

A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint under the NLRA*

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With the passage of the Taft-Hartley Act in 1947, Congress created the office of General Counsel of the National Labor Relations Board (NLRB).¹ Section 3(d) of the Act gives the General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints [regarding unfair labor practices], and in respect of the prosecution of such complaints before the Board"² Though this innovation may have appeared inconsequential in comparison with the great substantive changes that the Taft-Hartley Act wrought in American labor law, § 3(d) has been of major significance for both the development and administration of national labor policy. Shortly after his office was created, Robert Denham, the first General Counsel, described his powers as "broad and absolute" and his authority "final to an outstanding degree seldom accorded a single officer in a peacetime agency."³

Denham's appraisal assumed that no court could review the General Counsel's decision not to issue a complaint. Courts have generally refused to do so.⁴ Instead of analyzing the General Counsel's un-

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1. The Taft-Hartley Act is the popular designation for the Labor-Management Relations Act of 1947 (LMRA), ch. 120, 61 Stat. 136 (presently codified in scattered sections of 29 U.S.C.). Title I of the LMRA amended the National Labor Relations Act of 1935 (NLRA), popularly termed the Wagner Act, ch. 372, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-166 (1970 & Supp. V 1975)). The National Labor Relations Board was first constituted under the NLRA; its functions were modified by the LMRA amendments.

2. NLRA § 3(d), 29 U.S.C. § 153(d) (1970).

3. Remarks of Robert N. Denham before the Labor Relations Section of the ABA, Cleveland, Ohio, Sept. 23, 1947, *quoted in* 96 CONG. REC. 3695 (1950) (Rep. Hoffman).

4. *See* *Bays v. Miller*, 524 F.2d 631 (9th Cir. 1976); *Hernandez v. NLRB*, 505 F.2d 119 (5th Cir. 1974) (per curiam); *Holland v. Unico Corp.*, 81 L.R.R.M. 2736 (4th Cir. 1972); *Braden v. Herman*, 468 F.2d 592 (8th Cir. 1972) (per curiam), *cert. denied*, 411 U.S. 916 (1973); *Saez v. Goslee*, 463 F.2d 214 (1st Cir.) (per curiam), *cert. denied*, 409 U.S. 1024 (1972); *Mayer v. Ordman*, 391 F.2d 889 (6th Cir.) (per curiam), *cert. denied*, 393 U.S. 925

reviewable discretion, commentators have cited it as an established part of our administrative law.⁵ This article contends that this unreviewable discretion has impaired achievement of the goals of national labor policy and is inconsistent with prevailing administrative law doctrines. Part I examines the history of the General Counsel's office and demonstrates the absence of any clear congressional intent regarding reviewability.⁶ Part II argues that the General Counsel's independence of both Board and courts undermines the rights of charging parties and impedes the evolution of national labor policy by allowing low-visibility, unreviewed interpretations of the National Labor Relations Act (NLRA).

Judicial review of the General Counsel's failure to issue an unfair labor practice complaint would enhance the apparent and actual fairness of the General Counsel's decisions and would stimulate more vigorous exploration and enforcement of the rights afforded by the NLRA. Part III examines the reasons courts have advanced in refusing to review the General Counsel's decision not to issue a complaint. The cursory manner in which the courts have treated the relevant administrative law issues suggests their strong underlying conviction that Congress meant to preclude review. In light of the conclusion of Part I that Congress's intent with respect to review is unclear, the courts' legal arguments against judicial review are found wanting. Part IV outlines the form that judicial review should take. The proper scope of review is dictated by the dual purpose it must serve: to protect private parties from arbitrary treatment of their complaints and to ensure that new and important questions requiring interpretation of the NLRA are settled initially by the Board and ultimately by the courts reviewing Board decisions.

(1968); *United Elec. Contractors Ass'n v. Ordman*, 366 F.2d 776 (2d Cir. 1966) (per curiam), *cert. denied*, 385 U.S. 1026 (1967); *Contractors Ass'n v. NLRB*, 295 F.2d 526 (3d Cir. 1961) (per curiam), *cert. denied*, 369 U.S. 813 (1962); *Bandlow v. Rothman*, 278 F.2d 866 (D.C. Cir.) (per curiam), *cert. denied*, 364 U.S. 909 (1960); *General Drivers Local 886 v. NLRB*, 179 F.2d 492 (10th Cir. 1950); *Lincourt v. NLRB*, 170 F.2d 306 (1st Cir. 1948) (per curiam); *Grolnick v. Furniture Workers Local 75A-75B*, 91 L.R.R.M. 2558 (D. Md. 1976); *Hennepin Broadcasting Assocs., Inc. v. NLRB*, 408 F. Supp. 932 (D. Minn. 1975).

5. See, e.g., Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 368 (1968); Note, *The Charging Party Before the NLRB: A Private Right in the Public Interest*, 32 U. CHI. L. REV. 786, 787-88 (1965). But see McClintock, *The Unreviewable Power of the General Counsel—Partial Enforcement of the Labor Act*, 12 GONZ. L. REV. 79 (1976) (arguing for judicial review of General Counsel's refusals to issue unfair labor practice complaints).

6. Congressional intent in this context refers not only to specific views on judicial review, but also to the policies meant to be served by § 3(d). In the absence of a clear legislative intent to preclude review, courts will consider whether such review is consistent with the statutory scheme and purposes. See, e.g., *Hahn v. Gottlieb*, 430 F.2d 1243, 1249-51 (1st Cir. 1970). See generally Saferstein, *supra* note 5, at 371, 377.

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I. A History of the Office of General Counsel: Congress and the Issue of Reviewability

A. Board Procedures Under the Wagner Act

From the time of its creation by the Wagner Act in 1935,⁷ the National Labor Relations Board found its procedures under attack. Early criticism of the Board's alleged procedural irregularities was designed in large part to undermine public support for the Wagner Act's substantive provisions.⁸ Among the most frequently aired charges was that the Board served as "judge, jury and prosecutor" of the cases before it.⁹ In 1940, a Special House Committee to Investigate the National Labor Relations Board (the "Smith Committee") asserted that the Board solicited litigation either to establish a point of law or to harass management.¹⁰ As a solution, the Committee recommended

7. NLRA § 3(a), 29 U.S.C. § 153(a) (1970). The Board's primary responsibilities under the NLRA are to prevent unfair labor practices, NLRA §§ 8, 10, 29 U.S.C. §§ 158, 160 (1970 & Supp. V 1975), and to conduct union representation elections, *id.* § 9, 29 U.S.C. § 159 (1970).

8. Gellhorn & Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339, 340-41 (1939). Criticisms of the Board's procedures and of the bias of its employees went hand in hand with an antipathy for almost all its substantive decisions. The 1940 Report of the House Special Committee to Investigate the National Labor Relations Board, which characterized the Board as having radical tendencies and as entirely lacking in judicial temperament, criticized Board procedures and devoted over half its pages to an attack on various Board decisions. H.R. REP. NO. 3109, 76th Cong., 3d Sess., pt. 1, at 149-52 (1940) [hereinafter cited as SMITH COMM. REPORT]. The courts did not share the view that the Board's handling of cases was marred by frequent procedural irregularities and substantive errors. Between 1935 and 1947, the Supreme Court upheld the Board completely in 76% of the cases it heard and modified the Board's order in another 15%. The circuit courts set aside Board orders in only 12.6% of the 705 cases they considered and remanded for further proceedings in another 1.6%. See *Labor Relations: Hearings on S.249 Before the Senate Comm. on Labor and Public Welfare*, 81st Cong., 1st Sess. 1836 (1949) (letter from NLRB Chairman Paul A. Herzog) [hereinafter cited as 1949 *Labor Relations Hearings*].

9. Gellhorn & Linfield, *supra* note 8, at 385; see also H.R. REP. NO. 1902, 76th Cong., 3d Sess., pt. 1, at 89 (1940) (recommending independent Administrator to prosecute complaints) [hereinafter cited as SMITH COMM. INTERMEDIATE REPORT]. In its early years the Board's active involvement in the selection of cases gave some credence to these charges. Until 1937, Regional Directors were required to obtain authorization from the Board before issuing a complaint. This policy derived largely from the need to settle the constitutionality of the Act. The first Board was alert to cases that would resolve major constitutional questions and encouraged the Regional Offices to settle or postpone less significant ones. H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 38-39 (1950).

10. See SMITH COMM. REPORT, *supra* note 8, pt. 1, at 44-48 (1940). The Committee found that in *Inland Steel Co.*, 9 N.L.R.B. 783, 3 L.R.R.M. 331 (1938), the NLRB had instructed the union how to bring the issue of the necessity of a written contract before the Board. The Committee concluded that this advice amounted to entrapment of the company into an unfair labor practice. SMITH COMM. REPORT, *supra* note 8, pt. 1, at 44-45. The Committee also asserted that the Regional Director had been told to draft a complaint that would be issued as soon as charges were filed and that a Trial Examiner

the establishment of an independent Administrator who would perform the investigative and prosecutorial functions under the Act.¹¹

By 1937 the Board itself had realized the need for increased separation of its adjudicatory and prosecutorial functions. Under the procedures that emerged, the Board rarely had any direct involvement in a case before hearing its merits, yet retained some control over the questions it decided. If a Regional Director determined that a complaint should issue, he sought approval from the Administrative Examiners Division in Washington. Only in a particularly difficult or novel case did the Director of that Division consult the Board. Once approval from Washington had been obtained, the Regional Office drafted the complaint.¹² By 1942 the decision to issue a complaint had been totally delegated to the Regional Offices, so long as the case presented no issues of policy or novel questions of law or fact over which the Regional Director and the Regional Attorney disagreed.¹³ A dissatisfied complainant could appeal the Regional Office's decision to the Appeals and Review Committee in Washington, which then made recommendations to the Board.¹⁴ Through this internal separation of functions, the NLRB complied with the standards of the Administrative Procedure Act (APA) even before its enactment.¹⁵

had been appointed even before the complaint was issued. *Id.* at 46. The Committee found that in *Berkshire Knitting Mills*, 17 N.L.R.B. 239, 5 L.R.R.M. 305 (1939), the Board had manifested a continuing readiness to proceed with charges and had ordered an investigation of possible violations even before charges were filed by the union. Once charges were filed, the Board delayed issuance of the complaint for nine months at the request of the union, which was considering a strike. SMITH COMM. REPORT, *supra* note 8, pt. 1, at 47-49. Two minority reports sharply contested these findings. *See id.* pt. 2; SMITH COMM. INTERMEDIATE REPORT, *supra* note 9, pt. 2.

11. *Id.*, pt. 1, at 89.

12. Nathanson, *Separation of Functions Within Federal Administrative Agencies*, 35 ILL. L. REV. 901, 911 (1941).

13. H. MILLIS & E. BROWN, *supra* note 9, at 55. In the rare instance where the Regional Office sought advice on investigative or trial matters, a special committee was convened to provide it. None of the committee members was allowed to assist the Board in the ultimate resolution of the case. *Amendments to the National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096 Before the House Comm. on Education and Labor*, 80th Cong., 1st Sess. 3158, 3189 (1947) (statement of NLRB Chairman Paul A. Herzog).

14. Members of the Committee could not subsequently advise the Board on the decisions in the particular case or related ones. H. MILLIS & E. BROWN, *supra* note 9, at 64.

15. Findling, *NLRB Procedures: Effects of the Administrative Procedure Act*, 33 A.B.A. J. 14, 14, 16 (1947). Those who participated in the decision to initiate cases were isolated in every way possible from the adjudicatory stage. Review Section attorneys, who analyzed the Trial Examiner's findings and drafted opinions, were forbidden to examine office files from the investigative stage of the proceedings. Trial Examiners were set apart as an autonomous unit of the Board. Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB. REL. REV. 371, 373-74 (1958).

These requirements conform to those in APA § 5(d), 5 U.S.C. § 554(d) (1970). Section 554(d)(2) provides that an employee who presides at the reception of evidence or who

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B. *Legislative Intent and the Enactment of § 3(d)*

In 1947 Congress passed the Taft-Hartley Act; § 3(d) of that Act created the General Counsel's office and thereby established a formal separation of functions for unfair labor practice cases.¹⁶ During congressional debates both proponents and opponents of the idea of a separate official to bring complaints concentrated their attention on whether the existing internal separation of functions adequately protected the due process rights of parties before the Board. No attention was given to the issue of judicial review.

The provision that emerged from conference as § 3(d) was essentially the House proposal.¹⁷ The House documents, therefore, are significant in determining congressional intent with respect to judicial review. The original House version of the Taft-Hartley Act revived the Smith Committee's recommendation of an independent Administrator whose duty it would be "to investigate charges of unfair labor practices, to issue complaints if he has reasonable cause to believe such charges are true, to prosecute such complaints before the Board, to make application to the courts for enforcement of orders of the Board, [and] to investigate representation petitions and conduct [representation] elections"¹⁸ The accompanying House Report provides some support for the view that limited judicial review of the General Counsel's decisions was contemplated. The Report describes the Administrator as having discretion not to issue a complaint "only when the facts the complainant alleges do not constitute an unfair practice, or when the complainant clearly cannot prove his claim."¹⁹ Such a

makes the initial decision in a case may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." Similarly, any employee engaged in the performance of investigative or prosecutorial functions for an agency in a case "may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to [§ 537], except as witness or counsel in public proceedings." *Id.*

16. Section 3(d), 29 U.S.C. § 153(d) (1970), was added to the NLRA in 1947 by the Taft-Hartley Act. See note 1 *supra*. Cf. H.R. REP. NO. 245, 80th Cong., 1st Sess. 6 (1947), reprinted in I NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 297 (1948) (creation of independent prosecuting official in order to prevent prejudice and unfairness in Board consideration of cases) [hereinafter cited as LEGISLATIVE HISTORY].

17. See *IUE v. NLRB*, 289 F.2d 757, 761 (D.C. Cir. 1960).

18. H.R. 3020, 80th Cong., 1st Sess. § 4 (1947), reprinted in I LEGISLATIVE HISTORY, *supra* note 16, at 158, 174-75. The proposed Administrator became the General Counsel in the House-Senate Conference. The major difference between the House proposal and § 3(d) is that the General Counsel is not, as the proposed Administrator would have been, a wholly independent administrative agent.

19. H.R. REP. NO. 245, 80th Cong., 1st Sess. 40 (1947) (emphasis added), reprinted in I LEGISLATIVE HISTORY, *supra* note 16, at 292, 331.

precise expression of legislative intent implies that in all other cases a complaint should issue. Courts in other contexts rely on similar mandatory language to determine whether Congress intended judicial review of an official's failure to act.²⁰ In this case, of course, the mandatory language was not incorporated in the statute itself. And mandatory language directed at government officials does not necessarily imply that those officials' actions are reviewable.²¹

Other contemporary documents shed little additional light on congressional intent. The Senate did not independently consider the question of statutory separation of functions.²² Although the Conference Report stressed that the General Counsel was to operate "independently of any direction, control, or review" by the Board,²³ it failed to mention judicial review. Senator Taft, in his supplementary analysis of the Conference bill, said that the General Counsel would not have unfettered discretion because he would have to respect decisions of the Board and of the courts.²⁴ If Senator Taft meant to describe a statutory duty of the General Counsel, his statement would seem to assume judicial review. Since the Board clearly could not review the General Counsel's decision, such a duty could be enforced

20. In *DeVito v. Shultz*, 300 F. Supp. 381, 382 (D.D.C. 1969), the court relied on the language of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) § 402(b), 29 U.S.C. § 482(b) (1970), to hold that union members complaining of election violations could obtain judicial review of the Secretary of Labor's decision not to file suit. That section provides that the Secretary shall investigate complaints and that "if he finds probable cause to believe that a violation of [LMRDA Title IV] has occurred and has not been remedied, he shall . . . bring a civil action against the labor organization . . ." (emphasis added).

NLRA § 10(l), 29 U.S.C. § 160(l) (1970), provides that if after investigating a charge of certain unfair labor practices, a Regional Attorney "has reasonable cause to believe such charge is true and that a complaint should issue, he shall . . . petition any United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." (emphasis added) This language was construed in *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699 (8th Cir. 1971), *cert. denied*, 405 U.S. 996 (1972), to allow the charging party to seek judicial review of the Regional Director's failure to seek an injunction after he had made a finding of reasonable cause.

21. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 186 (Supp. 1970) (U.S. Attorneys) [hereinafter cited as *DAVIS TREATISE SUPP.*].

22. The original Senate bill did not substantially alter the structure of the Board, except to increase its membership from three to seven. S. REP. NO. 105, 80th Cong., 1st Sess. 8-10 (1947), *reprinted in* I *LEGISLATIVE HISTORY*, *supra* note 16, at 407, 414-16. An earlier proposed revision of the NLRA included provision for a separation of functions similar to that in § 3(d). S. 360, 80th Cong., 1st Sess. (1947). But S. 360 never passed the Senate. *Cf. id.* at 1826-31 (Sen. Morse) (opposing S. 360). Section 3(d) emerged from the Senate-House Conference, and thus was not subject to amendment before the Senate voted on the entire Taft-Hartley Act.

23. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 37 (1947), *reprinted in* I *LEGISLATIVE HISTORY*, *supra* note 16, at 505, 541.

24. 93 CONG. REC. 6859 (1947) (Sen. Taft).

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only by the courts. Yet the Senator may have been suggesting standards the General Counsel should follow, rather than describing an enforceable statutory duty.²⁵

President Truman also called attention to the General Counsel's broad discretion under the Taft-Hartley Act. In explaining to Congress his veto of the Act, he pointed out that under § 3(d) the General Counsel could usurp the NLRB's policymaking functions by deciding which cases the Board would hear.²⁶ But the relevance of judicial review to this possible weakness of a bifurcated structure was not discussed. Senator George, the only senatorial supporter of the Taft-Hartley Act to address himself specifically to this part of President Truman's veto message, simply revived the old charge that the Board lacked all pretense of fairness in its desire to put a CIO union in every plant.²⁷ The important point highlighted by Senator George's remark is that supporters of § 3(d) paid scant attention to possible injustices arising from a failure to prosecute. The perceived evil at which the office of General Counsel was aimed was the overzealousness of the old Board—too many prosecutions, not too few.²⁸

The evidence that most strongly suggests a congressional intent to

25. This last interpretation is the most probable one, as Senator Taft went on to compare the General Counsel with the Attorney General, whose decision whether to prosecute is usually thought to be unreviewable. *Id.*; *Oversight Hearings on the National Labor Relations Board: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 41 (1975)* (testimony of NLRB Chairman Murphy, citing Senator Taft's remarks) [hereinafter cited as *1975 NLRB Hearings*].

26. Veto Message of President Truman (June 20, 1947), *reprinted in* 93 CONG. REC. 7485, 7486-87 (1947). Proponents of the Taft-Hartley Act apparently did not appreciate that the powers delegated to the General Counsel gave him a significant policymaking capacity. *See* Comment, *The Proper Separation of Functions for Administering Our National Labor Relations Program*, 46 ILL. L. REV. 465, 469 (1951).

27. 93 CONG. REC. 7537-38 (1947) (Sen. George). However, Senator George seemed to assume that the General Counsel's powers would be limited:

Under [the Taft-Hartley Act] the Board is judicial. It is judicial today. Its counsel will be a prosecutor. He will not have any extraordinary powers—nothing like the power of the Attorney General of the United States, who decides whether criminal actions shall be brought against anyone in the United States. Under this bill, the counsel will have the right to make the decision as between employer and employee; but his decision will be subject to the judicial decision of the Board and, above the Board, the courts; and we have given the courts greater power to look into the decisions of the Board and to provide for the redress of any injustice.

Id. at 7538.

28. Hostility to the Board was completely consistent with a favorable attitude to judicial review. *See* note 27 *supra*. Indeed, proponents of the Taft-Hartley Act favored judicial review as a check on Board abuses. For example, § 10(e) of the Act, 29 U.S.C. § 160(e) (1970), which entrusts courts to determine whether the Board's findings of fact are supported by "substantial evidence on the record considered as a whole," anticipated a more active role for the courts than had the Wagner Act. *See* *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

preclude review is retention of the language from the Wagner Act describing the Board's power to issue complaints.²⁹ Prior to 1947, courts construing this language had emphasized that the Board's jurisdiction was not compulsory and that its decision whether to issue a complaint depended on expert determinations of appropriate administrative policy.³⁰ Section 3(d) of the Taft-Hartley Act simply delegated the Board's power to the General Counsel. Thus, it might be argued that the General Counsel's decisions are expert determinations of administrative policy, since he has the same discretion as the pre-1947 Board. Yet there are good reasons for not inferring congressional intent from prior judicial interpretations of similar statutory language. First, the reviewability of the Board's discretion not to issue a complaint under the Wagner Act had not been settled.³¹ Moreover, the debates over § 3(d) contain no discussion of prior judicial interpretations of the Wagner Act, nor does the legislative history yield any evidence that Congress was influenced by such judicial precedent.

29. The Taft-Hartley amendments did not alter the language now found in NLRA § 10(b), 29 U.S.C. § 160(b) (1970), which provides:

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect

30. *NLRB v. Indiana & Mich. Elec. Co.*, 318 U.S. 9, 18-19 (1943); *Jacobsen v. NLRB*, 120 F.2d 96, 100 (3d Cir. 1941).

31. Neither *Jacobsen v. NLRB*, 120 F.2d 96, 100 (3d Cir. 1941), nor *NLRB v. Indiana & Mich. Elec. Co.*, 318 U.S. 9 (1943), flatly posed the question whether the Board's discretion not to issue a complaint was reviewable. In each case a complaint already had issued. The courts simply contrasted the degree of the Board's discretion prior to the issuance of a complaint to its discretion once a complaint did issue.

A plausible, if hypothetical, argument can be constructed to show that there was judicial review under the Wagner Act of the Board's refusal to issue a complaint. One of the questions that arose shortly after the enactment of Taft-Hartley was whether the Board could decline jurisdiction of a case in which the General Counsel had issued a complaint and over which the Board undoubtedly had jurisdiction. Courts considering this question held that the Board could decline jurisdiction when in its expert opinion the assertion of jurisdiction would not serve the purposes of the Act. This holding was based on the belief that the same policy considerations that had necessitated the Board's wide discretion in the issuance of complaints under the Wagner Act operated to give it wide discretion in declining jurisdiction under the Taft-Hartley Act. See *Haleston Drug Stores v. NLRB*, 187 F.2d 418 (9th Cir.), *cert. denied*, 342 U.S. 815 (1951). Yet the Board's refusal to exercise jurisdiction on policy grounds is reviewable. See *Hotel Employees Local 255 v. Leedom*, 358 U.S. 99 (1958) (NLRB cannot refuse to exercise jurisdiction over entire hotel industry); *Office Employees Local 11 v. NLRB*, 353 U.S. 313, 318-20 (1957) (NLRB cannot refuse to exercise jurisdiction over labor unions, as a class, when acting as employers); *Joliet Contractors Ass'n v. NLRB*, 193 F.2d 833 (7th Cir. 1952) (NLRB improperly dismissed complaint on grounds that boycotted businesses were essentially local in nature). Since the Board's power to decline jurisdiction is premised on the same view of administrative discretion that underpinned the Board's power not to issue a complaint under the Wagner Act, perhaps the latter power was reviewable as well. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 360-61 (1965) [hereinafter cited as *JUDICIAL CONTROL*].

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Most importantly, policy arguments against review that might have influenced Congress when enacting the Wagner Act were less compelling under the Taft-Hartley Act. Because the Wagner Act had no common law tradition from which to borrow, there was need for a swift enunciation of policy and for an intake of cases best suited to establish that policy. Only centralized control over enforcement proceedings could prevent the agency from being inundated with routine work and free it to stake out the major parameters of the Wagner Act.³² By divorcing judge from prosecutor, the Taft-Hartley Act removed control over the intake of cases from the body charged with interpreting the new Act. The need for broad discretion over issuance of complaints as a necessary adjunct to effective policymaking was thus removed.

C. *Congressional Reconsideration of § 3(d)*

Twice in the three years following passage of the Taft-Hartley Act, Congress considered proposals to terminate the separation of functions within the NLRB. Although the accompanying debates demonstrated a clear recognition of the problems § 3(d) had created, the relevance of judicial review to these problems was ignored. The positions taken with respect to the proper separation of functions continued to depend largely on perceptions of the substantive policies followed by the Board and the General Counsel.³³ In 1949 a proposal to end the General Counsel's independent status³⁴ passed the Senate as part of a bill to revise the Taft-Hartley Act. Senator Taft termed

32. See Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946). Professor Jaffe has made perhaps the strongest case for broad administrative discretion in selecting cases for prosecution:

Administrative procedures are peculiarly apt where the standards are general, where there is a need for creating and developing subcategories, where guidance rather than punishment best conform[s] to the novelty and generality of the law. This development should be steady, sensitively responsive to experience and to current demands, . . . in one hackneyed word, integrated. Initially this task may be best performed by a small group capable of exhaustive and continuous discussion and decision.

Id. at 728. Although Jaffe's argument is forceful as applied to the newly created Board in 1935, it cannot be applied to the Board today, First, § 3(d) ended the integration of functions that is central to the argument. Second, the present Board is interpreting a thirty-year-old statute and is thus to some extent spared "the novelty and generality of the law" that confronted the Board in 1935. In this situation there is less need to tolerate broad administrative discretion.

33. For example, General Counsel Denham had issued complaints against unions in a series of cases in which the Board later declined jurisdiction. Denham consequently was viewed as pro-management, the avatar of the Taft-Hartley Act. Hence, Senator Taft called the Plan a plot to turn the NLRB into a labor agency. 96 CONG. REC. 6883 (1950) (Sen. Taft).

34. S. 249 §§ 101-103, 81st Cong., 1st Sess. (1949), reprinted in S. REP. NO. 99, 81st Cong., 1st Sess. 73-79 (1949).

this provision perhaps the most important part of the proposed amendments.³⁵ The bill was never voted on in the House, however, because the Truman Administration insisted on nothing less than total repeal of the Taft-Hartley Act.³⁶ A year later the Administration submitted Reorganization Plan No. 12, which sought to abolish the office of General Counsel and to transfer its functions to the Board and the Chairman.³⁷ Although the Senate eventually rejected the Plan, its reasons had little to do with support for a statutory separation of functions. Leading opponents of the Plan conceded that there should be some appeal from the General Counsel to the Board.³⁸ They concluded merely that a Reorganization Plan was not the proper method by which to achieve these results.³⁹

Thus throughout the early years of the Taft-Hartley Act, congressional debates focused almost exclusively on the propriety of combining the NLRB's adjudicative and prosecutorial functions under a single administrative authority. The debates reveal little about the Congress's attitude toward judicial review. Opponents of § 3(d) cast themselves as defenders of the Board, and in that role paid scant attention to the question of review as it affected private parties covered by the Act.⁴⁰ Occasionally they seemed to assume the unreviewability

35. 95 CONG. REC. 8586 (1949) (Sen. Taft). Senator Taft described the criticisms of the NLRB's bipartite structure as sufficient to justify a return to the APA requirement regarding internal agency separation of prosecuting and adjudicating functions. For a discussion of the relevant APA provisions, see note 15 *supra*.

36. Klaus, *supra* note 15, at 383-84 & n.62.

37. See Reorganization Plan No. 12 of 1950, *reprinted in* S. REP. NO. 1516, 81st Cong., 2d Sess. 16 (1950).

38. 96 CONG. REC. 6867 (1950) (Sen. Smith of N.J.).

Only Senator Taft, reversing his position of the year before, offered a theoretical defense of the policy underlying § 3(d): because feelings run so high in the labor field, there is a great need to ensure that all parties perceive themselves as fairly treated. *Id.* at 3703, 6882 (1950) (Sen. Taft). Interestingly, Taft's argument would seem to cut in favor of judicial review. Such review would give private parties some protection against politically motivated refusals to issue a complaint.

39. *Id.* at 3703, 6881-82 (Sen. Taft). Senator Taft argued that the Plan's proposal to return the General Counsel's executive and administrative functions to the NLRB Chairman would give the latter complete control over prosecutions under the Act, since all the General Counsel's functions could be described as administrative or executive. *Id.* at 6883 (Sens. Taft & Lehman). Proponents of Reorganization Plan 12 replied by asserting that "administrative functions" within the meaning of the Plan included only such typical housekeeping chores as appointment of personnel, assignment of business to different units, and decisions about the use of funds. All substantive powers of regulation—determination of policies, formulation of rules, and adjudication of cases—would be shared by the Chairman and the other members of the Board. *Id.* at 6852 (Rep. Holifield).

40. Opponents of the bifurcated administrative structure may have thought that to discuss judicial review of the General Counsel's decisions would be to concede the permanency of his office. Interestingly, General Counsel Denham himself made the most concrete proposal for review. He urged Congress to grant district courts the power to issue writs of mandamus in those cases in which the General Counsel has facts before

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of the General Counsel's decisions, but this may have been as much debating technique as statutory analysis.⁴¹

II. National Labor Policy: Desirability of Judicial Review of the General Counsel's Decisions

The tensions inhering in the General Counsel's broad power and discretion loom especially large today, thirty years after the passage of the Taft-Hartley Act. Each year the General Counsel and Regional Directors process an immense number of unfair labor practice charges.⁴² Eighty-five percent of these charges never reach the Board.⁴³ Although the General Counsel has for the most part discharged his

him clearly indicating a violation yet refuses to proceed. S. REP. No. 1516, 81st Cong., 2d Sess. 40-41 (1950) (minority views of Sens. Humphrey, Leahy, Benton & Ives). One implicit assumption of the proposal—which was not voted on in either House, but was opposed in committee by supporters of a unified Board—is that where a statutory violation occurs there is no valid reason for refusing to issue a complaint.

41. The Hoover Commission Task Force assumed that the General Counsel's decisions were not subject to judicial review. See, e.g., 96 CONG. REC. 3694-95 (1950) (Rep. Hoffman). Testifying on Reorganization Plan 12, Director of the Budget Frank Pace stated that the Plan created no right to judicial review, but simply added an additional level of internal agency review of the General Counsel's decision. *Reorganization Plan No. 12 of 1950: Hearings on H. Res. 512 and H. Res. 516 Before the House Comm. on Expenditures in the Executive Departments*, 81st Cong., 2d Sess. 100 (1950) [hereinafter cited as *1950 Hearings on Reorganization Plan No. 12*]. Congressman Roosevelt argued that one advantage of Reorganization Plan 12 was that vesting the Board with the final decision to issue complaints might permit an aggrieved party to obtain judicial review under the APA. Implicit in his argument is a belief that judicial review was currently unavailable.

42. See 41 NLRB ANN. REP. 4 (Chart No. 2) (1976):

Fiscal Year	Unfair Labor Practice Charges
1976	34,509
1975	31,253
1974	27,726
1973	26,487
1972	26,852
1966	15,933

The Regional Office investigates each charge according to procedures set forth in the NLRB FIELD MANUAL (rev. ed. 1971), which is issued by the General Counsel.

43. See 41 NLRB ANN. REP. at 5 (Chart No. 3) (1976), for a breakdown of disposition of unfair labor practice charges in fiscal 1976:

Withdrawals (Before Complaint):	35.6%
Dismissals (Before Complaint):	35.9%
Settlements and Adjustments:	23.4%
Board Orders in Contested Cases:	3.6%
Other Disposition:	1.5%

Regional Offices in fiscal 1976 found 31.2% of the charges meritorious; the remaining 68.8% were withdrawn, settled, or dismissed with possible appeal to the General Counsel. *Id.* at 9 (Chart No. 5). However, only 14.6% of the charges resulted in the filing of complaints; the remaining 16.6% were settled by the Regional Office, again with possible appeal to the General Counsel. *Id.*

duties intelligently and responsibly,⁴⁴ his unreviewable discretion has generated concern.⁴⁵ Independent judicial scrutiny would help to allay this concern: it would provide a remedy to protect the rights of

44. This article's thesis that the General Counsel's unreviewable discretion is problematic does not rest upon an assertion that the General Counsel seeks to usurp the Board's policymaking power. In fact, most General Counsels have maintained a policy that complaints should be issued in close cases and that enforcement should be active so that difficult issues reach the Board. See *1975 NLRB Hearings*, *supra* note 25, at 41 (statement of NLRB Chairman Betty Murphy); McGuiness, *Effect of the Discretionary Power of the General Counsel on the Development of the Law*, 29 GEO. WASH. L. REV. 385, 394-97 (1970).

45. See, e.g., Gabriel, *The Role of the NLRB General Counsel*, 26 LAB. L.J. 79, 85 (1975):

The power to refuse to issue a complaint, even after the complaint has been denied by a Regional Director, is a power to stop the case at its source. Both [former General Counsels] Ordman, a Democratic appointment, and Kammholz, a Republican appointment, agree that this particular power is too vast to be exercised by one individual. Parties who have complaints denied should have the right to proceed to a Circuit Court of Appeals on their own initiative.

Cf. Janofsky & Peterson, *The Exercise of Unreviewed Administrative Discretion to Reverse the U.S. Supreme Court: Ponsford Brothers*, 25 LAB. L.J. 729 (1974) (demonstrating abuses of the General Counsel's authority); Comment, *LMRDA: Reviewability of Decisions not to Prosecute Title IV Violations*, 50 B.U.L. REV. 310, 315-17 (1970).

Congress likewise has evinced concern. After extensive hearings in 1968, a subcommittee of the Senate Judiciary Committee reported:

The General Counsel thus controls the access of unions, employers, and employees to the protection of the act. The subcommittee has been unable to determine what, if any, standards are employed by the General Counsel in determining whether a complaint shall issue. The unreviewable nature of many of his powers creates a risk that they may be misused. And, unfortunately, we find that this has been the case.

SUBCOMM. ON SEPARATION OF POWERS, SENATE COMM. ON THE JUDICIARY, 91ST CONG., 1ST SESS., CONGRESSIONAL OVERSIGHT OF ADMINISTRATIVE AGENCIES (NATIONAL LABOR RELATIONS BOARD) 5 (Committee Print 1970) [hereinafter cited as 1970 NLRB OVERSIGHT REPORT]. The subcommittee concluded that "[s]ome check on the power of the General Counsel ought to be instituted. Refusals to issue a complaint ought to be appealable . . ." *Id.* at 30. In 1970, Senator Tower introduced S. 3671, one purpose of which was to eliminate the General Counsel's unreviewed discretion. Section 10(b) of the bill provided for prosecution of unfair labor practice complaints by U.S. Attorneys, with charging parties being allowed to bring their own suits if the U.S. Attorney refused to act. S. 3671, 91st Cong., 2d Sess., § 10, *reprinted in District Court Jurisdiction over Unfair Labor Practice Cases: Hearings on S. 3671 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 4-6 (1970); *see also id.* at 41, 42, 48 (statement of Sen. Tower) (explaining § 10). In 1973, Senator Tower introduced a similar bill. S. 853, 93d Cong., 1st Sess., *reprinted in 119 CONG. REC.* 4206-09 (1973). *See Oversight Hearing on the NLRA: Hearings on H.R. 8408, H.R. 8409, H.R. 8110, and H.R. 12822 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. 19 (1976) (statement of Robert Thompson, Chairman Labor Relations Comm., Chamber of Commerce) (Tower Amendment praised as one solution to problem of General Counsel's unreviewed discretion) [hereinafter cited as *1976 NLRB Hearings*]. In 1975, a subcommittee of the House Committee on Education and Labor questioned the Board about the General Counsel's discretion. Although loyally defending the General Counsel, Chairman Murphy noted "the possibility of judicial review where it can be demonstrated that the General Counsel has acted wholly arbitrarily or capriciously" and admitted that "this 'final [generally unreviewable] authority' has caused the Board some concern over the years." *1975 NLRB Hearings*, *supra* note 25, at 41.

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private parties against arbitrary or erroneous decisions,⁴⁶ and ensure that labor policy is made, not by the General Counsel, but by the body to whom Congress has entrusted the task—the NLRB.⁴⁷ Although judicial review would increase the burdens upon the administrative process and the courts, the costs of review are outweighed by its advantages.

A. *Protection of Individual Interests*

Charging parties in recent years have frequently criticized the General Counsel and, more prominently, the Regional Offices for being too conservative in filing complaints. This perceived conservatism undermines public confidence in the NLRA, since parties believe they are being denied their statutory rights. Though the *NLRB Casehandling Manual* provides that “[i]n the infrequent case in which (1) applying all relevant principles, the Region is unable to resolve credibility, and (2) the resolution of the conflict *means the difference between dismissal and issuance of complaint*, a complaint should be issued,”⁴⁸ nevertheless, Regional Offices sometimes ignore a complaining individual’s evidence, resolve all doubts against him, and refuse to issue a complaint.⁴⁹ Their decisions routinely are upheld by

46. See APA § 10(a), (c), 5 U.S.C. §§ 702, 706 (1970) (individual legally aggrieved by final agency action may have judicial review). See notes 177-78 *infra*.

47. Cf. DeVito v. Shultz, 300 F. Supp. 381, 383 (D.D.C. 1969) (quoted in Dunlop v. Bachowski, 421 U.S. 560, 572 (1975)) (judicial review ensures that Department of Labor will enforce Title IV to effectuate broad purposes of LMRDA).

48. NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL (PART ONE): UNFAIR LABOR PRACTICE PROCEEDINGS § 10060 (1975) (emphasis in original) [hereinafter cited as I NLRB CASEHANDLING MANUAL]. On March 5, 1976, General Counsel Irving promulgated a memorandum which stated that his office intended “to adhere to the past practice of administratively resolving credibility conflicts only where documentary or other objective evidence is the basis for doing so. If such evidence is not available, the issue of credibility is best resolved through a formal hearing where the testimony of witnesses is subject to cross-examination.” 1976 NLRB Hearings, *supra* note 45, at 884 (statement of National Lawyers Guild).

49. See 1976 NLRB Hearings, *supra* note 45, at 885 (statement of National Lawyers Guild):

The experience of Guild member attorneys and our clients is that charges are dismissed regardless of “objective evidence” or “inherent probabilities”. Workers bringing charges are consistently disbelieved at the investigatory stage. The cases presented here of unfairly dismissed charges include cases where there is no apparent “objective evidence” beyond witnesses’ contradictory testimony; where the circumstantial evidence supporting the charge is ignored; and where workers filing charges without the assistance of attorneys are disregarded in the processing of their charge.

The Guild’s statement also discussed several cases in which the General Counsel ignored precedent, relevant evidence, and workers’ uncorroborated testimony and refused to issue a complaint. See *id.* at 885-86. For example, in Laborers Local 300 (C.V. Holder, Inc.) (31-CB-1753), the General Counsel resolved a credibility conflict against a hiring hall

the General Counsel.⁵⁰ Certain Regional Offices, such as Region 20 (San Francisco), are subject to continual criticism for their conservative posture.⁵¹ Charging parties also complain that they are given inadequate explanations for dismissal of their charges; Regional Directors in many cases perfunctorily cite "insufficient evidence."⁵²

A general indication of charging party dissatisfaction with the General Counsel's disposition of charges is the recent growth in the number of suits seeking judicial review of his decisions.⁵³ Despite the

discriminatee, even though doubt as to the union's credibility had prompted him to issue a complaint based on similar charges filed by other members of the same union in a companion case (31-CB-1496, 1725). 1976 NLRB Hearings, *supra* note 45, at 885. The Guild asserted that such actions deprive workers of statutory rights and undermine national labor policy. *Id.* at 887. See also 1975 NLRB Hearings, *supra* note 25, at 404 (statement of Service & Hospital Employees Union Local 399) (alleging that Regional Directors deny charging parties hearing to resolve questions of credibility and refuse to file complaint unless there is "a substantial certainty" of a violation of the Act).

50. See 1976 Interim Report & Recommendations of the Chairman's Task Force on the NLRB, reprinted in 93-1 LAB. REL. REP. (BNA) 221, 242 (1976) (in fiscal 1975 General Counsel sustained Regional Office decisions not to issue complaints in 95% of appeals). See generally McClintock, *supra* note 5, at 103-05 (criticizing General Counsel's office for upholding summary dismissals of unfair labor practice charges and expressing skepticism about high rate of sustained appeals).

51. See 1975 NLRB Hearings, *supra* note 25, at 303-04 (statement of Roland Davis) (Board found employer violated NLRA in representation election, disagreeing with Regional Director's failure to issue complaint); *id.* at 308-09 (Region 20 prone to refuse to issue complaints on grounds of "insufficient evidence"); *id.* at 309-10 (General Counsel overruled Region 20 and decided to bring complaint but, after reconsideration and pressure from company lawyers, rescinded decision, without chance for union charging party to confront employer's evidence); *id.* at 326 ("[T]he General Counsel and regional offices refuse to issue complaints against employers far too frequently and often fail to follow precedent calling for such issuance of complaints.") *But see id.* at 458-90 (statement of John Irving, NLRB General Counsel) (defending Regional Offices in San Francisco and Los Angeles against allegations of delay and unfairness to union charging parties).

52. See, e.g., *id.* at 408, 410, 413, 414-15 (statement of Service & Hospital Employees Union Local 399) (questioning Regional Directors' *ex parte* dismissals of charges, without fair consideration of un rebutted evidence of violations).

53. In the 1960s, there were roughly a dozen reported cases involving judicial review of the General Counsel's discretion. During the last four years, the number has vastly increased. See *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1040-41 (8th Cir. 1976); *Union de Operadores y Canteros de la Industria del Cimento de Ponce v. NLRB*, 92 L.R.R.M. 3295 (1st Cir. 1976) (per curiam); *Bays v. Miller*, 524 F.2d 631 (9th Cir. 1975); *Echols v. NLRB*, 525 F.2d 288 (6th Cir. 1975); *Tensing v. NLRB*, 519 F.2d 365 (6th Cir. 1975) (per curiam); *National Alliance of Postal & Fed. Employees v. Klassen*, 514 F.2d 189, 197 (D.C. Cir.), *cert. denied*, 423 U.S. 1037 (1975); *Seafarers' Int'l Union v. NLRB*, 88 L.R.R.M. 2629 (D.C. Cir. 1975) (per curiam); *Hernandez v. NLRB*, 505 F.2d 119 (5th Cir. 1974) (per curiam); *Newspaper Guild Local 187 v. NLRB*, 489 F.2d 416, 426 (3d Cir. 1973); *Braden v. Herman*, 468 F.2d 592 (8th Cir. 1972) (per curiam), *cert. denied*, 411 U.S. 916 (1973); *Holland v. Unico Corp.*, 81 L.R.R.M. 2736 (4th Cir. 1972); *Sacz v. Goslee*, 463 F.2d 214 (1st Cir.) (per curiam), *cert. denied*, 409 U.S. 1024 (1972); *Grolnick v. Furniture Workers Local 75A-75B*, 91 L.R.R.M. 2558 (D. Md. 1976); *Hennepin Broadcasting Assocs., Inc. v. NLRB*, 408 F. Supp. 932 (D. Minn. 1975); *Illinois State Employees Council 34 v. NLRB*, 395 F. Supp. 1011 (N.D. Ill. 1975), *aff'd mem.*, 530 F.2d 979 (7th Cir. 1976); *Marland One-Way Clutch Co. v. Nash*, 85 L.R.R.M. 2358 (N.D. Ill. 1974); *Lentschke*

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courts' unflinching adherence to the principle of unreviewable discretion, frustrated charging parties, sometimes unassisted by counsel,⁵⁴ have increasingly sought judicial relief. The suits suggest exasperation with the General Counsel's procedures, which allow charging parties no formal opportunity to rebut opposing evidence or refute opposing arguments.⁵⁵ The cases indicate the need for a meaningful judicial hearing to assure full recognition of charging parties' rights.

Perhaps in response to this need, a few courts have evinced some restiveness with the presumed nonreviewability of the General Counsel's refusal to issue complaints.⁵⁶ Courts have also shown greater reluctance to leave other important decisions affecting the rights of charging parties unreviewed. A number of courts have granted review of the General Counsel's decision to settle cases informally after a complaint has been issued.⁵⁷ In so doing, the courts have recognized the charging party's legal interest, his right to judicial scrutiny of the General Counsel's reasons for terminating a meritorious suit, and the

v. Nash, 84 L.R.R.M. 2833 (S.D. Tex. 1973); *Balc v. Steelworkers Local 13263*, 84 L.R.R.M. 2558 (W.D. Pa. 1973), *aff'd mem.*, 503 F.2d 1398 (3d Cir. 1974); *Office & Professional Employees Local 153 v. Miller*, 357 F. Supp. 220 (S.D.N.Y. 1973).

54. *See, e.g.*, *Echols v. NLRB*, 525 F.2d 288 (6th Cir. 1975); *Grolnick v. Furniture Workers Local 75A-75B*, 91 L.R.R.M. 2558 (D. Md. 1976); *Balc v. Steelworkers Local 13263*, 84 L.R.R.M. 2558 (W.D. Pa. 1973), *aff'd mem.*, 503 F.2d 1398 (3d Cir. 1974).

55. *See, e.g.*, *Union de Operadores y Canteros de la Industria del Cimento de Ponce v. NLRB*, 92 L.R.R.M. 3295 (1st Cir. 1976) (court acknowledging possible need for better procedures and hearing but holding that charging party has no due process rights); *Braden v. Herman*, 468 F.2d 592 (8th Cir. 1972) (per curiam), *cert. denied*, 411 U.S. 916 (1973) (General Counsel's procedures no violation of due process); *Saez v. Goslee*, 463 F.2d 214 (1st Cir.) (per curiam), *cert. denied*, 409 U.S. 1024 (1972) (charging party has insufficient interest to activate due process concern); *Hennepin Broadcasting Assocs., Inc. v. NLRB*, 408 F. Supp. 932, 935 (D. Minn. 1975).

56. *See, e.g.*, *Braden v. Herman*, 79 L.R.R.M. 2114, 2115-16 (W.D. Mo. 1971), *aff'd*, 468 F.2d 592 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973) (Supreme Court may in future open General Counsel's decisions to judicial scrutiny). A few district courts have even taken jurisdiction to review decisions of the General Counsel. *See Illinois State Employees Council 34 v. NLRB*, 395 F. Supp. 1011 (N.D. Ill. 1975), *aff'd*, 530 F.2d 979 (7th Cir. 1976) (upholding General Counsel's decision as supported by law and within his discretion); *Southern Cal. Dist. Council of Laborers Local 1184 v. Ordman*, 318 F. Supp. 633 (C.D. Cal. 1970) (reversing General Counsel's refusal to investigate complaint as based on erroneous interpretation of statute).

57. The Regional Director, as agent for the General Counsel, may settle an unfair labor practice case before a complaint is issued. *See* 29 C.F.R. § 101.7 (1976). Even after a complaint is issued, the Regional Director may withdraw it and accept a settlement, which is not subject to Board approval, *see id.* § 101.9(b)(2). Neither the Board's regulations nor the NLRB FIELD MANUAL (rev. ed. 1971) provides any guidance as to when an informal, as opposed to formal, settlement is appropriate.

The decision to settle informally terminates the charging party's case without a formal hearing, and is thus quite similar to the refusal to issue a complaint. Indeed, the General Counsel based his claim that informal settlement orders are unreviewable on NLRA § 3(d)—the same section that supports his claim of unreviewable discretion not to issue a complaint. *See* 29 C.F.R. § 102.18 (1976). Yet the decision to settle a case informally has been held reviewable. *See* note 58 *infra*.

necessity of a judicial check against arbitrary or unlawful action by the General Counsel or his agents.⁵⁸ In *ILGWU Local 415-475 v. NLRB*,⁵⁹ for example, the D.C. Circuit held that the General Counsel's informal settlement of a case is "final action" of the Board and thus reviewable under NLRA § 10(f),⁶⁰ even though the Board never considers the settlement. The court concluded:

Section 3(d) invests the General Counsel with broad and "final authority" over the prosecutorial aspects of the Board's administrative process. Yet it is readily apparent that the prosecutorial role may at times blend with the adjudicatory role. Also, even in its most elemental form—for example, the unreviewable decision whether to issue a complaint—the prosecutorial act often might, quite properly, encompass basic policy considerations.⁶¹

The court found that the General Counsel's withdrawal of a complaint pursuant to an informal settlement agreement is "essentially adjudicatory" and "cannot meaningfully be distinguished from other types of Board action traditionally held to be within the review provisions of Section 10(f)."⁶² The Third Circuit has gone even farther and held that once a complaint issues, an informal settlement by the General Counsel is arbitrary and capricious.⁶³

The rationales the courts have cited in reviewing the General Counsel's informal settlements are equally applicable to his decisions not to issue a complaint.⁶⁴ As the settlement cases indicate, judicial

58. See *Oshkosh Truck Corp. v. NLRB*, 530 F.2d 744, 748-49 (7th Cir. 1976) (examining reasons statement supporting informal settlement); *ILGWU Local 415-475 v. NLRB*, 501 F.2d 823, 830-31 (D.C. Cir. 1974) (informal settlements reviewable as NLRB final order finally terminating an unfair labor practice proceeding); *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966) (charging party entitled to hearing and judicial review of informal settlement agreements). Cf. *NLRB v. Oil, Chemical & Atomic Workers*, 476 F.2d 1031, 1034-37 (1st Cir. 1973) (formal settlement negotiated by General Counsel; charging party entitled to a hearing and statement of reasons responsive to his objections); *NLRB v. IBEW Local 357*, 445 F.2d 1015 (9th Cir. 1971) (similar); *Concrete Materials of Ga., Inc. v. NLRB*, 440 F.2d 61, 68 (5th Cir. 1971) (similar).

Both the formal and informal settlement cases stress the importance of ensuring that the Board fulfill its task as the primary interpreter of national labor policy. Stricter procedural requirements for entry of formal settlement orders are designed to prevent the Board from abdicating its policymaking role through cursory consideration of the issues involved. Judicial review of informal settlement orders encourages formal settlements and placement of ultimate responsibility with the Board.

59. 501 F.2d 823 (D.C. Cir. 1974).

60. 29 U.S.C. § 160(f) (1970) (providing for appellate court review of a "final order of the Board" at instance of aggrieved party).

61. 501 F.2d at 831.

62. *Id.*

63. *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527, 531-32 (3d Cir. 1966).

64. See 43 GEO. WASH. L. REV. 936, 943-44 (1975). But see *Terminal Freight Cooperative Ass'n v. NLRB*, 447 F.2d 1099 (3d Cir. 1971), *cert. denied*, 409 U.S. 1063 (1972) (judicial review of informal settlement agreement precluded if Regional Director failed

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review would benefit the charging party: by giving him a hearing, it would "give the party who feels himself injured and has made a complaint a better chance to have his complaint remedied."⁶⁵ Moreover, judicial scrutiny of the General Counsel's decisions may encourage him to be more "vigilant" in issuing complaints and proposing remedies.⁶⁶

B. *Development of National Labor Policy*

Besides determining the statutory rights of individual charging parties, the General Counsel actively shapes labor policy. His interpretation of the Act, whether explicitly enunciated in Advice and Appeals Memoranda⁶⁷ and public reports⁶⁸ or outlined by his disposition of actual cases, dictates which policy issues the Board will have the chance to consider.⁶⁹ The implications of this authority were recognized soon after passage of the Taft-Hartley Act. A special task force of the Hoover Commission on the Organization of the Executive

to issue complaint). *Terminal Freight* reveals an inconsistency between judicial review of informal settlement orders and the General Counsel's presumed absolute discretion not to issue a complaint. Courts have recognized the rights of charging parties in settlements of their meritorious charges and have held that such settlements may be reviewed despite lack of formal Board action. See p. 1364 *supra*. Yet, under *Terminal Freight*, by entering into an informal settlement *before* a complaint is issued, the General Counsel can elude judicial review. In fiscal 1976, 73.6% of the General Counsel's settlements of meritorious charges were "pre-complaint settlements." See 41 NLRB ANN. REP. 12 (Chart No. 7) (1976). Thus, the doctrine of the General Counsel's unreviewable discretion not to issue a complaint may also shield him from judicial review of settlement agreements.

65. *Marine Engineers' Beneficial Ass'n No. 13 v. NLRB*, 202 F.2d 546, 550 (3d Cir. 1953) (quoted in *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527, 537 (3d Cir. 1966)).

66. *Cf., e.g., Containair Sys. Corp. v. NLRB*, 521 F.2d 1166, 1169, 1173 (2d Cir. 1975) (although judicial review of formal Board settlement was unsuccessful, pressure from charging parties stimulated Board to liberalize remedial orders).

67. Advice Memoranda discuss matters referred to the Regional Advice Branch in Washington by the Regional Offices. See, e.g., *Report of Case-Handling Developments at NLRB (Quarter Ending March 31, 1972)*, reprinted in [1972] LABOR RELATIONS YEARBOOK (BNA) 207, 207-08 (guidelines instructing Regional Offices to submit certain types of cases to Regional Advice Branch for review). Appeals Memoranda (now issued as letters to charging parties) are legal opinions of the General Counsel, issued in response to a party's appeal to the Office of Appeals in Washington from a Regional Director's decision to dismiss a charge for lack of merit.

68. The General Counsel issues "Quarterly Reports" detailing the theories upon which his office relies in advising Regional Directors whether to bring complaints in developing areas of the NLRA. See, e.g., *Report on Case-Handling Developments at NLRB*, reprinted in [1975] LABOR RELATIONS YEARBOOK (BNA) 236-99 (compilation of four Quarterly Reports issued in fiscal 1975).

69. See *id.* at 236 (editor's introduction):

As the person vested with final authority over the issuance of complaints under [the NLRA, as amended by] the Taft-Hartley Act, the General Counsel of the National Labor Relations Board plays a key role in the development of the law under the Act. His approach in deciding whether to issue a complaint in a particular set of circumstances can influence greatly the direction that development will take. See McGuinness, *supra* note 44, at 387.

Branch found that the General Counsel's discretion gave him virtual rulemaking power in many areas still uncertain under the NLRA.⁷⁰ Refusal to issue a complaint could preclude the Board and the courts from clarifying some aspect of the substantive law.⁷¹ NLRB Chairman Paul Herzog testified that the Board did not even know the kinds of cases in which the General Counsel was refusing to issue complaints; the General Counsel was thus in a position to make definitive interpretations of the Act. Chairman Herzog put it concisely: "He who speaks first, speaks best, for only he may speak at all."⁷²

Congress, however, intended that the Board decide matters of policy.⁷³ Indeed, the General Counsel himself has often averred a generalized purpose to authorize complaints "[i]n cases presenting substantial or novel issues arising under the legislation, . . . so that the Board will have an opportunity to pass on such matters."⁷⁴ His performance in this respect may be questioned. Recently, a congressional subcommittee recognized that the General Counsel's unreviewable discretion may impair the development of national labor policy by screening important questions from the Board and reviewing courts.⁷⁵ A number of examples help illustrate the problem, which was recognized early in the history of the office.⁷⁶

70. 96 CONG. REC. 3695 (1950) (Rep. Hoffman).

71. See *id.* at 6801 (Sen. Humphrey): "In a very real sense it can be said that the general counsel is indeed a judge, jury, and prosecutor. . . . [T]he judge, juror, and prosecutor role of the general counsel stems from his unlimited authority to refuse to issue complaints." See also *id.* at 3695 (Rep. Hoffman); *id.* at 6867-68 (Sen. Smith of N.J.).

72. 1950 Hearings on Reorganization Plan No. 12, *supra* note 41, at 119.

73. 93 CONG. REC. 3953 (1947) (Sen. Taft).

74. *Guidelines Issued by the General Counsel of the National Labor Relations Board for Use of Board Regional Offices in Unfair Labor Practices Arising Under the 1974 Nonprofit Hospital Amendments to the Taft-Hartley Act*, reprinted in [1974] LABOR RELATIONS YEARBOOK (BNA) 343, 343 n.2. But see 1975 NLRB Hearings, *supra* note 25, at 404 (statement of Service & Hospital Employees Union Local 399) (alleging that Regional Directors, obviously ignoring this directive, are very conservative in issuing complaints under the Nonprofit Hospital Amendments). But see *id.* at 41 (statement of NLRB Chairman Betty Murphy) (longstanding policy of accommodation by which General Counsel files complaint in close cases or cases involving novel issues).

75. See 1970 NLRB OVERSIGHT REPORT, *supra* note 45, at 27-28. The subcommittee concluded that

the General Counsel's independent and unreviewable authority to issue complaints has been abused and . . . the lack of any check on that power has permitted it to be exercised arbitrarily and lawlessly. As a result, congressional policy has not been effectuated.

Id. at 28. Former General Counsel Theophil Kammholz conceded that the General Counsel is "the final arbiter of the congressional purpose" and criticized this delegation of unreviewed power. *Congressional Oversight of Administrative Agencies (National Labor Relations Board): Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 246 (1968) [hereinafter cited as 1968 NLRB Hearings].

76. In 1950, opponents of the statutory separation of functions argued that the existence of two interpretative bodies resulted in confusion on the part of labor and manage-

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1. "Hot Cargo" Agreements under § 8(e) of the NLRA

The most notorious example of an important issue kept from the Board's scrutiny by the General Counsel's refusal to issue a complaint involved the latter's interpretation of NLRA § 8(e), which outlaws "hot cargo" agreements.⁷⁷ The General Counsel read the proviso of § 8(e)⁷⁸ to permit unions in the construction industry to coerce contractors into agreeing not to do business with nonunion subcontractors.⁷⁹ Despite academic criticism,⁸⁰ the obvious need for a Board interpretation, and a judicial suggestion that such union conduct might violate § 8(e),⁸¹ the General Counsel persisted in refusing to issue complaints.⁸² In 1975 the Board itself expressed concern about the General Counsel's policy,⁸³ and the Supreme Court in *Connell Construction Co. v. Plumbers Local 100*,⁸⁴ an antitrust suit, held that the proviso to § 8(e) did not authorize such subcontracting agreements.⁸⁵ The General Counsel finally began to issue complaints under

ment as to their respective duties. Regional Directors too were said to be confused by the dual sets of directives they received. Because most cases are settled at the regional level, confusion at that level could mean that conflicting policies would govern settled cases and cases decided by the Board. Such confusion could also reduce the number of settlements. 96 CONG. REC. 6800-02 (1950) (Sen. Humphrey).

77. NLRA § 8(e), 29 U.S.C. § 158(e) (1970), makes it an unfair labor practice for a union and employer "to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . dealing in any of the products of any other employer, or to cease doing business with any other person"

78. 29 U.S.C. § 158(e) (1970):

Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work

79. See Janofsky & Peterson, *supra* note 45, at 729 & n.1.

80. See, e.g., *id.* at 735:

The General Counsel has overruled *Denver Building Trades*, turned his back on the legislative history of the construction industry proviso of the Act and, by administrative fiat, closed the doors on parties whose substantial rights were materially affected thereby. We believe this is a clear case of administrative abuse of power.

81. See *Connell Constr. Co. v. Plumbers Local 100*, 483 F.2d 1154, 1171-75 (5th Cir. 1974), *rev'd on other grounds*, 421 U.S. 616 (1975).

82. See *Report on Case-Handling Developments at NLRB (Quarter Ending March 31, 1974)*, reprinted in [1974] LABOR RELATIONS YEARBOOK (BNA) 298, 298-308. The General Counsel's analysis is excellent, yet is written in the form of an authoritative judicial opinion, rather than from the perspective of a prosecutor charged with bringing unsettled issues to the attention of the Board.

83. See 1975 NLRB Hearings, *supra* note 25, at 41 (statement of NLRB Chairman Betty Murphy).

84. 421 U.S. 616 (1975).

85. *Connell* was brought as an antitrust action, since the General Counsel and Regional Director had refused to issue an unfair labor practice complaint under § 8(e). 483 F.2d at 1158. The Supreme Court reversed the Fifth Circuit on the antitrust charge, holding the proviso to § 8(e) did not immunize the subcontracting clause from antitrust attack. 421 U.S. at 621-26, 633-35. Although the proviso on its face seems to

the Court's interpretation in late 1975, sixteen years after § 8(e) was enacted.⁸⁶ Although the Board and courts disagreed with the General Counsel's interpretation of § 8(e), it took a curious antitrust case to provide a forum for resolution of the issue.

2. *Certification of Exclusive Bargaining Agent*

Another important and unforeseen consequence of the General Counsel's discretion is that it enables him to usurp the Board's exclusive statutory authority to determine the appropriate bargaining unit and to certify the exclusive bargaining representative.⁸⁷ In many cases the General Counsel's refusal to issue a complaint will lead to automatic Board inferences regarding representation elections. Two early cases under the Taft-Hartley Act illustrate how the General Counsel's refusal to issue a complaint can operate indirectly to limit the Board's certification power.

In *Kinsman Transit Co.*,⁸⁸ it was charged that an activist union member had been discharged four hours before an election. The Board held that since the General Counsel had declined to bring unfair labor practice charges against the employer, the election must be presumed to have been conducted fairly. In *Times Square Stores Corp.*,⁸⁹ the question was whether certain striking workers were entitled to vote in a representation election. This determination hinged on whether the workers were economic strikers or unfair labor practice strikers. The Board announced a presumption that strikers are economic strikers unless an unfair labor practice proceeding establishes otherwise. Since the General Counsel had not issued an unfair labor practice complaint against the employer, the Board's presump-

legalize such clauses in the construction industry, the Court held that Congress intended to limit the proviso's protection to subcontracting agreements within the context of a collective bargaining relationship and possibly with reference to but a single job site. *Id.* at 626-33.

86. See *Report on Case-Handling Developments at NLRB (Quarter Ending Sept. 30, 1975)*, reprinted in [1975] *LABOR RELATIONS YEARBOOK* (BNA) 289, 298-99.

87. NLRA § 9(b), 29 U.S.C. § 159(b) (1970), provides that the Board shall decide "whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ." Under NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1) (1970), if the Board finds after a hearing that a question of representation exists, "it shall direct an election by secret ballot and shall certify the results thereof."

88. 78 N.L.R.B. 78, 22 L.R.R.M. 1165 (1948). See also *1949 Labor Relations Hearings*, *supra* note 8, at 437, 482-83 (testimony of Arthur Goldberg) (citing *Kinsman Transit* as example of inconsistency resulting from policy disagreements between Board and General Counsel).

89. 79 N.L.R.B. 361, 364-65, 22 L.R.R.M. 1373, 1374-75 (1948).

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tion governed the case and the strikers were held ineligible to vote. The Board, eager to reduce friction with the General Counsel, refused to decide whether the employer had committed an unfair labor practice, even though that was the underlying issue in the case.⁹⁰

3. *Maintenance-of-Membership Clauses*

The General Counsel's inaction has apparently withheld from the Board any consideration of the issue whether a union contract provision requiring membership in good standing is an unfair labor practice when membership entails more than the tendering of dues. Unions cannot enforce such a provision.⁹¹ But its presence in the contract may induce workers, who otherwise would only tender dues, to join the union and thereby subject themselves to union discipline.⁹² Though such a provision has been held to be inherently deceptive and illegal under the Railway Labor Act,⁹³ no complaint has ever been brought under the NLRA.

4. *Employer Discrimination Based on Race or Sex*

The General Counsel's unreviewed discretion may restrict the development of national labor policy even where the Board and General Counsel concur in their interpretation of the NLRA. When the Board interprets the NLRA more narrowly than do reviewing courts, the General Counsel can ensure that the Board's view prevails by refusing to issue complaints. For instance, the Board in 1973 held that discrimination based on race, sex, or national origin is not an unfair labor practice unless there is actual evidence of a nexus between the alleged discriminatory conduct and restraint of employees in the

90. The General Counsel had dismissed the unfair labor practice charges because the union had not filed the necessary non-Communist affidavits. The Board's decision thus could not have depended on an assumption that the General Counsel refused to initiate complaints only where there was a lack of evidence. This assumption apparently governed *Kinsman Transit Co.*, 78 N.L.R.B. 78, 81, 22 L.R.R.M. 1165, 1166 (1948). The Board in *Times Square Stores Corp.*, 79 N.L.R.B. 361, 22 L.R.R.M. 1373 (1948), did not examine whether the purposes of the Act required deference to the General Counsel's reasons for not issuing a complaint.

91. See *Buckley v. AFTRA*, 496 F.2d 305, 312 (2d Cir. 1974); cf. *IAM v. Street*, 367 U.S. 740, 749 (1961) (§ 2, Eleventh, of Railway Labor Act allowing union shop is constitutional, provided that employees only required to give "financial support" to unions legally authorized to act as their collective bargaining agents"); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 238 (1956) (same). See generally Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022 (1976).

92. See Wellington, *supra* note 91, at 1051-52; cf. *Buckley v. AFTRA*, 496 F.2d 305, 312-13 (2d Cir. 1974) (noted intellectual William F. Buckley, Jr., misled into believing he was required to join union as "full-fledged" member").

93. *Marden v. IAM*, 91 L.R.R.M. 2841, 2843 (S.D. Fla. 1976).

exercise of their § 7 rights.⁹⁴ Although commentators have persistently criticized the Board and General Counsel for the narrowness of this approach,⁹⁵ and some courts have read the NLRA more broadly,⁹⁶ no subsequent complaints alleging that discrimination is a per se unfair labor practice have been filed.

5. *Union Fines*

A final example of the General Counsel's policymaking power shows that even when he is *correct*, his failure to file a complaint can leave a problem unresolved for years. In *NLRB v. Allis-Chalmers Manufacturing Co.*,⁹⁷ the Supreme Court held that NLRA § 8(b)(1)(A)⁹⁸ permitted unions to impose "reasonable fines" on their members, but left open the question whether unreasonably large fines would violate the Act.⁹⁹ The General Counsel nevertheless assumed that the issue was settled and refused to issue complaints challenging the reasonableness of union fines until roused by grumblings from Senator Ervin.¹⁰⁰ Shortly thereafter, the Board itself determined that it would not adjudge the reasonableness of union fines, only to be

94. *Jubilee Mfg. Co.*, 202 N.L.R.B. 272, 82 L.R.R.M. 1482 (1973), *enforced sub nom.* *Steelworkers v. NLRB*, 87 L.R.R.M. 3168 (D.C. Cir. 1974).

95. See *NLRB v. Mansion House*, 473 F.2d 471 (8th Cir. 1973) (Board constitutionally prohibited from requiring employer to bargain with labor organization practicing racial discrimination); Naffziger, *The NLRB Attitude on Discrimination and the Judicial Response*, 26 LAB. L.J. 21, 23-28, 32 (1976) (political conservatism of General Counsel—whose discretion not to issue complaints is unreviewed—has led to "benign neglect" of workers' civil rights, despite prodding by courts of appeals; need for NLRB to reconsider *Jubilee*); Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158, 175-79 (1974) (*Mansion House* should lead Board to reconsider *Jubilee*); cf. Hill, *The National Labor Relations Act and the Emergence of Civil Rights Law: A New Priority in Federal Labor Policy*, 11 HARV. C.R.-C.L. L. REV. 299, 335-36 (1976) (criticizing General Counsel for excessive deferral policy in cases where racial issues involved). *But cf.* *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (employees' right to be free of racial discrimination counterbalanced by demands of orderly collective bargaining process of NLRA).

96. *E.g.*, *United Packinghouse Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir.), *cert. denied sub nom. Farmers' Coop. Compress v. United Packinghouse Workers*, 396 U.S. 903 (1969) (employer practice of racial discrimination violates NLRA § 8(a)(1) by dividing workers and creating employee docility).

97. 388 U.S. 175 (1967).

98. 29 U.S.C. § 158(b)(1)(A) (1970):

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [NLRA § 7]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

99. 388 U.S. at 192-93.

100. See 1970 NLRB OVERSIGHT REPORT, *supra* note 45, at 27; 1968 NLRB Hearings, *supra* note 75, at 259-60 (statement of Theophil Kammholz, former NLRB General Counsel).

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reversed by the D.C. Circuit.¹⁰¹ Despite the evident substantiality of the issue involved and the contrary judicial interpretation, the General Counsel refused to issue any further complaints.¹⁰² Although the Supreme Court ultimately vindicated the Board,¹⁰³ the General Counsel's reluctance to address unsettled questions caused needless delay in the resolution of this central issue of labor policy.

III. Administrative Law: The Misapplication of Relevant Doctrines

The doctrine of nonreviewability is widely accepted, despite the lack of clear congressional intent to preclude review and the important labor law considerations militating in favor of a judicial check on the discretion of the General Counsel. Courts have often resorted to various administrative law doctrines to buttress their assumption of nonreviewability. This reliance is misplaced.

A. *The Current State of Judicial Opinion*

No court has ever ordered the General Counsel to issue a complaint. Several courts have suggested that there might be cases involving an abuse of discretion¹⁰⁴ or a constitutional challenge¹⁰⁵ in which relief should be granted. But, with only two exceptions,¹⁰⁶ the courts have not found facts warranting a departure from the general pattern of nonreviewability. Although the Supreme Court has never confronted the question directly, the Court has acknowledged, in a number of opinions, the generally accepted doctrine that there is no judicial review of the General Counsel's refusal to issue a complaint.¹⁰⁷

The leading Supreme Court decision is *Vaca v. Sipes*.¹⁰⁸ Writing

101. *Booster Lodge No. 405, IAM*, 185 N.L.R.B. 380, 75 L.R.R.M. 1004 (1970), *modified*, 459 F.2d 1143 (D.C. Cir. 1972), *rev'd in relevant part sub nom. NLRB v. Boeing Co.*, 412 U.S. 67 (1973). *See generally* Wellington, *supra* note 91, at 1033-34 & n.70.

102. *See, e.g., Erie Newspaper Guild Local 187 v. NLRB*, 489 F.2d 416, 425-26 (3d Cir. 1973) (despite D.C. Circuit opinion, General Counsel refused to amend complaint to include charge of excessive union fees).

103. *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), *rev'g in relevant part* *Booster Lodge No. 405, IAM v. NLRB*, 459 F.2d 1143 (D.C. Cir. 1972).

104. *NLRB v. IBEW Local 357*, 445 F.2d 1015, 1016 n.2 (9th Cir. 1971); *Retail Store Employees Local 954 v. Rothman*, 298 F.2d 330, 332 n.1 (D.C. Cir. 1962); *Hourihan v. NLRB*, 201 F.2d 187, 188 n.4 (D.C. Cir.), *cert. denied*, 345 U.S. 930 (1953).

105. *Balanyi v. Local 1031, IBEW*, 374 F.2d 723, 726 (7th Cir. 1967).

106. *See* note 56 *supra*.

107. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138, 155 (1975) (White, J.); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (White, J.); *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n*, 382 U.S. 181, 191-92 (1965). *See also* *Amalgamated Ass'n St. Employees v. Lockridge*, 403 U.S. 274, 314-15 (1971) (White, J., dissenting).

108. 386 U.S. 171 (1967).

for five Justices, Justice White held that a state court had jurisdiction to adjudicate a member's charge that his union had "arbitrarily [and] capriciously" refused to process his grievance to the fullest extent possible under the collective bargaining agreement.¹⁰⁹ The Court rejected the argument that state court jurisdiction was preempted under the doctrine of *San Diego Building Trades Council v. Garmon*,¹¹⁰ although the union's alleged actions arguably violated the NLRA.¹¹¹ The majority first noted that the prior doctrinal development of the duty of fair representation had been judicial, and for this reason concluded that the issues presented in *Vaca* were best not left exclusively to the Board.¹¹² Secondly, the Court feared that to preclude state court jurisdiction might deprive workers injured by discriminatory union conduct of any remedy because of the General Counsel's unreviewable discretion in deciding whether to issue a complaint.¹¹³

Justice White's second ground of decision is not dispositive of the reviewability question. He undertook no analysis; nonreviewability was an assumed premise, treated only in a footnote.¹¹⁴ Moreover, once Justice White had established that courts are the preferred forum for hearing a union member's charges of discrimination, he had completely answered the preemption argument without implicating reviewability. Indeed, an argument against preemption based upon the General Counsel's unreviewable discretion proves too much, for it is an argument against any application of the preemption doctrine.¹¹⁵ What

109. *Id.* at 174, 176-88.

110. 359 U.S. 236 (1959) (states cannot regulate activity arguably prohibited or arguably protected by NLRA §§ 7, 8, 29 U.S.C. §§ 157, 158 (1970)).

111. In *Miranda Fuel Co.*, 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), the Board held that NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970), prohibits labor organizations from taking action against any employee upon considerations that are "irrelevant, invidious, or unfair." 140 N.L.R.B. at 185, 51 L.R.R.M. at 1587. The Board also held that an employer who "participates" in such arbitrary union conduct violates § 8(a)(1), and that the employer and union violate §§ 8(a)(3) and 8(b)(2), respectively, "when for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." *Id.* at 186, 51 L.R.R.M. at 1587.

112. 386 U.S. at 181.

113. *Id.* at 182-83.

114. *Id.* at 181 n.8.

115. In the first major preemption case to reach the Court after *Vaca*, *Amalgamated Ass'n St. Employees v. Lockridge*, 403 U.S. 274 (1971), the Regional Director had already refused to issue a complaint on facts identical to those constituting the gravamen of the state court action. *Id.* at 280 n.3. Thus, the lack of alternative remedies before the Board, if state court treatment were preempted, was not a mere possibility, as in *Vaca*, but a virtual certainty. The Court's insistence on preemption in *Lockridge* strongly suggests that the Court did not attach much importance to the second ground of Justice White's opinion in *Vaca*. See also *id.* at 314-15 (White, J., dissenting) (claiming that *Vaca* rested

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made protection of the Board's primary jurisdiction unwarranted in *Vaca* was not that the General Counsel might refuse to issue a complaint when unfair labor practices had plainly occurred. Rather, it was that the Board and the courts had developed so little doctrine under the unfair labor practice provisions of the NLRA to protect union members against inadequate representation that the General Counsel might *legitimately* refuse to issue a complaint. Even if the General Counsel's decisions were reviewable, therefore, members' remedies before the Board would be insufficient and the argument for state court jurisdiction would remain valid.

B. *Administrative Law Doctrines and Judicial Review*

The cursory nature of court decisions disposing of challenges to the General Counsel's unbridled discretion can only be traced to a firm conviction that Congress intended to preclude review. But, as Parts I and II of this article have demonstrated, such assumptions about congressional intent are hazardous; indeed, judicial review would *advance* the goals of national labor policy embodied in the NLRA and its enforcement framework. When courts have attempted to rationalize the doctrine of nonreviewability, they have generally relied on arguments that plaintiffs lack standing because the NLRA does not confer "private rights" but creates only "public rights," or that the General Counsel's decisions are discretionary and therefore unreviewable. These rationalizations are invalid under the tests of standing and reviewability developed by the Supreme Court in the last decade.

1. *Standing*

The Supreme Court in 1970 announced a dual test for standing to challenge administrative decisionmaking. Under that test, set out in the companion cases, *Association of Data Processing Service Organiza-*

on two independent grounds, which would mandate a different result than that reached by the majority of the Court).

In his opinion in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), Justice White again alluded to the second ground of decision in *Vaca*. The Court held in an opinion by Justice White that Appeals and Advice Memoranda in which the General Counsel instructs Regional Directors concerning the issuance of complaints are final agency opinions, since the charging party cannot obtain review of the General Counsel's decisions. Justice White's statement concerning review was unnecessary to his conclusion. Finality, for purposes of 5 U.S.C. § 552(a)(2)(A) (1970), refers only to agency and not to judicial review. The General Counsel's decision is clearly final for agency purposes. 29 U.S.C. § 153(d) (1970).

tions, *Inc. v. Camp (ADPSO)*¹¹⁶ and *Barlow v. Collins*,¹¹⁷ plaintiffs must allege that the challenged action has caused them "injury in fact" and that the "interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."¹¹⁸ The Court perceived the new test as acknowledgment of a trend toward "enlargement of the class of people who may protest administrative action."¹¹⁹

Complainants challenging the General Counsel's refusal to issue a complaint satisfy both elements of the test. They typically allege that they have been victims of unfair labor practices, the redress of which is made impossible by the General Counsel's inaction. The alleged injuries may be economic, as where a complainant company has been victimized by an illegal boycott, or they may involve the deprivation of rights guaranteed to workers by § 7 of the NLRA.¹²⁰ Despite recent indications of a narrowed application of the "injury in fact" branch of the test,¹²¹ injuries of this sort are undoubtedly adequate.¹²²

116. 397 U.S. 150 (1970) (businesses providing data processing services have standing to challenge a ruling by the Comptroller of the Currency permitting national banks to make data processing services available to other banks and bank customers).

117. 397 U.S. 159 (1970) (tenant farmers have standing to challenge Secretary of Agriculture's regulation permitting more liberal assignment of their payments under the Food and Agriculture Act).

118. 397 U.S. at 152-53. *See also id.* at 167-68 (Brennan, J., concurring). The "injury in fact" and "zone of interest" tests enunciated in *Barlow* and *ADPSO* are not always logically distinct. A judgment as to what types of injuries are sufficient to make out "injury in fact" will often depend upon an assessment of the interests meant to be protected by the relevant statute. *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 491-93 (1974).

119. 397 U.S. at 154.

120. 29 U.S.C. § 157 (1970) (granting employees the rights, *inter alia*, to organize, bargain collectively, and engage in other activities for the purpose of "mutual aid or protection," as well as to refrain from such activities). Cases subsequent to *ADPSO* and *Barlow* expanded the class of injuries found sufficient to constitute "injury in fact." *See* United States v. SCRAP, 412 U.S. 669 (1973) (environmental harms); *Sierra Club v. Morton*, 405 U.S. 727, 738 & n.13 (1971) ("injuries other than economic harm are sufficient" to give standing, citing cases) (*dictum*). The underlying purpose of the NLRA would seem to make cognizable injuries other than traditional economic ones. Because § 7 guarantees workers' rights of self-organization, non-economic harms arising from prohibited employer activity in violation of those rights should be cognizable as "injuries in fact."

121. *See* *Warth v. Seldin*, 422 U.S. 490 (1975) (builders' association, association interested in housing problems, and low-income and minority residents of communities adjoining Rochester, N.Y., are without standing to challenge Rochester's allegedly restrictive zoning practices); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976) (low-income individuals denied hospital treatment are without standing to challenge IRS Revenue Ruling altering requirements for classification of hospitals as charitable organizations). To the extent that the Supreme Court in these cases has become more stringent in applying the "injury in fact" requirement, it has undermined *SCRAP*, in which the majority of the Court, *per* Justice Stewart, had adopted Professor Davis's position that "'an identifiable trifle'" is sufficient for standing. 412 U.S. at 689 n.14 (citing Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

122. In *Warth and Welfare Rights Organization* the Court found the relationship between plaintiffs' alleged injury and defendants' alleged wrongs so remote as to

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The standing of parties to challenge the General Counsel's refusal to issue a complaint usually turns on a consideration of the second element of the test, the requirement that the right being asserted be within the "zone of interests" protected by the statute. Courts frequently have described the NLRA as protecting only "public rights" or "public interests" and have relied on this finding to support the doctrine of nonreviewability.¹²³ Courts have thus implicitly analogized the NLRA to criminal statutes and the victim of an unfair labor practice to the victim of a crime. Just as the victim of a crime is said to have no legal interest in a criminal prosecution, the victim of an unfair labor practice is said to have no interest in the remedy of that practice and thus no interest arguably protected by the NLRA.

In general, the dichotomy between statutes that protect the public interest and those that protect private interests lacks analytical content.¹²⁴ The classification of a statute into one or another group may

preclude "injury in fact." In *Warth*, for example, low-income plaintiffs lacked standing because they could show little more than a remote possibility that they would have been able to obtain the housing they desired even if defendants had not engaged in the challenged zoning practices. 422 U.S. at 504-07. In light of *Warth* and *Welfare Rights Organization*, an argument might be made that the injury alleged by a party who has unsuccessfully sought issuance of an unfair labor practice complaint does not amount to "injury in fact." First, the *injury* results from the actions of union or management, but the *relief* sought is against the General Counsel. Secondly, even if the party gains the relief it requests—the issuance of a complaint—there is no assurance that the alleged injury will be remedied. The Court cited similar reasons in *Welfare Rights Organization*. The Court emphasized that while the injury was attributable to the hospitals, Treasury Department officials were the sole defendants. 422 U.S. at 41-42. And the Court reasoned that a grant of the relief requested would not necessarily redress the injuries alleged. *Id.* at 43. However, where an administrative official is charged with the enforcement of a particular statute, courts generally allow plaintiffs injured by statutory violations to bring actions for judicial review. *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560 (1975). Moreover, the filing of an unfair labor practice complaint would have an immediate effect on the parties responsible for plaintiff's injury: they would be forced to establish before the Board that they had not violated the NLRA, or to comply with the remedy the Board decreed.

123. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967); *Saez v. Goslee*, 463 F.2d 214, 215 (1st Cir.) (per curiam), *cert. denied*, 409 U.S. 1024 (1972).

124. The "public interest/private rights" dichotomy developed in the 1930s as a means of circumventing what were perceived to be possible constitutional infirmities in statutes making substantial grants of power to administrative agencies. The idea that an administrative body could grant relief against one party in favor of another was not easily reconciled with traditional learning about the performance of Article III business by non-Article III courts and the right to a jury trial. *See, e.g., Agwilines v. NLRB*, 87 F.2d 146 (5th Cir. 1936). But as legal doctrine concerning administrative agencies has grown, the fiction that NLRB proceedings have none of the characteristics of a traditional "case or controversy" between two parties has shown itself not only to be unnecessary, but an impediment to meaningful analysis. In a long line of cases following *Crowell v. Benson*, 285 U.S. 22 (1932), it has been held that administrative agencies may adjudicate the liability of one party to another so long as an Article III court is empowered to review questions of law. The perceived infirmity arising from the lack of jury trial is not applicable to NLRB proceedings, for the rights and duties created by the Wagner and Taft-Hartley Acts do not derive from the common law, and thus their adjudication is not within the ambit of the Seventh Amendment. *See Jaffe, The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485, 528 (1940).

announce a result in a particular case, but does nothing to explain it.¹²⁵ True, the NLRA is designed to further the public interest in industrial peace and in the uninhibited flow of commerce, but some public interest underlies every legal rule.¹²⁶ The question is not *whether* a statute furthers a public interest but *how*. The NLRA protects the public interest by creating an elaborate set of duties which labor and management owe to each other; it is predicated on the assumption that the protection of the collective bargaining relationship is in the public interest.¹²⁷ Where particular groups are the obvious beneficiaries of statutorily imposed duties they should have a recognized legal interest in securing adherence to those duties.¹²⁸

Furthermore, the Supreme Court has explicitly recognized that the NLRA creates private rights. In *UAW Local 283 v. Scofield*,¹²⁹ the

125. *Cf. Garner v. Teamsters Local 776*, 346 U.S. 485, 500 (1953) ("Whatever purpose a classification of rights as public or private may serve, it is too unsettled and ambiguous to introduce into constitutional law as a dividing line between federal and state power or jurisdiction.")

Under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), parties injured by a statutory violation can themselves sue in federal court; under the NLRA the Board can act only after the filing of a complaint by the General Counsel. Given the similarities between the duties that the two statutes impose, it confounds common sense to say that one allows private suits, and the other does not, because one protects "private rights" while the other protects "public interests."

126. *See Jaffe, supra* note 32, at 725 ("The enforcement of contracts is intrinsically no less a matter of public interest than the enforcement of the traffic laws.") *See also UAW Local 283 v. Scofield*, 382 U.S. 205, 220 (1965) ("[T]he statutory pattern of the [NLRA] does not dichotomize 'public' as opposed to 'private' interests. Rather, the two interblend in the intricate statutory scheme.")

127. *See Jaffe, supra* note 124, at 524.

The Taft-Hartley Act differs from its predecessor, the Wagner Act, precisely in the mutuality of duties it imposes on unions and employers. The Wagner Act, which imposed duties only on employers, was meant to vindicate a public interest—the spread of unionization and collective bargaining. In contrast, the Taft-Hartley Act sets up the Board as an umpire enforcing rules against both employers and unions. The Report of the Advisory Panel on Labor Management Relations Law on the Organization of the National Labor Relations Board, S. Doc. 81, 86th Cong., 2d Sess. 5 (1960) [hereinafter cited as *Cox Panel Report*].

128. *See Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 6-7 (1968). Professor Jaffe has stated the proposition clearly:

It is arguable that presumptively where the law creates duties of which identifiable individuals are the beneficiaries—particularly where the beneficiaries regard themselves and are regarded as the victims of wrongful conduct, where their protection is in part the purpose of the legislation—and provides for remedial redress, the individuals should be heard as of right. . . . The impact of the proposition diminishes as the class of beneficiaries becomes broader, undifferentiated, unidentifiable, in short as the class approaches the "general public"; so also as the administrative action is apprehended not as a remedy for a wrong but as approaching the norm of legislation.

Jaffe, *supra* note 124, at 528. *See Albert, supra* note 118, at 451-52.

129. 382 U.S. 205 (1965). That the NLRA creates private rights has been recognized in other cases. In *Mine, Mill & Smelter Workers Local 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338-39 (1945), the court allowed a party who was successful

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Court held that charged parties who are successful before the Board can intervene as a matter of right in court of appeals review proceedings, so as to “avoid unnecessary duplication of proceedings” and to increase the likelihood of obtaining “a just result with a minimum of technical requirements.”¹³⁰ The Court reached the same result with regard to successful charging parties, rejecting the Board’s argument that the charging party has no right of intervention because the NLRA creates no private rights.¹³¹ The Court held that the charging party may have vital “private rights” in the Board proceedings and recognized that the NLRA weaves “private” and “public” interests together in an “intricate statutory scheme.”¹³²

Scofield and subsequent cases recognizing the existence of “private rights” under the NLRA undercut the argument that charging parties have no protected legal interests.¹³³ While continuing to use the language of “private” and “public” rights, courts have recognized that these categories are not mutually exclusive. As Chief Justice Warren stated in *Scofield*, “[t]o employ the rhetoric of ‘public interest’ . . . is not to imply that the public right excludes recognition of parochial private interests.”¹³⁴ The various “private rights” recognized in the cases are all derived from the basic right to be protected against unfair labor practices. Clearly, a charging party challenging the General Counsel’s refusal to issue a complaint seeks to vindicate this basic right and thereby asserts a claim that falls within the “zone of interests” protected by the NLRA.

before the Board to petition for certiorari to the Supreme Court, even though the Board had elected not to seek review. More recently, private rights have been recognized in cases allowing private parties to intervene in proceedings in courts of appeals, *see* pp. 1376-77 *supra*, and in cases reviewing both formal and informal settlement orders, *see* p. 1364 *supra*.

130. 382 U.S. at 212.

131. *Id.* at 218-22.

132. *Id.* at 220. The right to intervene in appellate review proceedings is not unrelated to the right to seek judicial review of an administrative refusal to initiate the administrative process. In *Trbovich v. UMW*, 404 U.S. 528 (1972), parties complaining of union election violations were allowed to intervene in suits filed by the Secretary of Labor to set aside those elections under Title IV of the LMRDA, 29 U.S.C. § 482(b) (1970). Subsequently, in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the Court relied upon *Trbovich* in holding that the complainant could obtain judicial review of the Secretary’s decision not to file a suit. *Id.* at 569-70.

133. *See, e.g., Concrete Materials of Ga., Inc. v. NLRB*, 440 F.2d 61, 67 (5th Cir. 1971): “[T]he General Counsel represents the public interest in preventing the interference to interstate commerce caused by unfair labor practices, and, at the same time, the private interest of the charging party to be free from the harm to his interests caused by unfair labor practices.” *Cf. Dunlop v. Bachowski*, 421 U.S. 560, 570, 572 (1975) (Secretary of Labor as “lawyer” representing private interest in Title IV of LMRDA has duty to private parties, enforceable through judicial review of decisions not to bring suit).

134. 382 U.S. at 218.

2. Reviewability

Once a party has established his standing to challenge agency action, he is presumptively entitled to judicial review.¹³⁵ On the other hand, the APA provides for two exceptions to this rule: review will be unavailable to the extent that "statutes preclude judicial review" and to the extent that "agency action is committed to agency discretion by law."¹³⁶ The NLRA does not on its face preclude review. Thus any justification for the courts' unwillingness to review the General Counsel's decisions not to issue complaints must rest on some form of the argument that such actions are committed to the General Counsel's discretion by law. Usually one of two propositions is advanced: either that Congress vested the General Counsel with unreviewable "prosecutorial discretion"¹³⁷ or that the statutory scheme immunizes the Gen-

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

136. APA § 10, 5 U.S.C. § 701(a) (1970). See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967): "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

137. See, e.g., *Mayer v. Ordman*, 391 F.2d 889, 891 n.2 (6th Cir.) (per curiam), cert. denied, 393 U.S. 925 (1968) (analogizing General Counsel to United States Attorney); *Dunn v. Retail Clerks*, 307 F.2d 285, 288 (6th Cir. 1962) (same); Note, *Judicial Reviewability of NLRB Rulings*, 63 Nw. L. Rev. 106, 116 (1968). Cf. *United Elec. Contractors Ass'n v. Ordman*, 258 F. Supp. 758, 762 (S.D.N.Y. 1965), aff'd per curiam, 366 F.2d 776 (2d Cir. 1966), cert. denied, 385 U.S. 1026 (1967) (finding General Counsel's discretion unreviewable and adverting to his prosecutorial duties).

Another rationale for nonreviewability, closely related to prosecutorial discretion, is the "final order" doctrine. NLRA § 10(f), 29 U.S.C. § 160(f) (1970), makes reviewable "a final order of the Board granting or denying in whole or in part the relief sought." Some courts have held that the refusal to issue a complaint is not reviewable because it is a preliminary prosecutorial decision and not a "final adjudication" of the Board granting or denying the relief sought. *Contractors Ass'n v. NLRB*, 295 F.2d 526 (3d Cir. 1961) (per curiam), cert. denied, 369 U.S. 813 (1962); *Lincourt v. NLRB*, 170 F.2d 306 (1st Cir. 1948) (per curiam); 43 GEO. WASH. L. REV. 936, 940 (1975). Recent cases have called this application of the final order doctrine into question. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158-59 (1975) (General Counsel's decision not to issue complaint is "final opinion" made in the "adjudication of cases" under APA); *ILGWU Local 415-475 v. NLRB*, 501 F.2d 823, 830-31 (D.C. Cir. 1974) (General Counsel's entry into informal settlement is final Board action under § 10(f)).

Moreover, none of the policies underlying the final order doctrine militates in favor of precluding review of the General Counsel's refusal to issue a complaint. There is no risk of premature intervention into the administrative process before the agency has had the opportunity to formulate its position fully, since the General Counsel's determination is final for administrative purposes. Nor are the procedures producing the General Counsel's decision too informal to allow meaningful review. The charging party is furnished with reasons for the refusal to issue a complaint; he may appeal an adverse decision to the General Counsel's office in Washington. See 29 C.F.R. §§ 101.6, 102.19 (1976); K. DAVIS, *DISCRETIONARY JUSTICE* 205-07 (1969).

Since the General Counsel's refusal to issue a complaint fully disposes of the merits and is sufficiently formal to allow review, there should be judicial review of that decision. See *JUDICIAL CONTROL*, *supra* note 31, at 358-59: "[A]bsent a clear intention to

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eral Counsel's decision as one of expert administrative discretion and judgment.¹³⁸ Neither argument is compelling. A conclusion that the General Counsel's decisions are unreviewable is not supported by the legislative history of § 3(d),¹³⁹ the case law narrowing the exceptions to judicial review, or the Supreme Court's oft-repeated admonition that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."¹⁴⁰

a. *Prosecutorial Discretion*

It can be argued that Congress patterned the General Counsel's office and duties on those of a public prosecutor and thereby vested the General Counsel with unreviewable "prosecutorial discretion."¹⁴¹ The argument, like the public rights/private rights distinction, rests upon an analogy between criminal courts and administrative agencies. Owing to the large number of crimes and the scarcity of money and manpower, public prosecutors must have considerable discretion in deciding which cases to bring to trial, which to ignore, and which to plea bargain. Because of the dearth of regulations and clear statutory standards governing criminal prosecutions, and because of the count-

exclude review, an action which finally denies all relief should be construed as a statutory 'order' or, if this is not possible, should be within the general jurisdiction of the district court." As Professor Jaffe suggests, even if the circuit courts do not find that a refusal to issue a complaint is a final order under § 10(f), there is ample precedent for district court review under 28 U.S.C. § 1337 (1970). *Cf. Leedom v. Kyne*, 358 U.S. 184, 187-89 (1958) (district court has jurisdiction under § 1337 to set aside Board decisions in § 9 certification proceedings when Board acts in excess of statutory powers, though such decisions are normally unreviewable); *Hirsch v. McCulloch*, 303 F.2d 208 (D.C. Cir. 1962) (Board cannot decline jurisdiction over class or category of commerce in an advisory opinion); *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961) (district court has jurisdiction to enjoin interlocutory order made in excess of Board's statutory authority); *Local 112, Int'l Union of Allied Indus. Workers v. Rothman*, 209 F. Supp. 295 (D.D.C. 1962) (review under § 1337 of informal settlement orders).

138. *See, e.g., Sacz v. Goslee*, 463 F.2d 214, 215 (1st Cir. 1972) (per curiam), *cert. denied*, 409 U.S. 1024 (1973); *Mayer v. Ordman*, 391 F.2d 889, 892 (6th Cir.) (per curiam), *cert. denied*, 393 U.S. 925 (1968).

139. The legislative history of § 3(d) indicates that Congress gave no thought to the availability of judicial review. *See* pp. 1353-56 *supra*. Upon a similar finding, the Supreme Court in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), approved judicial review of the Secretary of Labor's refusal to initiate a union election suit because there was no "showing of 'clear and convincing evidence' that Congress meant to prohibit" review. *Id.* at 568. Indeed, the Court based its conclusion on the express finding that Congress gave no "thought to the matter of the preclusion of judicial review." *Id.* at 567.

140. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (cited in *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

141. *See* 93 CONG. REC. 6859 (1947) (Sen. Taft) (analogizing duties of General Counsel to those of prosecuting attorney).

less factual determinations that go into a decision to prosecute, many courts have concluded that review of prosecutors' discretion is impracticable.¹⁴²

The "prosecutorial discretion" exercised by the General Counsel, however, is narrowly confined and therefore insufficient to render review of his decisions wholly impracticable. Unlike a criminal prosecutor, for example, the General Counsel has limited capacity to cite budgetary or manpower considerations as valid reasons for failing to bring a case before the Board.¹⁴³ More importantly, the General Counsel and his subordinates are given much clearer statutory guidelines concerning the investigation of cases than is the typical public prosecutor. NLRA §§ 10(l)¹⁴⁴ and (m)¹⁴⁵ give investigative priority to specified unfair labor practice charges, and § 10(l) directs the Regional Attorney to petition for injunctive relief if he has reasonable cause to believe certain types of violations have occurred.¹⁴⁶ Congress has made a judgment of the relative importance of statutory violations; any further judgments by the General Counsel go beyond congressional

142. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973); *Newman v. United States*, 383 F.2d 479, 480 (D.C. Cir. 1967). A further argument traditionally adduced in favor of unreviewable prosecutorial discretion is that under principles of "separation of powers," courts cannot tell criminal prosecutors, appointed by and responsible to the President, how to *execute* the laws of the United States. *Id.* But see *Nader v. Saxbe*, 497 F.2d 676 (D.C. Cir. 1974) (suggesting that failure to prosecute offenders under Federal Corrupt Practices Act is reviewable); Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 393-411 (1976) (noting limits on prosecutorial discretion enforceable by judicial review).

143. The proviso to NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1970), states that "[t]he Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." This proviso would prohibit the NLRB from using budgetary or manpower constraints as justifications for declining to exercise jurisdiction if such declination were inconsistent with pre-1959 jurisdictional standards. Since Congress precluded the Board from declining jurisdiction for budgetary reasons, it is hardly credible that Congress left the General Counsel free to refuse to issue a complaint for such reasons. This conclusion is strengthened by NLRA § 14(c)(2), 29 U.S.C. § 164(c)(2) (1970). Under that section, state labor agencies are permitted to take jurisdiction of labor disputes over which the NLRB has declined jurisdiction. Section 14(c)(2) was enacted in response to *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957), which created a "no-man's land" wherein the Board could decline to act, yet state jurisdiction was preempted. Since § 14(c)(2) is only effective to give the states jurisdiction when the Board declines it, any ad hoc jurisdictional standards applied by the General Counsel in refusing to file a complaint would recreate the problem that § 14(c)(2) was meant to cure: a wrong without a remedy.

144. 29 U.S.C. § 160(l) (1970) (mandating investigative priority for charges of secondary boycotts and certain recognition strikes).

145. *Id.* § 160(m) (1970) (mandating investigative priority, except for cases given priority under subsection (l), for charges of employment discrimination on account of union membership or nonmembership).

146. Compare 29 U.S.C. § 160(l) (1970) (directing Regional Attorney to file for appropriate injunctive relief after he has reasonable cause to believe complaint should issue) with *id.* § 160(j) (no requirement that Regional Attorney seek injunction for stated violations).

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intent.¹⁴⁷ Moreover, unlike the public prosecutor, the General Counsel does not operate in the context of a long tradition which recognizes as relevant to the prosecutorial decision factors other than the likelihood of proving a statutory violation.¹⁴⁸

Not only are the guidelines governing the General Counsel's decisions stricter than those governing the decisions of a public prosecutor, but the institutional structure in which the General Counsel operates precludes analogy to a district attorney. The Supreme Court explicitly rejected the analogy in *NLRB v. Sears, Roebuck & Co.*¹⁴⁹ The Court noted that the General Counsel, unlike most public prosecutors, may initiate proceedings only if a private citizen files a charge.¹⁵⁰ Unlike the victim of a crime, the charging party becomes a party to the NLRB proceedings if a complaint is filed.¹⁵¹ And if an unfair labor practice is found to exist, the ensuing cease and desist order will, unlike the punishment of a defendant in a criminal case, redound specifically to the benefit of the charging party.¹⁵² Another difference, not mentioned by the Court, is that victims of an unfair labor practice

147. No less disturbing than the possibility that the General Counsel will formulate a policy inconsistent with the statutory scheme in deciding what cases to bring is the possibility that he will follow no policy at all. The NLRB FIELD MANUAL (rev. ed. 1971), issued by the General Counsel to guide Regional Directors, contains no rules or statements of policy regarding issuance of complaints.

The Supreme Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), may have provided the General Counsel with an incentive to promulgate more definite guidelines for decisionmaking. In that case, the Court held that private parties should have access to Advice and Appeals Memoranda in which the General Counsel has taken the position that a complaint should not issue. Because inconsistency with prior administrative caselaw is a possible ground for overturning administrative decisions, the availability of the Advice and Appeals Memoranda, coupled with judicial review, might force the General Counsel to develop standards. See DAVIS TREATISE SUPP., *supra* note 21, at 981-82.

148. In the congressional debates concerning the creation of the General Counsel's office, there is no mention of factors that should enter into his decision not to issue a complaint other than inability to prove a violation. See, e.g., 96 CONG. REC. 3694 (1950) (Rep. Hoffman) ("Upon the filing of a complaint, it is [the General Counsel's] duty to prosecute if he considers that the alleged action constitutes a violation of the law."); p. 1353 *supra*.

149. 421 U.S. 132 (1975). The General Counsel contended that his Advice and Appeals Memoranda should not be discoverable under the Freedom of Information Act because they announce no agency policy or rule. See note 147 *supra*. Arguing that "he makes no law, [the General Counsel] analogiz[ed] his authority to decide whether or not to file a complaint to a public prosecutor's authority to decide whether a criminal case should be brought . . ." *Id.* at 156 n.22.

150. See 29 U.S.C. §§ 153(d), 160(b) (1970); 29 C.F.R. § 101.2 (1976).

151. *Id.* (citing *UAW Local 283 v. Scofield*, 382 U.S. 205, 219 (1965)).

152. *Id.* See *Bachowski v. Brennan*, 502 F.2d 79, 87 (3d Cir. 1974), *rev'd on other grounds sub nom. Dunlop v. Bachowski*, 421 U.S. 560 (1975) (rejecting analogy of Secretary of Labor to criminal prosecutor, since in seeking to remedy union election violations Secretary acts not only to vindicate governmental or societal interests but also "on behalf of those individuals whose rights have been infringed"). Cf. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (victim of crime does not benefit from punishment of criminal).

have virtually no alternative private remedies, whereas most victims of crime have a remedy in tort.¹⁵³

Finally, courts have rejected the extension of the doctrine of unreviewable prosecutorial discretion to agency enforcement of civil statutes. Courts have frequently been willing to review the exercise of prosecutorial discretion by administrators enforcing civil statutes,¹⁵⁴ including the Civil Rights Act of 1964;¹⁵⁵ the Securities Exchange Act;¹⁵⁶ the Merchant Marine Act;¹⁵⁷ the Federal Insecticide, Fungicide, and Rodenticide Act;¹⁵⁸ and the LMRDA.¹⁵⁹ These decisions reflect Professor Davis's warning that "the power not to prosecute may be of greater magnitude than the power to prosecute, and it certainly is much more abused because it is so little checked."¹⁶⁰

b. *Agency Discretion*

Closely related to the preclusion of review of prosecutorial discretion¹⁶¹ is the argument that the General Counsel's decisions are "com-

153. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 7-8 (4th ed. 1971).

154. See generally Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130 (1975). In fact, courts in recent years have even expressed a willingness to review discretionary prosecutorial decisions in *criminal* cases. See *Nader v. Saxbe*, 497 F.2d 676 (D.C. Cir. 1974); *NAACP v. Levi*, 418 F. Supp. 1109, 1116-17 (D.D.C. 1976).

155. See *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (ordering Secretary of HEW to commence proceedings to cut off funds to schools not in compliance with Title VI of the Civil Rights Act).

156. See *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972) (requiring SEC to explain its failure to require the inclusion of petitioner's proxy material in Dow Chemical's annual proxy statement).

157. See *Safir v. Gibson*, 417 F.2d 972, 977 (2d Cir. 1969) (remanding to Merchant Administrator to give reasons for failure to recover subsidies from shipping lines engaged in predatory anticompetitive practices).

158. See *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (remanding to Secretary of Agriculture for reconsideration of his refusal to suspend registration of pesticides).

159. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975) (requiring Secretary of Labor to provide better statement of reasons for his failure to bring suit to set aside union election); Note, *Dunlop v. Bachowski and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal for Administrative Reform*, 86 YALE L.J. 885, 887-88 nn.10-12 (1977) (courts have undertaken review of broad range of agency prosecutorial decisions under Title IV of LMRDA).

160. K. DAVIS, *DISCRETIONARY JUSTICE* 22 (1969).

161. In *Bachowski v. Brennan*, 502 F.2d 79, 84-88 (3d Cir. 1974), *rev'd on other grounds sub nom. Dunlop v. Bachowski*, 421 U.S. 560 (1975), the Third Circuit treated the Secretary of Labor's prosecutorial discretion contention as an argument that his decision not to bring suit to overturn a union election is action "committed to agency discretion by law." The Supreme Court affirmed the Third Circuit's holding that the Secretary's decision is reviewable and specifically approved its analysis of the prosecutorial discretion issue. 421 U.S. at 567 n.7. See Mahinka, *The Problem of Nonreviewability: Judicial Control of Action Committed to Agency Discretion*, 20 VILL. L. REV. 1, 25-35 (1974) (analyzing and criticizing prosecutorial discretion as a special problem under the "committed to agency discretion" exception to reviewability).

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mitted to agency discretion by law.”¹⁶² The NLRA contains no language specifically committing to the General Counsel’s discretion the decision not to issue a complaint. Nevertheless, this exception to judicial review may be inferred if the relevant statutory language is so broad as to provide a reviewing court with no standards to apply,¹⁶³ or if judicial review would be so intrusive as to disrupt the administrative process contemplated by the statute.¹⁶⁴ The Supreme Court, however, has described this exception to the rule of judicial review as “very narrow.”¹⁶⁵ Examination of the available statutory standards and the administrative structure of the General Counsel’s office indicates that the exception should not be invoked here.

As noted above, the legislative history of § 3(d) evinces no congressional intent to give the General Counsel unbridled discretion over the issuance of complaints;¹⁶⁶ what is more, Congress provided standards in the statute to rein his discretion.¹⁶⁷ Even in the absence of explicit provisions such as those in the NLRA, the courts have been able to discover clear guidelines through resourceful statutory in-

162. 5 U.S.C. § 701(a)(2) (1970).

163. S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-46, at 185, 212 (1946) [hereinafter cited as APA LEGISLATIVE HISTORY]: “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 review.” See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

164. See, e.g., *Hahn v. Gottlieb*, 430 F.2d 1243, 1250 (1st Cir. 1970) (adverse impact of judicial review on agency effectiveness one factor in holding that courts should not review FHA rent decisions); Saferstein, *supra* note 5, at 371, 377 (suggesting that agency’s unreviewable discretion can be inferred from “general congressional scheme entrusted to the agency—its subject matter, purpose, background, legislative history, and practice”).

165. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Kerr-McGee Corp. v. Morton*, 527 F.2d 838, 839 (D.C. Cir. 1975) (following *Overton Park*; Secretary of Interior’s decision to award oil and gas leases); *Kelley v. Butz*, 404 F. Supp. 925, 930 (W.D. Mich. 1975) (following *Overton Park*; U.S. Forest Service’s decision to spray defoliants in national forest).

It is arguable that Congress intended the “committed to agency discretion” exception to be merely a limitation on the scope of review, rather than a bar to review altogether. See H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 163, at 233, 275:

Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. . . . 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. See also 92 CONG. REC. 2153-54 (1946), *reprinted in id.* at 295, 311 (colloquy between Sen. McCarran, Senate sponsor of APA, and Sen. Donnell noting that provision for judicial review for *abuse* of discretion supersedes “committed to agency discretion” exception to review); Saferstein, *supra* note 5, at 372.

166. See p. 1353 & note 148 *supra*.

167. See pp. 1380-81 *supra*.

terpretation.¹⁶⁸ Indeed, the clarity that is held to be a precondition of review has often been largely a judicial creation. In *Bachowski v. Brennan*,¹⁶⁹ for example, the Third Circuit decided that the language of LMRDA § 402(b)¹⁷⁰ requires the Secretary of Labor to bring a union election suit whenever he finds a member's complaint meritorious; this finding, said the Court, entails a "rather straightforward factual determination."¹⁷¹ In *Adams v. Richardson*,¹⁷² the Court inferred standards for review from the precision of the Civil Rights Act of 1964 in detailing specific enforcement procedures.¹⁷³

Furthermore, judicial review of the General Counsel's refusal to issue a complaint would not involve judicial interference with expert judgments that Congress meant to be in the exclusive province of an administrative agency. First, the Board, not the General Counsel, is charged with expert policymaking under the Act. This policymaking function has always been exercised in conjunction with reviewing courts. Secondly, courts reviewing the General Counsel's decisions need not—indeed should not—decide whether a violation of the statute has occurred. Even if a court compels the issuance of a complaint, the Board retains primary jurisdiction to decide its merits. Review of the General Counsel's decision would focus instead on questions within the peculiar expertise of courts: (1) Are the General Counsel's reasons for not issuing the complaint clear and precise? (2) Are his reasons consistent with the NLRA, Board and court precedents, and the General Counsel's own past policies? (3) Does the General Counsel's refusal rest on a legal theory that the Board needs to address in order to clarify the labor law?¹⁷⁴

168. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (mandatory standards governing Secretary of Transportation's decisions to authorize funding of highways through parks); *Wong Wing Hang, v. INS*, 360 F.2d 715 (2d Cir. 1966) (deriving standards governing deportation decision from agency policies and congressional purpose). Cf. *Saferstein, supra* note 5, at 372 (courts have been flexible in reviewing broad range of discretionary decisions).

169. 502 F.2d 79 (3d Cir. 1974), *rev'd on other grounds sub nom. Dunlop v. Bachowski*, 421 U.S. 560 (1975).

170. 29 U.S.C. § 482(b) (1970): "The Secretary *shall* investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he *shall*, within sixty days after the filing of such complaint, bring a civil action against the labor organization . . ." (emphasis added).

171. 502 F.2d at 88. On appeal, the Supreme Court failed to discuss explicitly the standards governing the Secretary of Labor's decision not to bring a Title IV suit, but the Court did incorporate the Third Circuit's analysis into its opinion. See 421 U.S. at 567 n.7 ("We agree with the Court of Appeals, for the reasons stated in its opinion, . . . that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion.")

172. 480 F.2d 1159 (D.C. Cir. 1973).

173. *Id.* at 1162 (construing 42 U.S.C. § 2000d-1 (1970)).

174. In *Southern Cal. Dist. Council of Laborers, Local 1184 v. Ordman*, 318 F. Supp. 633 (C.D. Cal. 1970), the General Counsel was ordered to investigate charges after he had

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Finally, there is no basis on which a court could infer from the NLRB's administrative structure that judicial review is inconsistent with congressional intent. The General Counsel exercises a screening function much like that which the Secretary of Labor exercises over union election complaints under Title IV of the LMRDA. Both have exclusive power to initiate proceedings under the statutes they are respectively charged with enforcing.¹⁷⁵ In *Dunlop v. Bachowski*, the Supreme Court held that the Secretary of Labor's screening function is not impaired by judicial review of his initial decision not to commence proceedings.¹⁷⁶ There is no reason for reaching a different conclusion with respect to the General Counsel.

IV. Effective Judicial Scrutiny: Scope and Standards of Review

Having concluded that the General Counsel's decision not to issue a complaint is reviewable, a court must determine the appropriate scope of review. At a minimum, the reviewing court must examine the General Counsel's reasons for his decision in order to ascertain that the decision has an articulated basis. Beyond this, the court should analyze the reasons statement to determine whether the decision is "arbitrary or capricious," or in excess of the General Counsel's statutory authority. If the court remands for additional reasons and the General Counsel fails to take appropriate action or to justify his inaction, judicial review can be effective only if the reviewing court is empowered to compel issuance of a complaint.

A. Review of Reasons Statement

Although there is no formal agency record for the reviewing court to examine, it can require the General Counsel to provide the charging party with a statement outlining the reasons for his action and

refused to do so on the grounds that they had been filed too late. The Court held it had the power to compel investigation because its order dealt only with a preliminary question, not with whether a complaint should issue, and because the interpretation of the time limit for filing complaints under NLRA § 10(b), 29 U.S.C. § 160(b) (1970), is a "purely legal question" (emphasis added).

175. Compare NLRA § 3(d), 29 U.S.C. § 153(d) (1970), with LMRDA § 403, 29 U.S.C. § 483 (1970) ("The remedy provided by this subchapter [*i.e.*, the Secretary's suit] for challenging an election already conducted shall be exclusive.") See *Calhoun v. Harvey*, 379 U.S. 134, 140 (1964) (Secretary of Labor has exclusive authority to initiate post-election suit to remedy union election violations). Indeed, courts have granted judicial review of the Secretary's decisions in part because "the very exclusivity of the remedy serves to emphasize the necessity of some degree of Court supervision." *Bachowski v. Brennan*, 502 F.2d 79, 85 (3d Cir. 1974) (quoting *DeVito v. Shultz*, 300 F. Supp. 381, 382 (D.D.C. 1969)).

176. *Dunlop v. Bachowski*, 421 U.S. 560 (1975). But see Note, *supra* note 159, at 889-96 (arguing that judicial review under Title IV of LMRDA does impair important statutory goals).

relating those reasons to administrative, judicial, or statutory authority.¹⁷⁷ The least intrusive form of judicial review demands that the court scrutinize the reasons statement to ensure that it sufficiently discloses the facts, policies, and statutory provisions on which the General Counsel has relied. Under this form of review, a court may remand the statement to the agency if it finds that the agency "has not sufficiently rationalized its action or has used irrelevant or failed to use relevant standards of judgment."¹⁷⁸ By requiring the General Counsel to explain inconsistencies or departures from earlier policy and to reconsider inadequately articulated decisions, courts can ensure that the General Counsel develops consistent standards to govern his discretion.¹⁷⁹ Judicial scrutiny will protect against careless actions by assuring that crucial facts and legal concepts are considered,¹⁸⁰ and will direct political and administrative attention to the policy considerations that may have influenced the General Counsel's judgment. Currently there is little congressional awareness of how the General Counsel interprets the NLRA. Greater familiarity with his interpretations would facilitate congressional oversight of his policy choices and could lead to statutory clarification where necessary.¹⁸¹ The Board may be little better informed on this score than Congress;¹⁸² were it

177. Even leaving aside the question of judicial review, the APA would seem to require the General Counsel to give the charging party a statement of reasons when he declines to proceed. The APA requires notice and "a brief statement of the grounds" for agency denial of "a written application, petition, or other request of an interested person made in connection with any agency proceedings." 5 U.S.C. § 555(e) (1970). "Agency proceedings" include agency adjudications that result in an "order," *id.* § 551(7), (12), and the decision of the General Counsel not to issue a complaint is an order. *See* note 137 *supra*. *Cf.* *Dunlop v. Bachowski*, 421 U.S. 560, 593-94 (1975) (Rehnquist, J., dissenting) (§ 555(e) requires Secretary of Labor to issue statement of reasons for not bringing suit). At present, the General Counsel does provide the charging party with a statement of reasons when he declines to issue an unfair labor practice complaint. *See* 29 C.F.R. §§ 101.6, 102.19 (1976).

178. JUDICIAL CONTROL, *supra* note 31, at 103. *See, e.g.,* *Bachowski v. Brennan*, 405 F. Supp. 1227, 1234 (W.D. Pa. 1975) (remanding reasons statement to Secretary for supplementation because the original statement inadequately disclosed the rationale for his decision).

179. Congressional critics have on occasion found such consistency wanting. *See* note 45 *supra*.

180. *See* *Dunlop v. Bachowski*, 421 U.S. 560, 575 (1975); *Childs v. United States Bd. of Parole*, 511 F.2d 1270, 1287 (D.C. Cir. 1974) (Leventhal, J., concurring).

181. For example, between 1947 and 1956 the General Counsel refused to issue complaints against unions that engaged in organizational picketing after they had lost a representation election. When the General Counsel finally issued a complaint on the theory that § 8(b)(1)(A) barred such conduct, attention was drawn to the issue and Congress acted to clarify the situation in 1959 by enacting § 8(b)(7), 29 U.S.C. § 158(b)(7) (1970). *See* McGuiness, *supra* note 44, at 389-90.

182. The Board was evidently surprised to learn in connection with the *Connell Construction Co.* antitrust litigation that the General Counsel had prevented it from deciding the validity of certain subcontracting agreements. *See* 1975 NLRB Hearings, *supra* note 25, at 41 (statement of NLRB Chairman Betty Murphy); pp. 1366-68 *supra*.

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better informed, the Board might be tempted to reassert its policy-making authority by utilizing its rulemaking power.¹⁸³

Beyond requiring the General Counsel to provide detailed reasons for not issuing a complaint, courts may review his reasons statements under the APA to determine if he has exceeded his statutory authority¹⁸⁴ or if his decision constitutes an abuse of discretion, *i.e.*, is "arbitrary and capricious."¹⁸⁵ The first task of a reviewing court is to define the ambit of the administrator's authority and discretion under the statute.¹⁸⁶ As a rule, the General Counsel should issue a complaint

183. See Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 752-61 (1961). Once the Board had made a rule, the General Counsel's failure to issue a complaint in accordance with it would be evidence of an abuse of discretion.

184. See APA § 10(e), 5 U.S.C. § 706 (1970):

The reviewing court shall—

....

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

....

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

185. See APA § 10(e), 5 U.S.C. § 706 (1970):

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

The "arbitrary and capricious" standard is the basic formula for review of informal agency action, *i.e.*, action for which the APA requires no formal hearing and record. See, *e.g.*, *Camp v. Pitts*, 411 U.S. 138, 140, 142 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-16 (1971). Cf. *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975) ("arbitrary and capricious" standard appropriate for review of Secretary of Labor's decision not to file suit to set aside union election).

It is clear that a formulaic description of the standard of review does not necessarily determine the intensity of the review undertaken. See 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 118 (1958). Occasionally review may be given an especially narrow compass in order to prevent the court from substituting its judgment on issues properly left to the administrator. The issues confronting the Secretary of Labor in enforcing Title IV primarily concern inferences about the effects on union elections of conceded irregularities, issues upon which the Secretary can be expected to have substantial experience. *Calhoun v. Harvey*, 379 U.S. 134, 140 (1964). Accordingly, review has been limited to an examination of the Secretary of Labor's reasons statement to determine whether his decision was reached "for an impermissible reason or for no reason at all." *Dunlop v. Bachowski*, 421 U.S. 560, 571-74 (1975). In contrast, the General Counsel's decisions frequently involve legal issues within the traditional ambit of judicial expertise and thus judicial scrutiny should be more intense. Moreover, the especially limited scope of review in *Bachowski* was dictated by the special time pressures in Title IV suits resulting from a congressional mandate to settle union election disputes "as quickly as practicable." *Id.* at 573.

186. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). Cf. *Safir v. Gibson*, 417 F.2d 972, 976 (2d Cir. 1969), *cert. denied*, 400 U.S. 850 (1970) ("Discretion . . . is not self defining; it does not arise parthenogenetically from 'broad' phrases. Its contour is determined by the courts, which must define its scope and its limit") (quoting *JUDICIAL CONTROL*, *supra* note 31, at 572).

whenever the facts *arguably* constitute an unfair labor practice.¹⁸⁷ The Act and its legislative history, decisions of the Board and courts, and the General Counsel's own past policy¹⁸⁸ provide objective standards for making this determination. Specific statutory restrictions, for example, limit the Board's power to decline jurisdiction over parties on the grounds the business involved is too small to warrant attention;¹⁸⁹ for this reason, courts should refuse to countenance a similar justification for the General Counsel's declining to proceed. Similarly, one may infer from cases involving review of informal settlement orders that a purpose to effect a quick end to tensions between parties is not a valid reason for refusing to issue a complaint when an unremedied violation of the Act has occurred.¹⁹⁰

When courts can enunciate standards to govern an administrator's discretion, the "scope of authority" and "arbitrary and capricious" formulae have real bite. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹⁹¹ for example, the Court found clear standards in § 4(f) of the Transportation Act of 1966,¹⁹² which prohibits the authorization of funds to finance construction of highways through parks where a "feasible" and "prudent" alternative route exists. Rejecting the Secretary of Transportation's argument that the statute required the discretionary balancing of many factors, the Court held that authorization is permitted only where "as a matter of sound engineering it would not be feasible to build the highway along any other route."¹⁹³ Although the Secretary's decision was entitled to a presumption of regularity, that presumption could not operate to shield his determination from a "thorough, probing, and in-depth review."¹⁹⁴

187. See note 148 *supra*. There may be some reasons, apart from a determination that no unfair labor practice has occurred, for a refusal to issue a complaint. Deference to a completed or ongoing arbitration proceeding might be such a reason. See *Collyer Insulated Wire*, 192 N.L.R.B. 830, 77 L.R.R.M. 1931 (1971) (Board will defer to future arbitration where employer conduct complained of allegedly violated both § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), and the collective bargaining agreement).

188. Particularly relevant would be the General Counsel's "policy" of issuing complaints in close cases. See notes 44, 48 & 73 *supra*. Moreover, the General Counsel's Advice and Appeals Memoranda constitute agency policy if they pertain to denial of a complaint. See note 67 *supra*.

189. See p. 1380 & note 143 *supra*.

190. See, e.g., *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527, 536 (3d Cir. 1966) (where important issues of labor policy are at stake, General Counsel cannot settle complaint without adjudicative hearing).

191. 401 U.S. 402 (1971).

192. 49 U.S.C. § 1653(f) (1970).

193. 401 U.S. at 411.

194. *Id.* at 415. The district court on remand was authorized even to question the administrators in order to discern how they had construed the administrative record before them. *Id.* at 420. The Secretary reconsidered his decision after a hearing in the

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To say that judicial review of the General Counsel's decisions should be incisive, however, is not to suggest that it will be boundless. The General Counsel's refusal to issue a complaint is informal agency action, *i.e.*, action without an adjudicative hearing. Hence, courts will not review the General Counsel's statement to determine whether it is supported by substantial evidence, nor will they conduct a *de novo* factual inquiry.¹⁹⁵ The General Counsel's findings of fact, in other words, will be binding on the reviewing court.¹⁹⁶ This will pose no problem, since a primary purpose of judicial review will be to encourage the General Counsel to develop new areas of *law* for the Board's consideration.¹⁹⁷

B. *Compelling the Issuance of a Complaint*

If a court finds the General Counsel's reasons statement inadequate, it may remand for appropriate action. In the rare case in which the General Counsel subsequently fails to issue a complaint or to supply the court with suitable reasons for not doing so, effective judicial review requires that the court be able to compel the General Counsel to proceed.

In *Dunlop v. Bachowski*,¹⁹⁸ the Supreme Court mentioned several objections to a judicial order compelling the Secretary of Labor to

district court and reversed his earlier approval of the Overton Park route. *See Citizens to Preserve Overton Park, Inc. v. Brinegar*, 494 F.2d 1212 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

195. *Cf.*, *e.g.*, *Camp v. Pitts*, 411 U.S. 138, 140-42 (1973) (Comptroller of the Currency's decision, not based on formal agency action or hearing, is reviewable only under "arbitrary and capricious" standard, not reviewable under "substantial evidence" standard, and reviewing court may undertake no *de novo* factual inquiry).

196. *But see Dunlop v. Bachowski*, 421 U.S. 560, 574 (1975) (suggesting that *de novo* review of informal agency action would be permitted where an administration's decision is "'plainly beyond the bounds of the [statute or] clearly defiant of the [statute]'" (quoting *DeVito v. Shultz*, 72 L.R.R.M. 2682, 2682 (D.D.C. 1969)).

197. *See pp.* 1361-71 *supra*. Distinctions between law and fact, of course, may not always be clear, and the General Counsel's classification does not bind a reviewing court. For example, in an unfair labor practice case involving employer activity before a union representation election, the General Counsel may conclude that sufficient evidence of a violation does not exist. This apparently factual determination may implicate one of two different findings: (1) the alleged activities never occurred, or (2) the actions did occur but had no effect on the election. In the latter event, the case is perhaps one for the Board, for the Board may derive from the statute a *per se* rule against certain employer actions. The General Counsel's failure to issue a complaint based upon the second type of "factual" determination could thus be erroneous as a matter of law. *Cf. Bachowski v. Brennan*, 413 F. Supp. 147 (W.D. Pa.), *appeal dismissed*, 545 F.2d 363 (3d Cir. 1976) (distinguishing between Secretary of Labor's findings of union election irregularities and his inferences as to what effect those irregularities may have had on the election's outcome).

198. 421 U.S. 560 (1975).

bring suit in a union election case.¹⁹⁹ Those objections, both statutory and constitutional, apply with considerably less force to the General Counsel. The statutory issue raised in *Bachowski* was whether "the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary" precluded a court from ordering him to bring suit.²⁰⁰ In contrast, the broad policymaking and exclusive enforcement authority under the NLRA is vested in the Board; the General Counsel's discretion is limited to determining whether the Board will probably take jurisdiction to adjudicate a particular controversy. The major constitutional issue raised in *Bachowski* was whether "Articles II and III . . . 'countenance a court order requiring the executive branch, against its wishes, to institute a lawsuit in federal court.'"²⁰¹ The General Counsel's decision whether to issue a complaint, however, is merely the first step in an *agency* process; by compelling the General Counsel to initiate that process, a court would not usurp the Board's enforcement authority, nor would it dictate to the Board what result it must reach.

Ample precedent exists for compelling the issuance of a complaint. Courts in numerous cases have ordered agency action analogous to the General Counsel's issuance of a complaint.²⁰² In *Adams v. Richardson*,²⁰³ for example, the Court distinguished between compelling an

199. *Id.* at 575-76 (leaving open question whether reviewing court can compel Secretary to file Title IV suit). See generally Note, *supra* note 159, at 900-03 (arguing that Secretary's broad statutory discretion and notions of separation of powers preclude courts from compelling Secretary to bring suit). In a separate opinion, Justice Rehnquist forcefully asserted that the majority's logic presupposed an affirmative answer to that question. 421 U.S. at 592 (Rehnquist, J., concurring in the result in part and dissenting in part). Indeed, the majority's adjuration to lower courts that they "must be mindful . . . that endless litigation concerning the sufficiency of the [Secretary's reasons] statement is inconsistent with the statute's goal of expeditious resolution of post-election disputes," *id.* at 574-75, could be taken to indicate that a court should compel suit if the Secretary showed himself incapable of producing an adequate statement of reasons.

200. *Id.* at 575.

201. *Id.* at 575 n.12. Cf. *Nader v. Saxbe*, 497 F.2d 676, 679 nn.18 & 19 (D.C. Cir. 1974) (judicial usurpation of prosecutor's "executive function of deciding whether a particular alleged violator should be prosecuted" contravenes "Art. II, § 3 of the Constitution, which charges the President to 'take Care that the Laws be faithfully executed'").

A second constitutional argument urged in *Bachowski* was that a judicially compelled lawsuit would lack "the requisite adversity of interest to constitute a 'case' or 'controversy' as required by Article III," inasmuch as the Secretary and union would agree that no new election was required. 421 U.S. at 575 n.12. This argument has no relevance to the issue of compelling the General Counsel to initiate proceedings before the Board, since the Board is not an Article III court and is subject to no "case" or "controversy" requirement.

202. Cf. APA § 10(e), 5 U.S.C. § 706(1) (1970):

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed

203. 480 F.2d 1159 (D.C. Cir. 1973).

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agency to commence proceedings and dictating the outcome of those proceedings.²⁰⁴ It ordered the Secretary of HEW to commence proceedings that might lead to termination of certain school funding. The CAB was ordered in *Trailways of New England, Inc. v. CAB*²⁰⁵ to initiate investigatory proceedings to determine whether certain airline fares were unjustly discriminatory. In *Templeton v. Dixie Color Printing Co.*,²⁰⁶ the Fifth Circuit held unlawful the NLRB's refusal to proceed with a decertification petition and compelled the agency to "proceed forthwith to perform its duties" of investigation and adjudication.²⁰⁷ The court was careful to distinguish this order from one directly ordering decertification and a new representation election.²⁰⁸ Finally, an Eighth Circuit decision, *Terminal Freight Handling Co. v. Solien*,²⁰⁹ suggests that a Regional Director can be compelled to seek an injunction in an unfair labor practice case under NLRA § 10(l).²¹⁰

Judicial power to compel a complaint is necessary if judicial review of the General Counsel is to be effective.²¹¹ First, it is possible that the General Counsel, regarding his original decision as valid and well-considered, may respond to successive remands by providing successive post hoc rationalizations in a protracted struggle to uphold his posi-

204. *Id.* at 1163-64.

205. 412 F.2d 926 (1st Cir. 1969).

206. 444 F.2d 1064 (5th Cir. 1971).

207. *Id.* at 1066. *Templeton* involved representation cases, which are initiated by the Board itself; the General Counsel initiates unfair labor practice cases. Since the Board in *Templeton* was performing prosecutorial duties analogous to those performed by the General Counsel in unfair labor practice cases, *Templeton* suggests that no "separation of powers" problems inhere in a court's ordering the General Counsel to bring an issue before the Board.

208. *Id.* at 1066-67.

209. 444 F.2d 699 (8th Cir. 1971), *cert. denied*, 405 U.S. 996 (1972) (construing 29 U.S.C. § 158(l) (1970)).

210. The court held that if the Regional Director determines that charges are true and cannot obtain cessation of the activity, he must petition for a temporary injunction. *Id.* at 708. Because the action was one for declaratory judgment, the issue of the court's power to compel the Regional Director was not decided. *Id.* at 709-10.

211. Notwithstanding its power to compel action by the General Counsel, a court should usually remand an inadequate reasons statement. If the statement inadequately discloses his reasons for refusing to issue the complaint, the General Counsel should have a chance to supplement his statement. If the statement is "arbitrary and capricious," the General Counsel should have a chance to investigate the charge further or reconsider his decision in the light of the court's misgivings. But when the General Counsel fails to "proceed appropriately" a reviewing court should compel issuance of the complaint. *Cf. Dunlop v. Bachowski*, 421 U.S. 560, 574-76 (1975). Constant remands must be avoided, for they ill serve the goals of the NLRA and judicial review. *Cf. Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098-1100 (D.C. Cir. 1970) (remanding Secretary of Agriculture's refusal to suspend registration of pesticides, with implication that court would compel suspension if further judicial relief were necessary).

tion. Such a stalemate would undermine judicial review and discourage litigants from testing the General Counsel's decisions.²¹²

More importantly, there may be cases in which the General Counsel has given a reasonable statutory interpretation on an issue for which precedent is slight or conflicting. Since the absence of a statutory violation is an adequate ground for refusing to issue a complaint and the court cannot say that the General Counsel's interpretation is clearly wrong, a remand serves no purpose. Yet to affirm the General Counsel's decisions whenever they are arguably correct is to make him the final arbiter of the NLRA when new issues arise. To protect the NLRB's policymaking authority, the reviewing court must be allowed to overturn the General Counsel's refusal to bring new issues before the Board.²¹³

The importance of preserving the Board's policymaking authority,²¹⁴ of course, does not require the issuance of a complaint whenever the legal rule applied by the General Counsel is "arguably" inapposite. Otherwise, the General Counsel would serve no screening function at all. The factors that should enter into a court's decision to compel issuance of a complaint resemble those that govern the Supreme Court's decision to grant certiorari. A reviewing court should consider

212. *Cf. Trailways of New England, Inc. v. CAB*, 412 F.2d 926 (1st Cir. 1969) (rather than remanding the case, court ordered the CAB to conduct the investigation that complainant requested).

213. Obviously, it is harder to overrule arguably correct statutory interpretations by the General Counsel under the "arbitrary and capricious" standard of review than to overturn a decision predicated on factors inconsistent with his prior handling of charges or patently at odds with current law. The rationale for requiring the General Counsel to bring important new issues before the Board parallels the view expressed by Learned Hand in *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 789 (2d Cir. 1946):

[T]he position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. If he surrenders a plausible construction, it will, at least it may, be surrendered forever; and yet it might be right.

In *Connell Constr. Co. v. Plumbers Local 100*, 483 F.2d 1154, 1175 (5th Cir. 1973), *rev'd on other grounds*, 421 U.S. 616 (1975), the court warned that repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion. For discussion of the *Connell* litigation, see p. 1365 *supra*.

214. One indication of Congress's desire to preserve the Board's policymaking functions is its rejection of Reorganization Plan No. 5 in 1961. The Plan would have made the hearing examiner's decision final unless two Board members voted to hear the case. Congress rejected the Plan because it feared that the Plan would remove important decisions from the hands of those to whom Congress had expressly delegated policymaking authority. See 107 CONG. REC. 10223 (1961) (Senator Dirksen); *Pepsi-Cola Buffalo Bottling Co. v. NLRB*, 409 F.2d 676, 680-81 (2d Cir.), *cert. denied*, 396 U.S. 904 (1969).

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the novelty and difficulty of the legal issue decided by the General Counsel, its significance and relevance to the policies embodied in the NLRA, and the importance of the outcome to the private parties involved. The court should not resolve the question, but decide only whether it is one the Board should hear.²¹⁵

215. There are other circumstances in which courts grant limited relief prior to the Board's disposition on the merits. Under NLRA §§ 10(j), (l), 29 U.S.C. §§ 160(j), (l) (1970), courts may grant injunctive relief in certain specified instances prior to a Board ruling. In ruling upon motions for injunctive relief, the courts have stressed that they do not decide the merits of the charge. *See, e.g., Kennedy v. Sheet Metal Workers Int'l Ass'n Local 108*, 289 F. Supp. 65, 87-89 (C.D. Cal. 1968).

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