THE PROBLEM OF NONREVIEWABILITY: JUDICIAL CONTROL OF ACTION COMMITTED TO AGENCY DISCRETION*

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I. INTRODUCTION

IN RECENT YEARS, changes in both the scope and the scale of governmental programs have resulted in a vast growth and increased presence of administration. The noted political scientist Theodore Lowi has observed that “modern law has become a series of instructions to administrators rather than a series of commands to citizens.”¹ In such a situation, the problem becomes “how to be certain he [the citizen] remains a citizen.”²

A prime method for control of administration is judicial review of allegedly unauthorized agency action. In recent years, recognition of the importance of such control to those administered has been a major factor leading to the emergence of a presumption of reviewability of agency action. However, the propriety of judicial review where action is committed to the discretion of the agency remains a subject of controversy in the courts,³ and of debate among the commentators.⁴

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* The author wishes to express his appreciation to Professor Clark Byse of the Harvard Law School for his comments and suggestions.
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2. Id. A provocative discussion of this problem may be found in Reich, The Law of the Planned Society, 75 YALE L.J. 1227 (1966).
3. See Northeast Community Org., Inc. v. Weinberger, 378 F. Supp. 1287 (D. Md. 1974), where the court noted that “the preliminary question of the propriety of judicial review over acts committed to agency discretion within the meaning of” section 10 of the APA “is a subject of intense dispute between the Circuits . . . .” Id. at 1292. For recent decisions denying review, see notes 40, 41, 115 & 195 infra.
4. See, e.g., Note, Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard, 1974 DUKE L.J. 382, where the author wrote: “It is clear that, if action is committed exclusively to agency discretion, the exercise of that discretion is not subject to judicial review.” Id. at 387. The cases relied upon are Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958), and Ferry v. Udall, 336 F.2d 766 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965). For criticism of these decisions, see text accompanying notes 34–62 infra.
This article advances the proposition that a person is entitled to judicial review of administrative action relating to his legally recognized interests except when the action which interferes with such interests is justified by a grant of valid authority.

Accordingly, a grant of broad discretion should not be held to foreclose all review of an agency's actions. The question of reviewability should be determined in each particular case, considering not only factors which militate against review, such as possible administrative inconvenience, but also the oft-ignored countervailing, positive factors which contribute to the effective and legitimate functioning of the administrative process.

II. Nonreviewability As A Threshold Determination

A. Discretion and the Administrative Procedure Act

In determining the reviewability of discretionary administrative action, sections 10,6 10(a),6 and 10(e)7 of the Administrative Procedure Act8 (APA) are most relevant.

The prime source of controversy in this area has been the result of the ambiguous statutory directive mandated by that portion of section 10(2), which states that judicial review is available except to the extent that "agency action is committed to agency discretion by law."

5. Administrative Procedure Act § 10, 5 U.S.C. § 701(a) (1970), provides in part: This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

Id.

6. Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1970), provides: A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Id.

7. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1970), provides in part:

To the extent necessary to decision and when 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 an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law . . . .

Id.

and section 10(e)(B)(1), which instructs the reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Conflicting interpretations have been proposed in an attempt to reconcile the withdrawal from judicial scrutiny of discretionary agency action in section 10, with the mandatory judicial review for abuse of that discretion in section 10(e)(B)(1) — the first principally by Professor Davis and Harvey Saferstein, and the second principally by Professors Jaffe and Berger.

Professor Davis' reconciliation of these two sections is premised upon the argument that:

[E]mphasis should be put on the word "committed." Action "committed" to agency discretion by law is that action which is so far committed as not to be reviewable, and agency action which is not so far committed is reviewable. The two concepts "committed to agency discretion" and "unreviewable" have in this limited context the same meaning.

Thus, Professor Davis suggests that if the court were to find that Congress committed the decision to agency discretion by law, "then a reviewing court can afford no review, not even for abuse of discretion."
Saferstein also has adopted this position,\textsuperscript{16} noting that the APA "only codified the already existing doctrine that in appropriate circumstances the courts would not as a matter of propriety and efficiency inquire into certain abuses."\textsuperscript{17}

Upon the other hand, Professor Jaffe has argued that despite the existence of discretion, a court normally still "will review an agency's choice in order to determine whether it is within the permissible class of actions."\textsuperscript{18} Professor Berger, in the course of his lengthy exchange with Professor Davis, has contended that the APA explicitly directs the courts to review all claims of abuse of discretion, and thus he espouses a position beyond Professor Jaffe's. Referring to section 10(2)'s exception provisions, Professor Berger argues that "only the exercise of 'sound discretion' was sheltered by the second exception; the directive to set arbitrariness aside was left untouched."\textsuperscript{19}

Any judicial consideration of a claimed abuse of agency discretion will of necessity be affected by a reviewing court's acceptance of one of the foregoing interpretations over another. The Davis-Saferstein position precludes judicial review if the administrative action is determined to be an inappropriate subject for judicial review, thus insulating from scrutiny action allegedly an abuse of the discretion delegated to the agency. Conversely, Professor Berger would require the court to review all allegations of arbitrariness upon the part of the agency, while Professor Jaffe alludes more directly to the authority of the agency and its \textit{permissible} range of choice. Professor Jaffe's position appears most sensitive to the problem of reconciling the need of the aggrieved individual for some measure of control over (or perhaps validation of) discretionary action, with the authority of the agency to take action conferred upon it by Congress to meet some public purpose.

This article submits that the aforementioned problem of statutory interpretation is best approached not by asking whether the particular action is of a type "intrinsically unsuited"\textsuperscript{20} to review, or whether the action could be characterized as arbitrary in some sense, but rather by looking to the statutory authority under which the action was taken. This solution is particularly appropriate given the concept of "discretion" itself. Professor Jaffe has defined discretion as "the power

\textsuperscript{16} Id.
\textsuperscript{17} Saferstein, \textit{supra} note 11, at 374 n.33. \textit{See id.} at 374 & nn.32-33.
\textsuperscript{18} \textit{Jaffe, Judicial Control, supra} note 12, at 359. \textit{See also id.} at 264-65; Jaffe, \textit{Judicial Review, supra} note 12, at 774. While Jaffe acknowledges that abuses of discretion will normally be judicially reviewable, he does concede that there will be instances in which the "character" of the power granted or the "terms" of its grant may imply absolute discretion. \textit{Jaffe, Judicial Control, supra} note 12, at 390.
\textsuperscript{19} Berger, \textit{Synthesis, supra} note 13, at 980. \textit{Cf. id.} at 970, 999. \textit{See also} Berger, \textit{Reply, supra} note 13, at 788.
\textsuperscript{20} Id.
of the administrator to make a choice from among two or more legally valid solutions,"²¹ solutions within the "permissible class of actions."²² Similarly, the legal philosopher Ronald Dworkin has noted:

[T]he concept of discretion is at home in only one sort of context: when someone is in general charged with making decisions subject to standards set by a particular authority . . . . Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction . . . . It always makes sense to ask, "Discretion under which standards?" or "Discretion as to which authority?"²³

The approach urged herein, contrary to that espoused by Professor Berger, is that arbitrary decision would be allowed in either of two situations: (1) where the statute specifically provided for it — for example, by allowing random selection as a method of choice — or (2) by providing no standards at all against which the permissibility of the choice under the statute might be judged.

Conversely, contrary to Professor Davis and Saferstein, only in the above two situations, or, of course, in a case in which the applicable statute precluded review expressly or by implication,²⁴ would a petitioner be denied judicial review for a prima facie allegation of abuse of agency discretion.²⁵

The leading case interpreting section 10's exceptions, Citizens to Preserve Overton Park, Inc. v. Volpe,²⁶ apparently adopted this approach, limiting the exception from judicial review of action "committed to agency discretion" to those "rare instances" where there is

²¹ JAFFE, JUDICIAL CONTROL, supra note 12, at 586.
²² Id. at 359. For a similar conception as to the nature of discretion, see Drucker v. United States, 498 F.2d 1350, 1352 (Cl. Ct. 1974).
²⁵ This last phrase indicates that the bare assertion of abuse of discretion, without more, will often be insufficient as a basis for judicial review. See Mulvoy v. United States, 398 U.S. 410 (1970), where the Court stated:
Since the petitioner presented a non-frivolous, prima facie claim for a change in classification based on new factual allegations which were not conclusively refuted by other information in his file, it was an abuse of discretion by the [selective service] board not to reopen his classification.

Id. at 418. See also Scanwell Lab. v. Shaffer, 424 F.2d 859, 875 (D.C. Cir. 1970); 13 B.C. IND. & COM. L. REV. 408, 416 (1971).
"no law to apply"\(^\text{27}\) and therefore no standard by which to distinguish the reasonable from the arbitrary decision. Thus, there will be situations involving arbitrary agency actions which will not constitute abuses of discretion. Nonetheless, as Overton Park makes clear, this is to be a very narrow exception. A penetrating discussion may be found in an earlier case, Wong Wing Hang v. Immigration and Naturalization Service,\(^\text{28}\) wherein Judge Henry Friendly stated:

Some help in resolving the seeming contradiction [between sections 10 and 10(e)] may be afforded by the distinction drawn by Professors Hart and Sacks between a discretion that "is not subject to the restraint of the obligation of reasoned decision . . ." and discretion of the contrary and more usual sort; only in the rare — some say non-existent — case where discretion of the former type has been vested, may review for "abuse" be precluded.\(^\text{29}\) As Saferstein noted, "since this sort of discretion would rarely be conferred, the doctrine [of "committed to agency discretion"] on the Friendly reading would almost never be invoked to bar review."\(^\text{30}\)

Saferstein and Professor Davis, however, see a broader role for the exception of action committed to agency discretion; the latter, particularly, has attempted to show that the existence of the broad discretion within the statutory mandate of an agency will serve to preclude review. However, this position seems to have been rejected in the most recent decisions of the Supreme Court of the United States and the lower federal courts.

B. The Existence of Discretion as Not Precluding Review

Professor Davis finds some support for his wider view of "unreviewable administrative action" in the fact that many statutes are

\(^{27}\) Id. at 410. An example of the "no law to apply" situation is Hi-Ridge Lumber Co. v. United States, 443 F.2d 452 (9th Cir. 1971), where the Ninth Circuit held that a decision by the Secretary of Agriculture that all bids for a contract for the sale of timber would be rejected was within the ambit of those decisions removed from judicial review upon the merits by the APA as action committed to agency discretion. Id. at 456. The court distinguished the case factually from Overton Park by noting that there, "the Supreme Court [had] found the statute involved contained specific requirements to guide and control agency action," whereas in Hi-Ridge "we have no standards before us by which we could review the rejection of all bids." Id. at 455-56. Accord, Kendler v. Wirtz, 388 F.2d 381, 383 (3d Cir. 1968); Sergeant v. Fudge, 238 F.2d 917, 918 (6th Cir. 1956); Corace v. Butterfield, 387 F. Supp. 446, 447-48 (E.D.N.Y. 1975); Community Nat'l Bank v. Gidney, 192 F. Supp. 514, 518 (E.D. Mich. 1961), aff'd as modified, 310 F.2d 224 (6th Cir. 1962). See The Supreme Court, 1970 Term, 85 HARY. L. REV. 40, 317 n.19 (1971).

\(^{28}\) 360 F.2d 715 (2d Cir. 1966).

\(^{29}\) Id. at 718 (citations omitted), quoting H.M. HART & A. SACKS, THE LEGAL PROCESS 172, 175-77 (Tent. ed. 1958).

\(^{30}\) Saferstein, supra note 11, at 676 n.56.
couched in permissive (the agency "may act") rather than in mandatory terms (the agency "shall act"). In 
Ferry v. Udall,\(^{31}\) a case upon which he heavily relies, the Ninth Circuit distinguished between decisions committed to an agency's discretion pursuant to a permissive-type statute, which it held not to be reviewable, and decisions pursuant to a mandatory-type statute, whereby there could be judicial review even though some degree of discretion was involved.\(^{32}\) Additionally, he relies upon the Supreme Court's decision in 
Panama Canal Co. v. Grace Line, Inc.,\(^{33}\) wherein the Court held that toll rates set by the Panama Canal Company were not subject to judicial review because rate adjustment was a matter left to the discretion of the company;\(^{34}\) and 
Hamel v. Nelson,\(^{35}\) wherein a district court, relying upon his Treatise,\(^{36}\) held that the denial of a patent was not reviewable. The court concluded that it was a case involving agency action committed by law to agency discretion, and that "the general rule is that such agency action is not judicially reviewable."\(^{37}\)

While the reasoning in 
Ferry, Panama Canal, and 
Hamel is still occasionally applied,\(^{38}\) this view of the scope of the committed-to-agency-

\(^{31}\) 336 F.2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965). Davis refers to 
Ferry as "a well-considered and especially instructive case." Davis, Treatise, 
supra note 10, § 28.16, at 968. But see Berger, Reply, supra note 13, at 799–803, for 
an extended criticism of 
Ferry.

\(^{32}\) Id. at 712. Accord, e.g., United States v. Walker, 409 F.2d 477, 480 (9th 
Cir. 1969). The decision in Barlow v. Collins, 397 U.S. 159, 166 (1970), undermined the 
conclusiveness of the "permissive-mandatory" distinction of 
Ferry and Walker 
as the basis for precluding judicial review. See also Rockbridge v. Lincoln, 449 F.2d 
567, 570 (9th Cir. 1971).


\(^{34}\) Id. at 317. Judge Friendly has referred to 
Panama Canal 
as an "inscrutable 
opinion." Langevin v. Chenango Court, Inc., 447 F.2d 296, 303 (2d Cir. 1971). See 

\(^{35}\) 226 F. Supp. 96 (N.D. Cal. 1963).

\(^{36}\) See note 10 supra.

\(^{37}\) Id. at 98. The district court's conclusion that this case involved agency 
action committed by law solely to agency discretion was founded upon the permissive-

The district court also stated that "agency action which merely denies a 
governmental benefit," rather than a vested property right, "may more properly be 
held not reviewable." 226 F. Supp. at 99. While the 
Hamel Court noted that the 
general rule of nonreviewability of action committed by law to agency discretion was 
qualifed by the allowance of limited review for fundamental jurisdictional or 
constitutional issues, id. at 98, this so-called right-privilege (benefit) distinction has been 
rejected as a basis for determining constitutional rights, and thereby puts into question 
its weight as a factor in 
Hamel. See Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971). See also W. Gellhorn 
& C. Byse, Administrative Law xi (5th ed. 1970); Van Alstyne, The Demise of 
the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

\(^{38}\) See Knight Newspapers, Inc. v. United States, 395 F.2d 353, 358 (6th Cir. 
395 U.S. 960 (1969), where the court, relying upon 
Panama Canal, Ferry and 
Hamel, denied the availability of habeas corpus relief.
discretion exception is not a compelling one, nor has it been accepted in many recent cases.99

Professor Jaffe has argued, contrary to Professor Davis, that “the mere presence of agency discretion does not oust review”40 and “should not bar a court from considering a claim of illegal or arbitrary use of discretion.”41 Since an agency action “may be set aside for ‘an

99mitted by law to the discretion of the Secretary of Health, Education, and Welfare, and accordingly was not reviewable under the APA. Id. at 822–23. See also Government Employees Local 2764 v. General Serv. Admin., 348 F. Supp. 1200 (W.D. Pa. 1972), a poorly considered, two-page memorandum opinion quoting Panama Canal in dismissing an action to enjoin the relocation of federal offices in Pittsburgh, Pennsylvania, since the relocation was an action committed to agency discretion by law. However, there were Presidential directives concerning efficiency and lowest possible cost available as potential guidelines for review.

See also Schneider v. Richardson, 441 F.2d 1320 (6th Cir.), cert. denied, 404 U.S. 872 (1971), holding that “the setting of fees for representatives of claimants before the Secretary [of HEW] is committed to that agency’s discretion . . . and judicial review is therefore precluded by [section 10] of the APA . . . .” Id. at 1321. Contra, Littell v. Morton, 445 F.2d 1207, 1211 (4th Cir. 1971); Davis, TREATISE, supra note 10, § 28.16, at 979–80.

More recently, the Fifth Circuit, in United States v. One 1970 Buick Riviera, 463 F.2d 1168 (5th Cir.), cert. denied, 409 U.S. 980 (1972), held that the Attorney General had unreviewable discretion concerning a bank’s claim for remission of a forfeiture of an automobile, citing the “long-standing, judge-made rule” to that effect, but relying upon cases no more recent than United States v. One 1961 Cadillac, 337 F.2d 730 (6th Cir. 1964). The court stated:

Although we recognize that agency action is unreviewable only in the exceptional case . . . we do not write upon a clean slate. We find no instance where the Attorney General’s discretion was subjected to judicial review; the full weight of authority lies on the other side.

463 F.2d at 1171 n.4 (citations omitted).

Commenting upon Buick Riviera, Professor Schwartz has noted, “[t]he decision is anomalous in view of the recent tendency to expand the availability of review. To make remission or mitigation action unreviewable is to place the judicial imprimitur upon a tendency to use remission and mitigation authority as a virtual substantive power.” Schwartz, Administrative Law Cases During 1972, 25 Am. L. Rev. 97, 107 (1973).

39. The most recent decision upholding a restricted view of reviewability is Action on Safety & Health v. FTC, 498 F.2d 757 (D.C. Cir. 1974), where the court held that a decision to deny intervention in a consent negotiation to a consumer protection organization was an agency action committed to agency discretion and therefore exempt from judicial review. Id. at 762–63.

The court dealt with the question of reviewability in a summary fashion, failing to consider the more recent cases in the area, including those decided by the District of Columbia Circuit. See notes 62–67 infra. The court instead chose to rely upon Professor Davis’ treatise, Panama Canal, and Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969), discussed at notes 148–50 and accompanying text infra. 498 F.2d at 761. Judge Tamm, writing for the court, attempted to buttress his position by noting that “[t]his analysis has been adopted by other courts.” Id. at 761 n.8. However, he cited only Ferry v. Udall, ignoring the apparent abandonment of that position by the Ninth Circuit 7 years after Ferry, in Rockbridge v. Lincoln, 449 F.2d 567, 570 (9th Cir. 1971). See notes 60 & 61 and accompanying text infra. He also neglected the considerable authority opposed to his position in other circuits. See notes 68–75 infra. It should also be noted that possible positive effects of judicial review, such as those tentatively outlined below, were not considered by the court. See the discussion in III (1) infra.

40. JAFFE, JUDICIAL CONTROL, supra note 12, at 374.

41. Id. at 375.
abuse of discretion,'” this “clearly implies reviewability despite the presence of discretion.” 42 Jaffe has concluded that “[p]resumptively, an exercise of discretion is reviewable for legal error, procedural defect, or, abuse.” 43

Saferstein has disagreed with this interpretation of the APA, which finds a presumption of reviewability, stating that “contrary to the general presumption for review, the [committed-to-agency-discretion] doctrine expresses a general presumption against review.” 44

Beginning with its decision in Abbott Laboratories v. Gardner, 45 the Supreme Court has explicitly adopted the Jaffe position. There, the Court, in an opinion by Justice Harlan, stated that “judicial review of a final agency action will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress,” 46 citing the statement in Rusk v. Cort 47 that “only upon a showing of ‘clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.” 48

Three years later, in Association of Data Processing Service Organizations, Inc. v. Camp, 49 the Court held that “[t]here is no presumption against judicial review and in favor of administrative absolutism . . . unless that purpose is fairly discernible in the statutory scheme.” 50 The same day, in deciding Barlow v. Collins, 51 Justice Douglas stated:

[P]reclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. . . . Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated. 52

44. Saferstein, supra note 11, at 370.
46. Id. at 140. Accord, Cappadora v. Celebrezze, 356 F.2d 1, 6 (2d Cir. 1966).
48. 387 U.S. at 141; the Court also cited JAFFE, JUDICIAL CONTROL, supra note 12, at 336-59. For three recent cases, illustrating the requirement that a statute must evince a clear and convincing legislative intent in order to insulate final agency action from judicial review, see Hayes Int'l Corp. v. McLucas, 509 F.2d 247, 258-60 (5th Cir. 1975); New Jersey Chap., Inc., American Phys. Therapy Ass'n v. Prudential Life Ins. Co. of America, 502 F.2d 500, 504 (D.C. Cir. 1974); Kingsbrook Jewish-Med. Center v. Richardson, 486 F.2d 663, 667-68 (2d Cir. 1973).
50. Id. at 157 (citations omitted).
52. Id. at 166 (citations omitted). For the lower federal courts' application of this directive, see Consolidated-Tomoka Land Co. v. Butz, 498 F.2d 1208, 1209 (5th Cir. 1974).
Notwithstanding the clear import of the above opinions, Professor Davis has argued that the language quoted with approval in *Data Processing* (that there must be "clear and convincing evidence" of a legislative intent to withhold judicial review) "is not and never has been a reliable guide to Supreme Court holdings; the dictum is contrary to holding and therefore is not the law." However, the only cases that are discussed by Professor Davis are dated 1960 and 1965, both prior to the clear and reiterated statement of the presumption of reviewability by the Court.

In the specific context of the reviewability of action committed to agency discretion, Professor Davis' continued reliance upon *Ferry v. Udall* seems misplaced. In *Mulloy v. United States*, the Supreme Court, dealing with a Selective Service Board's refusal to reopen a registrant's classification, stated:

> Though the language of [the regulation] is permissive, it does not follow that a board may arbitrarily refuse to reopen a registrant's classification.

This approach by the Court has been followed in virtually all recent decisions by the lower federal courts, including the Ninth Circuit, which decided *Ferry v. Udall*. Reversing its presumption in *Ferry*, the court stated in *Rockbridge v. Lincoln*:

> A permissive statutory term . . . is not by itself to be read as a congressional command precluding judicial review. The question is whether nonreviewability can fairly be inferred from the overall statutory scheme.

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53. *Davis, Text, supra* note 10, § 28.03, at 512. See also id. § 28.04, at 513; § 28.07, at 524; *Davis, Treatise, supra* note 10, § 28.08, at 947.


> The emergence of the presumption of reviewability in *Abbott Laboratories* was not an isolated event. It reflected a new approach to the formulation of concepts about the judicial review of administrative conduct and the effects of the transformation have been evident elsewhere . . . . [A] similar development in the law of standing has enlarged the class of plaintiffs who may seek review.

*Id.* at 692 (citations omitted).

57. *Davis, Text, supra* note 10, § 28.05, at 515.


60. 449 F.2d 567 (9th Cir. 1971).

61. *Id.* at 570. The court cited Barlow v. Collins, 397 U.S. 159 (1970), as authority. 449 F.2d at 570. *See also* National Forest Pres. Group v. Butz, 485 F.2d 1301 (D.C. Cir. 1973), where the court held that the discretionary authority of the
The District of Columbia Circuit, in a series of important decisions in disparate contexts, has strongly reinforced the presumption of reviewability notwithstanding the presence of permissive statutory language. In reviewing government procurement procedures and regulations in \textit{Scanwell Laboratories, Inc. v. Shaffer},\textsuperscript{62} the court held that "where, as here, a prima facie showing of illegality is made, the question is uniquely appropriate for judicial determination; a plea that such actions are reserved to agency discretion will not be allowed to deny review."\textsuperscript{63} In \textit{Environmental Defense Fund, Inc. v. Hardin},\textsuperscript{64} a suit to compel the Secretary of Agriculture to suspend the use of DDT, the court stated that evidence of a legislative intent to preclude judicial review of administrative action "cannot be found by the mere fact that the statute is directed in permissive rather than mandatory terms."

Further, in \textit{Peoples v. United States Department of Agriculture},\textsuperscript{65} Judge Leventhal stated:

Our decision was made in the context of the general rule, subject only to rare exceptions, that the action of a government agency in the domestic sphere... is subject to judicial review for arbitrariness and abuse of discretion, even though that discretion may be broad.\textsuperscript{66}

The Fourth Circuit is in agreement with the position of the District of Columbia Circuit. In a thoughtful and instructive opinion for the court in \textit{Littell v. Morton},\textsuperscript{68} Judge Winter concluded that, while the

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Secretary of Agriculture to enter into land exchanges was nonetheless reviewable as to specific questions, including compliance with statutory limitations as to authority. \textit{Id.} at 411.

63. \textit{Id.} at 875. A different result was reached by the court in \textit{Wheelabrator Corp. v. Chafee}, 455 F.2d 1306 (D.C. Cir. 1971), where it was held that plaintiff had failed to make out a prima facie case of agency illegality. \textit{Id.} at 1309.
64. 428 F.2d 1093 (D.C. Cir. 1970).
67. \textit{Id.} at 567. Other District of Columbia Circuit opinions in accord include \textit{Overseas Media v. McNamara}, 385 F.2d 308 (D.C. Cir. 1967), where Judge McGowan noted:

Appellee apparently would have us adopt the view that the act of committing a matter to an agency's discretion forecloses court consideration of an alleged abuse of discretion. The legislative history of the Administrative Procedure Act belies this position. \textit{Id.} at 316-17 n.14. See also \textit{National Auto. Laund. & Clean. Council v. Shultz}, 443 F.2d 689, 694-95 (D.C. Cir. 1971); and, most recently, \textit{Independent Brokers Ass'n of America v. Board of Gvs. of the Fed. Reserve Sys.}, 500 F.2d 812 (D.C. Cir. 1974), where the court held that "the use of permissive language, 'may' in this case, is not sufficient" to establish congressional intent to preclude review. \textit{Id.} at 814.

68. 445 F.2d 1207 (4th Cir. 1971).
\end{footnotesize}
statute committed the decision to deny compensation to an Indian attorney for professional services rendered an Indian tribe to the discretion of the Secretary of the Interior, the "APA provides limited judicial review to determine if there was an abuse of that discretion." 69

An earlier opinion of the Eighth Circuit, Webster Groves Trust Co. v. Saxon, 70 is also in accord with the above decisions. There, the court held that although the Comptroller is "free to exercise his discretion in the granting of charters," if he acts in "abuse of his legal authority, to this extent his actions are subject to judicial review . . . ." 71

The Eighth Circuit has continued to adhere to this view, most recently in Ratnayake v. Mack, 72 where a discretionary grant or denial of labor certification by the Secretary of Labor under the Immigration and Naturalization Act was held judicially reviewable, relying upon Overton Park and Barlow as authority. 73 The court found sufficient "law to apply" in the factors which were required to be considered when the Secretary was preparing to rule upon a labor certification, and therefore his determination was not "committed to agency discretion by law." 74

In a similar case involving alien employment certifications, Secretary of Labor v. Farino, 75 the Seventh Circuit also held that the exception from review for action committed to agency discretion was inapplicable. 76 Several decisions in the federal district courts as well have rejected the view that judicial review is precluded if broad discretion has been committed to the agency. 77

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69. Id. at 1211. See Appalachian Pwr. Co. v. EPA, 477 F.2d 495 (4th Cir. 1973), where the court noted that "while an agency may have the discretion to decide," such discretion "does not include a right to act perfunctorily or arbitrarily . . . ." Id. at 507, quoting Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).
70. 370 F.2d 381 (8th Cir. 1966).
71. Id. at 388.
72. 499 F.2d 1207 (8th Cir. 1974).
73. Id. at 1210.
74. Id. See Sioux Valley Empire Elec. Ass'n v. Butz, 504 F.2d 168 (8th Cir. 1974), where the court found "law to apply" in rejecting the argument of the Rural Electrification Administration that its decision to withhold funds was committed to agency discretion and hence "one inappropriate for judicial review." Id. at 172-73.
75. 490 F.2d 885 (7th Cir. 1973).
77. See Ozbirman v. Regional Manpwr. Adm'r, 335 F. Supp. 467 (S.D.N.Y. 1971), where the court, in actions by aliens seeking reversal of denials of employment certification, acknowledged that the ultimate decision as to whether there had been an "adverse effect" or "sufficient workers" was committed to the discretion of the Secretary of Labor, but went on to state that "such discretion does not immunize administrative action from judicial review when, for example, there has been an abuse of discretion." Id. at 470 (citations omitted). See Poirrier v. St. James Parish.
The foregoing cases demonstrate that there now exists a presumption of reviewability under the APA, and that even delegation of broad discretion to an agency (so long as there are some standards under which a court can meaningfully undertake review) does not preclude review. Yet, it has been asserted that regardless of the presence of standards under which a court may review discretionary activity, certain "areas" or "matters" remain unreviewable, even for abuse of discretion, and that a threshold determination should be made as to whether the matter is suitable for review.

C. The Rejection of Nonreviewability as a Threshold Determination

Professor Davis has argued that "under [section 10] of the Administrative Procedure Act, some discretion is reviewable and some is not" and therefore, "[a] case within the area of review is reviewable, and one outside the area of review is unreviewable." A case outside the area of review would be one which is "intrinsically unsuited to judicial review." According to him, these areas of nonreviewability exist where either (a) congressional intent is discernible to make it unreviewable, or (b) the subject matter is for some reason inappropriate for judicial consideration.

To the extent that (a) above means that intent is discernible in the statute to preclude judicial jurisdiction over the agency action, it would seem better assimilated to the exception of section 10(1) for statutes precluding judicial review than the section 10(2) exception for action committed to agency discretion, while (b) above suggests that...
an inappropriate subject matter could be precluded from review even if there were abuse of agency discretion.\textsuperscript{88}

Saferstein speaks explicitly of "the threshold question of non-review,"\textsuperscript{84} and states his view that "a court initially decides" whether an agency action is "reviewable in toto."\textsuperscript{86} The necessity for this initial determination is consistent with Professor Davis' opinion that "making all administrative discretion judicially reviewable would be impracticable . . . ."\textsuperscript{86} Saferstein's agreement is evidenced by his statement that "in appropriate circumstances the courts would not as a matter of propriety and efficiency inquire into certain abuses."\textsuperscript{87} In essence, it appears that "the argument against review of arbitrary action boils down to [administrative] convenience . . . ."\textsuperscript{88}

There are two major difficulties in sustaining an argument for a threshold determination of nonreviewability upon the basis of administrative efficiency. The first is that there may be practical difficulties in making such a determination; and the second is that there may be "constitutional" objections in allowing the balancing of administrative convenience with personal rights which have allegedly been infringed by an abuse of discretion.

Taking the latter difficulty first, it is not easy to see how considerations of efficiency or convenience would justify such a threshold determination. Professor Berger's claim that a plea for protection against arbitrariness rises to constitutional dimensions\textsuperscript{89} was rejected by Professor Davis, who argues that "[o]ne of Mr. Berger's pervasive mistakes is to equate lack of authority to act arbitrarily with judicial reviewability."\textsuperscript{90} But is, or should this be conclusive? This writer submitted above that the question of reviewability should be resolved by looking to the statutory authority under which the agency operates.\textsuperscript{91} Many early Supreme Court decisions advanced in dicta the proposition that "[t]here is no place in our constitutional system for the exercise of arbitrary power . . . ."\textsuperscript{92} In discussing one such case, \textit{American School of Magnetic Healing v. McAnnulty},\textsuperscript{93} Professor Schotland com-

\begin{footnotesize}
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\item 83. \textit{But see} text following note 19 \textit{supra}.
\item 84. Saferstein, \textit{supra} note 11, at 375 n.36; \textit{see also id.} at 368.
\item 85. \textit{Id.} at 395 (emphasis in original).
\item 86. Davis, \textit{Postscript, supra} note 10, at 831.
\item 87. Saferstein, \textit{supra} note 11, at 374 n.33 (emphasis added).
\item 88. Berger, \textit{Judicial Review, supra} note 13, at 81.
\item 89. \textit{Id.} at 57.
\item 90. Davis, \textit{Not Always Reviewable, supra} note 10, at 646.
\item 91. \textit{See} text accompanying note 20 \textit{supra}.
\item 92. Garfield v. United States \textit{ex rel.} Goldsby, 211 U.S. 249, 262 (1908). \textit{See also Yick Wo v. Hopkins, 118 U.S. 356 (1896)}, where the Court stated that our institutions of government "do not mean to leave room for the play and action of purely personal and arbitrary power." \textit{Id.} at 370.
\end{itemize}
\end{footnotesize}
mented that "even in 1902 . . . the Court . . . rejected the notion that administrative action might be wholly beyond judicial review, and therefore beyond assurance of constitutionality."

The most influential statement of this position came from Professor Henry Hart, who declared that it is "a necessary postulate of constitutional government — that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained." He asserted that the Supreme Court saw that

the courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and — seemingly also — that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion.

Notwithstanding the above argument, Saferstein relegates consideration of constitutional difficulties to a footnote. He states that there "is no reason to believe that such a right would not depend — as do so many constitutional rights — upon a balancing process . . . between the individual and the institutional interests." However, in other areas the asserted infringement of constitutional rights is actually reviewed and not subject to a threshold determination of nonreviewability. It is difficult to see how considerations of efficiency serve to preclude courts from receiving evidence in order to determine whether or not a party can make a prima facie showing of abuse of discretion. As Professor Berger has argued, such considerations of administrative efficiency should not

be "balanced" against invasion of the constitutional right to be protected against unreasonable officialdom. "Due process" can hardly be denied because protection is "inconvenient."

95. Hart, supra note 24, at 1372. Accord, Manges v. Camp, 474 F.2d 97 (5th Cir. 1973), where the court held that "when there has been a clear departure from statutory authority" a court-created exception to jurisdiction-withdrawing statutes comes into play which "thereby exposes the offending agency to review of administrative action otherwise made unreviewable by statute." Id. at 99.
96. Hart, supra note 24, at 1390 (footnote omitted).
97. Saferstein, supra note 11, at 373 n.31.
98. Id. (citations omitted).
100. Berger, Synthesis, supra note 13, at 987. See Schneider v. Rusk, 377 U.S. 163, 167 (1964) and United States ex rel. Marcial v. Fay, 247 F.2d 662 (2d Cir. 1957), where the court stated, "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency." Id. at 669. Cf. Argersinger v. Hamlin, 407 U.S. 25 (1972), where the Court held that no person may be
Substituting "unauthorized" for "unreasonable" in the above quotation would comport with the argument advanced here.

In addition to the constitutional difficulties attendant upon the closure of a judicial forum for review of abuse of discretion at the threshold, there are also practical difficulties in making the determination urged by Saferstein and Davis. Indeed, it is difficult to be sure how many courts are actually assisted by the Saferstein-Davis approach since, as Judge Winter observed in Littell v. Morton,

most courts do not directly face the issue; often they say that they cannot review and yet proceed to discuss the merits and find that there is no evidence of an abuse of discretion.

This seems to have been the experience and the result in three recent opinions, two of which explicitly cite Saferstein's article. In East Oakland-Fruitvale Planning Council v. Rumsfeld, an applicant for a grant of funds under the Economic Opportunity Act sued to compel the director of the Office of Economic Opportunity to override a governor's veto of its community organizing plan. The court held that "the Director's ultimate decision to override or not to override" is "not subject to judicial review." However, the court went on to say that it "does not follow . . . that no aspect of the Director's action can be reviewed," since "the statute imposes a number of limitations upon the scope of the Director's discretion," and accordingly, the court would enforce such a "clear and specific statutory limitation upon that discretion." Therefore, in this instance, it is less than clear what function the threshold determination of nonreviewability serves.

Similarly, in Knight Newspapers, Inc. v. United States, an action for refund of an alleged overpayment of postage, the court held "that the Postmaster-General's refusal to grant the appellant a postage refund is not subject to judicial review." However, the court pro-

imprisoned, absent intelligent waiver, for any offense, unless he was represented by counsel at his trial. Id. at 37. Chief Justice Burger, concurring in the result, noted that, "This will mean not only more defense counsel must be provided, but also additional prosecutors and better facilities for securing information about the accused . . ." Id. at 43 (Burger, C.J., concurring).

102. 445 F.2d at 1211.
103. 471 F.2d 524 (9th Cir. 1972).
104. Id. at 533.
106. 471 F.2d at 534 (emphasis added).
107. Id.
108. 395 F.2d 353 (6th Cir. 1968).
109. Id. at 357.
ceed to find that the parties, had raised "an additional issue . . . as to whether the Postmaster's denial of a refund in the instant case constitutes arbitrary action or a clear abuse of discretion." The court then reviewed this allegation, and found that it was without merit.

In a well-known decision, *Hahn v. Gottlieb*, the First Circuit considered a petition for an injunction restraining the Federal Housing Administration from approving a rent increase for a federally subsidized, low-income housing project, pending opportunity for the tenants to be heard upon the proposed increase. After a lengthy examination of the factors proposed by Saferstein, the court concluded that there was "clear and convincing" evidence that Congress did not intend courts to supervise FHA rent decisions. We therefore hold that the approval of rents and charges is a "matter [sic] committed to agency discretion by law" and thus not subject to judicial review.

However, immediately following this finding of nonreviewability of this "matter," the court noted:

In so holding, we do not reach the question whether courts may intervene in those rare cases where the FHA has ignored a plain statutory duty, exceeded its jurisdiction, or committed constitutional error. The present case, which at best concerns a failure to give proper weight to all the relevant considerations, plainly falls within the area committed to agency discretion.

Again, the threshold determination of nonreviewability does not seem essential to the holding of the opinion.

The above opinions indicate that a finding of nonreviewability should only be made in considering a particular case, and not upon a preliminary determination that the "matter" or "area" is inappropriate for review. The difference between the approach in *Hahn* and one which emphasizes the individual case is exemplified by a Second Circuit decision, *Langevin v. Chenango Court, Inc.*, which also held that the

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110. *Id.* at 359.
111. *Id.*
112. 430 F.2d 1243 (1st Cir. 1970).
113. *Id.* at 1249-50.
115. 430 F.2d at 1251. The First Circuit relied upon *Hahn* in the recent decision of *Davis Assoc., Inc. v. Secretary of Housing & Urban Dev.*, 498 F.2d 385 (1st Cir. 1974), which held that a housing contractor was not entitled to judicial review of the decision of a local housing authority rejecting the contractor's bids. The court, in summary fashion, rejected the applicability of APA section 10(e), again relying only upon Saferstein's analysis and considering the effect of neither *Overton Park* nor any more recent decision in this area than *Hahn* itself. *Id.* at 390 & n.8. *But see note 134 infra.*
116. 447 F.2d 296 (2d Cir. 1971).
approval of the FHA for a rental increase was not subject to judicial review, but employed a significantly different analysis. Recognizing the conflict between the exception for action committed to agency discretion and the direction to review abuses of discretion, Judge Friendly initially referred to Professor Davis' formulation that:

[A]dministrative action is usually reviewable unless either (a) congressional intent is discernible to make it unreviewable, or, (b) the subject matter is for some reason inappropriate for judicial consideration.117

In rejecting the reasoning of the court in Hahn, Judge Friendly noted that "the First Circuit relied in part on Professor Davis' second 'unless' "118 (which follows Saferstein's recommendation as well). Friendly argued that "[a]ssessing the reasonableness of [such] an increase . . . does not seem beyond judicial competence."119 Nevertheless, he determined that "we reach the same conclusion of nonreviewability as the First Circuit," but upon a significantly different ground — "on the basis of Professor Davis' first 'unless.' "120 As previously discussed,121 this would assimilate it to the exception in section 10(1), for statutes precluding judicial review, rather than the section 10(2) exception for action committed to agency discretion. Judge Friendly concluded by noting that:

Like the First Circuit, "we do not reach the question whether courts may intervene in those rare cases where the FHA has ignored a plain statutory duty, exceeded its jurisdiction, or committed constitutional error," including cases where it is alleged that the agency decision clearly "rested on an impermissible basis such as an invidious discrimination against a particular race or group."122

Judge Friendly apparently recognized the validity of Professor Berger's caution that "arbitrariness [in the distinction used in this article, unauthorized action] is too serious to be sheltered on an assumption that a particular category requires insulation."123 In the more visible areas of racial or religious discrimination,124 this proposition

118. 447 F.2d at 303.
119. Id.
120. Id.
121. See text accompanying notes 82-83 supra.
122. 447 F.2d at 303 (citations omitted).
123. Berger, Arbitrariness, supra note 13, at 57; see also Berger, Sequel, supra note 13, at 632.
would seem obvious; but even in less salient ones, it is difficult to justify a threshold preclusion. For example, if, in an overcrowded Public Health Service hospital, decisions must be made about which types of patients must be discharged, it is difficult to see why a total preclusion from review should be upheld if there are statutory purposes or provisions which could serve as a guide for the reviewing court. 125

This attention to the statutory authority conferred upon an agency, within which it exercises its discretion, 128 is discernible in Langevin and in a few other cases. 127

It is submitted that this attention to the statutory mandate was explicitly recognized in Citizens to Preserve Overton Park, Inc. v. Volpe. 128 In Overton Park, a citizens' organization petitioned to enjoin the Secretary of Transportation from releasing federal funds to a state highway department for construction of a segment of an expressway through a city park. In remanding for review upon a full administrative record, the Court stated that "it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority . . . ." 129 Justice Marshall, in his opinion for the Court, discussed the "committed to agency discretion" exception as follows:

In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of 'clear and convincing evidence' of a . . . legislative intent" to restrict access to judicial review.

Similarly, the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception. The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." 130

126. For a discussion of the various degrees of discretion see Dworkin, supra note 23, at 32-34.
128. 401 U.S. 402 (1971). One commentator has noted that "prior to Overton Park, no definitive assessment had been made [by the Court] of the 'committed to agency discretion' provision." 60 Geo. L.J. 1101, 1107 (1972).
129. 401 U.S. at 420.
In the above two paragraphs the Court apparently distinguishes the exceptions of section 10(1) and section 10(2), considering them as different grounds for exclusion, in contradiction to Saferstein. Furthermore, although the Court — speaking of statutorily unauthorized action rather than arbitrariness — did not adopt Professor Berger’s thesis completely,

[b]y thus restricting the exception, the Court took sides in the debate regarding judicial review of administrative action, aligning itself with those advocating a wide application of review.

Although other commentators have stated that Overton Park has settled the controversy, Professor Davis has argued that “the Court recognized the existence of the exception [for action committed to agency discretion] when it said: ‘Plainly, there is ‘law to apply’ and thus the exception . . . is inapplicable.’” However, this would appear to be an extremely limited form of “recognition”, in contrast to the wide view of the exception which Davis and Saferstein entertain, since the Court explicitly noted that it is “a very narrow exception.” The cases following Overton Park have made this clear. For example, in Rockbridge v. Lincoln, the court, while acknowledging that the relevant statutes invested the Commissioner of Indian Affairs with a

131. See Saferstein, supra note 11, at 377 n.43.
132. See text accompanying notes 19, 26 & 27 supra.
133. 60 Geo. L.J. 1101, 1108 (1972). While mentioning in a footnote that “[t]he scope of the ‘committed to agency discretion’ exception has been the subject of extensive commentary” and citing two additional articles by Professor Berger, one by Professor Davis, and Saferstein, it was Professor Berger to whom the Court cited in support of the narrow scope of that exception. 401 U.S. at 410 n.23.
134. Davis, Text, supra note 10, § 28.05, at 515. For additional views that Overton Park has settled the dispute, see Schwartz, Administrative Law Cases During 1971, 24 A.B.A. Rev. 299, 310–11 (1972); McCabe, Recent Developments in Judicial Review of Administrative Actions: A Developmental Note, 24 A.B.A. Rev. 67 (1972). In the latter article, the author, in addition to noting that the Court appears to have rejected the Saferstein factor-analysis approach utilized in Hahn, states that the controlling statute in Hahn would “surely” have been sufficient “law to apply,” resulting in “judicial review under the Overton Park test.” Id. at 94. See also Note, Discretion in a Crystal Closet: Applying a Systemic Approach to Determine the Reviewability of Agency Discretion, 3 Rutgers-Camden L.J. 452 (1972).
135. 401 U.S. at 410 (footnote omitted); cf. Schotland, supra note 94, at 121.
137. In 1972, relying upon Overton Park, narrowly distinguished Panama Canal in holding that the imposition of an electricity transmission service charge by the Secretary of the Interior was subject to judicial review. See Associated Elec. Coop., Inc. v. Morton, 507 F.2d 1167, 1176–77 & n.18 (D.C. Cir. 1974).
large element of discretion, closely examined the statutory authority and the legislative purposes behind the mandate of authority concluding:

In sum, the legislative history does not support the contention that the regulations promised under [the statutes] are wholly within the discretion of the Commissioner and thus immune from judicial review. The history demonstrates that the statutes were passed with a specific set of objectives in mind and that the lawfulness of the Commissioner’s exercise of discretion — his decisions to regulate or not to regulate in any particular instance, as well as the particular mode of regulation chosen — is to be determined by reference to these objectives. 138

Given the practical difficulties in making the sort of threshold determination urged by Professor Davis and Saferstein, the arguable constitutional impingements resulting from the denial to a party of the judicial forum for review of administrative abuse, and the apparent rejection of the Davis approach in Overton Park, it is difficult to accept such an approach even if it were substantiated that “[t]he courts have uniformly made an analysis like that” offered by Professor Davis upon the “committed to agency discretion” exception. 139 Indeed, prior to Overton Park at least three circuits had rejected Professor Davis’ suggested approach. 140 Furthermore, several of the cases relied upon by Professor Davis were criticized earlier in discussing the proposition that a grant of broad discretion does not insulate agency action from

138. 449 F.2d at 572.
139. See Davis, Text, supra note 10, § 28.05, at 515 (emphasis in original), referring to the argument examined at text accompanying notes 13–16 supra. See also Davis, Treatise, supra note 10, § 28.16, at 964.

In his treatise, Professor Davis listed several cases as supportive of his view that there is “unreviewable administrative action.” Davis, Treatise, supra note 10, § 28.16, at 965–70. The cases, however, are distinguishable, as Professor Hart noted in this passage from his celebrated “Dialogue”:

Q. But it’s notorious that there are all kinds of administrative decisions that are not reviewable at all. Professor Davis devotes a whole fat chapter to “Unreviewable Action” of administrative agencies.

A. [Professor Hart] Administrative law is a relatively new subject. Naturally there have been a number of ill-considered opinions. But if you look closely at Professor Davis’ cases you’ll find that almost all of them are distinguishable. Many of them don’t involve judicially enforceable duties of the complaining party at all. Others involve political questions . . .

Mahinka: The Problem of Nonreviewability: Judicial Control of Action Commi
review. 141 Other cases he relies upon may be distinguished either upon the bases that the decisions are allocated to another branch of government — for example, decisions upon foreign relations — or the political question doctrine, 142 or that they are cases in which review was precluded by clear Congressional intent, and thus fall within the exception of section 10(1).

While it is true that actions in the foreign relations area are generally unreviewable, 143 it is not because they fall within some expansive reading of section 10(2); rather, the foreign policy decision by its nature is nonjudicial, and therefore is one for review of which the "judiciary has neither aptitude, facilities, nor responsibility . . . ." 144 For example, in holding that the question of which government of a foreign nation is the lawful or recognized government is unreviewable by a court, the Supreme Court stated, in National City Bank v. Republic of China, 145 that "[t]he status of [foreign sovereigns] in our courts is a matter for determination by the Executive and is outside the competence of this Court." 146 It is difficult to see upon what grounds such a political determination could be reviewed by the courts without int-

141. See the discussion in section II B supra. Some of the cases relied upon by Professor Davis, in addition to Ferry, Panama Canal, and Hamel, are reviewed at note 38 supra.


144. Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). The Fifth Circuit has recently held that a decision of the State Department to recognize and allow a claim of sovereign immunity was not subject to judicial review under the APA. Spacil v. Crowe, 489 F.2d 614, 616-21 (5th Cir. 1974). The court noted that it was "analyzing here the proper allocation of functions of the branches of the government in the constitutional scheme of the United States." Id. at 618. See Ex parte Republic of Peru, 318 U.S. 578, 588-89 (1943).


146. Id. at 358. Professor Davis cites this as a case of unreviewable discretionary action. See Davis, Postscript, supra note 10, at 832.

A court will, however, in certain unusual circumstances, decide whether or not a particular group constitutes a de facto government. See, e.g., Pan Am. World Awys., Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1009-15 (2d Cir. 1974), an action against the insurers of an aircraft hijacked over London and later destroyed in Egypt by members of the Popular Front for the Liberation of Palestine.
vading the constitutional prerogatives of the Executive in foreign affairs.\textsuperscript{147}

Another case relied upon by Professor Davis, involving decisions regarding national defense, further illustrates determinations that are allocated to the Executive. In \textit{Curran v. Laird},\textsuperscript{148} the District of Columbia Circuit held that a provision of the Cargo Preference Act prohibiting the use of foreign vessels to transport American military cargo was subject to an implied exception that foreign ships may be used when American ships were not available; and the question of whether United States ships should have been made available by requisitioning them from the “national defense reserve fleet” (the “mothball” fleet) was within a span of actions not subject to judicial review.\textsuperscript{149} In so holding, Judge Leventhal carefully distinguished this case upon its facts:

That the matter before us for consideration lies in the special zones of exceptions, rather than the ordinary area of judicial reviewability, is established by several cardinal aspects of the issues. The case involves decisions relating to the conduct of national defense; the President has a key role; the national interest contemplates and requires flexibility in management of defense resources....\textsuperscript{150}

\textsuperscript{147} See generally L. Henkin, Foreign Affairs and the Constitution 37-65, 208-16 (1972), on the scope of Executive power and the judicial review of foreign affairs matters.

\textsuperscript{148} 420 F.2d 122 (D.C. Cir. 1969).

\textsuperscript{149} \textit{Id.} at 128.

\textsuperscript{150} \textit{Id.} at 152. The \textit{Curran} Court later emphasized that:

The point of our decision is that there is a narrow band of matters that are wholly committed to official discretion, and that the inappropriateness or even mischief involved in appraising a claim of error or of abuse of discretion, and testing it in an evidentiary hearing, leads to the conclusion that there has been withdrawn from the judicial ambit any consideration of whether the official action is “arbitrary” or constitutes an abuse of discretion.

\textit{Id.} at 131.

The view expressed by the District of Columbia Circuit in \textit{Curran} was reiterated in Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), \textit{vacated as moot}, 404 U.S. 403 (1972), where the court, in distinguishing Schilling v. Rogers, 363 U.S. 666 (1960), noted that “the subject matter of the regulatory scheme in Schilling was permeated with overtones of foreign affairs and national defense policy ....” 432 F.2d at 666 n.6 (citations omitted). \textit{Accord, United States ex rel. Schonbrun v. Commanding Officer, Armed Forces, 403 F.2d 371, 375 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969).}

National defense policy was also a major reason for the decision in Korematsu v. United States, 323 U.S. 214, 218-19 (1944), where the Court deferred to an Executive-military judgment directing the exclusion of all persons of Japanese ancestry from designated West Coast “military areas.” Cf. Hirabayashi v. United States, 320 U.S. 81 (1943). \textit{But see United States v. Robel, 389 U.S. 258, 263-64 (1967); cf. Definis v. Odegaard, 416 U.S. 312, 339 n.20 (1974) (Douglas, J., dissenting).} The background and import of this deplorable episode have been thoughtfully discussed recently by Dr. Milton S. Eisenhower, first Director of the War Relocation Authority, M. Eisenhower, \textit{The President as Calligrapher} 95-127 (1974).
Moreover, in areas not so clearly allocated to the Executive, it is, as the Supreme Court noted in Baker v. Carr, 151 "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 152 As Professors Steiner and Vagts have noted, "[i]n numerous fields with important bearing upon foreign relations, the courts have critically reviewed executive action and indeed exercised judicial review over legislation. Recall the passport cases . . . and the deportation cases." 153 Even within the area of exclusion of aliens, traditionally regarded as being solely within Executive power, the recent decision of Kleindienst v. Mandel 154 left open the possibility of judicial review in an appropriate future case, the court stating that "[w]hat First Amendment or other grounds may be available for attacking exercise of discretion for which no justification is advanced is a question we neither address nor decide in this case." 155

As noted above, other cases upon which Professor Davis relied for his proposition of unreviewable administrative action are distinguishable upon the ground that review is precluded by clear congressional intent. For example, Davis asserts that "[o]ne important area of administrative action in which judicial review is unavailable even if the agency acts arbitrarily or in abuse of discretion involves the suspension or refusal to suspend newly filed rates." 156 However, in the case Davis cites as supporting his position, Arrow Transportation Co. v. Southern Railway Co., 157 Justice Brennan explicitly concluded that Con-

See also Rostow, The Japanese American Cases — A Disaster, 54 Yale L.J. 489, 503, 508, 515 (1945).

151. 369 U.S. 186 (1962).

152. Id. at 211. Cf. JAFFE, JUDICIAL CONTROL, supra note 12, at 366, where the author concludes that, "There should therefore be no rule which automatically bars a judicial test of validity simply because the machinery of the Presidency is involved." Cf. also Hochman, Judicial Review of Administrative Processes in Which the President Participates, 74 Harv. L. Rev. 684, 712 (1961).


155. Id. at 770. See 14 Harv. Int'l L.J. 158 (1973), where the author states:

Faced with the rights of citizens rather than those of aliens alone, the Court expressly refused to accept the government's contention that the Attorney General's [statutory] waiver power is invariably immune from judicial review." Id. at 162.

Of course, if Mandel is interpreted narrowly, the proffered test of "facial legitimacy and bona fide reason" may be of little or no practical value because of the ease with which the Attorney General can develop ex post factum the necessary reasons for his action. Id. at 167. See also 22 Buffalo L. Rev. 499, 505, 507 (1973). For a similar view of executive exclusionary power, see Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 898 (1961).

156. DAVIS, TREATISE, supra note 10, § 28.16, at 966.

gress meant to "preclude judicial review" by its statutory scheme in this area:

Congress engaged in a protracted controversy concerning the period for which the Commission might suspend a change of rates. Such a controversy would have been a futile exercise unless the Congress also meant to foreclose judicial power to extend that period. This controversy spanned nearly two decades.\(^\text{158}\)

The Court's characterization of *Arrow Transportation* as a decision consistent with the exception of section 10(1) finds additional support in *United States v. SCRAP*\(^\text{159}\) and the decision of the District of Columbia Circuit in *Municipal Light Boards v. Federal Power Commission (FPC)*.\(^\text{160}\) In the latter case the court, relying on *Arrow Transportation*,\(^\text{161}\) held that an order by the FPC to suspend for 1 day an electric company's increase in rates for wholesale electricity was not subject to judicial review under the Federal Power Act. Writing for the court, Judge Leventhal distinguished *Environmental Defense Fund v. Hardin*, where a refusal to suspend the use of a pesticide was held reviewable,\(^\text{162}\) stating that in *Hardin*:

[W]e required a showing of "clear evidence of legislative intent" to preclude judicial review . . . . The history of the suspension power of the ICC [and the long line of cases holding refusal to suspend filed rates unreviewable exercises of agency discretion] place this case in a clearly different context.\(^\text{163}\)

One area in which nonreviewability for abuse of discretion has been prevalent is a prosecutor's decision to bring or not to bring an action. Traditionally, decisions concerning the initiation of judicial or administrative proceedings have been considered broadly discretionary,\(^\text{164}\) and there are many cases which hold that prosecutorial discretion

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158. *Id.* at 664.
161. *Id.* at 1349-51.
162. 428 F.2d at 1098.
163. 450 F.2d at 1351 n.23 (citations omitted); cf. Rural Elec. Admin. v. Central La. Elec. Co., 354 F.2d 859 (5th Cir.), *cert. denied*, 385 U.S. 815 (1966), a case also relied upon by Davis, wherein the court stated: "From the entire history of the Rural Electrification Act . . . we are totally convinced that Congress has never enacted or intended that loans by this agency should be reviewable in the Courts." *Id.* at 865.
The Supreme Court has recently remarked, in *United States v. Nixon*, that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . ." The reasons for this unwillingness to provide judicial oversight are varied. Professor Davis has noted that nonreviewability of prosecutors' discretion was established at an early period in the Court's history, when reluctance to oversee Executive action was much greater. Chief Justice — then Circuit Judge — Burger, in *Nevman v. United States*, observed that "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . ." In United

165. See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967), where the Court stated that the General Counsel of the National Labor Relations Board [NLRB] "has unreviewable discretion to refuse to institute an unfair labor practice complaint . . ." Id. at 182; Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974), where the court, relying upon *Vaca* commented that "[a]n agency's decision to refrain from an investigation or an enforcement action is generally unreviewable . . ." *Id.* at 645 (footnote omitted). The relevant statute in *Vaca* is unusually clear concerning the discretion given to the General Counsel of the NLRB. Section 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d) (1970), provides that the General Counsel "shall have final authority . . . in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board . . ." But see Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853 (8th Cir. 1975), where the court stated, "The discretion of the General Counsel . . . is broad, but not necessarily absolute." *Id.* at 858 n.8.


168. DAVIS, TEXT, supra note 10, § 28.06, at 523.

169. 382 F.2d 479 (D.C. Cir. 1967).


Recent comparative law studies have indicated, however, that pessimistic appraisals of the possibility of controlling prosecutorial discretion need not be taken as conclusive. For instance, in the Federal Republic of Germany legislation has been implemented to limit prosecutorial discretion in felony cases and serious misdemeanors. Sr. PO § 152(2)–(4) (C.H. Beck 1969). The German system has recently been described in Herrmann, *The Role of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974). The utility of comparing that system to current American practice has been stressed in Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974). Professor Langbein describes the German approach as regulating "the prosecutor's monopoly [upon bringing prosecutions] by giving the citizens the right to departmental and judicial review of decisions not to prosecute." *Id.* at 461. The statutory procedure is analogous to a mandamus action for a judicial decree to require the prosecutor to prosecute. He concludes that "these remedies constitute significant controls over and deterrents against abuse of prosecutorial authority." *Id.* at 463. While the structures of German and American criminal procedure differ considerably, the German approach should, at the least, be considered suggestive of both the possibility of and methods for some degree of control over prosecutorial discretion. See *U.C.L.A. L. Rev.* 116, 182.
States v. Cox, the Fifth Circuit suggested that the doctrine of separation of powers was an alternative ground for not allowing court interference with the unbridled exercise of the Executive's discretionary power to prosecute. Thus, it might be concluded that this area is one allocated to a branch other than the judiciary.

It is not at all clear, however, that these factors must serve to preclude all judicial review, whatever the abuse alleged or remedy appropriate. In terms of the argument presented previously, a threshold determination that this is a "matter" or "area" of nonreview should be rejected. Ironically, Professor Davis has been one of the chief advocates of an expanded judicial role in this area. He has asked, "if abuse of the prosecuting power is a major cause of denial of equal justice throughout our whole system of law and government, why should the courts refuse to inquire whether the power has been abused?"

In the area of prosecutorial discretion, the availability of review should depend upon the statutory authority of the agency exercising its choice. Ambiguity is common in statutes which provide that an officer "may act" or "shall act." Prosecution may be directed only in the presence or absence of specified circumstances, or authority to prosecute may be granted without reference to any standards by which the officer's decision might be reviewed. At other times, the meaning of a particular statute may not be clear. Only in instances where authority is granted without reference to any standard should a decision be held completely


171. 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

172. Id. at 171. In Inmates of Attica Correc. Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973), the Second Circuit relied upon the separation of powers argument of Cox in holding that the decision to investigate, arrest, and prosecute various state officers and officials for alleged violations of the federal civil rights of state prison inmates was left to the sole discretion of the United States Attorney. Id. at 379-80. The court stated that:


unreviewable.\footnote{175} Since such statutes are rare, it is submitted that this area of discretionary activity be subject to closer and more frequent review where prima facie cases of abuse of discretion exist.\footnote{176}

A case which illustrates the difficulties and hardships created by a total prohibition of review is 	extit{Peek v. Mitchell},\footnote{177} where the plaintiffs sought to compel the Attorney General of the United States and the United States Attorney to prosecute known civil rights violators. The court held that such control over the discretion of those prosecutors was beyond judicial powers.\footnote{178} However, should this be the case? Clearly, in 	extit{Peek}, fundamental constitutional rights had been allegedly violated, and the victims left without legal recourse because of a refusal to prosecute.\footnote{179} Although it is arguable that the authority of an Attorney General or a regulatory agency to prosecute exists independent of any judicially ascertainable standard, and that therefore there is no "law to apply," review is not necessarily precluded. A court nonetheless may be able to inquire upon what grounds the decision was made despite the fact that the court cannot interfere with the officer's judgment. This structuring of administrative discretion by requiring a reasoned decision for the exercise of prosecutorial or regulatory choice has recently been followed in many cases by the District of Columbia Circuit\footnote{180} and has increasingly found acceptance in the Supreme Court.\footnote{181}

Several decisions in the Circuit Courts in recent years have also cast doubts on the continued legitimacy of the concept of totally unreviewable prosecutorial discretion. The First Circuit, in 	extit{Trailways},

\footnotesize{175. See text accompanying note 20 supra.} \\
\footnotesize{176. It should be noted that an agency's failure to act is included within the APA's definition of agency action, 5 U.S.C. § 551 (13) (1970), and that section 706 (1) of the APA states that the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed . . . ." Administrative Procedure Act § 10(e) (A), 5 U.S.C. § 706 (1) (1970).} \\
\footnotesize{177. 419 F.2d 575 (6th Cir. 1970).} \\
\footnotesize{178. Id. at 577. The ruling in 	extit{Peek} was criticized in 	extit{Davis, Treatise}, supra note 9, § 28.16, at 985. See also 	extit{Inmates of Attica Correc. Facility v. Rockefeller}, 477 F.2d 375, 379-82 (2d Cir. 1973); 	extit{Georgia v. Mitchell}, 450 F.2d 1317, 1321 (D.C. Cir. 1971).} \\
\footnotesize{179. For a discussion of the problems involved with complete deference to prosecutorial discretion in the civil rights field, see 	extit{Note, Discretion to Prosecute Federal Civil Rights Crimes}, 74 YALE L.J. 1297 (1965).} \\
Inc. v. CAB, 182 held that the Civil Aeronautics Board's refusal to prosecute airlines for maintaining unjustly discriminatory fees was reviewable as there was alleged an abuse of discretion. The court found the Board's reasons for not prosecuting inadequate and held that the Board must proceed with the investigation sought by the petitioners. 183 In Safir v. Gibson 184 the Second Circuit also held a failure to prosecute reviewable. In that decision, the plaintiffs requested that the court order the Maritime Administrator to institute action to recover subsidies paid to member companies of a shipping conference, found by the Federal Maritime Commission to have willfully cut rates for the purpose of eliminating the plaintiff's competition, in violation of the Shipping Act. 185 Judge Friendly rejected an argument that the Administrator had unreviewable and unlimited discretion and held that a failure to act could be reviewed to determine whether discretion had been properly exercised, and if so, whether such had been upon grounds consistent with the statute. 186

More recently in Bachowski v. Brennan, 187 the Third Circuit held that Congress in authorizing suit by the Secretary of Labor as the exclusive post-election remedy for violations of Title IV of the Labor-Management Reporting and Disclosure Act of 1959 188 (L-MRDA), did not intend to render unreviewable the Secretary's decision not to bring a suit challenging a union election. 189 The court, noting that "[n]ot every refusal by a Government official to take action to enforce a statute . . . is unreviewable," concluded that "the principle of absolute prosecutorial discretion is not applicable to the facts of this case."190

182. 412 F.2d 926 (1st Cir. 1969).
183. Id. at 936. See REA Express, Inc. v. CAB, 507 F.2d 42, 45 (2d Cir. 1974).
185. Id. at 974-75.
186. Id. at 978. See Davis, Text, supra note 10, § 28.06, at 520-21, for further discussion of both Trailways and Safir.
189. 502 F.2d at 85.
190. Id. at 87. The court suggested that the doctrine of prosecutorial discretion "should be limited to those civil cases . . . involving[ing] the vindication of societal or governmental interests rather than the protection of individual interests . . . ." Id. Inasmuch as these two types of interests would almost always both be present in a particular case, any such distinction would seem to be necessarily highly arbitrary and of limited utility in practice.

See DeVito v. Shultz, 300 F. Supp. 381 (D.D.C. 1969), where the court required the Secretary of Labor to provide "an adequate written statement of his reasons for non-intervention" in a contested union election in which there were irregularities. Id. at 384. The court held that those seeking the prosecution "have a judicially enforceable right to demand that the Secretary exercise his discretionary authority in a manner consistent with the requirements of the Act and not arbitrarily or capriciously." Id. at 383. For further discussion of Judge Gesell’s opinion in DeVito, see Davis, Text, supra note 10, § 28.05 at 517-18.
The court held not only that "judicial review of the Secretary’s decision not to bring suit should extend . . . to an inquiry into his reasons for that decision to ensure that he has not abused the discretion granted to him by L-MRDA," but also, significantly, that review could extend to the factual basis of the Secretary’s determination of the merit of a complaint.101 The court criticized those cases holding review of the Secretary’s factual conclusions improper and stated:

The Secretary may as easily defeat the purpose of the L-MRDA by ignoring overwhelming evidence of violations affecting the outcome of an election as by refusing to file suit for reasons not intended by Congress. In either case, judicial review should be available to ensure that the Secretary’s actions are not arbitrary, capricious, or an abuse of discretion.102

Another case which held an agency’s refusal to require compliance reviewable is Medical Committee for Human Rights v. SEC,103 where the petitioner requested the Securities Exchange Commission (SEC) to take action against Dow Chemical Company for the company’s refusal to include in a proxy statement a resolution that the company should refrain from selling napalm for use against human beings. In a surprising reversal of the assumption that the SEC’s determinations in this area were unreviewable,104 the District of Columbia Circuit held that the SEC’s no-action determination was indeed reviewable, and remanded for a clarification of the reasons for the decision.105 Also, in Adams v. Richardson,106 that circuit affirmed an order directing the Secretary of Health, Education, and Welfare to commence enforcement proceedings against 74 secondary and primary school districts which had been found either to have reneged upon previously approved desegregation plans or to be otherwise not in compliance with Title VI of the Civil Rights Act of 1964.107 Relying upon Overton Park, the court rejected the argument that enforcement of Title VI was committed solely to

195. 432 F.2d at 682. The agency had already instituted investigatory proceedings, but had concluded that the petitioner was not entitled to relief. Id. at 663.
196. The Medical Committee decision was recently limited and distinguished in Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974), where the court held that judicial review of SEC action was confined to when orders were issued and was not available when the SEC merely refused to investigate. Id. at 644.
197. Id. at 1160-61. The relevant statute was 42 U.S.C. § 2000d-1 to -6 (1970).
agency discretion, since there was “law to apply”. The court noted that:

Appellants rely almost entirely on cases in which courts have declined to disturb the exercise of prosecutorial discretion by the Attorney General or by United States Attorneys. Georgia v. Mitchell. Those cases do not support a claim to absolute discretion and are, in any event, distinguishable from the case at bar.

Even in the area of criminal prosecutions, arguably an area where a broad discretion would be the most appropriate, review has been granted in several instances in cases of alleged retaliatory or discriminatory prosecution. For example, in Nader v. Saxbe, an action was brought against the Attorney General of the United States and other federal officials seeking to compel them to initiate prosecutions against persons who had failed to file reports of political campaign contributions and expenditures pursuant to the Federal Corrupt Practices Act of 1925. While the District of Columbia Circuit affirmed the dismissal of the action, the basis for decision was that the plaintiffs appropriate plans to end racial discrimination, directing the Department of Health, Education, and Welfare to initiate compliance procedures if an acceptable plan were not arrived at within a specified period. Id. at 1164–65. One state which refused to submit a plan has been sued by the Department of Justice. See Egerton, Adams v. Richardson: Can Separate Be Equal?, 6 Change 29 (Dec.-Jan. 1974–75).

198. 480 F.2d at 1161–62.
199. Id. at 1162 (citations omitted) (emphasis in original).

Professor Davis is of the opinion that not only should prosecutorial discretion be subject to judicial review (see Davis, Treatise, supra note 9, § 28.16, at 982–92); other police practices as well should no longer be exempt from judicial review. See K. Davis, Discretionary Justice: A Preliminary Inquiry 80–96 (1969); Davis, An Approach to Legal Control of the Police, 52 Texas L. Rev. 703 (1974).

204. The district court dismissed the action for failure to state a claim upon which relief could be granted upon the alternative grounds that 1) prosecutorial discretion was immune from review by the courts, and 2) even if the court could have...
sought only prospective relief, and therefore lacked standing to sue since the Act's reporting requirements had been repealed\textsuperscript{205} after the suit had been initiated.\textsuperscript{206} The court, in an opinion by Judge Wright, noted that while the "federal courts have customarily refused to order prosecution of particular individuals at the instance of private persons,"\textsuperscript{207} the complaint in question sought instead "a conventionally judicial determination of whether certain fixed policies allegedly followed by the Justice Department and the United States Attorney's office" lay outside the "constitutional and statutory limits of prosecutorial discretion."\textsuperscript{208} The court argued that based upon the constitutional mandate that the Executive "take care that the laws be faithfully executed"\textsuperscript{209} the "exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review."\textsuperscript{210}

Although there are fewer clear examples, there appears to be some willingness to review discretionary determinations of regulatory agencies to prosecute, as well as determinations not to prosecute. A leading case in this area is \textit{Moog Industries, Inc. v. FTC},\textsuperscript{211} where the Supreme Court considered whether cease and desist orders against the petitioner should be withheld until the petitioner's competitors were also proceeded against, in view of the competitive harm which would otherwise


206. 497 F.2d at 680-81.

207. \textit{Id.} at 679 n.18. \textit{See} notes 169-72 and 177 and accompanying text \textit{supra}.

208. \textit{Id.} at 679.

209. U.S. CONST. art. II, § 3.

210. 497 F.2d at 679-80 n.19. The constitutional ground suggested in \textit{Nader} to permit review should be compared with the separation-of-powers ground proposed as precluding review in United States v. Cox, 342 F.2d 167 (5th Cir.), \textit{cert. denied}, 381 U.S. 935 (1965). \textit{See} note 172 and accompanying text \textit{supra}. The court in \textit{Nader} also noted that "[T]he decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness." 497 F.2d at 680 n.19, \textit{quoting} Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970).

\textit{See} Joint Tribal Council v. Morton, 388 F. Supp. 649 (D. Me. 1975), an action concerning the refusal to institute suit on behalf of an Indian tribe against the State of Maine. The defendants argued that the action was committed to agency discretion under § 10, 5 U.S.C. § 701(a) (2) (1970), in that the Attorney General had absolute discretion to institute litigation, and that judicial review, is banned by the doctrine of prosecutorial discretion, relying on such cases as United States v. Nixon, 418 U.S. 683 (1974), and Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967). 388 F. Supp. at 665. In granting relief, the court, relying on Nader v. Saxbe, 497 F.2d 676, 679-80 n.19 (D.C. Cir. 1974), noted that only a declaratory judgment was sought by plaintiffs, and that "the doctrine of prosecutorial discretion cannot shield legal error." 388 F. Supp. at 665-66.

\textsuperscript{211} 355 U.S. 411 (1958) (per curiam).
result. In ruling for the Federal Trade Commission, the Court stated that the courts should defer to the expertise of the Commission as to the most propitious time to proceed and "its discretionary determination should not be overturned in the absence of a patent abuse of discretion." Several years later in Universal-Rundle Corp. v. FTC, the Seventh Circuit, relying upon the Supreme Court's dicta in Moog, found an abuse of discretion to exist within the FTC's decision to prosecute the defendant corporation because while defendant's share of the market was less than 6 percent, the practice complained of was common to the industry. The Supreme Court, although subsequently reversing upon the ground that the Commission's proceeding against Universal-Rundle was not a patent abuse of discretion, approved generally the view expressed by the Seventh Circuit, stating that the Commission "does not have unbridled power to initiate proceedings which will arbitrarily destroy one of many law violators in an industry."

More recently, in Marco Sales Co. v. FTC, the Second Circuit held that in the light of the Commission's ability to regulate the food and gasoline retailing industries' promotional games by eliminating only those practices deemed to be deceptive, the Commission's absolute prohibition of their use by the plaintiff in its lottery-retailing business, where there was no deception or fraud practiced at all, was an abuse of discretion. The court distinguished the case from Universal-Rundle, where the defendant claimed that the FTC had abused its discretion by not prosecuting other violators, stating:

The arbitrary character of the Commission's action here consists of its total failure to even advert to, much less explain, its reason for the rigid ad hoc adjudicatory stance it adopted toward the petitioner and the flexible tolerance its industry regulation displayed to those utilizing the same or similar devices.

212. Id. at 413.
213. Id. at 414 (emphasis added). While it has been held that the FTC has wide discretion in its choice of remedies deemed adequate to deal with illegal and unfair practices: Atlantic Ref. Co. v. FTC, 381 U.S. 357, 376 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965); the Second Circuit qualified the FTC's discretion in observing that it "is not absolute and does not insulate from review an order . . . which sweeps across lawful and unlawful behavior without distinction." Federated Nat. Whlsrs. Serv. v. FTC, 398 F.2d 253, 260 (2d Cir. 1968).
214. 352 F.2d 831 (7th Cir. 1965), rev'd, 387 U.S. 244 (1967).
216. FTC v. Universal-Rundle Corp., 387 U.S. 244 249-52 (1967). Id. at 251. The Court's caveat apparently was not considered by the District of Columbia Circuit in Action on Safety & Health v. FTC, 498 F.2d 757 (D.C. Cir. 1974), which noted that the general enforcement power of the Commission was "generally not subject to judicial review." Id. at 762. Cf. Kixmiller v. SEC, 492 F.2d 641, 645 (D.C. Cir. 1974).
217. 453 F.2d 1 (2d Cir. 1971).
218. Id. at 5-6.
219. Id. at 7-8.
220. Id. at 6.
In an analogous case, Sirbo Holdings, Inc. v. Commissioner, the Second Circuit, in an opinion by Judge Friendly, directed the Tax Court to "require the Commissioner [of Internal Revenue] to explain and justify the different positions taken by him" in cases involving essentially the same factual situation. As one commentator has noted, the decision "reduces the scope of the Commissioner's exclusive discretion to prosecute tax cases in the manner he chooses."  

This brief review of recent cases upon control of prosecutors' discretionary activity should indicate that even in this area the presumption of nonreviewability — the threshold determination that a matter or an area is one to be insulated in toto — should not be viable. As Professor Davis has rightly observed, "Important interests are at stake. Abuses are common."  

However, as has been noted throughout this article, this situation exists in almost all areas where action is committed to agency discretion. When important interests are at stake such as a civilian defense department employee discharged from his position, a longtime resident alien facing deportation, or any of the sundry interests reviewed in this article the foreclosing of judicial review of agency action seems indefensible. In addition to the practical and "constitutional" difficulties with such foreclosure, it should be clear that the Saferstein-Davis approach would often operate to frustrate Congressional intent. Judge Tamm, in Medical Committee for Human Rights v. SEC, observed that:

"[I]f we were to foreclose review as the Commission suggests, we would surely be condoning a frustration of congressional intent;"

220. 476 F.2d 981 (2d Cir. 1973).
222. Comment, New Limitations on the Scope of Discretion of the Commissioner of Internal Revenue, 54 B.U.L. Rev. 425, 430 (1974). See also id. at 440 n.57. The decision is described as "an unprecedented exercise of judicial control over the litigational activity of the Commissioner." Id. at 430.
224. See, e.g., Young v. United States, 498 F.2d 1211 (5th Cir. 1974), where the court noted that:

"[T]his judicial scrutiny under the Administrative Procedure Act has been exercised in the area of federal employment despite the provision of 5 U.S.C. § 701(a)(2), which make the judicial review provisions inapplicable to the extent that "agency action is committed to agency discretion by law.""

Id. at 1221–22. See also note 264 infra.
for here the petitioner asserts that the Commission is failing to correct abuses which Congress sought to end by enacting the statute, and that it is a member of the class which Congress endeavored to protect in the Securities Act.227

In such a situation, the agency's actions would be final, and the barring of review would prevent judicial consideration of issues and purposes which Congress may have considered vital. As has been urged above, attention to the statutory authorization becomes important. The direction of Overton Park to the statutory authority, and the difficulties described above, make very problematic the Davis-Saferstein approach of a threshold determination of nonreviewability. Reflecting recently upon Overton Park, Professor Schotland was moved to remark, "remember unreviewable discretion?"228

III. NONREVIEWABILITY IN A PARTICULAR CASE

A. Factors Determining Nonreviewability — Saferstein's Analysis

In his influential article, Saferstein proposed and examined nine factors which should be considered in reaching a determination of general nonreviewability. While the desirability of a threshold determination was rejected above,229 an analysis of these factors might aid a court confronted with a facially legitimate claim of abuse of discretion in determining the appropriateness of a finding of nonreviewability in a particular case.230

The nine factors suggested by Saferstein are:

1. broad agency discretion;
2. expertise and experience required to understand the subject matter of agency action;
3. managerial nature of the agency;
4. impropriety of judicial intervention;
5. necessity of informal agency decisionmaking;
6. inability of the reviewing court to ensure a correct result by the agency;

226. 432 F.2d 659 (D.C. Cir. 1970).
227. Id. at 675. See Bachowski v. Brennan, 502 F.2d 79 (3d Cir.), cert. granted, 95 S. Ct. 654 (1974) (No. 450), where the court states: "[W]e believe judicial review would further the general policy . . . of [the relevant statute] by ensuring that the Secretary does not do a remedy to those whose rights Congress sought to protect." Id. at 85. See NLRB v. Brown, 380 U.S. 278, 291-92 (1965); Davis v. Richardson, 460 F.2d 772, 775 (3d Cir. 1972); DeVito v. Shultz, 300 F. Supp. 381, 382 (D.D.C. 1969).
228. Schotland, supra note 94, at 122.
229. See generally section II C supra.
230. See Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971), and the discussion at note 215, supra, for an example of this use of Saferstein's factors, by Judge Friendly.
(7) need for expeditious operation of congressional programs;
(8) quantity of potentially appealable actions;
(9) existence of other methods of preventing abuses of discretion.\(^\text{231}\)

As Saferstein noted "Only in rare cases, however, is any of these factors, standing alone, controlling; rather, their cumulative effect on the interests of the individual, the agency, and the courts determines whether review should be denied."\(^\text{232}\)

It is not the purpose of this article to update or to extensively criticize Saferstein’s discussion. However, while each factor is worthy of consideration by a reviewing court, his emphasis upon several areas appears excessive.

With regard to expertise, while there are still cases which seem to defer in the broadest fashion to any determination made by the agency in its special field,\(^\text{233}\) the better view would seem to be that of Professor Jaffe, who suggested that a reviewing court "must evaluate the relevance and weight of expertise."\(^\text{234}\) Certainly expertise should not be determinative of the question of nonreviewability in such an area as that of procedural fairness,\(^\text{235}\) which would seem to be uniquely within a court’s capacities. In an “instructive opinion,”\(^\text{236}\) *Moore-McCormick Lines, Inc. v. United States*,\(^\text{237}\) Judge Davis concluded that the Merchant Marine Act\(^\text{238}\) did not cut off all judicial review of construction subsidy awards by the Maritime Subsidy Board,\(^\text{239}\) and observed that "[e]xpertise in the agency's special substantive field is rarely, if ever, a true prerequisite to oversight of its procedures."\(^\text{240}\)

\(^\text{231}\) Saferstein, *supra* note 11, at 382-95.

\(^\text{232}\) Id. at 379.


\(^\text{235}\) See Saferstein, *supra* note 11, at 383.


\(^\text{237}\) 413 F.2d 568 (Cl. Ct. 1969).


\(^\text{239}\) 413 F.2d at 580.
Moreover, as Saferstein mentioned, "the courts may be as qualified as a particular agency to prescribe standards and criteria,"241 as opposed to the agency's singular ability to apply the criteria. By so functioning a court would have the ability to oversee what Professor Lon Fuller refers to as the "congruence between official action and declared rule."242 As discussed below, this process of review is one method through which attention to congressional purposes may be enforced.243

In addition, insistence upon a reasoned decision by the agency244 will aid oversight in an area of special competence, and provide adequate review while minimizing judicial interference with informal agency decisionmaking, since "requiring the agency to provide such an elaboration normally would impose only a slight burden."245

As Saferstein recognized,246 the inability of a reviewing court to ensure a "correct" result should be considered a minor factor at best. Professor Jaffe has noted that although review of an agency's actions might be infrequently invoked, the availability thereof might discourage

241. Saferstein, supra note 11, at 384 (emphasis added).
243. See text accompanying notes 286-300 infra.
244. See Citizens Ass'n v. Zoning Comm'n, 477 F.2d 402 (D.C. Cir. 1973), where Chief Judge Bazelon declared that:

[R]espect for an agency's expertise does not eliminate the need for judicial review of agency actions, and inherent in that albeit limited power of review is the need for an agency to spell out its reasoning.

Id. at 408

The requirement that an agency give reasons for its decision was established in SEC v. Chenery Corp., 318 U.S. 80 (1943). Justice Frankfurter there explained that in order for the courts to be able to review an administrative action, they must receive from the agency an explanation for that action. Id. at 94. Only then, he concluded, could a court determine whether the agency had fulfilled the purpose of the congressional delegation or had reached an erroneous decision. Id. at 94-95. While the rule of Chenery is not a new one, courts have increasingly resorted to it as a means to structure agency discretion. See Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 805-06 (1973); Mower v. Britton, 504 F.2d 346, 398-99 (10th Cir. 1974); Bachowski v. Brennan, 502 F.2d 79, 88-89 & n.14 (3d Cir.), cert. granted, 95 S. Ct. 654 (1974) (No. 450); American Smelting & Ref. Co. v. FPC, 494 F.2d 925, 944-45 (D.C. Cir.), cert. denied, 95 S. Ct. 148 (1974); Ely v. Velde, 451 F.2d 1130, 1138-39 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 594 (D.C. Cir. 1971); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1100 (D.C. Cir. 1970); Leventhal, Principled Fairness and Regulatory Urgency, 25 Case W. Res. L. Rev. 66, 72-73 (1974); Comment, Confining and Structuring Administrative Discretion: Environmental Defense Fund v. Ruckelshaus, 1971 Utah L. Rev. 388. There is not, however, unanimous agreement that the requirement that agencies supply reasons for their decisions serves a useful purpose. See Sax, The (Unhappy) Truth About NEPA, 26 Okla. L. Rev. 239 (1973), where the author states:

I know of no solid evidence to support the belief that requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of administrative decisions.

246. Saferstein, supra note 11, at 389-90.
improper agency action.\textsuperscript{247} An example is Pepsi-Cola Buffalo Bottling Co. v. NLRB,\textsuperscript{248} where the court invalidated a rule against relitigation and required the NLRB to review the determinations of its regional directors in unfair labor practice proceedings.\textsuperscript{249} Judge Kaufman, author of the decision, later observed:

I must confess that we have no way of double-checking the degree of care with which the Board will review such decisions in the future . . . . But in compelling the Board at least to confront the case, we have, in effect, instructed it to adhere to a higher standard of care . . . . Moreover, a judicially mandated procedure obviously has effects far beyond the immediate case. It acts as a deterrent to unjustifiable agency action even though it may not change the outcome in those cases already decided.\textsuperscript{250}

Finally, although it is clear that the availability of other methods of preventing abuses of discretion may be considered in determining whether review is to be afforded\textsuperscript{251} in a particular case, limitations upon this factor must not be minimized. Professor Davis has been a strong advocate of “rule-making as a means of confining discretion.”\textsuperscript{252} However, as Professor Arrow has pointed out, “the idea of shifting from discretionary authority to rules is not the panacea it is sometimes alleged to be, particularly in the realm of economic policy.”\textsuperscript{253} Moreover, in his report upon the results of an extensive study of the discretionary activity of the Immigration and Naturalization Service, Professor Sofaer noted:

Dangerous, relatively broad and unchecked discretion may be unavoidable for any of several reasons. Standards to govern the exercise of discretion in some circumstances may be impossible or extremely difficult to design with sufficient specificity to offset fears of arbitrary action. This is particularly true when a new government program is created.\textsuperscript{254}

He concluded that administrative and legislative controls are insufficient and that the need for judicially imposed limitations is great.\textsuperscript{255}

\textsuperscript{247} See Jaffe, Judicial Review, supra note 11, at 407-08.
\textsuperscript{248} 409 F.2d 676 (2d Cir.), cert. denied, 396 U.S. 904 (1969).
\textsuperscript{249} Id. at 680-81.
\textsuperscript{251} See Saferstein, supra note 11, at 393.
\textsuperscript{252} Davis, Postscript, supra note 10, at 833; see generally K. Davis, Discretionary Justice: A Preliminary Inquiry, ch. 3 (1969).
\textsuperscript{254} Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Colum. L. Rev. 1293, 1296 (1972).
\textsuperscript{255} Id. at 1374-75.
B. Factors Determining Nonreviewability in a Particular Case — Neglected Considerations

While Saferstein fully considered the possible harmful or hampering effects of review upon the operation of the agencies, and the possible burden upon the federal courts of entertaining these actions, much more cursory attention is given to the individual interests involved. It is apparent that he considered factors of administrative convenience to be of prime importance. However, it is submitted that additional factors, which may outweigh any decision to preclude review determined by considering only administrative convenience, should be considered in making any determination of review in a particular case. These additional factors have never been systematically presented, and are often overlooked by reviewing courts. Four factors, each representing a positive function of judicial review in this area, should be balanced against possible administrative inconvenience in making a determination of reviewability in a particular case. They are:

(1) Protection of important individual interests;
(2) Utility for proper administrative functioning;
(3) Maintenance of the legitimacy of the administrative process;
(4) Enforcement of new public purposes.

While an exhaustive exploration of the factors is beyond the scope of this article, a preliminary delineation is presented below. Unfortunately, the failure of many courts to give these factors due consideration, such failure resulting in some measure from there having never been any systematic presentation of them, renders more than a preliminary exploration impossible.

(1) Protection of Important Individual Interests

As has been argued throughout this article, judicial review is an important method of controlling unauthorized agency action which may impinge upon recognized interests. This function has assumed greater significance in recent years with the expansion of the doctrines of standing and reviewability, and the creation of new statutory causes of action. Thus, there should be, and upon the part of many courts there is a solicitude for claims of abuse or denial of important rights or interests. Judge Friendly, in Cappadora v. Celebrezze, stated his view that:

256. Cf. Saferstein, supra note 11, at 371.
257. See text accompanying notes 251-55 supra.
258. 356 F.2d 1 (2d Cir. 1966).
Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.\(^{259}\)

In certain areas, the protection of the important individual interests involved should be given great weight. As the court noted in *Wellford v. Ruckelshaus*,\(^ {260}\) "close scrutiny of administrative action is particularly appropriate when the interests at stake are . . . personal interests in life and health."\(^ {261}\) When the very existence of the relationship of citizen or resident is involved, the interests at stake seem equally important.\(^ {262}\)

In the area of prosecutorial discretion, recourse to the courts is often the only avenue available to protect the individuals involved from unauthorized agency action.\(^ {263}\) Where an arguable abuse of discretion has interfered with the personal interest in maintaining or acquiring government employment, review has generally been granted.\(^ {264}\)

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\(^ {259}\) Id. at 6. For cases agreeing with *Cappadora* upon the reviewability of the refusal to reopen the denial of disability insurance benefits under the Social Security Act, see Maddox *v.* Richardson, 464 F.2d 617, 619–22 (6th Cir. 1972); Davis *v.* Richardson, 460 F.2d 772, 775 (3d Cir. 1972); Chenoweth *v.* Weinberger, 376 F. Supp. 1338, 1343–44 (W.D. Mo. 1974); Negron *v.* Secretary of Health, Educ. & Welfare, 382 F. Supp. 913, 915 (D.P.R. 1974). *Contra,* Stuckey *v.* Weinberger, 488 F.2d 904, 909–10 (9th Cir. 1973); Johnson *v.* Secretary of Health, Educ. & Welfare, 384 F. Supp. 994, 995 (C.D. Cal. 1974). See also Bailey *v.* Weinberger, 419 U.S. 953 (1974), in which three justices dissented from a denial of a writ of certiorari, noting the conflict among the circuits over this issue. Id. Justice Douglas commented that:

"[T]his case presents one of the most pressing problems on the modern scene. For the extent to which the evergrowing federal bureaucracy uses "discretion" to mask irresponsible action that evades review seems to me to be eroding basic rights of the citizen.

Id. at 954 (Douglas, J., dissenting).

260. 439 F.2d 596 (D.C. Cir. 1971).

261. Id. at 601.

262. See text accompanying note 225 *supra*. In Schneider *v.* Rusk, 377 U.S. 163, 167 (1964), in which the petitioner sought a declaratory judgment that she had not lost her American citizenship despite prolonged residence in her country of origin, the Court stated that legislation touching the "most precious rights" of citizenship would have to be justified "by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived." Id. at 167. Of course, no assertion is made in this section, or elsewhere in this article, that because important individual interests are at stake, judicial review is a requirement. See JAFFE, JUDICIAL CONTROL, *supra* note 12, at 326. It is merely a factor, albeit an important one, to be considered.

263. See Bachowski *v.* Brennan, 502 F.2d 79 (3d Cir.), *cert. granted*, 95 S. Ct. 659 (1974), where Judge Van Dusen commented:

To grant the Secretary [of Labor] absolute discretion in this situation seems particularly inappropriate, for if he wrongfully refuses to file suit, individual union members are left without a remedy.

Id. at 87–88.

264. See the incisive opinion by Judge Winter in McNeill *v.* Butz, 480 F.2d 314 (D.C. Cir. 1973), which declared in the context of untenured federal non-civil-service em-
Professor Jaffe has observed that "[t]here is quite obviously a movement in the direction of greater reviewability of military determinations," probably because of the intrusion into the civilian's life which might affect the conditions of life as a civilian. For example, the Supreme Court has extended judicial review to protect important interests of the individual in the recent military draft cases, even when the applicable statute seemingly precluded review.

Moreover, as Professor Arrow has pointed out, even greater than the effect upon the specific interest of a decision precluding judicial review is the effect on the worth and development of the individual human beings involved. Being subject to an authority against whom there is no recourse leads to a loss of self-respect and an atrophy of autonomous behavior...
(2) Utility for Proper Administrative Functioning

Professors Gelhorn and Byse have commented that "[n]otwithstanding its admittedly restricted role and other recognized limitations, judicial review is an important deterrent to administrative excesses." Particularly in those instances where discretion is held to be unreviewable the possibility of administrative abuse is more substantial. In *Holmes v. New York City Housing Authority*,270 the court stated: "It need hardly be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program . . . would be an intolerable invitation to abuse."271

The need to limit or control discretion was confirmed in Professor Sofaer's extensive study of discretionary activity at the Immigration and Naturalization Service (INS).272 Although never considered by Saferstein, this possible positive effect of judicial review should not be ignored by a reviewing court. Professor Sofaer outlined the positive effects review would have upon the discretionary activity of the INS:

Judicial review based on a principle that allowed changes and exception-making, but insisted that they be rationally explicable, would probably aid rather than hinder regulation at INS. It would force greater articulation of policy, provide agency personnel with rules to use as shields against improper pressure, and possibly lead to more stable decisions and less costly administration.273

Similarly, in discussing the import of *Sirbo Holdings, Inc. v. Commissioner*,274 one commentator has suggested that:

Clarification of seemingly conflicting policy positions [as directed in *Sirbo*] will save the [Internal Revenue Service] a substantial amount of resources presently expended on prosecution evolving

269. W. GELHORN & C. BYSE, supra note 55, at 144.
270. 398 F.2d 262 (2d Cir. 1968).
271. Id. at 265. See Leeds & Northrup Co. v. NLRB, 357 F.2d 527, 531-32 (3d Cir. 1966); Klanke v. Camp, 320 F. Supp. 1185, 1187 (S.D. Tex. 1970). See also Berger, Reply, supra note 13, where the author states: "[I]n practical effect, unreviewable discretion permits administrators to abuse it." Id. at 12 (emphasis added).
273. Id. at 1356. For an illustration of the problems created by standardless decisionmaking, see NLRB v. Longshoremen's Union, Local 50, 504 F.2d 1209, 1219-21 (9th Cir. 1974). In such circumstances, a reviewing court can be helpful in resolving doubts and uncertainties for all parties, including the agency.
274. 476 F.2d 981 (2d Cir. 1973).
from the practice of bringing suits founded on inconsistent interpretations of the Code.275

Another positive effect stemming from review might be to provide a check against the "likelihood of unnecessary error" based upon "the overload of information and decisionmaking capacity of the authority."276 As a complex organization, the administrative agency often cannot be aware of all that is relevant, and review may serve to allow the smoother functioning of the agency in a way entailing little disruption.

(3) Maintenance of the Legitimacy of the Administrative Process

Frequently overlooked is the effect of the decision to grant or refuse judicial review upon the legitimacy of the entire administrative process. In certain instances, denial of review could be most detrimental not only to the specific individuals involved, but also to the entire community.

Professor Jaffe has maintained that "[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate or legally valid."277 Many administrative actions or refusals to act can

275. Comment, supra note 222, at 445.
276. Arrow, supra note 253, at 73-74.

While research in this area is still in its initial stages, I suggest that a useful distinction might be made between the legitimacy-conferring capacity of particular decisions of a court (apparently Adamany's concern), and the legitimacy added to the administrative process by the very availability of review of agency action perceived to be unauthorized or unfair. The existence of a potential forum for redress represented by the courts, and the opportunity to at least be heard should this forum be resorted to, should prove even more significant as areas of governmental regulation continue to expand.

The distinction offered is somewhat analogous to that in political science between the study of decisions and nondecisions. See Bachrach & Baratz, Decisions and Nond ecisions: An Analytical Framework, 57 Am. Pol. Sci. Rev. 632 (1963); Bachrach & Baratz, Two Faces of Power, 56 Am. Pol. Sci. Rev. 947 (1962); Deutsch, supra at 251-52, 254-55. For an excellent empirical study, see M. Crenson,
stir great resentment, and the absence of any opportunity for judicial review by a seemingly impartial tribunal may exacerbate this feeling. Alternatively, a finding of nonreviewability might encourage apathy in the face of apparent manipulation by an impersonal bureaucracy.278

As Jaffe observes:

From the point of view of the agency, the question of the legitimacy of its action is secondary to that of the positive solution of a problem. It is for this reason that we, in common with nearly all of the Western countries, have concluded that the maintenance of legitimacy requires a judicial body independent of the active administration.279

A related aspect of the legitimacy issue is the effect that official illegality has upon the people's perceptions of their government. The late Herbert Packer commented upon the importance of providing some sort of review, noting that "[w]hen victims of discriminatory enforcement see what is happening, secondary effects subversive of respect for law ... are produced."280 Review would counteract these effects in many cases, and also would serve as a mechanism for alleviating some of the rigid and impersonal aspects of administration, simply by allowing the petitioner's grievances to be aired and his viewpoints considered,281 thus providing "a constant source of assurance and security to the citizens."282

The Un-Politics of Air Pollution: A Study of Non-Decisionmaking in the Cities (1971).

278. Professor Fuller has pointed out that in the United States, the judiciary is responsible for maintaining a "congruence between official action and declared rule." FULLER, supra note 242, at 81. See National Auto. Laundry & Clean Council v. Shultz, 443 F.2d 689, 695 (D.C. Cir. 1971); JAFFE, JUDICIAL CONTROL, supra note 12, at 324.


The very qualities which make the agency well suited to determine questions within its area of specialization may lead it to overlook or understate general values which are fundamental to the legal order as a whole. The generalist Court is ideally suited to check the specialist Agency at the point where those general values are threatened.

Id. at 164.


281. In the area of labor law, the Supreme Court, in United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), recognized the "therapeutic" effect of submitting even a facially frivolous claim to arbitration. Id. at 568. In other areas of law the judiciary performs a similar task. Faced with a dispute in which an administrative agency is a party, a court should not ignore its capacity to perform a palliative function when determining whether review should be granted.

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It is submitted that the availability of judicial review helps legitimize and maintain respect for the administrative process itself. As Judge Leventhal pointed out in Greater Boston Television Corp. v. FCC,283 there is a broad interest in "enabling the public to repose confidence in the process as well as in the judgments of its decision-makers."284 While the contribution of the availability of review to the legitimacy of the administrative process is an intangible factor, and as such is often ignored or devalued in decisionmaking,285 its importance should not be minimized in any determination as to reviewability.

(4) Enforcement of New Public Purposes

In recent years, several decisions — notably those emanating from the District of Columbia Circuit — have discussed the "partnership" of the judicial system with the agencies in the administrative process. For example, in Greater Boston Television Corp., Judge Leventhal stated that there is, in the review process,

an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest, and are "collaborative instrumentalities of justice." The court is in a real sense part of the total administrative process . . . .286

A prime motivating factor behind the advancement of this partnership theory is that it enables a court to supplement the aims of the agencies. Utilizing an informed sense of judgment as to the movement

285. See the discussion of the "dwarfing of soft variables" in Tribe, Trial by Mathematics, supra note 284, at 1361-65. He notes that:
Readily quantifiable factors are easier to process — and hence more likely to be recognized and then reflected in the outcome — than are factors that resist ready quantification. The result, despite what turns out to be a spurious appearance of accuracy and completeness, is likely to be significantly warped and hence highly suspect.
Id. at 1362. See also Tribe, Technology Assessment, supra note 284, at 625-30.
See, e.g., Scenic Hudson Pres. Conf. v. FPC, 354 F.2d 608, 623 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), and the discussion of this case in Reich, supra note 2, at 1248-51. See also id. at 1264-65.
286. 444 F.2d at 851-52. Professor Schotland considered this opinion to be "the best and wisest statement of the relationship between courts and administrators . . . ." Schotland, supra note 94, at 126-27.

Professor Shapiro puts forward the view that "the courts and the administrative bureaucracy ought to be considered as two parallel structures for the administration of government programs," SHAPIRO, supra note 277, at 44. See Karst & Horowitz, supra note 277, at 57-80.
and purposes of public policy in an area of the law, a court, through judicial review, might pressure an agency to consider newer national goals (exemplified, for example, in supplementary legislation, or in legislation having a bearing on the agency's traditional functions) in the decisionmaking process.  

Professor Jaffe has been averse to "a legal philosophy which insists on completely rigid roles, which stifles and discourages creative expression and interchange between the judges and the executive." An example of such stratification would be a court's dereliction in its responsibility to consider whether or not proper attention is being paid to new congressional policies. The courts, however, have increasingly moved in the direction of supplementation through the review process. The concern of the Supreme Court that the newly announced purpose of protecting public parks was not being adequately considered seemed to be an important aspect of the decision in Overton Park. Similarly, the court in Wellford v. Ruckelshaus remanded in part because the Secretary of Agriculture may have failed, contrary to the relevant statute's direction, to assign sufficient importance to the risk of harm to human lives in his refusal to ban federal registration of a certain herbicide. Other recent decisions also have attempted to impress upon specialized agencies their responsibility to incorporate various broad national policies into their decisionmaking processes.

In the leading decision interpreting the National Environmental Policy Act of 1969 (NEPA), Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, Judge Wright commented:

287. See Comment, supra note 56, where the author states: "The basic idea is simply that the courts monitor the administrative process to insure that the substantive objectives which Congress seeks to achieve through administrative action are achieved in fact." Id. at 692.

288. JAFFE, JUDICIAL CONTROL, supra note 12, at 326.


290. 439 F.2d 598 (D.C. Cir. 1971).

291. Id. at 602-03.

292. See Air Line Pilots Ass'n Int'l v. CAB, 502 F.2d 453, 456 (D.C. Cir. 1974), where the court noted that transportation agencies like the CAB have a responsibility to make decisions consistent with national labor policy; National Ass'n of Indep. Tel. Producers & Distrbs. v. FCC, 502 F.2d 249, 256 (2d Cir. 1974), where the court noted that the FCC must incorporate the nation's policy favoring competition in regulating the broadcast media. See also Martin-Trigona v. Federal Reserve Bd., 509 F.2d 363, 367 (D.C. Cir. 1974).

The courts may also be helpful by ratifying and encouraging agency attempts to implement new national policies, often over the opposition of previously favored groups. See, e.g., Zabel v. Tabb, 430 F.2d 199, 211-14 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), a review under the National Environmental Policy Act upholding the Secretary of the Army's refusal to authorize a project for ecological reasons. Zabel is noted in 16 VILL. L. REV. 766, 777-78 (1971).


294. 449 F.2d 1109 (D.C. Cir. 1971).
[I]t remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role . . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.295

Many cases have arisen under the NEPA where judicial attention has been focused upon the agency's responsibility to take environmental values into account in the process of decisionmaking.296 These decisions reflect the judiciary's awareness that NEPA "is intended to interrupt business-as-usual and to affect the decisionmaking process at the lowest agency level,"297 and its efforts to impress this new public policy objective upon often recalcitrant agencies.298 Dean Cramton and Berg have observed that the "willingsness of courts to vindicate environmental values means that governmental agencies must take seriously the NEPA

295. Id. at 1111.
296. See Sierra Club v. Morton, 510 F.2d 813, 829 (5th Cir. 1975); Minnesota Pub. Int. Res. Group v. Butz, 498 F.2d 1314, 1319-20 (8th Cir. 1974); Environmental Defense Fund, Inc. v. Corps of Eng'r's, 492 F.2d 1123, 1139-40 (5th Cir. 1974); Sierra Club v. Froehlke, 486 F.2d 946, 951-53 (7th Cir. 1973); Silva v. Lynn, 482 F.2d 1282, 1283 (1st Cir. 1973); Conservation Council v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Eng'r's, 470 F.2d 289, 297-300 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973); Calvert Cliffs' Coordinating Comm'n, Inc. v. AEC, 449 F.2d 1109, at 1115 (D.C. Cir. 1971). See also Environmental Defense Fund, Inc. v. TVA, 492 F.2d 466, 468 (6th Cir. 1974), aff'd 371 F. Supp. 1004, 1013 (E.D. Tenn. 1973). The courts, however, are not unanimous in their view as to what the proper scope of review should be. Some limit review to a determination of whether the NEPA's procedural requirements have been met. See, e.g., Sierra Club v. Stamm, 507 F.2d 788, 793 (10th Cir. 1974); Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974); Lathan v. Brinegar, 506 F.2d 677, 692-93 (9th Cir. 1974).


298. One commentator has suggested that the number of actions will be reduced as the procedural requirements of NEPA are mastered and as the agencies "develop an institutional stake in consideration of environmental values . . . ." Note, Evolving Judicial Standards under the National Environmental Policy Act and the Challenge of the Alaskan Pipeline, 81 Yale L.J. 1592, 1629 n.221 (1972).
obligation to consider environmental factors and the views of outsiders.”

Nor is it surprising that the concept of partnership, which gives the courts a more active role in the administrative process, has been so prominent in environmental decisions, for it is in that area that new statutory policies and public concerns have faced a difficult period of accommodation, and have not been readily accepted by the many agencies affected by them; some of them having had differing and often apparently inconsistent purposes. Yet it is just this sort of frontier area in which the fourth positive factor should be given weight by a reviewing court.

CONCLUSION

The rejection of nonreviewability as a threshold determination was dictated by a recognition of the great need for review to protect the individual, the administrative process itself, and new public purposes, as well as by an appreciation of the practical and constitutional difficulties with acceptance of such an approach. An attempt has been made to outline four additional factors to be balanced against the administrative convenience factors proposed by Saferstein, when making the determination of reviewability in a particular case.

The position taken here is that foreclosure of judicial review as a means of aiding administrative “convenience” is inapt. The view urging convenience as a paramount virtue is not only too narrow, since it does not consider the four factors outlined above; it may also attack the problem from the wrong end. Emphasis should be placed upon efforts to improve quality and efficiency in other areas of the administrative process in addition to providing rather than foreclosing review. The removal or redesign of the many unwieldy and overly complicated


The openness of the judiciary to the arguments of the often ephemeral coalitions which support newer goals, and the judiciary’s willingness to insert itself more explicitly into the administrative process, will be an important factor in determining the degree to which newer goals will be taken into account by established agencies. This is particularly the case in this area since, as Professor Jaffe has noted, “the great limitation . . . of the administrative process is that in many cases it is unrepresentative,” with “[p]ermanently organized groups . . . overrepresented.” Jaffe, supra note 296, at 20.

bureaucratic procedures in government programs would serve both the agencies and the individuals affected by them. It should be remembered that the availability of judicial review is a necessary, but certainly not a sufficient condition for legitimate and effective administrative functioning. As Professor Summers has recently suggested, some kinds of abuse of discretion can be traced directly or indirectly to deficiencies in process design. These problems which result in abuse of discretion stem from internal shortcomings of the administrative process and have only been tangentially dealt with herein, from the standpoint of the ameliorative effect that judicial review has upon them. It is hoped that lack of preoccupation with this issue is not mistakenly construed as a relegation of it to secondary importance.

The stress throughout this article has been upon the statutory mandate to the agency — the scope of discretion granted to it by Congress. As Professor Berger has commented, “[i]t is difficult to read . . . ‘committed to agency discretion’ as if it included authority to ‘abuse’ discretion.” The thrust of this article has been to demonstrate that it need not, and should not, be so read.

302. It is submitted that there are other areas which could be corrected with less adverse effects upon important values. See also the conclusion of Professor Schotland that:

To speak of delay as bad and therefore rush to limit judicial review is . . . to ignore how much of the delay which is blamed on judicial review is actually caused by failures or slowness elsewhere . . . .

Schotland, supra note 94, at 128. Cf. NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969), for a case of bureaucratic delay in decisionmaking (delay of over 5 years by NLRB in making back pay specification). The Court stated that in certain instances of agency delay, action could be compelled under § 706(1). Id. at 266 & n.3. See also Columbus Brdcstg. Coalition v. FCC, 505 F.2d 320, 325 (D.C. Cir. 1974).

There has been, however, a paucity of studies of the implementation of public programs by government agencies. The most valuable is J. PRESSMAN & A. WILDBAVSKY, IMPLEMENTATION (1973), an illuminating case study of the failure of the Economic Development Administration's employment effort in Oakland, California.

303. Summers, supra note 284, at 11.

304. I am not unmindful of Judge Friendly's reflection that most students of administrative law are more concerned “with what the courts do with the agencies than with what the agencies do with themselves.” H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 173-74 (1962). See also Cranton & Berg, supra note 296, who note that while “NEPA is a constant pressure in the right direction . . . it cannot in itself provide the organizational structure or the intelligence and judgment that are prerequisites to needed change . . . .” Id. at 596; Denvir, Controlling Welfare Bureaucracy: A Dynamic Approach, 50 NOTRE DAME LAW. 457, 458 (1975).

Charles Reich has suggested, as a means of “institutionalizing certain values which might otherwise be neglected," adding special interest bureaus to a department, thereby “underwrit[ing] pluralism" within a particular bureaucracy. Reich, supra note 2, at 1262-63. Such structural alterations might be very successful to the extent that the institutional processes discussed by Cranton & Berg, supra note 296, at 515-17, are operative. But see Sax, supra note 244, at 245-46.

305. Berger, Arbitrariness, supra note 13, at 61.