F.2d 694, 698 (10th Cir.), cert. denied, 329 U.S. 773 (1946). (3) *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (judicial trial de novo required by due process for an issue of citizenship if a substantial showing of citizenship is made in deportation of residents). Cf. *Crowell v. Benson*, 285 U.S. 22 (1932). In cases of private right—liability of one person to another, such as workmen's compensation—certain jurisdictional facts, as occurrence of injury on navigable waters in admiralty cases and existence of employment relation in workmen's compensation, must be tried de novo in courts as part of the judicial function under article III. This rule applies to all facts which are a basis for constitutional exercise of power. There is dicta that this rule also applies to facts basic to an exercise of statutory authority, at least if the person seeking review is potentially the object of enforcement. But cf. *NLRB v. Hearst*, 322 U.S. 111 (1944). See 4 Davis, *Treatise* § 29.08-.09; Jaffe, *Judicial Review, Constitutional and Jurisdictional Fact*, 70 *Harv. L. Rev.* 953 (1957).

Today, so far as granting an enlarged scope of review is concerned, the cases above are almost entirely confined to (1) deportation hearings involving a claim of citizenship; (2) workmen's compensation cases in admiralty on issues of existing employment relationship or occurrence on navigable waters. See *Alabama Pub. Serv. Comm. v. Southern Ry.*, 341 U.S. 341, 348 (1951); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Davis v. Department of Labor*, 317 U.S. 249, 256-57 (1942); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indem. Ins. Co.*, 288 U.S. 162 (1933); *L'Hote v. Crowell*, 286 U.S. 528 (1932), reversing 54 F.2d 212 (5th Cir. 1931); *Western Boat Bld. Co. v. O'Leary*, 198 F.2d 409 (9th Cir. 1952); *Gudmundson v. Cardillo*, 126 F.2d 521 (D.C. Cir. 1942); *South Chicago Coal & Dry Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), aff'd, 309 U.S. 251, 257-58 (1940); note 189 *supra*.

Some state courts still apply the *Ben Avon* rule to public utility rate-making. Cf. *Southern Bell Tel. & Tel. Co. v. Tennessee Pub. Serv. Comm.*, 304 S.W.2d 640 (Tenn. 1957); *Opinion of the Justices*, 328 Mass. 679, 106 N.E.2d 259 (1952); *Note*, 102 U. Pa. L. Rev. 108 (1953).

other disputed facts in the case. No one has yet come up with a logical test. Yet, elusive though the category may be, there do seem to be some facts in certain situations which are more essential than others, stressed more by the relevant statute, related perhaps to areas of extremely narrow discretionary administrative powers. There are also facts about which it is easier to be objective, to give hard and fast answers, or to view things as black or white (such as the issue of citizenship in deportation). Moreover, when a court feels a very grave and fundamental error has been made by the agency, it is apt to speak in terms of jurisdictional fact to indicate that the agency act is void. The feeling may well be that a tribunal of limited jurisdiction should not be the final judge of its own powers and limits. The judicial function must and should include the power to decide *de novo* facts relevant to constitutional limits on state power, as in civil liberties cases.

Another problem is whether the Constitution sets a maximum limit upon the extent of review in the federal courts, at least for courts established under article III of the Constitution. The Supreme Court has indicated that it does in order to prevent these courts from engaging in so-called non-judicial activities—legislative or administrative. This happens if the court simply repeats what the agency is supposed to do.<sup>203</sup> The basic notion here, doubtless, is that courts should not determine purely subordinate legislative policies about rates or licenses.

No formulas for review of factual issues can avoid giving wide discretion to judges. The substantial evidence rule, in theory, tells a judge not to weigh evidence, determine credibility of witnesses, or choose from among various reasonable inferences or between conflicting testimony. In fact, however, there is little doubt that judges can and do perform these supposedly forbidden things even when purportedly applying the substantial evidence rule. The line between what is and what is not allowed by the rule cannot always be drawn clearly and firmly.

## XVII. JUDICIAL REVIEW OF QUESTIONS OF "LAW"

A much disputed matter is judicial review of questions of law decided by an agency. There is considerable support for the view that all ques-

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The right to introduce new evidence on review in these situations is not clear. Cf. *American Trucking Ass'ns v. United States*, 344 U.S. 298, 320-23 (1953); *Baltimore & O.R.R. v. United States*, 298 U.S. 349, 362-69 (1936).

203. Cf. *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952); *Sanford v. Kepner*, 344 U.S. 13 (1952); *Hoover Co. v. Coe*, 325 U.S. 79 (1945); *Federal Radio Comm. v. Nelson Bros. Co.*, 289 U.S. 266 (1933); *Federal Radio Comm. v. General Elec. Co.*, 281 U.S. 464 (1930); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693 (1927); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428 (1923); *United States v. Jones*, 119 U.S. 477 (1886). See 4 Davis, *Treatise* § 29.10.

tions of law should be decided independently by the judges. Proposals<sup>204</sup> to this effect have been made as substitutes for the Administrative Procedure Act to clarify its language<sup>205</sup> which has yet to accomplish this result.<sup>206</sup>

The present state of the problem is that while some questions of law are decided independently by judges, others, which are often labeled either questions of fact or questions of discretion, are reviewed only to determine either their reasonableness or their adherence to the limits of the agency's powers. The difficult problem is to determine which questions of law are fully reviewable and which are not, and the reasons therefor.

The troublesome cases involve concrete application of legal concepts. Often Congress has used broad statutory terms, such as "employee," which must be applied to a particular fact situation. There is language in several Supreme Court opinions<sup>207</sup> which seems to say that any reasonable interpretation of the statutory term must be accepted by a reviewing

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204. Section 1009(f) of the A.B.A. Code provides: "In all cases under review the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established." A.B.A. Proposed Code 196. It also provides for the setting aside of an agency order which is an "abuse or clearly unwarranted exercise of discretion." A.B.A. Proposed Code 196. Section 10(e) of the present Act merely refers to "an abuse of discretion." 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1952).

205. Section 10(e) provides that "so far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law. . . ." 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1952).

206. Cf. *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264 (1956); *Howell Chevrolet Co. v. NLRB*, 346 U.S. 482 (1953); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951).

207. See, e.g., *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264 (1956) (CIO Regional Director not a union "officer"); *O'Leary v. Brown-Pacific-Maxon Co.*, 340 U.S. 504, 508 (1951) (whether death was in course of employment); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (meaning of "fair and equitable" and "detrimental to the public interest or the interest of investors or consumers"); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (whether newsboys are employees under the Wagner Labor Act); *Gray v. Powell*, 314 U.S. 402 (1941) (meaning of statutory term exempting one both a producer and consumer of coal). See also *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939); *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 185 (1938); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-87 (1934); *ICC v. Union Pac. R.R.*, 222 U.S. 541, 547 (1912).

court. The Supreme Court itself, however, has never consistently followed such a view.<sup>208</sup>

The initial problem is to separate questions of law from questions of fact. Unfortunately, whether the court is determining law or fact may be unclear, since applying legal concepts involves both law and facts. It is not surprising, therefore, to find much confusion here. Moreover, courts have tended to label questions "law" or "fact" not because of a logical analysis of the issues but rather because of practical considerations.<sup>209</sup> Nowhere is this truer than in judicial review of agency decisions. The court's choice of a "fact" or "law" label for a question may be motivated by its determination as to whether the appropriate scope of review is either the substantial evidence test—the reasonableness or rational basis approach—or the independent judgment, rightness, or substitution of judgment test. If the former, then the "fact" label is used; if the latter, the "law" label. If the court decides to substitute its judgment for that of the agency, it can always do so by labeling the question one of "law." If it does not wish to do so, it can either label the issue as one of fact or discretion, or else as one of law, but, despite this, apply the test of reasonableness.

There are many questions of law, strictly speaking, which clearly de-

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208. See, e.g., *Office Employees v. NLRB*, 353 U.S. 313 (1957) (Court substituted views as to who are "employees"); *NLRB v. American Ins. Co.*, 343 U.S. 395 (1952) ("good faith" in bargaining with the union); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951) (Court in upholding lower court disagreed with the view of the NLRB as to who were labor union officials required to file non-communist oaths); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (whether foremen were employees; Court upheld the Board in deciding issue itself); *Board of Governors of Fed. Reserve Sys. v. Agnew*, 329 U.S. 441 (1947) (Court independently upheld Board's interpretation of statutory phrase); *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946) (Court reversed agency ruling that back pay awarded by NLRB was not wages for social security); *Railroad Retirement Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946) (who is an employee); *Unemployment Compensation Comm. v. Aragon*, 329 U.S. 143 (1946) (agency decides what is a labor dispute and was it in progress; Court decides if dispute was at place of employment).

209. See *Dobson v. Commissioner*, 320 U.S. 489 (1943) (where the Court assessed the comparative qualifications of the Tax Court and the courts in deciding whether to label an issue one of fact, so that the court's judgment should not be substituted for that of the agency). Cf. *FTC v. Standard Oil Co.*, 355 U.S. 396 (1958); *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151 (1957); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 590 (1945); *Swift & Co. v. United States*, 316 U.S. 216, 225 (1942); *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 (1938); *Adams v. Mills*, 286 U.S. 397, 409-10 (1932); *Manufacturer's Ry. v. United States*, 246 U.S. 457, 481 (1918). In all these cases the Court treated the issue as one of fact and refused to substitute its judgment for that of the agency. Yet, in every case the issue could have been labeled one of law, for the meaning of a statutory term was involved to some extent as to whether certain admitted facts fell within the scope of statutory language. The same result could also be reached even if the issue were labeled law, but the Court still applied the test of reasonableness, as it sometimes seems to do.

mand the expertness of the agency. This is particularly true when the problem is to apply a so-called statutory standard—such as fair return or public interest—to a set of facts. A court can label this an issue of “fact” and so avoid substituting its judgment for that of the administrator. Or it can label it one of “law,” but still apply a test of reasonableness. Whatever the label chosen, the court should consider certain basic problems, the first of which is whether the issue was one for administrative discretion.

Courts should always decide by an independent judgment whether the agency has stayed within the limits set on its discretionary authority to interpret the statute. The agency’s interpretation may be reasonable and highly relevant to the purpose of the statute, but still not acceptable if outside the relevant limits the court believes the statute authorized the agency to apply. The court’s task is to decide whether the agency considered relevant or irrelevant factors in applying a statutory standard. However, once the court determines the standards of relevancy, the agency alone applies these standards to the facts. Courts interfere then only if the findings of the agency are unreasonable, arbitrary, or harsh under these standards.<sup>210</sup>

As a general proposition, there should be a presumption that the legislature always means to give an agency some discretionary power to make choices within certain limits, this, after all, being one of the chief reasons for entrusting the agency with its job. The decisive issue is whether this particular question of law was left to the discretion of the agency, which only a court can decide. In view of the statutory purpose, as the court sees it, is the agency’s interpretation of the statute’s meaning within the range of choices given the agency by the legislature? If the court decides that the question has been left to agency discretion, the only issue left for the court is whether the rule is a reasonable one. In effect, the court then refuses to interpret the statute or to pronounce the rule of law, but leaves it up to the reasonable discretion of the agency. Even in these cases, however, where the agency pronounces the rule itself or applies the rule to the facts, the court, on judicial review, has two functions: (1) to pass independently upon the reasonableness of the rule or its application; and (2) to decide independently if the pronouncement of the rule or its application falls within or without the discretionary powers of the agency. On the other hand, when the court decides the agency lacks discretionary power to announce or apply the rule, then the court itself may undertake to do so.

The problem of questions of law and of statutory interpretation is closely related to the exercise of the agency’s rule-making functions. A

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210. Cf. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941).

distinction is usually made between legislative rules<sup>211</sup> which fill in "gaps" in a statute and which the statute expressly authorizes the agency to make, and rules<sup>212</sup> which merely "interpret" a statute and which are based solely upon the implied powers of the administrator. The criteria for this distinction are often confusing. Legislative rules usually are those which the administrator is expressly empowered by statute to make, but they also may be based only upon an implied grant of power. Interpretative rules are ordinarily issued in reliance upon implied powers, but their issuance may be expressly authorized by statute. Strictly speaking, many legislative rules obviously do "interpret" a statute. On the other hand, so-called interpretative rules often do not interpret. The truth is that almost any agency power to make rules or to adjudicate cases has the concomitant power to make law, to fill in some statutory gaps and to interpret some statutory language.

Perhaps a significant distinction would be three-fold. First, there are legislative rulings without which a statute would impose duties on no one, as contrasted with interpretative rulings which are not essential in this manner for the operation of the statute. Interpretative rulings may either be formally adopted as binding by the agency or like interpretative bulletins of the Wage and Hour Administrator, enforcement rulings which announce general agency policy in the enforcement of a statute in order, primarily, to guide those charged with the enforcement of the law.

In any event, the ultimate distinction is not between rules which are "interpretative" and those which are "legislative," in the usual meanings of these words. Nor is the distinction between those rules based upon implied powers and those based on express powers. The decisive factor is

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211. *United States v. Howard*, 352 U.S. 212 (1957); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Mitchell v. Budd*, 350 U.S. 473 (1956); *American Trucking Ass'ns v. United States*, 344 U.S. 298 (1953); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944); *NBC v. United States*, 319 U.S. 190, 224 (1943); *Federal Security Agency v. Quaker Oats Co.*, 318 U.S. 218 (1943); *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 154-55 (1941); *American Tel. & Tel. Co. v. United States*, 299 U.S. 232, 236-37 (1936); *Houston v. Saint Louis Independent Packing Co.*, 249 U.S. 479 (1919). Cf. *United States v. Hvass*, 355 U.S. 570, 575 (1958). See Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 *Colum. L. Rev.* 252 (1940); Griswold, *A Summary of the Regulations Problem*, 54 *Harv. L. Rev.* 398 (1941); Feller, *Addendum to the Regulations Problem*, 54 *Harv. L. Rev.* 1311 (1941); Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes*, 88 *U. Pa. L. Rev.* 556 (1940).

212. *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954); *United States v. Zazove*, 334 U.S. 602 (1948); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 290 (1946); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944) (legislative rule interprets statute). Sections 4(a) and (c) of the Administrative Procedure Act exempt "interpretative rules" from requirements of notice and publication. 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1952). There is no such exemption in the A.B.A. Proposed Code.

the *amount* of power or discretion expressly or impliedly conferred on the administrator by Congress.

The question is whether Congress intended the administrator to have any power to make law, and if so, how much. Congress may have conferred narrow or broad law-making powers on the agency. The court should not substitute its judgment for that of the administrator when Congress has given the administrator the *primary* law-making power on the issue. Thus, as in other questions of statutory construction, the problem is whether Congress meant for the courts or for the agency to interpret the language or to decide this matter. It is for the court independently to determine what Congress meant. If the court decides that the agency has the primary power, then it may label the rule "legislative." This means that the rule is valid if the agency has followed the correct procedure, stayed within statutory and constitutional authority, acted reasonably, and relied upon substantial evidence. The court will not substitute its judgment for that of the agency in passing upon the validity of the "legislative" rule. On the other hand, if the court decides that it has this primary power of rule-making on the issue, then it may label the rule "interpretative." This means that the court may, if it wishes, pass upon the wisdom of the rule and substitute its judgment for that of the agency. The rule may be valid only if the court agrees with the agency. Actually, however, this distinction is often misleading because even in the case of "interpretative" rules, the court often will give *great weight* to the views of the administrator and merely inquire to see if the statute *permits* the agency to make the rule. In any event, the scope and nature of judicial review should be governed by the same criterion for rules as for other questions of law. True, there may be more discretion conferred upon the agency by the statute; but even so, it is up to the court to decide if the limits of that discretion have been exceeded and the discretionary power reasonably exercised.

The next problem which must be faced is what factors enter into a court's determination as to whether it should independently determine the correct rule of law or application, thus denying policy-making or discretionary power to the agency, or whether it should leave this decision up to the discretionary power of the agency, within limits. Mere ambiguity in a statute is not enough to prove that the right to exercise discretion has been given the administrator. A court may be convinced that it is unwise to take an independent view of the law, but if that court believes that the administrative interpretation exceeds the agency's discretion, it can, and should, intervene.

When should a court hold that while several views are possible and reasonable, only one is correct? There are several elements to consider

here.<sup>213</sup> First, and perhaps most important, is the extent to which interpretation of the statute, and the framing and application of the rule, require the expert experience of the agency in its special field.<sup>214</sup> The relevance and weight of this expertness must be evaluated by the court. This aspect involves a comparison of the qualifications of agencies and courts. Unfortunately, the criterion of comparative qualifications is often not decisive because both court and agency may be equally competent on the particular problems involved. On certain matters, however, courts seem especially well qualified to pass judgment, such as those involving interpretation of the common law; analysis of legislative history (particularly if political conflicts are at stake rather than legislative inquiry into the technical problems of the agency's specialized work); common law type problems of ethics or fairness; problems extending into fields outside the agency's special area; problems presenting, or even substantially affected by, constitutional questions; and judge-made law growing out of statutory interpretation.<sup>215</sup>

To say that courts are specialists in statutory interpretation (either as to the meaning of words or legislative history) contains some truth, but ignores the fact that the subject-matter may often be technical or non-legal, or involve an area in which the legislature intended that the agency's policy should be developed through use of its own discretion. The particular element involved in construction of the statute may be decisive. If the question concerns the general purpose of the statute, this calls for judgment as to statutory language, its legislative history, and the social and economic conditions responsible for its enactment. Here courts would usually seem as well, if not better, qualified than agencies to make determinations. However, as the purpose becomes more specific, there may be more need for an agency's special knowledge. If the problem pre-

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213. See Jaffe, *Judicial Review: Question of Law*, 69 *Harv. L. Rev.* 239 (1955); 4 *Davis, Treatise* ch. 30; Note, 42 *Minn. L. Rev.* 271 (1957).

214. Cf. *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413-14 (1958); *Frank Bros. v. NLRB*, 321 U.S. 702 (1944); *Board of Trade v. United States*, 314 U.S. 534, 548 (1942); *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942); *Railroad Comm. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 581-84 (1940); *United States v. Louisville & Nashville R.R.*, 235 U.S. 314 (1914); *Director v. Princess Elkhorn Coal Co.*, 226 F.2d 570, 574 (6th Cir. 1955); *NLRB v. Standard Oil Co.*, 138 F.2d 885, 887 (2d Cir. 1943).

215. See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953) (national policy of competition); *Henderson v. United States*, 339 U.S. 816 (1950) (racial discrimination on railroads); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944) (legislative history); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (principles of equity and common law); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941) (common law fairness in unfair labor practice). One may question the judicial abdication in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), where the question concerned the further extension of the common law principle of fiduciary obligation. Cf. *SEC v. Cogan*, 201 F.2d 78 (9th Cir. 1951) (court decided the proper fiduciary standard).



sented is which statutory interpretation will best carry out this statutory purpose, the agency has expertness here and may be intended by the legislature to decide this very issue. Frequently there are several interpretations consistent with the statutory purpose, all equally reasonable, from which a choice—presumably by the expert agency—must be made. Whether the statutory words will actually bear the meaning given by the agency, or whether the agency's views violate any clear policies of our society—are matters which the courts should determine.

A second factor is the clarity with which the rule can be enunciated. A court may desire to assume jurisdiction over the matter only if it can delineate a rule which can serve as a future guide to the parties and the administrator. If a clear-cut rule, stable in form and context, cannot be drawn, it may be desirable to leave the matter to the agency's discretion.

A third factor is the nature of the administrative proceeding in question. The more thorough and impartial the administrative proceeding, the less apt is the court to substitute its judgment for that of the administrator. This requires inquiry into such matters as did an agency member or a subordinate issue the ruling; was it made by an enforcing or an adjudicating official; was the rule formulated by an *ex parte* hearing or after a public hearing—not necessarily an adversary one—in which opposing viewpoints of counsel were adequately presented and considered in the agency decision.<sup>216</sup>

A fourth factor is the intent of Congress concerning allocation of functions between the court and the agency, as revealed by the existence of any clear legislative preference that the administrator, and not the courts, should have the primary power of passing upon this matter of discretion or judgment.<sup>217</sup> This criterion is particularly useful in dealing with rule-making powers of administrators, for it is often the real distinction between legislative rules<sup>218</sup> (those the legislature meant the agency to promulgate as law) and interpretative ones<sup>219</sup> (those issued by the agency without such legislative delegation of power). Unfortunately, it is often impossible to tell to what extent Congress intended to delegate law making power to an agency. The courts have particularly emphasized that legislative delegation of power to fashion appropriate remedies is usual.<sup>220</sup>

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216. See *Fishgold v. Sullivan Drydock & Repair Co.*, 328 U.S. 275, 290 (1946); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

217. *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947); *Gray v. Powell*, 314 U.S. 402, 411-12 (1941).

218. *American Trucking Ass'ns v. United States*, 344 U.S. 298, 309 (1953); *NBC v. United States*, 319 U.S. 190 (1943); *American Tel. & Tel. Co. v. United States*, 299 U.S. 232 (1953); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935).

219. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

220. *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

Courts seem inclined to interfere very little with agency discretion in imposing sanctions and penalties to obtain compliance with a statute,<sup>221</sup> unless the agency has clearly exceeded its statutory powers.<sup>222</sup>

A fifth factor is the relative importance of the legal problem to the statutory scheme. This involves an inquiry as to whether such a problem is fundamental<sup>223</sup> (a general concept) or comparatively minor<sup>224</sup> (such as application of a concept to a unique fact). For example, a court may substitute its own judgment for the agency's in formulating criteria, but allow the agency wide discretion in using the broad criteria. The difference is between applying and generalizing, between making broad policy and administering details, and between deciding broad questions or narrow ones. Thus, a court may enumerate an important proposition, such as the absence of a national policy of competition or the inapplicability of common law rules for defining employees under a statute, and then leave to the agency the task of choosing in a specific case between monopoly and competition,<sup>225</sup> or defining in a specific case, "employees."<sup>226</sup>

Two other important elements to be taken into account are whether there has been a consistent, prolonged adherence to the same view by the agency and parties most affected;<sup>227</sup> and whether the administrative interpretation was made contemporaneously with the enactment of the statute by those responsible for carrying out the statutory program who

221. *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948); *American Light & Power Co. v. SEC*, 329 U.S. 90, 112 (1946); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704-05 (1944); *Northwestern Elec. Co. v. FPC*, 321 U.S. 119, 124 (1944); *Federal Security Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 227-29 (1943); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Magnolia Liquor Co. v. Black*, 252 F.2d 405 (5th Cir. 1958); *Walker v. CAB*, 251 F.2d 954 (2d Cir. 1958).

222. *NLRB v. District 50, UMW*, 355 U.S. 453 (1958); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *FTC v. Royal Milling Co.*, 288 U.S. 212, 218 (1933); *Alberty v. FTC*, 182 F.2d 36, 40 (D.C. Cir. 1950), cert. denied, 340 U.S. 818 (1951).

223. *Office Employees v. NLRB*, 353 U.S. 313 (1957); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

224. Cf. *Gray v. Powell*, 314 U.S. 402 (1941). There are cases giving agencies much discretion on broad questions. See *Brooks v. NLRB*, 348 U.S. 96 (1954); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945).

225. *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953).

226. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). Cf. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (Board may determine whether facts show lack of good faith in bargaining; the Court decided that refusal to produce records to prove inability to raise wages may be used to show bad faith).

227. See *Commissioner v. Flowers*, 326 U.S. 465, 469 (1946); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938). But cf. *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946); *Koshland v. Helvering*, 298 U.S. 441 (1936).

were familiar with the legislative intent.<sup>228</sup> An administrative interpretation of a statute is at least some evidence that the statutory language may denote this meaning, and that this meaning, ordinarily, is a natural one. If this ruling also is widely accepted and consistently followed, considerations of stable transactions may lead to its judicial acceptance. Experience may show this is the meaning the words should bear. At the least, a uniform interpretation by an agency charged officially with responsibility for a statute must be given some weight by a court. It may be given conclusive weight if the interpretation is consistent with the purpose properly attributed to the statute in the court's judgment, and if it is arrived at with proper regard for the factors which should, in the court's opinion, be considered in spelling out that purpose.

Finally, there are certain other factors often considered, such as whether the statute was re-enacted after the issuance of the administrative interpretation by legislators with knowledge thereof;<sup>229</sup> the psychological advantage of having the prestige of a court pronouncing the rule itself, instead of the agency; and fundamental responsibility of the judiciary to impart unity and coherence to our legal system and to see that an agency remains consonant with our legal order and its constitutional principles.

In the last analysis, any formula leaves much discretion to a judge. If he adopts a test allowing substitution of his judgment, he may still lend much weight to the administrative views. If he follows the test of reasonableness, he must also determine whether the agency has exceeded what he deems are the limits of its discretionary power. In fact, in many cases, the two tests seem to interblend so that it is impossible to ascertain which one the court actually applied.<sup>230</sup>

An unqualified rule that all questions of law must be decided independently by the courts is improper and unwise. Certain questions of law are better left to the agency to decide, if it acts reasonably. To the prac-

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228. See *FHA v. Darlington, Inc.*, 358 U.S. 84 (1958); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *White v. Winchester Country Club*, 315 U.S. 32, 41 (1942); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549 (1940). But cf. *Trust of Bingham v. Commissioner*, 325 U.S. 365 (1945).

229. See *Service v. Dulles*, 354 U.S. 363, 380 (1957); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *Wilmette Park Dist. v. Campbell*, 338 U.S. 411, 417-18 (1949); *Crane v. Commissioner*, 331 U.S. 1, 7-8 (1947); *Commissioner v. Flowers*, 326 U.S. 465, 469 (1946); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 115-17 (1939). But cf. *United States v. Calamaro*, 354 U.S. 351, 359 (1957); *Helvering v. Reynolds*, 313 U.S. 428, 431-32 (1941); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-01 (1939); *Biddle v. Commissioner*, 302 U.S. 573, 582 (1938).

230. Cf. *NLRB v. Truck Drivers Local Union*, 353 U.S. 87 (1957); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *East Texas Lines v. Frozen Food Express*, 351 U.S. 49 (1956); *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946).

tical wisdom of judges, therefore, must be left the determination of which questions of law are for administrators, which for courts, to decide.

#### CONCLUSION

Judicial review is a keystone and far too essential a part of the administrative process to be frozen into a rigid mold. To function at its best, much must be left to the discretion of both administrators and judges. If we do not trust judicial discretion, then judicial review cannot be regarded as an effective method of using the administrative process in a democratic society with a minimum of harm to individual rights and liberties. If the scope of review is unduly broadened, however, we will so overwhelm the courts as to make it impossible for them to be effective in performing their essential duty of insuring that agencies abide by the law. Government will not be able to secure competent administrators if more and more power is given to courts and examiners, less and less to administrators.

The time is not yet ripe to adopt legislation which would prevent further experimentation. We have learned much about the administrative process in the last few decades. There is every prospect that such knowledge will increase rapidly in the future, for the growth of the administrative process seems inevitable as we try to cope with the new problems presently confronting society. Now is an inopportune moment to ignore the great need for continued experimentation and knowledge. We desperately need every resource available to insure that state control and regulation will be exercised fairly, and with due regard for individual rights and liberties, since there is no escape from the allocation of discretionary powers to government officials.

To transfer administrative functions, even those of an adjudicative nature, to the courts on the theory that the problems facing the agencies have now been solved is to close our eyes to present realities. Perhaps if given another chance, we might well have used tools other than administrative agencies for certain matters, such as the authority granted to the post office and customs in fraud and censorship cases, and to the Immigration Service in alien and naturalization affairs. These tasks involve important issues affecting individual liberties, where the need for courtroom hearings and procedures to ascertain facts from conflicting oral testimony is imperative. They might have been better handled in the courts, but interested agencies, however, have gradually reformed their procedures and evolved measures which seem, on the whole, reasonably satisfactory.<sup>231</sup> To transfer their functions to the courts now seems unnecessary and might cause prolonged confusion. To a large extent, after

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231. See Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. Rev. 1273, 1289 (1955).

all, it is Congress and the electorate who are responsible for the kind of treatment given aliens. Nor is it wise to transfer the functions of the NLRB or the FTC to the judiciary, even if these agencies do prosecute, as well as regulate, transcend all industries, and rely more upon adjudication than rule-making to establish and enforce their policies.<sup>232</sup> The problems confronting these agencies are far from solved, because in our dynamic society new ones constantly arise. Yesterday's precedents provide little guidance for the solution of today's problems.

Questions about the availability and extent or scope of review are far from solved. Further study is necessary to determine how to remove obstacles to effective judicial review raised by rigid rules about standing, timing, and methods. Emphasis should be given to the development of agency procedures which facilitate and insure effective judicial review of agency actions. This involves insistence on such matters as adequate hearings (not necessarily formal trials), reasoned decisions, prohibitions against *ex parte* secret influences or open reliance upon secret evidence, and the availability of experienced counsel to all litigants, among others. Perhaps the most fundamental problems are: (1) the extent to which the administrative process may and should depart from judicial procedure without incurring too great a loss in public confidence, and (2) determinations as to which matters are, and which are not, suited for the administrative process.

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232. But cf. Cole, *Administrative Agencies and Judicial Powers*, 44 A.B.A.J. 953, 1004-06 (1958).