Administrative Arbitrariness: A Sequel

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In retrospect a prolonged debate about a fine legal point may resemble not a little the theological disputes of the Church Fathers so quizzically described by Gibbon. Yet historians of ideas attribute the trustworthiness of scientific findings to the fact that they are challengeable and often are challenged by others.¹ One who has served in an adjudicatory capacity or has submitted a series of briefs to a court knows that those who sit in judgment often value clarification of arguments that are not as glittering as they may at first appear. Frequently, too, the agile shifts of a hard-pressed advocate require the eye of one steeped in the intricacies if attention is to be riveted on core determinants. Let this serve as my apology for continuing my debate with Professor Kenneth Culp Davis concerning judicial review of administrative arbitrariness.²

The debate involves two main issues: 1) whether the direction of section 10(e) of the Administrative Procedure Act (APA)³ that courts “shall... set aside agency action... found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” was curtailed by the introductory ex-

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ception of section 10 for action "by law committed to agency discretion," as Professor Davis maintains; 4 and 2) if that direction was so curtailed, what are the criteria for determining when "discretion" is "by law committed" so as to insulate arbitrariness from review. Professor Davis' "Final Word" was relatively restrained, but, emboldened by an editorial assurance that his would be the last word, he let fly with a ballooned "Postscript" replete with distortions, misleading statements, and denigrating charges which must be answered. Such grave deficiencies of scholarship constrain one to follow the example set by Professor Davis in his scathing indictment of Dean Pound, and to point out his own egregious "disservice to sound scholarship." When flaying Dean Pound, Professor Davis built large accusations on what were relatively minor flaws when compared with his own shortcomings. Uncritical citation of his work makes it necessary to dwell on those shortcomings, and to emphasize that his "Papal Bulls" must be carefully examined.

The "Postscript" does, however, serve a useful purpose, for without acknowledging the fact, Professor Davis now retreats from several extreme and indefensible positions that he at first dogmatically asserted, and these retreats manifest the intrinsic weakness of his position. Further, in his "Postscript" Professor Davis at last makes a brave show of meeting the issues, so that opposing considerations can now be lined up and evaluated. Such evaluation may begin with the constitutional argument.

I. CONSTITUTIONAL PRINCIPLES

The reader of Professor Davis' argument under this heading would conclude that Berger's argument lies in the realm of pure assertion, for Davis focuses exclusively on "Berger statements" with never a reference to a Berger citation nor an intimation that Berger has called a row of Supreme Court declarations to

4. The relevant portions of § 10 read as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . .

(e) [the court shall] . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .


6. Davis, Dean Pound's Errors About Administrative Agencies, 42 Colum. L. Rev. 804 (1942). See also Berger, Reply 784.

One who ventures to differ with Professor Davis finds himself involuntarily embattled. Though not a pejorative word or epithet will be found in my initial Article, the Davis Comment, an eminent spectator
his support.\textsuperscript{7} Because the "case law," Davis claims, "is overwhelmingly in support of [his] position,"\textsuperscript{8} it will be useful to line up the opposing positions, bearing the "overwhelmingly" in mind, for it is by such demonstrably overblown statements that Professor Davis' judgment can be tested.

A. The Berger Position

The Supreme Court has epitomized "due process" as the "protection of the individual against arbitrary action."\textsuperscript{9} In addition, other Supreme Court statements were cited in my prior writings. (1) Our institutions "do not mean to leave room for the play and action of purely personal and arbitrary power."\textsuperscript{10} (2) The Constitution condemns "all arbitrary exercise of power."\textsuperscript{11} (3) "The delegated power, of course, may not be exercised arbitrarily . . . ."\textsuperscript{12} (4) The Court would not leave an individual "to the

...
absolutely uncontrolled and arbitrary action of... [an] administrative officer...”13 (5) A state governor’s “order may not stand if it is an act of mere oppression, an arbitrary fiat that overleaps the bounds of judgment.”14 (6) “[T]here is no place in our constitutional system for the exercise of arbitrary powers. ...”15 Such utterances clearly furnish evidence of a constitutional doctrine that arbitrariness is reviewable.

B. The Davis Position

In support of his assertion that “The case law is overwhelmingly in support of [his] position,” Professor Davis states:

For instance, when an officer was buying steel for the government, the Supreme Court in holding that the officer’s determination was not judicially reviewable did not even mention the possibility that a constitutional question might be involved.16

Nonmention of a “constitutional question” in a case affords a dubious base upon which to build constitutional doctrine. Repeatedly, for example, the Court has rejected arguments that the issue of jurisdiction was settled because the Court had proceeded in earlier cases without noticing it.17 Professor Davis himself criticized Perkins v. Lukens Steel Co.18 because it overlooked important constitutional considerations.19 It is therefore

sylvania, 382 U.S. 399 (1966), a Pennsylvania statute authorizing a jury to impose costs of criminal prosecution on a defendant acquitted of a misdemeanor charge was held “invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs.” Id. at 402. In other words, one may not be deprived of protection against arbitrariness.

15. Garfield v. United States ex rel. Goldsby, 211 U.S. 249, 262 (1908). Professor Davis professes to “share” my “passionate belief” in this statement. Davis, Final Word 815. Despite the above-quoted statements, Professor Davis maintains that Berger’s “position is not at all supported by constitutional doctrine.” Davis, Postscript 831. (Emphasis added.)
18. 310 U.S. 113 (1940).
19. “The Court was forgetting that even when the government is acting in a proprietary capacity it is still subject to constitutional limitations.” 1 Davis, Administrative Law Treatise § 7.12, at 456 (1958) [hereinafter cited as Davis, Treatise]. At another point he stated, The Court is going too far when it says that the government
an unenviable feat to derive from nonmention of the constitutional issue in *Perkins* the proposition that arbitrariness cannot be challenged on constitutional grounds. It exhibits a singular taste in “authorities” to single out the nonmention of the constitutional issue in *Perkins* while ignoring affirmative statements that arbitrariness is unconstitutional.

Another case invoked by Professor Davis is *Switchmen’s Union v. National Mediation Bd.*, which, he declares, “held administrative discretion unreviewable.” Were this the fact, it would still beg the question whether “abuse of discretion” is also unreviewable. Professor Davis persists in ignoring the fact that “discretion” and “abuse of discretion” are opposites, and that the former does not include the latter, as courts have repeatedly stated and as Congress made clear. Then too, since review of arbitrariness is the rule—as section 10(e) demonstrated afresh—and since his “solution” at most seeks selective unreviewability in the exceptional case where prior “law” allegedly so required, it is incumbent upon him to point to the reasoning or factors in *Switchmen’s* which indicate that the Court departed from the norm. Blandly to equate a holding that “discretion” is not reviewable with a decision that “abuse of discretion” is not reviewable falls far short of proof that the Court so held.

In fact, no issue of arbitrariness was presented. As the Court later explained, *Switchmen’s* “involved a question of stat-

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4 DAVIS, TREATISE § 28.06, at 26. For an example of invalid nonreligious and nonracial discrimination in this area, see Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961). See also Berger, Article 55 n.2.

20. The Court held that the plaintiffs had no “standing” to challenge an administrative interpretation because the government has “an unrestricted power . . . to determine those with whom it will deal . . . ;” 310 U.S. at 127, 132. The theory of “standing” is that “the court lacks jurisdiction to consider the validity of the governmental action.” 3 DAVIS, TREATISE § 22.01, at 209. A decision that the Court lacks jurisdiction to decide is quite different from a decision on the substantive question of whether the plaintiff has a constitutional right which is entitled to protection. Professor Davis thwacked the decision lustily: the case is of “questionable soundness,” the Court has since “backtracked,” etc. 4 DAVIS, TREATISE § 28.07, at 32; 1 DAVIS, TREATISE § 7.12, at 456.

22. Davis, Postscript 531.
23. See §§ II & III infra.
24. Davis, Comment 21; Berger, Reply 810.
utory construction,” and mistaken interpretations of law are not indicia of arbitrariness. Arbitrariness patently played no role in the case. Equally clearly, no constitutional issue was presented in *Switchmen’s,* for the Court stated “all constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced.” Finally *Switchmen’s,* says the Davis Treatise, is “much the most important case holding that a statute inexplicitly precluded review,” i.e., the case comes within the first exception of section 10, where “statutes preclude judicial review.” It is under this heading that the Davis Treatise discusses *Switchmen’s.* The case is not even mentioned in the discussion of the second exception, pertaining to “action committed by law to agency discretion.” From this it may be inferred that in a more dispassionate moment Professor Davis thought *Switchmen’s* entirely irrelevant to the “discretion” exception.

The last case cited by Professor Davis to show that “the case law is overwhelmingly in support of [his] position” is *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees,* another inexplicit statutory preclusion case which expressly relied on *Switchmen’s.* Apparently invoking *Leedom v. Kyne,* a case subsequent to *Switchmen’s,* United Airlines contended “that *Switchmen’s Union* does not control a claim that the [National Mediation] Board has ignored an express command of the Act.” The Court, however, found that “the contention is completely devoid of merit.” In short, an alleged error in the Board’s interpretation of law was challenged, and the Court concurred with the Board. Absent arbitrariness there was of course no need to discuss the constitutional issue that

27. 320 US. at 301.
28. 4 DAVIS, TREATISE § 28.09, at 42.
29. Ibid. Whether Congress can deprive the courts of jurisdiction to hear claims that constitutional guarantees are invaded remains to be decided. See Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953).
30. 4 DAVIS, TREATISE § 28.16, at 80.
31. Davis, Postscript 831.
34. 380 U.S. 650, 661 (1965).
35. Ibid.
might be presented by an attempt to foreclose review of arbitrariness.

Perkins, Switchmen's, and Brotherhood are the "overwhelming" proof cited by Professor Davis in support of his "position . . . that some administrative discretion is unreviewable for arbitrariness or abuse . . . under the Constitution." The transformation of such tenuous, farfetched inferences into "overwhelming" proof shakes confidence in his judgment. And what is one to say about reliance on such "proof" when it is accompanied by willful failure to comment upon a line of clearly opposed Supreme Court statements? That an omission to notice a point that calls for notice is a sin which is high in the Davis decalogue is revealed by his recent critique of Professor Jaffe, wherein Jaffe is charged with no less than fourteen such omissions. For example: "He [Jaffe] simply looks the other way and pretends that the large body of law does not exist, even after it has been pointed out to him. And he offers no explanation for ignoring it." Measured by his own yardstick, Professor Davis falls short of what he would require from others.

36. Davis, Postscript 831.
37. Professor Davis also cites § 28.19 of his Treatise, but I assume that he selected his best cases for discussion. See notes 9–15 supra and accompanying text; cf. note 16 supra.
38. Davis on Jaffe, 645, 646, 647, 649, 650, 652, 656, 657, 659, 663, 670 (twice), 671, 677.
39. Id. at 670. "The large body of law represented by the eleven cases is the body of law which Professor Jaffe refuses to recognize. He does not conclude that it is unsound. He gives no reason for rejecting it. He simply ignores it." Id. at 671. "Especially unfortunate, in my opinion, is his failure to let his readers know about the sixth of my items . . .." Id. at 677.
40. One of the Davis' strictures is especially pertinent: the criticism of Jaffe for failure to follow Davis' interpretation of the legislative history bearing on the words "adversely affected" in § 10 of the APA. Id. at 668-69. In my article which touched off the Berger-Davis debate, I made a detailed analysis of this history and the Davis interpretation, and was constrained to conclude that his interpretation was faulty. Berger, Article 84-87. Before twitting Jaffe for nonacceptance or failure to notice the Davis interpretation, it might be thought that Davis would take account of my recent criticism of his view.

For other examples of Davis' persistent neglect to take account of unpalatable facts at about the time that he was berating Jaffe for such failures, see Berger, Reply 790, 792; Berger, Rejoinder 819, 820, 821. Professor Bailey, who rose to the defense of Dean Pound against Davis' attack, commented on Davis' "own agility in avoiding contact with unpleasant facts." Bailey, Dean Pound and Administrative Law—Another View, 42 Colum. L. Rev. 781, 802 (1942).

Finally, because Davis had repeatedly belabored me with "the cases," see Berger, Reply 794-95, I devoted eight pages to painstaking analysis of his citations and demonstrated that they did not bear the
II. THE STATUTORY WORDS

The necessity for Professor Davis' interpretive panacea (of which more anon) springs, he would have us believe, from the confusion of terms on the face of the statute—the words are allegedly "unclear." My demonstration that the confusion is of his own making provoked the statement, "I can hardly believe my eyes, because I had supposed that no reasonable person could find the words clear." Since Professor Davis would not question that he is a "reasonable person," I shall avouch him to witness. In his original "Comment," addressing himself to my "mistaken" denial "that administrative arbitrariness or abuse of discretion is sometimes unreviewable," he stated that "the words of [section 10 of] the Administrative Procedure Act are so clear that occasion for doubting their meaning seems surprising.... When the statutory language is so clear, resort to legislative history should be unnecessary."

But since those statements constitute at best only a plea in mitigation, let me not glide over my own "unreason." To demonstrate my "unreason" Professor Davis telescopes the second exception of section 10 with section 10(e): "Except so far as . . . agency action is by law committed to agency discretion . . . the reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion," and asks "Is the provision clear or unclear?" He answers that it is unclear because "the exception consumes the whole power of the court, so that whenever the agency has discretion the court is prohibited from setting aside an abuse of discretion." On his "literal" reading, which wraps "discretion" and "abuse of discretion" in one skin, that result would certainly follow. His "literal" reading proceeds from an assumption that "abuse of discretion" is embraced within "discretion," so that an exception for "discretion" also

41. Davis, Postscript 823.
42. Davis, Comment 18. See also his remark in text accompanying note 58 infra.
43. Davis, Postscript 823-24.
44. Ibid.
45. Initially he stated that the courts "unanimously" read the clause "literally." See text accompanying note 58 infra. Under the impact of my criticism he has tempered his claim; now the "literal" meaning is what "I [Davis] consider to be a literal interpretation." Davis, Postscript 823.
excepts the "abuse." But that assumption, I have demonstrated, runs counter to judicial practice and to the intention of Congress, and is repelled by the face of the statute. Only Professor Davis' invincible dogmatism enables him to persist in lodging "abuse of discretion" within "discretion" without so much as a reference to my demonstration that his view is untenable.\footnote{See Berger, Article 61-62; notes 51-55 \textit{infra} and accompanying text.} If my extended analysis is mistaken, he owes his readers an explanation.

To begin with the face of the statute, section 10(e) states that "abuse of discretion" is "not in accordance with law."\footnote{Emphasis added.} The second exception of section 10 is for action "by law committed to agency discretion." Congress manifestly did not "by law" commit to agency discretion action which it stated was "not in accordance with law." Thus the face of the statute itself makes it "clear" that the "discretion" exception was not designed to impinge on the directive to set aside "abuse of discretion." Further, for Congress and for the courts, even prior to the APA, "discretion" and "abuse of discretion" were opposites. One posits the reasonable exercise of delegated power; the other, unreason and oppression.\footnote{"This court can and should insure that the agency stays within the bounds of reason and outside the realm of caprice . . . ." North Cent. Airlines v. CAB, 265 F.2d 581, 584 (D.C. Cir. 1959).} One is lawful; the other is not, as section 10 itself makes plain. Chairman Walter, referring to the phrase "by law committed to agency discretion," said that agencies "do not have authority \textit{in any case} to act blindly or arbitrarily,"\footnote{Emphasis added.} again showing that the exception for "discretion" was not meant to affect the section 10(e) direction to set aside "abuse of discretion." Walter's view reflected that of the courts. The differentiation was sharply drawn in \textit{Yick Wo v. Hopkins},\footnote{118 U.S. 356 (1886).} where the

\footnote{46. See Berger, Article 61-62; notes 51-55 \textit{infra} and accompanying text.} \footnote{47. Emphasis added.} \footnote{48. Emphasis added.} \footnote{49. Under the Administrative Procedure Act all agency action is subject to review except where specifically precluded by statute or where it is "by law committed to agency discretion." 5 U.S.C. § 1009(a). However, again, the possibility of judicial review of arbitrary or capricious decisions would be present.} \footnote{88 Cong. Rec. 14992 (1963).} \footnote{51. 118 U.S. 356 (1886).}
Supreme Court condemned an ordinance that conferred
not a discretion . . . but a naked arbitrary power to give or
withhold consent . . . . The power given to them is not con-
fined to their discretion in the legal sense of that term, but is
granted to their mere will. It is purely arbitrary. . . .

That distinction has frequently been reiterated: "discretion . . .
means sound discretion, not discretion exercised arbitrarily"; an
arbitrary finding "is outside the administrative discretion
conferred by statute"; an officer "exceeds his authority by mak-
ing a determination which is arbitrary or capricious." So one
who concludes that "discretion" does not comprehend "abuse of
discretion," as both the courts and Chairman Walter emphasized,
has not, Professor Davis to the contrary notwithstanding, taken
leave of his senses.

Professor Davis employs the statutory setting to expose "the
kind of thinking Mr. Berger uses in attacking" him: Berger un-
justly "leads the reader to believe that I [Davis] both favor and
oppose a literal reading of the same provision." The contra-
diction is in fact so glaring as to cry out for explanation; instead
Davis substitutes a red herring, as a quick survey of the facts
will disclose. The point merits examination, for it illustrates
once again Davis' unfortunate incapacity to confess error. Once
he has taken a position, he seems driven to maintain it at all
costs.

In his "Comment," Professor Davis repeatedly charged me
with rejecting a "literal" reading of the "except" clause, which
allegedly the courts "unanimously" read "literally." He stated
that:

One clear expression of Congress in favor of preventing review
is the provision of § 10 of the APA allowing review "except
so far as . . . agency action is by law committed to agency
discretion." Unlike Mr. Berger, the courts uniformly read this
provision literally, because they believe that Congress intended
what it so clearly said. . . . In sum, the courts reject the
Berger view mainly because they allow Congress to govern on

52. Id. at 366-67.
53. Smaldone v. United States, 211 F.2d 161, 163 (10th Cir. 1954).
Film Corp. v. Trumbull, 7 F.2d 715, 727 (D. Conn. 1925); "The use of
the words 'within the discretion of the commission' does not import
absolute and capricious discretion."; Markall v. Bowles, 58 F. Supp. 463, 465 (N.D. Cal. 1944); note 49 supra. For additional citations see Berger, Reply 61 n.33.
56. Davis, Postscript 824-25; see text accompanying note 61 infra.
57. Davis, Comment 25; Berger, Reply 787.
this subject.58
As he correctly notes, I said that "this is utterly misleading . . . as I shall prove by the Professor's own words."59 Those words were:

The literal language says that a court shall set aside an abuse of discretion except so far as the agency may exercise discretion. But this makes neither grammatical sense nor practical sense, for the exception consumes the whole power of the reviewing court . . . .60

This is true if the validity of the Davis "literal" reading is assumed. To take the curse off this manifest contradiction—between belaboring me for rejecting a "literal" reading and maintaining that such a reading makes no sense—Professor Davis now lamely charges that

without saying that he [Berger] is moving from a discussion of the "except" clause to a discussion of a combination of the "except" clause and a part of subsection (e), he quotes me as saying that the literal language makes neither grammatical nor practical sense. He thus leads the reader to believe that I both favor and oppose a literal reading of the same provision.61

Beyond doubt, Professor Davis is caught in the coils of just that contradiction, and his "combination" argument seeks to obscure rather than explain the fact.

From the beginning, Davis' argument was built on the "combination." The categorical, unqualified section 10(e) directive to set aside arbitrariness leaves no room for selective unreviewability. The issue is whether the operation of section 10(e) was curtailed by the "except" clause, and his entire "literal" interpretation argument was designed to rebut my view that the clause left section 10(e) untouched. It constituted his opening salvo to bolster his answer of "no" to "the two questions of (1) whether the Berger position is the law and, (2) whether it ought to be the law."62 He invoked the "except" clause as a "clear expression of Congress in favor of preventing review" to explain why "the courts reject the Berger view."63 That is why he drummed away that the courts "uniformly" read the "except" clause "literally"64 and "uniformly give full effect to the literal words of the 'except' clause."65 The Supreme Court, he stated,

58. Davis, Comment 25. (Emphasis added.)
59. Davis, Postscript 824, quoting from Berger, Reply 787.
60. Davis, Comment 21. (Emphasis added.)
61. Davis, Postscript 824-25.
62. Davis, Comment 17.
63. See text accompanying note 58 supra.
64. Davis, Comment 25.
65. Id. at 17.
reads that clause literally, interpreting it according to the face value of its words,” meaning that if Congress “has left ['a matter'] to the discretion of the administrators,” it is unreviewable. Berger alone “rejects a literal interpretation of the ['except' clause] provision of § 10.” If all this was without bearing on section 10(e), if it was not being employed by Davis in “combination,” it was utterly pointless. The fact is that he resorted to the “except” clause to curtail the sweep of section 10(e), and that he read the two in “combination.”

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 declare that when the “except” clause is read in “combination” with section 10(e) it makes no sense. Whether or not I sufficiently emphasized that Professor Davis was referring to the “combination,” the disastrous effect of that declaration upon his reiterated insistence on a “literal” reading is not altered.

66. Id. at 18.
67. Id. at 25.
68. Professor Davis has not yet sorted out his ideas. At the outset of his “Postscript” he states, “The introductory clause of section 10 says in part: ‘Except so far as . . . agency action is by law committed to agency discretion. . . .’ I think these words are clear, and I have pointed out that the courts have consistently given them what I consider to be a literal interpretation.” Davis, Postscript 823. In fact, however, Professor Davis does not really rely on a “literal” reading, but rather on a “practical solution” of a “difficult” interpretative problem. See Berger, Reply 791; Davis, Postscript 825; § IV infra.

But Professor Davis persists in playing ducks and drakes with the “literal” argument. Witness the admission he would wring in his “Postscript” from my early statement that on a literal reading the exception of “discretion” at the outset of Section 10 may be thought to exempt “abuse of discretion” and “arbitrary” action from review. But such a reading must be rejected because it produces unreasonable consequences . . . . Berger, Article 58. “May be thought” is tentative, and it is not equivalent to a categorical assertion of my belief, particularly when such a “literal” reading is patently unreasonable, as Professor Davis agrees. But being less reluctant than he to acknowledge that I can modify early expressions in the light of more mature study, I admitted in my “Reply,” after setting out a comprehensive basis for my view that “discretion” and “abuse of discretion” are “opposites” and were so considered by courts and Congress, that though my article pointed out that Congress had these differences in mind, I did not sufficiently emphasize that Davis’ “literal” reading turned on an assumption that Congress employed the statutory terms merely to represent different aspects of the same thing, and I was for the moment, in fact, seduced by his use of “literal.” Berger, Reply 788 n.30. Although my guarded early remark was thus
The flaw is not in my "kind of thinking" but in the contradiction in which Davis trapped himself. Since he cannot adequately explain that contradiction, he takes refuge in a specious intimation that I was unfair in not emphasizing that his rejection of a "literal" reading rested on a "combination" of the "except" clause and section 10(e). That intimation is repelled by the fact that self-evidently he built on the two of them in "combination" in order to refute me, and the fact that his own statement discloses on its face that he had "moved" to a discussion of the "combination," and that there was in consequence no need to underscore the fact.

Before moving to the legislative history, let me summarize the argument from the face of the statute, saving the Davis gloss on "by law committed" for later discussion. The statute employed terms which courts generally regarded as mutually exclusive: "discretion" was a reasonable exercise of delegated power which did not comprehend "abuse of discretion," the oppressive, unreasonable abuse of power. The judicial differentiation was underscored by the section 10(e) provision that "abuse of discretion" is "not in accordance with law" and therefore could not be comprised in "discretion by law committed," for self-evidently the "law" does not "commit" what is "unwarranted by law." The legislative history abundantly confirms this, my "literal" reading.

supplanted by the mature judgment expressed in my "Reply," Professor Davis employs the earlier remark to suggest that it represents my view. He states in his "Postscript" that Berger "finds that the 'discretion' exception does not bar review of 'abuse of discretion,' a conclusion not warranted by a literal reading of the words, as Mr. Berger himself asserts." Davis, Postscript 824.

69. Professor Davis also states that "Mr. Berger repeatedly goes wrong by reading portions of section 10 without taking into account the 'except' clause." He charges that Berger says without qualification that section 10(e) expressly instructs the courts to set aside action that is "arbitrary" or an "abuse of discretion." In the act as written, what he quotes in these passages is modified by the "except" clause which he completely ignores in such statements as I have quoted. Davis, Postscript 829-30. Having shown that Davis himself considers that under his "literal" reading the "exception consumes the whole power," I had good reason to think that the "except" clause left subsection 10(e) unaffected. To the extent the Davis "solution" depends on his "literal" reading, I did my duty when I demonstrated the untenability of that reading. It was not thereafter incumbent upon me to restate my refutation every time I referred to subsection 10(e), and indeed such restatement would have been cumbersome and unnecessary.

70. See text accompanying note 60 supra.
III. THE LEGISLATIVE HISTORY

Originally Professor Davis erroneously charged me with suppression, with "choosing materials [from the legislative history] on one side" and ignoring "the strongest part of it," which allegedly "supports [Davis'] literal reading." 71 Originally he declared "the principal answer" to the question "why should not the law be what [Berger] wants it to be" is that Congress gave "clear expression . . . in favor of preventing review" by "what it so clearly said." 72 If our debate has accomplished nothing else, it has caused Professor Davis to retreat from such vulnerable positions. Now his purpose in presenting "the legislative history opposed to Mr. Berger's position . . . is not to show that it leads to a conclusion against Berger," but merely to "show that it is conflicting." 73 Now the legislative history proffered by Davis merely "seems to [him] rather substantial, just as the legislative history in support of Mr. Berger's view is rather substantial." 74 How "substantial" the respective histories are, the reader may now judge for himself.

A. THE BERGER EVIDENCE FOR REVIEWABILITY OF ARBITRARINESS

1. Referring to matters "by law committed to the absolute discretion of administrative agencies," Chairman Walter said: "They do not have authority in any case to act blindly or arbitrarily." 75

2. Early in the legislative process, it was "proposed that the phrase 'by law committed to agency discretion' might be clarified to indicate that judicial review is conferred only to correct an 'abuse of discretion granted by law.'" 76 In other words, it was feared that "discretion" as well as "abuse of discretion" would be reviewable. The Senate committee concluded that "so far as necessary, the matter may be explained by committee report," 77 thus exhibiting an understanding that the "committed" phrase did not impinge on review of "abuse of discretion."

3. Both the Senate report and the House report stated that it has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined

71. Davis, Comment 18; see Berger, Reply 792-93.
72. Davis, Comment 25. (Emphasis added.) This was said with respect to the face of the statute; see text accompanying note 58 supra.
73. Davis, Postscript 826.
74. Id. at 827.
75. S. Doc. No. 248, at 368. (Emphasis added.)
76. Id. at 36. (Emphasis added.)
77. Ibid.
to the scope of the authority granted [arbitrariness is never authorized] or to the objectives specified ["discretion" reasonably exercised as opposed to "abuse of discretion"]. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.78

Least of all did Congress want to issue a "blank check" to be arbitrary, which is exactly what the Davis plea that some arbitrariness must be unreviewable calls for.

4. Chairman Walter explained that the APA was meant to be operative "across the board" in accordance with its terms or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. . . . Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment.79

Translated into relevant terms, no agency or operation was exempted from the section 10(e) directive to set aside "abuse of discretion." If a particular function was "intrinsically unsuited"—the Davis criterion—to judicial review of arbitrariness, all such functions would have been exempted. But the APA makes no blanket exemption of any function from judicial review of arbitrariness. To invoke "by law committed" to preclude judicial review is to invite a checkerboard of unreviewability turning on the fortuitous drafting of primary agency statutes. So far as such statutes precluded review, they were preserved by the first exception of section 10 for preclusive statutes. One who would cut down the avowed congressional "across the board" policy needs a sharper blade than the amorphous "by law committed."

5. Both the Senate report and the House report state that section 10(e) "lists the several categories of questions of law," among them "arbitrary" action and "abuse of discretion," that "are for courts rather than agencies to decide."80 And the House report states that "in any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him pro tanto from prevailing therein."81 The "discretion" exception, in other words, does not bar review of "abuse of discretion"; the litigant may obtain review, although he may then fail to prove his complaint of arbitrariness.

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78. Id. at 212, 275.
79. Id. at 250.
80. Id. at 213-14, 278 ("abuse of discretion" appears only in the House version).
81. Id. at 275. (Emphasis added.)
During the Senate debate, Senator Donnell asked whether a person who claims an abuse of discretion would be barred from judicial review when the agency has "a discretion vested in it by law." Chairman McCarran replied that judicial review would be available "where an agency ... by caprice makes a decision .... It must not be an arbitrary discretion." Thus a leading exponent of the APA explained that the exception for "discretion" would not bar review for "abuse of discretion."

Immediately after the enactment of the APA, Chairman McCarran explained to the American Bar Association that "committed 'by law' means, of course, that claimed discretion must have been intentionally given to the agency by Congress, rather than assumed by it ..."; and he added that "'abuse of discretion' is expressly made reviewable [by section 10(e)]" once more demonstrating that the "committed" phrase was not designed to curtail review of arbitrariness.

These citations unmistakably demonstrate that arbitrariness was to be reviewable without qualification—in Chairman Walter's words, "in any case."

B. The Davis Evidence Against Reviewability of Arbitrariness

Do the Davis citations to "the legislative history opposed to Mr. Berger's position" show that the phrase "by law committed to agency discretion" was meant to curtail the section 10(e) mandate and to make some arbitrariness unreviewable? It can be categorically stated that nowhere in the legislative history will be found the plea for selective unreviewability of arbitrariness made by Professor Davis. It is entirely a product of his lucubrations. His citations, which follow, add up to little more than this:

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82. Id. at 311. McCarran was Chairman of the Senate Committee on the Judiciary. See Berger, Article 64.
84. Davis, Postscript 826.
85. See text accompanying note 106 infra.
"by law committed" means "by law committed," and "discretion" must be "preserved."

1. The Senate Committee said: "Section 10 on judicial review does not apply in any situation so far as . . . agency action is by law committed to agency discretion . . . . The basic exception of matters committed to agency discretion would apply even if not stated at the outset."86 The "basic exception [which] . . . would apply even if not stated" refers to the pre-APA discretion, i.e. the reasonable exercise of power, uncluttered by the gloss on "by law committed" which is Professor Davis' later brainchild. He has never claimed that the words "by law committed" were words of art prior to the APA. His reading confessedly represents no more than his "practical solution" of a "difficult problem" of interpretation;87 the "legislative history," he admits, "does not compel" his interpretation.88 Therefore, when the Senate committee merely quoted the statutory words "by law committed," it said nothing which advances the Davis argument that those words curtail the scope of section 10(e). In the absence of any contrary explanation, the presumption must prevail that when Congress employed the terms "discretion" and "abuse of discretion," it adopted the mutually exclusive meanings given those two terms by the courts,89 so that the exception for "discretion" did not affect review of "abuse of discretion." That presumption is confirmed by the distinction Chairman Walter carefully drew when, after alluding to the exception for "discretion," he stated that arbitrariness would be reviewable "in any case."90

2. The House Committee said: "Section 10 on judicial review does not apply in any situation so far as . . . agency action is by law committed to agency discretion . . . . Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act . . . ."91 Again "by law committed" means "by law committed." The reference to "broadly drawn" grants of "large discretion" speaks to the problems raised by standards so broad as to leave an agency virtually at large. As the parallel passage in the Senate report states, "If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of

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86. Davis, Postscript 827.
87. Id. at 825, 828. See § IV infra.
88. Davis, Postscript 828.
90. See text accompanying note 75 supra. Walter's statement is echoed by the House report. See text accompanying note 81 supra.
91. Davis, Postscript 827.
course have no statutory question to review."\(^{92}\) More precisely, given an overly broad grant of power, almost any administrative act will be within its confines and will raise no issue of limits which courts must apply. Courts cannot cut down "large" grants of power; but they can police "limits" and they can, by review of arbitrariness, prevent the oppressive exercise of limited grants.

3. The Senate Judiciary Print said of Section 10: "The introductory exceptions state the two present general or basic situations in which judicial review is precluded—where (1) the matter is discretionary or (2) statutes withhold judicial powers." The word "present" seems to me [Davis] to indicate an intent to have previously-existing law continue with respect to review of discretion, and this is the interpretation the courts have given.\(^{93}\)

The "present" law with respect to "discretionary" matters was that courts would not interfere with the reasonable exercise of delegated power, but they would set aside "abuse of discretion" or "arbitrary" action. Professor Davis' citations of pre-APA cases for the contrary "interpretation the courts have given" simply fail to establish insulation of arbitrariness from judicial review, and it would be supererogatory to attempt a summary of my extended analysis of those cases.\(^{94}\) If my analysis be faulty, the fact remains those cases were not called to the attention of Congress; and as my quotations from the legislative history make clear, Congress intended to make abuse of discretion reviewable without qualification. The word "present" affords a flimsy basis for Davis' disregard of Chairman Walter's statement, for example, that arbitrariness was to be reviewable "in any case."

4. The Attorney General said that section 10 "in general, declares the existing law concerning judicial review." Mr. McFarland [Chairman of the ABA Special Committee on Administrative Law] said: "We do not believe the principle of review or the extent of review can or should be greatly altered. We think the basic exception of administrative discretion should be preserved, must be preserved."\(^{95}\)

\(^{92}\) S. Doc. No. 248, at 212: The quoted passage is followed by: "That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative power." Id. See also FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

\(^{93}\) Davis, Postscript 827.

\(^{94}\) For analysis of the cases, see Berger, Reply 796-804. Professor Davis never attempts to rebut this analysis, but is content to state that "after reading [Berger's] argument I find no reason to change any one of them [Davis' "interpretations"]." Davis, Final Word 814. See also Davis, Postscript 829: The reader who desires further light on Davis' unwillingness to revise a position once taken is referred to my analysis of his "interpretations."

\(^{95}\) Davis, Postscript 827.
The "existing law" was insulation of reasonable exercise of delegated power and review of oppressive abuse of discretion. Were this less clear, the Attorney General's at best equivocal utterance still is not sufficient to curtail the clear terms of section 10(e), particularly in light of the legislative history which repeatedly shows that arbitrariness was to be reviewable without qualification. Observe also that Mr. McFarland did not employ Professor Davis' talismanic "by law committed"; what was to be preserved was the "basic exception of administrative discretion," pure and simple. This from a chief draftsman of the Act who knew well enough where the bones were buried.

So compelling do his quotations seem to Professor Davis that he bursts into italics to stress that:

"In his Columbia Law Review Article, [Berger] has three pages under the title "The Legislative History" and those three pages do not mention any single statement I have quoted from the legislative history. Is he unwilling to look at the history that is against him?"

No, Professor Davis, Berger was not "unwilling to look"; he did look and for the above reasons concluded that those statements shed no light on whether the word "committed" was designed to curtail the section 10(e) directive in favor of selective unreviewability. Since no one faintly intimated in those statements or elsewhere that any kind of arbitrariness would be unreviewable, I found it difficult to conceive that the statements that I cited, which expressly corroborate the section 10(e) provision that arbitrariness would always be reviewable, could be overcome by ambiguous expressions that "discretion" was "by law committed" to agencies or that "discretion" was to be "preserved." Of course discretion was to be preserved, but the question is "was any part of 'abuse of discretion' to be preserved," and that question is not answered by assuming, in the teeth of judicial statements to the contrary, that "discretion" comprehends "abuse of discretion" and that therefore arbitrary action was to be "preserved."

Now that Professor Davis has brought forth his legislative history, the reader may judge for himself whether my vision was distorted. In my "Rejoinder" I stated there was "not a shred of evidence in the legislative history for [the Davis] view that arbitrary action was to be selectively unreviewable—all the evidence points the other way. So there is no conflict on this score in the legislative history." "Of all the strange Berger positi-
tions,” says Professor Davis, “this is the strangest.”98 Even more “strange,” I daresay, is his capacity to balance his few equivocal citations against the unambiguous legislative utterances which indicate that arbitrariness, without qualification, was to be reviewable—as Chairman Walter and the House Report stated, “in any case.”

IV. PROFESSOR DAVIS’ “SOLUTION”

Professor Davis’ arguments respecting constitutionality, the statutory terms, and the legislative history have crumbled under examination. Our constitutional system leaves no room for arbitrariness, and if that is not crystal clear, an equivocal statutory phrase such as “by law committed” should still be construed to avoid a constitutional doubt, especially when the Davis “solution” would curtail the express and unqualified section 10(e) directive to set aside “abuse of discretion.”

On what does Professor Davis build his theory that the words “by law committed” authorize selective unreviewability of arbitrary action? He admits: “I do not say that the statutory words require my interpretation. Nor do I say that the legislative history must be interpreted my way.”99 Instead, he offers his theory as “the best solution that I have been able to find for a difficult problem.”100 The difficulty is of his own making, proceeding from his assumption that “discretion” comprehends “abuse of discretion” and therefore the exception for “discretion” necessarily curtails the section 10(e) directive to set aside “abuse of discretion” aside. That assumption, as we have seen, flies in the face of judicial treatment of the two as opposites, a treatment followed by Congress. It prefers a construction which creates a “difficulty” to a traditional reading which avoids it.

Having generated a “difficulty,” Professor Davis then sought “a practical interpretation which will carry out the probable intent.”101 This “probable intent” was speedily transmuted into a “clear expression of Congress in favor of preventing review”;102 this was what Congress “so clearly said.”103 Happily, he has since beat a retreat. Now he does “not say that the statutory words require [his] interpretation.”104 Since, in addition and by

98. Davis, Postscript 826.
99. Id. at 825. Contrast this with the cocksure statement he made earlier. See text accompanying note 58 supra.
100. Ibid.
101. 4 Davis, TREATISE § 28.16, at 80. (Emphasis added.)
102. See text accompanying note 58 supra.
103. Ibid.
104. Davis, Postscript 825.
his own testimony, the "legislative history [in his view is] conflicting and unhelpful," and since he does "not base [his] position upon the legislative history,"[105] where does Professor Davis derive a "probable intent" to curtail the express section 10(e) mandate to set aside "abuse of discretion"? Certainly not from the face of the statute, which brands "abuse of discretion" as "not warranted by law" and therefore excludes it from "action by law committed to agency discretion."

Yet "by law committed" is the key building block in the Davis "solution":

The main idea is to emphasize the word "committed." So far as the action is by law "committed" to agency discretion, it is not reviewable, even for arbitrariness or abuse of discretion; it is not "committed" to agency discretion to the extent that it is reviewable. This means that the two concepts "committed to agency discretion" and "unreviewable" have in this limited context the same meaning. Both depend upon the statutes and the common law. To the extent that "the law" cuts off review for abuse of discretion, the action is committed to agency discretion. The result is that the pre-act law on this point continues.106

This "solution" is admittedly not "required" by the "statutory words"; neither is it required by the legislative history. Professor Davis is now content to state that "taken as a whole" the legislative history "is not inconsistent with [his] solution."107 But this is a very flimsy basis upon which to cut down the express terms of section 10(e). Moreover, exemptions from the APA—here from the express directive of section 10(e)—are "not lightly to be presumed."108 Against his "solution" also runs the conflict between "by law committed" and the section 10(e) declaration that arbitrariness is "not warranted by law," as well as Chairman McCarran's common sense explanation that "by law committed" simply means "intentionally given."109 Professor Davis' strained "solution" must also be weighed against his own "opposition to administrative arbitrariness and abuse of discretion,"110 his ostensibly "passionate belief" in the Supreme Court's "remark that 'there is no place in our constitutional system for

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105. Id. at 825, 828.
106. Id. at 825. See § VII infra for my critique of Davis' interpretation of pre-APA case law on this point. See also note 114 infra and accompanying text.
107. Davis, Postscript 828.
109. See text accompanying note 83 supra. The Chairman inferred that "by law committed" was without impact on § 10(e), for he went on to say that "abuse of discretion" is expressly made reviewable.
110. Davis, Comment 17.
the exercise of arbitrary power.'" He would do well to ponder the statement of Mr. Justice Frankfurter, a mighty paladin of the administrative process: "[H]e is no friend of administrative law who thinks that the Commission should be left at large," and, of all things, to act oppressively and unreasonably with impunity.

V. THE RELATION BETWEEN THE FIRST AND SECOND EXCEPTIONS TO SECTION 10

The Davis "solution" "depend[s] upon statutes and the common law." He cites no case which does not turn on an explicit or tacit interpretation of the statutory grant of discretion, and his assertion that there is a "common law" of nonreviewable arbitrariness is really undocumented. If a statute bars review, the matter is covered by the first exception to section 10, "where statutes preclude review"; and if a judicial construction of such a statute bars review, this is "inexplicit" preclusion, which is also covered by the first exception. Thus a special construction of the second exception in order to preserve statutes which (allegedly) preclude review of arbitrariness is superfluous.

To this Professor Davis retorts that Berger apparently does not realize that whenever a statute precludes review of discretion, agency action is by law committed to agency discretion. That a statute precludes review does not mean that the discretion exception is inapplicable, for the two parts of the introductory clause overlap.

111. Davis, Final Word 815.
113. See quote in text accompanying note 106 supra.
114. The Davis citations are to cases that construed statutes and mistakenly concluded, in a few instances, that the mere grant of discretion cuts off review of arbitrariness. See Davis, Comment 18-23. For analysis of his citations, see Berger, Reply 796-804. Apparently he regards United States v. One 1961 Cadillac, 337 F.2d 730 (6th Cir. 1964), as an example of the "common law of unreviewability." See Davis, Comment 26-27. But that case also turned on a "discretion" statute—the Secretary of the Treasury, the statute provided, "may" act. In the forfeiture field there involved, the courts construed the statutory discretion against a background of holdings that remissions of forfeitures were an "act of grace." If there is a "common law" of unreviewable arbitrariness—a highly debatable "if"—not one such case was called to the attention of Congress. No one made a plea for insulation of arbitrariness from review in reliance on any decision; and there is not the faintest suggestion in the legislative history that the "committed" phrase was meant to be a vehicle of such insulation.
115. See Berger, Reply 811-12. An interpretation that Congress expressed itself tautologically is to "be avoided if fairly possible." Emery Bird Thayer Dry Goods Co. v. Williams, 98 F.2d 166, 172 (8th Cir. 1938).
116. Davis, Postscript 830. Apart from the second exception of § 10
His assumption that the two exceptions "overlap" raises the question: Why did Congress resort to "overlap"? Not, certainly, because it feared that a statute which explicitly or implicitly precluded review of abuse of discretion would not be caught up in the first exception. No one suggested that the second exception was needed if the first exception for statutory preclusion failed to shelter arbitrariness. Rather, by the second exception Congress wanted to make sure that the reasonable exercise of delegated power would be left untouched—that, in Mr. McFarland's words, the "basic exception for administrative discretion should be preserved."117 Others had expressed this same concern;118 and the second exception, I suggest, should be regarded as a precaution for that special purpose, not as an "overlap" to backstop inadequate coverage by the first exception of statutes which (allegedly) shield arbitrariness from review. This approach is indeed compelled by the need to avoid a dual set of standards for statutory unreviewability, which the "overlap" would inexplicably engender, as will hereafter appear.119

VI. THE "FREEZING" PROBLEM CREATED BY THE DAVIS ANALYSIS

Commenting on a particular agency statute, Professor Davis stated that "the whole question of complete unreviewability . . . might well be re-examined;"120 I pointed out that under his analysis the pre-APA interpretation of such statutes was frozen by the introductory exceptions in section 10 of the APA, and that he had painted himself into a corner.121 To my showing that he has deprived the courts of the power to reconsider their prior preclusive interpretations of primary statutes, he retorts:

which expressly precludes review of discretion, I recall but one statute which explicitly provides that the "discretion" which it confers shall be unreviewable. See Berger, Article 61. A few courts have concluded that because of the second exception to § 10 of the APA, the "discretion" conferred by other statutes is unreviewable. To speak of a statute which precludes review of "abuse of discretion" is therefore to assume the answer to the question at issue: was the mere grant of "discretion" meant to bar review of abuse of discretion.

117. See text accompanying note 95 supra.
118. As the House report stated: "Matters of discretion are necessarily excepted from the section, since otherwise courts would in effect supersede agency functioning." S. Doc. No. 248, at 275. See also id. at 36. In other words the normal, reasonable exercise of delegated power by an agency was to be left alone. This was what "discretion" meant to Congress and to the courts.
119. See § VIII infra.
120. Davis, Comment 28.
121. Berger, Reply 810.
Of course, if my analysis had any such effect, I would reject it. But the act did not freeze any prior practice. The act can codify pre-existing law and still leave the courts free to go on developing the codified law.\textsuperscript{122}

"More careful" reading, he states, would have led me to his statement that the "courts remain free, except to the extent that other statutes are controlling, to continue to determine on practical grounds in particular cases to what extent action should or should not be unreviewable even for abuse of discretion."\textsuperscript{123} But this statement is utterly irreconcilable with the sum of his other statements; he cannot have his cake and eat it too. Since my "misunderstanding" on this score is allegedly "unsound on a subtle basis and reaches the heart of [his] . . . interpretation,"\textsuperscript{124} it merits close consideration, the more so because if my demonstration is solidly based, Davis proclaims that he himself "would reject" his analysis.

According to Professor Davis:

"committed to agency discretion" and "unreviewable" have . . . the same meaning . . . To the extent that "the law" cuts off review for abuse of discretion, the action is committed to agency discretion. The result is that the pre-act law on this point continues.\textsuperscript{125}

The "discretion" exception, he stated, represented a "clear expression of Congress in favor of preventing review."\textsuperscript{126} If the existing "law" (primary statute) "cuts off review," if "the pre-Act law on this point continues," and if "committed to agency discretion" means "unreviewable" and was designed to "prevent" review, all this adds up to the incorporation in section 10 of the "pre-Act law" of unreviewability, which courts were given no power to change. This is incontrovertibly true with respect to a primary statute which expressly precludes review, for such a statute cannot be altered by the courts and it is plainly preserved by the first exception, "where statutes preclude review." So too, if such a statute had been judicially construed to prevent review, this inexplicit preclusion of review was likewise "continued" on the Davis analysis and cannot be changed by the courts. Such has been the judicial construction of the first exception.\textsuperscript{127}

\textsuperscript{122} Davis, \textit{Postscript} 825 n.13.
\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid.
\textsuperscript{125} Davis, \textit{Postscript} 825. By "pre-Act law" and the "law," Professor Davis means primary agency statutes which explicitly or implicitly preclude review. His inclusion of the "common law" was discussed in the text accompanying note 114 supra.
\textsuperscript{126} Davis, \textit{Comment} 25. (Emphasis added.)
\textsuperscript{127} It was said with respect to the first exception that "when, as in the Switchmen's case, it had been held that Congress had manifested
And despite the Davis "overlap" argument, we have no congressional indication that the "statutes" which govern "abuse of discretion" and their pre-Act interpretations were to be treated altogether differently, i.e., that the courts were powerless to alter inexplicit statutory preclusion under the first exception but had unlimited control over such statutory interpretations under the second exception. I submit that under the Davis analysis any "pre-Act" statutory preclusion of review, explicit or inexplicit, was the "law" embodied in the phrase "by law committed," that such "law" was to "continue," and that it was therefore placed beyond the power of judicial revision. And if there is no preclusionary statute that bars review, there is no independent judicial power to bar review of arbitrariness. By his own test, Professor Davis would therefore be well advised to "reject" his analysis.

VII. "THE CASES"

Throughout, Professor Davis has played a tattoo on "the cases," and though I analyzed his citations painstakingly he professes to be mystified about what my "main position about the case law is." My analysis was not wrapped in mystery:

1) His pre-APA cases and his two post-APA Supreme Court citations completely fail to sustain his claim that the grant of discretion barred review of arbitrariness; 2) Of the handful of cases which cite the Davis "solution," very few squarely hold that arbitrariness is unreviewable; the rest utter pure dicta as a prelude to review of arbitrariness. No case which cites his "solution" has attempted to compare it with the statutory terms, legislative history, and constitutional considerations—the courts have taken him on faith. Since I believe that Professor Davis is demonstrably "wrong," and since the cases which cite his "solution" uncritically can rise no higher than their source, I must perforce conclude that these citations are equally "wrong." Multiplication of such uncritical citations merely seeks to repel analysis with a nose-count. Error does not become sanctified

its intention to exclude review the new [APA] legislation was not to be construed as changing the situation." Air Line Dispatchers Ass'n v. National Mediation Bd., 189 F.2d 685, 689 (D.C. Cir. 1951). A fortiori, no court could do so. Switchmen's, said Professor Davis, is a case of inexplicit preclusion. See text accompanying note 28 supra.

128. Davis, Postscript 830.

129. For analysis of the Davis citations, see Berger, Reply 796-804.

130. See Davis, Postscript 830.

131. Davis maintains that such citations, which rely on a theory about which he has grown quite modest, represent "the law as it is,"
by repetition, even in the highest quarters.

The latest "case" which Professor Davis adds to his nose-count, *Vucinic v. United States Immigration & Naturalization Serv.*,\(^{132}\) serves only further to sap confidence in his judgment. *Vucinic*, he asserts, "adopts my analysis."\(^{133}\) Some "adoption"! Noting the difficulty Davis experiences in juxtaposing the "discretion" exception and the section 10(e) mandate to set aside "abuse of discretion," the court stated: "To solve the verbal puzzle, Davis suggests that the word 'committed' be employed . . . ." The court then quoted the Davis explanation and went on to say:

> It is certain that the granting or withholding of an alien crewman's parole into the United States under the Attorney General's regulation . . . lies within the District Director's "discretion" in the sense that he is responsible for receiving and weighing the relevant evidence and that the courts will not substitute judgment. However, I am unable to conclude that the decision relating to parole is "committed to . . . discretion" in the sense, to apply Davis's analysis, of making his findings, conclusions and order unreviewable—even for arbitrariness, capriciousness, or abuse of discretion. Moreover, courts have often refused to recognize even a fairly explicit denial of reviewability when the issues of arbitrariness or abuse of discretion are raised.\(^{134}\)

Actually the court in *Vucinic* found no magical compulsion in the "committed" phrase and was "unable to conclude" that the mere grant of "discretion" prevented review of "abuse of discretion." The reason appears on the face of the opinion: the court

never mind the powerful argument based on the face of the statute, the legislative history, and the constitutional doctrine denying arbitrariness any place in our system. When he says "our debate is about what the law is, not what it ought to be," Davis, *Postscript* 823, he speaks for himself. Properly construed, the statute, not Davis' few mistaken judicial followers, represents what the law is. If I am utterly unable to comprehend what the law "is," I am yet persuaded that arbitrariness is so alien to our institutions that the law "ought to be" that there is no place for arbitrariness, precisely as the Supreme Court has stated. See text accompanying notes 10 and 15 supra.

Professor Davis states that "Berger's principal claim of support in the case law is a dictum in a district court case that has now been decided by the Fourth Circuit [on other grounds]. The dictum does not seem to support [Berger] . . . ." Davis, *Postscript* 829. The reader will find that Davis' discussion of these decisions sheds revealing light on his way with a case. See Berger, *Rejoinder* 817-19. But I leave nose-counts to Professor Davis. If my analysis is sound, it calls for judicial rejection of the Davis "solution." If Davis' analysis is unsound, it is not improved by uncritical judicial citation.

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133. Davis, *Postscript* 828 n.27.
declined to assign greater weight to the equivocal “committed” than to “a fairly explicit denial of reviewability” which, the opinion noted, courts have “refused to recognize” as a bar to review of arbitrariness. Far from being an “adoption” of Davis’ “solution,” Vucinic constitutes a tacit rejection. His earlier citations stand no better, as the reader may confirm by resort to my previous analysis.

In evaluating uncritical citations of the Davis “solution,” it is to be noted that the claims he earlier made for his “solution” have shrunk very considerably. He now disclaims the proposition that his “solution” is required by the statutory words or the legislative history; he claims no more than “it is the best solution that I have been able to find for a difficult problem.” And he continues with the deplorable statement: “Rightly or wrongly, this solution has been adopted by every court that has considered it . . .” If “wrongly,” the citations add up to absolutely nothing. And the astonishing implication of “wrongly” is that it matters not whether Davis’ “solution” is “right” so long as it is cited! The overtones of “rightly or wrongly” are amplified by his continued reliance on the “Cadillac and Pullman cases,” which are “against” me. Those cases, as I stated “do not rely on Professor Davis but conclude that the discretion exception cuts off review of abuse of discretion on the ground that ‘we have no right to disregard this plain language.” In short, they rest on a “literal” reading of the “except” clause. To be sure, “the law of the[se] cases is against” me, but it does Professor Davis little credit to rely upon them. For, as I also pointed out, “the literal language of the second exception, read against section 10(e), as Professor Davis said, ‘makes neither grammatical sense nor practical sense, for the exception consumes

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135. See text accompanying note 134 supra. Assuming the Davis “solution,” why was the court “unable to conclude” that the grant of discretion was “by law committed” so as to make arbitrariness unreviewable? Professor Davis does not tell us. I have called upon him to furnish criteria whereby courts (in the absence of alleged “pre-Act law”) may determine when a grant of discretion is “by law committed” so as to foreclose review. See Berger, Rejoinder 819. See also Berger, Reply 798-803 (discussion of the maze into which his “solution” led one court). But he has been laggard. The courts that cite his “solution” come to diametrically opposed results, with Davis conferring his blessing on “both your houses.” See Berger, Rejoinder 819-21.


137. Davis, Postscript 825. (Emphasis added.)


139. Berger, Reply 803.
the whole power of the reviewing court . . . .”¹⁴⁰ To this view he still adheres;¹⁴¹ and it is on this discredited “literal” reading that Pullman and Cadillac rest. Professor Davis is therefore flailing me with cases which invoke an analysis that he himself repudiates.

VIII. IDENTIFICATION OF THE CRITERIA FOR “BY LAW COMMITTED”

Suppose that I am mistaken in my view that the face of the statute, the legislative history, and the Constitution bar the Davis “solution.” Suppose that section 10 does in fact make selective arbitrariness unreviewable. How are the courts then to determine whether a particular function is “by law committed” so as to foreclose judicial review? One court which, unlike the Vucinic court, attempted to apply the Davis “solution,” became involved in a maze.¹⁴²

Professor Davis recognizes that when a statute explicitly or implicitly makes abuse of discretion unreviewable, the situation is covered by the first exception—“where statutes preclude judicial review.” But his plea in avoidance is that the first and second exceptions “overlap.”¹⁴³ Be it so. Indubitably the test of nonreviewability under the first exception is that stated in the House report: “To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.”¹⁴⁴

¹⁴⁰ Davis, Comment 21.
¹⁴¹ Davis, Postscript 824.
¹⁴² In Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965), the court held that action is “committed by law to agency discretion” when the statute is “permissive,” i.e., when it permits rather than commands an administrator to act. Despite Professor Davis’ acclaim of the case as “well-considered,” he finds it possible to approve of cases that are at odds with it. See Berger, Reply 799-803, 808-09; Berger, Rejoinder 820. Furthermore, the “permissive” formula of Ferry v. Udall runs counter to the recent decision in Consolo v. Federal Maritime Comm’n, 383 U.S. 607 (1966). There the statute also provided that “the Board . . . may direct the payment,” and the Court noted that “this contemplates that the Commission shall have a certain amount of discretion . . . .” After considering certain facts, the Court concluded that “this by itself might not be sufficient to establish that the Commission abused its discretion under the Act,” id. at 621-22. Thus the fact that a statute is “permissive” does not, Ferry v. Udall to the contrary notwithstanding, shut off review of abuse of discretion.
¹⁴³ Davis, Postscript 830. See § V supra.
¹⁴⁴ S. Doc. No. 248, at 275. (Emphasis added.)
My opinion is that a discernible intent of Congress is enough whether or not it is explicitly expressed. And I know of no “presumption of the APA in favor of review.” The APA codifies the previous law, including whatever presumption the previous law contained, but the APA does not otherwise erect any presumption in favor of review.

Davis on Jaffe, 651. These statements are themselves unimpeachable. 1) Davis’ “The APA codifies the previous law” is contradicted by the Senate report statement that the proposed bill was not “a codification of administrative law.” S. Doc. No. 248, at 193. 2) The House report did not require merely a “discernible intent” to bar review, which might perhaps be satisfied by legislative history of a given statute. Instead, it demanded that the given statute “must upon its face give clear and convincing evidence of an intent to withhold it,” a far different and more stringent requirement. 3) A “presumption” is simply an inference from known facts. The relevant facts, in the words of Chairman Walter, are that

Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not [by a given statute] expressly provided for judicial review would be completely immaterial...

Id. at 368. Plainly, Congress assumed that judicial review would be the rule, and expressly stated that statutory nonreviewability is the “rare” exception (“Very rarely do statutes withhold judicial review”). Id. at 212, 275, 368. Though Congress did not employ the word presumption, what it said is fairly translatable into a presumption that judicial review would be available in the absence of an unmistakable congressional intent to preclude it, a presumption that is reinforced by congressional statements that “Judicial review is of utmost importance...” Id. at 217, 281. As Chairman McCarran explained to the bar shortly after enactment of the APA,

it is therefore a major premise of the statute that judicial review is not merely available but is plenary in every proper sense of the word. [N]o citizen need complain that he has been subjected to injury beyond the law.

McCarran, Improving “Administrative Justice”- Hearings & Evidence; Scope of Judicial Review, 32 A.B.A.J. 827, 893 (1946)

Professor Davis’ captious rejection of the Jaffe “presumption” is the more mystifying because on the preceding page he stated that “The decisions of the past two or three decades fit reasonably well the idea of a presumption of reviewability that may be rebutted by affirmative indication of legislative intent in favor of unreviewability.” Davis on Jaffe, 650. It is quite reasonable to infer from the several congressional statements earlier quoted that the “idea” was shared by Congress. And if, in fact, the “opinions have not expressly formulated the presumption,” ibid., Davis has been ready enough to overlook such a fact in twitting Jaffe on another and related score. Id. at 649.

Professor Davis himself notices, 4 Davis, TREATISE § 28.08, at 35, that in Heikkila v. Barker, 345 U.S. 229, 232-33 (1953), the Court relied on the Walter and “very rarely” statements. True, he states that it “runs counter to deeply embedded traditions concerning statutory interpretation,” but it is open to Congress to lay down how its statutes shall be construed. It is likewise true that in Switchmen’s Union v. National Mediation Bd., 320 U.S. 279 (1943), the Court found statutory “inexplicit preclusion” when that was not clearly apparent “upon its face,” but that case antedates the APA and the House committee statement.

As I earlier suggested, the Switchmen’s concept of “inexplicit
The test for nonreviewability under the second exception, proposed by Professor Davis, is whether the function is "intrinsically unsuited" to judicial review. On what ground are we to conclude that Congress employed two disparate standards for statutes which preclude review; a rigorous "on its face" standard for statutes under the first exception, and the equivocal Davis test, "intrinsically unsuited" for review, with respect to statutes which fall under both the first and second exceptions? No indication that Congress had such a result in mind can be found in the legislative history. It cannot be that Congress was especially anxious to insulate "abuse of discretion" statutes, for Professor Davis states that "of course, everyone, including every court, shares Mr. Berger's opposition to administrative arbitrariness and abuse of discretion." Nor is there need to warp or discard the "on its face" test of the first exception in order to preserve sound discretion from review, for that is plainly exempted by the second exception. The "overlap" which Professor Davis conjures up in order to lift statutory unreviewability of abuse of discretion out of the coverage of the first exception is untenable, if only because it would avoid the test for statutory preclusion expressly supplied by the House report, and substitute an "intrinsically unsuited for review" test of which not an inkling is to be found in the legislative history. If the House report furnishes the test of statutory unreviewability, as seems undeniable, all of Professor Davis' discussion about "intrinsically unsuited" for review and "practical needs" is beside the point.

So far as the "intrinsically unsuited" criterion is relevant, Professor Davis has approved two pairs of cases, and in each of those pairs, the cases arrive at diametrically opposed conclusions in terms of that criterion, so that he has laid himself open to the charge that he is working both sides of the street. In no preclusion" needs to be reexamined in light of this Committee report. Berger, Reply 812 n.159.

145. Davis, Comment 25.
146. Id. at 17.
147. Berger, Reply 790.
148. Davis, Postscript 831-32; Davis, Comment 25.
149. Professor Davis does not explain his "intrinsically unsuited to judicial review" beyond citing some examples which he thinks self-evidently exclude review, such as the presidential power in foreign affairs. Davis, Comment 25. See Berger, Article 79-80.
150. The cases and Professor Davis' condemnation of the Supreme Court for issuing opinions which looked "both ways" are discussed in Berger, Reply 819-21. See also Davis on Jaffe, 657. Compare Davis' statement, "The two proposals differ substantially. Jaffe's agreement with both implies lack of concern for working out the legislative reform." Id. at 645 n.50.
corner of American life can it be assumed that an official function is "intrinsically unsuited" for judicial protection against oppression. Professor Davis now professes to "share Mr. Berger's passionate belief in a Supreme Court remark that 'there is no place in our constitutional system for the exercise of arbitrary power.'" But he has yet to square that "passionate belief" with his insistence that such protection must be withheld on hypothetical grounds.

The House report requirement, that "clear and convincing evidence of intent to withhold" review must appear on the "face" of the statute, is but a sharpened version of the general rule articulated by Professor Jaffe as "basic": "[J]udicial review is the rule.... The intention to exclude it must be made specifically manifest." Stated differently, there is a "presumption of reviewability." In an opinion that has markedly clarified analysis, Judge Friendly recently stated for the Second Circuit that, with respect to a truly arbitrary administrative decision . . . . absent any evidence to the contrary, Congress may rather [than "close the door"] be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.

Thus the "presumption of reviewability" can only be rebutted by "evidence" of a congressional intent "to the contrary."

In his "Postscript," Professor Davis "is pleased with" my statement that "there is a presumption that arbitrariness is re-

151. Davis, Final Word 815. The Supreme Court's "remark" is confirmed by five other "remarks." See text accompanying notes 9-14 supra, and The Japanese Immigrant Case, 189 U.S. 86 (1903). These "remarks" are uncontradicted by any other "remarks."


An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power . . . .

In other words, not only is there a presumption of reviewability, but any indication that Congress intended to vest officials with "arbitrary power" would render the Act unconstitutional. Both the Senate report and the House report on the APA emphasized that very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified.


153. Cappadora v. Celebrezze, 356 F.2d 1, 6 (2d Cir. 1966). (Emphasis added.) In a subsequent opinion, Judge Friendly stated that
viewable unless there is ‘evidence to the contrary.’”154 “This,” he says, “is my position, too, and has been ... since ... 1954.” “But,” he continues:

Mr. Berger asserts that the idea of a presumption of reviewability “is vastly to be preferred to Davis’ ‘intrinsically unsuited’ standard ...” He misunderstands when he goes on to say: “Professor Davis puts the shoe on the other foot: ‘nothing but the clearest and strongest congressional intent could induce the court to undertake tasks which the judges deem inappropriate for judicial action ...’ He fails to note that the statement is limited to “tasks which the judges deem inappropriate for judicial action.”155

It is Professor Davis who completely misses the point. Whether judges “deem” review of arbitrariness “inappropriate” in a particular case is of no moment if there is a “presumption of reviewability” which, as Judge Friendly properly declared, can only be overcome by “evidence” of a congressional intent to “close the door” to review. If there is no such evidence, there is no room for judicial consideration of whether review is “appropriate,” for the presumption prevails. By the same token, the Davis appeal to functions “intrinsically unsuited” to review must yield to the “presumption,” in the absence of “evidence” that Congress intended the presumption to be inoperative. And I would re-emphasize that the test for such “evidence”—“overlap” or not—is whether the “face” of the statute gives “clear and convincing” indication of congressional intent to preclude review.

IX. “THE PRACTICAL NEEDS”

Professor Davis lays down a veritable barrage of hypothetical cases which he considers self-evidently reveal the absurdity of across-the-board reviewability of administrative arbitrariness.156 Practical needs are irrelevant if there is a “presumption of reviewability” which only a plainly expressed congressional intention to shut off review can overcome. Even so, it may be that experience will lead the courts, under the stress of par-

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154. Davis, Postscript 830 n.35.
155. Ibid. (Emphasis added.)
156. Id. at 831-32. As Mr. Justice Miller stated:

Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government, and if the existence of laws is to depend on their capacity to withstand such criticism, the whole fabric of the law must fail.

ticular facts, to read a limitation into the broad terms of section 10(e) despite the fact that the legislative history bespeaks an unqualified intention to reach abuse of discretion "in any case." That hypothetical possibility, however, scarcely requires courts to engrat a priori limitations upon a remedial statute instead of waiting for demands that arise from a developed record. Such exclusions, which alter or rewrite statutory terms, should rest on demonstrable needs, not on assumptions rooted in generalities.

In my "Article" I demonstrated the untenability of several earlier Davis examples, but he has studiously avoided comment thereon and instead has marshalled a fresh array. Thus, he earlier asked: "Should the courts inquire whether a commanding officer of a domestic military post has abused his discretion in denying a requested leave?" This is not to be laughed out of court. 1) The APA inclusion of the military, with certain not relevant exceptions, repels a carte blanche for military oppression. 2) Patently, leave could not be denied on the ground that a soldier was a Negro or Jew, or a redhead or Mason. 3) The Swedish Military Ombudsman was created "to guard citizens against abuses in military administration," and albeit the examples cited by Professor Gellhorn of prosecutions by the Ombudsman for such abuses might not run the gauntlet of Professor Davis' a priori assumptions, they give color of "practicality" to judicial review, even of petty tyranny. What

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157. "We should be careful not wholly to give up all potential jurisdiction on abstract grounds lest we make wise handling of future cases difficult or impossible." Louisell, Responding to the December 8th Resolution: Of Politics, Free Speech, and Due Process, 54 Calif. L. Rev. 107, 116 (1966).

158. Berger, Article 78-80.

159. 4 Davis, TREATISE § 28.16, at 82.

160. Berger, Article 80. See Sterling v. Constantin, 287 U.S. 378, 401 (1932), "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

161. It was precisely on such grounds that Professor Davis criticized the opinion in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). See note 19 supra.

162. Berger, Article 82-83; Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 370-71 (D.C. Cir. 1961); cf. Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 123 (1849) "The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong..."

can be better calculated to encourage oppression than the assurance that the oppressor is immune from judicial review; what better way to deter official abuse than the threat of accountability? As the Senate report, the House report, and Chairman McCarran stated, judicial review is "indispensable since its mere existence generally precludes the arbitrary exercise of powers . . .".164

Since Professor Davis has made no attempt to meet my dissection of several of his examples, it is unfruitful to undertake the inspection of still other examples.165 If they have more merit than appears on the surface, they yet suffer from a serious defect: they would deny review of oppression on a priori assumptions that selected functions are "intrinsically unsuited" to review. The Founding Fathers held strong views against arbitrariness, professedly shared by Professor Davis.166 In the words of James Wilson, "Every wanton, or causeless, or unnecessary act of authority . . . is wrong, and unjustifiable, and tyrannical . . .".167 It is a betrayal of their ideals to withhold constitutional protection against arbitrariness, and on hypothetical grounds at that.

X. DISTORTIONS, MISREPRESENTATIONS, AND MISLEADING STATEMENTS

It needs no argument that a scholar who persistently distorts and misrepresents the position of his critic, and who resorts to misleading statements to score points, impeaches his own integrity and shakes the confidence of those who rely upon him. For example, in my "Rejoinder" I pointed out how Professor Davis twisted my remark that the heavily burdened "courts increasingly look to [scholars] for guidance" into my al-

164. S. Doc. No. 248, at 217, 281, 326. See also Berger, Article 93 n.207.
165. Mr. Justice Jackson said of a row of citations that "if the first decision cited does not support it [the proposition], I conclude the lawyer has a blunderbuss mind and rely on him no further." Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations, 37 A.B.A.J. 801, 804 (1951).
166. Davis, Final Word 815.
167. 2 Wilson's Works 393 (Andrews ed. 1896). Reporting to Maryland after the Federal Convention, Luther Martin said: "By the principles of the American revolution, arbitrary power may and ought to be resisted . . ." 3 Farrand, Records of the Federal Convention 223 (1911). And Congressman Jackson said in the First Congress that "every act of authority of one man over another for which there is not an absolute necessity is tyrannical." 1 Annals of Cong. 830 (1789) [1789-1824].
ledged "naive notion that judges obey when the treatise writer commands"—obviously unfair ridicule.\textsuperscript{168} Though he exhibited a tender conscience in flagellating Dean Pound,\textsuperscript{169} he offers not a word of extenuation in his "Postscript," but plunges deeper into the mine.

1) "When Professor Jaffe says that 'there are statutory discretions which are not subject to judicial review,'" states Professor Davis, "he takes a position directly opposed to Berger's."\textsuperscript{170} Now Davis must have realized that this was contrary to fact. My position is that the second exception of section 10 does not curtail the section 10(e) directive to set aside "abuse of discretion." This is exactly Professor Jaffe's view:

The further provisions of the judicial-review section [section 10] make it clear that the mere presence of agency discretion does not oust review. Under the heading [in section 10(e)] "Scope of Review" an agency action may be set aside for an "abuse of discretion," which clearly implies reviewability despite the presence of discretion.\textsuperscript{171}

Indeed, at the very time that Davis was invoking Jaffe against me in the \textit{University of Pennsylvania Law Review} he was criticizing him sharply in the \textit{Columbia Law Review} for espousing a view that is identical with mine:

In discussing the APA, Professor Jaffe italicizes the statement: "the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion." I think the statement is unsound . . . . The presence of discretion often bars a court from considering arbitrary use of discretion . . . .\textsuperscript{172}

Davis' citation of Jaffe as "directly opposed to Berger's" position

\textsuperscript{168}. My remark was but a paraphrase of Cardozo's early statement: "Crowded dockets make it impossible for judges, however able, to probe every case to its foundations. . . . More and more we are looking to the scholar in his study, to the jurist rather than to the judge or lawyer, for inspiration and for guidance." \textsc{Cardozo, The Growth of the Law} 5, 11 (1924).

\textsuperscript{169}. Berger, \textit{Reply} 793.

\textsuperscript{170}. Davis, \textit{Postscript} 823 n.28. (Emphasis added.) Those who may condone Davis' reliance on a possibly "equivocal" statement should note Davis' mordant rebuke to Pound: "The quotation is accurate, but taking it out of its context and putting it into Pound's context is as clearly misleading as if the words themselves were false." Davis, \textit{Dean Pound and Administrative Law}, 42 \textsc{ColuM. L. Rev.} 89, 97 (1942).

\textsuperscript{171}. \textsc{Jaffe, Judicial Control of Administrative Action} 374 (1965).

\textsuperscript{172}. Davis on Jaffe 652. The italicized statement to which Professor Davis refers is taken from Jaffe's disclaimer of a plea "for judicial interference with discretion; the argument is rather that the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion." \textsc{Jaffe}, op. cit. supra note 171, at 375. Note that Jaffe's statement about § 10, quoted in the text accompanying note 171 supra, is on the page preceding this statement.
is therefore not merely dead wrong; it betrays an incapacity to appreciate that a scholar may not play both ends against the middle.

2) Professor Davis recklessly charges me with falsity. He states that "Mr. Berger says falsely that I cited [Community Nat'l Bank v. Gidney\textsuperscript{173}] 'with approval'.\textsuperscript{174} In that case, in reliance on the Davis Treatise, the court held unreviewable a complaint that the Comptroller of the Currency had abused his discretion in authorizing a Detroit bank to establish a branch. The court employed the Davis formula: because agency action was "by law committed to the discretion of the Comptroller, such action is not reviewable—even for arbitrariness or abuse of discretion.\textsuperscript{175} Since the court in Gidney specifically invoked the Davis "solution," since it additionally quoted and relied upon his judgment that the banking function "is largely immune from the checks of judicial review" and that "freedom from arbitrary or unfair administrative action must depend upon factors other than formal procedures or judicial review,"\textsuperscript{176} and since Gidney was then cited in the Davis Supplement as relying on the Treatise,\textsuperscript{177} it was not unreasonable to conclude that the case had his approval. To charge me with "falsity" in these circumstances illustrates his recklessness.

His accompanying explanation is equally dispiriting. The Gidney issue turns on the fact that the court, in Professor Davis' words, later "backtracked," and Gidney was then dropped from his Supplement without a word that the court had recanted and decided that the particular banking function was reviewable for arbitrariness,\textsuperscript{178} thus running counter to his citation of Gidney under the head of "Unreviewable [discretionary] Action." Davis explains:

The court first held that approval by the Comptroller of the Currency of establishment of a branch bank was not reviewable and later changed its mind. Granting and denying licenses has traditionally been reviewable, and therefore the holding that it was not seemed worthy of mention in the 1963 Supplement to my Treatise. It seemed wrong but unimportant and I cited it with no word of approval or disapproval. Mr.

\begin{itemize}
\item[174.] Davis, Postscript 829 n.30.
\item[175.] 192 F. Supp. at 517, quoted in Berger, Article 76.
\item[176.] 192 F. Supp. at 518, quoted in Berger, Rejoinder 819.
\item[177.] 4 Davis, TREATISE § 28.16 (Supp. 1963).
\item[178.] See Berger, Article 75 n.109. Only after I had nudged him with these facts, and with the fact that Gidney conflicted with another case with which he belabored me, did Professor Davis at last notice that after Gidney "the court backtracked." Davis, Postscript 829 n.30.
\end{itemize}
Berger says falsely that I cited it "with approval." 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, which was buttressed by citation of his analysis of the "practical needs" of the banking business, and which Davis then cited in turn as relying on the Treatise. If the case "seemed wrong," his citation of it and his belated explanation reveal surprising disregard of his duty to the courts. Gidney was cited under the head of "Unreviewable Action." It was unaccompanied by a "but see." The court relied on Davis' statements for its holding that an "abuse of discretion" in the banking field was unreviewable. An author's citation of a case which quotes his views is unlikely to suggest that he considers the case to be "wrong." Consequently, a court which turned from the Davis citation of Gidney to the case itself would have no inkling that Davis thought it "wrong," but instead would perforce be led to conclude, like myself, that the "wrong" Gidney case had his approval and would thereby be likely to perpetuate the "error." The mildest thing that can be said about this episode is that Professor Davis little recked whether the courts which relied upon him would be misled.

A word should also be added about his ineffable dismissal of both Gidney and my discussion of his handling of the case on the grounds that "granting and denying licenses has traditionally been reviewable" and that "any good law clerk can give [Berger] ten thousand cases that will support" that proposition. But a cautionary citation (e.g., "but see") to such cases did not accompany Professor Davis' citation of Gidney in his Treatise under "Unreviewable Action." "Ten thousand cases" that negative such a citation are like an iceberg of which a mariner through the shoals of the Davis "solution" deserved warning. Nor did Davis point out that those cases cut a huge chunk—discretionary licensing covers a vast domain—out of his theory that arbitrariness is unreviewable where action "is by law committed to agency action."

Not only did Professor Davis neglect to red-flag the "ten thousand cases" that "any good law clerk" could furnish, but he also cited at least one "license" case to the contrary in his Treatise:

A good example of a case in the present category ["Unreviewable Action"] is Sellas v. Kirk. The plaintiff sued to enjoin a

179. Davis, Postscript 829 n.30. (Emphasis added.)
180. Ibid.
range manager of the Department of the Interior from reducing
the plaintiff's permitted grazing on public lands.\textsuperscript{181}

In short, the Department had modified a grazing “license.” Professor Davis quotes from the court's opinion: “the situation would seem to be one where ‘agency action is by law committed to agency discretion,’ and hence the action complained of here would not be subject to judicial review. . . .”\textsuperscript{182} Thus we have here a Davis citation which applies the second exception to preclude review of a “license” modification.\textsuperscript{183} Then too, there is his accolade to Ferry v. Udall\textsuperscript{184} as a “well-considered” case.\textsuperscript{185} Ferry involved the propriety of a withdrawal of public lands from sale. After quoting Davis’ “solution,” the court determined that the question whether arbitrariness was reviewable turned on whether the statute was “permissive” or “mandatory.” Since the statute did not require the Secretary to sell, but left the sale in his discretion (i.e., “permitted” him to sell), the court held that the withdrawal from sale was unreviewable.\textsuperscript{186} There is no hint that the subject matter—sales of public lands as contrasted with “licenses”—was determinative, but only the broad generalization that a “permissive” statute bars review. Many a statute leaves the issuance of a “license” to the discretion of the administrator, and under the “well-considered” view of Ferry v. Udall, denials of licenses under statutes are not reviewable, “ten thousand cases” to the contrary notwithstanding. The Ferry holding that arbitrary action under a “permissive”, i.e., discretionary, delegation is unreviewable is directly opposed to the holding of the second Gidney case that it is reviewable; and Professor Davis' endorsement of both cases exhibits unconcern

\begin{footnotes}
\footnotetext[181]{\textsuperscript{181} 4 Davis, Treatise § 28.16, at 83.}
\footnotetext[182]{\textsuperscript{182} 220 F.2d 217, 220 (9th Cir. 1952), quoted in 4 Davis, Treatise § 28.16, at 83.}
\footnotetext[183]{\textsuperscript{183} Professor Davis has stated that “upholding unreviewability of questions of law, jurisdiction, and procedure is easiest in the batch of cases involving denial of government bounties or benefits . . . .” 4 Davis, Treatise § 28.18, at 98. The Supreme Court has sustained a decision that a state statute which permitted “administrative denial of a license to practice medicine” was not reviewable. Id. at 101. Professor Davis also cites Hamel v. Nelson, 226 F. Supp. 96 (N.D. Cal. 1963), as holding that “a denial by the Bureau of Land Management of a patent to a tract of land . . . is not reviewable.” Davis, Comment 23. To distinguish between a “discretionary” patent and a “license” would slice it pretty thin. Of course, I do not argue for such unreviewability; I merely cite Professor Davis himself against his “ten thousand cases.”}
\footnotetext[184]{\textsuperscript{184} 336 F.2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965).}
\footnotetext[185]{\textsuperscript{185} Davis, Comment 20.}
\footnotetext[186]{\textsuperscript{186} See Berger, Reply 799.}
\end{footnotes}
3) A purely denigratory tactic is Professor Davis' attribution to me of advocacy of "the Walter-Logan view (which is essentially what Mr. Berger advocates)," i.e., "the early extreme position of trying to eliminate unreviewability [Berger's position]." That view, rejected by Congress, found little favor in administrative law circles, so the attribution patently was designed to discredit me. The attempt is utterly baseless. Under the Walter-Logan Bill, the Davis Treatise tells us (quoting the Attorney General), administrative "discretion . . . would, to a considerable extent, be transferred to the courts." Throughout, my discussion has been confined to review of arbitrariness. I have emphasized that the "vast bulk of the cases" governed by the exception for action "by law committed to agency discretion" would fall into the area of "sound discretion" and would therefore remain unreviewable. I have stressed that by the APA Congress "desired to prevent the substitution of judicial judgment for the sound exercise of administrative discretion," to "insulate the exercise of 'discretion,' i.e., reasonable action, and to make oppressive and unreasonable action reviewable." Manifestly this is far removed from espousal of the "extreme" Walter-Logan proposal to eliminate all "unreviewability."

A second aspect of Professor Davis' attribution to me of Walter-Logan views does him little more credit. Attorney General Jackson, he states, criticized the Walter-Logan Bill because it sweeps into the judicial hopper all manner of questions which have never before been considered appropriate for judicial review.

For example, such matters as the awarding of contracts, [and] the acceptance or rejection of supplies . . . Professor Davis winds up this recital with the statement that "even the minority [of the Attorney General's Committee] rejected the Walter-Logan view (which is essentially what Mr. Berger advocates)." In the Davis context this must be taken to mean that I would sweep "into the judicial hopper" the sev-

187. See Davis' comment on Jaffe, supra note 150; Berger, Rejoinder 819-20; text accompanying note 172 supra; cf. note 19 supra. See also subsection (4), infra.
188. Davis, Postscript 826.
189. Ibid.
190. 4 Davis, TREATISE § 28.08, at 40. (Emphasis added.)
192. Ibid.
193. Davis, Postscript 826.
194. Ibid.
eral categories enumerated by Jackson, which inferentially are not presently covered by the APA. Now the several functions enumerated by Attorney General Jackson were not exempted from the APA by section 2;\textsuperscript{108} they were exempted from "rule-making" by section 4,\textsuperscript{108} but not from judicial review under section 10, from which it may be deduced that they are reviewable unless exempted by the first or second exceptions of section 10. And since the claimed wholesale exemption of those functions was rejected in the APA, but for "rule-making," the exceptions of section 10 can hardly be read to exhibit an intention to insulate arbitrariness in the exercise of those functions.

4) In my "Article" I had argued that abuse of "prosecutorial discretion" was reviewable.\textsuperscript{197} To refute my argument Professor Davis cited a case to show that the power to "withhold prosecution is . ‘clearly discretionary’ and therefore judicially unreviewable."\textsuperscript{198} In his recent review of Professor Jaffe's book, Judicial Control of Administrative Action,\textsuperscript{199} Professor Davis takes Jaffe to task for non-mention of the view that prosecutorial "abuse of discretion" is reviewable, saying:

True, the Court does not say affirmatively that it will interfere for abuse of prosecutorial discretion [including decisions "not to prosecute"], and therefore the opinion might be interpreted as leaving that question open. But I hope and expect that the Court will interfere when it finds that such discretion has been abused. The law of the present and of the future is likely to be found in a decision just rendered by the Seventh Circuit to that effect. . . The prosecuting power is an enormous one; it is much abused, and frequent injustice results from its exercise. Since courts are equipped to right some of these wrongs, why shouldn't they?\textsuperscript{200}

Why indeed? But why—since his fervent plea for review echoes the view expressed in my "Article"—did he find it necessary to

\textsuperscript{195} Administrative Procedure Act § 2, 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1964), excludes from the operation of the APA:

(1) agencies composed of representatives of the parties . . . to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities . . . and the functions conferred by . . . Contract Settlement Act of 1944; Surplus Property Act of 1944. . .

\textsuperscript{196} Section 4 exempts from rule-making "(2) any matter relating . . . to public property, loans, grants, benefits, or contracts . . . "; cf. Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 371 (D.C. Cir. 1961).

\textsuperscript{197} Berger, Article 68-69.

\textsuperscript{198} Davis, Comment 23.

\textsuperscript{199} Davis, "Judicial Control of Administrative Action": A Review, 66 Colum. L. Rev. 635 (1966).

\textsuperscript{200} Id. at 649.
refute my view? If the explanation is that the light belatedly dawned on him, acknowledgment that his criticism of my view was mistaken would have made a scholarly amend. One can only marvel at Professor Davis' chameleon-like capacity to tailor his views to the occasion.

The pages of the Davis "Postscript" are peppered with still more shortcomings, but it would tax the reader's patience to detail them. To those who may consider some of the foregoing examples carpingly critical, I commend Professor Davis' exhumation of minutiae with which he excoriated Dean Pound. Because, as he said of the Dean, the "conclusions of such an illustrious legal scholar are naturally welcomed by the American Bar as the product of painstaking analysis and deep insight, we are entitled to demand that he himself should comply with the most exacting standards of scholarship. Instead, he is guilty of repeated distortion, baseless denigration, and misrepresentation. And all this merely to score a point, to defend a position that—it must be increasingly apparent—is indefensible. Views that require such defensive tactics must be suspect. And such deplorable tactics, it is time to say bluntly, are unworthy of a scholar—they strongly counsel those who rely upon Professor Davis to peer behind his pontifications.

201. Davis, Dean Pound and Administrative Law, 42 Colum. L. Rev. 89 (1942).