SUMMARY OF RECENT DEVELOPMENTS IN JUDICIAL REVIEW IN AMERICAN ADMINISTRATIVE LAW

ARTICLE/WISCONSIN LAW REVIEW

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III. Judicial Review

Our discussion of *Vermont Yankee* shows that courts are illling to impose additional procedural requirements upon making.[75] But this has not affected their traditional role in trolling the legality of administrative action. If anything, ind, in recent years renewed emphasis has been placed upon cial review as the ultimate safeguard against improper adistrative action. In 1971 Judge Bazelon asserted, "We stand the threshold of a new era in the history of the long and tful collaboration of administrative agencies and reviewing rts."[76] We appear to be in the midst of another crucial swing he administrative law pendulum. The trend is likely to conte as the judges, like the citizenry generally, become increasy disenchanted with claims of administrative expertise. The lt may be a drastic alteration in traditional restrictions on icial review. If agencies prove increasingly unable to meet sol needs, we can expect the courts to play a more activist . This should be true of the judicial role in both of the prinl areas of judicial review: 1) availability, and 2) scope of ew.

A. Availability

The overriding trend in recent years has been to broaden availability of judicial review. In today's administrative law, re is a strong presumption in favor of judicial review. The preme Court asserted a decade ago that "[t]here is no preption against judicial review and in favor of administrative olutism."[77] On the contrary, review is the rule and reviewability an exception that must be demonstrated. reclusion of judicial review of administrative action adjudi-

74. Loc. cit. supra note 63. See Cal. Gov't Code § 11349.1.

75. *See* text accompanying notes 32-37 *supra*.

76. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir.).

77. Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 157 (1970).

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:ng private rights is not lightly to be inferred."[78] In a 1975 :, where the statute did not expressly prohibit review, the rt held that absent a prohibition the agency "bears the vy burden of overcoming the strong presumption that Con- : did not mean to prohibit all judicial review of [its] deci- .."[79] The Court found this burden had not been met. At :t, the materials the agency relied on suggested that Congress not addressed the matter. This was insufficient to overcome 'clear and convincing evidence" the presumption that Con- .s meant to prohibit judicial review.[80]

The general rule is that statutory provisions that appear to :lude review are not interpreted literally so as to bar review. t happens, however, when a statute, on its face, gives "clear convincing evidence" of a legislative intent to preclude re- .v? This is the kind of provision precluding review that a .er once termed "so blatant as to be positively indecent."[81] recent cases hold that even such a provision is not construed ally to cut off review. As strong a preclusive provision as any contained in the Micronesian Claims Act. It provided that :sions of the agency set up to review ~~farms under the Act~~ e to be "final and conclusive for all purposes, notwithstand- any other provision of law to the contrary and not subject to :ew."[82] Even this provision was held not to forestall judicial nizance of plaints that the agency had disregarded statutory :ctives or constitutional commands.[83] The Court of Appeals the District of Columbia rested its decision in favor of review broad grounds. It noted that to frustrate the ability to obtain :cial redress would be to call into question the seriousness of : devotion to human rights and fundamental freedoms.[84]

There are comparable decisions in other federal and state :s. The most recent was in a New York case, where the stat- described decisions of the commissioner as "final and con- :ive, and not subject to question or review in any place or .rt whatever."[85] This language was described by the court as

78. Barlow v. Collins, 397 U.S. 159, 166 (1970).
79. Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).
:0. *Id.*
:1. J. Willis, The Parliamentary Powers of English Government Departments 1933).
:2. Pub. L. No. 92-39, § 201, 85 Stat. 96 (1971) (terminated Aug. 3, 1976).
:3. Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977).
:4. *Id.* at 626.
:5. ———

eemingly bespeaking an unchallengeable power."[86] Notwith-
nding this, the court declared, "our courts have not hesitated
exercise a reviewing function when, in their opinion, the com-
ssioner had erroneously decided issues involving statutes and
estions of law, on the theory that determinations so flawed fell
thin the rubric of arbitrariness."[87] Consequently, despite the
tute, judicial review in the case was proper.[88]

Despite these cases, the broadside statutory bar against re-
w of decisions granting or denying benefits by the Veterans
ministration[89] is taken literally. Yet the Supreme Court has
d that even such a no-review clause does not prohibit *all* judi-
l review. In *Johnson v. Robison*,[90] the VA had denied educa-
nal benefits to a conscientious objector who had completed
o years of required alternate civilian service, relying on statu-
y provisions that denied "eligible veteran" status to such an
ividual. Appellee challenged the statute's constitutionality on
t and fifth amendment grounds. The Court held that the dis-
ct court had jurisdiction despite the no-review clause. A no-
iew clause does not "preclude judicial cognizance of constitu-
nal challenges to the veterans' benefits legislation."[91] Other
es hold that the VA no-review clause does not preclude re-
w of VA regulations[92] or decisions not involving claims for
efits.[93]

But the courts continue to give literal effect to the VA no-
iew clause in cases involving claims for benefits. Under the
ditional approach, veterans' benefits were mere "privileges,"
en on the statutory terms. If one of those terms was a provi-
n precluding review, it would be given literal effect by the
urts.[94] But the distinction between "rights" and "privileges"
s seemingly eliminated by *Goldberg v. Kelly*.[95] The demise of
"privilege" concept in procedural due process cases brought
out by *Goldberg* should lead to a similar result with regard to

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86. Board of Educ. v. Nyquist, 48 N.Y.2d 97, 103, 397 N.E.2d 365, 367, 421
.S.2d 853, 856 (1979).
87. *Id.*
88. *See also* Owens v. Hills, 450 F. Supp. 218 (N.D. Ill. 1978); Hirschfeld v. Com-
ion, 376 A.2d 71 (Conn. 1977).
89. 38 U.S.C. § 211(a) (1976).
90. 415 U.S. 361 (1974).
91. *Id.* at 373.
92. Evergreen College v. Cleland, 621 F.2d 1002 (9th Cir. 1980).
93. University of Maryland v. Cleland, 621 F.2d 98 (4th Cir. 1980).
94. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 77 (1976).
95. 397 U.S. 254 (1970).

cial review.[96]

The cases have not yet gone that far. Instead, they still ap- literally the provision for administrative finality in the VA ute. In one case, it was claimed that, so taken, the VA no- ew provision violated due process. The court rejected the m, stating that it was settled that veterans benefits were e gratuities which might be granted or withdrawn under n conditions as Congress imposed[97]—*i.e.*, the pre-*Goldberg v. lly* approach, which one would have thought that case had udiated.[98]

Aside from these VA cases, however, the prevailing theme in nt years has been that mentioned at the beginning of this ion: to expand the availability of judicial review. Thus, sev- courts have adopted a simple approach to prevent chal- es to administrative action from being frustrated by the nical requirement that a proper form of review action be ight. Under the approach in question, the court holds that ew actions brought in the wrong form should not be dis- sed, but should be regarded as having been brought in the per form.[99] This is a substantial step forward which enables formalistic hurdles to review still posed by the forms of re- v action in many states to be overcome without legislative on.

The courts are also expanding the availability of review by adening the exceptions to the rule requiring the exhaustion administrative remedies. Thus, the cases increasingly hold t the exhaustion rule does not apply "where the available ad- istrative remedy is inadequate and to require the party to aust those remedies would be a futile gesture."[100] This excep- n has been ruled applicable where the agency had previously de clear what its decision would be[101] in such a case, a court said, to demand exhaustion "would be to require them to

96. Goldberg v. Kelly itself has been narrowed by Mathews v. Eldridge, 424 U.S. 1976).

97. Sager v. Johnson, 342 F. Supp. 351 (D. Md. 1972). *See also* Holley v. United es, 352 F. Supp. 175 (S.D. Ohio 1972), *aff'd*, 477 F.2d 600 (6th Cir.) *cert. denied*, 414 1023 (1973).

98. On Sept. 11, 1979, the Senate passed a bill which provides for judicial review of decisions denying claims for benefits.

99. *See* Hamptons Hosp. v. Moore, 52 N.Y.2d 88, 417 N.E.2d 533, 436 N.Y.S.2d 1981); Commonwealth v. East Washington, 378 A.2d 301 (Pa. 1977).

100. Battle Creek v. FTC, 481 F. Supp. 538, 544 (W.D. Mich. 1979).

101. Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496 (9th Cir. 1980).

ap oil from a dry hole"[102] and where excessive administrative ys render the administrative remedies inadequate.[103] In an- r case, the Supreme Court held that where constitutionality statute or other act is challenged on its face, rather than as ied, exhaustion should not be required.[104]

B. Scope

The question of the proper scope of judicial review has been ing to the fore again, assuming a significance it has not had e before passage of the Federal APA. The new concern with oe of review is directly related to the widespread dissatisfac- . with administrative performance and the consequent em- sis upon the need for effective controls. If the scope of review o limited, the right to review itself becomes meaningless and ew in operation is reduced to a facade rather than an effec- control.[105]

One must, however, note a difference in approach to scope eview on the part of the Supreme Court and the other fed- and state courts. The highest Court continues to talk in as of deference to administrative expertise. As the Court ed in an NLRB case, "[t]he Board's resolution of the conflict- claims in this case represents a defensible construction of the ute and is entitled to considerable deference."[106] The judicial is narrow. It is for the agency, not the courts, to fashion s and apply them based on its experience. Regardless of how Court might have resolved the question initially, deference t be given to the judgment of the agency whose special duty s to apply the broad statutory language to varying fact terns.[107]

Lower courts have attempted to broaden the scope of review xpanding the doctrine of *Woodby v. INS*.[108] The Court there l that it was not enough for a deportation order to be based he preponderance of the evidence normally required for an icy decision. The impact upon the deportee was so great that Court imposed a stricter standard: the deportation order had

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02. Ogo Assoc. v. Torrance, 37 Cal. App. 3d 832, 835, 112 Cal. Rptr. 761 (1974).
03. Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980).
04. Moore v. East Cleveland, 431 U.S. 494 (1977).
05. *See* Jackson, J., dissenting, in SEC v. Chenery Corp., 332 U.S. 194, 210 (1947).
06. NLRB v. Local Union No. 103, Int'l Assoc. of Bridge, Structural & Ornamen- on Workers, 434 U.S. 335, 350 (1978).
07. *See* Bayside Enterprises v. NLRB, 429 U.S. 298, 304 (1977).
08. 385 U.S. 276 (1966).

'e supported by "clear and convincing evidence."[109]

Does the stricter *Woodby* standard apply in other cases .re the impact of the agency decision is comparable? The .rt of Appeals for the District of Columbia answered this .stion affirmatively in a 1980 case.[110] The FCC had revoked a io station's license on the ground that the station's owner . officers had made deceptive statements to the Commission conceal improper billing practices. The revocation order was .ported by substantial evidence, but the court held that this ; not enough. Such a license revocation involved "a loss of lihood" and the FCC determination should be governed by "clear and convincing" standard.[111] The same court had pre- .isly held that the SEC revocation of a broker's license also . to be supported by "clear and convincing" evidence. Though SEC sanction was not as "profound as that of deportation, : to ancient banishment," it was severe enough to require the cter standard.[112]

The Supreme Court, however, rejected this line of cases in *adman v. SEC.*[113] The SEC had issued an order, after a ;thy evidentiary hearing, barring petitioner from associating .n an investment advisor or dealer in securities. The order was .ed upon a finding that petitioner had violated various an- aud provisions of the federal securities laws. Petitioner con- ded that, because of the severe sanctions that the Commis- . was empowered to impose, its order had to meet the "clear . convincing evidence" standard. The Court rejected this con- .tion, noting that *Woodby* could require the stricter standard 'ause Congress had not spoken on the matter and it involved roceeding not governed by the APA. However, the instant ceeding was subject to the APA. The Court interpreted sec- : 7(c) of the APA as establishing a standard of proof and held t the standard adopted was "the traditional preponderance of evidence standard."[114] Where Congress has thus spoken, the .rt should defer. There is no reason to accord less deference ongressionally prescribed standards of proof and rules of evi- .ce in agency proceedings than in judicial proceedings.

The *Steadman* opinion draws an interesting analogy with

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109. *Id.* at ____
110. Sea Island Broadcasting v. FCC, 627 F.2d 240 (D.C. Cir. 1980).
111. *Id.* at 244.
112. Collins Securities v. SEC, 562 F.2d 820 (D.C. Cir. 1977).
113. 450 U.S. 91 (1981).
114. *Id.* at 102.

: *Vermont Yankee* case.[115] The *Vermont Yankee* Court stated t section 4 of the APA sets the maximum procedural require-nts for rulemaking, which may not be expanded ,by the irts.[116] In *Steadman*, the Court applied the *Vermont Yankee* proach to administrative adjudications. Justice Brennan's nion stressed that Congress had expressed its intent that de-minations in adjudicatory proceedings subject to the APA be de according to the preponderance of the evidence.[117] Here, , the courts may not impose a stricter requirement than that osen by Congress. *Steadman* answers the question already ed—whether the *Woodby* stricter standard applies in other s where the impact of the agency decision is severe—in the ative, at least so far as proceedings governed by the APA are cerned.

In many ways, the most important developments on scope judicial review have taken place in California. The develop-its there have been both legislative and judicial. A recent ute has changed the scope of review of agency regulations. ler it, a "regulation may be declared invalid if the court can-find that the record of the rulemaking proceeding supports agency's determination that the regulation is reasonably nec-ary to effectuate the purpose of the statute relied on as au-rity for the adoption of the regulation."[118]

Before this statute, regulations were required to be "consis- and not in conflict with the statute and reasonably neces- to effectuate the purpose of the statute."[119] The cases, how-r, had held that in reviewing a regulation to determine ether it was reasonably necessary the independent judgment he courts could not be utilized.[120] According to the California rt, the notion of independent judgment review was inconsis-t with the "presumption of regularity accorded administra- rules and regulations."[121] So long as the agency acted within limits of its enabling act, the courts would defer to the ncy's determination that a regulation was reasonably

15. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 35 U.S. 519 (1978).
16. *Id.* at 523-24.
17. 450 U.S. at 100-02.
18. Cal. Gov't Code § 11350(b), *amended by* 1979 Cal. Stats., ch. 567.
19. Cal. Gov't Code § 11374 (West 1966).
20. Ralphs Grocery Co. v. Reimel, 69 Cal. 2d 172, 175, 444 P.2d 79, 82, 70 Cal. 407, 410 (1968).
21. *Id.*

:essary.[122]

Such deference is eliminated by the new provision on review :egulations. Its language appears to contemplate independent gment review on the necessity of regulations.[123] This makes a drastic change in the scope of review of rules that greatly ›ands the role of the courts in controlling administrative ver.

A comparable expansion has been worked by the adoption the California court of the *Strumsky* rule that, where an ncy decision substantially affects "a fundamental vested it," the reviewing court must exercise its independent judg- nt on the evidence.[124] This rule limits the substantial evi- ice test to cases where the agency decision does not affect a damental right; where such a right is affected, the reviewing rt must reverse if the findings are not supported by the ght of the evidence. As this writer has shown,[125] the dametal right doctrine is a California version of the *Ben n* doctrine.[126] It is, indeed, even broader, since unlike *Ben n*, it is not limited to constitutional rights; it includes eco- ic entitlements, such as a police widow's pension.[127]

Yet, if the *Strumsky* rule has a *Ben Avon*-type constitu- ial foundation, that basis is an unusual one, since under a 0 case it can be abrogated by statutory provision. At issue in case referred to was the proper scope of review of an unfair or practice order of the Agricultural Labor Relations ard.[128] The governing statute provided that the agency's fact iings should be conclusive if supported by substantial evi- ice on the whole record. The employer claimed that, despite is, the California Constitution's restrictions on judicial power uired courts to reject the findings unless, after an indepen- it review of the record, they were ruled supported by the ight of the evidence. The court rejected the claim. It held that

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122. *See* Agricultural Labor Relations Bd. v. Superior Court, 546 P.2d 687, 700, 128 . Rptr. 183 (1976).

123. *See* Starr, *California's New Office of Administrative Law and Other Amend- nts to the California APA*, 32 AD. L. REV. 713, 729 (1980).

124. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, d 29, 112 Cal. Rptr. 805 (1974).

125. B. SCHWARTZ, ADMINISTRATIVE LAW § 225 (1976).

126. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

127. This was the right involved in *Strumsky*, 11 Cal. 3d 28, P.2d 29, 112 Cal. Rptr. (1974).

128. Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979).

Strumsky rule did not bar the legislature from providing a rower scope.[129]

Though it may thus be subject to legislative control, the *umsky* doctrine still makes for a substantial broadening of scope of judicial review. From a wider point of view, the Cal- ia approach may be seen as a logical consequence of the ency in recent years to permit broad review of agency action ting personal rights. The preferred status of personal rights resent day public law has led the federal courts to adopt a ter standard for judging restrictions on them than the stan- for judging restrictions on property rights. Thus, when ncy action affects such personal rights protected by the Con- ution as the right of citizenship, there may be room for ader review. This has been confirmed in *Agosto v. INS*,[130] ere the Court stated that "the Constitution requires that re be some provision for *de novo* judicial determination of ms to American citizenship in deportation proceedings."[131] A dent of this country has a right to *de novo* determination of laim to United States citizenship, since citizenship is a "fact" n which both congressional and agency power to order de- tation depend.

The growing disenchantment with the administrative pro- s may lead the courts to extend the broad review now as- ted by the federal courts in personal rights cases to other hts, leading ultimately to adoption of something like the Cali- nia fundamental rights doctrine. A suggestive decision was by istrict court in a case involving review of regulations. Despite e recent California statute discussed, review of regulations is rmally governed by the test of reasonableness, with deference orded the agency judgment on the matter.[132] According to the eral court in question, however, a stricter standard of review equired where a "fundamental right" is involved. In such a e the court may not end its inquiry upon finding that the ulation is reasonably related to its enabling legislation. A reg- tion that significantly interferes with the exercise of a funda- ntal right requires more rigorous scrutiny: it must be sup- ted by a compelling interest and be closely tailored to ctuate only that interest.[133]

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129. *Id.* at ___, 595 P.2d at ___, 156 Cal. Rptr. at ___.
130. 436 U.S. 748 (1978).
131. *Id.* at 753.
132. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 57 (1976).
133. Southwestern Community Action Council, Inc. v. Community Serv. Admin.,

If the federal court's approach is correct in cases where reg- tions affecting fundamental rights are at issue, why is it not ɔ correct in cases involving other agency acts which affect .damental rights? If the court's reasoning is followed to its ical conclusion, the result will be an expansion in the scope of iew comparable to that under the California *Strumsky* rule.

CONCLUSION

According to the West Virginia court, "the ad hoc develop- nt of administrative law . . . produced a creature which ked very much like the famous elephant, which was allegedly orse designed by a committee."[134] American administrative has clearly developed in an unsystematic fashion; to use Jus- Frankfurter's oft-quoted phrase: "our Administrative Law largely 'growed' like Topsy."[135]

Despite this our administrative law has been governed by ic trends during its different periods. The first period of ad- istrative law development saw the creation and then liferation of agencies. The first task of the developing system s to legitimize the vast delegation of powers made to agencies. e emphasis was on delegation and judicial review as means of rolling delegation. The next stage saw a shift in emphasis to ninistrative procedure. During this period, starting in the -thirties, the procedural pattern was worked out—first in the latory agencies and then extended to the newer areas of so- welfare. The basic principles were codified in the Federal A and its state counterparts.

Toward the end of the period, there was another spate of ncy creation, this time a product of the increased focus on sumer and environmental protection that has so changed our lic law in recent years.[136] The proliferation of the new gener- n of agencies has rivaled, if not surpassed, that during the Deal period. "The term 'alphabet soup,'" the Supreme rt tells us, "gained currency in the early days of the New d as a description of the proliferation of new agencies . ."[137] By comparison, it goes on, the terminology needed to

F. Supp. 289 (S.D. W. Va. 1978).

134. Citizens Bank v. Board of Banking, 233 S.E.2d 719, 724 (W. Va. 1977).

35. Frankfurter, Foreword, 41 Col. L. Rev. 585, 586 (1941).

36. The most important of these new-breed agencies are the Environmental Pro- on Agency, the Occupational Safety and Health Administration, and the Consumer ucts Safety Commission.

137. Chrysler Corp. v. Brown, 441 U.S. 281, 286 n.4 (1979).

scribe the situation now "suggests that the 'alphabet soup' of New Deal era was, by comparison, a clear broth."[138]

The renewed growth of administrative power, however, has n accompanied by ever-increasing concern about administra- effectiveness. That concern has been reflected in the devel- ents discussed in this article. The renewed emphasis on del- tion and judicial review has been a response to the felt need ubject agencies to effective controls. Such controls are being osed both by the legislature and within the executive branch lf. They are subjecting administrative rulemaking to increas- procedural requirements, as well as to direct legislative and cutive review. Just as significant is the growing judicial con- usness of courts' role in ensuring the basic goals of our ad- istrative law. Justice Frankfurter once wrote, "How to fit an- t liberties . . . into solution of those exigent and intricate omic problems that have been too long avoided rather than d, is the special task of Administrative Law."[139]

Judges are coming to realize that abdication of the field to administrator is not a proper way of performing the task. "It not do to say that it must all be left to the skill of ex- s."[140] A more positive juducial role is demanded by the ging nature of agency power, which increasingly touches on damental personal interests. "To protect these interests from inistrative arbitrariness, it is necessary . . . to insist on t judicial scrutiny of administrative action."[141] After all, as Court reminded us four decades ago, "Courts no less than inistrative bodies are agencies of government. Both are in- uments for realizing public purposes."[142]

38. *Id.* at 237.
39. Frankfurter, *supra* note 135, at 536.
40. FPC v. Hope Natural Gas Co., 320 U.S. 591, 627 (1944).
41. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. 971).
42. Scripps Howard Radio, Inc. v. FCC, 316 U.S. 4, 15 (1942).