Washington and Lee Law Review

Volume 29 | Issue 2 Article 10

Fall 9-1-1972

Judicial Review Under the APA of "Agency Action Committed to Agency Discretion by Law" .

inclusion of confidential employees in the specifically excluded "supervisor" category seems to have been accepted by highly respected commentators in the field of labor law.[74] Classified as a supervisor, the confidential employee has the right to join a labor organization, but this right seems to be of dubious value since management is not bound to recognize him as an employee protected by the Act.[75] Under the *Wheeling* decision, the confidential employee may not actively divide his allegiance and expect to keep his job. For purposes of the National Labor Relations Act, he has been placed solely on the side of management.

JOHN C. BALDWIN

JUDICIAL REVIEW UNDER THE APA OF "AGENCY ACTION COMMITTED TO AGENCY DISCRETION BY LAW"

The Administrative Procedure Act[1] contains an apparent inconsis-

---

stating that the legislative history of the 1947 amendments "clearly indicates that labor relations and employment division personnel and confidential employees are not intended to be protected by the Act." *Id.* at 610.

[74]MORRIS at 217 states:

> Confidential employees are closely related to managerial and supervisory employees. The latter category is specifically excluded by the Act. . . . Confidential employees . . . are not expressly excluded by the Act, but their implied exclusion has been deemed necessary in order to make the Act function.

COX & BOK at 118 states that "confidential employees . . . are also excluded" from the Act; no explanation is given.

[75]National Labor Relations Act § 14(a), *as amended* 29 U.S.C. § 164(a) (1970). Note 8 *supra.*

---

[1]5 U.S.C. §§ 500-706 (1970). The Administrative Procedure Act was enacted in 1946 (Act of June 11, 1946, Pub. L. No. 79-404, 60 Stat. 237) to achieve reasonable uniformity and fairness in administrative procedures by codifying to an extent certain essential administrative rights and procedures. It was thought that such a codification would afford private parties a means of knowing their rights and how to protect them as well as giving administrators a simple framework upon which to base their operations. H.R. REP. No. 1980, 79th Cong., 2d Sess. 15-17 (1946). Section 10 of the APA, codified at 5 U.S.C. §§ 701-06 (1970), was included to provide a simplified statement of available judicial review. *Id.* at 17. It has been argued that despite the broadly remedial purpose of the APA, section 10 made no real change in the law of reviewability. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.08 (1958). Furthermore, the question has been raised whether section 10 in addition to regulating review also operates as an independent jurisdictional grant to the federal courts to review "final agency action." Byse & Fiocca, *Section 1361 of The Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L.

tency which has been the subject of a lengthy, scholarly debate.[2] Section 701 of the APA reads in relevant part:

> (a) 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.[3]

The second exception to judicial review under this section, that of agency action committed to agency discretion by law, seemingly contradicts a proviso found in section 706 that the reviewing court shall

> (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 . . . .[4]

It has been argued that section 701(a)(2) codifies certain judicial doctrines which courts offer as grounds for deciding that particular agency determinations are not reviewable.[5] Professor Raoul Berger insists that the language of section 701(a)(2) notwithstanding, those agency determinations involving "abuse of discretion" or arbitrariness are always reviewable by the courts.[6] This argument is disputed by Professor Kenneth

---

REV. 308, 326-31 (1967). *See also* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 165 (1965); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 443-46 (1970).

[2]Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1965); Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966); Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word,"* 114 U. PA. L. REV. 816 (1966); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966); Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967); Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968); Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1970).

[3]5 U.S.C. § 701(a) (1970).

[4]5 U.S.C. § 706(2)(A) (1970).

[5]These doctrines are: sovereign immunity, separation of powers, justiciability, standing, exhaustion of administrative remedies, ripeness and others. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 367-68 (1968) (hereinafter cited as *Functional Analysis*).

[6]Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 999-1001 (1969) [hereinafter cited as *Synthesis*].

Culp Davis who asserts that section 701(a)(2) most assuredly qualifies section 706 and in fact precludes review of certain agency action even for arbitrariness or abuse of discretion.[7]

Although the Berger-Davis debate appears to be highly abstract, the importance of the controversy is underscored by the reliance courts often place on such commentators. For example, the Fourth Circuit Court of Appeals in *Littell v. Morton*[8] has held that despite section 701(a)(2), the APA provides limited judicial review of an agency decision to determine if there has been an abuse of discretion.[9] In reaching this decision, the court "chose sides" and declared the Berger rationale to be preferable.[10]

The situation in *Littell*[11] involved an attorney's claim on his contract with the Navajo Tribe of Indians. The Secretary of the Interior denied the compensation, deriving his authority for so doing from an 1872 statute[12] which, according to the court, "commits the decision to deny compensation to an Indian attorney to the discretion of the Secretary . . . ."[13] The court, however, held reviewable an alleged abuse of the Secretary's discretion. In reaching this decision, the court outlined the Berger-Davis debate mentioned above[14] and concluded that review under the APA for "abuse of discretion" was always available.[15]

With respect to the other circuits, no clear-cut approach to section 701(a)(2) is readily apparent. Some of the courts stress the importance of making a proper finding of "agency action committed to agency dis-

---

[7]K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 964 (Supp. 1970).

[8]445 F.2d 1207 (4th Cir. 1971).

[9]The doctrine of sovereign immunity was also raised by the Secretary to preclude review. The court held that although the doctrine was applicable in *Littell*, the policy reasons for invoking sovereign immunity were not strong enough to require dismissal of this suit. *Id.* at 1214.

[10]*Id.* at 1211. The court referred to the legislative history of the APA which supports the notion that where an agency without authority or by caprice makes a decision, then it is subject to review. However, as has been pointed out, the legislative history of the APA is mixed and confusing although, according to Professor Davis, the strongest part of it supports a literal reading of section 701(a). 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 18 (Supp. 1965).

[11]445 F.2d 1207 (4th Cir. 1971).

[12]25 U.S.C. § 82 (1970) (originally enacted as Act of May 21, 1872, ch. 177, § 3, 17 Stat. 137).

[13]The text of the statute reads in relevant part:

> the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, *in their judgment*, such contract or agreement has been complied with or fulfilled. . . .

25 U.S.C. § 82 (1970) (emphasis added).

[14]Text accompanying notes 1-7 *supra*.

[15]445 F.2d at 1211.

cretion by law,"[16] while for other courts such a "finding" appears to be more of an initial assumption than a well-founded conclusion.[17] Furthermore, once these magic words have been pronounced courts will either disregard the limitation as in *Littell*[18] or invoke it to justify the preclusion of judicial interference.[19]

The Presumption of Reviewability and Congressional Intent

The position of the Supreme Court on the problem of judicial reviewability of agency determinations serves as a good starting point for an understanding of the "agency action committed to agency discretion" limitation of review.[20] Beginning 1902 with *American School of Magnetic Healing v. McAnnulty*,[21] the Court has fashioned an underlying presumption of reviewability of administrative action[22] which is rebuttable, however, by an indication of legislative intent favoring nonreviewability.[23] The Supreme Court preserved and restated this presumption in *Abbott Laboratories v. Gardner*,[24] where the Court considered whether Congress had intended to forbid review of a regulation promulgated by the Commissioner of Food and Drugs. The Court emphasized that judicial review of agency action in the interest of an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.[25]

In *Abbott* the section 701(a)(1) exception to judicial review, preclusion by a specific statutory provision,[26] seemed to be in issue. The government argued that the congressional intent to preclude review was implied since the statute under consideration had provided review procedures for some regulations[27] but not for the ones in controversy.[28] However, the Court flatly rejected the government's dependence on such weak evidence to adduce congressional intent and held that in this case judicial review

---

[16]*E.g.*, Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970). Text accompanying notes 72-77 *infra*.

[17]*E.g.*, Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971). Text accompanying notes 85-93 *infra*.

[18]Text accompanying notes 8-15 *supra*.

[19]*E.g.*, United States v. One 1961 Cadillac, 337 F.2d 730 (6th Cir. 1964).

[20]5 U.S.C. § 701(a)(2) (1970).

[21]187 U.S. 94 (1902).

[22]4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.07 (1958).

[23]*Id.* at 31.

[24]387 U.S. 136 (1967).

[25]*Id.* at 140.

[26]5 U.S.C. § 701(a)(1) (1970).

[27]Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371 (1970).

[28]21 C.F.R. § 1.104(g)(1) (1967); 21 C.F.R. § 1.105(b)(1) (1967).

was available.[29]

Consistently with the emphasis in *Abbott* on the presumption of reviewability and the requirement of clear congressional intent to deny review,[30] the Court has in a 1971 case subjected the section 701(a)(2) limitation to vigorous statutory analysis.[31] In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[32] the Court refused to find "agency action committed to agency discretion by law." In holding reviewable the Secretary of Transportation's decision approving construction of a highway through a public park, the Court determined that the "committed to agency discretion" limitation was a narrow one. According to the Court, the legislative history of the APA indicated that the section 701(a)(2) exception applies only in those rare instances when the particular statutes are so broad that "no law" can be found to apply.[33] Since the statutes at issue[34] set forth specific directives for the purpose of approving highways to be constructed through parklands, plainly there was " 'law to apply' and thus the exemption for action 'committed to agency discretion' [was] inapplicable."[35]

Generally, then, in the face of a presumption of reviewability, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[36] This directive would seem to apply to a statutory preclusion of review under

---

[29]387 U.S. at 141. But notice the Court's earlier use of negative implication to discover legislative intent in Schilling v. Rogers, 363 U.S. 666 (1960). Dissenting in a 5-4 decision, Justice Brennan reminded the majority that the Court had previously "gone far towards establishing the proposition that preclusion of judicial review of administrative action . . . is not lightly to be inferred." 363 U.S. at 677.

[30]Text accompanying notes 20-29 *supra*.

[31]*But see* Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958). The second exception, the section 701(a)(2) exemption, was the subject of the Court's inquiry in *Panama Canal Co.* It was held that Congress had granted its agency, the Panama Canal Co., the discretion of initiating proceedings for the readjustment of canal tolls. The conflict, as the Court saw it, raged over questions of cost accounting which were peculiarly matters requiring agency expertise. 356 U.S. at 317. In light of the presumption of reviewability, the Court can be criticized for having made no attempt to show that Congress had indeed intended to cut off review in this case.

[32]401 U.S. 402 (1971).

[33]*Id.* at 410. A statute which is so "broad" could be construed as a "permissive" type statute. *See* Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965) and text accompanying notes 63-68 *infra*.

[34]49 U.S.C. § 1653(f) (Supp. V, 1964); 23 U.S.C. § 138 (Supp. V, 1964). The Court emphasized that these statutes had been enacted in response to the growing public concern about the natural environment. The purpose of the statutes was to minimize the construction of highways through certain areas in which the highway's existence would effectively disturb the natural beauty and surroundings. 401 U.S. at 404-05.

[35]401 U.S. at 413.

[36]Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

section 701(a)(1) as well as to preclusion under section 701(a)(2).[37]

Abuse of Discretion

As mentioned, the court in *Littell* held that judicial review for "abuse of discretion" was available even in the face of an "agency action committed to agency discretion" limitation.[38] Semantic problems arise, however, since the term "abuse of discretion" is used in a variety of ways. One writer has defined discretion as "a power to make a choice within a class of actions"[39] and abuse of discretion as "an exercise of discretion in which a relevant consideration has been given an exaggerated, an 'unreasonable' weight at the expense of others."[40]

Judge Friendly of the Second Circuit has suggested two possible definitions of "abuse of discretion." The first was presented as a "clearly erroneous" concept (error of judgment) and the second, as a more limited notion that discretion is abused when the action taken is extremely arbitrary, fanciful or unreasonable.[41] The latter understanding of "abuse of discretion" would be involved if agency action

> were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination . . . or . . . on other "considerations that Congress could not have intended to make relevant."[42]

In making this distinction between erroneous judgment and judgment which is far more than just erroneous, Judge Friendly also implied that review for the extreme "abuse of discretion" would be available despite section 701(a)(2).[43] It is submitted, however, that the line between the two abuses of discretion is a very difficult one to draw. Moreover, it appears that the courts have not settled on any one definition of abuse of discretion.[44]

In addition to the Second Circuit,[45] three other circuits have implied

---

[37]*See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

[38]Text accompanying notes 8-15 *supra.*

[39]L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 359 (1965).

[40]*Id.* at 586.

[41]Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 718 (2d Cir. 1966).

[42]*Id.* at 719.

[43]*Id.* at 718-19.

[44]For instance, it is possible that "abuse of discretion" could be used to mean that an agency has exceeded its statutory authority or jurisdiction or has committed constitutional error. Text accompanying notes 54-62 *infra.*

[45]Text accompanying notes 41-43 *supra.*

that they will on occasion hold "abuse of discretion," as they may define it, reviewable in the face of a section 701(a)(2) limitation. For instance, *Curran v. Laird*[46] supposedly evinces the D.C. Circuit's unqualified support of the section 701(a)(2) limitation.[47] Despite the holding that such discretion is unreviewable, dicta in *Curran* suggest the existence of a number of limitations of nonreviewability:[48]

> These . . . instances relate to a case where there has been not merely a contention of error or abuse of discretion, but also facts adduced in support of a claim of the kind of bad faith, fraud, or conscious wrongdoing which in effect undercuts the assumption that the personnel involved have been genuinely acting as government officials.[49]

In addition, three Seventh Circuit decisions specified that certain action committed to agency discretion is reviewable upon a clear showing of abuse of discretion.[50] Finally, the Fourth Circuit in *Littell v. Morton*[51] has become the first circuit to hold, not just imply, that abuse of discretion, as defined by Judge Friendly,[52] is reviewable despite the section 701(a)(2) limitation.[53]

---

[46]420 F.2d 122 (D.C. Cir. 1969).

[47]Professor Davis insists that *Curran* demonstrates the D.C. Circuit's view that the section 701(a)(2) limitation prohibits review for abuse of discretion even when the official action is "arbitrary." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 966-67 (Supp. 1970). But the question remains as to the definition of "arbitrary." The court emphasized that agency action which involves personal rights and liberties, constitutional claims, and rights expressly granted by statute were not involved in the case. 420 F.2d at 130-31. Text accompanying notes 54-62 *infra*.

[48]Likewise in Overseas Media Corp. v. McNamara, 385 F.2d 308 (D.C. Cir. 1967), the D.C. Circuit remarked that even if it had found agency action committed to agency discretion, which it did not do in the case, nevertheless abuse of discretion would be reviewable. *Id.* at 316 n.14.

[49]420 F.2d at 131. "Abuse of discretion" in this sense appears to involve not merely erroneous judgment, nor judgment which is extremely fanciful, nor agency action in excess of statutory authority, jurisdiction, or the Constitution. The action alluded to would seem to connote a sense of criminality on the part of the individual decision-maker.

[50]Velasco v. Immigration & Naturalization Serv., 386 F.2d 283, 286 (7th Cir. 1967), *cert. denied*, 393 U.S. 867 (1968); Kladis v. Immigration & Naturalization Serv., 343 F.2d 513, 515 (7th Cir. 1965); Obrenovic v. Pilliod, 282 F.2d 874, 876 (7th Cir. 1960).

[51]445 F.2d 1207 (4th Cir. 1971).

[52]In deciding that "abuse of discretion" would be reviewable, the court in *Littell* stated that Judge Friendly's formulation of the extreme abuse of discretion would define the "scope of this limited review." In other words, the court would seem to allow review for "any" alleged abuse of discretion, the scope of review being limited, however, to deciding if that abuse were an extreme one in the sense of Judge Friendly's definition. 445 F.2d at 1211.

[53]*Id.*

A Review of the Circuits

In perceiving the differing circuit approaches to the effect of a section 701(a)(2) limitation, it can be helpful to keep in mind not only the Supreme Court's insistence that clear legislative intent is needed when a court restricts reviewability but also the significance of the introductory clause of section 701(a) of the APA: "except to the extent that."[54] The opening words are not "except when" but "except to the extent that."[55] The question thus is not "whether agency action is by law committed to agency discretion but *to what extent* agency action is so committed."[56]

Thus written, the introductory clause of section 701(a) has been construed as a restriction on section 701(a)'s preclusion of reviewability.[57] In other words, only "to the extent that" Congress has committed the action to agency discretion will review be barred. Exemplary of this construction is that several circuits have indicated that despite the secton 701(a) limitation they may nevertheless grant review if an agency has exceeded its statutory authority or breached a statutory duty,[58] committed constitutional error,[59] or exceeded its jurisdiction.[60] This approach was demonstrated by the D.C. Circuit in *Scanwell Laboratories, Inc. v. Shaffer*.[61] The court stated that it will invade the forbidden domain of administrative discretion when it is apparent that the agency has stepped outside its statutory perimeter, the theory being that once outside the perimeter the discretion no longer exists.[62]

Reasoning in a similar fashion, the Ninth Circuit, in deciding whether review under the APA should be precluded by section 701(a)(2), drew a distinction in *Ferry v. Udall*[63] between "permissive" and "mandatory"

---

[54]Text accompanying note 3 *supra*.

[55]The original version of section 701 read "except so far as" but in its codified form reads "except to the extent that." Administrative Procedure Act of 1946, ch. 324, § 10, 60 Stat. 237 (codified at 5 U.S.C. § 701(a) (1970)). The change is neither relevant nor important to our present discussion.

[56]4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.08 at 33 (1958) (emphasis added). Thus the section 701(a)(2) exemption from review is not an all or nothing limitation. *Id.* at 33-34.

[57]*Functional Analysis* at 369-70.

[58]Langevin v. Chenango Court, Inc., 447 F.2d 296, 303 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243, 1251 (1st Cir. 1970); North City Area-Wide Council, Inc. v. Romney, 428 F.2d 754, 757 (3d Cir. 1970).

[59]Langevin v. Chenango Court, Inc., 447 F.2d 296, 303 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243, 1251 (1st Cir. 1970).

[60]*Id.*

[61]424 F.2d 859 (D.C. Cir. 1970).

[62]*Id.* at 874.

[63]336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

type statutes.[64] Recognizing that almost every agency action involves some discretion, the court in *Ferry* sought to restrict review "to the extent that" the action really is committed to agency discretion.[65] The method to be used in ascertaining to what extent the agency is vested with the discretion involves construing the statute under which the agency derives its authority for the decision in question. Where administrative discretion is limited to deciding whether statutory requirements have been met, the statute is a "mandatory type" and the agency must take action which is then subject to review. Where the agency still has discretion to refuse to act even when statutory requirements have been met, the statute is "permissive," and the discretion exercised is nonreviewable.[66] Although this distinction may be nebulous,[67] the court seems to recognize the importance of statutory analysis.[68] Furthermore, the appeal of the Ninth Circuit approach is evidenced by its apparent acceptance by the Sixth Circuit.[69]

It is possible that the Eighth Circuit also follows the Ninth Circuit approach. In *Jones v. Freeman*,[70] a case involving an attempt by the United States Forest Service to keep razorback hogs from foraging in a national forest, the Eighth Circuit held that the agency action of impounding the hogs was reviewable. Although it is not clear on what grounds this decision was actually based, the court did indicate that the "committed to agency discretion" limitation applied only "to the extent that" such discretion existed. The court then cited to *Ferry* and implied that the statute involved was a "mandatory type."[71]

In contrast to the limited approach of the Ninth Circuit, the First Circuit thoroughly analyzes various factors in determining whether agency action is reviewable. The question the First Circuit faced in *Hahn*

---

[64]*E.g.*, Mollohan v. Gray, 413 F.2d 349, 351 (9th Cir. 1969); United States v. Walker, 409 F.2d 477, 480 (9th Cir. 1969).

[65]336 F.2d at 711-12.

[66]Mollohan v. Gray, 413 F.2d 349, 351 (9th Cir. 1969).

[67]For an extended discussion on the distinction between "mandatory" and "permissive" type statutes, see Ferry v. Udall, 336 F.2d 706, 712-13 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

[68]For a favorable reaction to the Ninth Circuit approach, see K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 968 (Supp. 1970). For adverse comment, see Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970) and *Functional Analysis* at 397.

[69]Once the Sixth Circuit has found "agency action committed to agency discretion," it appears that it will bar review. United States v. One 1961 Cadillac, 337 F.2d 730, 732 (6th Cir. 1964). In order to ascertain whether or not—to what extent—the action is so committed, a Sixth Circuit case, Knight Newspapers, Inc. v. United States, 395 F.2d 353 (6th Cir. 1968), has followed the Ninth Circuit approach. *Id.* at 358.

[70]400 F.2d 383 (8th Cir. 1968).

[71]*Id.* at 390.

v. Gottlieb[72] was whether tenants in federally subsidized housing have the right to an administrative hearing and judicial review when their landlord proposes a rent increase. With regard to possible review, the court recognized the section 701(a)(2) limitation as well as the "strong presumption in favor of review, which is overcome only by 'clear and convincing evidence' that Congress intended to cut off review above the agency level."[73] The court then discussed the problems involved in deciding what Congress had intended and concluded that in the absence of clear congressional intent, three factors seems determinative of the requisite intent:

> first, the appropriateness of the issue raised for review by the courts; second, the need for judicial supervision to safeguard the interests of the plaintiffs; and third, the impact of review on the effectiveness of the agency in carrying out its assigned role.[74]

Applying these three factors to the problem at hand, the court concluded that deciding whether or not rent increases were necessary involved complex questions of economics which were not appropriate for the courts.[75] Secondly, although there was a need for judicial intervention to protect tenants in federally subsidized low-rent housing, other forms of relief, such as rent supplements, were available to them. In addition, the court reasoned that the interests of the plaintiffs might be hurt more by a judicially-imposed system of review of all rent increases than by the single rent increase itself: the delay, the frictions and the costs engendered by constant litigation might lead to increased rentals, as well as less participation in these housing projects by private investors. Finally, with regard to the impact of review on agency effectiveness, the court felt that the frequency with which Federal Housing Authority rent-increase considerations can recur (as the many different leases expire) would render judicial review of these increases unduly burdensome on the agency by retarding and complicating its work. Furthermore, since the FHA's specific role in this area is to help provide needy families with low-income housing, the necessary involvement of private investors would be substantially discouraged through an additional increment of governmental interference.[76]

The court in *Hahn* concluded that, on the basis of the above analysis,

---

[72]430 F.2d 1243 (1st Cir. 1970). This case is commented upon in the special student project *Reviewability of Matters Committed to Agency Discretion*, 1971 DUKE L.J. 312.

[73]430 F.2d at 1249.

[74]*Id.*

[75]*Id.* This first factor appears to have been the basis of the Supreme Court's holding of nonreviewability in Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-19 (1958). Note 31 *supra*.

[76]430 F.2d at 1250.

Congress had meant to preclude judicial review of FHA rent-increase approval and that such approval was therefore a matter committed to agency discretion by law.[77] The First Circuit approach thus stresses substantial analysis of both statutory provisions and certain practical problems in ascertaining whether Congress has intended the section 701(a)(2) limitation to apply.

The Second Circuit in *Langevin v. Chenango Court, Inc.*[78] criticized part of the *Hahn* "test"[79] but nevertheless based its decision of nonreviewability of an agency decision on factors similar to the ones employed in *Hahn*.[80] Likewise in *Kletschka v. Driver*[81] the court engaged in a similar analysis and prohibited review in a case involving the Veterans Administration.

With regard to a *Hahn*-type approach, the argument has been made that a court's analysis of such factors as agency expertise, managerial nature of an agency, impropriety of judicial intervention, and necessity of informal agency decision-making may indicate a "presumption of nonreviewability."[82] However, the First Circuit's understanding of these factors as only being dispositive of the required congressional intent to show "agency action committed to agency discretion" seems more consistent with the Supreme Court's position in *Abbott*, *i.e.*, the court begins an analysis weighted with the presumption of reviewability.[83] On the other hand, other approaches can be construed as indicating a presumption of nonreviewability;[84] and although the result reached may be the same in cases similar to the ones discussed, different presumptions can lead, of course, to different conclusions.

---

[77]*Id.* at 1251.

[78]447 F.2d 296 (2d Cir. 1971).

[79]The court in *Langevin* indicated it could see no reason why a court was not equipped to pass on the reasonableness of a rent increase. *Id.* at 303.

[80]In precluding review the court looked to such factors as the managerial nature of the responsibilities confided to the FHA, the need for expeditious agency action, and the quantity of appeals which might result from a holding of reviewability. *Id.* at 303.

[81]411 F.2d 436 (2d Cir. 1969).

[82]*Compare Synthesis* at 965 *with Functional Analysis* at 377-95.

[83]Text accompanying notes 20-29 *supra*.

[84]In neither *Kletschka* nor *Langevin* did the court even mention the "presumption of reviewability" nor the requirement that clear congressional intent was needed to cut off review of administrative action. See text accompanying notes 20-29 *supra*. In both instances the court seemed to begin its analysis weighted with a presumption of nonreviewability. Langevin v. Chenango Court, Inc., 447 F.2d 296, 303 (2d Cir. 1971); Kletschka v. Driver, 411 F.2d 436, 443 (2d Cir. 1969).

Littell v. Morton

The possible abuse of discretion in *Littell*[85] apparently stemmed from a background of prior litigation between Littell and the Secretary, litigation which had been characterized as an "unseemly squabble."[86] The court therefore held that review for "abuse of discretion" was always available even though the Secretary's denial of compensation had been "agency action committed to agency discretion by law," the section 701(a)(2) limitation on review. The court, however, engaged in no analysis to decide if a section 701(a)(2) limitation were applicable. Since the court in *Littell* referred at the end of the decision to the problems of contract interpretation and the absence of agency expertise in this area of the law,[87] it is arguable that the Secretary's decision was not really one "committed to agency discretion by law."

Instead of assuming the section 701(a)(2) limitation to be applicable, the court could have engaged in an analysis similar to that employed in *Hahn*.[88] For instance, the court could have begun an analysis of the situation weighted with the presumption of reviewability. It could have inquired whether Congress really intended the Littell contract decision to have been committed to agency discretion for the purposes of the section 701(a)(2) limitation. In other words, although the Secretary of Interior could exercise his discretion in determining whether or not the contract had been complied with, it is plausible that this fact does not necessarily mean that Congress meant to preclude review of such a decision.

To begin with, the statute granting the Secretary his discretion dates back to 1872, long before the Administrative Procedure Act was enacted[89] to provide more opportunity for judicial review of administrative decisions.[90] In addition, the principles of contract interpretation seem appropriate for judicial review, which conclusion the court in *Littell* reached at the end of its opinion.[91] In view of the "unseemly squabble" between the plaintiff and the Secretary, judicial supervision to safeguard Littell's interests would appear warranted. Finally, the argument could be made that review of such contract decisions would not operate as too great a burden on the Department of the Interior and would not significantly impede the agency's particular role in paying over monies due attorneys

---

[85]Text accompanying notes 8-15 *supra*.

[86]Littell v. Hickel, 314 F. Supp. 1176, 1177 (D. Md. 1970), *rev'd sub nom.* Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971).

[87]445 F.2d at 1214.

[88]Text accompanying notes 72-77 *supra*.

[89]Act of June 11, 1946, Pub. L. No. 79-404, 60 Stat. 237.

[90]Note 1 *supra*.

[91]445 F.2d at 1214.

who have performed services for Indians.[92]

The above analysis, following basically an approach set out by the First Circuit in *Hahn*, could lead to the conclusion that Congress did not intend to commit the Secretary of Interior's decision to agency discretion by law, at least for the purposes of precluding review. To put it another way, Congress did not intend to commit the agency action to agency discretion "to the extent that" such action would be nonreviewable.[93] The advantage of such an analysis would appear to lie in the necessity of a closer examination of the statute and the nature of the issues in controversy viewed in the light of both the agency's particular function and the presumption of judicial reviewability.

Conclusion

It has been urged that courts "enter into fuller analyses of the composite of factors that justify a holding of nonreviewability."[94] Confusion has resulted, it seems, through viewing the "committed-to-agency-discretion doctrine" as a magical category which, once invoked, ends thought and blinds the court to further possibilities.[95] A converse argument might be made in cases such as *Littell* where reviewability is upheld.

In *Littell* the court assumed the applicability of the section 701(a)(2) limitation and then brushed it aside, holding that review for "abuse of discretion" was always available. It is arguable that agency action is never committed to agency discretion "to the extent that" such discretion is abused.[96] However, it is often hard for a court to determine whether allegations of abuse of discretion have any factual support.[97] The court was aided in *Littell* by the reported court history of the "unseemly squab-

---

[92]Text accompanying notes 74-77 *supra*.

[93]The contention that the language "to the extent that" keeps section 701(a)(2) from being an all or nothing limitation, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.08 at 33-34 (1958), is usually thought to refer to the degree of discretion which is reviewable, *i.e.*, "scope of review." *See* Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970), *vacated as moot*, 92 S. Ct. 577 (1972); *Functional Analysis* at 369-70. The difficulty in drawing the line between reviewable and nonreviewable abuse of discretion has already been discussed. Text accompanying notes 38-52 *supra*. Furthermore, as the D.C. Circuit points out in *Curran v. Laird*, even a "restricted review requires probing the surface and going beyond mere conclusory affidavits." 420 F.2d 122, 132 (D.C. Cir. 1969). Such a review thus belies the notion that the matters are in fact committed to agency discretion. *Id.* at 132-33. It appears then that the language "to the extent that" can operate as a limitation on section 701(a)(2) in the sense that Congress only meant to commit the action to agency discretion "to the extent that" it meant to preclude review of that action.

[94]*Functional Analysis* at 396.

[95]*Id.* at 396-98.

[96]This appears to be Professor Berger's basic thesis. *Synthesis* at 968-69.

[97]*See Functional Analysis* at 374-75.