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## Administrative Arbitrariness Is Not Always Reviewable

Kenneth Culp Davis\*

Mr. Berger's main thesis in his four articles is that the Administrative Procedure Act<sup>1</sup> makes administrative arbitrariness or abuse of discretion *always* judicially reviewable. At many points throughout his four articles on this subject he expresses or implies the *always*.<sup>2</sup> He says, for instance, that his demonstration should lead judges "to conclude that arbitrariness was meant to be and should be reviewable across the board."<sup>3</sup> He refers to "the section 10(e) provision that arbitrariness would always be reviewable . . ."<sup>4</sup> His main purpose is to attack the position I have taken in section 28.16 of my *Treatise* that administrative discretion is sometimes reviewable for arbitrariness or abuse and is sometimes not.

My opinion continues to be that under the APA administrative arbitrariness or abuse is *sometimes* unreviewable. Solely on the basis of the Act and its legislative history, before any case had interpreted the Act on the question, I took that position in a 1948 article.<sup>5</sup> Now that the abundant case law uniformly so holds,<sup>6</sup> I think I can be extremely cautious and still say that the law is *entirely clear*.

Mr. Berger's main position is, in his words, that "the second exception of section 10 [of the APA] does not curtail the section 10(e) directive to set aside 'abuse of discretion.'"<sup>7</sup> The Supreme Court unanimously says precisely the opposite, as I think it should. The second exception is "Except so far as . . . agency action is by law committed to agency discretion. . . ." The Supreme Court has declared: "Section 10 of the Administrative Procedure Act . . . excludes from the categories of cases subject to judicial review 'agency action' that is 'by law committed to agency discretion.'"<sup>8</sup>

Not a single case has adopted the Berger interpretation of the APA. The courts have uniformly adopted the opposite interpretation. And the case law is so abundant that at least eight cases on the question were decided during the single year 1966.<sup>9</sup>

Lacking decisions to support his view, Berger resorts to the interesting argument that the law is not what the uniform case

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law holds it to be: "Properly construed, the statute, not Davis' few mistaken judicial followers, represents what the law is."<sup>10</sup>

But he has never mentioned the APA's *main provision* on reviewability, which says the opposite of what he says: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion (c) . . . every final agency action . . . shall be subject to judicial review."<sup>11</sup>

Another conclusive consideration, of which Berger shows no awareness, is that the 1966 codification of the APA says that the judicial review provisions of the APA do not apply to "agency action . . . committed to agency discretion by law."<sup>12</sup> This means that Berger's main position that the APA makes such action reviewable becomes an unseemly posture of lying flat on his back with all four wheels spinning. The APA can have no effect on something to which it does not apply. The codifiers have taken my view. Even if Berger writes four more articles that the codifiers are wrong, their view is the law because Congress has enacted it.

The Berger interpretation of the APA has nothing against it except the clear statutory words, the unanimous Supreme Court, the unanimous lower courts, and now the unanimous Congress in the codification! Perhaps nothing more need be said, but I think other Berger misunderstandings need correction.

The most extreme of all Berger positions is that the Constitution requires review of arbitrariness.<sup>13</sup> No case supports him. Throughout our history, the Supreme Court has held some administrative action unreviewable for arbitrariness or abuse. In the foundation case in 1827, the Court refused to review a finding of fact and declared: "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse."<sup>14</sup> In 1900 the Supreme Court denied review to a federal employee who was allegedly discharged "without just cause." The Court said the discretionary action was "beyond review in the courts . . ."<sup>15</sup> In 1919 the Supreme Court held administrative action unreviewable because "a mere excess or abuse of discretion in exerting a power given . . ." was " . . . beyond the reach of judicial power."<sup>16</sup> The Supreme Court in 1943 held a certification of a union unreviewable, because the issue was deemed "explosive" and the Court found that Congress did not intend "to implicate the federal judiciary . . ."<sup>17</sup> Chapter 28 of my *Treatise* reviews perhaps thirty Supreme Court decisions denying review to particular administrative action.<sup>18</sup>

Perhaps the most important single case against Berger's view that arbitrariness is always reviewable and that the Constitution requires reviewability is a 1965 holding of the Supreme Court. The Board denied a petition for "an opportunity to vote for or against representatives." The complaint alleged that the denial was "arbitrary, capricious and discriminatory" and also alleged that "the form of the ballot . . . is arbitrary, capricious and discriminatory."<sup>19</sup> The district court dismissed the case and a divided court of appeals affirmed, holding that the APA required review, but the Supreme Court reversed. The Supreme Court held that the Board's "decision on the matter is not subject to judicial review where there is no showing that it has acted in excess of its statutory authority," and that "the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board."<sup>20</sup>

Indeed, the Supreme Court is sometimes at the other end of the spectrum from Berger's extreme idea that the Constitution requires review of arbitrariness. *Even when a statute unequivocally required review*, the Supreme Court has unanimously denied review, without mentioning the possibility that cutting off review might raise a constitutional question. The Court said that "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are . . . of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power and not subject to judicial intrusion or inquiry."<sup>21</sup> Contrast Berger's assertion: "In no corner of American life can it be assumed that protection against official oppression is 'intrinsicly unsuitable.'"<sup>22</sup>

The reasons that have impelled both Congress and the courts to make *some* administrative arbitrariness or abuse of discretion unreviewable are powerful. Section 2(a) of the APA makes the president an "agency."<sup>23</sup> Since section 10 on judicial review does not except foreign affairs or military matters, adoption of Mr. Berger's thesis would mean that courts would review for arbitrariness or abuse of discretion the President's activities in seeking peace in Vietnam, the President's military orders about Vietnam,<sup>24</sup> decisions about slowing down donations of grain to India, all decisions about foreign aid, the President's denial of a pardon,<sup>25</sup> and the President's recognition or refusal of recognition of a foreign government.<sup>26</sup>

Congress often cuts off review entirely, including review of arbitrariness. For instance, a statute makes certain decisions on veterans' claims "final and conclusive and no . . . court . . . shall have power or jurisdiction to review . . ." <sup>27</sup> If discretion is arbitrary, it still cannot be reviewed. <sup>28</sup> There are many such statutes, including the Renegotiation Act under which issues involving many billions of dollars have been resolved. <sup>29</sup> No such statute has ever been held unconstitutional for cutting off review. <sup>30</sup>

Mr. Berger presents an impressive collection of Supreme Court statements that our Constitution and our institutions leave no place for arbitrary exercise of power. <sup>31</sup> I agree with those statements; I do not see how anyone could disagree with them. But they do not prove that arbitrary exercise of power is always reviewable. One of Mr. Berger's pervasive mistakes is to equate lack of authority to act arbitrarily with judicial reviewability. A lieutenant in Vietnam surely lacks authority to pick on the same private for every dangerous assignment, but that does not mean that a court will or should review.

*In many respects my position differs drastically from the picture of it that Mr. Berger paints.* He is mistaken in giving the impression that I favor unreviewability. In section 28.21 of my *Treatise* I have argued for enlarging the area of reviewability; in 1954 I initiated the idea of a presumption of reviewability. <sup>32</sup> As to what the law *should be*, my position is a middle one between the courts and Mr. Berger. He is mistaken in repeatedly implying that any holding that the APA requires review of discretion is contrary to my view; I have consistently said that under the APA some discretion is reviewable and some is not, and the affirmative part of that is as important as the negative part. <sup>33</sup> Berger is also mistaken in his many arguments that I have changed my position; the whole structure of his arguments is based on a dozen or more clear-cut misquotations, which he has refused to correct after I have called them to his attention. <sup>34</sup>

Berger seems to me plainly mistaken in asserting that Professor Jaffe's view is not directly opposed to his. The Berger view is that arbitrariness is always reviewable. Jaffe asserts that "there are statutory discretions which are not subject to . . . review . . ." <sup>35</sup> and this is directly opposed to Berger, because Jaffe means not subject to review for arbitrariness or for other reasons. <sup>36</sup> Another Jaffe statement directly opposed to Berger's is this: "[E]ven without explicit exclusion of review, the char-

acter of the granted power or the terms in which it is granted may imply exclusion."<sup>37</sup> The idea that "the character of the granted power" may exclude review is precisely what Berger is fighting against. Jaffe italicizes his conclusion: "*Presumptively, an exercise of discretion is reviewable for . . . 'abuse.'*"<sup>38</sup> I agree. A presumption of reviewability is altogether different from Berger's position that abuse is always reviewable.<sup>39</sup>

Although I have pinpointed each of Berger's many misunderstandings in full detail in memoranda supplied to him (a copy of which I shall be glad to send to any reader who has reason to make a full analysis), my opinion is that most of his misunderstandings do not merit discussion in a law review. I shall accordingly limit myself to two selected ones in a footnote,<sup>40</sup> and I shall devote the next two paragraphs to two major ones.

The cornerstone of his argument about interpreting the APA is his proposition, repeatedly asserted, that "'discretion' and 'abuse of discretion' are opposites."<sup>41</sup> My opinion is that of the three categories—(1) exercise of discretion, (2) proper exercise of discretion, and (3) abuse of discretion—the second and third are opposites but the first and third are not. Berger's view that the first and third are opposites is something like saying that animals and male animals are opposites.

Although Mr. Berger's main position is that (1) the courts should always review abuse of discretion or arbitrariness, he couples that with the idea that (2) discretion should often "remain unreviewable."<sup>42</sup> These two propositions, in my opinion, cannot *possibly* be adopted either by Congress or by the courts, because whenever a party falsely alleges abuse of discretion, the court cannot escape violation of either the first proposition or the second. If it does not inquire whether discretion has been abused, it violates the first, and if it does so inquire, it reviews the exercise of discretion, thus violating the second. Mr. Berger's main position seems to me as logically impossible as a square circle.

## FOOTNOTES

1. Federal Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C.A. §§ 551-59, 701-06 (Special Pamphlet 1966). The APA is hereinafter cited with only original section numbers, except in note 12, which explains the 1966 codification.

2. He says he differs with my view that "in some areas arbitrary action must be and is unreviewable." Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. Pa. L. Rev. 783, 784 (1966) [hereinafter cited as Berger, *Reply*]. He says without qualification that "APA section 10(e) directs that courts 'shall . . . set aside agency action . . . found to be (1) arbitrary, capricious, an abuse of discretion . . .'" *Id.* at 785. In making this statement he makes no mention of the qualifying words in the APA: "Except so far as . . . agency action is by law committed to agency discretion." APA § 10. He protests in his article against what he calls "the Davis proposal selectively to shield arbitrary action from review." *Ibid.* He says: "There is no shred of evidence that Congress intended to create a system of selective review of arbitrariness." *Id.* at 811. He says in his article: "The categorical, unqualified section 10(e) directive to set aside arbitrariness leaves no room for selective unreviewability." Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. Rev. 601, 611 (1967) [hereinafter cited as Berger, *Sequel*]. He makes perhaps a dozen or more other similar statements.

3. Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word"*, 114 U. Pa. L. Rev. 816, 822 (1966).

4. Berger, *Sequel* 619.

5. Davis, *Nonreviewable Administrative Action*, 96 U. Pa. L. Rev. 749 (1948). Two paragraphs at 775-76 are now the first two paragraphs of § 28.16 of my *Treatise*, and these are the primary target of Mr. Berger's attack.

6. I do not mean to imply that every court has adopted my analysis. Many have explicitly done so, but many have reached the same result without mention of my analysis. Berger three times asserts that the courts have taken my analysis "on faith." Berger, *Sequel* 625; Berger, *Reply* 786, 804. Possibly some have, but my surmise is that reasons have been more influential than "faith."

7. Berger, *Sequel* 635.

8. *Panama Canal Co. v. Grace Lines, Inc.*, 356 U.S. 309, 317 (1958).

9. The recent case law is summarized in § 28.16 of the 1965 pocket parts to my *Treatise*. In this note I shall mention some 1966 cases. The Fifth Circuit holds that discretionary action by the Rural Electrification Administration in making loans is unreviewable for abuse: "Regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in Congress." *Rural Electrification Administration v. Central Louisiana Elec. Co.*, 354 F.2d 859, 865 (5th Cir. 1966). The Third Circuit refuses review of administrative reduction of a lawyer's fee from \$5,000 to \$250, saying that "even if we were to assume . . . it was arbitrary and capricious and constituted an abuse of discretion, his order is nonetheless not reviewable." *Chernock v. Gardner*, 360 F.2d 257, 259 (3d Cir. 1966). The Second Circuit holds that discretionary refusal by the General Counsel and the NLRB to issue complaints is not reviewable; I am not sure that I would so hold, but I am sure that the APA does not prevent such a holding. *United Elec. Contractors Ass'n v. Ordman*, 366 F.2d 776 (2d Cir. 1966). A district court holds, on the basis of a line of cases to the same effect, that removal of a federal employee is reviewable only for procedure, not for

## FOOTNOTES (cont'd)

substantive errors. *Cohen v. Ryder*, 258 F. Supp. 693 (E.D. Pa. 1966), and cases cited. Discretion of the Small Business Administration in granting or denying loans is not reviewable. The court's generalization about the APA is precisely the opposite of Berger's position: "The Courts have consistently given effect to the provision excepting . . . 'agency action that is by law committed to agency discretion.'" *vonLusch v. Hoffmaster*, 253 F. Supp. 633, 635 (D.C. Md. 1966). A court held it lacked jurisdiction to review a discretionary denial of federal funds for a college; the court disposed of an argument based on the APA by saying simply that it provides for judicial review except so far as statutes preclude review or action is committed to agency discretion. *Paducah Junior College v. Secretary*, 255 F. Supp. 147 (W.D. Ky. 1966). A court held it was without authority to review denial of remission of an automobile. *Jary Leasing Corp. v. United States*, 254 F. Supp. 157 (E.D.N.Y. 1966). An example of a case that adopts my view as to how the APA should be interpreted and then goes on to hold that the action is reviewable is *Cappadora v. Celebrezze*, 356 F.2d 1, 5-6 (2d Cir. 1966). The court analyzed the APA and concluded: "The question thus is whether the Act 'so far' commits decision to reopen to agency discretion that a refusal would not be open to review even in case of abuse." *Id.* at 5. That is precisely my position. The court goes on to hold that administrative action in the case was not so far committed to agency discretion. Not only do I agree with the result but I agree with *all* of the court's analysis. The only slight doubt I have is about this passage at page 5: ". . . § 10(e) of the APA expressly authorizes the courts to set aside any administrative decision constituting an abuse of discretion." If those words stood alone, I would disagree. But they are immediately followed by words which satisfy me:

The question is whether the Secretary in deciding not to reopen enjoys absolute discretion—whether such a decision is totally committed to the judgment of the agency because of the practical requirements of the task to be performed, absence of available standards against which to measure the administrative action, or even the fact that no useful purpose could be served by judicial review.

*Id.* at 5-6. The opinion is one of the best I have seen.

10. Berger, *Sequel* 625-26 & n.131.

11. APA § 10, 5 U.S.C. § 1009 (1964). One error that pervades Berger's four articles is his assumption that a discussion of the "except" clause has no point except in combination with subsection (e) on scope of review. For instance, in the latest article at 611-12, he quotes various statements of mine that the "except" clause is read literally and says: "If all this was without bearing on section 10(e), if it was not being employed by Davis in 'combination,' it was utterly pointless." Berger, *Sequel* 612. Apparently the only combination he can see is the combination of the "except" clause with subsection (e). But the "except" clause combines with subsection (a) on standing, with (b) on forms of action, with (c) on reviewability, with (d) on interim relief, and with other parts of (e) besides the "abuse of discretion" phrase that Berger focuses on. On the subject of reviewability, the key combination is with (c), because (c) deals with reviewability.

Berger says at page 612:

The crucial question, to which no reply has been made, is how Professor Davis can, in good conscience, argue that a "literal" reading of the "except" clause curtails across-the-board reviewability of arbitrariness under section 10(e), and simultaneously

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declare that when the "except" clause is read in "combination" with subsection 10(e) it makes no sense.

The answer to this crucial question is easy. First, I have never said that the combination of the "except" clause with 10(e) makes no sense; what I have said is that the combination of the "except" clause with the "abuse of discretion" phrase of 10(e) makes no sense. Secondly, the literal reading of the "except" clause is always used in any combination other than with the "abuse of discretion" phrase. The literal reading is used in combinations with (a), (b), (c), (d), and all parts of (e) except the "abuse of discretion" phrase.

I know of no reason for rejecting a literal interpretation of the following combination of the "except" clause with a part of 10(e): "Except so far as . . . agency action is by law committed to agency discretion. . . . (e) . . . the reviewing court shall . . . (B) . . . set aside agency action . . . found to be (1) arbitrary . . . ."

See my analysis in the first two paragraphs of § 28.16 of my *Treatise*.

12. 80 Stat. 392 (1966), 5 U.S.C.A. § 701 (Special Pamphlet 1966), effective Sept. 6, 1966: "This chapter [all the provisions on judicial review] applies . . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Perhaps even Mr. Berger will now agree that since the judicial review provisions do not apply to agency action which is committed to agency discretion by law, the APA cannot make such action reviewable. As to what action is "committed to agency discretion," see § 28.16 of my *Treatise*. Of course, the theory of codification is that no substantive change is made, and I agree with the codifiers that in this provision they have made no substantive change.

13. He says, for instance, that "in my view, the right to be protected against arbitrariness is rooted in the Constitution . . . ." Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 57-58 (1965). In the present article he says at page 607 that the three cases he discusses do not support my statement that the law is overwhelming that unreviewability of arbitrariness is not necessarily unconstitutional. My opinion is that he has misinterpreted each of the three cases. The most important one is the *Brotherhood* case, which I discuss *infra* notes 19-20 and accompanying text.

14. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32 (1827).

15. *Keim v. United States*, 177 U.S. 290, 292, 294 (1900). The case is still the foundation of the law concerning the removal of federal employees. See, e.g., *Cohen v. Ryder*, 258 F. Supp. 693 (E.D. Pa. 1966).

16. *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 184 (1919). Even when the abuse of discretion involved a finding of guilt and "the subsequent investigation established his innocence," the Supreme Court held: "It is settled that in such cases the action of executive officers is not subject to revision in the courts." *Eberlein v. United States*, 257 U.S. 82, 84 (1921).

17. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 303 (1943). Because of the broad base of the opinion, the case has generally been interpreted to cut off review of arbitrariness; the Supreme Court so interpreted it in *Brotherhood of Ry. & S.S. Clerks v. Association*, 380 U.S. 650 (1965).

18. Not all of the cases denying review raise issues of arbitrariness. But many hold that administrative interpretation of a statute is not reviewable, and, in general, the courts are more reluctant to hold statutory interpretation unreviewable than to hold arbitrariness or abuse of

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discretion unreviewable. This difference comes out often in judicial opinions. For example, see the text at notes 19-20 *infra*.

19. Paragraphs X and XII of the Complaint, at pages 7 and 8 of the printed Transcript of Record.

20. *Brotherhood of Ry. & S.S. Clerks v. Association*, 380 U.S. 650, 669, 671 (1965). As for Berger's view that cutting off review would be unconstitutional, the Court did not even mention that possibility. Nor did *any* of the many excellent briefs.

21. *Chicago & So. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The Court refused to review the grant to one airline and the refusal to another of a certificate to engage in overseas air transportation, even though the statute provided for review of "any order . . . except any order in respect of any foreign air carrier . . ." *Id.* at 115 n.2. Both carriers were domestic. The Court was unanimous that what stemmed from the President was unreviewable, but four Justices thought that what stemmed from the Board was reviewable. That the case involved foreign relations, some aspects of which called for secrecy, led the unanimous Justices to the conclusion that the President's action was unsuitable for review, even though the statute did not preclude review but required review. In whatever capacity the President acts, he is an "agency" as the term is defined in § 2(a) of the APA. See note 23 *infra*. In this instance, he was acting as an administrative officer pursuant to power delegated by Congress and he was determining the rights of the private corporations.

22. *Berger, Reply* 813. In the only 1967 case on the subject that has come to my attention, the Court of Appeals for the District of Columbia, declining to enjoin the Secretary of Defense from sending the plaintiff to Vietnam, declared:

It is difficult to think of an area less suited for judicial action than that into which appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power . . .

*Luftig v. McNamara*, Feb. 6, 1967.

23. Section 2(a) of the APA defines "agency" as "each authority . . . of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." APA § 2(a). That clearly includes the President.

24. The Act excepts "military or naval authority exercised in the field in time of war . . ." APA § 2(a). But the lack of a declaration of war apparently means that we are not technically at war in Vietnam.

25. Conceivably, a court might step in if the executive action were sufficiently outrageous. But courts will ordinarily refuse to examine the denial of a pardon, and that is enough to reject Berger's "always."

26. The Supreme Court refuses to review such recognition decisions. *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955); *United States v. Pink*, 315 U.S. 203, 229 (1942).

27. 72 Stat. 1115 (1958), 38 U.S.C. § 211(a) (1966). The provision goes back at least as far as 48 Stat. 9 (1933).

28. See the holding, as well as the collection of authorities, in *Barefield v. Byrd*, 320 F.2d 455 (5th Cir. 1963), *cert. denied*, 376 U.S. 928 (1964).

29. See the discussion of various such statutes and the case law under them in §§ 28.09, .13, .14, .15 of my *Administrative Law Treatise* and its 1965 pocket parts.

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30. One of the strangest positions Mr. Berger takes is that a court's denial of review on the ground that a statute precludes review is not an authority against his position that arbitrariness or abuse is always reviewable. See Berger, *Sequel* 622-23. Following his reasoning is difficult for me, but I gather that he thinks he can confine his discussion to the second exception to § 10, so that anything governed by the first exception can be excluded from his discussion. The two exceptions are: "Except so far as (1) statutes preclude . . . review or (2) agency action is by law committed to agency discretion." APA § 10.

My opinion is that the two exceptions clearly overlap. Whenever a statute cuts off review of a discretionary determination, I think the statute precludes review *and* the agency action is by law committed to agency discretion.

The two main reasons the courts give for unreviewability are congressional intent and judicial belief in unsuitability of judicial review. Some decisions for unreviewability rely on one of these reasons, some on the other, and some on both. All opinions that rest on both can be classified as within both exceptions in the introductory clause to § 10. But nothing of substance hinges on the classification, I think, except that convenience of discussion is sometimes aided by such classification. The important points are that the overlap is clear and that much arbitrariness or abuse is held unreviewable.

31. Berger, *Sequel* 603-04.

32. The presumption idea was first advanced in my article, *Unreviewable Administrative Action*, 15 F.R.D. 411, 426 (1954), and later carried into § 28.07 of my *Treatise*. When the first of Mr. Berger's four articles appeared, I asked him why he ignored my § 28.21. By letter of March 2, 1965, he said that that section he had "inadvertently missed, much to my regret." In his three later articles he has never mentioned either his inadvertence or his regret.

33. Berger's idea that a case allowing review under the APA is contrary to my position pervades half or more of his analysis of case law. This error appears perhaps a dozen times. A good example is his discussion of the *Vucinic* case at 626-27. The court quoted from my § 28.16 and then said:

However, I am unable to conclude that the decision . . . is "committed to . . . discretion" in the sense, to apply Davis's analysis of making his . . . order unreviewable—even for arbitrariness

Berger seems to me clearly wrong when he says: "Far from being an 'adoption' of Davis' 'solution,' *Vucinic* constitutes a tacit rejection." The court applied my analysis in order to reach its decision and I am in agreement not only with the court's adoption of that analysis but with the way the court applied it.

Related to what has just been said is another of Berger's pervasive misunderstandings. Most of the many pages he devotes to discussing the *Gidney* case revolve around his belief that I cannot disagree with a decision which adopts my analysis. For instance, he says at page 637: "Let us put to one side his graceless dismissal as 'wrong' of a decision which was framed in reliance on the 'solution' he proposed in his *Treatise*." Here and elsewhere, he fails to see that a decision about reviewability involves a two-step process: The court first interprets the APA to mean that reviewability depends on the question whether the action is "committed" to agency discretion; as to this step the case law is uniform. The second step is to decide whether the particular action is so "committed." I agree with the *Gidney* court's adoption of my in-

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terpretation of the APA; I have never agreed with its initial decision that the licensing of a bank was so "committed." Berger's six or seven pages on *Gidney* rest on his false statement that I cited the case with approval. He now refuses to acknowledge his error. Berger, *Sequel* 636. He should realize that any reader can see for himself that I did not cite the case with approval. See § 28.06 of my 1963 pocket parts.

34. Berger's misquotations were undoubtedly inadvertent in the first instance. But I leave to the reader the explanation for two further facts: (1) He has refused to correct them after they have been pointed out to him; (2) Correcting them would destroy the basis for much of his argument.

I have called his attention to more than a dozen misquotations. I shall here limit myself to three typical examples.

The neatest example is probably the Berger passage at page 620 in which he makes me look hilariously inconsistent. He says, quoting me four times:

This "probable intent" was speedily transmuted into a "clear expression of Congress in favor of preventing review"; this was what Congress "so clearly said." Happily, he has since beat a retreat. Now he does "not say that the statutory words require [his] interpretation."

Of the four quotations from me, the first and fourth are about the combination of the "except" clause with the "abuse of discretion" phrase, and the second and third are about the "except" clause taken alone. I have consistently said that the combination cannot be read literally, and I have consistently said that the "except" clause alone or in any combination other than with the "abuse of discretion" phrase is and should be read literally. My discussion of the "except" clause appears in the first paragraph of § 28.16 of my *Treatise*. My discussion of the combination with the "abuse of discretion" phrase appears in the second paragraph of that section. Both those paragraphs were first published in a 1948 article, before any case law existed on the subject. The unanimous case law now supports both paragraphs. Why *should* I "beat a retreat" from such a position?

At 610-11 he quotes me twice. The second quotation is said to "prove by the Professor's own words" that the first quotation "is utterly misleading." The point of the first quotation of three sentences is that the courts uniformly read the "except" clause literally. The point of the second quotation of two sentences is that the literal language makes no sense, but Berger does not say what language. By saying that the second quotation proves that the first is "utterly misleading," he clearly implies that both quotations are about the same subject. But the first one was about the "except" clause alone, and the second was about that clause in combination with the "abuse of discretion" phrase. I have consistently said that the "except" clause is and should be interpreted literally, and that the combination is not and cannot be interpreted literally.

Berger has refused my request that he tell his readers that the second quotation from me is not on the same subject as the first quotation. Of course, disclosing that would destroy his point that he can "prove by the Professor's own words" that the first quotation "is utterly misleading," and that point is the foundation for a whole section of his argument.

At page 627 Berger says:

"[T]he 'literal language' of the second exception, read against section 10(e), Professor Davis said, 'makes neither grammatical nor practical sense . . . .'"

## FOOTNOTES (cont'd)

The statement of mine to which Berger refers was not about 10(e) but was expressly stated to be about "one clause of subsection (e)." That one clause was that the "court shall . . . set aside agency action . . . found to be . . . an abuse of discretion . . ." The statement Berger imputes to me would be false about any part of 10(e) except that one clause. But Berger refuses to make correction. Making correction would destroy his argument.

35. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 359-60 (1965).

36. Jaffe shows throughout his discussion of reviewability that he does not share Berger's erroneous idea that discretion can be unreviewable at the same time that abuse of discretion is reviewable. See the last paragraph of my text *supra* at 647.

37. JAFFE, *op. cit. supra* note 35, at 360.

38. *Id.* at 363.

39. Jaffe quite properly says that "the mere presence of agency discretion does not oust review." *Id.* at 374. I agree; after all, the books are full of review of discretion. But on the next page he suffers a slight lapse when he says that "*the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion.*" *Id.* at 375. He should have put in the word "mere," as he had just done on the preceding page. Presence of discretion bars a court from reviewing whenever the action is deemed "committed" to agency discretion, and on this the courts are unanimous.

40. Berger, at page 639, calls my discussion of the Walter-Logan bill "a purely denigratory tactic." I did not so intend it. What he objects to is my statement that he advocates "essentially" the Walter-Logan view. He now confirms that this is so at the very time that he is denying it. With respect to awarding contracts and rejecting supplies, courts could not review before Walter-Logan, but that bill provided they could, as the Attorney General said. And now Berger asserts, at page 640, that the APA "can hardly be read to exhibit an intention to insulate arbitrariness in the exercise of those functions." The view Berger now asserts about awarding contracts and rejecting supplies is not merely "essentially" the same as Walter-Logan; it is precisely the same. (Berger's long discussion of scope of review in Walter-Logan seems to me irrelevant to a discussion of reviewability.)

Berger says at page 640 that I take Jaffe to task "for nonmention of the view that prosecutorial 'abuse of discretion' is reviewable." He goes on to say at 641 that "One can only marvel at Professor Davis' chameleon-like capacity to tailor his views to the occasion." My view has been the same on all occasions: A prosecutor's discretion is ordinarily unreviewable for abuse, but in the special context of the *Moog* case (where one competitor is caught between the FTC and his competitors) the Seventh Circuit has reviewed and the case is now before the Supreme Court. Berger is clearly mistaken in giving the impression that a prosecutor's discretion is ordinarily reviewable for abuse; it is not, whichever way the Supreme Court holds in the pending case.

41. Berger, *Sequel* 609.

42. *Id.* at 639.