Spring 1969


William H. Towle

Follow this and additional works at: http://repository.jmls.edu/lawreview

Part of the Law Commons

Recommended Citation


http://repository.jmls.edu/lawreview/vol2/iss2/3

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.
THE NON-REVIEWABILITY PROBLEM UNDER THE ADMINISTRATIVE PROCEDURE ACT

By WILLIAM H. TOWLE*

While judicial review of administrative action is generally considered a fundamental aspect of our governmental system, the prefatory language to Section 10 of the Federal Administrative Procedure Act — the Section which establishes the right and scope of judicial review of agency action — specifically limits judicial review in the following language:

Except to the extent that —

(1) statutes preclude judicial review; or

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

This preclusion of review is not limited to the more esoteric functions of the federal government. It touches such commonplace dealings as veteran’s benefits, employment contracts and housing. It is of concern to such disparate subjects as rate proceedings before the Interstate Commerce Commission and the determination of soil bank allotments. The applicability of these preclusion provisions is therefore of a general interest to those dealing with the federal agencies.

The problem of non-reviewability may be best stated with an example. The Interstate Commerce Act requires that carriers who change existing rates prove that the new rate is lawful. Persons adversely affected by the new rate may petition the Interstate Commerce Commission for an investigation into the new rate and a stay of its effectiveness until after the investigation. If the Commission disregards this request, the rate becomes effective and the only recourse is to file a formal complaint with the Commission. In such formal proceedings the burden of proof shifts to the complainant, and the consequence of


1 Administrative Procedure Act §10, 5 U.S.C. §701 (Supp. III 1968). The original language of Section 10 reads “Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.” Administrative Procedure Act §10, 5 U.S.C. §1009 (1964). In 1966 Congress codified the various provisions of Title 5, including the Administrative Procedure Act. Its purpose in effecting the change was to restate, without substantial change, the laws replaced by the new section.


this shift and the delay until final determination, during which time the rate is effective, may cause a substantial detriment to the protesting party.⁴

If the protesting party submits irrefutable evidence that the proposed rate is unlawful and the carrier responds with speculation and conjecture, the protestant will undoubtedly feel agrieved if the Commission allows the rate to become effective while considering the Commission action capricious, arbitrary and definitely unlawful. Even if such analysis of the pleadings submitted to the Commission is correct, the complainant will not be able to achieve judicial review since the decision is one committed by law to agency discretion.⁵

On the other hand, if the determination were not within the ambit of the non-reviewability provisions of Section 10 of the APA, then the established concepts of judicial review of administrative action would attach. These would normally include judicial review of the record before the agency to see whether the decision was supported by the whole record.⁶ An administrative decision would be required and analyzed by the court to assure that a supportable bridge exists between the factual determination and the expressed conclusion.⁷ In short, the usual safeguards to assure that agency action is kept within the intended bounds would be applied.⁸ Since, under the APA, the application of these safeguards is stopped at the threshold of review it is appropriate to consider the intent of Congress in enacting this provision.⁹

I. LEGISLATIVE HISTORY

In determining the reach of the preclusion provision there are few specifics in the way of statutory history to rely upon as guides. The review provisions of Section 10 were intended to “afford a remedy for every legal wrong.”¹⁰ At the very outset,

---

⁴ For a more complete explanation of the Commission's suspension procedures see E. ANDERSON, ICC PRACTICE AND PROCEDURE 101-07 (1966).
⁵ See text beginning after note 18 infra.
⁸ See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320-27 (1965).
⁹ It must of course be recognized that the statutory prescription of review is not the sole method of avoiding review on the merits. Such concepts as standing and sovereign immunity permit the courts to exercise some selectivity in the matters to be reviewed. Eccles v. Peoples Bank, 333 U.S. 426 (1948); Malone v. Bowdoin, 389 U.S. 643 (1962). Furthermore, the doctrine of non-reviewability itself predated the enactment of the Administrative Procedure Act. Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943).
¹⁰ S. Doc. No. 248, 79th Cong., 2d Sess. 251 (1946). "What the bill does may be summarized. . . . It sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong (sec. 10)." Id.
however, this broad mandate was to be subject to the generally recognized non-reviewability provisions. While the Congress apparently proceeded on the assumption that the doctrine of non-reviewability was an established principle, there was an attempt to define the proposed legislation in terms of the limits of Congressional acceptance and understanding of the doctrine.

A. Statutory Preclusion of Review
Where the statute precluded judicial review the Congress was at pains to point out that the statute must either expressly preclude review or the intent to do so must be clearly evidenced. This position was clearly recognized in both the Senate and House Committee Reports, with the following language from the House Report stating this understanding:

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

The implicit withholding of judicial review was adopted by Congress in response to the suggestion of the Attorney General. The original Summers Bill has stated that review would be precluded only where statutes "explicitly" so provided. When this proposed language was sent to the Attorney General for comment he cited the (then recent) decision in Switchmen's Union of North America v. National Mediation Board, to the effect that a statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. The present language resulted from this suggestion.

In the debate before the House, Mr. Walter, Chairman of the Subcommittee in charge of the bill, reiterated the understanding expressed in the Committee Reports in his explanation of the legislation:

11 The Senate Committee on the Judiciary explained the preclusionary language as follows: "The introductory exceptions state the two present general or basic situations in which judicial review is precluded — where (1) the matter is discretionary or (2) statutes withhold judicial powers." S. Doc. No. 248, 79th Cong., 2d Sess. 36 (1946).
14 320 U.S. 297 (1943).
15 Id. at 304-05.
Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial. See Stark v. Wickard (321 U.S. 288 at p. 317).\(^\text{16}\)

Congress was willing to accept the suggestion of the Attorney General that an implicit preclusion should, within the terms of the Switchmen's case, be included in the statute. While Congress, by rewording its exclusionary language, did not overrule the Switchmen's decision it certainly did not adopt a preference for non-reviewability.\(^\text{17}\) Instead, its message was that in those cases where the statute is silent, review will be afforded unless a contrary congressional intent is clear, convincing and unmistakable. The preference is for review and even in the amorphous world of statutory construction, it should be difficult to interpret the history of a particular statute to preclude review unless some specific manifestation of such an intent is present.\(^\text{18}\)

B. Action Committed to Agency Discretion

The legislative consideration of the second exception — where agency action is committed to agency discretion — illustrates a considerable degree of uncertainty as to the scope of this exception. According to the Senate Committee Report, discretionary agency conduct would involve all of that which is not confined by statutory standards or definitions:

The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to

---

\(^\text{16}\) S. Doc. No. 248, 79th Cong., 2d Sess. 368 (1946). The citation to Stark v. Wickard, was to a case that followed Switchmen's by some six months. While it did not overrule Switchmen's it did clearly state the principle that the courts have a responsibility to define the limits of statutory authority and resolve cases where individual rights are infringed by unauthorized administrative power, and while the statute specifically granted review to one group (milk handlers) the Court did not construe that as intent to preclude another and different group (milk producers) from obtaining judicial review.

\(^\text{17}\) Certainly affirming the principle of implied preclusion in the Switchmen's case was a practical necessity in view of the many previously enacted statutes concerning a multitude of different agencies and their different powers. The implied preclusion doctrine effectively dealt with these existing statutes. However, instead of the formulation in Switchmen's, i.e., is the intent of Congress "plain", 320 U.S. at 305, Congress intended to restrict the Switchmen's case by the more stringent proofs required to invoke an implied Congressional intent to preclude review.

\(^\text{18}\) Congress can and has focused its intent and employed specific language such as that in the Federal Employees Compensation Act, where the action of the Secretary in allowing or denying payment "shall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or by any court by mandamus or otherwise. . . ." 5 U.S.C. §793 (1964).
review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.\footnote{S. Doc. No. 248, 79th Cong., 2d Sess. 212 (1946).}

The following expression of legislative intent set forth in the Senate Report seems only to indicate the obvious point that no clear standards could be framed and the matter would be left to the courts for their development:

Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supercede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him pro tanto from prevailing therein.\footnote{Id. at 275.}

It is apparent from the foregoing explanation of the effect and purpose of the discretionary preclusion that the framers of the bill were unable to formulate the extent and reach of the legislation. Broad provisions were to be redrafted, but such a solution fails to deal with the specific instance where that broadly phrased power is questioned in court with a concrete situation. Similarly, a person is not prevented from bringing a review action, but will merely be prevented from prevailing "pro tanto". That formulation provides little assistance to the courts in determining when, in fact, the agencies argument that it is invested with exclusive discretion should preclude an analysis of its specific exercise.

The apparent uncertainty concerning the reach of the provision caused the following colloquy in floor debate on the measure:

Mr. Donnell. . . . It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the
agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

Mr. McCarran. Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

But in answer to the first part of the Senator's question — namely, where a review is precluded by law — we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.

Mr. Donnell. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

Mr. McCarran. It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.

The final report on the bill was in accord with this colloquy, where Mr. Walter, Chairman of the Subcommittee in charge of the bill, reported to the House as follows:

The second general limitation on the section is that there are exempted matters to the extent that they are by law committed to the absolute discretion of administrative agencies. There have [sic] been much misunderstanding and confusion of terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily. They may not willfully act or refuse to act. Although like trial courts they may determine facts in the first instance and determine conflicting evidence, they cannot act in disregard of or contrary to the evidence or without evidence. They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding. Of course, they may not proceed in disregard of the Constitution, statutes, or other limitations recognized by law.

The statutory history indicates a troublesome concern on the part of Congress as to the reach of agency discretion. It is the more sustainable position that Congress intended a narrow reading of this language. While review on the merits could be precluded, the Congress was not forbidding the courts the threshold inquiry into whether the action was capricious or arbitrary.

II. JUDICIAL APPLICATION — DISCRETION

In almost all areas of administrative conduct there is some degree of discretion given by Congress. This factor has created certain doubts in the applicability of the discretionary preclusion

21 Id. at 310-11.
22 Id. at 368-69.
and the courts are puzzled over the applicability of this provision. An interesting illustration of their concern involves the Interstate Commerce Commission's statutory power to suspend a proposed rate pending an investigation into its lawfulness. Where a request for suspension was made and the agency denied it, the courts had, prior to the APA, held that such action was not judicially reviewable.\textsuperscript{23}

Reference to the APA was first made in \textit{Coastwise Line v. United States},\textsuperscript{24} where the extent of the court's treatment of the APA's effect upon reviewability of a Commission suspension order was to conclude that the APA did not increase the scope of review. While the court did not examine the precise limits of ICC discretion in denying a suspension request it noted that, assuming it had jurisdiction to review an arbitrary and capricious denial, it found no such arbitrary and capricious action in this case.

It was not until 1959 in \textit{Luckenbach Steamship Co. v. United States},\textsuperscript{25} that a court squarely faced the effect of Section 10 of the APA upon the scope of Commission discretion and judicial review of action taken pursuant to such discretion. The sole question was whether the suspension provisions, Section 15(7), of the Interstate Commerce Act committed to agency discretion the decision to deny suspension petitions. The court rested its conclusion that the statute did vest the Commission with discretionary authority upon: (1) the statutory history which was the basis of Section 15(7), namely, that diverse federal courts had, in issuing injunctions against rate proposals, confounded the uniform administration of rates which was envisioned by the Interstate Commerce Act; and (2) the uniform judicial interpretation of refusing to review the denial of suspension petitions.

The necessary finding was: "The court is constrained, therefore, to hold that the denial of a suspension of a rate by the Commission is by law committed to agency discretion and therefore not reviewable."\textsuperscript{26} The express language of Section 10 of the APA removes the denial of suspension from the reviewing powers of the court. This occurs even if the denial of suspension would be shown to be arbitrary or capricious, as the \textit{Luckenbach} court noted: "[I]t [the court] may not set aside arbitrary or capricious action so far as agency action is by law committed to agency discretion. So far as the action is by law committed to

\textsuperscript{24} 157 F. Supp. 305 (N.D. Cal. 1957).
\textsuperscript{25} 179 F. Supp. 605 (D. Del. 1959).
\textsuperscript{26} \textit{Id.} at 610.
agency discretion it is not reviewable — even for arbitrariness or abuse of discretion.”27

That the full reach of the Luckenbach decision — no review of even capricious agency action — was not wholly palatable was evident in the case of Bison Steamship Corp. v. United States.28 The court sought a way to avoid Luckenbach by concluding that it was in conflict with another decision on the subject, Seatrain Lines, Inc. v. United States.29 However, the court held that it had no power to review this particular order, since there had been a failure to exhaust administrative remedies by filing a formal complaint under another section of the act, so that review at this stage of the proceeding would disrupt the administrative scheme. It was obvious that the court did not like the Luckenbach statement that judicial review is precluded even if the Commission action were arbitrary and capricious.

Where the Commission does grant a request for suspension, the courts have generally denied review but have not quite accepted the concept that the Commission has unbounded discretion in this matter. Section 15(7) of the Interstate Commerce Act requires that reasons be given when a proposed rate is suspended.

In Ferguson-Steere Motor Co. v. United States,30 the Commission’s order was attacked on the basis that insufficient reasons were given for suspension where the Board’s statement was: “That said schedules make certain reductions in rates . . . for the transportation in interstate . . . commerce . . . in tank trucks and that the rights and interests of the public would be injuriously affected thereby.”31 The three judge court rejected this argument and sustained the dismissal by the single district judge. However, the court was not disposed to embrace the Commission’s argument that the court was absolutely without authority to review a Commission order, but instead stated:

[I]t is certainly true that the making of the orders is confided to the discretion of the Commission, and that only upon the closest

27 Id. at 609.
29 168 F. Supp. 819 (S.D. N.Y. 1958). However, a close reading of the Seatrain case would indicate that the court was not on sound ground in concluding there was a conflict between Luckenbach and Seatrain. In the Seatrain litigation the issue before the Commission was an application for Section 4 relief which the Commission granted over the opposition of Seatrain. Seatrain immediately brought suit to overturn the grant of the Section 4 relief and also to stay the effective date of the rate pending judicial determination. The court found that the Section 4 relief had been unlawfully granted. It therefore had no trouble in taking the next step which was to enjoin the rate pending remand to the Commission. This action, however, is no more than what courts normally do in those instances where they review a final Commission Order and conclude for one reason or another that the Commission has erred.
31 Id. at 589.
and most compelling showing that discretion was not exercised at all, or, if exercised, was abused, would a court interfere with a suspension order; we think it clear that, considering the reason given by the Commission in this case in the light of this compelling principle, it cannot be said of it that it was no reason at all and that the Commission, therefore, entered the order not in the exercise of its discretion and in compliance with the statute but without the exercise of discretion and in defiance of the statute.  

The court held that it can review for abuse of discretion. However, given the generalized formulation of the Commission's reasons in this case it is difficult to perceive an instance where such abuse of discretion could be found. The Commission merely said that there was a proposed reduction and that the rights and interests of the public would be injuriously affected thereby.

Another case concerning judicial review of a grant of suspension is *Consolidated Truck Service, Inc. v. United States*. In a somewhat confusing decision, the court held that the suspension order was not a final order but rather a proceeding committed by law to agency discretion and consequently Section 10 of the APA precluded review. However, the court specifically declined to decide the question of whether an arbitrary and capricious suspension order would be subject to judicial review, stating that,

[T]he question of whether even an arbitrary and capricious suspension order in the present context is subject to judicial review . . . has led to different opinions. [Citations omitted.] Suffice it to say that without more proof it cannot be said that the action of the Commission is arbitrary and capricious. Surely such a conclusion must await the results of the hearing.

Thus, where the Commission either grants or denies the request for suspension the courts have not allowed review, although they have refused to accept the proposition that an arbitrary use of discretion is not reviewable.

*Amarillo-Borger Express, Inc. v. United States*, was the first case which held that a Commission suspension order was reviewable. In this case the Suspension Board had issued one of its standard orders saying that the rates would, if permitted to become effective, be unjust and unreasonable in violation of the Interstate Commerce Act and would constitute unfair and destructive competitive practices in contravention of the National Transportation Policy. The reviewing Division of the Commission vacated and set aside the suspension portion of this order, giving the following reasons: "It further appearing, That consideration has been given to petitions of the respondents request-

---

32 Id. at 591.
34 Id. at 779.
ing vacation of the order of suspension, and to replies thereto, and good cause appearing therefor [sic].”36

The court looked upon the long line of authority concerning Commission grant and denial of suspension as follows:

The action we review is not the failure of the Commission to suspend, nor are we confronted with the question of reviewability, or extent thereof, of Commission action, taken with proper regard to substantive and procedural requirements, declining to suspend proposed rates, such as that involved in the cases pressed on us so heavily by defendants. . . .37

Instead the court analyzed Section 15(7) and its requirements that the Commission state its reasons for suspension as constituting a statutory duty to adequately articulate the basis for granting suspension so that the court may review the action taken.

The reasons stated by the Suspension Board for granting suspension were considered to be “decisive and significant in nature”38 and constituted findings. When the Division reversed, on an order which merely stated “good cause appearing,” the court found a lack of basic or essential administrative findings to negate the decisive and significant findings of the Board. The court’s conclusion relied upon the requirement of Section 8(c) of the Administrative Procedure Act, which requires an agency to enunciate its findings supporting its order.39

As to whether the action of the Commission was discretionary, so as to have it fall within the prefatory provision of Section 10 of the APA and thereby not be subject to the findings requirement, the court, in an interesting construction of statutory history, concluded that a discretionary judgment was the type of action which the Congress intended to have reviewed and not exempt from review by the language of Section 10 of the Administrative Procedure Act. Once having left the hurdle of Section 10 upon finding that the court had jurisdiction to review a suspension order, at least to the extent of requiring the Commission to adequately state the underlying reasons for its action, the court easily concluded that the “for good cause appearing” order was not an adequate exposition of the Commission’s findings and conclusions. It, therefore, remanded the matter to the Commission.

When the question was next raised in *Long Island Railroad Co. v. United States*,40 two of the three judges agreed with Judge Brown’s decision in *Amarillo-Borger*. It is interesting to note that while Judge Brown referred to the order of the Suspension

---

36 *Id.* at 415.
37 *Id.* at 416 n. 10.
38 *Id.* at 417.
Board as one based upon decisive and significant findings made under the statutory mandate, the majority in Long Island increased the force of the Board's action by stating: "In order to invoke the power to suspend a tariff of rates asserted to contemplate an adverse effect against which the Interstate Commerce Act is thought to afford protection, the plaintiffs were required in effect to present a prima facie case to the Board of Suspension."\(^{41}\)

In this case, the Commission had initially reversed the Board of Suspension with a "good cause appearing" order. However, it substituted another order, nunc pro tunc, for its good cause order, which merely negated the exact language of the order of the Board of Suspension. This negation was not thought by the court to constitute an adequate statement of the reasons supporting the Division reversal. It remanded to the Commission for a fuller explanation.

Circuit Judge Swan dissented and categorically denied the validity of the reasoning in Amarillo-Borger concerning the reviewability of action committed by statute to agency discretion. He noted that these decisions precluding reviewability of discretionary acts long predate the APA and that the APA was not designed to change the law. He argued that the language of Section 10 precluded judicial review where, as in a suspension action, the matter was vested in the agency's discretion.

The first case to question the authority of Amarillo-Borger was the second case of Long Island Railroad Co. v. United States.\(^{42}\) This case represents the single instance of a court considering a Division reversal of a denial of suspension. Judge Friendly assessed the authority concerning reviewability of the vacation of a suspension order, and stated:

The writer of this opinion must confess some difficulty in finding satisfactory grounds for reconciling the decisions that the vacating of a suspension order is reviewable even on the limited basis suggested in the cases so holding, with the generally accepted view that a refusal to suspend is not (save perhaps when the latter rests on an erroneous belief as to lack of power), see Swan, C.J., dissenting in Long Island R.R. Co. v. United States, supra, 140 F. Supp. at page 828.\(^{43}\)

However, since the first Long Island case was the law in the Eastern District of New York, Judge Friendly felt compelled to follow that holding.

Having concluded that it had this jurisdiction to review, the question then became one of the scope of review. In this context the court noted the serious interference with effective agency performance if it should require elaborate findings and

\(^{41}\) Id. at 828.
\(^{43}\) Id. at 798.
hearings in respect to the discretionary action taken on suspension matters. Consequently the court formulated the scope of review into the proposition that "a suit to enjoin such an order for lack of power may be entertained if, but only if, the complaint shows that the suspension is plainly without statutory authority or violates 'a clear statutory command,' . . . ."44

Following hard on the heels of the second Long Island case was Freeport Sulphur Co. v. United States.45 In this case the suspension board had originally denied the petitions for suspension. Division 2, acting as an appellate division, reversed and granted suspension. Then on petition for reconsideration the Division reversed and vacated the suspension order. In essence, this is the same sort of problem which had, since Amarillo-Borger, been decided in favor of the court having the power to review. The court relied heavily upon Judge Friendly's exhaustive analysis of the cases in the second Long Island case and reached conclusions similar to his in respect to the status of the law respecting reviewability.

As to the question of the effect of the Administrative Procedure Act upon reviewability, the court concluded that the matter of granting or refusing suspension was "discretionary" within the purview of Section 10 of the APA. However, the court did not extend itself so far as to state that the court would have no power to review an arbitrary or capricious action. Instead it took the position that "[a]ssuming that the Commission's vacating order may be reviewed for abuse of discretion, we see no abuse of discretion in its reconsideration of the suspension order."46

In two recent cases, Oscar Mayer & Co. v. United States47 and Naph-Sol Refining Co. v. United States,48 the courts considered a Division vacation of a Board suspension order and concluded not to follow Amarillo-Borger. In the latter case, the court noted the conflict between the Amarillo-Borger line of decisions and the second Long Island case decisions and specifically declined to follow the position advocated by the Commission, based on Luckenbach, that there is no judicial power to review suspension orders. Instead, the Naph-Sol court specifically aligned itself with Judge Friendly in his conclusion that the reviewing court would have power to enjoin the Commission order upon a showing that the suspension was without statutory authority or violated a clear statutory command, and that the complaining party had no other available remedy.

44 Id. at 800.
46 Id. at 916.
47 268 F. Supp. 977 (W.D. Wis. 1967).
In the *Oscar Mayer* case, the court, one judge concurring in the result, took the position that it had no jurisdiction to review the suspension order, reasoning that Congress had vested the Commission with sole and exclusive discretionary power to grant or deny suspension. Thus, the court concluded that under Section 10 of the APA, the vesting of agency action to agency discretion precluded judicial review by its express terms, citing *Luckenbach*.

The court did not leave the matter there, however, but assumed for discussion that it would have jurisdiction to examine the statement of reasons listed by the Commission in support of its order. In this respect the court compared *Amarillo-Borger* and *Freeport Sulphur* and concluded:

The vacation of a prior suspension order has the same effect [a refusal to suspend rates for which reasons are not required] after it has been entered as an initial refusal to suspend. It is difficult to find justification for a requirement that a vacating order contain the reasons for its entry when reasons are not necessary when the Commission initially refuses to suspend rates. *Freeport Sulphur Company v. United States* .... This Court is of the opinion that an order vacating suspension is not reviewable and rests wholly in the discretion of the Commission.5

It is readily apparent that courts are troubled with the reach of a preclusion of judicial review. Some, arguendo, would go so far as to preclude review even where the agency action is predicated on a “corrupt” basis. Others would demand findings and a reasonably drawn exercise of discretion which would prohibit judicial review. It would appear that regardless of the ultimate conclusion with respect to any given area of discretionary power, a court should undertake the type of analysis found in *Luckenbach*. The purpose of the discretionary grant should be examined in light of the consequences of exercising review, but in no event should agency action which is clearly arbitrary or capricious be allowed to remain unreviewable. Such was not the intent of Congress in enacting Section 10 and such is not consonant with the proper function of the judiciary vis-a-vis the administrative process.

### III. Judicial Application — Statutory Preclusion

Where statutes have specifically precluded judicial review the courts have generally honored the congressional mandate. In

---

49 Judge Doyle, concurring in the result, states his concept of review as follows: “In my view, we should assert jurisdiction to review the procedure by which the Commission took the action complained of, but should hold that the Commission was not required to state the reasons of basis for its revocation of the suspension order.” 268 F. Supp. at 984. The Judge specifically recognizes that arbitrary or “even corrupt” reasons for suspension action by the Commission would not be reviewable. *Id.*

50 268 F. Supp. at 981.
Caulfield v. United States Dep't of Agriculture, the statute stated that the decision of the agency "shall be final and conclusive and shall not be reviewable by any other officer or agency of the government." The court concluded that the APA affords no review where the particular statute denies it.

While such language is sufficient to preclude review, Congress can be quite specific in its preclusion of judicial inquiry. This is evidenced by language in the Federal Employees Compensation Act, stating that the action of the Secretary in allowing or denying payment:

[S]hall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or by any court by mandamus or otherwise. . . .

It should be noted that preclusion, such as the foregoing, most often appears in areas where Congress has created rights to federal funds. However, in areas of personal liberties the preclusion of review does not readily find favor with the courts. The tortured history of the deportation cases illustrates the difficulty of denying review of administrative orders in this area of personal rights.

In Heikkila v. Barber, the Court held that a provision in the Immigration Act of 1917 to the effect that the decision of the Attorney General was "final" in deportation cases precludes direct attack upon a deportation order by means of suits for injunction or declaratory relief. Then in Shanghnessy v. Pedrozo, the Court went further into the legislative history underlying the Immigration Act and concluded that "final" referred only to the administrative procedure rather than as a preclusion of judicial review by injunctive and declaratory relief. The Court reasoned that since Congress had amended the statute after the APA was in effect it must have realized that Section 10 would only apply to express preclusions. Since they merely left the word "final" in the statute without stating that there shall be no judicial review, the intent must have been to permit review.

It is apparent that, in the area of personal liberties, the courts are going to be more particular about the statutory language and purposes that will support a preclusion of judicial review. Since this is the case when Congress expressly at-

---

51 293 F.2d 217 (5th Cir. 1961).
52 Id. at 219 n. 7.
54 345 U.S. 229 (1953).
tempts to limit review, the courts will certainly apply the same analysis to an implied preclusion.

With respect to the area of implied prohibition of review, Congress rather clearly said that such preclusion should only be involved in cases where the intent of Congress was clear, convincing and unmistakable. The usual method of determining implied preclusion is the existence of specified review provisions which impliedly preclude resort to others.

A recent case in this area is Abbott Laboratories v. Gardner, where the Court appeared to accept the Congressional understanding that implied preclusion be clear and unmistakable. In this case the Commissioner of Food and Drugs, pursuant to a 1962 amendment to the Food, Drug and Cosmetic Act that required manufacturers to label drugs with the established name along with their trade name, promulgated regulations requiring the manufacturers to state the established name every time that the trade name appeared. The drug industry asserted that the Commissioner exceeded his authority by the regulation which required the established name to appear “every time” the trade name appeared.

The Court noted that the historical method of reviewing regulations under the Food and Drug Act was by injunction, seizure or criminal prosecution, all instituted by the Attorney General. Review of the regulations could then be had in the course of the proceeding instituted by the Attorney General without allowing review prior to enforcement.

The Court then reviewed the statutory history of the Food and Drug Act's review provisions and concluded that the pre-enforcement review was not prohibited. The Court refused to investigate whether the sought-after review was within that authorized by Congress, but instead determined whether it was prohibited by Congress. It found nothing in the statutory history to indicate that Congress intended to preclude pre-enforcement review of formal agency action. In fact, the Court concluded that “a study of the legislative history shows rather conclusively that the specific review provisions were designed to give an additional remedy and not to cut down more traditional channels of review.”

---

59 The Helko case was distinguished as being an informal regulation. The regulations involved in Swift & Co. v. Wickham, 230 F. Supp. 398, 409 (1964); aff’d 364 F.2d 241 (1966) were characterized as tentative.
60 387 U.S. at 142. There was, however, sharp disagreement over the interpretation of Congressional intent in Justice Fortas’ dissenting opinion. The three dissenters found instead that Congress had specifically considered and rejected pre-enforcement remedies because of the overriding need for...
That the Court was taking a broad position with respect to review is evident in its citing with approval the position of Professor Jaffee, that:

The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.\(^6\)

The Court then stated the approach which must be taken in reviewing legislative intent, for the judiciary to "inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review."\(^2\)

If in this case where there are compelling historical and policy arguments for reading the statute to preclude pre-enforcement judicial review, as the dissenting justices argued, it would appear that proving to a court that Congress impliedly intended to preclude review will be most difficult.

**CONCLUSION**

Courts will not look with favor upon the implied intent of Congress to preclude review. The standard of clear and unmistakable evidence to prove such an intent will be most difficult to sustain. This is a highly practical approach, since Congress is well aware of the problem of review and should specifically decide where it wants agency action to remain unreviewable.

Even where agency action is held to fall within the preclusion, either because of statutory direction or because of a vested discretion, the courts must balance the need for review in the particular instance with the policy determinations of the objectives to be achieved by agency freedom.\(^6\) Courts, however, should not withhold review where a reasonable showing of an arbitrary or capricious exercise of power is demonstrated. Congress did not intend such a result by the enactment of the Administrative Procedure Act. The courts should not accept the argument that they are precluded from examining proceedings which do not attain those minimal standards.

---

\(^6\) For a consideration of the various policies and objectives to be weighed and considered by the courts see Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion", 82 HARV. L. REV. 367 (1968).