Judicial Review under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation

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JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT — IN WHICH JUDICIAL OFFSPRING RECEIVE A CONGRESSIONAL CONFIRMATION

From the day that the Administrative Procedure Act of 1946 became law, the tempo of legal psycho-analysis, striving vigorously to unravel the real meaning behind this congressional jargon (euphemistically referred to as "the Act"), has ever accelerated. Articles fill the law reviews and the bar journals; symposiums are held to explain the new congressional nostrum guaranteed to cure "bureaucratitis" the easy way; and even congressmen indulge in post facto appraisal of what their intentions were (or would have been, if they must have had to intend anything) when they gave to us the statute. Since a teacher in so functional and experimental a field as administrative law must have, by necessity, if not by choice, a proclivity toward legal "Freudism," this writer must join the ranks of those who are busying

themselves with the legal "double-crosstics" involved in any attempt to assay what the Administrative Procedure Act was meant to accomplish, and, more important, what it probably will accomplish.

However, readers of this effort might be relieved somewhat to find that it will be confined to an analysis of Section 10 of the Act, which deals with judicial review of administrative action. This selection is dictated in part by limitations of time and space; but more proximately is caused by a personal belief that it is the sphere of judicial review in which the controversy over the proper place of administrative action in our jurisprudence best can be apprehended. Let it be stated from the outset that it is the writer's personal opinion that:

1. the Administrative Procedure Act was not intended to upset the existing rules or principles governing judicial review of administrative action;
2. nor will the federal courts (especially the present Supreme Court) allow it to upset those rules and principles. This is not an a priori postulate laid down out of a devotion to the efficiencies of administrative government; rather it is the conclusion of a syllogism whose major premise is that congress was aware of the existing principles of judicial review when it passed the Act, and whose minor premise is that congress merely restated them.

While this view is not unique, having the welcome agreement of the Justice Department, nevertheless it is far from being received with unanimity. Opposing views run the gamut from that of outraged scholars in the field of public administration who regard the passage of the Act as a death sentence to all future efficient administrative effort, to those of some of the more tenacious "diehards" among the sup-

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porters of government exclusively by law suit, who see in the Act only a gentle slap on the bureaucratic wrist when they would prefer a kick in the bureaucratic buttock. In between these extremes are those who advance a modified in terrorem argument that Congress did not mean to emasculate administrative action, but that its choice of words was not only unfortunate, but positively dangerous; and those who with polite, but conservative firmness insist that the Act lays down new rules for the judicial review of administrative action.

These others the writer leaves to their own devices. The purpose of this article will be to demonstrate through a provision by provision analysis of Section 10, that the Act did not change the existing law of judicial review, either by increasing the availability of judicial remedy, or by widening the scope of judicial review. The Act undoubtedly will result in reforms of certain administrative procedures, but it will not upset the rubric of judicial review which the federal judiciary has fashioned piecemeal, and from which it has no intention of deviating, even though its homemade precepts also now have been expressed, however opaquely, in statutory flapdoodle.

**General Exceptions To Section 10**

Because of their controlling importance, the provisions of Section 10 will be set forth in the main text as they are taken up. Section 10 begins:

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8 See remarks of Mr. Gwynne on the floor of the House, 92 Cong. Rec., 5761, May 24, 1946.


11 In addition to the general exceptions discussed in the text, it should also be noted that Section 10 is inapplicable in two other general situations. (1) It is inapplicable to those agencies and functions which are exempted by section 2 (a) from all the provisions of the Act except section 3, which deals with publication of administrative action. Included in this category are functions conferred by the
Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion...

There can be no doubt of the constitutionality of a statute which precludes judicial review of certain administrative action. The more difficult task is to ascertain when a statute is intended to preclude judicial review. Statutes which by their own terms expressly preclude judicial review, while rare, still can be found. One such statute gives finality to certain decisions of the Administrator of Veterans Affairs and forbids judicial review in such cases. This denial of judicial review has been held constitutional because it applied to a "gratuity". There are also other similar statutes expressly forbidding judicial review. As far as such statutes are concerned, it is clear from the very words of the introductory clause of Section 10 that no change is contemplated. This conclusion is supported by the only case on the point which has been decided since the passage of the Administrative Procedure Act.

selective Training and Service Act of 1940, the Contract Settlement Act of 1944, the Surplus Property Act of 1944, the Veterans Emergency Housing Act of 1946, the Sugar Control Extension Act of 1947, and the Housing and Rent Act of 1948. (2) Section 10 would appear also to be inapplicable to cases pending in the courts on Sept. 11, 1946 (the date the Act became operative). At least this is the position taken by the Justice Dept. and it does appear correct since an allegation to the opposite effect has been raised only to receive the silent disapproval of the Supreme Court in an unsuccessful certiorari petition. May Department Stores v. N. L. R. B. ---U. S.---, 67 S. Ct. 107, 92 L. Ed. 74 (1947).
15 See, e. g., Packers and Stockyards Act, 56 Stat. 372 (1942), 7 U. S. C. A. App. 217 (a) (1947) in which the decision of the Secretary of Agriculture authorizing the charging and collection of fees for the inspection of brands at a stockyard subject to the Act is made final and "should not be subject to judicial review."
More challenging an inquiry is presented when we examine statutes which are said "impliedly" to preclude judicial review. Are such statutes still to be interpreted as ruling out judicial review, now that the Administrative Procedure Act is law? Statutes of these types, whose terms have been judicially construed to bar judicial review, are fairly numerous. For instance, the Supreme Court has held that review of the National Mediation Board's certification of representatives for collective bargaining was beyond the jurisdiction of the federal courts. Moreover, the courts have held in other situations that they have no power, or only limited power, to review "inherently" administrative determinations, such as matters concerned with the use of public lands, granting of second class mailing privileges, exclusion of aliens, and government purchasing. It is not the province of this article to examine all the possible classifications of administrative action which permit the parent statute to be interpreted as precluding judicial review. The question more pertinent here is whether the Administrative Procedure Act has restricted such statutes? To this the writer must answer in the negative. The strongest argument in support of this assertion is to point out that the introductory provision of Section 10 has received an expanding exposition during the evolution of the Act. Originally confined to situations where "statutes expressly preclude judicial review", it was changed to its present form with the word "expressly" omitted (Italics supplied). Moreover, the appendix to the At-

17 Switchmen's Union v. Nat. Mediation Board, 320 U. S. 297, 64 S. Ct. 95, 88 L. Ed. 61 (1943).
19 An excellent discussion of situations where judicial review defers to administrative discretion is contained in the Final Report of the Att'y. General's Comm. on Administrative Procedure (1941) at p. 86 (hereinafter referred to as REP. ATT'y. GEN.)
20 Senate Judiciary Committee Print of June 1945. This change in wording to insure the continuance of judicial inaction under certain statutes seems to have been overlooked by Blackly and Oatman who conclude that Congress meant to preclude judicial review only where the parent statute expressly bars it. Blackly and Oatman, op. cit. supra note 7, p. 427.
torney General's statement to the Senate Judiciary Committee cited the *Switchman Union* case, *supra*, as an example of a congressional manifestation impliedly to preclude judicial review. Thus, it may be fairly concluded that Congress was aware of, and took specific action to preserve the situations where statutes impliedly precluded judicial review.

This conclusion seems to be justified by cases decided since the passage of the Act. In *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.* 22 the Supreme Court held that a provision of the Civil Aeronautics Act authorizing judicial review of described orders of the Civil Aeronautics Board does not include those which grant or deny applications by citizen carriers to engage in overseas and foreign air transportation and which are subject to approval by the President. Therefore, this latter type order was not reviewable. While the decision probably also could be rested on the ground that such orders of the Civil Aeronautics Board were not final orders, and while it is also true that no Administrative Procedure Act objection was raised in the proceedings before the Court, nevertheless, the language of the majority opinion reiterated the principle that "statutes which employ broad terms to confer power of judicial review are not always to be read literally". It seems clear from a reading of the opinion that the Court will continue their philosophy of judicial self restraint in taking up review of administrative action. Administrative action which, from its "nature, from context of act, or from relation of judicial power to the subject matter", is inappropriate for review will continue to be

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23 68 S. Ct. 431, 434.

24 *Ibid.* In the instant case the opinion stressed the differences between air transportation and other forms of transportation, the relation of aviation to national security, and the broad character of presidential control over the final order of the Board.
so, the Administrative Procedure Act to the contrary notwithstanding.\textsuperscript{25}

The second provision of exception to Section 10 includes "agency action—by law committed to agency discretion." There are many types of agency action which have been held to be discretionary and not reviewable, save where the discretion granted has been overreached. A paramount example is the discretion lodged in the N. L. R. B. to refuse to issue a complaint.\textsuperscript{26} There are many others, including the discretionary authority of the Civil Aeronautics Board to dismiss complaints filed by municipalities under section 401 (h) of the Civil Aeronautics Act, and the many discretionary powers vested in the Secretary of Agriculture under the various acts with whose administration he is entrusted.\textsuperscript{27} Whether a statute vests discretion in an administrative official or agency is simply a question of the intent of Congress as disclosed by the act under examination.\textsuperscript{28} Our inquiry is directed at finding out whether the Administrative Procedure Act allows this discretion to continue undisturbed. The sometimes captious critics from the land of public administration seem to think that, unless the parent statute expressly provides that there shall be use of discretion, then by force of the Administrative Procedure Act there must now be judicial review afforded.\textsuperscript{29} While it is true that this view finds some minutiae of support

\textsuperscript{25} See also \textit{In Re Certificates of Service et al.} 73 F. Supp. 725 (S. D. N. Y. 1947) where a federal court held that the decision of the Coast Guard Commandant on an appeal from maritime casualty investigators boards is final and beyond the authority of the court to examine.

\textsuperscript{26} Jacobsen v. National Labor Relations Board, 120 F. (2d) 96 (C. C. A. 3rd 1941).

\textsuperscript{27} See Hunter, \textit{The Administrative Procedure Act In Its Applications To The Functions Of The Department Of Agriculture}, Institute Proceedings, \textit{op. cit. supra} note 4 at 344, 375.


\textsuperscript{29} Blachly, \textit{Sabotage of the Administrative Process}, \textit{op. cit. supra} note 7; 213, 226.
in a confusing congressional colloquy during the debates, this writer believes the stronger evidence refutes that conclusion.

The words "by law" are clearly more broad in their scope than if the phrase "by statute" had been used, indicating a congressional purpose to exempt agency discretion previously precluded by judicial decision. and not to restrict the exemption to cases where the statute expressly made an administrative action purely discretionary. In addition, the congressional committees had before them the interpretation of the Attorney General, in which it was made quite clear that matters committed partly or wholly to agency discretion were not now reviewable under Section 10. Additional support can be cleared from the fact that objection was early raised in committee that the Act might be interpreted to permit judicial review of the discretionary authority of the N. L. R. B. not to institute proceedings in labor cases. Since the objection was answered by citing the agency discretion exception to Section 10, it seems clear that the exception was meant to encompass previous situations. While the point is yet to be tested in the federal courts, none have demonstrated that they intend to intrude in matters of administrative discretion.

Concluding the appraisal of the congressional intention behind the introductory phrase to Section 10, it can be stated

30 See the interrogation of Sen. McCarran by Sen. Donnell concerning the applicability of the Act to cases of agency discretion. 92 Cong. Rec., 2195 (March 12, 1946). The most logical interpretation of Sen. McCarran's replies on that occasion would seem to be that under the Act an administrative agency could not exercise its discretionary powers arbitrarily.

31 SEN. REP., 44; SEN. DOC., 230.

32 SEN. COMM. PRINT, 19, ¶ (3); SEN. DOC., 38.

33 See, e.g., Federal Housing Authority et al. v. Mobile Housing Board et al., 164 F. (2d) 146 (C. C. A. 5, 1947) where the court held that the choice of companies from whom fire insurance for federal housing units was to be purchased rested within the discretion of the Housing Board, and was not to be interfered with by federal courts in the absence of abuse of discretion or fraud. See also Gross et al. v. Missouri & A. Ry. Co., 74 F. Supp 242 (W. D. Ark. 1947) holding that the I. C. C.'s approval of the proposed abandonment of a railroad was within the sole discretion of that commission and not judicially reviewable.
that Congress meant to effect no change in the existing situation; nor is it likely that the federal courts will be activated to a change of approach when reviewing administrative action precluded (expressly or impliedly) from judicial review, or committed (expressly or impliedly) to administrative discretion. It might be, however, that in the future, as one recent case seems to demonstrate, when a court is faced with the initial decision of whether a particular administrative function is judicially reviewable, the Administrative Procedure Act will spur on an otherwise reluctant judge to require more clear and convincing evidence of the congressional intent to preclude review than he might otherwise have demanded.\footnote{Beyond that no more can be said; the prophesying of judicial interpretation of statutes is always a contingency concerning which lawyers and litigants must risk hazardous guesses.}

Section 10(a): Right of Review

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by

\footnote{A district court judge has held that the Administrative Procedure Act makes judicially reviewable the refusal of the Navy Department to pay six months death gratuity to widow of deceased naval officer. Snyder v. Buck, 75 F. Supp. 902 (App. D. C. 1948). The court reasoned that since, in its opinion, the action sought to be reviewed was not one "committed by law to agency discretion" nor precluded from review by the basic statute (34 U. S. C. 943), it therefore was reviewable under the A. P. Act. The Navy Department's ruling was, in effect, a collateral attack on a prior Mexican divorce obtained by the widow from her first husband. As such, it seems clearly to be an abuse of administrative discretion and a mistake of law. It was, therefore, reviewable by an appropriate form of legal action. Consequently it was unnecessary for the court to give aid and comfort to the Blachlyites by saying the Administrative Procedure Act now "necessarily subjects to judicial review a large group of administrative actions which previously could not have been re-examined or set aside by the courts." Cf. Thomson v. United States, 58 Court of Claims 207 (1923). See also Roberts v. United States, 176 U. S. 221, 20 S. Ct. 376, 44 L. Ed. 443 (1900).}

\footnote{Mr. Blachly is one of those worried about what he imagines to be the uncertainty which the new Act inculcates into the law. Blachly, \textit{op. cit. supra} note 7, 213, 227. This writer believes that he can at least cease being apprehensive about any alleged uncertainty inherent in the introductory provision of Section 10.}
such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Again, in the opinion of the writer, Congress has restated the existing law. Others, however, are upset because of a belief that Section 10(a) has expanded the class of persons who may seek and obtain judicial review of administrative action. This latter apprehension grows out of the belief that Congress by adding the words “aggrieved” has thus enlarged the category to whom judicial review is available. The writer hopes herein to demonstrate that such fears result from conjured up horrors, not from dispassionate examination of the words of the provision and the legislative history behind it.

In the first place, the provision was changed during the course of its evolution from one in which any person “adversely affected” could seek judicial review to its present form wherein “legal wrong” has been inserted as the general prerequisite. By inserting the phrase “legal wrong,” the framers of the Act have given us a general category identifying those who are entitled to judicial review. Moving from this general classification we encounter one sub-division thereof embraced in the phrase “adversely affected” and another in “aggrieved.” In the past, in interpreting these two phrases the courts have held that they bar persons (1) who bring a review proceeding prematurely (that is, before the administrative action sought to be reviewed is of such a nature as to injure the petitioner, and (2) who have not shown an injury to a “legal interest” within the meaning of any relevant statute. There is every reason to think that

35 Cohen, op. cit supra note 2, 323, 340.
36 The bill as originally introduced in the Senate read: “Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section.”
the courts will continue so to interpret these two phrases. The individual determinations by courts of these phrases have been worked out on a case by case, statute by statute basis. The only intelligent interpretation in a particular case will be the one which gives effect to the whole statute; one that effects its purposes, rather than one which defeats it. In such a process, the Administrative Procedure Act will neither make nor mar.

Moreover, the cases which had highlighted the past history of this pragmatic process had been called to the attention of Congress by the Attorney General in conjunction with his own opinion that Section 10(a) merely restated the existing law. Mr. Walter, Chairman of the House Sub-Committee, on the floor of the House specifically called Congress' attention to the fact that Section 10(a) "summarized the situation as it is now generally understood." These views were not challenged during the course of the legislative history of the bill; the conclusion is inescapable that the provisions of Section 10(a) bring no change, but merely restate the law as it stood.

If this is the case, it should set at rest the fears of the faint hearted that Section 10(a) would permit the premature judicial review of administrative rules of general applicability before the "legal interest" of the complainant has been threatened by them, and set at ease those who imagine that, because "any agency action" is included in Section 10(a), all possible types of agency action, including benefactory action,

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41 92 Cong. Rec. 5759, (May 24, 1946).
42 For a recent Supreme Court decision in which the Court made much of the fact that a particular construction given to a proposed act in a letter written by the Attorney General had not been questioned during the course of legislative history, see American Stevedores v. Porello, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 733 (1947).
43 Shine, op. cit. supra note 9, 24; and, of course, the nervous Mr. Blachly, op. cit. supra note 7, 226.
are now made reviewable. However, if further proof is needed to assuage the "doubting Thomases" it can be found in the fact that a proposal for the judicial review of administrative rules, contained in S.674, a bill introduced into Congress in 1941 based on the recommendations of the minority report of the Attorney General's Committee on Administrative Procedure, had been much criticized during the 1941 hearings and as a consequence had been specifically deleted from the 1946 Act. The inclusion of such a provision was objected to because of the fear that to include it would evoke the granting of premature review where there is no real occasion for judicial relief, since no legal interest would yet be infringed. The omission from the 1946 Act of any such provision for premature review, when taken with the requirements explicit in Section 10(a) that a petitioner must show a "legal interest" which is being immediately jeopardized, seem to furnish sufficient refutation to any argument that judicial review of administrative rules may be undertaken before the litigant has been specifically affected by their operation.

This conclusion seems to be substantiated by one, and possibly, two cases decided since the passage of the Act. In one, the Supreme Court refused to grant a declaratory judgment of a rule of specific applicability of the Board of Governors of the Federal Reserve system, which made as a condition

44 Kaufman, op. cit. supra note 2, at 500.
45 Hearings Before Subcommittee of the Committee On The Judiciary On S. 674 S. 675, and S. 918, 77 Cong. 1st Sess. 9, (1941), (hereinafter cited as Sen. Hearings (1941)). Bill S. 675, modeled on the recommendations of the majority of the Attorney General's Committee, contained no proposals concerning judicial review in general, or declaratory judgments of administrative rule making in particular. S. 918, a proposed bill tailored to the special minority opinions of Chief Justice Groner, contained a provision for judicial review by declaratory judgment of administrative rules. It was even more severely criticized during the course of the 1941 hearings.
46 It would, as Sen. O'Mahoney pithily put it, "open the door ... to fictitious laws." Senate Hearings (1941), 195. A further apprehension voiced at the hearings was that it would tend to encourage the courts to substitute their judgment for the agency's in determining the propriety or reasonableness of the rule. Ibid, 190.
of membership in the Federal Reserve system for a member bank, that it withdraw if a named corporation acquired an interest in said bank without approval of the Board.\textsuperscript{47} The Court found that, although the named corporation had thereafter acquired an interest in the bank without the approval of the Board, the Board, after investigation, had formally disavowed any intention to invoke the condition since it found no subversion of the bank’s independence. Therefore, the Court felt that the grievance was “too remote and insubstantial, too speculative in nature” to allow review. It would appear from this decision (although there is no mention of the Administrative Procedure Act) that the Supreme Court will not be predisposed to grant judicial review of administrative rules unless the complainant can show that he is a person suffering a “legal wrong.” Nor does it appear likely that the circuit courts will open the flood gates.\textsuperscript{48}

It would appear then that the Attorney General was correct when he opined that Section 10(a) merely restated the existing law. The legislative history, ancient\textsuperscript{49} and late\textsuperscript{50} support that conclusion; the only relevant Supreme Court opinion seems to reaffirm it. The alarmists should rest easier. However, Section 10(a) illustrates quite well the danger of trying to define by general rule the class of persons who can attack acts of administrative agencies. As the Attorney General’s Committee Report pointed out, to attempt

\textsuperscript{47} Eccles v. Peoples Bank of Lakewood Village, ..., U. S. ..., 68 S. Ct. 641, 92 L. Ed. 592 (1948).

\textsuperscript{48} In Philadelphia Co. v. S. E. C., 164 F. (2d) 889 (App. D. C., 1947), Justice Stevens emphasized that where in its impact, a rule of the S. E. C. applied specifically and affected the rights of a particular person or corporation, it is reviewable even if cast in general terms. This result illustrates the point that the decisive factor in determining whether the courts will review administrative rules is the effect of the rule on the complaining party. If a legal interest is threatened review will be granted; if not, it will be denied as being sought prematurely. It is not the rule which is important, but the effect of its promulgation upon various individual legal interests.

\textsuperscript{49} Supra notes 45 and 46.

\textsuperscript{50} See, e. g., House Hearings on H. R. 184, 339, 1117, 1202, 1206, and 2602, 79 Cong. 1st Sess. p. 30, (1945), (hereinafter cited as House Hearings (1945). See also supra notes 40 and 41.
it is to do a "futile" thing,\textsuperscript{51} in spite of the efforts of the skittish to make it appear as a terrifying and radical change in the law.

\textit{Section 10(b): Form of Action and Venue}

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Again one is encountered by a farrago of opaque statutory gibberish which merely tells us what we knew all the time. For instance, many regulatory statutes provide for judicial review of agency action by requiring petitioner to file a petition for review with a circuit court of appeals (in some cases, a district court).\textsuperscript{52} It seems self evident such statutory provisions will continue to control the required judicial review procedure. Moreover, the Senate Committee report makes it clear that statutes which have adopted a common law method of review, such as a suit to enjoin under the Urgent Deficiencies Act of 1913,\textsuperscript{53} will continue unaffected.\textsuperscript{54} In ad-

\begin{itemize}
\item \textsuperscript{51} ATT'Y. GEN. 85.
\item \textsuperscript{53} 38 Stat. 220 (1913), 28 U. S. C. 47 (1940).
\item \textsuperscript{54} "The expression 'special statutory review' means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by other statutes as the appropriate mode of review in given cases", SEN. REP., 26; see also HOUSE REP., 42; SEN. DOC., 212, 276.
\end{itemize}
dition, Congressman Walter made the point clear on the floor of the House during debate.\textsuperscript{55}

Nor does Section 10(b) affect other forms of action which have heretofore been found by the courts to be appropriate in particular cases. For instance, habeas corpus proceedings shall continue to be used to obtain review of exclusion and deportation proceedings,\textsuperscript{56} and orders of the Postmaster General suspending second class mailing privileges will continue to be tested by an injunctive suit to restrain.\textsuperscript{57} That these types of non-statutory remedies, which the federal courts have developed in the absence of legislation, are meant to be preserved by the Administrative Procedure seems a fact beyond cavil, as the explanation given by the Senate Sub-committee makes clear.\textsuperscript{58}

Of course, the form of the non-statutory proceeding must be an "applicable" form of legal action. Thus, habeas corpus will continue to be the acceptable method to review a deportation order,\textsuperscript{59} but certiorari could not be used since the Supreme Court has previously decided that the writ of certiorari will not lie to review federal administrative determinations.\textsuperscript{60} Furthermore, since the non-statutory review pro-

\textsuperscript{55} "Mr. Walter: . . . Under this bill the technical form of proceeding for judicial review is, first, any special proceeding which Congress has provided, or in the absence or inadequacy thereof, any relevant form of action such as those for declaratory judgments or injunctions in any court of competent jurisdiction." 92 Cong. Rec. 6759 (May 24, 1946).


\textsuperscript{57} Hannegan v. Esquire, Inc. 327 U. S. 146, 66 S. Ct. 456, 90 L. Ed. 586 (1946). See also a decision decided since the passage of the A. P. Act in which the injunctive suit was used to obtain judicial review of a fraud order of the Postmaster General. Donaldson v. Read Magazine et al., . . . U. S. . . ., 68 S. Ct. 591; 92 L. Ed. 440 (1948).

\textsuperscript{58} "Explanation: The first sentence states the general situation, that methods of review are 'of two kinds': (a) those contained in statutes and (b) those developed by the courts in absence of legislation." Sen. Comm. Print, 25; Sen. Doc. 36.


\textsuperscript{60} Degge v. Hitchcock, 229 U. S. 162, 33 S. Ct. 639, 57 L. Ed. 1135 (1913). This is some evidence to the contrary contained in a discussion on the floor between Sen. McCarran and Sen. Austin. See 92 Cong. Rec. 2200-2201 (May 13,
ceedings are to be available only where the special statutory method is inadequate, a question arises as to what "inadequate" means. The Act does not define it. However, an appraisal of the legislative history of the provision makes manifest the conclusion that Congress meant to leave to the courts as hithertofores, the determination of whether or not a particular statutory review proceeding is legally adequate.  

The conclusion here reached on this question has been squarely reiterated in a recent federal district court decision. In *United States v. Watkins*, the court held, in a review upon a habeas corpus proceeding of a deportation order issued by the Commissioner of Immigration and Naturalization, that "the Administrative Procedure Act does not in any way modify the existing forms of proceedings to review final actions of administrative agencies, nor does it create new remedies if an adequate remedy is in existence." It appears obvious that the courts will continue to tolerate non-statutory methods of review when, in their opinion, the situation calls for judicial relief. Such a process is old stuff to them; it took no Administrative Procedure Act to galvanize them into action on that front.

In regard to the venue provision of Section 10(b) it is equally evident that Congress wished to leave existing venue provisions undisturbed. The Act specifically says that re-

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1946). However, it seems that Sen. McCarran overlooked the *Degge* case when he informed Sen. Austin that certiorari might be available to review federal administrative action. At least one other writer agrees with this observation. Dickinson, *op. cit. supra* note 4, at 572.

61 "... if the procedure is inadequate (i.e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus is available." Appendix to Attorney General's Letter, *Sen. Rep.*, 44; *Sen. Doc.* 230. Note also that certiorari is not listed in the category of applicable form of relief.


63 For a recent example of this traditional phenomenon see *United States v. Wheeling Downs, Inc.*, 72 F. Supp. 882 (N. D. W. Va., 1947) where the court granted equity review of an order of the housing expediter in spite of the fact that the statute under which review was originally sought had been repealed.
view shall take place in "any court specified by statute" or "in any court of jurisdiction." But just to insure that this time "words mean what they say they mean" the House Committee report states that no change was intended.64

The last sentence of Section 10(b) provides that "agency action shall be subject to judicial review in criminal or civil proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law." The question immediately arises, does this mean that agency action can be collaterally attacked in civil or criminal proceedings in all cases except where a statute has prescribed the exclusive form of review? The answer to this seems clear enough to be "no". The Committee reports make it certain that the provision is only operative "where statutes, either expressly or as they are interpreted" require some prior, adequate, and exclusive form of judicial review.65 (Italics supplied). This objective was accomplished by expanding the phrase "provided by statute" to its present form, "provided by law." 66 Thus, situations where the court has concluded from an appraisal of the statutory context that it was the congressional intention to provide for an exclusive method of judicial review, even though they didn't expressly say so in the statute, are preserved.67. Therefore, the courts will continue to determine for themselves whether

64 "The section does not alter review provisions under existing law, whether in connection with specially provided statutory review or the so called nonstatutory or common-law action variety." House Rep., 42; Sen. Doc., 276. See also Mr. Walter's explanation of the provisions on the House floor. 92 Cong. Rec., 5654 (May 24, 1946).


the alleged invalidity of agency action can be set up as a defense in criminal or civil enforcement proceedings, or, on the other hand, whether such collateral attack is barred in a particular case because Congress has provided that the exclusive road to judicial review is by first exhausting the administrative procedure available.\(^68\)

In other words, the "i. p. j" (initial primary jurisdiction) doctrine is preserved and, for example, the alleged unreasonable of rates or tariffs must still first be tested before the administrative agency concerned before an enforcement court will assume jurisdiction of the matter.\(^69\)

Once again, in Section 10(b) we see the legislative draftsmen telling us in the peculiar language of their cult that which we already know. This is not to deprecate the efforts of Congress to fashion in statutory jargon what was already quite clearly understood by those lawyers who took the time to study the availability of judicial review of administrative action; but it must be admitted that up to this point the provisions of Section 10 seem to be \textit{vox et praeterea nihil}.

\textit{Section 10(c): Reviewable Acts}

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purpose of this subsection whether or not there has been presented or deter-

\(^{68}\) "The second sentence states the present rule as to enforcement proceedings." \textsc{Sen. Comm. Print}, 18; \textsc{Sen. Doc.}, 37.

mined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Indeed, Section 10(c) reads like a product of a semantic Alice-in-Wonderland world populated by legislative draftsmen and German philosophers. What does this unintelligible hodgepodge mean? From the point of view of change in the law, let it be said that it means little, if anything.

First, it is clear that the words "every agency action made reviewable by statute" insure that where statutes specifically provide for judicial review of agency action, such action will thus continue so to be reviewed. More problematical is the meaning and effect of the phrase which requires review of "every final agency action for which there is no other adequate remedy in any court." It seems plausible that this section is to be construed in the light of other statutory and case law and must be read in conjunction with the two general exceptions to Section 10, with the provisions of 10(a) governing the category of persons who have a right of review, and with the provisions of 10(b) respecting review actions. It should be emphasized that the Administrative Procedure Act can only be correctly understood when interpreted as a whole, as a complete entity composed of inter-related parts. Those who insist upon proceeding upon a compartmentalized basis do the framers of the Act a great disservice. With this in mind it is clear that, if administrative action is committed to agency discretion, or is precluded from review (expressly or impliedly) by the basic statute, or is

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70 "The bill is so drafted that its several sections and subordinate provisions are closely knit. House Rep., 17; Sen. Doc., 251. "Mr. McCarran: ... Perhaps it might be well at this time to emphasize that this bill is a coherent whole; no section or paragraph is independent; all parts of it are closely interrelated. The bill must be read and considered as a whole, and in this case the whole is considerably more than the sum of all its parts." 92 Cong. Rec. 2192 (March 12, 1946).
challenged by a person who has no legal interest in the matter, Section 10(c) can not be relied on to remedy the particular disqualification for judicial review.

With this method of approach as a guidepost, the provisions of Section 10(c) begin to make more sense and to reveal no persuasive evidence that the section embodies any change in the law. For example, the phrase "final agency action" can thus be unraveled. While the act does not provide us with a definition of final, it is obvious that it is used in contrast with "preliminary, procedural, or intermediate" agency actions as those terms are used in Section 10(c). Furthermore, previous cases involving the interpretation of "final" administrative action are not unknown. "Agency action" is, however, defined in 2(g) of the Act to include "rule, order, license, sanction, relief * * * (and) failure to act." This does not mean, therefore, that every administrative action, such as a rule of general applicability, would be made reviewable under the terms of Section 10(c). In such a case, as previously pointed out, we would first have to consider the applicability of Section 10(a) which deals with the right of review.

Moreover, assuming that the action is challenged by a person whose legal interests have been, or are about to be, violated, we still must consider whether, in the words of Section 10(c), "there is no other adequate remedy in any court." In a recent federal circuit court decision, it has been held that a deportation order of the Commissioner of Immigration and Naturalization was reviewable under Section 10 of the Administrative Procedure Act. The district court had pre-

72 See supra p. .... See also the recent case of Land v. Dollar, 330 U.S. 731, 67 S. Ct. 1001, 91 L. Ed. 903 (1947), in which petitioner by reading 2(g) of the Act together with 10(c), attempted to argue that the Administrative Procedure Act indicated an intention to make the United States suable for the purpose of recovering collateral bonds from the United States Maritime Commission. The court left the point unanswered in its decision.
viously ruled that a proceeding other than habeas corpus was not, despite the Administrative Procedure Act, the proper form of action to restrain deportation.\(^74\) The decision of the circuit court might be questioned on the grounds that the "applicable" form of review should have been by habeas corpus. However, since the petitioner had exhausted all his administrative remedies before the Board, even though he had not yet been taken into custody, it would be a harsh thing to argue that habeas corpus was the "exclusive" remedy by which he must proceed. In other words, there existed a gap between the exhausting of one's remedies before the Board, and the act of being taken into custody. This gap is now closed by the terms of Section 10(c). The decision is in line with the extra and proper solicitude with which the present Supreme Court surveys threatened injury to personal liberty.\(^75\) The Administrative Procedure Act may make that judicial philosophy more easy to rationalize henceforth. It should work no great change in the large sphere which lies outside of the right to personal liberty.\(^76\)

The second sentence of Section 10(c) makes any "preliminary, procedural, or intermediate agency action not directly

\(^74\) 72 F. Supp. 193 (E.D. Pa., 1947).
\(^75\) The Supreme Court has construed section 11 of the Selective Training and Service Act of 1940 (50 U.S.C. App. 311) to allow a defendant, indicted for a violation of the Act, to attack a local board's induction order, even though section 10(a) (2) of that Act states that the . . . "decisions of such local boards shall be final" except for certain appeal purposes. Estep v. United States, 327 U.S. 114, 66 S.Ct., 423, 90 L.Ed. 567 (1946). The Court had previously ruled in a similar case that a defendant who refused to report for induction could not collaterally attack a draft board classification by way of a defense to a criminal prosecution for failure to report for induction. Falbo v. United States, 320 U.S. 549, 64 S.Ct. 346, 88 L.Ed. 305 (1944). In the Estep case, defendant had reported for induction but refused to submit to induction. In the Falbo case defendant did not proceed this far. He did not "exhaust his administrative remedies."

\(^76\) The present Supreme Court sometimes seems to become more demanding in its application of the "substantial evidence" rule when dealing with a personal liberty case. See Bridges v. Wixon (deportation proceeding), 326 U.S. 135, 178, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945). While the writer is in hearty agreement with such cautious and high regard for the protection of personal liberty, he is also aware that decisions such as the Trinter, Estep and Bridges cases are not able to be relied too heavily on as precedents in other situations not concerned with a threat to a personal right of freedom, liberty, etc.
reviewable" able to be reviewed upon review of the final agency action. This is made clear by legislative history of the section to the effect that there was no “intention to make reviewable preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule.”

Such a rule had been firmly settled on the strength of many decisions. At least one decision subsequent to the passage of the Act which has treated the question manifests no judicial inclination to reverse the previous attitude of courts in the matter. In this decision, the Second Circuit Court of Appeals denied a petition for review of an order of the S. E. C. disallowing motion for change of site of a Commission hearing on the rationale that under Section 10(c) of the Administrative Procedure Act preliminary or procedural orders of an administrative body are not subject to a review.

One final inquiry about Section 10(c) might be the question of whether or not that section in any way overturns the doctrine of “exhaustion” of administrative remedies? Extracts from both the House and Senate Committee reports indicate it was not the congressional purport to change the existing rule along these lines. Section 10(c) provides that where the basic statute expressly requires that an application for rehearing be resorted to as a prerequisite for judicial review, such a procedure will continue unimpaired. There is at least one statute which might be affected by Section 10(c), how-

79. Eastern Utilities Associates v. S.E.C., 162 F. (2d) 385, 387 (C.C.A. 2nd. 1947). An argument unsuccessfully was made to the effect that section 5(a) of the Administrative Procedure Act requires the Commission to give “due regard for the convenience and necessity of the parties” in arranging hearings; hence, the interlocutory order of the Commission should be reviewed on the grounds that it had failed in this regard.
ever section 1006(d) of the Civil Aeronautics Act does not specifically mention petitions for rehearing or reconsideration but has been judicially interpreted as requiring a rehearing petition as a prerequisite for review.\textsuperscript{81} Since the parent statute does not “expressly require” a petition for reconsideration, it is now quite possible that petitioners proceeding under the Civil Aeronautics Act can now omit this intermediate step. (Italics supplied). However, it seems clear that, under the many statutes (including Section 1006(d) of the Civil Aeronautics Act) which provide that no objection to agency action not urged before the agency action shall be considered by the courts, the wisest course will be first to seek agency reconsideration with all objections fully set forth. Otherwise, since many objections to the agency action obviously cannot be intelligently formulated until the agency has handed down its decision, petitioners might be rebuffed by the courts on the grounds that their request for judicial review was premature. Finally, where the parent statute merely confers a right upon the parties to apply for a rehearing and does not make it their express duty, Section 10(c) now makes such an application unnecessary.\textsuperscript{82}

The last sentence of Section 10(c) allows the administrative agencies to require by rule that agency reconsideration must be sought as a prerequisite for judicial review. Thus, while under Section 8(a) of the Administrative Procedure Act the initial decision of the hearing officer may become the final decision of the agency in absence of an appeal therefore, the agency can, under Section 10(c), require by rule that the initial decisions first be appealed to the top agency authority before judicial review can be sought.\textsuperscript{83} However, Section 10(c) does specifically require that agency action be made in-

\textsuperscript{81} Braniff Airways, Inc. v. C.A.B., 147 F.(2d) 152 (App. D.C. 1945).
operative pending any such appeals, since otherwise the effect of any agency rule or reconsideration would be to subject the party "to the agency action and to repetitious administrative process without recourse." 84 This does not mean that the agency must take positive action for the benefit of a complaining party. Thus, where an agency requires by its rule that the denial of the issuance of a license be appealed to it, the license would not have first to be granted in order to require a request for rehearing as a prerequisite to judicial review. 85

At least one recent case adopts the view that Section 10(c) is merely declaratory of existing law. 86 The court held that an administrative action held by the N. L. R. B., under procedures not published as required by 3(e) of the Administrative Procedure Act, is unlawful but is not reviewable under the Act. Since, in the N. L. R. B. cases, even after a hearing has been held and an order issued, there is no effective agency action until the Board secures an enforcement order from the court, it is clear that the request for review here was premature. In other words, it was intermediate agency action which could be reviewed only upon review of the final agency order by the court to whom application was made for an enforcement order. The decision is an excellent example of a court which properly looked to the Act as an entirety and was not misled by isolated sections or phrases. 87 Courts using this approach to the problem of interpreting the Administrative Procedure Act will agree with Congressman Walter's remark that Section 10(c) involves "no departure from the usual and well understood rules of procedure in this field." 88

84 SEN. REP. 27; SEN. DOC. 213.
85 Ibid. The provision is aimed at preserving the status quo, not at compelling affirmative agency action.
87 Contrast this approach with the opinion in Snyder v. Buck, op. cit. supra note 33a.
88 CONG. REC., May 24, 1946, 5654; See also SEN. REP., 44; SEN. DOC. 230.
Section 10(d): Interim Relief

Pending judicial review an agency is authorized where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve the status or rights pending conclusion of the review proceedings.

The first sentence merely embraces a well accepted discretionary practice of administrative agencies to stay operative effect of its own action in certain cases. It is once again a restatement of the existing law, only in this case it is statutory recognition of an administrative practice rather than a judicial one.

The second sentence takes up the power of reviewing courts to grant stay orders postponing the operative effect of administrative action. This power the courts have always possessed as a necessary adjunct in making their power of judicial review effective. For instance, the court of appeals has made a practice for many years of granting stay orders in attempts to preserve the status quo while it reviews decisions of the Federal Communications Commission. While Section 10(d) would not allow the court of appeals, by exercising its stay power, to compel issuance of an initial license, it seems that the court may now, by issuance of a stay order, keep an existing station in operation until the appeal is determined.

89 Sen. Rep. 27; House Rep. 43; Sen. Doc. 213, 277. By the same token, interim payments of benefits could not be ordered by the court.
90 To this extent any language to the contrary found in the Scripps Howard
Nevertheless, the Act manifests clearly the intention that the stay power should only be exercised when necessary to prevent irreparable injury. It is not to be granted automatically but only if the equities of the situation so dictate.\(^9\) It must be admitted that there is some language in the House report which, if taken at face value, would indicate a congressional wish that courts extend rights of parties pending judicial review and to that extent diminish the exclusiveness of a particular administrative remedy.\(^9\) There may be some who like Professor Cohen, believe that the decks are now cleared for judicial tyranny and the "immobilization of administrative action by the use of the restraining order or temporary injunction".\(^9\) This writer prefers to accept the reassuring explanation which Chairman Walter gave on the floor of the House that the "operation (of Section 10(d) will involve no radical departures from what has generally been regarded as an essential and inherent right of the courts . . .".\(^9\) This conclusion is further strengthened by recalling that the particular sentence in Section 10(d) dealing with the problem has received a curtailed phraseology from that which it originally possessed.\(^9\) As the section reads now it would seem that courts are not to grant a stay order for the mere maintenance of the status quo. Therefore, Section 10(d) appears to reaffirm the judicial attitude, expressed by the Supreme Court in the *Yakus* case, that the "award of an


\(^9\) "... statutes authorizing agency action are to be construed to extend rights pending judicial review and the exclusiveness of the administrative remedy is diminished as far as this section operates ..." House Rep., 43; Sen. Doc., 277. Naturally, this language furnishes Mr. Blachly an opportunity for indulging in some grand *in terrorem* arguments. *op. cit. supra* note 7. p.422. Professor Cohen (*op. cit. supra* note 2, p. 340) and Mr. Shine (*op. cit. supra* note 9, 27) seem to share these apprehensions.

\(^9\) Cohen, *op. cit. supra* note 2, 340.

\(^9\) 92 Cong Rec. 5659 (May 24, 1946).

\(^9\) As originally introduced the section read: "to the extent necessary to preserve status or rights, afford an opportunity for judicial review of any question of law, or prevent irreparable injury." (Italics supplied).
interlocutory injunction . . . has never been regarded as strictly a matter of right" but will issue only after proper judicial evaluation of the public interests and private rights involved, and the evidence of the congressional desire in the matter. 6

At any rate, two decisions decided since the passage of the Act reveal no tendency on the part of the courts to depart from an attitude of forbearance to interfere with the operative effect of administrative action by promiscuous use of their power to stay. In an action against a market administrator, under the Agricultural Market Agreement Act, for a preliminary injunction pending disposition of statutory review proceedings before the Secretary of Agriculture, Section 10(d) of the Administrative Procedure Act was relied on before a "potential" reviewing court (which would have jurisdiction if the pending proceedings before the Secretary should turn out adversely to the complainant). The court refused to grant the injunction sought and made it clear that the stay power, if exercised at all, could only be exercised upon the final adverse determination of the Secretary of Agriculture. 7

The point is, that "pending conclusion of review proceedings" refers to court proceedings, and not administrative proceedings.

Again, another federal court has held that the fact that veterans employed in the Civil Service at a Boston shipyard who were demoted would suffer immediate inconvenience of loss of pay and prestige, would not constitute irreparable injury warranting injunction relief under Section 10(d) of the Administrative Procedure Act pending final decision by the Civil Service Commission. 8

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7 Avon Dairy v. Eisaman, 69 F. Supp. 500 (D.C. Ohio, 1946). The case also illustrates the requirement that, under 10(d), the phrase "reviewing court" refers only to a court which has, or will have, jurisdiction to review the final agency action. It is not equivalent to "any reviewing court" (Italics supplied). See Attorney General's Manual, op. cit. supra note 6, at 106-107.
Section 10(e): Scope of Review

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

As an example of the prolixity of legislative draftsmen Section 10(e) is hard to best. Consequently, it is not strange to discover that it is Section 10(e) about which there is, perhaps, more disagreement over its intended effect than any other section of the Administrative Procedure Act.99 This writer's personal view is that no fundamental change was intended as to the scope of judicial review; nor is it likely that

99 "This 10(e) restates the present law as to the scope of judicial review." Attorney General's Manual, op. cit. supra note 6, 108. On the other hand, Professor Dickinson contends that 10(e) broadens the scope of judicial review of fact and law. Dickinson, op. cit. supra note 4, at 578 et. seq.
the courts will construe Section 10(e) as to effect any major change in that regard.

The first sentence would appear to be quite simply a restatement of the present powers which reviewing courts possess, and frequently exercise, of reviewing relevant questions of constitutional and statutory law, including whether the factors upon which the administrative decision was based were such as the agency was permitted to consider. There is at least one respectable authority who argues that a change of a fundamental nature is embraced in that seemingly harmless first sentence. Professor Dickinson has contended with some force that, since Section 10(e) places the imperative duty upon the reviewing court to determine “the meaning or applicability” of agency action, courts now must broaden their scope of review of questions of law in cases where the questions of law involve the construction of technical terms and the application of knowledge expert and specialized in character. In other words, “mixed” questions of law and fact must now be reviewed de novo by the courts. Professor Dickinson selects as his prime example of the phenomenon referred to the Dobson decision, a tax case, wherein the Supreme Court refused to substitute their own judgment for that of the Tax Court, which previously had found a particular transaction resulted in either a capital gain or a return on capital but not an ordinary gain. In that decision, the Supreme Court gave persuasive indication that, when dealing with a situation where it “cannot separate the elements of a decision so as to identify a clear cut mistake of law,” it would not treat the administrative decision as one of “law.” In other words, the Court will respect the finding of the administrative agencies in the hazy enclave of “mixed questions of law and fact” land in the same manner as they do in the more

101 Dickinson, op. cit. supra note 4, at 582-585.
103 Id. at 520.
distinctly outlined sphere of a "pure" question of fact. It is not the purpose of this article to rehash the whole problem of mixed questions of law and fact; enough has been said on the point! This writer's only concern is to ascertain what happens to the approach of the Supreme Court (as exemplified in the Dobson case) under Section 10(e).

In this respect, the writer must join Mr. Shine in his disagreement with the conclusion of Professor Dickinson on the point. In the first place, Professor Dickinson, who argues that the words of Section 10(e) change the rule of the Dobson case, ignores the general exception to Section 10 in the form of matters "by law committed to agency discretion." The Dobson case and subsequent Supreme Court decisions dealing with decisions of the Tax Court have it apparent that, in regard to questions which are not "clear cut" questions of law, their determination will reside exclusively in the discretion of the Tax Court. It is true that in the cases subsequent to the Dobson case the Supreme Court has shown a tendency to limit this category of administrative exclusiveness as the part of the Tax Court. Nevertheless, the rule of the Dobson case had been a subject of extensive comment in legal circles at the time of the passage of the Administrative Procedure Act. The congressional silence on the subject, plus the agency discretion exception, at least are equal to the only evidence which Professor Dickinson is able to marshall, i. e., the words of a single phrase in Section 10(e).

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105 Shine, op. cit. supra note 9, at 30.


107 When it suits his purpose Professor Dickinson makes much of congressional silence on a point. See Dickinson, op. cit. supra note 4, at 585, fn 55.
Moreover, the Attorney's Committee on Administrative Procedure had pointed up the great difficulty in drawing any clear cut line of cleavage between questions of law and questions of fact.\(^\text{108}\) It is highly unlikely that so debatable and complex a concept was meant to be resolved by Congress through the use of an isolated phrase which could be interpreted in one of several ways, and for whose alleged intended effect, not one iota of evidence can be found in the Committee reports or in the debates on the floor of either House or Senate. Indeed, Carl McFarland, a member of the Attorney General's Committee and prime mover in the important task of guiding the present Act through its legislative evolution has specifically ventured the opinion that Congress did not mean to affect the rule of the *Dobson* case.\(^\text{109}\) It may be presumptuous, but the implication from Mr. McFarland's remark in this regard would seem to indicate that he is of the same opinion as this writer. Namely, the whole problem of "mixed" questions of law and fact is merely another ramification of the substantial evidence rule. If the administrative determination is based on substantial evidence, i.e., a conclusion that a reasonable person could have reached in view of both the facts and the law, then the court should not disturb it, even though it might have reached a different conclusion.\(^\text{110}\) Therefore, if (as will be attempted to be proved *infra*) the Administrative Procedure Act wrought no change

\(^{108}\) *Rep. Att'y. Gen.*, p. 88. Interestingly enough, the Committee there cites Professor Dickinson himself: "Matters of law grow downward into roots of fact, and matters of fact reach upward into roots of law. . . . It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of 'fact'; and when otherwise disposed, they say it is a question of 'law.'" *Dickinson, Administrative Justice and the Supremacy of Law* 55 (1927).

\(^{109}\) "Question: I wonder if Mr. McFarland would care to comment on the effect of the use of the word 'substantial' in the statute in connection with the evidence upon which judicial review is based. . . . as to whether he thinks the Dobson rule is affected by the statute? Mr. McFarland: I can answer the question very simply by saying no." *op. cit. supra* note 4, p. 69. See also Mr. McFarland's testimony before the House Subcommittee, *House Hearings* (1945) 37; *Sen. Doc.* 83.

in the substantial evidence rule, by the same token, it effected no alteration of the Dobson rule as applied to "mixed" questions of law and fact.

Moreover, recent cases decided by the Supreme Court reveal no indication on the part of that body of jurists of a change of attitude or approach toward review of "mixed" questions of law and fact. If anything, decisions subsequent to the passage of the Administrative Procedure Act manifest a greater resolve on the part of the court to disdain the conceptualistic formula as a solution to the mysteries of law and fact, and, instead, to embrace more firmly a pragmatic, case by case, modus operandi, with special stress on the special and particular expertise (real or alleged) of administrative tribunals.111

In a case decided soon after the passage of the Administrative Procedure Act, Unemployment Compensation Commission of Alaska v. Aragon,112 the Supreme Court upheld a finding by the Alaska Commission that certain unemployment insurance benefits properly were denied applicants because their employment was "due to a labor dispute which is in active progress," which constituted disqualification for benefits under the statute. In upholding the Commission's construction of this phrase, the court, in so many words, applied the substantial evidence rule. Again in N. L. R. B. v. Atkins113 a case which involved an interpretation of the term "employee" under the National Labor Relations Act as applied to certain guards of a plant engaged in war production required by law to be auxiliaries to the military police of the United States Army, the Court upheld the Board's initial determination. In his majority opinion Justice Murphy

111 A brief but excellent discussion of the Supreme Court's progress away from the approach of the logician to that of the pragmatist is contained in Carrow, Background of Administrative Law, p. 68 et seq. (1948).
made it clear that the administrative tribunal to whom Congress had entrusted the administration of statutes involving the most complex economic and social relationships was not restricted to traditional legal concepts of "employee" and "employer", but was free to take into account the more relevant economic and statutory considerations in arriving at its decision. Such a decision would not lightly be set aside by the court.114

The latest manifestation of the Court's abjuration of abstractionism occurs in \textit{S. E. C. v. Chenery}, 115 wherein the majority sustained a denial by the Commission of a proposed amendment to a reorganization plan whereby preferred stock purchased by management during the reorganization of a holding company would be treated on a parity with other preferred stock. The record showed neither fraud nor any general commission, rule or regulation governing in any way this type of management trading during reorganization. In short, the problem was \textit{res nova}. However, the majority felt that retroactivity was no bar in the case; that the Commission had rested its decision on the particular facts of the case, its general experience in reorganization matters, and its informed view of statutory requirements that such reorganizations must be in the public interest. In such a situation, the scope of the administrative order was limited to an application of the substantial evidence rule.

While this last case was also the occasion for a polemical dissent by Justice Jackson in which Justice Frankfurter joined,116 and while none of the other cases mentioned here referred to Section 10(e) of the Administrative Procedure

\footnotesize{114 \textit{N.L.R.B. v. Atkins & Co.}, 67 S.Ct. 1265, 1268-1269.}
\footnotesize{115 \textit{332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1429 (1947)}. Noted in 1 \textit{VANDERBILT L. R.} 118 (1947).}
\footnotesize{116 Justice Jackson castigated the majority opinion as sanctioning "conscious lawlessness." \textit{332 U.S. 194, 67 S.Ct. 1760, 92 L.Ed. 1 (1947)}. Justice Jackson did not file his dissenting opinion till the beginning of the new term after probably having spent the intervening months sizzling with anger and the anticipation of offering hot rejoinder.}
Act, they certainly cannot be dismissed lightly. They furnish strong corroboration for the view that the spectre of "mixed" questions of law and fact has finally been completely obliterated by a few well delivered blows with the "substantial evidence" poker. It seems highly unlikely that a vague phrase in the Administrative Procedure Act will resurrect that apparition from the purgatory of outmoded jurisprudential concepts.

Clause A of Section 10(e) has also been the occasion for uneasiness on the part of some observers. However, the salient legislative history of the phrase which authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed" should dispel any doubts on the score. It is no more than a particularized restatement of the existing judicial practice under the Judicial Code. Specific statutory consent was not necessary to give the federal courts this power. For example, the District of Columbia courts have a recognized jurisdiction to issue writs of mandamus to administrative agencies. Nevertheless, the power is one the courts have exercised with the greatest of restrained discretion. It is to be expected that they will continue to demonstrate caution in the administration of this power since its proper exercise is one which must, as Professor Nathanson has pointed out, weigh important considerations of dispatch in the conduct of public business against equally heavy considerations of public interest.

120 Nathanson, op. cit. supra note 2, p.418. Some of the factors which Professor Nathanson cites to illustrate the difficulty of choice in a particular instance are (1) a short-handed staff who must decide between matters of equal importance, (2) a choice between an ill-informed decision and a more thorough examination, (3) a change in staff necessitating the allowance of an opportunity of new officials to familiarize themselves with old problems. These and other factors make any selection of action in particular cases a function better reposed in administrative officials close to the scene than in any reviewing court.
Moreover, it seems certain that clause (A) does not empower a court to substitute its discretion for that of an administrative agency. For a court to do that would be to exercise administrative duties, and in the case of constitutional courts would be a violation of the separation of powers principle which has been firmly enunciated in prior cases.\textsuperscript{121} As a final word, it should be pointed out that clause (A) grants the power to compel action to "the reviewing court" and thus would appear to limit it to the court which has, or eventually will have jurisdiction.\textsuperscript{122}

Coming to an appraisal of what possible changes in the scope of judicial review, if any, may be effected by the numbered clauses of Section 10(e) (B) there is presented little doubt as to congressional intention, except for clauses (5) and (6). It should be made clear, however, that clause (1) which places upon the reviewing court the duty of setting aside agency action which is, among other possibilities, "otherwise not in accordance with law," requires that all of the procedures made mandatory by the twelve sections of the Administrative Procedure Act be observed by administrative tribunals. It may be, as at least one writer fears,\textsuperscript{122} that reviewing courts will be besieged with objections to administrative procedural sins. If that hazard exists, it does so, not because of any restrictive changes imposed by Section 10, but because broader procedural requirements have now been statutorily imposed. To this writer, it seems that statutory certainty, which lays down the requirements of minimum fair administrative procedure, is much to be preferred by parties, agencies, and courts, than to continue an illusive


\textsuperscript{122} Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943).

struggle with the vague "due process" objection in the search for legality of administrative proceedings. We all can recall the endless series of Morgan cases; we all should be thankful that the Act implements judicial subjectivity with some legislative objectivity.\textsuperscript{124}

It might be noted that in at least two recent cases in which the failure to observe the procedural requisites of the Administrative Procedure Act (apart from those imposed on the courts by Section 10) has been alleged as grounds for reversal of the administrative decision, the reviewing court has rejected the contention.\textsuperscript{125}

The most important, and perhaps the widest disagreement about Section 10(e) is found in the dispute among courts and commentators as to its alleged effect upon the substantial evidence rule. Clause (5) requires a reviewing court to set aside an administrative determination where it is "unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8\textsuperscript{126} or otherwise reviewed on the record of an agency hearing provided by statute." In making administrative determinations "the court shall review the whole record or such portions thereof as may be cited by any party \textsuperscript{127} \textsuperscript{128} \textsuperscript{129}\textsuperscript{130}." Professor Cohen fears,\textsuperscript{127} and Professor Dickinson is certain,\textsuperscript{128} that the net effect of all this is to change or modify the substantial evidence rule. Professor Dickinson rests his argument on the grounds that some previous decisions had revealed a tendency for the Supreme Court to uphold administrative determination if supported by a "scintilla" of evidence;\textsuperscript{129} that such judicial obliquity had been called to the attention of Congress during

\textsuperscript{125} Sections 7 and 8 refer to procedures to be observed where administrative hearings are required by statute.
\textsuperscript{126} Cohen, \textit{op. cit. supra} note 2, at 343.
\textsuperscript{127} Dickinson, \textit{op. cit. supra} note 4, at 586-589.
\textsuperscript{128} Id. at 587.
\textsuperscript{129} \textit{Ibid.}
the course of the 1941 hearings; and that the language of the present Act was specific evidence of congressional intent to change the rule.\textsuperscript{131}

It is this writer's belief that Professor Dickinson's argument must fail in all particulars. In the first place, the cases which he and Dean Stason rely on as horrible examples of the Supreme Court's sanctioning of administrative decisions based on a modicum of evidence, do not appear in that light at all, as any dispassionate reading of the record will confirm.\textsuperscript{132} It may be concluded that some circuit courts in the past have not searched the record with as great thoroughness as might be expected. Nevertheless, the real explanation for the illusion in quarters that the "scintilla" had replaced the "substantial" evidence rule, lies in the fact that disappointed litigants very often, and very normally, express their chagrin in tirades of accusation at the tribunal which has ruled against them. This has been especially true in new and experimental fields such as that of labor relations.\textsuperscript{133} Unfortunately, this has had a tendency to obfuscate any accurate appraisal of the judicial machinations involved in applying the substantial evidence rule. Disappointment at substantive results has lead to reckless and unsubstantiated charges against procedural methods.

Assuming, however, that violations did exist in practice in some instances, the next problem is to ascertain how Congress meant to handle the situation. Must reviewing courts

\textsuperscript{130} Id. at 588.

\textsuperscript{131} Professor Dickinson relies (as did Dean Stason in his testimony before the Senate Subcommittee in 1941) on N.L.R.B. v. Waterman Steamship Corp., 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704 (1940) and N.L.R.B. v. Bradford Dyeing Ass'n., 310 U.S. 318, 60 S. Ct. 918, 84 L. Ed. 1226 (1940).

\textsuperscript{132} It is interesting to note that the cases which Professor Dickinson and Dean Stason cite as examples of judicial review confined to finding a "scintilla" of evidence are both National Labor Board cases. Other administrative agencies, such as the Federal Trade Commission, have experienced the sometimes severe partisan criticisms of its procedures when struggling through the embryonic period of their existence. Novelty of administrative action often provokes unwarranted hostility. See Testimony of Professor Schulman, \textit{Sen. Hearings} (1941) 857.

\textsuperscript{133} Dickinson, \textit{op. cit. supra} note 4, at 589.
now weigh all the testimony or one side against that of the other? Must they now decide in favor of the preponderance of the evidence contained in the whole record? While Professor Dickinson does not go that far, he does assert that Congress, by providing that the court "shall review the whole record or such portions thereof as may be cited by any party," has broadened the scope of judicial review of the evidence necessary to support administrative determinations. What Professor Dickinson seems to have overlooked is that, when Dean Stason presented his criticism of the alleged "scintilla" rule to Congress, he proposed language, similar to that of the present Act, which was to be a "clarification" of the substantial evidence rule, not a broadened application thereof. Several of the previous witnesses at the 1941 hearings, and, indeed, several of the members of the Senate Subcommittee before whom the hearings were being conducted, had expressed doubt as to the exact meaning and purpose of the requirement that review be "on the whole record" as contained in S. 674, which was the bill based on the findings of the minority report of the Attorney General's Committee. Therefore, Dean Stason made it unequivocally clear that the purpose of the phrase was not "to broaden the review powers of the court . . . to any extent." Finally, to eliminate all confusion on the matter, the phrase was altered in a memorandum submitted to Congress by the minority of the Attorney General's Committee to read almost exactly like the language in the Act as finally passed.

The later legislative history of the Act confirms the conclusion thus drawn from that of the earlier stages. Carl Mc-

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134 Sen. Hearings (1941) 1357, 1359.
135 Id. at 372-374, 665, 853.
136 Id. at 1359. After this, Sen. O'Mahoney felt that he understood what the phrase meant. Id. at 1360.
137 "In view of the doubts expressed, it is suggested that the phrase 'upon the whole record' be eliminated or the phrase 'after consideration of the whole or such parts of the record as may be cited by the parties be substituted." Id. at p.1401. The latter suggestion was the one adopted.
Farland, testifying at the 1945 hearings, reiterated the assurances given by Dean Stason that the Act did not alter the substantial evidence rule and "reflected" the present judicial rule." Senator Morse and Congressman Walter re-echoed these views on the floor of their respective chambers, and the Senate Sub-Committee was informed by the Attorney General that clause (5) was "intended to embody the law as declared..." These indicia of legislative intent cannot be offset by reliance on loose talk on the floor of Congress expressing dissatisfaction with what was imagined to be the practice of some courts to follow the "scintilla" formula.

This writer believes that in face of the available evidence of legislative history, the only fair conclusion to be drawn is that Congress did not mean to alter, in any way, the well established substantial evidence rule. On the other hand, Congress meant to issue a strong exhortation to these courts, if any, who have fallen into the vice of relaxing that rule. No longer can the "administrator or board... base their finding on the scintilla rule." However, the Supreme Court has never said that the requirements of the substantial evidence rule can be satisfied by merely looking at one side of the record and picking enough evidence therefrom to support the administrative decisions. After all, the substantial evidence rule is merely the reasonable man fiction concealed in a new semantic garb. Certainly, evidence from one side only, without an opportunity to weigh it against countervailing evidence, is not such evidence as would satisfy the ordinary prudent man in reaching a decision. It seems apparent that Section 10(e) neither makes nor mars the correct application

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130 92 Cong. Rec. 2196 (March 12, 1946).
140 92 Cong. Rec. 5760 (May 24, 1946).
142 See, e.g., 92 Cong. Rec. 5762 (May 24, 1946).
143 To the same effect see ATTORNEY GENERAL'S MANUAL, p. 109.
144 92 Cong. Rec. 5765 (May 24, 1946).
145 Nathanson, op. cit. supra note 2, 417.
of the substantial evidence, rule. But if those who think differently are appeased by the fact that they now have an additional probing device with which to psycho-analyze the thought processes of individual judges, so be it.

Professor Nathanson has conjectured that Section 10(e) might encourage the lower federal judges to greater independence of action in upsetting administrative determinations. Fortunately, cases decided since the Act has become law do not bear out that observation. Lower federal courts have reaffirmed the substantial evidence rule as applied to the N.L.R.B., the Bureau of Internal Revenue, the S. E. C., the F. T. C., the Commissioner of Immigration and Naturalization, and the Social Security Board. In addition, the Supreme Court has applied it in a recent case involving a fraud order by the Postmaster General. Opposed to these cases, there is a dicta in only two cases to the effect that the Administrative Procedure Act has broadened the scope of judicial review. One of the cases where this opinion was expressed involved a habeas corpus proceeding to review a deportation order. It has previously been indicated in this article that some federal courts, especially the Supreme Court, are more strict in requiring compliance with the substantial evidence requisites when a threat


151a Donaldson v. Read Magazine, ...U.S...., 68 S. Ct. 591, 92 L.Ed. 440 (1948).


153 Supra note 76.
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to personal liberty, such as a deportation order, is involved.\textsuperscript{154} If the only effect Section 10(e) is to make more federal judges extra cautious in such situations this writer will be delighted.

Concluding appraisal of the effect of Section 10(e) on the substantial evidence rule it can be stated with some certainty that no changes in law will ensue but that some changes in practice may follow. Courts, however, Section 10(e) or no Section 10(e), will continue to find a way of sustaining administrative action of which they approve, and of setting aside agency action where they do not approve of what the agency is doing.\textsuperscript{155}

Clause (6) of Section 10(e) places the duty upon a reviewing court to upset administrative decisions “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.” Does this mean that in every case where there is no statutorily prescribed administrative hearing a reviewing court must try the facts de novo? There are rather sweeping statements found in both Committee reports which would appear to provide an affirmative answer to that inquiry.\textsuperscript{156} This would mean that in

\textsuperscript{154} Whether the Taft-Hartley Act extends the substantial evidence rule as far as court review of N.L.R.B. proceedings are concerned is not immediately clear from the legislative history. 10(e) of that Act reads: “The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.” Senator Morse, one of the authors of the provision, stated clearly that it was not the intent of the Senate to broaden the test of judicial review stated by the Administrative Procedure Act. 43 Cong. Rec. 5289 (May 13, 1947). However, this statement was made before the conference of House and Senate Committees from whose report an inference to the contrary can be drawn that the Taft-Hartley bill goes further than the Administrative Procedure Act and does attempt to broaden the scope of judicial review. See Sen. Rep. on S. 1126, 80th Cong., 1st Sess. 40 et seq. (1947). Statutes which prescribe a broader scope of judicial review than the Administrative Procedure Act are not altered in that respect by the Act. See Section 12 of the Act.


\textsuperscript{156} United States ex. rel Vajtauer v. Commissioner, 273 U.S. 103, 47 S.Ct. 302, 71 L. Ed. 560 (1927).
deportation and mail fraud cases, where administrative hearings are held out of respect for due process requirements and are not prescribed by statute, the reviewing court would try the facts de novo. In the past, judicial review has been confined to a review of the record made in the agency hearing to see whether the agency action is supported by substantial evidence. Before concluding that Congress meant to upset the existing application of judicial review in such cases another look at the legislative history and the words of the statute might be enlightening.

As clause (6) first stood when S.7 was first introduced in the Senate, it contained an additional provision that "The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing." (Italics supplied). This provision was omitted when the bill was reported by the Senate Committee. Moreover, the language of clause (6) permits the court to overturn administrative action unwarranted by the facts only "to the extent that the facts are subject to a trial de novo by the reviewing court." (Italics supplied). It refers, obviously, to those existing situations where judicial review has consisted of a trial de novo, such as separation orders under the Interstate Commerce Act and under the Packers and Stockyards Act. The Committee reports cite the latter two examples to illustrate the broad language used in explaining the clause. It would appear that clause (6) merely restated the existing state of affairs and will not increase the quantum of judicial review to be applied in deportation and fraud order situations. At the most, clause (6) is a congressional request to reviewing courts that, in cases where there is no statutory

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158 Supra note 155.
159 See Mr. Walter's statement to this effect in 92 Cong. Rec. 576 (May 24, 1946). See also McCarran, op. cit. supra note 5, at 831.
hearing to which review is confined, they examine de novo facts pertinent to questions of law. There is no evidence to suggest that they have not usually done so in the past.

Cases decided since the passage of the Act bear out the prediction that clause (6) worked no change in existing judicial review of administrative action where the administrative hearing was not one prescribed by statute. In United States v. Jordan, the Seventh Circuit Court held that a party ordered deported can, in a habeas corpus proceeding, complain only that the administrative determination is manifestly unfair or without support of substantial evidence, or that an error of law or clause of discretion has been committed; he may not obtain a trial de novo of the issues on evidence not submitted before the administrative body. Again, in United States v. Walkins, a federal district court judge, finding the deportation order of the Commissioner of Immigration and Naturalization supported by substantial evidence, refused, in a habeas corpus proceeding, to consider the question of whether the reviewing court may grant a trial de novo and take additional evidence under clause (6) of the Administrative Procedure Act. Two other lower court decisions have reaffirmed the existing rule that a suit to review a decision of the Commissioner of Patents, although in form of an action de novo, is actually a proceeding to review the ruling of an administrative agency. As such, the substantial evidence rule will be the proper scope of judicial review, not a de novo proceeding. Moreover, the Supreme Court recently reviewed a fraud order of the Postmaster General without exhibiting any desire to apply a de novo review to his determination.

160 Supra note 150.
161 Supra note 59.
163 Donaldson v. Read Magazine, supra note 151.
164 REP. ATT’Y. GEN. 92.
One final word concerning Section 10 serves to call attention to the innocuous appearing last clause of 10(e) which entitles the reviewing court to take due account of the rule of prejudicial error. This tail-end provision might, in the long run, prove to be of great assistance to those reviewing courts who are faced with technical procedural transgressions on the part of administrative bodies but which do not deserve to be overturned without inviting a host of subsequent dilatory and vexatious petitions for review based on procedural objections entirely.

Conclusion

At the risk of repetition, it can be concluded that the legislative intent behind the provisions of Section 10, taken individually or collectively, was to restate the existing principles governing judicial review of administrative actions. These principles had their genesis in the fertility of a judicial process which has been flexible enough to tolerate, and even to encourage, the experimental solutions of the weighty social problems of a modern industrial civilization within the proper framework of an institutionalized tradition of individual liberty. The majority report of the Attorney General’s Committee recognized the great accomplishment that our courts thus have achieved.\textsuperscript{165} Consequently, they did not see fit to recommend the enactment of congressional standards to guide the courts in their review of administrative action, feeling that most dissatisfaction with existing standards of judicial review grew out of a dissatisfaction with the procedures of administrative tribunals.\textsuperscript{166} It was their rationale that with reform of the administrative process itself, the need for more stringent congressional directives on judicial review would decrease. On the other hand, the minority of the Committee, while recognizing the need of maintaining the

\textsuperscript{165} Ibid.
\textsuperscript{166} Id. at 211.
maneuverability of the experimental approach in the field of judicial review, expressed the desire that Congress should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. 167

It must be conceded that, as far as judicial review alone is concerned, the Administrative Procedure Act represents a triumph for the minority view of the Attorney General’s Committee. Section 10 most surely is an expression of congressional standards to govern judicial review of administrative action. However, this is not to say, by any means, that Congress has abrogated the old, or created new standards of judicial review. As has been attempted to be demonstrated in this article, the Congress has merely restated the homemade principles which the judicial process already had fashioned. In this sense, the Administrative Procedure Act, taken as a whole, reflects more the view of the majority of the Attorney General’s Committee. It is the agencies themselves who must provide the final answer in the quest for fair administrative procedure. As they comply with the statutory requisites of fair procedure available to the parties before them, the courts will find less need for severity in the doses of judicial review which they are called upon to dispense.

This does not mean that the Administrative Procedure Act may not encourage some courts to a “judicial activism” in their review of administrative action. The cases decided since the act do not betray any such general trend away from their previous attitude of “judicial self denial”; but what the future will bear must remain a conjecture.

On the positive side, Section 10 does represent a fine effort to bestow the garb of statutory certainty upon the illusive principles of judicial review. To the extent it succeeds in

that endeavor it simplifies as well as directs the administrative process and also the judicial process. The danger is, however, that this pursuit for certainty in the embryonic field of administrative procedure may come to resemble the chase of Syrinx by Pan. Just as we come to think that we have grasped the living body of statutory certitude, it well may turn out to be the dry reed of jurisprudential ossification, both on the judicial and the administrative level. Let us cautiously salute this effort of Congress to protect individual rights from the alleged sins of bureaucratic caprice; but let us recall to them that up to now our courts have not been slumbering on that job. It would be a great tragedy if the late-comers, in their zeal to do something, should impose crippling statutory fetters upon a judicial process which thus far has permitted administrative efficiency without allowing it to transgress the bounds of individual liberty.*

*Since this article has gone to the printer, several relevant decisions worthy of comment have been handed down. In one case, the Circuit Court of Appeals for the District of Columbia held that Section 10 of the Administrative Procedure Act does not confer jurisdiction on the federal courts to hear a complaint, seeking to have a certification of a bargaining representative by the National Mediation Board, declared null and void. The decision in the Switchmen's Union case, supra note 17, was reaffirmed, the court saying that the Railway Labor Act is a statute which has been interpreted to "withhold" judicial review. Consequently, judicial review is "precluded" within the meaning of Section 10. Kirkland et al. v. Atlantic Coast Line R. R. Co., 166 F. (2d) .... (C. C. A. D. C., 1948).

In another recent decision, a federal district court relying on the Trinler v. Carusi decision, supra note 73, held that a deportation order can be reviewed under Section 10 by any district court to which a petition for habeas corpus would lie. The court quoted extensively from a student note in 96 University of Penn. L. R. 269 (1947), in which the excellent point was made that previous decisions had not conclusively demonstrated an intent to restrain the character of judicial review as opposed to its scope. (Italics supplied). The student writer argued that the allowance of review of deportation proceedings under Section 10, in addition to the well recognized habeas corpus remedy, would not impair the deportation process, and would be more consonant with our philosophy of personal liberty. We thus have another decision sustaining the hopeful prophecy that Section 10 might enlarge the availability of review in the sphere of personal liberty. United States ex rel. Cammarata v. Miller, 76 F. Supp. .... (S. D. N. Y., 1948).