
Stephen Van Dolsen

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JUDICIAL REVIEW OF ALLEGEDLY ULTRA VIRES ACTIONS
OF THE VETERANS' ADMINISTRATION: DOES 38
U.S.C. § 211(a) PRECLUDE REVIEW?

INTRODUCTION

In his second inaugural address, Abraham Lincoln challenged the Na-
tion "to care for him who shall have borne the battle and for his widow
and his orphan." Since the beginning of the Nation, in one form or
another, Americans have provided benefits for veterans. Today Lin-
coln's charge has become a huge undertaking: for in fiscal year 1985 the
Veterans' Administration (VA) spent over 26 billion dollars on a vast
system of veterans' programs. While few would argue with the principle
that the American people owe something more than gratitude to their
servicemen and -women, there are occasional debates on just how large a
debt the Nation should feel obligated to pay. A current subject of dis-
pute among traditional participants in these debates deals less with the
size of the debt than with the amount of due process owed veterans in
repaying it.

This current controversy swarms around the modern versions of two
old statutes that many feel to be the vestiges of an archaic tradition. This
tradition holds that government benefits are mere gratuities and not
"rights," and thus the government enjoys great latitude in disbursing
them. One statute prohibits a lawyer from charging a veteran more

1. Second Inaugural Address of President Abraham Lincoln (Mar. 4, 1865), re-
printed in 6 A Compilation of the Messages and Papers of the Presidents, 1789-1897, 276,
277 (1897). These words have since become the motto of the Veterans' Administration. See 1985 V.A. Ann. Rep. at xi.
2. Massachusetts colony implemented the first American veterans' program in 1636
providing benefits for those maimed in service against the Pequot Indians. Some of the
other colonies followed suit. See 1985 V.A. Ann. Rep. at xi. In 1776 the Continental
Congress passed a bill providing disability pensions for veterans of the Continental Army. See id; 5 Journals of the Continental Congress 702, 702-04 (1906). The First Congress
later consolidated all pension programs under the federal government in 1789. See Act of
Sept. 29, 1789, ch. 24, 1 Stat. 95 (expired 1790); 1985 V.A. Ann. Rep. at xi. The veterans
benefit program would grow over the next century and beyond, and by the 1920's veter-
ans' programs were inefficiently administered by several different agencies. Id. at xii.
Congress began consolidating the programs in the 1920's by creating the Veterans' Bu-
reau. See Act of August 9, 1921, ch. 57, tit. I, 42 Stat. 147, 147-52, repealed by World
War Veterans' Act, 1924, ch. 320, § 601, 43 Stat. 607, 629-30; World War Veterans' Act,
Stat. 1016, 1018. Congress completed consolidation by establishing the Veterans' Ad-
61 (1945) (synopsis of veterans' legislation enacted prior to 1933).
assistance, special assistance to disabled veterans, burial benefits and cemetery operations,
guaranteed and insured loans, life insurance and medical care including hospital, nursing
home and outpatient care. See generally id. at 9-112. The veteran population of the
4. See infra notes 52-54 and accompanying text.

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than ten dollars to process a veteran's claim. The second statute, which is the subject of this Note, precludes review in the federal courts of most VA benefit determinations.

Traditionally, much of the veterans' benefit system has been beyond the reach of the federal courts. A continuous chain of statutes has barred the courts from reviewing most decisions involving benefits claims. Until the 1950's, these laws were followed almost without fail. Since that time, however, some courts have been devoting increasing energy to circumventing the preclusion statute and reviewing VA benefit determinations. Among the variety of judicially created exceptions to the statute is one permitting review of VA actions that are said to be beyond the Veterans' Administrator's statutory authority, despite plain statutory language that precludes such review. This Note examines the decisions

5. See 38 U.S.C. § 3404(c)(2) (1982). An agent or attorney who violates this provision is subject to a maximum of two years imprisonment, or a 500 dollar fine, or both. 38 U.S.C. § 3405 (1982).


7. See infra notes 89-112 and accompanying text.


9. In a line of cases between 1958 and 1967 the Courts of Appeals for the District of Columbia created an exception to § 211(a) that permitted review of all VA benefit determinations except the initial processing of an application for benefits. See infra notes 107-110 and accompanying text. Congress later overruled this exception through an amendment to § 211(a). See infra note 111 and accompanying text.

In Johnson v. Robison, 415 U.S. 361 (1974), the Supreme Court held that § 211(a) does not bar review of the constitutionality of a veterans' benefits statute challenged by a veteran denied VA benefits. See infra note 112-127 and accompanying text. Several courts have used the reasoning in Robison to find permissible other types of review of VA action. See, e.g., American Federation of Government Employees v. Nimmo, 771 F.2d 28, 31 (4th Cir. 1983) (§ 211(a) does not bar review of the constitutionality of Administrator's actions); Devine v. Cleland, 616 F.2d 1080, 1083-85 (9th Cir. 1980) (Robison permits review of VA procedures on grounds that the procedures are unconstitutional due to failure of Congress to provide due process protection by statute); Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978) (same); Beausches v. Nimmo, 562 F. Supp. 250, 254 (D. Conn. 1983) (§ 211(a) does not bar review of the constitutionality of Administrator's actions); Arnolds v. VA, 507 F. Supp. 128, 130-31 (N.D. Ill. 1981) (same); Falter v. VA, 502 F. Supp. 1178, 1180-81 (D.N.J. 1980) (same); Dumas v. Cleland, 486 F. Supp. 149, 151-52 (D. VT 1980) (same); Wayne State Univ. v. Cleland, 440 F. Supp. 806, 808-09 (E.D. Mich. 1977) (same), rev'd on other grounds, 390 F.2d 627 (6th Cir. 1978); Plato v. Roudebush, 397 F. Supp. 1295, 1302-04 (D. Md. 1975) (same). Some courts have permitted challenges to the Administrator's actions alleged to have been ultra vires. See infra notes 137-154 and accompanying text.

10. See American Federation of Government Employees v. Nimmo, 771 F.2d 28, 31 (4th Cir. 1983) (section 211(a) does not bar review of VA authority to promulgate regulations); Evergreen State College v. Cleland, 621 F.2d 1002, 1007-08 (9th Cir. 1980) (same);
creating and those rejecting this exception. It argues that rejecting the exception correctly construes the preclusion statute. Part I of this Note discusses the presumption in American administrative law that agency actions are reviewable. Part II surveys the history of the VA preclusion statute and analyzes the major Supreme Court decision interpreting it. Part III reviews the decisions granting and those rejecting federal court review of VA actions alleged to be beyond statutory authority. Finally, Part IV examines those decisions and argues that the exception should not in fact exist.

I. PRESUMPTION OF THE EXISTENCE OF A RIGHT TO JUDICIAL REVIEW

A. General Presumption

As a result of both judicial and legislative action, there is a strong presumption favoring the availability of judicial review in American administrative law. The presumption was originally created by the courts interpreting the common law. Congress later enacted the presumption


11. See Administrative Procedure Act, § 702, 5 U.S.C. § 702 (Supp. III 1985) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). See also Califano v. Sanders, 430 U.S. 99, 104 (1977) ("[The APA] undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials."); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) ("[T]he Secretary ... bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision."); City of Chicago v. United States, 396 U.S. 162, 164 (1969) ("[W]e start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose.") (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967)); Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."); Harmon v. Brucker, 355 U.S. 579, 581-82 (1958) (per curiam) ("Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."); Brownell v. Tom We Shung, 352 U.S. 180, 185 (1956) (exceptions from the APA not lightly to be presumed and expanded mode of review granted by the Act not to be modified); Marcello v. Bonds, 349 U.S. 302, 310 (1955) (exemptions from APA "not lightly to be presumed"); Heikkila v. Barber, 345 U.S. 229, 232 (1953) (APA to be construed as providing expanded judicial review); see also 5 K. Davis, Administrative Law Treatise § 28:1 (2d ed. 1984) at 253-57; Note, Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers, 97 Harv. L. Rev. 778, 778 & nn. 1-2 (1984) [hereinafter Separation of Powers].

12. Under the common law of the 19th century discretionary government action was generally held to be unreviewable. See, e.g., Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840) (interference by courts into the ordinary duties of the executive departments would cause "nothing but mischief" and no such power was given to the courts). In Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) the Court stated that
as part of the Administrative Procedure Act (APA). The legislative history of the APA clearly indicates that the availability of judicial review of administrative action is to be presumed. The Supreme Court established the modern version of the presumption in *Abbott Laboratories v. Gardner*. The Court, following the holdings of earlier cases and combining their language with that of the legislative history of the APA, stated that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." To determine if a statute explicitly or impliedly precludes review, a court examines its express language, legislative history, its objectives, the nature of the administrative action said to be non-reviewable and the structure of the statutory scheme providing for such action. Where a "substantial doubt" exists as to congressional intent, the general presumption favoring judicial review controls.

It is well settled that Congress can narrow, and perhaps preclude, judicial review. The power to do so may depend upon the challenges facing
the Nation,20 a balancing of the interests involved in the purportedly non-reviewable agency action,21 and the type of review sought. The presumption in favor of reviewability is strongest for a claim that the agency action in question is unconstitutional.22 The presumption is weakest

to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the plaintiff belongs. Under the [APA], 'statutes [may] preclude judicial review' or 'agency action [may be] committed to agency discretion by law.' In either case, the plaintiff is out of court . . . because Congress has stripped the judiciary of authority to review agency action.


20. See, e.g., Briscoe v. Bell, 432 U.S. 404, 409-10 (1977) (necessity of combatting continuing discrimination against voters requires "sterner" measures of Voting Rights Act, including limitations on judicial review); South Carolina v. Katzenbach, 383 U.S. 301, 308-10, 332-33 (1966) (same); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111-14 (1948) (Presidential decision concerning awarding of overseas air routes a political decision not subject to judicial review); Estep v. United States, 327 U.S. 114, 122-23 (1946) (review of decisions of draft boards final and unreviewable unless there is no basis in fact for classification of registrant); Yakus v. United States, 321 U.S. 414, 427-31, 441-43 (1944) (wartime emergency permits Congress to limit judicial review of price regulations); F. Davis, supra note 19, at 189 ("That constitutional sanction for such limitations on judicial review varies in accordance with the necessities of the times . . . has . . . become increasingly clear." (footnote omitted)).

21. See Block v. Community Nutrition Inst., 467 U.S. 340, 345-53 (1984) (consumers not able to obtain judicial review as their interests less important than those of dairy handlers); United States v. Erika, 456 U.S. 201, 208-10 & n.13 (1982) (denial of judicial review of certain benefits determinations under Medicare program because such benefits were minor matters); Briscoe v. Bell, 432 U.S. 404, 409-10 (1977) (minorities' rights to vote outweigh states' interests in obtaining judicial review of certain decisions under Voting Rights Act); South Carolina v. Katzenbach, 383 U.S. 301, 308-17, 332-33 (1966) (same); F. Davis, supra note 19, at 189 (limitations on judicial review vary with "the relative importance of the interest for which protection is sought").

where appellants seek review of fact findings. Between these extremes, courts may find the right to review determinations of discretion, procedure, law, and claims of arbitrariness. Finally, regardless of a preclusion statute, courts almost certainly will review an action on grounds of lack of jurisdiction, fraud and clear unconstitutionality.

What is not clear is exactly to what extent Congress may narrow the scope of judicial review. The courts have been troubled by cases where both explicit and implied limitations of judicial review have been found. Faced with an equivocal preclusion statute, some courts use the practical, if paradoxical, approach of deciding the case against the party seek-

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Shapiro & P. Verkuil, Administrative Law and Process § 5.2, at 128-30 ("Despite the dearth of case law on the issue, dicta in several cases and scholarly analysis suggest strongly that there is a constitutional right to judicial review of constitutional issues raised by agency actions." (footnotes omitted)).

23. See FTC v. Indiana Fed'n of Dentists, 106 S. Ct. 2009, 2015-16 (1986) (court must defer to agency's findings of fact if based on reasonable conclusion under statute similar to APA, but questions of law are for courts to resolve); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-14, 416 (1971) (review of facts under APA limited to "certain narrow, specifically limited situations"); 5 K. Davis, supra note 11, § 28:3, at 259 (determination of factual issues have the weakest claim to reviewability); see also Administrative Procedure Act, § 706, 5 U.S.C. § 706 (1982) (standards of review under APA). Courts will use the "substantial evidence" test to review formal rulemaking and adjudications under the APA and when required by agency organic acts. The arbitrary and capricious test is used in informal rulemaking and informal adjudications. See generally R. Pierce, S. Schapiro & P. Verkuil, supra note 22, §§ 7.3, 7.3.1, 7.3.2, at 357-62 (standards of review of fact findings).


25. See Heckler v. Chaney, 470 U.S. 821, 839 (1985) (Brennan, J., concurring) ("It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands . . . ." Review of nonenforcement decision made pursuant to bribe not foreclosed by nonreviewability presumption); 5 K. Davis, supra note 11, § 28:2 at 257-59.

26. Compare Wayne State Univ. v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978) (38 U.S.C. § 211(a) does not preclude review of VA authority to promulgate regulations with Traynor v. Walters, 791 F.2d 226, 228-31 (2d Cir. 1986) (§ 211(a) precludes review of VA authority to promulgate regulations), cert. granted sub nom. Traynor v. Turnage, 55 U.S.L.W. 3607 (U.S. Mar. 10, 1987) (No. 86-622); see also Daniel Int'l Corp. v. OSHRC, 656 F.2d 925, 932 (4th Cir. 1981) (APA "does not require agency to publish in advance every . . . proposal which it may ultimately adopt as a rule," particularly when proposals are adopted in response to comments in rulemaking proceeding) (quoting Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 321 (4th Cir. 1980)); Chrysler Corp. v. EPA, 600 F.2d 904, 908-09 (D.C. Cir. 1979) (§ 16(a) of Noise Control Act fails to provide jurisdiction for court to review enforcement regulations promulgated pursuant to Act); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (agency should disclose all scientific material that it believes supports proposed rule, to suppress meaningful comment is to reject comment altogether); Verkuil, Congressional Limitations on Judicial Review of Rules, 57 Tul. L. Rev. 733, 735 (1983) ("Explicit and implied limitation of review situations have troubled the courts deeply and as a result have produced confused and often contradictory decisions.").
ing review of agency action on the ground that this party would lose the case on the merits even if it enjoyed a right to review. The court thus avoids deciding the reach of the preclusion statute. Such judicial hedging is symptomatic of uncertainty as to whether the Constitution requires some form of judicial review of administrative action.

B. Does the Constitution Require Some Judicial Review of all Administrative Action?

The constitutional objections to denial of judicial review of agency action are found in the Article III judicial power, the doctrine of separation of powers, the purposes underlying the requirements of Article III; Thomas v. Union Carbide Agric. Pros., 105 S. Ct. 3325, 3334 (1985) (discussing Article III effects on judicial review of agency action); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.23 (1982) (plurality opinion) ("[W]hen Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review."); Johnson v. Robison, 415 U.S. 361, 367-68 (1974) (rejecting argument that § 211(a) prohibits Congress from considering constitutionality of veterans' benefits legislation because such an interpretation is of questionable constitutionality); Verkuil, supra note 26, at 736 (constitutional sources of objections to denial of judicial review). Article III of the Constitution provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2, cl. 2. Professor Hart believed that this clause must be read and interpreted such that the "[e]xceptions" do not "destroy the essential role of the Supreme Court in the constitutional plan." See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364-65 (1953). Professor Hart believed that a necessary part of the constitutional scheme was the availability of a court to decide claims of constitutional rights to judicial process and to provide such process if the claim is sustained. See id., at 1363-72.

The ability of Congress to narrow the jurisdiction of the Supreme Court and other federal courts "[has] been the subject of vigorous academic debate for many years." Redish, Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager, 77 NW. U.L. Rev. 143, 143 (1982). See, e.g., Hart, supra; Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960); Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45 (1975). See generally C. Wright, Law of Federal Courts, § 10, at 32 n.1 (4th ed. 1983) (collecting law review articles). Although scholars generally view as plenary the power of Congress over the appellate jurisdiction of the Supreme Court, many scholars also believe that such power may not be exercised in violation of other provisions of the Constitution. See id. § 10, at 35. Congress also has considerable control over the jurisdiction of the lower federal courts. See generally, id. § 10 at 35-36 (discussing congressional control over lower federal court jurisdiction).
tion of powers\textsuperscript{29} and the fifth amendment due process clause.\textsuperscript{30} These interrelate to provide a limit on Congress's power to restrict judicial review.\textsuperscript{31} Although the Supreme Court has never fixed the precise character of this relationship, it recently has hinted that some minimum review may be required even in the face of a preclusion statute. In \textit{Northern Pipeline Construction Co. v. Marathon Pipe Line Co.},\textsuperscript{32} the Court distinguished between private rights\textsuperscript{33} and public rights.\textsuperscript{34} The latter, which include VA benefits,\textsuperscript{35} require an action "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."\textsuperscript{36} The Court noted that even where the management of public rights is assigned by Congress to administrative agencies, providing some Article III judicial review might be required.\textsuperscript{37}

It is generally agreed that there is a right to review of unconstitutional administrative action.\textsuperscript{38} In \textit{Califano v. Sanders},\textsuperscript{39} the Supreme Court


\textsuperscript{30} See infra notes 48-70 and accompanying text; Verkuil, supra note 26, at 736.

\textsuperscript{31} Cf. Hunt v. Local Bd. No. 197, 438 F.2d 1128, 1132-37 (3d Cir. 1971) (Gibbons, J., concurring in result) (considering due process clause, separation of powers, and Article III in determining right to review of Selective Service classification); see supra notes 28-30 and accompanying text; Verkuil, supra note 26, at 736.

\textsuperscript{32} 458 U.S. 50 (1982).

\textsuperscript{33} Private rights are defined as involving "the liability of one individual to another under the law as defined." \textit{Id.} at 67-70 (plurality opinion) (quoting \textit{Crowell v. Benson}, 285 U.S. 22, 51 (1932)). They are distinct from public rights, which at a minimum arise "between the government and others." \textit{Id.} at 69 (plurality opinion) (quoting \textit{Ex Parte Bakelite Corp.}, 279 U.S. 438, 451 (1929)). Private rights "lie at the core of the historically recognized judicial power" and are not removable from Article III courts. \textit{Id.} at 70 (plurality opinion).

\textsuperscript{34} See \textit{id.} at 67-70 & nn.22, 23 (plurality opinion). Public rights are often created by statute. They have been described as involving such matters as "interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." \textit{Id.} at 69 n.22 (plurality opinion) (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)); see also infra note 67.


noted that constitutional questions were unsuited to resolution in administrative hearings, and that access to the courts was essential to their resolution.\textsuperscript{40} Despite the strong indication that Article III review of constitutional questions may be constitutionally required, however, the Court in \textit{Sanders} also suggested that "clear and convincing evidence" of congressional intent may preclude such review.\textsuperscript{41}

On occasion, the Court has distinguished between cases in which the government argues that constitutional challenges to agency action have been precluded, and preclusion cases where no constitutional challenges have been made.\textsuperscript{42} For example, the Court has protected its power to review constitutional challenges by finding that Congress never intended to bar review of constitutional claims.\textsuperscript{43} The Court has implied Congress's acceptance of this dichotomy,\textsuperscript{44} preserving the Court's role in the constitutional plan.\textsuperscript{45} The Court's stance allows Congress flexibility in shaping government priorities and avoids constitutional confrontations over the power of Congress to limit the jurisdiction of Article III courts.\textsuperscript{46}

\textsuperscript{40} Whether a statute that bars judicial review of a substantial constitutional issue would be constitutional has no clear answer in present law.
\textsuperscript{41} Professor Davis believes the uncertainty has arisen following the Supreme Court decision in United States v. Erika, Inc., 456 U.S. 201 (1982). See 5 K. Davis, supra, § 28:3, at 261-65. In Erika the Court held that Congress had impliedly precluded judicial review of adverse benefit determinations in Part B of the Medicare program. Erika, 456 U.S. at 206-11. Professor Davis found significant the Court's holding that judicial review was impliedly precluded despite the claim that administrative action had been unconstitutional. See 5 K. Davis, supra, § 28:3, at 264. Although the claim that the government's action had been unconstitutional had not been argued in the appeal to the Supreme Court, see Erika, 456 U.S. at 205-06, it had been argued below. See Erika, Inc. v. United States, 634 F.2d 580, 591 (Ct. Cl. 1980), rev'd, 456 U.S. 201 (1982). The Supreme Court, however, specifically avoided the issue of whether there was a constitutional right to judicial review of the constitutional claim because it had not been properly raised by Erika. See Erika, 456 U.S. at 211 n.14. Nevertheless, the Court had precluded review of a constitutional claim.


\textsuperscript{44} See Johnson v. Robison, 415 U.S. 361, 366-74 (1974) (Congress did not intend 38 U.S.C. § 211(a) to preclude review of claims that veterans' benefits statutes were unconstitutional); Verkuil, supra note 26, at 737-39.

\textsuperscript{45} See Heckler v. Chaney, 470 U.S. 821, 839 (1985) (Brennan, J., concurring) ("It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands. . . ."); Weinberger v. Salfi, 422 U.S. 749, 762 (1975) (statutory preclusion of review of constitutional claims acceptable as Congress has provided alternative avenues of review); Johnson v. Robison, 415 U.S. 361, 366-74 (1974) (preclusion statute interpreted as not intending to preclude review of claims that statute is unconstitutional); Verkuil, supra note 26, at 737-39.

\textsuperscript{46} When constitutional review is not at stake the Court frequently is generous in
Of particular interest in the case of government benefits is whether the fifth amendment due process clause requires some sort of judicial review of agency action affecting benefits. The "new property cases" of the past two decades have suggested that the due process clause mandates minimum procedures for providing most government benefits, and that these minimum procedures may include the availability of judicial review. In any particular situation these minimum procedures are determined by balancing of the government and private interests involved.

In the past, there was considerable authority that grants of statutory benefits were "gratuities" or "privileges" given by the state. As such, one had no "right" to receive these benefits. They were beyond any procedural or constitutional protection. Thus, a benefits program could be finding that Congress has impliedly precluded review. Cf. Block v. Community Nutrition Inst., 467 U.S. 340, 346-53 (1984) (structure of statute implies preclusion of review of milk marketing orders when sought by consumers); United States v. Erika, Inc., 456 U.S. 201, 206-11 (1982) (implication that review of most determinations under Part B of Medicare statute is precluded); Morris v. Gressette, 432 U.S. 491, 499-507 (1977) (implication that review of Attorney General's decision under § 5 of Voting Rights Act is precluded); Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 300-07 (1943) (NLRB and courts have no jurisdiction to review mediation board's decision because Congress wanted expedited procedure).

47. See U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ").


50. No court has yet reached this issue. See Note, Separation of Powers, supra note 11, at 782 & n.32. However, the Court wrote in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.23 (1982), that "when Congress assigns [public rights] to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review."

51. See Mathews v. Eldridge, 424 U.S. 319 (1976). The Court balances three factors: first, the private interest affected by the official action; second, the risk of an erroneous deprivation of the private interest through the current procedures and the probable value of additional procedures; and third, the impact on government's interest of the additional safeguards. See id. at 335; see also Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (Powell, J., concurring in part and concurring in the result in part) (balancing of interests of government and employee).

52. See Lynch v. United States, 292 U.S. 571, 577 (1934). In the context of veterans' benefits, see, De Rodulfa v. United States, 461 F.2d 1240, 1257-58 (D.C. Cir.), cert. de-
administered by the state without any judicial oversight. A corollary to this doctrine was that the United States was not bound to provide a judicial remedy to claims it had created against itself.\textsuperscript{53} It could refuse to create any remedy, or it could create an exclusively administrative remedy.\textsuperscript{54}

In the 1970's, however, the Supreme Court began to undermine this doctrine by viewing state created rights, including government benefits, as property or liberty interests protected by the due process clause of the fifth amendment.\textsuperscript{55} The Court took the position that operating benefits programs involves state action because important rights are adjudicated,\textsuperscript{56} and because the discretion of bureaucrats administering such programs is restricted by the statutes creating and controlling the programs.\textsuperscript{57} Because procedural due process exists to control the proper application of a particular statute, state created rights are subject to the due process clause.\textsuperscript{58}


\textsuperscript{54} United States v. Babcock, 250 U.S. 328, 331 (1919).

\textsuperscript{55} See cases cited supra at note 49; L. Tribe, supra note 48, § 10-9, at 514-22; Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1717-20 (1975); Separation of Powers, supra note 11, at 781.


\textsuperscript{57} These statutes enact certain rules and understandings that create entitlement to benefits, and applicants meeting the entitlement requirements possess a claim to the entitlement and an expectancy that such a claim will be protected. This expectancy is similar to that of the expectancy of traditional holders of property interests, which are protected by the due process clause. See Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972); see also Wolff v. McDonnell, 418 U.S. 539, 557 (1974) (state's establishment of prisoners' good-time credit creates interest of prisoner protected by due process clause); Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195, 1256 (1982) (due process protection limited to constitutional liberty rights and property rights derived from federal and state statutes and regulations, and property rights derived from state common law); Separation of Powers, supra note 11, at 781 (noting that courts have ordered administrative process be augmented to comport with due process minimums).

\textsuperscript{58} See, e.g., Carey v. Piphus, 435 U.S. 247, 259-62 (1978) (procedural due process rules “enable[e] persons to contest the basis upon which a State proposes to deprive them of protected interests.”); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (required analysis of state action to ensure it conforms with procedural process); Fuentes v. Shevin, 407
Like the due process protection traditionally granted to property and liberty interests, the new property protections are designed to police the exercise of governmental authority. While the new property cases have refined the distinction between "gratuties" and "rights," the scope of new property protection has not matched that of traditionally protected interests. In reviewing government actions concerning traditionally protected interests, the courts have had two concerns. The first is whether the applicable administrative procedures have satisfied certain minimum due process requirements. The second is whether the government action meets the required substantive standards. Although the first concern is part of the new property cases, the second concern is not. Thus, while it is apparent that the recipients of government benefits are entitled to some due process protection, this protection is less than that accorded to the holders of traditional interests. The explanation for this

U.S. 67, 97 (1972) (minimum rights necessary to protect property). "The Supreme Court has repeatedly asserted that the purpose of procedural protection is to ensure accurate application of the relevant statute." Stewart & Sunstein, supra note 57, at 1255 n.258.

59. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring) (general discussion concerning due process, which requires fair procedure prior to depriving citizen of rights to liberty and property); Dent v. West Virginia, 129 U.S. 114, 123-24 (1889) (due process secures the citizen against arbitrary deprivation of life, liberty or property). Generally, fair hearings are required to deprive persons of property. See McGrath, 341 U.S. at 165-66 (Frankfurter, J., concurring); see also Stewart, supra note 55, at 1718 (protection of property interests).


61. In one opinion, the Supreme Court stated that it had "fully and finally rejected the wooden distinction between 'rights' and 'privileges.'" Board of Regents v. Roth, 408 U.S. 564, 571 (1972). But see L. Tribe, supra note 47, § 10-9, at 515 n.4 (rights-gratuity distinction "retained vitality . . . where government carefully avoided creating any expectation of receipt or renewal of interest upon the fulfillment or non-fulfillment of stated conditions") (emphasis in original); Rabin, Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis, 27 Stan. L. Rev. 905, 910 & n.25 (1975) (rights-privileges dichotomy often appears in another guise).

62. See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 165-66 & n.10 (1951) (Frankfurter, J., concurring); Londoner v. Denver, 210 U.S. 373, 385-86 (1908); see also Separation of Powers, supra note 11, at 781.

63. "In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure . . . regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required." Crowell v. Benson, 285 U.S. 22, 53 (1932); Separation of Powers, supra note 11, at 781.


65. See Stewart & Sunstein, supra note 57, at 1258 n.269; Separation of Powers, supra note 11, 781-82 & n.26.
dichotomy may lie in the status of benefits as statutorily created rights subject to the public rights doctrine. 66

The public rights doctrine is derived from two sources. The first is the principle of separation of powers. The second is the traditional distinction between matters exclusively determined by the political branches, and those that are inherently judicial. 67 Thus, Congress may create certain rights that exist in a form that the judiciary is capable of adjudicating. 68 At the same time, however, the Court recognizes that at the very least Congress has some say in the adjudication of those rights. 69 Finally, because the operation of a benefits program requires some flexibility, the Court recognizes that the analogy between benefits and traditional property "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes" to the public benefits laws. 70

In sum, it is not certain whether the Constitution requires some minimum judicial review, even in the face of a preclusion statute. It is certain, however, that constitutional challenges to agency action have the strongest claim to a right to review. The Supreme Court seems to guard its power to review constitutional claims, while granting Congress considerable leeway to preclude review of the remaining claims. Finally, in recent decades the Court has begun to require certain minimum due process standards for adjudicating claims to government benefits. The im-

66. See supra notes 32-37 and accompanying text.

67. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-68 (1982) (plurality opinion). "The doctrine extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' and only to matters that historically could have been determined exclusively by those departments." Id. (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).


69. The interaction between the Legislative and Judicial Branches is at its height where courts are adjudicating rights wholly of Congress' creation. Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.


70. Richardson v. Belcher, 404 U.S. 78, 81 (1971); see De Rodulfa v. United States, 461 F.2d 1240, 1256 (D.C. Cir.) (quoting Richardson, 404 U.S. at 81), cert. denied, 409 U.S. 949 (1972); cf. Hisquierdo v. Hisquierdo, 439 U.S. 572, 589-90 (1979) (because Railroad Retirement benefits are noncontractual Congress can change these benefits at any time without due process violation); Califano v. Goldfarb, 430 U.S. 199, 210 (1977) (plurality opinion) (Social Security benefits classifications by Congress are entitled to deference as Congress is primarily responsible for making policy determinations). There is also some authority to the effect that the legislative power to grant substantive rights includes power to restrict procedures for vindicating those rights. See Arnett v. Kennedy, 416 U.S. 134, 152-54 (1974) (plurality opinion); Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445, 460-70 (1977).
impact of these rulings on the power of Congress to preclude review is also in some doubt.

C. Review Under the Administrative Procedure Act

Congress codified the general presumption of the availability of review of agency action in the Administrative Procedure Act (APA).\(^7\) The sections pertaining to judicial review provide "a simplified statement of judicial review designed to afford a remedy for every legal wrong."\(^2\) Thus, the APA entitles a person to judicial review if he or she has suffered a legal wrong or has been adversely affected or aggrieved as a result of agency action.\(^3\) The APA also sets the scope of review available to a litigant, including a requirement that a reviewing court set aside agency action that is unconstitutional, is in excess of statutory authority or without observance of lawful procedure.\(^4\) The provisions granting review, however, are not applicable if another statute precludes judicial review of the agency action in question,\(^5\) or if such action is committed by law to agency discretion.\(^6\)

Since these provisions exempt review of actions made non-reviewable by other statutes, the key issue to determine whether agency action is reviewable is the existence and interpretation of such statutes. As the Supreme Court has held in Abbott Laboratories v. Gardner\(^7\) and its progeny, a statute will be held to preclude review only after finding "clear and convincing evidence" of congressional intent to so preclude.\(^8\) The Court also has noted that it was the intent of Congress that the APA cover a broad spectrum of administrative action,\(^9\) and that its "generous review provisions" be given a hospitable interpretation.\(^10\)

The Court has not, however, used the Abbott Laboratories standard in every subsequent case in which it has adjudicated claims of preclusion.

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76. See 5 U.S.C. § 701(a)(2) (1982). These provisions have led one commentator to remark that the law of reviewability would be the same without the APA. "Because the APA provision on reviewability is always dependent on other law, [see 5 U.S.C. § 701(a) (1982)] the law of reviewability is essentially the same as it would be without any APA provision." 5 K. Davis, supra note 11, § 28:1, at 256 (emphasis in original). Reviewability without the APA would be based on the common law. See supra notes 11-12 and accompanying text.
77. 387 U.S. 136 (1967).
80. See id. at 141.
It has ignored the standard in some cases. The Court also is more likely to find preclusion in cases involving areas of traditional legislative or executive control, such as foreign relations, wartime emergencies and military affairs, and civil rights enforcement.

D. Summary

Despite the confusion as to the extent to which Congress can preclude judicial review of agency action, there is a strong presumption favoring review. The right to review will be found unless there is no substantial doubt about congressional intent to preclude it. This right has been codified in the Administrative Procedure Act, and exists unless it has been removed by a particular statute precluding review. In the case of veterans' benefits, such a statute exists. The question thus becomes whether this statute precludes review of particular Veterans' Administration actions. The question is further complicated by the changing constitutional protections afforded the recipients of "new property" such as veterans' benefits.

II. SECTION 211(A) AND PRECLUSION OF REVIEW OF VETERANS' ADMINISTRATION DECISIONS

The statute precluding review of veterans' benefits determinations is codified at 38 U.S.C. § 211(a). It provides that

the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in


82. See, e.g., Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111-14 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial.").


84. See, e.g., Briscoe v. Bell, 432 U.S. 404, 409-10 (1977) ("Reading [the Voting Rights Act] as completely precluding judicial review thus implements Congress' intention to eradicate the blight of voting discrimination with all possible speed."); South Carolina v. Katzenbach, 383 U.S. 301, 327-29 (1966) (discrimination against minority voters requires sweeping remedies including preclusion of judicial review).

the nature of mandamus or otherwise.86

This approach of precluding review has been the policy of Congress since it first waived sovereign immunity in the 19th century.87

It is well settled that the United States cannot be sued without its consent.88 When Congress consented to suits against the government in actions not sounding in tort through the passage of the Tucker Act in 1887,89 it exempted pension claims,90 which at the time comprised virtually the entire veterans' program.91 The first law specifically addressing preclusion in the context of veterans' benefits appeared in 1924.92 It made all determinations of fact by the Veterans' Bureau involving most veterans' programs conclusive.93

The next preclusion statute appeared as part of the Economy Act of 1933.94 A fiscal crisis created by the Depression led Congress to cut veterans' benefits and grant the President and the Administrator complete authority over administration of the programs designated in the Act.95 Section five of the Act precluded review of decisions of the Administrator

86. Id. The statute also specifically excludes from its provisions certain sections of the veterans' benefits statutes. See id. These include: § 775, which grants jurisdiction to the district courts of the United States in cases involving Servicemen's Group Life Insurance, 38 U.S.C. § 775 (1982); § 784, which provides general provisions for suing the government over other life insurance programs, 38 U.S.C. § 784 (1982); and housing and small business loan determinations, 38 U.S.C. §§ 1801-1851 (1982 & Supp. III 1985).

87. See infra notes 88-90 and accompanying text.


90. See Tucker Act, § 1, 24 Stat. at 505.

91. See Dismuke v. United States, 297 U.S. 167, 170 (1936) ("The proviso withholding jurisdiction of suits on claims for pensions was a part of the original Tucker Act, which became law . . . at a time when the term 'pensions' commonly referred to the gratuities paid by the government in recognition of past services in the Army or Navy."); see also Veterans' Legislation, supra note 2, at 1-61.

92. See World War Veterans' Act, 1924, ch. 320, § 5, 43 Stat. 608, 609 (current version at 38 U.S.C. §§ 210(c)(1), 211(a) (1982)).

93. See id.


95. See 77 Cong. Rec. 201 (1933) (statement of Rep. McDuffie) ("there is no quicker way to restore the economic conditions of [the country]"); 77 Cong. Rec. 204 (1933) (statement of Rep. Taber) ("the President may, by regulation, change the provisions of compensations and pensions" and "may cut down these things"); 77 Cong. Rec. 254 (1933) (statement of Rep. Harrison) ("tragic happenings throughout this country which call for [this] exceptional action"); see also F. Davis, supra note 19, at 188.
made under the authority of the Act. Congress added an additional preclusion statute to the veterans' benefits law in 1940. This second statute was said to preclude review of any VA decision relating to any claim under the veterans' benefits law. During the debates prior to passage of both the 1933 and 1940 acts, members of Congress agreed that both laws merely continued or restated the law of non-reviewability then in effect.

The 1933 and 1940 statutes were repealed in 1957 and replaced by a single rewritten statute as part of a congressional effort to consolidate, simplify and make more uniform the entire veterans' benefits law. This statute was the first version of the section 211(a) preclusion statute. With the exception of some minor liberalizations of benefits, the Act was said to continue the entire veterans' benefits law, presumably including preclusion of review, then in effect. The process was completed the following year when once again Title 38 was rewritten. With the addition of one major and two minor amendments, this became the modern version of the preclusion statute.

99. See 77 Cong. Rec. 254 (1933) (statement of Rep. Harrison) (1933 statute) ("[A]cting under those regulations and rates, whatever decision the Administrator shall make shall be final."); 86 Cong. Rec. 13,383 (1940) (statement of Sen. George) (1940 statute) ("The amendment makes final the findings and adjudications of the Veterans' Administrator"); 86 Cong. Rec. 13,491 (1940) (statements of Rep. Rogers) (1940 statute) ("This bill is desirable for the purpose of uniformity and to make clear what is believed to be the intention of Congress that the various laws shall be uniformly administered in accordance with the liberal policies [of] the Veterans' Administration.").
103. See id.
The major amendment to section 211(a) was enacted in 1970 following a series of decisions by the Court of Appeals for the District of Columbia significantly narrowing the preclusion statute. That court held that because the term "claim" was defined by the VA to mean an initial application for benefits, the 1958 version of section 211(a), as amended, precluded review of only the initial decision to grant or deny benefits. Thus, any subsequent action by the VA on the claim was subject to judicial review. Congress overruled these decisions by removing the phrase "concerning a claim for benefits" from section 211(a). Whether this action by Congress has greater significance than merely overruling the D.C. Circuit is a subject of some controversy.

In Johnson v. Robison, the leading Supreme Court decision construing section 211(a), the Court viewed the 1970 amendment as an attempt to restore vitality to what it called the two "primary purposes" of the preclusion statute: to prevent veterans' benefits claims from burdening the courts, the Veterans' Administration and the government with expensive and time-consuming litigation and to ensure the uniform and adequate application of VA policy in light of the technical and complex nature of the veterans' benefits program. The Administrator had articulated these two purposes in a 1952 congressional hearing, and the

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108. See Tracy v. Gleason, 379 F.2d 469, 472-73 (D.C. Cir. 1967); Wellman v. Whittier, 259 F.2d 163, 168-69 & n.23 (D.C. Cir. 1958). Both the 1940 and 1958 versions of the preclusion statutes prohibited review of "any question of law or fact concerning a claim for benefits or payments." Wellman, 259 F.2d at 168 (quoting 38 U.S.C. § 11a-2) (emphasis in original); see supra notes 97 & 104.
109. See Tracy v. Gleason, 379 F.2d 469, 473 (D.C. Cir. 1967) (adopting the Wellman interpretation); Thompson v. Gleason, 317 F.2d 901, 907 (D.C. Cir. 1962). The Wellman case was decided under the old 1933 and 1940 preclusion statutes. The court held that the 1933 statute did not apply to Wellman because the section under which he forfeited his benefits was not covered under the 1933 statute. See Wellman v. Whittier, 259 F.2d 163, 168 (D.C. Cir. 1958). Accordingly, Wellman's case was covered by the 1940 statute, which because of the language concerning claims, see infra note 110, did not preclude review of a forfeiture of benefits. Wellman, 259 F.2d at 168-69.
110. See Tracy v. Gleason, 379 F.2d 469, 473 (D.C. Cir. 1967) (veteran "no longer a mere claimant . . . he is a beneficiary, and the Administrator's subsequent termination of his benefits should not be immune from judicial scrutiny" (emphasis in original)); Thompson v. Gleason, 317 F.2d 901, 907 (D.C. Cir. 1962); Wellman v. Whittier, 259 F.2d 163, 168-69 (D.C. Cir. 1958).
113. See id. at 368-71.
114. See id. at 369-70 & nn.11 & 12 (quoting Hearing on H.R. 360, 478, 2442 and 6777 before a Subcommittee of the House Committee on Veterans' Affairs, 82d Cong., 2d Sess., 1963 (1952) [hereinafter Hearing on H.R. 360]).
Court found references to these concerns in the legislative history of the 1970 amendment.\textsuperscript{115} The dispute in \textit{Robison} involved a constitutional challenge to three statutes that the VA had interpreted as acting in concert to deny veterans' educational benefits to certain conscientious objectors.\textsuperscript{116} The government argued that section 211(a) denied jurisdiction.\textsuperscript{117} The Court first noted that an interpretation of section 211(a) purporting to bar the Court from considering the constitutionality of veterans' benefits legislation would itself be of questionable constitutionality.\textsuperscript{118} The Court, however, followed the "cardinal principle" that it will construe a statute to avoid a constitutional question if such a course is "fairly possible."\textsuperscript{119} The Court found a fairly possible construction of section 211(a) that favored the presumption of judicial review in cases challenging the constitutionality of veterans' benefits legislation.\textsuperscript{120} The Court using the \textit{Abbott Laboratories} test, failed to find in the legislative history any "clear and convincing evidence" of congressional intent to preclude such review.\textsuperscript{121} It interpreted the section 211(a) prohibition as precluding only decisions of law or fact made by the VA in administering a statute providing veterans' benefits.\textsuperscript{122} It also defined such a decision made "under" a statute as one made by the VA in the "application of a particular provision of a statute to a particular set of facts."\textsuperscript{123} This was to be distinguished from a challenge to the constitutionality of a veterans' benefits statute.\textsuperscript{124} The latter involved a decision of Congress, which had passed the statute, and not a decision of the Administrator.\textsuperscript{125} Thus, the statute barred only those claims involving decisions of the Administrator interpreting or ap-

\textsuperscript{115} See \textit{id.} at 371-74.
\textsuperscript{116} See \textit{id.} at 362-64. The statutes at issue were: 38 U.S.C. § 101, which defined "active duty" as full-time duty in the Armed Forces; 38 U.S.C. § 1652(a)(1), which defined an "eligible veteran" for educational benefits under the Veterans' Readjustment Benefits Act of 1966 as one serving a minimum of 180 days on "active duty," unless disabled; and 38 U.S.C. § 1661(a), which provided benefits to "eligible veterans" only. The respondent's service as a conscientious objector did not meet the statutory definition of "active duty," despite the non-voluntary nature of his service. See \textit{Johnson v. Robison}, 415 U.S. 361, 362-64 & nn.1 & 2 (1974).
\textsuperscript{117} See \textit{id.} at 366.
\textsuperscript{118} See \textit{id.} at 366-67 & n.8. Although the Court did not elaborate on why such an interpretation of § 211(a) might be of questionable constitutionality, it cited several cases as well as Professor Hart's Article on limiting appellate jurisdiction of the Supreme Court. See \textit{id.}; Hart, \textit{supra} note 28.
\textsuperscript{120} See \textit{id.} at 373 (construction of § 211(a) permitting constitutional challenges to veterans' benefits legislation "is not only 'fairly possible' but is the most reasonable construction").
\textsuperscript{121} See \textit{id.} at 373-74; see also \textit{supra} notes 15-18, 77-80 & accompanying text.
\textsuperscript{123} Id.
\textsuperscript{124} See \textit{id.}
\textsuperscript{125} See \textit{id.} For discussions in a later case of the impact of this interpretation of § 211(a), compare \textit{Weinberger v. Salfi}, 422 U.S. 749, 761-62 (1975) (opinion of Court, written by Rehnquist, J.) with Salfi, 422 U.S. at 795-96 (Brennan, J. dissenting).
plying the veterans' benefits statutes. In support of its interpretation of section 211(a), the Court noted that the VA itself had refused to consider the constitutionality of the applicable benefits legislation because it viewed such an undertaking as beyond its competence. Finally, the Court stated that permitting challenges to the constitutionality of veterans' benefits legislation would not contravene the two primary purposes of section 211(a), for it would neither burden the system or involve the courts in determinations of VA policy.

The precise reach of Robison is a subject of some dispute. Some courts have limited the case to its facts. The Court's interchangeable use of the terms "constitutional challenge," "constitutional claim," or "constitutional questions" in its opinion without tying them to the term "veterans' legislation," has led other courts to hold that section 211(a) permits constitutional challenges to VA procedures, regulations and policies. Courts adopting the narrow view of section 211(a) have cited Robison for the proposition that section 211(a) bars only review of VA action involving the application of benefits statutes to a "particular set of facts.

Interestingly, the courts seem more likely to find action reviewable when brought as class actions or when the decision will have a wide ranging effect. The rationale is that such cases do not burden the system or

127. See id. at 373. In reaching the merits the Court upheld the constitutionality of the combined effect of the three statutes. See id. at 374-86; see also Hernandez v. VA, 415 U.S. 391 (1974) (companion case to Robison).
130. See id.
133. Compare Wayne State Univ. v. Cleland, 590 F.2d 627 (6th Cir. 1978) (class action, review granted), and Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975) (same) and Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980) (college principal plaintiff, magnifying impact, review granted) with Roberts v. Walters, 792 F.2d 1109 (Fed.
interfere in VA policy. Thus, while the minimum effect of section 211(a) is clear, the Supreme Court has never addressed the statute's full range. Among the questions left unresolved is whether section 211(a) bars review of actions challenged as being beyond the Administrator's statutory authority.

III. CLAIMS THAT THE ADMINISTRATOR EXCEEDED STATUTORY AUTHORITY

Prior to Johnson v. Robison, there existed some dicta suggesting that despite the preclusion statute, veterans' benefits claimants enjoyed a right to judicial review of VA actions alleged to be beyond the Agency's statutory authority. It was not until after Robison, however, that a court actually held that section 211(a) did not preclude all judicial review of VA actions challenged as ultra vires. In Wayne State University v. Cleland, plaintiffs attacked as ultra vires three VA regulations interpreting a statutory definition of full-time study under the educational benefits statutes. The Court of Appeals for the Sixth Circuit found a lack of clear and convincing evidence that Congress intended section 211(a) to preclude review of the Administrator's authority to promulgate regulations. Moreover, review of regulations was permitted under the APA. The decision affirmed a district court holding that section 211(a) precluded review of only decisions concerning individual claims under the veterans' benefits statutes and not the sort of review sought by the plaintiffs.

The Sixth Circuit opinion relied heavily on Robison. In addition to

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134. See id. at 631; see also supra notes 71-76 and accompanying text.
136. See id. at 631; see also supra notes 71-76 and accompanying text.
138. See id. at 628-30. Although the statute, 38 C.F.R. § 21.4272, 38 C.F.R. § 21.4200, Department of Veterans' Benefits (D.V.B.) Circular 20-77-16, all have since been amended, their relevant texts are reprinted in Wayne State, 590 F.2d at 628-29 & nn.2-4.
139. See Wayne State Univ. v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978).
140. See id. at 628-30. Although the statute, 38 U.S.C. § 1788(a)(4), and the regulations, 38 C.F.R. § 21.4272, 38 C.F.R. § 21.4200, Department of Veterans' Benefits (D.V.B.) Circular 20-77-16, all have since been amended, their relevant texts are reprinted in Wayne State, 590 F.2d at 628-29 & nn.2-4.
142. See id. at 808-09.
holding that the clear and convincing evidence standard necessary to preclude review was not met, the Wayne State court analogized the effects of permitting review of the VA's promulgation of regulations to the effects of permitting constitutional review of veterans' benefits legislation. In Robison, the Supreme Court had reasoned that application of section 211(a) to constitutional challenges would not serve the primary purposes of the statute. The Sixth Circuit found the same to be true of challenges to the VA's authority to promulgate regulations. The court stated that such suits do not involve the courts in the details of VA policies, but merely determine if the regulations had been promulgated pursuant to statutory authority. The court also reasoned that such review does not encourage suits asking for review of individual benefits claims, because a decision affecting a regulation affects many potential litigants.

The Wayne State court made two other observations. First, it noted that all cases barring judicial review had involved individual benefits adjudications, and neither the Supreme Court nor the Sixth Circuit had ever ruled that section 211(a) barred review of regulations. Second, the court opined that an interpretation of section 211(a) preventing review of regulations raises the same questions about the constitutionality of section 211(a) as an interpretation barring constitutional review of veterans' benefits legislation would have raised in Robison. The Sixth Circuit adopted the Robison Court's approach by finding a "fairly possible" interpretation of section 211(a) that avoided the constitutional question.

When the Courts of Appeals for the Eighth and Ninth Circuits faced identical challenges to the same regulations, they adopted the reasoning of Wayne State. The Court of Appeals for the Fourth Circuit also adopted this reasoning on similar facts. The Courts of Appeals for

143. See supra note 139 and accompanying text.
144. See Wayne State Univ. v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978). Compare id. (discussing review of regulations and primary purposes of § 211(a)) with Johnson v. Robison, 415 U.S. 361, 368-74 (1974) (discussing review of statutes for constitutionality and primary purposes of § 211(a)).
146. See Wayne State Univ. v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978).
147. See id. at 631-32.
148. See id. at 631.
149. See id. at 632.
150. See id. at 632 & n.13.
152. See Evergreen State College v. Cleland, 621 F.2d 1002, 1007-08 (9th Cir. 1980); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1077-78 (8th Cir. 1979). In these cases as well as in Wayne State the VA had certified all students in these colleges' "non-traditional programs" as part-time rather than full-time students. See Evergreen, 621 F.2d at 1007-08; Merged Area X, 604 F.2d at 1077; Wayne State Univ. v. Cleland, 590 F.2d 627, 630 (6th Cir. 1978).
153. See University of Md. v. Cleland, 621 F.2d 98, 100-01 (4th Cir. 1980). The University had sued the VA in a dispute over the VA’s refusal to issue checks assigned to the
both the Second and Federal Circuits refused to follow *Wayne State*. These courts took a broad view of section 211(a) and held that challenges to the Administration's authority to promulgate regulations is within the statute's preclusive purview.\textsuperscript{154}

In *Roberts v. Walters*,\textsuperscript{155} a veteran challenged a regulation providing him with part-time rather than full-time educational benefits.\textsuperscript{156} Rejecting the *Wayne State* line of cases, the Federal Circuit held that section 211(a) barred review.\textsuperscript{157} Although it considered itself bound by precedent,\textsuperscript{158} the *Roberts* court believed that the Supreme Court had created no exception to section 211(a), but had "read the constitutional challenge as being in consonance with that section."\textsuperscript{159} The court stated that its construction of section 211(a) harmonized with that of the Supreme Court in *Robison*.\textsuperscript{160}

In *Traynor v. Walters*,\textsuperscript{161} the Second Circuit heard a challenge to a VA regulation said to be in violation of the Rehabilitation Act of 1973.\textsuperscript{162}

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University by students on active duty to pay for courses offered through a VA program. \textit{See id.} at 98-99.


155. 792 F.2d 1109 (Fed. Cir. 1986).

156. \textit{See id.} at 1110.

157. \textit{See id.} at 1111.

158. \textit{See id.} The court cited a decision of its predecessor court, the appellate jurisdiction of the United States Court of Claims, see Baker v. United States, 225 Ct. Cl. 668 (1980), which in turn cited a long line of its prior decisions denying review of veterans' educational benefits determinations. \textit{See e.g.}, Cunningham v. United States, 549 F.2d 753 ( Ct. Cl. 1977), \textit{cert. denied}, 445 U.S. 969 (1980); Jennings v. United States, 214 Ct. Cl. 789 (1977).

159. Roberts v. Walters, 792 F.2d 1109, 1111 (Fed. Cir. 1986).

160. \textit{See id.}


Applying the *Abbott Laboratories* test, the court found clear and convincing evidence of congressional intent to preclude review. The Second Circuit rejected the *Wayne State* line of cases for two reasons. First, unlike the *Wayne State* cases where the large class of potential plaintiffs had increased the applicability of the decisions and thus limited future litigation, this case involved only one plaintiff. The court classified the *Wayne State* cases as involving broad challenges to a regulation by institutions interested in the general operation of the benefits program, rather than the denial of benefits in individual cases.

Second, the court questioned the rationale of the *Wayne State* holding. It initially stated that there was no constitutional difficulty in Congress precluding the type of review sought in this case. The language of section 211(a) alone provided clear and convincing evidence of an intent to bar review of plaintiff’s claim. The court found support for its broad interpretation of section 211(a) by comparing the statute’s language to the preclusion statute construed in *Briscoe v. Bell*.

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164. See id. at 227, 230.
165. See id. at 230.
166. See id. The Second Circuit noted that the *Wayne State* court had ignored the “unambiguous language of Section 211(a) itself.” See id. Although the *Wayne State* court undertook no analysis of the language of § 211(a) in its decision, it did state that the text and legislative history failed to provide clear and convincing evidence of an intent to preclude review. See *Wayne State Univ. v. Cleland*, 590 F.2d 627, 632 (6th Cir. 1978).
167. 432 U.S. 404 (1977) (vacating and remanding *Briscoe v. Levi*, 535 F.2d 1259 (D.C. Cir. 1976)). The petitioners in *Briscoe* had sought review of decisions of the Attorney General and Director of the Census under § 4(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1970 & Supp. V). *Briscoe*, 432 U.S. at 405-08. This section had provided that “[a] determination or certification of the Attorney General or of the Director of the Census under this section shall not be reviewable in any court.” *Id.* at 408. The D.C. Circuit had held that even in the face of this preclusion statute “a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority.” *Briscoe v. Levi*, 535 F.2d 1259, 1265 (D.C. Cir. 1976), vacated & remanded sub nom. *Briscoe v. Bell*, 432 U.S. 404 (1977). The Supreme Court vacated the D.C. Circuit judgment holding that the statute “could hardly prohibit judicial review in more explicit terms. . . . The language is absolute on its face and would appear to admit of no exceptions.” *Briscoe v. Bell*, 432 U.S. 404, 409-10 (1977). The Court ignored a line of cases stretching from the early twentieth century to the 1950’s in which it had stated that courts possess the power to restrain officials acting in excess of their statutory power. See, e.g., *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (per curiam) (judicial relief generally available to one injured by official exceeding his statutory authority); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (“The responsibility of determining the limits of statutory grants of authority [to administrative agencies] is a judicial function entrusted to the courts by Congress . . . .”); *Shields v. Utah Idaho Cent. R.R.*., 305 U.S. 177, 185 (1938) (court can decide extent of official’s statutory authority); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 621-22 (1912) (courts possess equitable power to restrain official’s *ultra vires* invasion of a property right); *American School of Magnetic Healing v. McAnunnily*, 187 U.S. 94, 108 (1902) (courts may act if official action not authorized by statute). Interest-
also noted that in cases where the Supreme Court had construed other preclusion statutes and found a lack of sufficient proof of intent to preclude review, it had been the express language of the statutes in question that had failed to provide the proof necessary to preclude review.\textsuperscript{169} Thus, the court stated that \textit{Wayne State} had relied too much on the supposed compatibility between permitting review challenging VA authority to promulgate regulations, and the two primary purposes of section 211(a), and not enough on the plain language of the statute.\textsuperscript{170}

Finally, \textit{Falter v. Veterans' Administration},\textsuperscript{171} illustrates a third approach to challenging VA promulgation of regulations. The plaintiffs challenged the VA's operation of a hospital on the ground that it violated numerous statutes, some of which were not specifically veterans' legislation.\textsuperscript{172} The plaintiffs cited \textit{Wayne State} as permitting review of such agency action because it involved general VA operations and not individual benefits adjudications.\textsuperscript{173} The court rejected this view of section 211(a).\textsuperscript{174} Although the \textit{Falter} court agreed that this was a primary pur-
pose of the statute, it also noted that the language of the statute, the Robison opinion, and the legislative history of the 1970 amendment all indicated that section 211(a) was to have a far broader effect. The court held that section 211(a) barred a challenge to hospital operations, because such operations "precisely fit the statutory language in that they are questions of law . . . arising] in relation to the V.A.'s administration of laws providing hospital benefits for veterans." The court also stated that such challenges would thwart the policy embodied in section 211(a) of keeping the courts out of day-to-day VA business.

The precise reach of section 211(a)—specifically its application to review of claims challenging VA action as ultra vires—is unclear. There appear to be three views: that at least review of the authority to promulgate regulations is permitted; a possible middle ground forbidding review of allegedly ultra vires action when the case involves only individual adjudications; and that no such review is permitted. Part IV analyzes the conclusions reached in these cases and argues for a broad reading of section 211(a).

IV. SECTION 211(A) PRECLUDES REVIEW OF ALLEGEDLY ULTRA VIRES ADMINISTRATOR ACTION

To determine whether and to what extent a statute precludes judicial review, a court examines the statute's express language, its objectives, its legislative history, the structure of the statutory scheme and the nature of the administrative action involved. The action is presumed reviewable unless clear and convincing evidence of intent to preclude review is present, or there is no substantial doubt as to congressional intent to pre-

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175. See id.
176. See id. at 1180-81. The court quoted from the legislative history of the 1970 amendment to § 211(a): "The restated section 211(a) will make it perfectly clear that the Congress intends to exclude from judicial review all determinations with respect to non-contractual benefits provided for veterans and their dependents and survivors." H.R. Rep. No. 1166, 91st Cong., 2d Sess. 10-11, reprinted in 1970 U.S. Code Cong. & Admin. News 3723, 3731.
178. See id.
179. See supra notes 137-153 and accompanying text.
181. See supra notes 155-178 and accompanying text.
182. See supra note 17 and accompanying text.
183. See supra notes 15-16, 77-80 and accompanying text.

This Court has ... never applied the 'clear and convincing evidence' standard in the strict evidentiary sense. ... Rather, the Court has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.' In the context of preclusion analysis, the 'clear and convincing evidence' standard is not a rigid evidentiary test but a useful reminder to courts
clude it. In short, this determination is an exercise in statutory analysis, which is a search for legislative intent. The intentions or spirit of the statute should guide all interpretations of its language.

A. Express Language

To determine whether section 211(a) precludes judicial review of challenges to Administrator action as allegedly ultra vires, the analysis must begin with the statute's express language. Courts most often invoke the plain meaning rule: if the statutory authority is clear and unambiguous, the court should hold it to mean what it plainly expresses. This is the most settled canon of statutory construction. To discredit plain meaning, a party must show either that language elsewhere in the act

that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.


184. See supra note 18 and accompanying text.

185. See United States v. Argrillo-Ladlad, 675 F.2d 905, 907-09 (7th Cir. 1982), cert. denied, 459 U.S. 829 (1982); Lavin v. Marsh, 644 F.2d 1378, 1380-81 (9th Cir. 1981). See generally 2A N. Singer, Sutherland Statutory Construction § 45.05, at 22 (Sands 4th ed. 1984) (collecting cases) (“None of these methods [of statutory construction] can be criticized if they in fact reflect the intent of the legislature, but none can be supported when they result in a finding of legislative intent which did not in fact exist within the legislature.”).

186. See Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279-89 (1956); Addison v. Holly Hill Fruit Prod., 322 U.S. 607, 609-11 (1944); see also 2A N. Singer, supra note 185, §§ 45.05, 46.05. Chancellor Kent has said that

‘[I]n the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention should be taken or presumed according to what is consistent with reason and good discretion.’

Id. § 46.05, at 92 (quoting Kent’s Commentaries 462 (13th ed. 1884)).

187. See Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.”); Caminetti v. United States, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . .”); see also Johnson v. Robison, 415 U.S. 361, 367 (1974) (Court begins its interpretation of § 211(a) with examination of the statute’s text.). See generally 2A N. Singer, supra note 185, § 46.01, at 73 (discussing form of plain meaning rule).


189. See United States v. McFillin, 487 F. Supp. 1130, 1133 n.4 (D. Md. 1980) (“When the words of a statute are not ambiguous . . . the ‘plain meaning’ rule of statutory interpretation is applicable.” (citation omitted)); Swarts v. Siegel, 117 F. 13, 18-19 (8th Cir. 1902) (“There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses . . . .”). See generally 2A N. Singer, supra note 185, § 46.01, at 73-80 (collecting cases discussing plain meaning rule).
expands or restricts the meaning of the statute in question, the provision is repugnant to the general provisions of the act or that the legislative history casts doubt on results obtained through using the plain meaning rule.\textsuperscript{190}

The plain meaning of section 211(a) appears to preclude most judicial review of VA action. The language of the statute is very broad. Decisions that hold that review of VA actions is precluded all mention the statute's plain language.\textsuperscript{191} Departures from the plain language of the statute are rare,\textsuperscript{192} suggesting that in most cases preclusion is plainly warranted. There is no disagreement that at the very least the statute precludes review of individual fact based adjudications.\textsuperscript{193} Even courts that are hostile to a broad application of section 211(a) find such actions unreviewable.\textsuperscript{194} Preclusion should also apply to individual fact based adjudications when it is claimed that VA action applying a regulation is \textit{ultra vires}. The language of section 211(a) is “patently broad enough to encompass” an argument that a regulation was “unreasonably applied”

\textsuperscript{190} See 2A N. Singer, \textit{supra} note 185, § 46.01, at 74; see also Consumer Prod. Safety Comm’n \textit{v.} GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (“Absent a clearly expressed legislative intention to the contrary, [the] language [of the statute] must ordinarily be regarded as conclusive.”); Caminetti \textit{v.} United States, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . .”).

\textsuperscript{191} See, e.g., Roberts \textit{v.} Walters, 792 F.2d 1109, 1110-II (Fed. Cir. 1986) (court invokes plain language of statute to affirm lower court holding that judicial review was precluded); Traynor \textit{v.} Walters, 791 F.2d 226, 231 (2d Cir. 1986) (“[T]he language of section 211(a) itself provides clear and convincing evidence of congressional intent to bar judicial review the type of claim raised by [plaintiff].”), \textit{cert. granted sub nom.} Traynor \textit{v.} Turnage, 55 U.S.L.W. 3607 (U.S. Mar. 10, 1987) (No. 86-622); Milliken \textit{v.} Gleason, 332 F.2d 122, 123 (1st Cir. 1964) (“[T]his command is categorical”), \textit{cert. denied}, 379 U.S. 1002 (1965); Falter \textit{v.} VA, 502 F. Supp. 1178, 1181 (D.N.J. 1980) (court concludes that “broad language of § 211(a) requires” that review is precluded of VA actions challenged as \textit{ultra vires}); see also Pappanikoloaou \textit{v.} Administrator of VA, 762 F.2d 8, 9 (2d Cir.) (per curiam), \textit{cert. denied}, 106 S. Ct. 150 (1985); Anderson \textit{v.} VA, 559 F.2d 935, 936 (5th Cir. 1977) (per curiam); S K. Davis, \textit{supra} note II, § 28:13, at 321.

\textsuperscript{192} See cases cited in \textit{supra} note 9; S K. Davis, \textit{supra} note II, § 28:13, at 321.

\textsuperscript{193} See, e.g., Johnson \textit{v.} Robison, 415 U.S. 361, 367 (1974) (§ 211(a) does not bar review of constitutionality of veterans’ benefits legislation); Traynor \textit{v.} Walters, 791 F.2d 226, 229 (2d Cir. 1986) (“[T]he VA] has never disclaimed its authority to determine whether its own regulations . . . are properly applied to a particular case.”), \textit{cert. granted sub nom.} Traynor \textit{v.} Turnage, 55 U.S.L.W. 3607 (U.S. Mar. 10, 1987) (No. 86-622); Merged Area X (Educ.) \textit{v.} Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979) (§ 211(a) permits review of VA authority to promulgate regulations); Falter \textit{v.} VA, 502 F. Supp. 1178, 1180-81 (D.N.J. 1980) (§ 211(a) permits review of constitutional but not statutory claims); Wayne State Univ. \textit{v.} Cleland, 440 F. Supp. 806, 808-09 (E.D. Mich. 1977) (§ 211(a) prohibits review of only individual claims for benefits), \textit{rev’d on other grounds}, 590 F.2d 627 (6th Cir. 1978).

in a certain situation.\textsuperscript{195}

Courts find the power to review VA actions allegedly \textit{ultra vires} in cases joining numerous plaintiffs or controlling the results of many potential adjudications.\textsuperscript{196} The cases frequently involve application of VA regulations or general policy.\textsuperscript{197} The courts cite two reasons for permitting such review. The first is that certain language in \textit{Robison} mandates such a result.\textsuperscript{198} The second is that such review is permissible because the review is consistent with the "two primary purposes" of section 211(a).\textsuperscript{199} Nevertheless, this reasoning ignores the plain language of the statute. The resulting "exceptions" are in concert with neither the statute nor the Supreme Court's interpretation of it in \textit{Robison}.\textsuperscript{200}

The Supreme Court discussed the \textit{Robison} decision in \textit{Weinberger v. Salfi},\textsuperscript{201} another preclusion case involving a different statute. The Court stated that it had held in \textit{Robison} that constitutional challenges to veterans' legislation were not within the express language of section 211(a) because the statute precluded review of decisions of the Administrator on

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\textsuperscript{195} Traynor v. Walters, 791 F.2d 226, 229 (2d Cir. 1986) (§ 211(a) precludes review of VA application of alcoholism regulation alleged to have been \textit{ultra vires}), \textit{cert. granted sub nom}. Traynor v. Turnage, 55 U.S.L.W. 3607 (U.S. Mar. 10, 1987) (No. 86-622); see Roberts v. Walters, 792 F.2d 1109, 1110-ll (Fed. Cir. 1986) (§ 211(a) precludes review of VA application of VA educational benefits regulation alleged to have been \textit{ultra vires}).

\textsuperscript{196} See, e.g., Evergreen State College v. Cleland, 621 F.2d 1002, 1007 (9th Cir. 1980) (court finds § 211(a) inapplicable where university and students challenge educational benefits regulations); University of Md. v. Cleland, 621 F.2d 98, 100 (4th Cir. 1980) (court states that purposes of § 211(a) would not be served by application of § 211(a) where university challenges VA actions concerning assignment of student veterans' benefits); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979) (court finds that where university and student challenge educational benefits regulations purposes of § 211(a) are not served by precluding judicial review); Wayne State Univ. v. Cleland, 440 F. Supp. 806, 807 (E.D. Mich. 1977) (same), rev'd on other grounds, 590 F.2d 627 (6th Cir. 1978).

\textsuperscript{197} See supra note 196.


\textsuperscript{199} See, e.g. University of Md. v. Cleland, 621 F.2d 98, 100 (4th Cir. 1980) (citing Johnson v. Robison, 415 U.S. 361, 370 (1974)); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979); Wayne State Univ. v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978); see also supra note 113 and accompanying text.

\textsuperscript{200} See Roberts v. Walters, 792 F.2d 1109, 1110-ll (Fed. Cir. 1986). The Federal Circuit noted the Supreme Court in \textit{Robison} had read § 211(a) as barring review of decisions of law arising in the administration by the VA of a veterans' benefits statute. \textit{See id.} at llll. Because a constitutional challenge to veterans' benefits statutes involves decisions of Congress that create a statutory class, § 211(a), which applied to decisions of the Administrator, did not bar the courts from reviewing such challenges. \textit{See id.}; see also supra notes 124-126 and accompanying text. Thus, permitting constitutional challenges was actually in consonance with § 211(a) and no exceptions to the statute had been created. \textit{See Roberts}, 792 F.2d at 1111. Since no exceptions existed the court was without power to review the educational benefits regulation challenged in \textit{Roberts}. \textit{See id.} at llll-ll. Supreme Court dictum also supports this view. \textit{See infra} notes 201-03 and accompanying text.

\textsuperscript{201} 422 U.S. 749 (1975).
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any question of law or fact, but did not preclude review of the constitutionality of a statute, the passage of which was a decision of Congress and not the Administrator. As another court has noted, this meant that the Robison Court had not "creat[ed] an exception to § 211(a) but [had] read the constitutional challenge as being in consonance with that section." Since any claim that VA action is ultra vires challenges a "decision of the Administrator," such action should be precluded from judicial review.

Justice Brennan, dissenting in Salfi and author of Robison, had a different view of the holding in Robison. He saw Robison as turning on whether the claim arose under the statute or the Constitution. According to Justice Brennan, a claim arises under a statute if it alleges that the statute grants someone certain rights, while it arises under the Constitution if it "seeks to hold invalid the result which would be reached under the statute itself." When a person claims that the VA has acted beyond its statutory authority, the claim is that the agency failed to award benefits as rights granted by the statute.

Perhaps a distinction can be wrung between exceeding statutory authority to issue regulations and operating in violation of statutes not directly "providing benefits for veterans" but statutes affecting veterans' benefits.

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202. See id. at 761-62; supra notes 121-125 and accompanying text.
203. Roberts v. Walters, 792 F.2d 1109, 1111 (Fed. Cir. 1986). See supra note 200 and accompanying text.
205. Id. at 795.
207. Justice Brennan defined the term "arising under" as a term of art in jurisdictional statutes referring, at least in part, to the body of law necessary to consider in order to determine the rights in question. Weinberger v. Salfi, 422 U.S. 749, 797 (1975) (Brennan, J., dissenting). Certainly, when the courts considered if the regulations challenged in Wayne State were consistent with the statute, they considered the veterans' benefits statutes, "law[s] administered by the Veterans' Administration providing benefits for veterans . . . ." 38 U.S.C. § 211(a) (1982). See Evergreen State College v. Cleland, 621 F.2d 1002, 1009-12 (9th Cir. 1980) (court considered if regulation properly interpreted and applied the statute it was promulgated to interpret and apply); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1078-81 (8th Cir. 1979) (same); Wayne State Univ. v. Cleland, 590 F.2d 627, 632-35 (6th Cir. 1978) (same).
208. The regulations in the educational benefits cases were challenged as an improper interpretation the statute's mandate which resulted in the plaintiffs failing to receive the benefits to which they were entitled by law. See, e.g., Roberts v. Walters, 792 F.2d 1109, 1110 (Fed. Cir. 1986); Wayne State Univ. v. Cleland, 590 F.2d 627 (6th Cir. 1978).
benefits legislation.\textsuperscript{209} For example, statutes outside the veterans’ benefits title of the United States Code control the VA’s operation of hospitals and treatment of the handicapped.\textsuperscript{210} Several courts have held that the effect of these statutes on veterans’ benefits legislation is “a question of law . . . under any law administered by the Veterans’ Administration providing benefits for veterans” and are thereby precluded by section 211(a).\textsuperscript{211} At least one court has distinguished these cases from cases in which the VA’s authority to promulgate regulations is challenged.\textsuperscript{212} The distinction, however, appears to make little difference.

The courts’ phrase “authority to issue regulations,” implies that such regulations properly interpret and apply the veterans’ benefits statutes,\textsuperscript{213} and not that the regulations were issued in violation of the rulemaking requirements of the Administrative Procedure Act.\textsuperscript{214} In several cases plaintiffs have claimed that regulations issued by the VA regarding the interpretation and application of a statute in fact violate it.\textsuperscript{215} These cases involved challenges to the Administrator’s authority to issue regulations pursuant to section 210(c)(1),\textsuperscript{216} which grants the Administrator the au-

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\item \textsuperscript{209} These statutes exist outside the veterans’ benefits law yet impose requirements on the VA in its administration of benefits, for example, that it not discriminate against benefits recipients. The statutes also impose requirements on other federal and state agencies. See, e.g., Traynor v. Walters, 791 F.2d 226, 228 (2d Cir. 1986) (VA must abide by Rehabilitation Act section (29 U.S.C. § 794 (1973)) prohibiting discrimination based upon an individual handicap), cert. granted sub nom. Traynor v. Turnage, 55 U.S.L.W. 3607 (U.S. Mar. 10, 1987) (No. 86-622); Falter v. VA, 502 F. Supp. 1178, 1179 (D.N.J. 1980) (court citing to various statutes that effect the conduct of the VA).
\item \textsuperscript{212} Falter v. VA, 502 F. Supp. 1178, 1181 (D.N.J. 1980) (“The present case is distinguishable from [the Wayne State] cases because no challenge is being made to the V.A.’s authority to promulgate rules, rather the plaintiffs contend that the V.A. at [the hospital] is failing to live up to its statutory obligations.”).
\item \textsuperscript{213} See, e.g., Evergreen State College v. Cleland, 621 F.2d 1002, 1009 n.10 (9th Cir. 1980) (“Procedural regularity in the promulgation of the regulations and circular was not challenged by appellants and therefore requires no further discussion.”); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1078-81 (8th Cir. 1979) (analyzing the challenge to the VA’s authority as posing two distinct questions: “(1) does the VA have the authority to establish twelve semester hours . . . as the minimum a veteran can carry and still be considered a full-time student, and (2) does the VA have the authority to define ‘semester hours’ as twelve hours in class per week for one standard semester term?”); Wayne State Univ. v. Cleland, 590 F.2d 627, 632-34 (6th Cir. 1978).
\item \textsuperscript{214} See Administrative Procedure Act, § 553, 5 U.S.C. § 553 (1982). Although VA benefit regulations are exempt from the terms of § 553, see 5 U.S.C. § 553(a)(2), the VA has agreed to follow it under its own regulation. See 38 C.F.R. § 1.12 (1986).
\item \textsuperscript{215} See supra note 213.
\item \textsuperscript{216} See 38 U.S.C. § 210(c)(1) (1982); see, e.g., Evergreen State College v. Cleland, 621 F.2d 1002, 1008 (8th Cir. 1980); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1080 (8th Cir. 1979); Wayne State Univ. v. Cleland, 590 F.2d 627, 633 (6th Cir. 1978).
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thority to issue all rules and regulations that are consistent with and necessary or appropriate to the laws administered by the Veterans' Administration.\textsuperscript{217} These cases, however, may be viewed as similar to cases that have held that review of decisions of law are precluded when the action involved the applicability of statutes that direct Administrator action, but do not actually provide veterans benefits. Section 210(c)(1) can be viewed as such a statute. It authorizes the Administrator to promulgate regulations necessary to and consistent with the veterans' benefits statutes yet it in no way actually awards any benefits.\textsuperscript{218} The promulgation of regulations pursuant to section 210(c)(1) is certainly a decision of law affecting statutes "providing benefits to veterans."\textsuperscript{219} Hence, there is no relevant distinction between the two lines of cases.\textsuperscript{220}

Both types of ultra vires challenges appear to be non-reviewable even under the narrowest view of the scope of section 211(a) that only individual fact based determinations are precluded from review. This view of the scope of section 211(a) is based on the language "[a] decision of law or fact 'under' a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts."\textsuperscript{221} The promulgation and application of regulations certainly interprets or applies a particular provision of the statute to a par-

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\textsuperscript{218} See id.
\textsuperscript{219} See, e.g., Traynor v. Walters, 791 F.2d 226, 227 (2d Cir. 1986), cert. granted sub nom. Traynor v. Turnage, 55 U.S.L.W. 3607 (U.S. Mar. 10, 1987) (No. 86-622). In Traynor, the alcoholism regulation, 38 C.F.R. § 3.301(c)(2) (1986), defined 38 U.S.C. § 1662(a)(1) in such a manner to deny Traynor an extension of his period of eligibility for veterans' educational benefits. See Traynor, 791 F.2d at 227. Section 1662(a)(1) permits an extension of eligibility if the veteran is prevented from pursuing an educational program by a disability if the disability was not the result of willful misconduct. The statute, however, does not define willful misconduct. See 38 U.S.C. § 1662(a)(1) (Supp. III 1985). It is the VA regulation promulgated pursuant to 38 U.S.C. § 210(c)(1) that defines the term. See 38 C.F.R. § 3.301(c)(2). Thus it was the alcoholism regulation that affected § 1662(a)(1) and denied Traynor his benefits. See Traynor, 791 F.2d at 227. See also Wayne State Univ. v. Cleland, 590 F.2d 627, 628-30 (6th Cir. 1978) (regulations applying definition of full-time study deny such status to non-traditional college program). Thus in both cases the promulgation of these regulations affected the outcome of the benefits determination.
\textsuperscript{220} See Traynor v. Walters, 791 F.2d 226, 228-31 (2d Cir. 1986), cert. granted sub nom. Traynor v. Turnage, 55 U.S.L.W. 3607 (U.S. Mar. 10, 1987) (No. 86-622). Like the Falter case in which the court held that the effect of statutes outside Title 38 on veterans benefits legislation was a decision of law under § 211(a) not subject to judicial review, see supra notes 171-178 and accompanying text, the Traynor court also held that the effect of § 504 of the Rehabilitation Act of 1973 on the educational benefits statutes was precluded by § 211(a). See Traynor, 791 F.2d at 229-30. The Falter court, however, distinguished the Wayne State cases from its own facts citing Wayne State as involving the VA's authority to promulgate regulations. See supra notes 173-174 and accompanying text. Yet the Traynor court questioned the rationale of the Wayne State cases, holding that § 211(a) also precluded review of the VA authority to promulgate regulations. See Traynor, 791 F.2d at 230-31. Thus, it appears to make little difference whether the action challenged is based upon a statute outside Title 38 or is premised on the VA's authority to promulgate regulations. See Traynor, 791 F.2d at 228-31.
\textsuperscript{221} Johnson v. Robison, 415 U.S. 361, 367 (1974); see supra note 198.
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ticular set of facts. Since regulations are the tools that interpret or apply the statute, the conceptual difference between authority to promulgate regulations and reaching beyond outer statutory limits is irrelevant in the face of the plain language of section 211(a). The statute precludes them both.

B. Legislative History

The legislative history also suggests that Congress meant to preclude review of allegedly ultra vires regulations. The 1924 statute made all findings of fact by the Veterans’ Director “conclusive,” but it mentioned nothing about questions of law. The language of the preclusion statute in Economy Act of 1933 was broader, making all decisions “final and conclusive on all questions of law and fact.” According to the statements made at the time of its passage, the addition of language concerning questions of law was not significant. The 1933 statute was said merely to restate the law as it had previously existed. This suggests that prior to 1933 review of decisions regarding questions of law was also precluded, despite the omission of language to that effect in the 1924 law.

The 1933 statute is also the only one whose express language suggests that review of regulations may be precluded. The phrase “[a]ll decisions . . . under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive” may be interpreted one of two ways. First, it may be read to preclude review of decisions made under either the Title or the regulations issued under the Title. Second, it may be read to preclude review of decisions under the Title, and also to preclude review of regulations issued under the Title. There is some evidence to support the first view in the language of section 9 of the Economy Act of 1933. That section stated that when a veteran’s benefits claim had finally been disallowed “under this title and the regulations issued thereunder,” the claim could not later be “reopened or allowed.”


223. See supra notes 92, 93 and accompanying text.


225. See supra note 99 and accompanying text.


228. Id.
ant to it. At that time, however, Congress may have felt it unnecessary to include a phrase specifically barring review of regulations. The 1924, 1933 and 1940 laws clearly precluded review of individual benefits claims. In that era, the doctrine of ripeness precluded review of rules until they were applied in the course of an adjudication. Congress likely thought that by passing these acts it was also precluding review of regulations.

Like section 5 of the Economy Act, the 1940 preclusion statute was said merely to continue the law already in effect. The 1940 statute, however, was also to provide a uniform law for the preclusion of review of all benefits claims. It had been the practice of Congress to provide for the preclusion of review in each of the major benefits laws it had passed. Thus, the 1924 and 1933 preclusion statutes had been passed as part of major benefits packages. Since 1933, additional benefits legislation had been passed that had not included a preclusion statute. It is possible that decisions concerning these benefits might have been subject to review under the Warner-Logan Bill. Thus, the 1940 statute was

229. This interpretation is supported by a statement made by Senator Harrison in the Congressional Record. "The only purpose of [§ 5 of the Economy Act] is that after the President has announced the regulations and fixed the rates the decision shall be final, and that, acting under those regulations and rates, whatever decision the Administrator shall make shall be final." 77 Cong. Rec. 254 (1933) (statement of Sen. Harrison).

230. See supra notes 8 & 92-99 and accompanying text.

231. In Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), the Court defined ripeness as a doctrine preventing the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Id. at 148-49.

232. See id. at 175-76 (Fortas, J., dissenting) (criticizing Court's permitting "a gross, shotgun fashion" of review of regulations prior to any action attempting to enforce the regulations as "gross, free-wheeling" and contrary to "established principles of jurisprudence, solidly rooted in the constitutional structure of our Government"). See generally, Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345, 375-77 (1979) (discussing changes in approach to ripeness since passage of the A.P.A.).

233. See supra note 99 and accompanying text.


235. See World War Veterans' Act, 1924, ch. 320, 43 Stat. 607 (providing disability treatment and payments, insurance, vocational rehabilitation); supra notes 94, 95 and accompanying text.


237. In 1940 Congress passed the Warner-Logan Bill, which would have subjected all administrative agencies not exempted from its provisions to judicial review had it not
passed to ensure that review of decisions concerning all benefits was precluded.

There are passages in the legislative history of the 1940 statute that reflect the then prevalent attitudes toward government benefits. It was stated that VA benefits were gratuities, and as such, suits concerning such benefits were barred unless Congress consented. Without a specific provision, "consent to be sued does not exist." If Congress believed that it had not consented to suit for gratuitous benefits, it probably also believed that it had not consented to challenges to VA regulations, particularly since regulations were not open to challenge except in the context of benefits adjudications.

The next important preclusion legislation was passed in 1970 amending the 1958 version of the statute. The Bill was expressly meant to overrule the judicially created exception to section 211(a) and restore the traditional preclusion law. Congress included in its legislative history a letter from the Administrator complaining that the exception had subjected all aspects of VA policy, including regulations, to judicial review. It also included in the legislative history a strong statement that the amendment embodied congressional intent that any and all decisions with respect to noncontractual benefits were to be unreviewable. This was vetoed by President Roosevelt. See 1 K. Davis, supra note 11, § 1:7 at 23-24. This was an era of great controversy about administrative law and judicial review. See generally 1 K. Davis, supra, § 1:7, at 20-24 (discussing controversy concerning administrative law in the 1930's); Landis, Crucial Issues in Administrative Law, 53 Harv. L. Rev. 1077 (1940) (discussing controversy concerning administrative law and Warner-Logan Bill). The bill provided for a special procedure permitting review of administrative rules said to be beyond the Agency's statutory authority. See 86 Cong. Rec. 13,745 (1940) (Senate version of bill provision providing judicial review of rules, adopted by House at 86 Cong. Rec. at 13,815-17 (1940)). Administrative rules were defined as including "regulations ... interpreting the terms of statutes they are respectively charged with administering." 86 Cong. Rec. 4650 (1940) (definition section of Bill). The VA was not exempt from the Bill's provisions, see 86 Cong. Rec. 13,747 (1940) (Senate version of exemption provision, adopted by House at 86 Cong. Rec. 13,807-17 (1940)), and the Veterans' Administrator complained that it "would materially interfere with prompt and efficient administration of benefits." Hearings on H.R. 4236, 76th Cong., 1st Sess. 114 (1939), quoted in Landis, supra, at 1087. The following year Congress passed a third preclusion statute. See supra note 97 and accompanying text. Although there is no contemporary indication in the legislative history that the statute was enacted as a result of the Warner-Logan Bill, a 1970 letter from the Administrator to Congress stated that the VA had proposed the 1940 statute to prevent it from falling under the provisions of the Warner-Logan Bill. H.R. Rep. No. 1166, 91st Cong., 2d Sess. 21, reprinted in 1970 U.S. Code Cong. & Admin. News 3723, 3740.

239. Id.
240. See id.
241. See supra notes 231, 232 and accompanying text.
242. See supra note 106 and accompanying text.
244. See id. at 3740.
245. "The restated section 211(a) will make it perfectly clear that the Congress intends
presumably would include promulgation of regulations designed to determine eligibility for benefits, as the promulgation of regulations are decisions of law under statutes providing benefits for veterans. Finally, the method chosen by Congress in 1970 to amend section 211(a) has been described as far broader than would be necessary if its only purpose had been only to overrule the exceptions created by the District of Columbia Circuit. Congress removed the language concerning “claims” from the statute. Thus Congress clearly wanted to signal that more than just the individual fact based adjudications were non-reviewable.

In sum, the legislative history provides some indication that Congress has precluded review of agency action, including regulations alleged to be ultra vires. The 1933 and 1940 statutes provided for preclusion of review of questions of law and at the time these statutes were in effect regulations could only be challenged through an attack on their use in an adjudication. Congress passed a preclusion statute to ensure that review of all benefits determinations was precluded in the same year it passed a bill permitting review of administrative agency regulations. At the time these Bills were passed it was thought that review of actions concerning gratuities was precluded unless Congress granted consent in such cases to sue the United States. Finally, in 1970 when Congress amended the preclusion statute to overrule exceptions created by the District of Columbia Circuit and return the law of preclusion to its traditional scope, it did so in a highly emphatic manner.

D. The Statute’s Objectives, the Statutory Scheme, and the Type of Administrative Action Involved

A search to determine if Congress intended to preclude judicial review includes an analysis of the objectives of the statute. One of the primary objectives of section 211(a) is to keep the federal courts out of the technical aspects of VA policy. Permitting review of allegedly ultra vires regulations may interfere with this objective in two possible ways. First, uniformity will be at risk if individual circuit and district courts reach different conclusions concerning the requirements of the benefits laws. As the Supreme Court noted in Robison: “It cannot be ex-

246. See Falter v. VA, 502 F. Supp. 1178, 1181 (D.N.J. 1980) (“Nevertheless, the language that [Congress] chose to employ . . . is far broader than that narrow purpose [of overruling the D.C. Circuit] would require.”); see supra notes 106-111 and accompanying text.

247. See supra note 111 and accompanying text. The Veterans’ Administrator had proposed a bill that would have overruled the D.C. Circuit exception by statutorily defining the word “claim” to include the “assertion of rights to continuance, nonreduction, or restoration of . . . benefits or payments . . . .” H.R. Rep. No. 1166, 91st Cong., 2d Sess. 24, reprinted in 1970 U.S. Code Cong. & Admin. News. 3723, 3743.

248. See supra note 17 and accompanying text.

249. See supra notes 113-115 and accompanying text.

250. Compare McKelvey v. Turnage, 792 F.2d 194, 199-203 (D.C. Cir. 1986) (per
pected that the decisions of the many courts would be based on the uniform application of principles as is now done by the Veterans' Administration through its system of coordination . . . .”251 The current myriad of section 211(a) interpretations illustrates this problem.252

Second, the promulgation of regulations controlling adjudications are at least as likely as the adjudications themselves to involve “technical and complex” policies concerning benefits.253 A reviewing court must necessarily “interpret” the regulations in question to determine if they are consistent with the statute under which the regulations were promulgated.254 Because such regulations may involve highly technical and complex areas of VA policy and were conceived against the background of the VA’s considerable experience, it is almost inevitable that such an interpretation will involve the courts in VA policy.

The final components of congressional intent are the structure of the entire statutory scheme and the nature of the administrative action involved.255 The Supreme Court noted in Robison that the types of issues


252. See supra notes 9, 179-181 and accompanying text.

253. In Robison the Supreme Court quoted the Administrator: “‘In the adjudication of compensation and pension claims a wide variety of medical, legal and other technical questions constantly arise which require the study of expert examiners of considerable training and experience. . . .’” Johnson v. Robison, 415 U.S. 361, 370 n.12 (1974) (quoting the Administrator in Hearing on H.R. 360). Although the quote specifically refers to adjudications themselves, its conclusion is equally applicable to regulations controlling these adjudications since the adjudications are controlled by a “massive set of regulations.” See J. Mashaw, Due Process in the Administrative State 265 (1985) (regulations controlling VA adjudications); cf. 38 C.F.R. parts 0-41 (1986) (regulations governing Veterans’ Administration). This observation was also made by Judge, now Justice, Scalia in his opinion in Gott v. Walters, 756 F.2d 902, 909-10 (D.C. Cir.), vacated, rehearing en banc granted, 791 F.2d 172 (D.C. Cir.) (per curiam), remanded with instructions to dismiss with prejudice, 791 F.2d 172 (D.C. Cir. 1985) (per curiam) (en banc). The case involved a challenge by veterans, veterans’ wives, and veterans’ organizations to VA regulations concerning claims of injury from radiation exposure. See Gott, 756 F.2d at 904. Judge Scalia wrote a long opinion holding that § 211(a) precluded review of VA regulations. See Gott, 756 F.2d at 905-16. Following the grant of a rehearing en banc the case was settled, remanded and dismissed. See Gott v. Walters, 791 F.2d 172 (D.C. Cir. 1985) (en banc). The settlement agreement was published in the Federal Register. See Settlement Agreement; Gott v. Walters, 50 Fed. Reg. 45,703 (1985). But see Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979) (same); University of Md. v. Cleland, 621 F.2d 98, 100 (4th Cir. 1980) (same); Wayne State Univ. v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978) (review of regulations does not involve court in complex aspects of VA policy).

254. Cf. Evergreen State College v. Cleland, 621 F.2d 1002, 1009-11 (9th Cir. 1980) (court interprets regulation defining full-time study to determine if it is consistent with statute); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1078-81 (8th Cir. 1979) (same); Wayne State Univ. v. Cleland, 590 F.2d 627, 632-34 (6th Cir. 1978) (same).

255. See supra note 17 and accompanying text.
handled by the VA are of the sort that are ideal for administrative and not judicial adjudication. As a result, the VA benefits disbursement system is one that does not operate under the adversary system of dispute resolution found in the courts. Some commentators have questioned whether the courts can be as effective in the area of government benefits as can a strictly controlled bureaucracy.

The process that has developed instead of an adversarial system is one that "operates informally and nonadversarially." In addition to a general denial of judicial review, the system also limits the fee a lawyer can charge for any one veteran's claim to ten dollars, and provides criminal penalties for exceeding this limit. One court has described this system as one "plainly rejecting the judicialization, and even the lawyerization, of this field." The system was designed to be informal and easily accessible and understandable to veterans, and to handle most efficiently the large number of benefits claims. Permitting judicial review endangers these aims. The courts will become involved in VA policy and may formalize and proceduralize the system, raising the danger that the sys-

258. See generally 5 K. Davis, supra note 11, § 28:14. Professor Davis notes that the massive number of cases handled by bureaucracies such as the VA fall into patterns that afford opportunity for greater efficiency than that attainable in the courts. A large number of cases develop into categories that are susceptible to extensive study and accumulation of experience denied the courts. These factors also allow for the writing of regulations that may provide "a brand of justice that is superior to what a reviewing court could do by using customary judicial methods." Id. at 325. Finally, Professor Davis notes that the tight control kept over bureaucrats will lead to less disturbing case by case variations than that found among federal judges under no such controls. "Equal justice is the loser when variations are wider." Id. at 326.
259. See Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3194 n.12 (1985). "The process is designed to function throughout with a high degree of informality and solicitude for the claimant." Id. at 3184. For a general description of the VA claims process, see id. at 3184-85; Rabin, supra note 61, at 911-16.
260. See supra note 5. In addition to an attorney, whose fee is limited to $10 per claim, a "service representative" may represent a claimant in the VA claims process, or a claimant may appear pro se. See Rabin, supra note 61, at 914-15; Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3184 & n.4 (1985). The service representatives are authorized by statute, 38 U.S.C. § 3402 (1982 & Supp. III 1985), and are provided free of charge by authorized veterans' groups regardless of the veteran's affiliation. See Radiation Survivors, 105 S. Ct. at 3184. The service representatives are trained professionals and are considered an important part of the benefits scheme. See id. at 3184. Although the service representatives are thought to provide a "high quality of representation," id. at 3194 n.12 (quoting S. Rep. No. 466, 97 Cong., 2 Sess. 25, 49-50 (1982)), this system has been criticized as failing veterans in highly complex cases. See id. 3185-86. For a description of the service representative system, see Rabin, supra note 61, at 914-20.
261. Gott v. Walters, 756 F.2d 902, 916 (D.C. Cir.), vacated, reh'g en banc granted, 791 F.2d 172 (D.C. Cir.) (per curiam), remanded with instructions to dismiss with prejudice, 791 F.2d 172 (D.C. Cir. 1985) (en banc) (per curiam).
tem might develop into one not contemplated by Congress, and one less efficient and flexible as it once was.\textsuperscript{263}

**CONCLUSION**

The *Wayne State* line of cases has created an exception to section 211(a) that should not exist. The express language of the Statute as interpreted by the Supreme Court indicates that section 211(a) bars review of actions arising under the Statute, or of the Administrator's actions, either of which would include claims that such actions are *ultra vires*. The history of the Statute shows that review of *ultra vires* regulations was meant to be precluded, and that this purpose was to be carried forward into the modern version of the Statute. Permitting such review violates the primary purposes of the Statute and is not necessarily compatible with the system created by Congress. These factors provide the clear and convincing evidence necessary to preclude review of VA actions claimed to be *ultra vires*.

There are proposals in Congress to amend section 211(a) and to permit some form of judicial review.\textsuperscript{264} Congress must decide whether the benefits of permitting review\textsuperscript{265} outweigh its costs,\textsuperscript{266} which too often seem to be ignored. The resources available to the veterans' benefits system is

\textsuperscript{263} Cf. 105 S. Ct. at 3191-92 (permitting attorneys into veterans benefits system will complicate a system Congress wanted to keep simple). Judicial review would change "[t]he climate in which we would have to do our work... The adjudication officers of the Veterans Administration would deny more claims and cause more problems for veterans by being more formal and restrictive." Interview with Robert Lyagh, National Director of Rehabilitation for the American Legion (printed in Moss, *VA Judicial Review?*, A.B.A. Journal, Sept. 1, 1986, at 29); 5 K. Davis, *supra* note 11, § 28:14 at 324-27 (discussing advantages in administrative law of regulated bureaucracies over the courts).


\textsuperscript{265} In addition to the correction of occasional errors even the best bureaucracy will make, judicial review will legitimate the system in the eyes of many. See 5 K. Davis, *supra* note II, § 28:14, at 326 (critic of judicial review favors its retention because of its "political legitimation of the system."); Daschle, *Making the Veterans' Administration Work for Veterans*, 11 J. Legis. 1 (1984).

\textsuperscript{266} See *supra* note 263 and accompanying text. The exact extent of the costs of providing judicial review is controversial. See Rabin, *supra* note 61, at 916-23. The Supreme Court in *Robison*, however, declared that one of the primary purposes of § 211(a) was to ensure that veterans' claims do not burden the courts with expensive and time consuming litigation. See Johnson v. Robison, 415 U.S. 361, 367 & n.11 (1974). The cost of judicial review would vary with the extent of judicial review provided. See Rabin, *supra*, at 921. An estimate prepared by the VA estimated that the 1979 Senate judicial review bill would substantially increase the workload of the VA Office of General Counsel, would require the appointment of eight additional district court and one additional circuit court judges (with the resultant rise in administrative costs) and increase in benefits costs as the VA would occasionally be required by the courts to provide benefits it had denied. See 125 Cong. Rec. 24,768-69 (1979).
limited, particularly in this age of budget constraints.\textsuperscript{267} Providing judicial review may become such an expensive undertaking as to require that cuts be made in some other program providing benefits to veterans or other social programs.\textsuperscript{268} Congress must ensure that the improvements in the system gained by providing judicial review are great enough to justify the costs, particularly if those costs are borne by the truly deserving. Congress should not create another layer of procedural protection that reaches virtually the same results as the present system, at much greater cost.

The granting of access to the courts is an American tradition\textsuperscript{269} and it is possible that some courts have created exceptions to section 211(a) in part because they find "truly incomprehensible . . . the whole concept of a system of administrative justice, even in a field of government benefits, without general judicial supervision."\textsuperscript{270} Congress, however, with its more comprehensive fact finding ability,\textsuperscript{271} is best suited to set the proper policy. It is because of this unique ability to sift facts and determine

\begin{itemize}
\item \textsuperscript{267} Between March 1 and Sept. 30, 1986 the VA was forced to reduce benefits payments in order to meet its spending targets under the Graham-Rudman-Hollings bill. See Veterans Administration Implementation of the Balanced Budget and Emergency Deficit Control Act of 1985, 51 Fed. Reg. 9575 (March 19, 1986). The impact on the courts might also be substantial. During the Summer of 1986 most federal judicial districts were forced to postpone non-criminal trials during a two week period due to a funding shortfall. See N.Y. Times, July 2, 1986, at A10, col. 5 (following suspension of civil trials for two weeks due to lack of funds, civil trials underway with assurance of future funding); N.Y. Times, June 17, 1986, at A16, col. 5 (lack of funds requires delay in civil trials); N.Y. Times, June 13, 1986, at A14, col. 6 (same); Kaufman, \textit{Justice Unfunded is Justice Undone}, N.Y. Times, May 25, 1986 at IV 17, col. 2 (effect of proposed automatic budget cuts across the board threaten ability of judiciary to function). See also Friendly, \textit{"Some Kind of Hearing"}, 123 U. Pa. L. Rev. 1267 (1975):
\begin{quote}
It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.
\end{quote}
\textit{Id.} at 1276.

\item \textsuperscript{268} Cf. \textit{supra} notes 266, 267 and accompanying text (discussing costs of judicial review).

\item \textsuperscript{269} See interview with Professor Frederick Davis (printed in Moss, \textit{VA Judicial Review?}, A.B.A. Journal, Sept. 1, 1986 at 29) ("It's deeply rooted in the American psyche that you should be able to go into the American courthouse.").

\item \textsuperscript{270} Gott v. Walters, 756 F.2d 902, 915 (D.C. Cir.), vacated, \textit{reh'g en banc granted}, 791 F.2d 172 (D.C. Cir.) (per curiam), \textit{remanded with instructions to dismiss with prejudice,} 791 F.2d 172 (D.C. Cir. 1985) (en banc) (per curiam). \textit{See also 5 K. Davis, \textit{supra note} 11, § 28:14, at 323-24 (virtually the entire legal profession would instinctively support judicial review).}

\item \textsuperscript{271} "When Congress makes findings on essentially factual issues [involving effectiveness of various processes] those findings are . . . entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3194 n.12 (1985).
policy that the debate over judicial review belongs before the Congress, and not the courts.

Stephen Van Dolsen