

Winter 1964

Veterans' Benefits, Judicial Review, and the Constitutional Problems of Positive Government

Frederick Davis
Emory University

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Constitutional Law Commons](#), [Labor and Employment Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Davis, Frederick (1964) "Veterans' Benefits, Judicial Review, and the Constitutional Problems of Positive Government," *Indiana Law Journal*: Vol. 39 : Iss. 2 , Article 1.

Available at: <http://www.repository.law.indiana.edu/ilj/vol39/iss2/1>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

INDIANA LAW JOURNAL

Volume 39

WINTER 1964

No. 2

VETERANS' BENEFITS, JUDICIAL REVIEW, AND THE CONSTITUTIONAL PROBLEMS OF "POSITIVE" GOVERNMENT

FREDERICK DAVIS†

If a chartered commercial bank refused to honor a depositor's check because of an illegality in some collateral transaction, or because of the low state of the depositor's morals, legal redress for the victim would be swift and sure. Similarly, a resolution by corporate directors limiting dividend distributions to shareholders who are willing to execute loyalty affidavits might not be expected to survive a representative suit brought by those aggrieved. Yet, at least in the theoretical sense, a veteran can currently be denied benefits solely on grounds almost as irrelevant and arbitrary as those hypothesized above.

This anomalous gap in the celebrated "American system of justice"¹ has received scant attention from either courts or commentators, although it cries for reform.² Moreover, even a casual review of the judicial and legislative attitude towards benefits claimants suggests that such attitudes are shaped more by moralistic reservations concerning the desirability of such programs in the first place than they are by allegiance to the concept of "equal justice under law."

The absence of a substantial body of law dealing with benefits claims in American administrative law is contrary to the experience of such con-

† Professor of Law, Emory University.

1. The characterization of a tradition which refuses to approve of administrative illegality, however manifested, as the "American system of justice" is eloquently set forth in an old California decision: "[U]nder the American system of justice it is the policy of our law that a person should not even be deprived of a permit . . . without a fair and impartial hearing. . . ." *Irvine v. State Bd. of Equalization*, 40 Cal. App. 2d 280, 104 P.2d 847, 850 (1940).

2. The following cases hold that even if the action of the Veterans' Administration (hereinafter referred to as V.A.) is arbitrary and capricious, no relief is available under the "no-review" clause. 38 U.S.C. § 211(a) (1958). *Sinlao v. United States*, 271 F.2d 846 (D.C. Cir. 1959); *Hahn v. Gray*, 203 F.2d 625 (D.C. Cir. 1953); *Van Horne v. Hines*, 122 F.2d (D.C. Cir. 1941). See also Letter From Mr. G. H. Hyde, Chief, Benefits and Facilities Section of the V.A. Regional Center at St. Paul, Minn., to Martin Weeks, of Vermillion, S. D., April 6, 1961, in connection with the claim of Mr. Kenneth Steinmasel (see discussion in notes 63-79 *infra* and accompanying text): "I regret that Congress in writing the law provided no escape for this office from the decision made here."

tinental European countries as France.³ In fact, it may be suggested that in France, and on the Continent generally, administrative law tends to reflect a genuine concern for justice in the administration of social benefit and welfare programs.⁴ In the United States, on the other hand, the primary concern has been with the regulation of business excesses, while preserving a maximum entrepreneurial freedom, and the establishment of limitations on the discretion exercised in the allocation of resources. One result is that in the United States few attorneys and even fewer law students have ever been confronted with the unique legal problems presented by benefits claimants. Similarly, despite the widely heralded advent of the welfare state in Britain, administrative law problems in that country have centered mainly upon property control⁵ and occupational licensing,⁶ and, as might be expected, British courts have approached the "benefits" or "status" problems with comparable artlessness.⁷

The differing weights given these benefits interests under the various systems of administrative law account in large measure for the difficulties which beset the comparative scholar and may help to explain Dicey's naïve remark that the common-law system has no "droit administrative."⁸ They also reflect the pervasiveness of the "Protestant ethic,"⁹

3. In France, the administrative tribunals and the Council of State, as the appellate body, have jurisdiction to remedy every official abuse of discretion, and are therefore more concerned with such individual rights as pension payments and job security. See Deak & Rheinstejn, *The Machinery of Law Administration in France and Germany*, 84 U. PA. L. REV. 846, 858-61 (1936); Letourneur & Hamson, *Executive Powers in France*, 11 CAMB. L.J. 258 (1952).

4. *E.g.*, Ribeyrolles, Conseil d'Etat, Jan. 17, 1930, [1930] Section du contentieux R. 76 (revocation of educational benefits reversed); Goujon, Conseil d'Etat, May 5, 1928, R. 576 (failure to extend required increase in pension payments). Both cases have been translated and reproduced in VON MEHREN, *THE CIVIL LAW SYSTEM* 283, 291 (1957). See also PEKELIS, *LAW AND SOCIAL ACTION* 83-87 (1950); Gormley, *The Significant Role of French Administrative Jurisprudence*, 8 S.D.L. REV. 32 (1963).

5. Three of the most widely celebrated British administrative law cases concern housing and real property. *Franklin v. Minister of Town & Country Planning*, [1948] A.C. 87; *Rex v. Minister of Health (Ex parte Yaffe)*, [1931] A.C. 494; *Local Gov't Bd. v. Arlidge* [1915] A.C. 120.

6. *E.g.*, *Regina v. Metropolitan Police Comm'r (Ex parte Parker)*, [1953] 2 All E. R. 717 (Q.B.); *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66; *General Medical Council v. Spackman*, [1943] A.C. 627. See also Frederick Davis, *Must a Licensing Authority Act Judicially?*, 32 N.Z.L.J. 360 (1956), 18 N.Z.J. PUB. AD. 45 (1956).

7. *E.g.*, *Ex parte Fry*, [1954] 1 Weekly L. R. 730 (no judicial review of "disciplinary" action); *Healy v. Minister of Health*, [1955] 1 Q.B. 221 (C.A. 1954) (no review of pension status); *Rex v. Northumberland Compensation Appeal Tribunal (Ex parte Shaw)*, [1952] 1 K.B. 338 (C.A. 1951) (review by certiorari to correct error of law not on the record approved, but court's reasons for departing from traditional views are tortured and unconvincing); *Rex v. Inspector of Leman St. Police Station (Ex parte Venicoff)*, [1920] 3 K.B. (deportation order unreviewable).

8. "In England, and in . . . the United States . . . the system of administrative law and the very principles on which it rests are in truth unknown." DICEY, *LAW OF THE CONSTITUTION* 330 (9th ed. 1939).

9. In the context used here, the "Protestant ethic" identifies that ascetic char-

which, in the Anglo-American legal system, has had the effect of denigrating the interest of a legitimate benefits claimant to the point where it receives far less protection than those interests which are violated by what is traditionally described as a "tort" or a "breach of contract." At least this is a hypothesis which is suggested by the following review of the legislative history of the Veterans' Benefits Act¹⁰ and the litigation which it has provoked. Although the statutes under which other benefits programs in our nation are administered do not generally permit the same degree of arbitrary action by the administrator as does the Veterans' Benefits Act, the judicial attitude toward the nature of the interests created by such statutes appears to be the same.¹¹

I. HENRY VIII IN AMERICA: 38 U.S.C. § 211(a) (1958)

Although congressional limitation of judicial power is not an unknown phenomenon in the United States, no more extreme example exists than the "no-review" provisions which have appeared in our veterans' benefits laws. The current provision reads:

(a) Except as provided in sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a

acteristic of Puritanism and Calvinism which condemns the receipt of any economic advantage unless the recipient has given a corresponding economic advantage in exchange, even though he may have had insufficient opportunity to do so. See DEFOE, *Giving Alms is No Charity*, in *THE SHORTEST WAY WITH THE DISSIDENTS* 153-88 (1927); LEONARD, *EARLY HISTORY OF ENGLISH POOR RELIEF* (1900); and, of course, that masterful exposure and explanation of the heresy in WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 155-83 (5th ed. 1956). An excellent example of the way in which this ethic can move judicial judgment appears in the opinion of Mr. Justice Sutherland, denying a permanent disability allowance to a one-armed World War I veteran who was arguably within a statutory classification which made the loss of an arm a permanent disability: "He was . . . not without resources with which to obtain proper training. It does not appear that he undertook to do so. It is by no means infrequent for one-armed men to make a good living and support others by performing work adapted to their condition." *Miller v. United States*, 294 U.S. 435, 441 (1934).

10. In 1958 Congress revised, codified and enacted Title 38 of the United States Code entitled "Veterans' Benefits Act." That title is a consolidation of all previous laws relative to the powers, authority and junctions of the V.A. 38 U.S.C.A. V (1959).

11. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (no recovery on insurance policy bought on the basis of a misrepresentation by a government official); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840) (widow denied recovery of pension to which she was ex facie entitled by statute); *Soderman v. United States Civil Service Comm'n*, 313 F.2d 694 (9th Cir. 1962) (no review of administrative decision denying payment of claim for personal injuries under enabling statute); *Caulfield v. United States Dep't of Agriculture*, 293 F.2d 217 (5th Cir. 1961) (no judicial review of a local board's allegedly erroneous classification of farm land which effected a denial of benefits to petitioner); *Calderone v. Tobin*, 187 F.2d 514 (D.C. Cir. 1951) (constitutional for Congress to deny judicial review to federal employees' claims for compensation allowance).

claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.¹²

The sections of the law which are excluded from the no-review provision deal with National Service Life Insurance; home, farm and business loans; and the audit and review responsibilities of the General Accounting Office with respect to certain benefits programs. These are, however, limited aspects of the V.A.'s welfare and benefits programs. The vast majority of the V.A.'s activities are insulated from judicial review by this section. The seemingly small number of reported cases suggests that hundreds, and perhaps thousands, have sought to scale this barricade without success. Nor have their various causes won much support from either legal scholars or groups of one sort or another which devote themselves to correcting injustices.

The only other civilized country which has so completely insulated administrative action from external controls is England. For a long time British cabinets found it convenient to protect their ministerial regulations, statutory instruments, orders in council, etc., from judicial challenge by having Parliament insert into the enabling statute which created the powers a phrase providing in substance that "all regulations made under this Act shall have effect as if enacted in this Act."¹³ The phrase was devastatingly effective because in Britain the Parliament can do any-

12. 38 U.S.C. § 211(a) (1958). This clause is the bad seed of two parents of different ages and origin. The father was the provision of the old Economy Act which read:

All decisions rendered by the Administrator of Veterans Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

48 Stat. 9 (1933). The mother of the present clause was an amendment to the old Pensions, Bonuses and Relief Act, 43 Stat. 610 (1924) and read:

Notwithstanding any other provisions of law . . . the decision of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under this or any other Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.

54 Stat. 1197 (1940). The present clause resembles its mother more than its father, but paternity is confirmed by the conversion tables. 38 U.S.C.A. XXIII (1959).

13. *E.g.*, Patents, Designs and Trademarks Act, 1883, 46 & 47 Vict. c.57. The first judicial confrontation with the problem created by the potential abuse of administrative power under such a statute was the celebrated case of *Institute of Patent Agents v. Lockwood*, [1894] A.C. 347.

thing.¹⁴ Thus British courts were compelled, by and large, to give effect to these words, even though the judges found them distasteful.¹⁵

A storm of protest led by such stalwarts as C. K. Allen¹⁶ and Lord Hewart¹⁷ produced winds of change, and in recent years Parliament appears to have abandoned the technique. The reformers' master stroke was winning acceptance of the label "Henry VIII clause" to identify the statutory phrase. The label had obvious reference to the unreviewable and arbitrary power which that famous English monarch is purported to have exercised, and, like the expressions "Star Chamber" and "Marxist-Communist," it produces a Pavlovian disgust. But the passing of the device in England, it must be remembered, was not because it was declared unconstitutional by the courts, but rather because it was declared "non-U"¹⁸ or "unthinkable" by the Establishment.

In the United States things are different. At first glance such a grant of arbitrary power to the executive would clearly appear to be unconstitutional, even in these days when the conventional administrative law course begins with a requiem for *Panama Refining Co. v. Ryan*¹⁹ and *Schechter Poultry Corp. v. United States*,²⁰ and last rites for *Crowell v. Benson*.²¹ However, if the interest of the person seeking to challenge such a delegation of power is classified as a claim for a "mere gratuity" to which the claimant has no "right," legislative condonation of administrative lawlessness can win magical and almost enthusiastic judicial approval. It was by classifying the interest in this way that the courts initially gave their approval to the no-review provision of the Veterans' Benefits Act quoted above,²² and the consistency with which this approval

14. DICEY, *op. cit. supra* note 8, at 39-85. The French author, De Lolme, is reputed to have summed it up by saying, "It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman." *Id.* at 43. But some English lawyers refuse to accept even this limitation on parliamentary sovereignty. See also *Liversidge v. Anderson*, [1942] A.C. 206.

15. See *Minister of Health v. Rex (Ex parte Yaffe)*, [1931] A.C. 494; *Miller v. Boothman*, [1944] K.B. 337 (C.A.); ALLEN, *LAW AND ORDERS* 295-98 (4th ed. 1950).

16. *Id. passim*.

17. HEWART, *THE NEW DESPOTISM* (1929).

18. See REPORT OF THE COMMITTEE ON MINISTERS' POWERS (DONOUGHMORE REPORT) (1932); MITFORD, *NOBLESSE OBLIGE* 9-56 (Penguin ed. 1959).

19. 293 U.S. 388 (1935). See 1 DAVIS, *ADMINISTRATIVE LAW TREATIES* 98 (1958).

20. 295 U.S. 495 (1935). See Nutting, *Congressional Delegations Since the Schechter Case*, 14 *MISS. L.J.* 350 (1942).

21. 285 U.S. 22 (1932). See Mr. Justice Frankfurter's concurring opinion in *Estep v. United States*, 327 U.S. 114, 142 (1946), to the effect that the doctrine of *Crowell v. Benson* has "earned a deserved repose." Cf. Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 *U. PA. L. REV.* 163 (1949).

22. *Lynch v. United States*, 292 U.S. 571, 587 (1934) (dictum); *Van Horne v. Hines*, 122 F.2d 207 (D.C. Cir. 1941); *Barnett v. Hines*, 105 F.2d 96 (D.C. Cir. 1939); *United States v. Mroch*, 88 F.2d 888 (6th Cir. 1937).

has been followed would warm the heart of even the most ardent advocate of *stare decisis*.²³

The no-review statute has a curious history. It crept into the law as part of the Economy Act of 1933,²⁴ a moralistic piece of legislation enacted at a time when people thought that the best way to stop a depression was for the government to stop spending money. President Franklin D. Roosevelt's message to Congress, urging enactment of the law, is the key to an understanding of the sentiments which prompted the endorsement of a statute with such an arbitrary provision. After bewailing the unbalanced budget produced by his predecessor's deficit spending, President Roosevelt asked for new legislation which would overhaul the entire pension and veterans' benefits structure, and which would also give to the Executive complete authority over the administration of the programs.

Too often in recent history liberal governments have been wrecked on rocks of loose fiscal policy. We must avoid this danger.

It is too late for the leisurely approach to this problem. We must not wait to act several months hence. The emergency is accentuated by the necessity of meeting great refunding operations this spring.²⁵

That was the mood which prompted the adoption of the no-review clause. Times were difficult, and it was thought that the country could not afford to waste money and time quibbling over legal technicalities in court. The impulse, inevitable in times of stress and anxiety, to give the job to one man and to make his say final seems to have expression in the Economy Act. That the administrator might make a few mistakes here and there was considered unimportant because nobody was thought to have a "right" to live off the government anyway. Although President Roosevelt's economic theories underwent a marked reversal in the years succeeding the enactment of the Economy Act, the no-review provision of the Veterans' Benefits Act remains as a monument to a more Spartan age.²⁶

The exceptions to the no-review clause in its present form, although quantitatively small, are significant indicators of the essential unfairness and unjust discrimination which the clause imposes. The House of Representatives report on the 1958 bill which re-enacted the no-review clause

23. See note 22 *supra*; cases cited in *Steinmasel v. United States*, 202 F. Supp. 335 (D.S.D. 1962).

24. 48 Stat. 9 (1933).

25. Reproduced in 38 U.S.C.A. 22 (1959).

26. 38 U.S.C. § 211(a) (1958).

in its present form unwittingly confessed a legislative discrimination as to the value of protectible interests.

Section 211 (a).—This is a restatement of the existing law concerning the finality of determinations with respect to claims for benefits or payments attending decisions of the Administrator. It corresponds to section 211 of Public Law 85-86 with the addition among the excepted items of subsection 1820(a) (1) of the bill.

. . .
This further exception in section 211(a) is simply to make it clear that the Administrator's authority to make final determinations with regard to various matters, including basic eligibility of a veteran to receive benefits, *will not exclude the rights of lenders to litigate claims on the contract of loan guaranty.*²⁷

In other words, while no veteran would be entitled to judicial review of administrative decisions touching upon his eligibility for the benefits provided by Congress, banks and other financial institutions making loans to veterans, which loans are guaranteed by the government, could seek judicial review.²⁸ The legislative history does not show whether Congress was aware of this manifest discrimination in protectible interests made by the clause, but the preference is, on its face, undeniable. Stated in perhaps its least sympathetic terms, money lenders get judicial review, while those who have served their country in the armed forces do not.

That Congress may narrow the scope of judicial inquiry into the legality of administrative action has been clear for some time, and it was accepted practice long before it became clear. That constitutional sanction for such limitations on judicial review varies in accordance with the necessities of the times,²⁹ the international situation,³⁰ and the relative importance of the interest for which protection is sought³¹ has, unfortunately, also become increasingly clear. The word "unfortunately" is used because it appears that the more often we are confronted with the reality of relativity, the more misgivings we seem to entertain about the

27. House Comm. on Veterans' Affairs, *Veterans' Benefits Act*, H.R. Doc. No. 1298, 85th Cong., 2d Sess. (1958), in 38 U.S.C.A. 296 (1959). (Emphasis added.)

28. *Ibid.* Compare *Fidelity Fed. Sav. & Loan Ass'n v. Gray*, 89 F. Supp. 832 (M.D. Tenn. 1950), with *Hahn v. Gray*, 203 F.2d 625 (D.C. Cir. 1953).

29. *E.g.*, *Estep v. United States*, 327 U.S. 114 (1946); *Yakus v. United States*, 321 U.S. 414 (1944).

30. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Chicago & So. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

31. *E.g.*, *Doremus v. Board of Educ.*, 342 U.S. 429 (1952); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

integrity of our legal system.³²

Despite a grudging recognition that administrative finality is a dependent variable in the social equation, courts have been reluctant to say that any official or agency has a complete immunity from judicial control. This reluctance to disclaim power is not entirely attributable to the normal human inclination to make one's own calling the measure of all creative activity. It is to some degree, at least, a recognition that the threat of judicial review, no matter how remote and no matter how unlikely to be invoked, can operate at least as a psychological restraint upon careless or impulsive administrative action. As Lord Hewart once put it, "The knowledge that machinery exists, and that when it is employed it is employed with skill and without favor, has the effect of rendering its employment unnecessary save only in the exceptional case."³³ Experience under the no-review provisions of the Veterans' Benefit Act seems to prove the converse of Lord Hewart's point—namely, that the absence of review machinery has had the effect of making judicial review quite *necessary* at least in one case.³⁴

Even if there be doubts about the supportability of Lord Hewart's first hypothesis, the cases clearly confirm a second Lord Hewart rubric that "in order for justice to be done it must be seen to be done."³⁵ This maxim finds support in a series of cases extending over a twelve year period and involving a litigant who, whatever the merits of his case (the courts never seem to have come to the merits), must sooner or later join the litigants Jarndyce³⁶ as one of Anglo-American law's most intrepid martyrs.

II. THE DI SILVESTRO SAGA

Mr. Di Silvestro was dismissed on July 31, 1947, from a position as "adjudicator" with the V.A. The dismissal was allegedly necessary because of an authorized and legitimate reduction in staff. However, Di Silvestro, like one of the unfortunate Thames River travelers celebrated in *Mouse's Case*,³⁷ was only one of a number of persons against whom a disability might legitimately have been imposed in order to achieve the

32. Compare Phelps, *Constitutional Government Is Imperiled*, 22 GA. B.J. 7 (1959), with Griswold, *Absolute Is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963).

33. HEWART, *THE NEW DESPOTISM* 155 (1929).

34. See *Di Silvestro v. United States*, 132 F. Supp. 692 (E.D.N.Y. 1955), and the general discussion of the Di Silvestro litigation at notes 37-62 *infra*.

35. HEWART, *THE NEW DESPOTISM* 49 (1929).

36. *Jarndyce v. Jarndyce* is the name give by Charles Dickens to the protracted litigation around which he built his famous novel "Bleak House." DICKENS, *BLEAK HOUSE* (1892).

37. 12 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1609).

desired result, and, like the unfortunate passenger in *Mouse's Case* or Professor Lon Fuller's human hors d'oeuvre in the "Case of the Speluncean Explorers,"³⁸ raised the inevitable question of "why pick on me?"

Di Silvestro, it should be pointed out, was a World War II veteran with an alleged service-connected disability on the basis of which he had a claim pending before the V.A., allegedly at the time of his dismissal. Any veteran with a service-connected disability and a recommendation from his superior at that time enjoyed a seniority-type preference under the appropriate regulations,³⁹ that is, in the event of a reduction in staff such as the one to which Di Silvestro had fallen victim, such a veteran was to be the last to go.

Di Silvestro's claim for service-connected disability was favorably acted upon in February of 1948, about seven months after his dismissal. The award was made retroactive to October 10, 1946, a date about nine months prior to his dismissal. Di Silvestro therefore reasoned, and not illogically, that the favorable disposition of his claim which was made retroactive operated as a sort of order nunc pro tunc, and that he enjoyed a preference at the time of his dismissal which, had it been officially recognized at that time, would have precluded that action.

Round One. Like many other litigants these days, Di Silvestro sued to get his job back. The court did not "buy" his nunc pro tunc theory, however, and granted the government's motion for summary judgment, which was affirmed on appeal.⁴⁰ This occurred early in 1949.

Round Two. Following his first failure, Di Silvestro (who always appeared in these proceedings pro se) sought leave to amend his complaint, alleging that the court had overlooked the fact that the records showed that the V.A. had received notice of his disability claim at a time prior to his dismissal. The court denied this leave, pointing out that the petitioner's own affidavit in the original action had made reference to this fact and that the basis upon which he sought to proceed was not one of new matter or newly discovered evidence.⁴¹ This decision was rendered late in 1949.

Round Three. An attempt was then made to join the United States as a party defendant because of the alleged negligence of the V.A., and to join the administrator, Carl Gray, Jr. Both requests were denied,⁴²

38. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

39. Di Silvestro v. United States, 81 F. Supp. 844 (E.D.N.Y.), *aff'd*, 173 F.2d 933 (2d Cir. 1949).

40. *Ibid.*

41. Di Silvestro v. United States, 9 F.R.D. 435 (E.D.N.Y. 1949).

42. Di Silvestro v. United States, 10 F.R.D. 20 (E.D.N.Y. 1950), *aff'd*, 181 F.2d 502 (2d Cir.), *cert. denied*, 339 U.S. 989 (1950).

the first because the action did not qualify under the Tucker Act,⁴³ and the second because the venue applicable to Gray was then the District of Columbia. It was also held that the plaintiff's preferential position depended upon more than his disability status since his superior's recommendation would also have been necessary. No showing having been made that the latter condition had been complied with, plaintiff had no cause of action. The decision was affirmed on appeal⁴⁴ and certiorari was denied by the Supreme Court.⁴⁵ This was in 1950.

Round Four. Taking the hint, Di Silvestro shifted his energies to Washington where he brought action against the administrator in the U.S. District Court for the District of Columbia. The court held, however, that the plaintiff had already had whatever day he was going to have in court and that the matter was, in essence, *res judicata*.⁴⁶ This was in 1952.

At this point the facts in the narrative become unclear, but it is a fair inference from a reading of the reports that the V.A. decided it was time to re-examine all of the records of its litigious ward. From this re-examination the V.A. apparently became convinced that the plaintiff had filed false writings, or had in other ways tampered with his file, in order to have the records show a more favorable case for him both on his disability claim and on his action for re-employment. Striking back with a vengeance which is now precluded by statute,⁴⁷ the V.A. cancelled *all* of DiSilvestro's benefits, except insurance, pursuant to statutory language requiring such action when the claimant has procured benefits by false or fraudulent means.⁴⁸

Round Five. Plaintiff then instituted an action to restore the status quo, or, in other words, to recapture at least the status which he had enjoyed prior to his earlier excursions into court. It was held, however,

43. 48 Stat. 9 (1933).

44. *Di Silvestro v. United States*, 10 F.R.D. 20 (E.D.N.Y. 1950), *aff'd*, 181 F.2d 502 (2d Cir.), *cert. denied*, 339 U.S. 989 (1950).

45. *Ibid.*

46. *Di Silvestro v. Gray*, 194 F.2d 355 (D.C. Cir.), *cert. denied*, 343 U.S. 930 (1952).

47. In 1959 Congress amended the Veterans' Benefits Act and prohibited administrative forfeitures for activities which could be made the subject of a criminal prosecution, provided the veteran was jurisdictionally indictable (present within the state where the offense took place). 38 U.S.C. §§ 3503, 2505 (Supp. IV, 1963).

48. "Whoever knowingly makes or causes to be made or conspires, combines, aids, or assists in, agrees to, arranges for, or in any way procures the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning any claim for benefits under any of the laws administered by the V.A. (except laws pertaining to insurance benefits) shall forfeit all rights, claims, and benefits under all laws administered by the Veterans' Administration (except laws pertaining to insurance benefits)." 38 U.S.C. § 3503(a) (1958).

that plaintiff was barred by the no-review clause.⁴⁹ Judge Galston was at pains to point out, nevertheless, that the decision was without prejudice to the petitioner's right to pursue his administrative remedy.⁵⁰ This occurred in 1955, and the Supreme Court denied certiorari in 1956.⁵¹

Round Six. Pursuit of "administrative remedies" having apparently proved fruitless, plaintiff brought a new action in 1957 for a declaratory judgment that the administrative decision cancelling all his benefits was unlawful, but he was again denied relief on the basis of the no-review clause.⁵² In 1958 the Supreme Court denied his petition for leave to appeal in forma pauperis, his petition for certiorari and his petition for a rehearing on the denial of certiorari.⁵³

Round Seven. Two years later Di Silvestro launched a desperate assault on the basis of the Federal Tort Claims Act.⁵⁴ In this final action seeking relief, plaintiff artlessly, if understandably, included a charge of defamation arising from allegedly false statements made by the V.A. to Senators Keating and Javits whom plaintiff had requested to intervene on his behalf. The action was dismissed on obvious grounds in 1960.⁵⁵ The litigation expired with a whimper in 1961 when the Supreme Court, after granting a petition to proceed in forma pauperis,⁵⁶ denied a motion for leave to file a second petition for rehearing.⁵⁷

The incredible feature of this veritable course in federal procedure is not so much that one aggrieved veteran could exhaust so much of the professional time and energies of at least sixteen different government attorneys, or that he was able to occupy so much of the literature published by the West Publishing Company, but that the legitimacy of the V.A. withdrawal of all his benefits was never considered on the merits. No explanation was ever given for the V.A.'s delay in uncovering the allegedly false statement which was the basis for his ostracism. Moreover, the fact that the discovery of the alleged offense and the action

49. *Di Silvestro v. United States*, 132 F. Supp. 692 (E.D.N.Y. 1955), *aff'd per curiam*, 228 F.2d 516 (2d Cir.), *cert. denied*, 350 U.S. 1009 (1956).

50. "[T]he defendant's motion to dismiss the complaint must be granted, without prejudice to any administrative rights, if any, that the plaintiff may have." *Di Silvestro v. United States*, 132 F. Supp. 692, 693 (E.D.N.Y. 1955). (Emphasis added.)

51. *Di Silvestro v. United States*, 132 F. Supp. 692 (E.D.N.Y., 1955), *aff'd per curiam*, 228 F.2d 516 (2d Cir.), *cert. denied*, 350 U.S. 1009 (1956).

52. *Di Silvestro v. United States*, 151 F. Supp. 337 (E.D.N.Y. 1957), *application to appeal in forma pauperis denied, cert. denied, and application for rehearing denied*, 355 U.S. 968 (1958).

53. *Ibid.*

54. 28 U.S.C. § 2674 (1958).

55. *Di Silvestro v. United States*, 181 F. Supp. 860 (E.D.N.Y. 1960), *cert. denied*, 364 U.S. 825 (1960).

56. *Di Silvestro v. United States*, 364 U.S. 897 (1961).

57. *Di Silvestro v. United States*, 364 U.S. 917 (1961).

taken against him by the V.A. coincided with the termination of lengthy litigation which by all appearances left the parties thereto on something less than the friendliest of terms creates at least the suspicion that Di Silvestro was a selected victim of a "low-visibility" system of general non-enforcement of the law.⁵⁸

In round five, which was the first suit for the reinstatement of the benefits forfeited by the V.A., Judge Galston said that "the subject matter of this litigation has been before the courts on several occasions."⁵⁹ This statement was inaccurate because the former cases had dealt with the veteran's claim for reinstatement and not with the review of a forfeiture action which had occurred during the interim. Moreover, only two years later the Circuit Court of Appeals for the District of Columbia held, in *Wellman v. Whittier*,⁶⁰ that the very same type of action (forfeiture) which had been declared unreviewable in round five of the *Di Silvestro* saga was specifically excluded from the no-review clause, meaning that the courts could review such action. Yet in that same year, the Supreme Court denied certiorari to a subsequent "unreviewable" holding in round six of *Di Silvestro*,⁶¹ despite the conflict between the circuits on this point.

Responding, at last, to the widespread dissatisfaction with arbitrary administrative forfeitures, in 1959 Congress withdrew the power to declare forfeitures for fraud unless the claimant was not jurisdictionally indictable for the offense.⁶² But this was no help to Di Silvestro. Justice was not seen to be done, and considerable question exists as to whether it in fact *was* done.

III. THE STEINMASSEL STEW

A second case which documents the needless injustice which the no-review clause can perpetrate is *Steinmasel v. United States*.⁶³ As the result of official negligence or inadvertence, the plaintiff was deprived of educational benefits otherwise available to him under legislation of the United States Congress.⁶⁴ Moreover, a decision of an administrative tri-

58. The equal protection and due process problems latent in a selective system of law enforcement, together with the manifest difficulties which attend attempts to acquire information concerning the criteria employed by the authorities exercising the discretion in law enforcement, have been described as "low-visibility" systems. La Fave, *The Police and Nonenforcement of the Law*, 1962 WIS. L. REV. 104, 171.

59. *Di Silvestro v. United States*, 132 F. Supp. 692 (E.D.N.Y. 1955).

60. 259 F.2d 163 (D.C. Cir. 1958).

61. *Di Silvestro v. United States*, 355 U.S. 935 (1958).

62. 38 U.S.C. § 3503 (Supp. IV, 1963).

63. 202 F. Supp. 335 (D.S.D. 1962).

64. 38 U.S.C. § 1613 (1958).

bunal, erroneous on its face with respect to what would traditionally be described as a "question of law," was held beyond the curative powers of the courts by the no-review clause of the Veterans' Benefits Act.⁶⁵

The facts of the *Steinmasel* case are relatively simple. The plaintiff, a veteran eligible for educational benefits under the "G.I. Bill," left his job in Seattle, Washington, and returned to his native state for the purpose of matriculating at the State University of South Dakota. The statute establishing these educational benefits provides for a specific interval within which an educational program must be commenced if the veteran is to qualify. In Steinmasel's case that interval ended on July 24, 1960. Apparently aware of the significance of this delimiting date, which came about two months before the normal University enrollment time, Steinmasel had arranged to entrench his eligibility by enrolling in a series of full scale and duly approved extension courses, offered as part of the standard educational program of the University. In this way he would have embarked upon a full scale educational program before the July deadline, and have continued the program in the fall as a campus student attending the University's regular session.

While discussing his plans with the University's Veterans' Affairs Officer, however, the latter suggested that it might not be necessary immediately to begin the extension courses in order to protect his eligibility, and that the V.A. might waive the requirement in his case.⁶⁶ Accordingly, a long distance telephone call was made to the V.A. offices in St. Paul, Minnesota, about 400 miles distant. The University's Veterans' Affairs Officer spoke with the Educational Benefits Representative of the V.A. for that particular region, who allegedly approved the "waiver" and authorized registration in September as sufficiently timely to entrench the veteran's eligibility. On the basis of this telephone conversation the plaintiff abandoned his plans to take extension courses and did not begin his formal educational program until September. The following October, after having enrolled at the University on the basis of these assurances, he received notice that he was ineligible for educational benefits for failure to begin his program within the statutory period.

The case is a good example of the tragic consequences produced when non-lawyers undertake to extend legal counsel or give legal opinions.

65. 38 U.S.C. § 211(a) (1958). "It is therefore apparent that Congress has expressly denied the courts any power to review the decisions of the Veterans' Administrator." *Steinmasel v. United States*, 202 F. Supp. 335, 337 (D.S.D. 1962).

66. Affidavits of Kenneth Steinmasel, May 29 and Feb. 2, 1961; Affidavits of Lowell Hansen, May 29 and Feb. 2, 1961; Record, *In re Kenneth Steinmasel*, No. 537718, Board of Veterans Appeals, Jan. 19, 1961, *aff'd on rehearing*, No. 557440, Board of Veterans Appeals, June 23, 1961.

Nevertheless, the circumstances are not at all atypical in agencies such as the V.A. which are called upon to process hundreds of thousands of applications of one sort or another, or, for that matter, in educational institutions, where responsibility for advising and counseling students is exercised so extensively and so decisively by administrative officers that a natural and understandable impression of infallibility is easily assumed.

The eligibility denial was duly protested by Steinmasel and resulted in an appeal to the Board of Veterans' Appeals. On January 19, 1961, that Board, in a routine decision which ignored the equities of the case, affirmed the denial of eligibility.⁶⁷ It is interesting to note that although the evidence before the Board clearly indicated that the person responsible for the erroneous advise was a named male, Mr. La Moure, the opinion imputed a feminine gender to him. "The individual Mr. Hansen believed he had talked to has stated that *she* was certain that *she* would not advise anyone that the initial deadline date could be waived."⁶⁸

The good offices of South Dakota's congressional delegation were then solicited, but to no avail, although they did direct communications to the V.A. urging favorable action on a request for a rehearing.⁶⁹ At the ensuing rehearing the evidence introduced on behalf of the veteran consisted mostly of affidavits, the substance of which may be summarized as follows: affidavits of the veteran and the University's Veterans' Affairs Officer establishing the phone call, the substance of the conversation, the clarity with which the precise question was put, and that the veteran was moved to withdraw from the extension courses as a result of the call; letters of telephone company officials confirming the occurrence of the call and the identities of the parties thereto; the veteran's completed but withdrawn university application showing enrollment in extension courses at a time prior to his delimiting date; and a letter from the Veterans' Affairs Officer of the University to the St. Paul regional office which was sent pursuant to a request made during the telephone conversation corroborating both the existence of the conversation and the sub-

67. *In re* Kenneth Steinmasel, No. 537718, Board of Veterans Appeals, Jan. 19, 1961.

68. *Ibid.* (Emphasis added.)

69. Letter From the late Senator Francis Case to Martin Weeks, Esq., Vermillion, S.D., March 30, 1961; Letter From the Honorable Karl E. Mundt to Martin Weeks, Esq., Vermillion, S.D., Feb. 20, 1961. It should be noted that in this case South Dakota's Congressional delegation behaved with the utmost propriety and with a punctilious respect for the independence and integrity of the adjudicative responsibilities of the V.A. Congressmen and Senators have not always accorded the adjudicative processes of administrative agencies this same measure of respect. See GELLHORN & BYSE, ADMINISTRATIVE LAW 959-1018 (1960).

stance of what was discussed.⁷⁰

The evidence submitted to controvert the facts established by the veteran consisted of only three items, and they are worthy of careful consideration:

(1) A letter from the Chief of the Benefits and Facilities of the V.A. stating that it is "standard practice" to refuse to make commitments of this sort over the telephone.⁷¹

(2) A letter from La Moure, the man who allegedly gave the erroneous advice, written in response to the question of whether he could remember having the conversation upon which Steinmasel's decision had been based:

There is no question Mr. Hansen may have called our office regarding this veteran. A great number of calls are received by our office on purely routine matters. After reviewing his records I can see no possible way that authority, whether by telephone or written communication, could be given which would permit a delay beyond his delimiting date.⁷²

(3) The foregoing letter being unresponsive and equivocal, it was again inquired of La Moure whether he had advised Mr. Hansen that the veteran could enroll a month following his delimiting date, and the following letter was received in reply:

I have no remembrance of such a call from Mr. Hansen and there is no record of it here. I would assert that the limitations of the law are so clear and definite that I would tell no one that he could for any reason, delay original entry into training to a date later than three years after his separation from duty. I regret I cannot substantiate Mr. Hansen's claim of what was said.⁷³

In summary, then, two persons executed affidavits concerning the existence of the telephone call and stating the precise words of advice

70. Letter From Mr. S. Steiner to Mr. G. H. Hyde, July 1, 1960; Record, *In re* Kenneth Steinmasel, No. 537718, Board of Veterans Appeals, Jan. 19, 1961, *aff'd on rehearing*, No. 557440, Board of Veterans Appeals, June 23, 1961.

71. Letter From Mr. G. H. Hyde to Mr. Lowell S. Hansen, March 13, 1961; Record, *In re* Kenneth Steinmasel, *supra* note 70.

72. Letter From Mr. A. H. LaMoure to Martin Weeks, Esq., Vermillion, S. D., May 2, 1961.

73. Letter From Mr. A. H. LaMoure to Martin Weeks, Esq., Vermillion, S. D., May 9, 1961. Seemingly in contrast of the evidence entered in favor of the V.A. and LaMoure, when the *Steinmasel* case came up for rehearing before the Board of Veterans Appeals, the St. Paul office of the V.A. sent a transmittal letter dated June 8, 1961, referring to the controversial telephone call of July 1, 1960, and stating that "we cannot dispute that it took place." Letter From Mr. John R. Murphy to Chairman, Board of Veterans Appeals, Washington 25, D.C., June 9, 1961.

and direction given. The facts were corroborated by letters from a telephone company official and by the courses of action taken by the parties. On the other hand, the V.A. official was careful never to deny, specifically, that he had given the advice. All he said was that he did not remember the call and that he "would" tell no one to take such a course of action. The record also contained documents indicating the availability of accredited extension courses which would have secured the veteran's eligibility and the timely filing and subsequent withdrawal of the original application of the veteran to enroll in such courses before the delimiting date.⁷⁴

The decision of the Board of Veterans' Appeals on rehearing made the incredible assertion that the veteran had not sustained his burden of proof. These were the findings:

The evidence does not establish that a correspondence course was available in July 1960, which would provide credits acceptable toward a college degree, and permit the veteran to enter an approvable program before July 24, 1960. . . . His entitlement to a program of education and training was subject to the delimiting date of July 24, 1960, and he was not otherwise informed by an employee of the Veterans' Administration, either directly or indirectly.⁷⁵

Whether this decision would survive attack under the various formulas which allegedly define the scope of judicial review under normal circumstances is an interesting theoretical question. The author believes, however, that even under the so-called "scintilla" rule⁷⁶ these findings are in such defiance of *all* the evidence that the decision would be hopelessly vulnerable. But beyond that, if one of the functions of adjudication is to stimulate confidence in the objective and impartial qualities of decision-making by supplying the adversaries with a rational and reasonable explanation for the decision, and by demonstrating that the decision is sup-

74. Application Form, State University of South Dakota, Extension Division, signed by Kenneth Steinmasel and dated June 30, 1961, on file in the offices of Bogue & Weeks, Attorneys and Counsellors-at-law, Vermillion, S. D.

75. *In re* Kenneth W. Steinmasel, No. 557440, Board of Veterans Appeals, 3-4, June 23, 1961.

76. In its classic statement the scintilla rule never included vague or uncertain evidence, or evidence which had no capacity to induce conviction. It embraced only evidence of substance and relevant consequence. *Wigginton's Adm's v. Louisville Ry.*, 256 Ky. 287, 75 S.W.2d 1046 (1934). Kentucky seems to be the jurisdiction which had the greatest opportunity to refine and define the scintilla rule before its ultimate abolition. See a review of its history in *Fyffe v. Commonwealth*, 301 Ky. 165, 190 S.W.2d 674 (1945). The rule was apparently first mentioned in a Supreme Court decision when it was condemned in *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 229 (1938).

ported by identified and accurately stated legal precepts enjoined by our system of law to which all presumably owe allegiance, this decision certainly misses the mark.

While it is easy to be critical of Steinmasel's judgment as well as that of the University's Veterans' Affairs Officer, that is irrelevant to the decision. Moreover, any moralizing about the clear wording of the statute which was reproduced on Steinmasel's eligibility form and other warnings which he received cannot alter the fact that Steinmasel believed that he had been given a relatively authoritative interpretation of the law. It appeared to have come from a sufficiently highranking V.A. administrator—from the Regional Center at St. Paul, Minnesota—where, at least in the eyes of Steinmasel and the University's Veterans' Affairs Officer, supreme official discretion in such matters dwells unfettered.

When the findings of the Board of Veterans' Appeals and the grounds upon which relief was denied are examined in the light of the facts presented to the Board, the reaction of Steinmasel's attorney seems both natural and understandable.⁷⁷ Suit was brought against the United States on two counts: the first sought judicial review of the denial of benefits, *i.e.*, reversal of the Board of Veterans' Appeals, and the second requested damages under the Federal Tort Claims Act.⁷⁸ Both causes of action were denied,⁷⁹ and the motion to dismiss the complaint was granted.⁸⁰ The court prosaically recited all of the sordid authorities for the proposition that such administrative lawlessness was constitutionally possible without meeting the fundamental question which the no-review clause presents. Proper constitutional exceptions not having been raised

77. However, any attorney at all familiar with the world of administrative law will quickly recognize that Steinmasel's action was hopelessly weakened by at least two general rules to which the Board of Veterans' Appeals made no reference whatsoever. These rules follow. (1) Estoppel is not available against the government based upon the acts of its agents except under rare circumstances, and almost never when there is a clear statute on the subject. "Whatever the form in which the government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). The rule has been widely criticized. DAVIS, 2 ADMINISTRATIVE LAW TREATISE 541-42 (1958); Newman, *Should Official Advice Be Reliable?*, 53 COLUM. L. REV. 374 (1953). Nevertheless, it is still the law. *United States v. Neustadt*, 366 U.S. 696 (1961); *United States v. Ward*, 309 F.2d 640 (5th Cir. 1962). (2) The government is not ordinarily responsible for the misrepresentations of its agents or servants. *United States v. Neustadt*, 366 U.S. 696 (1961). For discussion in this case see notes 110-17 *infra* and accompanying text. But these grounds for denying relief were never even hinted at in the Board's decisions.

78. 28 U.S.C. §§ 2681-80 (1958).

79. *Steinmasel v. United States*, 202 F. Supp. 335 (D.S.D. 1962).

80. *Ibid.*

or made, the *Steinmasel* case was concluded as decisively, although more abruptly, as were the *Di Silvestro* cases.⁸¹

IV. CHALLENGES TO THE NO-REVIEW CLAUSE

In his complaint, Steinmasel's attorney raised only two of the five possible theories upon which the so-called unreviewable decisions of the V.A. may be attacked. One was the inherent judicial power to remand determinations of administrative agencies for further consideration,⁸² and the second was the tort liability of the government resulting from a clearly incorrect decision.⁸³ A brief review of the treatment accorded by the courts to these two theories, as well as to the other three not raised in the *Steinmasel* case, provides an interesting and perhaps useful portrayal of judicial attitudes.

A. *An Inherent Judicial Power to Correct Injustice Overcomes Statutory Preclusion of Review*

This is perhaps the brashest of the theories, one no doubt worthy of Lord Coke. Nevertheless, its main utility lies in its use as a canon of statutory construction, and no court appears ever to have used it as a ground for ignoring statutory language absolutely precluding review.

Where a statute provides that an administrative decision shall be "final," many courts have interpreted this simply to mean "complete"⁸⁴ insofar as the administrative process is concerned, and therefore "ripe" for judicial review in the sense that no further administrative remedy remains to be "exhausted."⁸⁵ This construction of legislative intent has, on at least one occasion, been sustained on the theory that where different constructions are possible, a statute is to be given that construction which

81. See notes 39-62 *supra* and accompanying text.

82. *E.g.*, *Siegel v. United States*, 87 F. Supp. 555 (E.D.N.Y. 1949).

83. The court treated the tort claim as based upon a misrepresentation by government employee. *Steinmasel v. United States*, 202 F. Supp. 335, 338 (D.S.D. 1962). It was therefore within the limitation of *United States v. Neustadt*, 366 U.S. 696 (1961). The court did not consider whether the plaintiff had sustained tort damage as the result of an incorrect but otherwise unreviewable administrative decision. However, recovery under this theory would probably also be barred by the provision of the Federal Tort Claims Act which states that "the provisions [waiving immunity in tort] . . . shall not apply to . . . any claim based upon . . . the exercise . . . [of] a discretionary function . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1958).

84. *E.g.*, *Bandy v. Mickelson*, 73 S.D. 485, 44 N.W.2d 341, 342 (1950) wherein it was said:

Reverting to the provision making the decision of the Board final, our construction thereof is that it was the legislative intent to make the board's action final upon all questions which, by settled public administrative law, are accepted by the courts as final.

85. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955).

most favors its constitutionality.⁸⁶

Where, however, the plain intent of the statute is to make the decisions "unreviewable," courts have not uncommonly circumvented this restriction by holding that the decision is unreviewable only *if* it is within the administrative "jurisdiction,"⁸⁷ based upon adequate "evidence,"⁸⁸ or "lawful."⁸⁹ Indeed, in *Reynolds v. United States*⁹⁰ the Supreme Court granted relief without even mentioning a controlling no-review provision in the statute. True, the Supreme Court has never forthrightly declared that a no-review clause is unconstitutional, but this view has been strongly suggested where personal liberty was at stake by Mr. Justice Douglas' opinion in *Estep v. United States*.⁹¹ Even Mr. Justice Frankfurter's sharp concurring opinion in that case seems to concede that the action of the administrative agency (the draft board) could, if wrong, ultimately be rectified by writ of habeas corpus following induction.⁹² Nevertheless, the upshot of the decisions is that where the statute clearly bars a judicial construction which would retain a measure of judicial control, a point is reached beyond which the interpretive technique cannot go—a point where the "words [of the statute] can only mean what they appear to mean if they are read as ordinary words should be read."⁹³

These decisions and the considerable authority which they represent have not won universal acceptance. In *Caulfield v. U.S. Dep't of Agriculture*⁹⁴ Chief Judge Tuttle and Judge Rives of the Fifth Circuit joined in an unusual dissent by Judge Wisdom in which the general thesis of nonreviewability was critically examined and exposed for what it is—an abnegation of a fundamental judicial responsibility.⁹⁵ The question in that case was whether a tenant farmer who was denied soil bank benefits under an allegedly incorrect administrative decision affecting his status could seek judicial review of that decision. Judge Wisdom refused to concede that legislative insulation of administrative illegality is permissible under the American system of justice. Relying heavily upon Pro-

86. *Estep v. United States*, 327 U.S. 114, 132 (1945) (Mr. Justice Rutledge, concurring); *United States v. Owens*, 147 F. Supp. 309 (E.D. Ark. 1957).

87. *Harmon v. Brucker*, 355 U.S. 579 (1958); *United States v. California E. Line, Inc.*, 348 U.S. 351 (1955).

88. *Cole v. Young*, 351 U.S. 536 (1955); *Chin Yow v. United States*, 208 U.S. 8 (1908).

89. *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (dictum); *Wall v. Fenner*, 76 S.D. 252, 76 N.W.2d 722 (1956).

90. 292 U.S. 443 (1934); *accord*, *Chin Yow v. United States*, 208 U.S. 8 (1908).

91. 327 U.S. 114, 122-24 (1945).

92. *Id.* at 134-45.

93. *Id.* at 136.

94. 293 F.2d 217 (5th Cir. 1961).

95. *Id.* at 226.

fessor Jaffe's classic analysis of the law of judicial review,⁹⁶ Judge Wisdom added an illuminating and concise corollary to the subject:

The law of administrative justice is still in a state of flux. The only common denominator of the decided cases I am able to discern is the broad principle, loosely applied, that finality language will be whittled down to size—to fit the Court's sense of fundamental fairness, whenever that sense is offended by denial of judicial review.⁹⁷

Despite Judge Wisdom's admirable restatement of a policy in which the rule of law is firmly rooted, the "weight of authority" is clearly the other way. The no-review provisions of the Veterans' Benefits Act have been held to put administrative action beyond judicial review even where "arbitrary and capricious,"⁹⁸ despite an earlier Supreme Court case with dicta to the contrary.⁹⁹

Indeed a curious characteristic of the case law on the reviewability of V.A. decisions is the number of fox holes created by judicial dicta, but seemingly never filled, distinguished or explained. Thus in *Hospoder v. United States*¹⁰⁰ Judge McLaughlin seized upon the 1940 Congressional failure to insert the words "by mandamus or otherwise" when it denied judicial "power or jurisdiction to review [by mandamus or otherwise] any such decision [relating to claims],"¹⁰¹ as clearly authorizing man-

96. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 769 (1958).

97. *Caulfield v. United States Dep't of Agriculture*, 293 F.2d 217, 228 (5th Cir. 1961) (dissenting opinion).

98. *Sinlao v. United States*, 271 F.2d 846 (D.C. Cir. 1959); *Hahn v. Gray*, 203 F.2d 625 (D.C. Cir. 1953). "Even if the Veterans' Administration action was arbitrary and capricious, Congress has given us no jurisdiction to review it. . . . And there can be no doubt as to the power of Congress to exclude gratuities—not rights." *Steinmasel v. United States*, 202 F. Supp. 335, 337 (D.S.D. 1962).

99. "The Commissioner is required . . . 'to adjudicate the claim.' This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it." *Dismuke v. United States*, 297 U.S. 167, 172-73 (1935).

100. 209 F.2d 427 (3d Cir. 1953).

101. The 1933 no-review clause, which was part of the old Economy Act, remained in effect until 1958 when it was dropped by the revisors for redundancy. This clause specifically precluded mandamus. 48 Stat. 9 (1933). The later clause, enacted as an amendment to the Pensions, Bonuses and Relief Act, 43 Stat. 610 (1924), did not specifically preclude mandamus, although its intention to bar all judicial review was clear. 54 Stat. 1197 (1940). Since 38 U.S.C. § 211(a) (1958) retains all the characteristics of the later 1940 clause, under Judge McLaughlin's theory, mandamus would still be available in a case such as *Steinmasel v. United States*, 202 F. Supp. 335 (D.S.D. 1962). See also note 12 *supra*. Under the new law fathered by Harvard's Professor Clark Byse, a plaintiff need no longer journey to Washington in order to meet the talismanic requirements of *Blackmar v. Guerre*, 342 U.S. 512 (1952); *Gnerich v. Rutter*, 265 U.S. 388 (1924); or *Di Silvestro v. United States*, 10 F.R.D. 20 (E.D.N.Y.), *aff'd*, 181 F.2d 502 (2d Cir.), *cert. denied*, 339 U.S. 989 (1950). Byse, *Proposed Reforms in Federal "Non-Statutory" Judicial Review*, 75 HARV. L. REV.

damus against the V.A. in an appropriate case. Yet no one seems to have exploited this invitation to avoid the no-review clause, despite the numerous decisions disclaiming review power which have been handed down since *Hospoder*.¹⁰² Additionally, in a number of unusual cases the government has sought to assert the finality and no-review clauses of the Veterans' Benefits Act as a ground for recovering benefits allegedly paid in defiance of an earlier ruling by the V.A.¹⁰³ Sensing what lies ahead if courts continue to give such no-review clauses a literal interpretation, one federal district court was led to observe that "obviously, such a construction would make the courts but rubber stamps for administrative action in cases of this kind, serving no function but to render judgments preliminary to the issuance of executions thereon."¹⁰⁴ Inconsistencies such as these, together with the obvious pain experienced by courts when confronted with "no-review" cases,¹⁰⁵ make evident the shortcomings of this statutory device.

B. *Action Under the Federal Tort Claims Act*

At least two veterans have attempted to recover V.A. benefits on the theory that an otherwise unreviewable administrative decision which causes injury creates a cause of action under the Federal Tort Claims Act. Both attempts proved futile. In the final round of the *Di Silvestro*

1479 (1962); 28 U.S.C. § 1391 (Supp. IV, 1963) (authorizing decentralized actions for affirmative administrative relief). Since an action in the nature of mandamus may be brought against officers or employees of the United States or its agencies, 28 U.S.C. § 1361 (Supp. IV, 1963), the problem raised in *Kendall v. United States*, 37 U.S. (12 Pet.) 522 (1838), has been eliminated and the relief can be granted. *Quaere*: If Steinmasel had sought mandamus, might he not have been entitled to relief under this theory? See *Steinmasel v. United States*, 202 F. Supp. 335 (D.S.D. 1962).

102. *E.g.*, *Steinmasel v. United States*, *supra* note 101; *Sinlao v. United States*, 271 F.2d 846 (D.C. Cir. 1959); *Cook v. Higley*, 238 F.2d 41 (D.C. Cir. 1956); *Magnus v. United States*, 234 F.2d 673 (7th Cir. 1956); *Longerneck v. Higley*, 229 F.2d 27 (D.C. Cir. 1955); *United States v. Daubendiek*, 25 F.R.D. 50 (N.D. Iowa 1959).

103. *United States v. Wiley's Cove Ranch*, 295 F.2d 436 (8th Cir. 1961); *De Espiritu v. United States*, 10 Pike & Fischer Admin. Law 2d 442 (D.D.C. Cir. 1960); *United States v. Daubendiek*, 25 F.R.D. 50 (N.D. Iowa 1959) (*dicta*); *United States v. Crockett*, 158 F. Supp. 460 (N.D. Me. 1958); *United States v. Lawrence*, 154 F. Supp. 454 (D. Mont. 1957); *United States v. Owens*, 147 F. Supp. 309 (E.D. Ark. 1957); *Hormel v. United States*, 123 F. Supp. 806 (S.D.N.Y. 1954). The former cases either bar the government from asserting the finality clause to prevent the benefits recipient from defending prosecution on the ground that he *was* entitled, or else bar the government from disregarding its own finality clause or action. Under this line of cases, the government, had it paid for Steinmasel's educational training (see notes 64-67 *supra* and accompanying text), would have been unable to recover back the money. *Contra*, *United States v. Mroch*, 88 F.2d 888 (6th Cir. 1937); *United States v. Gudewicz*, 45 F. Supp. 787 (E.D.N.Y. 1942).

104. *United States v. Owens*, 147 F. Supp. 309, 313 (E.D. Ark. 1957).

105. *Ibid.* See *e.g.*, *Dismuke v. United States*, 297 U.S. 167 (1936); *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958); *Hospoder v. United States*, 209 F.2d 427 (3d Cir. 1953); *Siegel v. United States*, 87 F. Supp. 555 (E.D.N.Y. 1949).

litigation¹⁰⁶ a claim was made under that act,¹⁰⁷ but it was clearly barred by the statutory provision which continues governmental immunity for defamation.¹⁰⁸ In the *Steinmasel*¹⁰⁹ case more favorable grounds existed, but since the alleged tort was a misrepresentation of the law, the action was clearly barred by the holding of the Supreme Court in *United States v. Neustadt*.¹¹⁰

In *Neustadt*, the Court was required to construe the section of the Federal Tort Claims Act which preserves governmental immunity for intentional torts committed by the government's servants. The governing provision reads as follows: "The provisions of this title shall not apply to . . . any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, *deceit*, or interference with contract rights."¹¹¹ While this catalogue of traditional tort causes of action appears to confine itself to the so-called "intentional" torts, it includes "misrepresentation" as well as "deceit." Although the two terms are often used interchangeably, misrepresentation connotes a lower degree of culpability.¹¹² Sometimes it is said that misrepresentation defines a "negligent" deceit,¹¹³ but at other times it has been held to mean the same thing as deceit.¹¹⁴ Which ever view is correct, courts, when faced with an action based upon injury resulting from a statement which was careless but not wilfully deceptive, have typically referred to the statement as a "negligent misrepresentation,"¹¹⁵ rather than a "misrepresentation" alone or a "negligent deceit."

The Court in the *Neustadt* case was faced with a suit by an injured purchaser for damages resulting from a negligent appraisal and misstatement of the value of a house by a Federal Housing Administration employee. The question of statutory construction confronting the court was whether the word "misrepresentation," as used in the section otherwise restricted to preserving governmental immunities with regard to intentional torts, evidenced a Congressional intent to include negligent mis-

106. *Di Silvestro v. United States*, 181 F. Supp. 860 (E.D.N.Y. 1960), *cert. denied*, 364 U.S. 825 (1960), *petition to proceed in forma pauperis for a petition for rehearing granted and petition for rehearing denied*, 364 U.S. 897, *motion for leave to file a second petition for rehearing denied*, 364 U.S. 917 (1961).

107. 28 U.S.C. § 2674 (1958).

108. 28 U.S.C. § 2680(h) (1958).

109. *Steinmasel v. United States*, 202 F. Supp. 335 (D.S.D. 1962).

110. 336 U.S. 696 (1961).

111. Federal Tort Claims Act, 28 U.S.C. § 2674 (1958). (Emphasis added.)

112. See PROSSER, TORTS 522, 538 (2d ed. 1955).

113. *E.g.*, *Weston v. Brown*, 82 N.H. 157, 131 Atl. 141 (1928). See generally PROSSER, *op. cit. supra* note 112, at 539.

114. *Id.* at 522.

115. See generally Bohlen, *Should Negligent Misrepresentation be Treated as Negligence or Fraud?*, 18 VA. L. REV. 703 (1932).

statements, or whether the use of both "misrepresentation" and "deceit" was a redundancy—a simple Twentieth Century expression of the Hebrew poetry form transplanted into our legal language through the agency of Cranmerian tautology. Mr. Justice Whittaker, speaking for the Court, found himself unable to impute such unconscious poetic traditionalism to the Congress and held that the word "misrepresentation" had to have a meaning distinct and different from "deceit." Therefore, despite the fact that it appeared in a section otherwise confined to the intentional torts, it was held that the use of the word continued the immunity for negligent misstatements.¹¹⁶ Thus, the government cannot be sued in tort for the careless or negligent statements of officials of any agency, including the V.A.

Another obstacle which a litigant faces when he attempts to circumvent the no-review clause by bringing an action under the Federal Tort Claims Act is the immunity which the government enjoys for injuries caused by its employees in the performance of "discretionary functions."¹¹⁷ Viewed together, these limitations on government liability under the Act greatly reduce the vitality of this approach by which the effect of the no-review clause might be circumvented.

C. *Inherent Power to Order an Administrative Rehearing*

The theory that, while the no-review clause prohibits a court from disposing of a case, it nevertheless implies a power akin to "cassation," that is, a power to remand the dispute for further consideration to the authority duly charged with the responsibility for disposition, was first expressed in *Siegel v. United States*.¹¹⁸ In that action, Mrs. Siegel had allegedly been erroneously advised by the V.A. that she was not entitled to benefits upon the death of her serviceman-husband. Allegedly because of this erroneous advice she had not seasonably produced evidence of her marriage. Much later she learned from the Red Cross that she in fact had been entitled to such benefits, and when proof of marriage was furnished the V.A., monthly payments were begun. Under the governing regulations however, she forfeited most of the payments she would otherwise have received had she made seasonable proof in the first instance, and she sued to recover those payments. Judge Galston held:

It would appear from the authorities that the decisions of the Administrator with regard to claims of the kind asserted by

116. *United States v. Neustadt*, 366 U.S. 696, 711 (1961).

117. 28 U.S.C. § 2680(a) (1958).

118. 87 F. Supp. 555 (E.D.N.Y. 1949).

this plaintiff are final.

. . . .

The function of the courts, in matters involving administrative actions in which the Congress has not expressly provided for judicial review, is "not one of review but essentially of control—the function of keeping them within their statutory authority." [citing Mr. Justice Brandeis, dissenting in *Crowell v. Benson*, 285 U.S. 22, 89 (1932) and other cases] . . . Thus it is recognized that where the equity powers of the court are properly invoked by a clear showing that the administrative officer acted in excess of the jurisdiction conferred, appropriate relief may be obtained.

In the instant case, therefore, although it may not be possible judicially to determine the amount of the award, the court as a court of equity can upon an adequate showing order a rehearing by the Veterans Administration.¹¹⁹

In the *Steinmasel* case,¹²⁰ Steinmasel's attorney attempted to invoke *Siegel* for the purpose of ordering a further rehearing, but the court chose not to follow *Siegel* on the theory that the V.A. had not overstepped its jurisdiction in furnishing incorrect advice. This was surprising because on their facts *Siegel* and *Steinmasel* were closely akin and were the only two officially reported cases in which relief against the V.A. was sought for damages resulting from erroneous advice.

The events subsequent to the decision in *Siegel* suggest that it does not provide a breach in the wall of no-review which it appears to authorize at first reading. Pursuant to the suggestion of the court in the *Siegel* case, an amended complaint was filed seeking remand to the V.A. The V.A. again moved to dismiss, but, in the meantime, Mrs. Siegel remarried and ordered her attorneys not to proceed with the matter.¹²¹ Thus, the seed, though planted, was never watered, and the *Steinmasel* case seems to assert that it was never germinated in the first place.

D. *Unconstitutionality of No-Review Clauses*

The Supreme Court has never either accepted or ruled upon the theory that a denial of judicial review is unconstitutional. The Court has

119. *Id.* at 558.

120. *Steinmasel v. United States*, 202 F. Supp. 335 (D.S.D. 1962). It is a curious fact that the *Steinmasel* and *Siegel* cases appear to be the only instances in which formal litigation against the V.A. was based upon misrepresentation, and yet in neither case was the defense of estoppel interposed. *Ibid.* *Siegel v. United States*, 87 F. Supp. 335 (D.S.D. 1962).

121. Letter From Sidney Z. Searles, Esq., to Professor Frederick Davis, Aug. 1, 1961.

been traditionally reluctant about deciding exactly how far Congress can go in restricting the appellate jurisdiction of federal courts,¹²² and perhaps for good reason. South Africa experienced such a legislative-judicial collision, and the rule of law has seemingly never recovered in that jurisdiction.¹²³ This may also explain why the reach of *Ex parte McCardle*¹²⁴ has never been measured.

In his masterful discussions of "The Right to Judicial Review," Professor Jaffe suggests that, in the federal system, judicial review is constitutionally entrenched with respect to official actions affecting personal liberty and criminal procedure.¹²⁵ Beyond that, he asserts, review appears to be entrenched only as to actions visiting a disability or working a change in status upon the person aggrieved. Professor Jaffe demonstrates the shallow nature of such a practice, but proceeds no further with the matter.

Recent developments, to be discussed below, confirm Professor Jaffe's views about the unsatisfactory nature of this dividing line for judicial review, as it is based upon the "passive v. active" distinction which has proved so unsatisfactory in the law of torts. Nevertheless, despite occasional expressions of dissatisfaction,¹²⁶ it remains true that a no-review statute or clause governing a benefits or subsidy program has yet to be held unconstitutional.

E. *Inherent Court Power to Invalidate Decisions Which are Nullities or Whose Paternity is Irregular*

Here again, under this challenge to the no-review clause, the British experience is more extensive than the American. In one startling decision, an English judge concluded that the procedure in the Ministry of Agriculture and Fisheries for the appointment of tribunals passing upon the validity of farmland allocations was defective.¹²⁷ It followed that all of the decisions of these improperly constituted tribunals affecting thousands of tracts of land throughout the United Kingdom were nullities. Although the holding of this all too logical judge was reversed by the inter-

122. See generally Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

123. See McWhinney, *Law and Politics and the Limits of the Judicial Process*, 35 CAN. B. REV. 1203 (1957).

124. 74 U.S. (7 Wall.) 506 (1868).

125. Jaffe, *op. cit. supra* note 96, at 803-14.

126. *Rochester Tel. Co. v. United States*, 307 U.S. 125 (1939) (the dispatch of the negative orders doctrine).

127. *Woollett v. Minister of Agriculture & Fisheries*, [1954] 1 Weekly L.R. 1149, *rev'd with leave to appeal to the House of Lords granted*, [1955] 1 Q.B. 103 (C.A. 1954).

mediate appellate court,¹²⁸ the Ministry was unwilling to risk the tidal wave of suits which would surely follow in the event that the lower court decision was reinstated on further appeal. It therefore promptly acquiesced in the appellant's requests, rendering the cause moot.¹²⁹ Other British decisions, although never quite going this far, have suggested this ground as a means of relief against a legislative or administrative action in outrageous defiance of contemporary notions of justice.¹³⁰ In the United States the chief case suggesting that this theory has merit is *Hiatt v. Compagna*,¹³¹ in which it was held that even where judicial review is foreclosed under the federal Administrative Procedure Act,¹³² a court may set such a decision aside as a total nullity if the procedure was fatally defective or no evidence existed in support of the decision.

The very smoothness of the logic of this theory tends to undermine its reliability. Its acceptance exposes every administrative action to judicial review. One can almost hear Mr. Justice Frankfurter reviling it as exhuming ancient casuistries.¹³³ But the emotion of the criticism is still no answer to the logic. It may well be that in attempting to capture an abstract principle which would define reviewability of the fact of statutory insulation we are confronted with the unanswerable. The problem of preserving judicial integrity by granting immunity from civil actions in tort at the expense of the aggrieved victim is the same, and Learned Hand's impatient dispatch of this problem in *Gregoire v. Biddle*¹³⁴ is no answer to the questions which would be presented by a judge who machine-gunned the spectators in his courtroom.

128. *Ibid.*

129. The anti-climax of the *Woollett* case was reported, in part, as follows: "MRS. WOOLLETT TO KEEP HER LAND. . . . Mr. Heathcote Amory, Minister of Agriculture stated that . . . 'in all the circumstances' he would not go on to acquire the land notwithstanding the recent decision of the Court of Appeal in his favor." *The Times* (London), Nov. 25, 1954, p. 8, col. 2. The Ministry of Agriculture and Fisheries lost no time in putting this valuable precedent to work, however. *Regina v. Minister of Agriculture & Fisheries (Ex parte Graham)*, [1955] 2 Q.B. 140, 166 (1954). This swift invocation of a precedent to the effect that substantial defects in the appointment of administrative tribunals cannot be relied upon when attacking the decisions of such tribunals or the ministry under which they function seems to contradict the appraisal of an English commentator who observed that "the case of *Woollett v. Minister of Agriculture and Fisheries* is not of itself of any great importance." Jackson, *Administrative Tribunals*, 18 MODERN L. REV. 165 (1955).

130. *E.g.*, *Smith v. East Elloe Rural Dist. Council*, [1956] A.C. 736 (H.L.); *Acton Corp. v. Morris*, [1953] 2 All. E.R. 932 (C.A.); *In re Workmen's Compensation Act & Canadian Pac. Ry.*, [1950] 2 D.L.R. 630.

131. 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 880 (1950), *on remand*, 100 F. Supp. 74 (N.D. Ga. 1951).

132. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

133. *City of Yonkers v. United States*, 320 U.S. 685, 695 (1944) (dissenting opinion).

134. 177 F.2d 579 (2d Cir. 1949).

Impeachment of any precept in the system of positive law on the ground that the credentials of the promulgating authority are defective will invariably raise delicate political questions which courts are anxious to avoid.¹³⁵ Yale's Samuel J. Tilden Club, the members of which refuse to acknowledge the validity of legislation enacted during the term of President Hayes, is an institutional reminder of the difficulties which would be created if this theory were carried to the limit of its logic. Those who contend for the same reasons that the fourteenth amendment to the U.S. Constitution is a nullity are also reminders. Nevertheless, while the ultimate limit of the theory is an indeterminate rather than an ascertainable line, instances exist in which it, or something like it, has proven an effective ground for relief where other judicial review is unavailable.¹³⁶

V. FORFEITURE: JUDICIAL AND LEGISLATIVE REACTIONS

It will be recalled that Mr. Di Silvestro was not only unable to secure judicial review of his claim that he was entitled to be reinstated to his position of adjudicator, but that he was also unable to secure judicial review of the forfeiture of all his benefits which the V.A. declared some years after the unsuccessful reinstatement litigation had begun.¹³⁷ At that time the Veterans' Benefit Act included two no-review provisions. One was the predecessor of the present clause and made decisions "on any question of law or fact concerning a claim for benefits or payments" non-reviewable.¹³⁸ The second provision enumerated a number of the sections of the law and made decisions under these sections also non-reviewable.¹³⁹ The sections covered by the second no-review clause included V.A. decision declaring a forfeiture for misrepresentation, but did *not* include the section authorizing V.A. forfeitures for disloyal conduct.

In *Wellman v. Whittier*¹⁴⁰ Judge Danaher held that a decision forfeiting a veteran's benefits for disloyal conduct was subject to judicial review because the section authorizing such forfeitures was not enumerated in the second no-review clause mentioned above. The government contended that even so, since the action was a "claim" for reinstatement, it was barred by the first no-review clause applicable to "claims." But

135. *E.g.*, *Coleman v. Miller*, 307 U.S. 433 (1939).

136. *E.g.*, *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891). See note 130 *supra*.

137. *Di Silvestro v. United States*, 132 F. Supp. 692 (E.D.N.Y. 1955), *aff'd*, 228 F.2d 516 (2d Cir.), *cert. denied*, 350 U.S. 1009 (1956).

138. 54 Stat. 1197 (1940). See note 12 *supra*.

139. 48 Stat. 9 (1933). See note 12 *supra*.

140. 259 F.2d 163 (D.C. Cir. 1958).

Judge Danaher ruled that this clause did not apply because, in order to explain the existence of these dual no-review provisions, the earlier or more general clause had to be limited to mean "initial claims" only.¹⁴¹

Consider the law, then, following the decision in *Wellman*. Any V.A. decision denying a claim for disability or for educational benefits, regardless of the grounds, was deemed unreviewable. So also was a decision forfeiting a veteran's benefits for false statements or misrepresentations made to the V.A. But a forfeiture for allegedly disloyal activity was, through a highly technical statutory interpretation, subject to judicial review.

In September of 1958 Congress passed the revised and recodified Veterans' Benefits Act.¹⁴² The second no-review clause of the old statute was abandoned, leaving only the first no-review clause relating to "claims." Under the reasoning of *Wellman v. Whittier*,¹⁴³ therefore, all forfeitures were judicially reviewable, but at least one district court did not get the hint.

In *Thompson v. Whittier*,¹⁴⁴ Mr. Thompson, an honorably discharged World War II veteran, sought reinstatement of his veteran's disability benefits. During the Korean conflict he had made many speeches concerning the propriety of United States' intervention into that war, which reflected discreditably on the motives of those in political power in the United States at that time. It was for these activities that the V.A. had declared a forfeiture of his benefits.¹⁴⁵ The District Court for the District of Columbia declared the forfeiture of Mr. Thompson's disability benefits by the V.A. unreviewable, the case being heard before a three judge district court because it was thought that it involved a direct attack upon the constitutionality of a federal statute.¹⁴⁶ Appeal to the Supreme Court was denied on the ground that the three judge district court had been improperly convened.¹⁴⁷ In the meantime Congress had passed two amendments to the Veterans' Benefits Act prohibiting for-

141. "We have repeatedly recognized that non-reviewability must be accorded to the Administrator's decisions as to claims. But we are not here concerned with a 'claim' by a veteran, but with action by the Administrator working the forfeiture of an already adjudicated award." *Id.* at 169.

142. See note 10 *supra*.

143. 259 F.2d 163, 169 (D.C. Cir. 1958).

144. 185 F. Supp. 306 (D.D.C. 1960); Note, 29 GEO. WASH. L. REV. 580 (1961); Note, 6 VILL. L. REV. 249 (1961). For subsequent history of this case, see notes 147 & 150-51 *infra*.

145. A complete narrative of the activities for which the V.A. declared the forfeiture appears in the subsequent opinion of the Court of Appeals for the District of Columbia. *Thompson v. Gleason*, 317 F.2d 901, 903-04 (D.C. Cir. 1962).

146. 28 U.S.C. § 2282 (1958).

147. *Thompson v. Whittier*, 365 U.S. 465 (1961).

feitures where the veteran was jurisdictionally indictable for the offenses which would otherwise warrant the forfeitures.¹⁴⁸

Following the Supreme Court's denial of the appeal, the case came to the Court of Appeals for the District of Columbia, wherein Judge Prettyman ruled *Wellman v. Whittier*¹⁴⁹ applicable and the action subject to judicial review.¹⁵⁰ The V.A. had originally contended that it could forfeit a veteran's benefits if in its view the veteran had rendered assistance to an enemy of the United States. But Judge Prettyman said that this was a misinterpretation of the statute, and that before a forfeiture could be declared, it must be shown that the veteran had rendered assistance to the enemy within the meaning of only those offenses defined as crimes by statute.¹⁵¹ He therefore remanded the case to the V.A. for a new determination.

Thompson's forfeitures had been declared before the enactment of the non-retroactive 1959 amendments prohibiting forfeitures where the veteran is jurisdictionally indictable for certain offenses. Thus, it did not remove the V.A.'s authority to forfeit Thompson's veterans' benefits in keeping with the pre-1959 law. Additionally, the 1959 amendments permitted summary forfeiture by the V.A. for conviction of subversive activities pursuant to specific federal laws dealing with such activities.¹⁵² Yet, since that part of the legislation is likewise not retroactive, Thompson's earlier conviction under the Smith Act¹⁵³ could not have served as an adequate basis for the V.A.'s summary forfeiture. For these reasons *Thompson v. Gleason*¹⁵⁴ is a lame duck, but an interesting lame duck nevertheless.

In the first place it illustrates the unsatisfactory nature of the judicial decisions which attempt to circumvent the no-review clause by technical legal distinctions or nice statutory constructions. Judge Danaher's decision in *Wellman v. Whittier*,¹⁵⁵ although logical, did not square with Congressional policy and the legislative history. The assumption that Congress meant to limit the no-review clause to initial claims because it had provided an alternative no-review clause for other V.A. activities is not borne out by the legislative history. The two no-review clauses were included in the pre-1958 legislation as a fortuity of consolidation and

148. 38 U.S.C. §§ 3503(d), 3505(a) (Supp. IV, 1963).

149. 259 F.2d 163, 169 (D.C. Cir. 1958).

150. *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962).

151. *Id.* at 907.

152. 38 U.S.C. § 3505(a) (Supp. IV, 1963).

153. *Dennis v. United States*, 341 U.S. 494 (1951).

154. 317 F.2d 901 (D.C. Cir. 1962).

155. 259 F.2d 163 (D.C. Cir. 1958).

evinced no conscious design on the part of Congress to so limit the no-review clause applicable to claims or benefits.¹⁵⁶ Thus, in 1958, those responsible for the revision and recodification eliminated the second no-review clause because it was thought redundant, not because of a policy choice against making forfeitures nonreviewable.¹⁵⁷ Since earlier cases had construed the no-review of claims clause as applicable to forfeitures as well as to initial claims,¹⁵⁸ the district court in *Thompson v. Whittier*¹⁵⁹ had ample authority for ignoring the distinction previously made by Judge Danaher in *Wellman*. It might better have served the ends of justice had the constitutional issue of no-review been directly met in *Wellman*, instead of according relief on the highly artificial distinctions made therein. Finally, *Thompson v. Gleason*¹⁶⁰ avoided the vital question of whether collateral punishment can be inflicted by a withdrawal of benefits, whether administratively or through a legislative condition, for behavior, whether involving a criminal conviction or not, basically unrelated to conditions of eligibility.

Thus, while both the courts and the Congress have limited the V.A.'s discretion to declare a forfeiture, the question of initial eligibility is still not open to judicial review. Veteran "A," whose benefits are *withdrawn* because of his speeches, is entitled to judicial review of the legality of that withdrawal, whereas veteran "B," whose *claim* for educational benefits is

156. See notes 12 & 101 *supra*.

157. In the tables accompanying the codification of the 1958 Veterans' Benefits Act, former section 705, which was the corresponding code provision to that in the Economy Act making all decisions of the administrator unreviewable, 48 Stat. 9 (1933), is indicated as now appearing at 38 U.S.C. 211 (1958), and *not* as "Omitted." 38 U.S.C.A. XXIII (1959). Moreover, the report of the House Committee on Veterans' Affairs on the 1958 Veterans' Benefits Act confirms this conclusion. See note 27 *supra* and accompanying text. Additionally, in the concededly unofficial but nevertheless authoritative compilation, the present no-review clause is indicated as having been based upon the earlier Economy Act provision, 48 Stat. 9 (1933). See Historical Note to 38 U.S.C.A. § 211 (1959).

158. *E.g.*, *Van Horne v. Hines*, 122 F.2d 207 (D.C. Cir. 1941). See note 102 *supra*.

159. 185 F. Supp. 306 (D.D.C. 1960). The singular failure of the district court to note the distinction made in *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958), between initial claims (unreviewable) and forfeitures (reviewable) also escaped the usually critical eyes of the note writers. See Notes, *supra* note 144. Before congressional intervention to restrain the practice (see note 148 *supra*) the V.A. processed 9,206 forfeiture cases and decreed forfeiture in 4,753, or approximately half of them. Of the 4,753 actual forfeitures, 1,062 were for subversive activities. This means that 1,062 American citizens had their veterans' benefits revoked for "treasonable activities without, in many cases, the benefit of a jury trial or even curial review. 2 United States Code Congressional & Ad. New 2219 (1959). In the legal sense, "treason" is a highly technical and complicated offense fraught with procedural and venue niceties. Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 395, 806 (1944). The reader may wish to ponder the consequences of the no-review clause which permitted such a large number of "convictions" by administrative fiat.

160. 317 F.2d 901 (D.C. Cir. 1962).

denied for having made the same kind of speeches, has no opportunity for judicial review.

VI. STATUTORY EXCEPTIONS TO NONREVIEWABILITY: EDUCATIONAL INSTITUTIONS AND NATIONAL SERVICE LIFE INSURANCE

The fundamental unfairness of the no-review clause of the Veterans' Benefits Act¹⁶¹ is further demonstrated by an examination of two other areas of controversy which provoked exceptions to the no-review policy.

Under the original "G.I. Bill" the V.A. was given final authority to determine the tuition payments to be made on behalf of veterans attending educational institutions which did not have established charges.¹⁶² In a number of cases arising prior to 1950, the decisions of the V.A. on these matters were held nonreviewable on any ground whatsoever.¹⁶³ Dissatisfaction with these decisions provoked Congress to enact legislation which amended the V.A. regulations governing such controversies. This legislation created a Veterans' Education Appeal Board and vested it with jurisdiction to consider appeals by "any educational or training institution which is dissatisfied with a determination of a rate of payment for tuition, fees, or other charges . . . or with any other action of the Administrator."¹⁶⁴ Significantly, this statute further provided that "such Board shall be subject, in respect to hearings, appeals, and all other actions and qualifications, to the provisions of sections 5 to 11, inclusive, of the Administrative Procedure Act. . . ."¹⁶⁵ Subsequent to the enactment of this legislation, educational institutions have experienced no difficulty in obtaining judicial review of decisions which are allegedly arbitrary or unjust,¹⁶⁶ except in one Alabama case in which the plaintiff for some reason neither pleaded nor relied upon the foregoing statute.¹⁶⁷

The Veterans' Benefits Act also excludes from the no-review clause

161. 38 U.S.C. § 211(a) (1958).

162. 58 Stat. 290 (1944); 13 Fed. Reg. 2695 (1948).

163. *E.g.*, *Brasier v. United States*, 223 F.2d 762 (8th Cir. 1955) (school decertified in 1949); *Fletcher v. Veterans Administration*, 103 F. Supp. 654 (E.D. Mich. 1952) (school decertified only days before the curative statute); *New York Technical Institute v. Limburg*, 87 F. Supp. 308 (D. Md. 1949); *Slocumb v. Gray*, 82 F. Supp. 125 (D.D.C. 1959).

164. 64 Stat. 336 (1950).

165. *Ibid.* For the legislative history, see 1 United States Code Congressional & Ad. News 2710 (1950).

166. *Radio Television Training Ass'n, Inc. v. United States*, 163 F. Supp. 637 (Ct. Cl. 1958); *Art Center School v. United States*, 142 F. Supp. 916 (Ct. Cl. 1956); *Hemphill Schools, Inc. v. United States*, 135 F. Supp. 946 (Ct. Cl. 1955).

167. *Birmingham Business College, Inc. v. Smith*, 140 F. Supp. 403 (N.D. Ala. 1956).

claims arising out of contracts of National Service Life Insurance.¹⁶⁸ This exemption has proved troublesome only in terms of the type of action to which it is applicable. The interesting question, and the one which typifies the artificial conceptual problems which a no-review clause tends to provoke, relates to the definition of a "contract" of life insurance.

Following each World War Congress enacted legislation providing payments to widows or next of kin of armed service personnel killed in action in accordance with the standard provisions of the contracts of National Service Life Insurance, even though the deceased personnel were not so insured and had never paid premiums on policies of insurance.¹⁶⁹ The issue frequently raised in suits brought by such next of kin was whether this payment was a "gratuity" or constituted a vested contractual "right." The split in judicial opinion was precise, and no authoritative answer was ever given to the question. Owing to the normal expiration of the programs, the question is now moot. It is instructive, nevertheless, to survey the judicial approaches to the question.

With respect to the free and automatic insurance granted to World War I victims, the courts fairly consistently held that the beneficiaries of this legislative "grant" had contractual rights which gave them greater standing to secure judicial review than had they been the mere recipients of gratuities.¹⁷⁰ However, in 1925 Mr. Justice Holmes, with a characteristic positivism which tended to place decisiveness before analysis, considerably weakened this decisional structure by making the following observation concerning the jural relationships created by this statute:

The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the government at considerable cost to itself for the soldier's good.¹⁷¹

The ease with which difficult questions of standing could be dismissed under this formula made it popular with judges who were more interested in disposing of cases than in seeing that justice was done. Moreover, the concealed hostility felt by many judges toward programs of such a "pa-

168. 38 U.S.C. § 784 (1958) deals with disputes regarding insurance claims. This section is specifically excluded from the embrace of the no-review clause. 38 U.S.C. § 211(a) (1958). *Napier v. Veterans Administration*, 187 F. Supp. 723 (D.N.J. 1960).

169. 40 Stat. 409 (1917); 65 Stat. 33 (1951).

170. See review of the cases in *Wilkinson v. United States*, 242 F.2d 735, 736 (2d Cir. 1957).

171. *White v. United States*, 270 U.S. 175, 180 (1925).

ternal" nature was bound to make the language of this decision popular. Such judges, when presented with a benefits case, could seize upon the "gratuity" distinction as a basis for both denying relief and delivering a homily about the dangers which beset a society which becomes too dependent upon its government.

Cases arising under the Servicemen's Indemnity Act of 1951 show the divergent judicial attitudes in sharp focus. In the split, the Protestant ethic made a contingent triumph. In *Ford v. United States*,¹⁷² the Court of Appeals for the Fifth Circuit affirmed a decision which dismissed the claim of a natural mother for compensation under the act. The court had to decide whether the action was a true claim arising under a policy of insurance and therefore exempt from the no-review clause, or whether it was a simple claim for a benefit and therefore subject to the clause. The court took the easy road suggested by Mr. Justice Holmes in *White v. United States*.¹⁷³ "While the Congressional intention to preclude judicial review . . . must be clearly and positively reflected . . . that standard is met here . . . by the intrinsic nature of this as an act of pure gratuity from the sovereign's grave. . . ."¹⁷⁴ The leading case for the opposite view had been *Miller v. United States*¹⁷⁵ in which Mr. Justice Whittaker (then a federal district court judge) repudiated the reasoning behind cases such as *White* with the following remarks:

The defendant's argument is that . . . the insurance . . . is "a gratuity rather than a contractual matter," and payment can be granted or withheld in the exclusive discretion of the Administrator of Veterans' Affairs. . . .

Upon first reading, this position shocks the conscience. Further study of the law has not changed my first impression. Servicemen who lose their lives in the service of our country, and the families of those men, are not the discretionary cestuis of a beneficent Veterans Administration, but, rather are the beneficiaries of a grateful America, whose Congress . . . gave them a vested property right in the life insurance thereby afforded.¹⁷⁶

172. 230 F.2d 533 (5th Cir. 1956).

173. 270 U.S. 175 (1925).

174. *Ford v. United States*, 230 F.2d 533, 534 (5th Cir. 1956).

175. 124 F. Supp. 203 (W.D. Mo. 1954).

176. *Id.* at 204-05. Holding contrary to the *Miller* case *i.e.*, that automatic life insurance claims are *not* subject to judicial review, are *De Espiritu v. United States*, 10 Pike & Fisher Admin. Law 2d 442 (D.D.C. 1960); *Del Castillo v. United States*, 272 F.2d 326 (9th Cir. 1959), *cert. denied*, 361 U.S. 966 (1960); *Stayne v. Veterans Administration*, 6 Pike & Fisher Admin. Law 2d 308 (E.D. Pa. 1956); *Brewer v. United States*, 117 F. Supp. 842 (E.D. Tenn. 1954); *United States v. Sellers*, 75 F.2d

The opinion went on to hold the decision of the V.A. not subject to the no-review clause and granted judgment for the plaintiff.

As stated earlier, no authoritative resolution of these differing views was ever given by the Supreme Court, largely because with the 1958 re-enactment of the Veterans' Benefits Act¹⁷⁷ Congress chose a different method of compensating the dependents of uninsured servicemen killed on active duty. But the clear division of authority on this issue is a fitting introduction to a more general consideration of the distinction between a "right" and "eligibility for a mere gratuity," which distinction Professor Jaffe has rightly termed "a perversion of thought and of language."¹⁷⁸

VII. BENEFITS AND DUE PROCESS

For many years too many courts, both state and federal, have been condoning administrative lawlessness in the administration of benefits programs by labeling the interest of the claimant as a mere "gratuity," the right to which, in the absence of statute, is beyond the reach of any procedural or substantive constitutional protection.¹⁷⁹ Professor Jaffe,

623 (5th Cir. 1935). Supporting the *Miller* case, *i.e.*, that automatic life insurance claims are subject to judicial review, are *United States v. Roberts*, 192 F.2d 893 (5th Cir. 1951); and *Unger v. United States*, 79 F. Supp. 281 (E.D. Ill. 1948).

177. The provisions of the Servicemen's Indemnity Act of 1951, 65 Stat. 33 (1951), were omitted. 38 U.S.C.A. XXII (1959).

178. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 769, 784 (1958).

179. The cases are too numerous for exhaustive collection. Some of the more notorious ones, which specifically predicate denial of review on the gratuitous nature of the claimant's interest, follow. *Miller v. United States*, 294 U.S. 435 (1934); *Slocumb v. Gray*, 179 F.2d 31 (D.C. Cir. 1949); *Van Horne v. Hines*, 122 F.2d 207 (D.C. Cir. 1941); *Nolde & Horst Co. v. Helvering*, 122 F.2d 41 (D.C. Cir. 1941); *Barnett v. Hines*, 105 F.2d 96 (D.C. Cir. 1939); *International Union v. Bradley*, 75 F. Supp. 394 (D.D.C. 1948); *Bannister v. Soldiers' Bonus Bd.*, 43 R.I. 346, 112 Atl. 422 (1921). Annot., 13 A.L.R. 594 (1921). The typical judicial attitude is illustrated by the opinion of the Court of Appeals for the District of Columbia in *Nolde & Horst Co. v. Helvering*, *supra* at 143:

The fundamental fallacy is in misconceiving the substantive nature of the claim. From this flows the error concerning the procedural protections to which its assertion is entitled. . . . The payments . . . were in the nature of gratuities. . . . [T]he procedural consequences flowing from the gratuitous character of the payments is [sic] that Congress had full power to vest final and exclusive jurisdiction over the claims in an executive official or agency, and to withhold entirely from the courts power to interfere with his or its action.

In 1948, the district court for that same jurisdiction held that:

In a case such as this the recipient of a gratuity may not be heard to complain of the manner in which one by law charged with the administration of a public law comes into possession of facts necessary to a proper administration of law. . . . Plaintiffs urge that the statutory provision denying to the courts the right to review decisions of the defendant are unconstitutional. In view of the authorities cited and the conclusion that the benefits sought by plaintiff Golas are necessarily a gratuity the constitutional question is not to be regarded as a substantial one.

International Union v. Bradley, *supra* at 398.

writing in 1958, observed that there was little or no authority to support the proposition that a benefits grant is a mere "privilege" which presumptively excludes judicial review,¹⁸⁰ although he probably permitted his own abhorrence of this proposition to influence his appraisal. Actually, considerable authority existed prior to 1958 in support of the proposition that a statutory grant of benefits created a mere privilege and vested no enforceable right in the donee.¹⁸¹ Variants of this heresy are also observable in the government employment,¹⁸² occupational license¹⁸³ and academic tenure¹⁸⁴ cases. In these latter disputes the sententious judicial dispatch of the problem is usually accomplished through the use of such expressions as "nobody has a right to a government job," "what the State can grant as a mere privilege it can summarily take away," and "nobody has a right to teach."

Unfortunately, these heresies have recently been in ascent. This is curious because the patently false premise behind such reasoning has been exposed frequently by legal writers.¹⁸⁵ The question is not whether any person has a "right" to a bounty or educational benefits, a "right" to a job, a "right" to run a liquor store, or a "right" to teach. Rather it is whether the exercise of a statutory discretion for wrong or mistaken reasons, or in the wrong way, can be squared with the public responsibility and duty of the administrative agency. The related question put by the veterans' benefits cases is whether a legislature—be it state or federal—can constitutionally authorize or impose otherwise illegitimate conditions or accessory requirements to a benefits or subsidy program.

The legitimacy of the *agency* action under a benefits program can usually be questioned on either statutory or constitutional grounds, and

180. See note 178 *supra*.

181. See note 179 *supra*.

182. *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951); *Palmer v. Walsh*, 78 F. Supp. (D. Ore. 1948); *Cain v. United States*, 73 F. Supp. 1019 (N.D. Ill. 1947). The history and continuing vitality of the "privilege" approach to public employment has been reviewed by Dotson, *The Emerging Doctrine of Privilege in Public Employment*, 15 PUB. ADMIN. REV. 77 (1955).

183. *E.g.*, *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *Walker v. City of Clinton*, 244 Iowa 1099, 59 N.W. 2d 785 (1953).

184. *Posin v. State Bd. of Higher Educ.*, 86 N.W.2d 31 (N.D. 1957); *Worzella v. Board of Regents of Educ.*, 77 S.D. 447, 93 N.W.2d 411 (1958); Byse, *Academic Freedom, Tenure, and the Law*, 73 HARV. L. REV. 304 (1959). *Cf.* Frederick Davis, *Enforcing Academic Tenure*, 1961 WIS. L. REV. 200.

185. JAFFE & NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 591-98 (2d ed. 1961); GELLHORN & BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 759-61 (1960); 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* 452-512 (1958); Frederick Davis, *Must a Licensing Authority Act Judicially?*, 32 N.Z.L.J. 360 (1956), 18 N.Z.J. PUB. AD. 45 (1956); Byse, *Opportunity to be Heard in License Insurance*, 101 U. PA. L. REV. 57 (1952).

if the legislature has created no barrier such as a no-review clause, the benefits claimant usually secures review.¹⁸⁶ One of the best answers to the "gratuity" or "crumbs under thy table" theory as applied to a benefits program which does not preclude judicial review is found in an obscure South Dakota decision in which that state's supreme court, while denying relief on clear substantive grounds, made this significant observation:

It is further contended by the appellants that in creating these claims against itself in the nature of gratuities the State intended to withhold the right to resort to the courts and to limit aggrieved applicants to recourse by appeal within the administrative agency it set up. . . . [A]lthough it provided for no appeal to the courts from a determination of the Department, we fail to find any indication of an intent to cut off appropriate judicial remedies.¹⁸⁷

On the other hand, where the issue is the revocation of a license, the dismissal of an employee, or the dismissal of an academic, agency action claimed to be *ultra vires* because it is based upon improper motive or upon insufficient procedural assurance that the action is consistent with commonly expected policies is frequently held beyond judicial challenge.¹⁸⁸ Such cases appear to be wrong. They may involve more delicate and sensitive questions of standing than found in benefits actions,¹⁸⁹ but they are in principle inconsistent with the more liberal review policy in benefits cases. Such decisions most often are wrong because the courts erroneously view public employment dismissals, license revocations or academic suspensions as involving solely the issue of whether the aggrieved individual has a "right" to the status which he has lost.¹⁹⁰ If such disputes were viewed as akin to shareholders' derivative actions¹⁹¹—with the

186. *E.g.*, *Bandy v. Mickleson*, 73 S.D. 485, 44 N.W.2d 341 (1950); *Wood v. Waggoner*, 67 S.D. 365, 293 N.W. 188 (1940); *Annot.*, 13 A.L.R. 589 (1921).

187. *Wood v. Waggoner*, 67 S.D. 365, 293 N.W. 188, 189 (1940) (*dictum*).

188. See cases cited in notes 182-183 *supra*.

189. Even in the numerous cases challenging dismissals or denials of benefits through the use of the prerogative writs or other such "private attorney general" types of action, the courts have almost always treated the controversy as one between the applicant and the government, rather than as between the public authority and the body politic. See *Frederick Davis, op. cit. supra* note 184, at 203 n. 13. *Cf.* *Associated Industries of N.Y. State, Inc. v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

190. *E.g.*, *Fuller v. Mitchell*, 269 S.W.2d 517 (Tex. Civ. App. 1954); Mr. Justice Holmes' famous remark that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

191. See Note, 38 CORNELL L.Q. 244 (1953), discussing the jural correlatives involved in the derivative suit as distinguished from the normal representative suit or class action.

jural correlatives running primarily between the administrative agency and the public interest, rather than between the agency and the aggrieved individual—the sole questions raised would be the standing of the aggrieved party to maintain the action, and whether the constitutional or legislative standards upon which the validity of official action depends have been fully satisfied. While this approach may, in a sense, substitute one bag of problems for another, it at least eliminates the necessity of having to meet the highly artificial question of whether the petitioner has a “right” to this or that job, benefit, license or academic appointment. In its place it substitutes the more realistic question of whether the public has an enforceable interest in the due and regular discharge of administrative business.¹⁹²

The more basic but related question, however, is whether the legislature itself, in the establishment of benefits or subsidy programs, can utilize discriminatory conditions or incorporate features of compulsion which it otherwise might not directly compel or apply under an appropriate regulatory or criminal statute. If the answer to this question be in the negative, *i.e.*, if the legislature *cannot* do indirectly that which the Constitution prevents it from doing directly, then it is clear that a legislative benefits program which implicitly or explicitly authorizes indirect administrative infringement of constitutional rights fails, and that the no-review clause of the Veterans' Benefits Act is unconstitutional.¹⁹³

Unfortunately, this basic question has never been directly answered by the Supreme Court. Although it has been present in one form or another in many cases before the Court,¹⁹⁴ the issue has been consistently averted. Like many major issues which have arisen in the past, *e.g.*, legislative reapportionment¹⁹⁵ and segregation in the public schools,¹⁹⁶ however, there is an observable increase in the pressure which may inevitably

192. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *cf.* *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956); *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

193. 38 U.S.C. § 211 (a) (1958). Such an assertion is, of course, inconsistent with *International Union v. Bradley*, 75 F. Supp. 394 (D.D.C. 1948), and the overwhelming weight of authority. See note 22 *supra*.

194. *E.g.*, *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960); *Speiser v. Randall*, 357 U.S. 513 (1958); *Beilan v. Board of Educ.*, 357 U.S. 399 (1958); *Lerner v. Casey*, 357 U.S. 468 (1958); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950). But *cf.* *Communist Party v. Catherwood*, 367 U.S. 389 (1961).

195. See the trend from *Colegrove v. Green*, 330 U.S. 804 (1946), to *Baker v. Carr*, 369 U.S. 186 (1962).

196. See the trend from *Plessy v. Ferguson*, 163 U.S. 537 (1896), to *Brown v. Board of Educ.*, 347 U.S. 483 (1954). For an objective narrative of the steady journey between these two cases with no evaluation of the cases or expression of emotion, sentiment or opinion, see Schutter, *The Segregation Cases*, 6 S.D.L. Rev. 31 (1961).

affect that mystical "wise adjudication" which "has its own time for ripening."¹⁹⁷

A low point was probably reached in the 1950 decision of *American Communications Ass'n v. Douds*,¹⁹⁸ in which the Court approved congressional imposition of a discriminatory disability aimed at a collateral objective. There the court upheld a statutory denial of labor organization recourse to the facilities of the National Labor Relations Board unless officers of the labor organization filed the ubiquitous non-communist disclaimer affidavit.¹⁹⁹ Another low point was *Fleming v. Nestor*,²⁰⁰ in which the congressional termination of social security benefits to a person already punished by deportation without the benefit of a criminal trial was upheld.

The high points, on the other hand, have mostly turned on findings that the discriminatory disability or handicap was an interference with freedom of speech. Thus, in *Hannegan v. Esquire*²⁰¹ the denial of mailing privileges without observing minimum requirements of administrative due process was held invalid because of its infringement of the free speech guarantees of the first amendment.²⁰² Similarly, in *Talley v. California*²⁰³ it was held that the right to distribute handbills could not be restricted by imposing requirements which tended to discourage the exercise of this right. But the difficulty with these high point cases is not in the results (which are laudable), but in the only logical inference which can be drawn from the narrow ground upon which they are decided. Specifically, this inference is that arbitrary and capricious official action in the administration of benefits or subsidy programs is constitutionally permissible so long as it in no way hinders free speech.

The Supreme Court had an excellent opportunity to correct this short-sighted and limited approach to the benefits and subsidies question in *Speiser v. Randall*.²⁰⁴ This decision is of enormous significance, not

197. *State of Md. v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950). It is the author's opinion that such poetic phrases as that quoted in the text avoid the issue and do more harm than good. Frederick Davis, *Lawyers, the Supreme Court, and Individual Rights*, 6 S.D.L. Rev. 54, 77 (1961).

198. 339 U.S. 382 (1950).

199. See *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951). The provision of the law requiring labor union officials to file non-communist disclaimer affidavits as a condition to the benefits of the National Labor Relations Act was repealed by Congress after twelve years of controversy and several Supreme Court reviews. WOOLLETT & AARON, *LABOR RELATIONS AND THE LAW* 129-30 (1960).

200. 363 U.S. 603 (1960).

201. 327 U.S. 146 (1946).

202. U.S. CONST. amend. I. See PAUL & SCHWARTZ, *FEDERAL CENSORSHIP* 139-67 (1961).

203. 362 U.S. 60 (1960).

204. 357 U.S. 513 (1958).

so much for what it decided, but as an indicator of the type of issue on which the Court will ultimately be forced to ponder and rule. The broad question was whether California could condition the eligibility for a tax exemption upon the individual's willingness to file a so-called "loyalty oath." Had the statute compelled all California citizens to file such oaths or be guilty of a misdemeanor, the board question would probably have been decided in the negative. But the denouement on that question would not be so certain on the facts of the *Speiser* case. The narrow question, however, was whether the state of California could encumber *free speech* through a general tax exemption program which denied eligibility to those guilty of certain types of speech without meeting the burden of proof with respect to the qualitative content of that speech. The Court chose to decide the case on the narrow ground and held the legislation invalid because the California procedure placed the burden of proof on the taxpayer to prove that he had not engaged in certain forms of speech, instead of on the state to prove that he had.²⁰⁵ Owing to the invalidity of the statute, the taxpayer was not required to file the affidavit. The Court, therefore, did not meet the broad due process question of the legitimacy of conditioning receipt of benefits upon the surrender of *any* constitutional rights. It thereby permitted a battle to be won, but only by permitting further entrenchment of a heresy. Briefly stated, that heresy is that the state can purchase a surrender of constitutional freedom by establishing a benefits or subsidy program which the individual is theoretically free to reject, but where the economic circumstances are such that this theoretical freedom of choice is about as real as that which a diabetic has in dealing with the holder of an insulin monopoly.²⁰⁶

While an analogous technique has been approved as a means of compelling state participation in federal welfare programs which the federal government might not be permitted directly to compel under the tenth amendment,²⁰⁷ the infringement involved in this latter case, if there be

205. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a Procedure." *Id.* at 529. Mr. Justice Black, in his concurring opinion in which he was joined by Mr. Justice Douglas, disclosed he would have decided the broad question: "California, in effect, has imposed a tax on belief and expression. In my view, a levy of this nature is wholly out of place in this country; so far as I know such a thing has never even been attempted before." *Id.* at 529-30.

206. Relative bargaining position is an ascendant factor in deciding whether contractual provisions are enforceable. Comment, *Products Liability, Breach of Warranty and the Waning of Some Classic Defenses*, 7 S.D.L. REV. 124. For an interesting theory concerning the philosophical contributions to the relative bargaining position factor in legality see James, *Law, Morals, and the Limits of Contractual Power: An Interpretation of Immanuel Kant*, 3 S.D.L. REV. 24 (1958).

207. *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

any, affects only the status of an individual's state citizenship relative to his federal citizenship.²⁰⁸ It involves no direct inhibition of fundamental rights. Even so, the propriety of the technique has been criticized.²⁰⁹ Surely, however, such a technique has no place in the manifold relationships between the *individual* and his government, for the simple reason that it subverts the fundamental premise of the American system that there are limitations upon what the majority can do to the minority. A benefits or subsidy program which is made dependent upon individual acceptance of otherwise unconstitutional inhibitions of constitutional freedom needs only a legislative majority for enactment. This, incidentally, is also the fundamental issue which has somehow eluded all the commentators on the school prayer cases.²¹⁰ These latter cases, while superficially presenting questions involving the free exercise and no-establishment provisions of the first amendment,²¹¹ are in effect dealing with a much deeper issue: Can the majority sentiment, otherwise disabled from imposing its will upon the minority, indirectly accomplish this same objective by attaching conditions or instituting compulsory adjuncts which limit, offend, or inhibit not just "free speech" or "freedom of religion," but *any* of the constitutional rights of the minority?

All of this may seem unrelated to the question of veterans' benefits, but the two are tied together with a common strand far more real than a tender thread. If, in the administration of a benefits program, an administrative agency is free to ignore fundamental concepts of due process, the door is opened to an unlimited number of practices and procedures by which the exercise of constitutional liberties may be indirectly limited or curtailed. The same is true if legislative disabilities, imposed upon the beneficiaries of such programs in order to curtail or punish activities unrelated to basic entitlement, continue to be upheld.²¹²

In addition to the argument that a disability imposed as part of a benefits or subsidy program violates the constitutional protection of free speech, another argument has been used. This argument is to the effect that a disenfranchisement based upon conduct occurring long before the estab-

208. *Massachusetts v. Mellon*, 262 U.S. 447 (1924).

209. Nilsson, *There Is No "General Welfare Power" in the Constitution of the United States*, 47 A.B.A.J. 43 (1961). See generally REPORT OF THE COMMISSION ON INTERGOVERNMENTAL RELATIONS (1955); *Symposium on Federal Grants-in-Aid*, 13 NAT'L TAX J. 193-248 (1960); Gilliam, *The Impact of Federal Subsidies on State Functions*, 39 NEB. L. REV. 528 (1960).

210. *E.g.*, Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962); Kurland, *The Regents' Prayer Case*, 1962 SUP. CT. REV. 1; Cahn, *On Government and Prayer*, 37 N.Y.U.L. REV. 981 (1962).

211. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

212. *E.g.*, *Flemming v. Nestor*, 363 U.S. 603 (1960).

ishment of the benefits or subsidy program or occurring at a time when it would not have been an obstacle or bar to participation in the benefits or subsidy program is a bill of attainder.²¹³ The argument has been repeatedly rejected by the courts, largely on the basis of two questionable theories. First it has been held, based upon the pernicious "gratuity" concept, that the withdrawal of the benefit is not a "punishment" because the beneficiary's interest is not a "property right."²¹⁴ For this reason, the theory continues, the benefit is subject to modification or withdrawal consistent with any legislative objective. This is the same type of unrealistic casuistry which has plagued the law of occupational licensing, and led too many uncritical courts to uphold the arbitrary destruction of a legitimate business by an administrative agency on the ground that engaging in such business is a "privilege" and not a "right."²¹⁵

Alternatively it has been asserted that even if withdrawal or denial of benefits were an interference with a property right, such a disability is not a punishment because it results in no affirmative action, *e.g.*, a fine or detention being imposed upon the individual.²¹⁶ This argument ignores common knowledge that the forfeiture of all veterans' benefits or social security rights can be far more onerous than the imposition of a ten-day jail sentence, and, regardless of the legal definition of the procedure, it is "punishment" in the popular understanding of that term.

In two cases the courts have strained the limits of credulity by suggesting that somehow or other the beneficiary of a benefits program is intimately involved in the program to such an extent that the efficient administration of that program requires him to curtail the exercise of constitutional liberties which he would otherwise be free to enjoy.²¹⁷ To such absurdities does reliance upon blind logic lead.

The general failure of the "bill of attainder" theory and the unreliability and narrowness of the "free speech" theory lead to the conclusion that the only correct basis upon which to measure the legitimacy of collateral legislative conditions or of various administrative procedures in the functioning of a benefits, claims or subsidy program is that of due process. Whether one emphasizes the "equal protection" overtones of

213. *Ibid.*; *Thompson v. Whittier*, 185 F. Supp. 306 (D.D.C. 1960), *rev'd and remanded sub. nom.*, *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962); Note, 6 VILL. L. REV. 249 (1961); Note, 29 GEO. WASH. L. REV. 580 (1961).

214. *Flemming v. Nestor*, 363 U.S. 603 (1960).

215. *E.g.*, *Walker v. City of Clinton*, 244 Iowa 1099, 59 N.W.2d 785 (1953).

216. *Flemming v. Nestor*, 363 U.S. 603 (1960); *Thompson v. Whittier*, 185 F. Supp. 306 (D.D.C. 1960), *rev'd and remanded sub. nom.*, *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962).

217. *Flemming v. Nestor*, *supra* note 216; *Speiser v. Randall*, 357 U.S. 513 (1958). *Cf. American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

due process as voiced in *Bolling v. Sharpe*,²¹⁸ or the more penetrating idea of "property" as the right fairly to compete for legally protectible managerial control of economic resources,²¹⁹ is immaterial. The concept of due process is rooted in fundamental notions of fairness, and a disability indirectly imposed through a discriminatory denial of an economic advantage otherwise freely available to other persons of the same status can be as unfair as a discriminatory tax.²²⁰

VII. CONCLUSION: THE LEGISLATIVE RESPONSIBILITY

The complexities of the economic society we have created and the necessity for increased governmental control of resource allocation inspired by the cold war have led Professor Arthur Miller to conclude that we are moving into the era of the "Positive State."²²¹ Whether we call it "paternalism" or "government with a heart," and whether we like it or not, the undeniable fact is that the individual to fulfill his creative potential must increasingly depend upon official "licenses," "certificates of eligibility," "honorable discharges," "retirement points," "pensions," "disability allowances," "passports" and the like. Failure to qualify, as in the case of a veteran of only nominal scholastic ability and limited financial resources who seeks educational benefits under the "G.I. Bill" can impose an economic hardship which the victim may have great difficulty in overcoming, or be unable to overcome at all. As the desegregation cases have taught us, unlawful discrimination in the administration of a benefits program is a denial of both the equal protection and due process of law.²²² It follows that a statute which in effect licenses such discrimination by precluding all judicial review of administrative action is also such a denial, and that the no-review clause of the Veterans' Benefits Act²²³ is unconstitutional on its face.

The American system of justice ought never officially concede that a little administrative illegality is the price that must be paid for efficient government. Instead of awaiting judicial decision, therefore, it is proposed that the no-review clause be amended to read as follows:

218. 347 U.S. 497 (1954).

219. *E.g.*, *International News Serv. v. Associated Press*, 248 U.S. 215 (1918); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct.), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1950).

220. *E.g.*, *Morey v. Doud*, 354 U.S. 457 (1957).

221. Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962).

222. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

223. 38 U.S.C. § 211(a) (1958).

The decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and subject to §10 of the Federal Administrative Procedure Act.

Repeal or amendment of the no-review clause would in no way alter the internal procedure of the V.A. It would simply restore the necessary guidance and judicial participation in the policy-making function without which, it is submitted, the administrative machine tends to run amuck.

An example of the desirability of permitting the courts to play even a slight role in the development of administrative benefits programs is afforded by the Department of Health, Education, and Welfare. This Department administers benefits programs of considerable magnitude; yet its decisions, albeit on limited grounds, are still subject to review.²²⁴ In the administration of its program, passive participation by the judiciary as a protection against the abuse of individual rights has seemingly proved no albatross, but, rather, an effective compass.

In *Boyd v. Folsom*²²⁵ the problem was a simple claim by a widow for social security benefits. According to the record the husband had maintained a separate abode because of the friction caused by his eight children of a prior marriage coming into contact with the two children of his wife, also by a former marriage. Despite this arrangement, forced upon the parties by conditions with which even a celibate might sympathize, the parties fully maintained their marital relationships. The husband saw his wife almost every day and spent considerable time during the evening at his wife's home. During the period in which this arrangement was in effect, the wife bore her husband twins and was again pregnant at the time of his death. In fact, the record showed that death struck the claimant's husband while he was once again consummating the marriage.

The administrator, however, (illustrating, once again, that laymen are more legalistic than lawyers) denied benefits on the ground that, because of the maintenance of the separate abode, the deceased was not living with his wife at the time of his death. This decision survived no less than two internal administrative appeals,²²⁶ but the federal district court reversed it and the court of appeals affirmed the reversal.²²⁷ Judge Kalodner might have been speaking for the entire legal profession when

224. 75 Stat. 626 (1961), 42 U.S.C. § 405(g) (Supp. IV, 1963).

225. 149 F. Supp. 925 (W.D.Pa. 1957), *aff'd*, 257 F.2d 778 (3d Cir. 1958).

226. The chronology of the administrative processing of this claim is detailed in the Court of Appeals decision. *Id.* at 780.

227. *Boyd v. Folsom*, 149 F. Supp. 925 (W.D.Pa. 1957), *aff'd*, 257 F.2d 778 (3d Cir. 1958).

he expressed his reaction to the incredibly short-sighted and technical decision of the bureaucracy: "A man isn't 'living with' his wife 'at the time of death' even though he dies while engaged in sexual intercourse with her. That was the startling result reached in the instant case by the Secretary of Health, Education, and Welfare."²²⁸

Unlike England the United States has no system of cabinet responsibility and parliamentary executives to facilitate the bureaucracy's search for standards.²²⁹ In the American system, the only institution capable of performing the job is the judiciary, and this will continue to be true for some time. We do ourselves no good, therefore, by disabling the judiciary from entering into this process.

Another technique through which we do ourselves no good is the legislative use of welfare and benefits programs indirectly to punish or restrict conduct either on or beyond the fringe of what may be constitutionally reached by direct controls. It is submitted, with an indelicacy not characteristic of an era in which we are admonished to "weigh" and "balance,"²³⁰ that this technique, apart from being basically unconstitutional, is fundamentally dishonest and unworthy of a free people. One may appropriately question the extent to which our internal security is advanced or our fiscal position strengthened by denying National Defense Educational Loans to a handful of students unwilling to execute disclaimer affidavits,²³¹ by cutting off Mr. Nestor's social security benefits,²³² by discontinuing Mr. Thompson's disability pension,²³³ by denying Mr. Benjamin Davis a driver's license,²³⁴ and so forth.

228. *Id.* at 782 (concurring opinion).

229. See Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 HARV. L. REV. 863, 1055, 1263 (1962); Eisenberg, *Judicial Standing in Subsidy Cases: Availability of Review Should Be Expanded*, 41 A.B.A.J. 719 (1955). Compare *Brown v. United States*, 10 Pike & Fischer Admin. Law 2d 547 (Ct. Cl. 1960) (no review of V.A. benefits denial based on discharge classification), with *Brown v. United States*, 143 Ct. Cl. 605 (1958) (administrative denial of retirement pay by administrator not acting under a no-review clause, unanimously reversed). See also *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958) (suspension of retirement income for taking the 5th amendment reversed by the court); Note, 22 GA. B. J. 114 (1959).

230. *E.g.*, Griswold, *Absolute Is In The Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963).

231. 72 Stat. 1602 (1958). After four years of boycotting by some of the nation's leading colleges and universities, and the expenditure of much energy and time by persons interested in maintaining academic integrity, the sordid disclaimer affidavit was eliminated from the statute. 76 Stat. 1070 (1962), 20 U.S.C. § 581 (Supp. IV, 1963).

233. For discussion of *Thompson v. Whittier*, 185 F. Supp. 306 (D.D.C. 1960), *rev'd and remanded sub. nom.*, *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962), see notes 144-60 *supra* and accompanying text.

234. *Davis v. Hults*, 24 Misc. 2d 954, 204 N.Y.S.2d 865 (Sup. Ct. 1960). There the commissioner's revocation was reversed because the criminal conviction was for a misdemeanor only. Quære: Where does this leave the rehabilitated felon?

The difficulty with "positive" government is that its "positive" programs have proven all too convenient devices for the indirect curtailment of our constitutional liberties. The veterans' benefits cases are only one aspect of their difficulty. The school prayer decisions²³⁵ are another aspect, although the decisions are based upon the explicit constitutional provisions regarding religion rather than upon the broader due process base. The inescapable conclusion to which a consideration of these various cases leads is that they present a more fundamental problem than that which was perceived in the school prayer decisions, and that the problem will become increasingly acute as we move further into "welfare statism." The question presented is the extent to which majority sentiments can indirectly inhibit the exercise of constitutional liberties by legislatively imposing or by permitting the administrative imposition of conditions or rituals as requirements for, or as integral parts of, benefits or welfare programs, or as requirements for public employment or vocational or recreational activity subject to some sort of licensing function. It may well be that this will become the dominant constitutional question in the decades ahead.

235. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).