

# STATUTORY PRECLUSION OF JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

The general review provisions of section 10 of the Administrative Procedure Act (APA)<sup>1</sup> entitle any person adversely affected by agency action to obtain judicial review of the action. Thus, even though the particular statute under which the challenged agency activity has been conducted does not itself specify<sup>2</sup> that review shall be available, an aggrieved party may turn to the APA for relief.<sup>3</sup> Where the statute, however, is one which, instead of simply failing to address the question, actually "preclude[s] judicial review" within the meaning of section 10,<sup>4</sup> the APA review provisions afford no access to the courts.

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## THE FOLLOWING CITATION WILL BE USED IN THIS NOTE:

K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958) [hereinafter cited as K. DAVIS, *TREATISE*].

1. 5 U.S.C. §§ 701-06 (1970). Section 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Section 703 provides: "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction." Section 704 provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

2. Statutes creating federal administrative agencies may specifically provide that persons adversely affected by such agencies' decisions may seek review by the judiciary. *See, e.g.*, Civil Service Commission Act, 5 U.S.C. § 1508 (1970); Securities Act of 1933, 15 U.S.C. § 77i(a) (1970); Federal Power Act, 16 U.S.C. § 825i(b) (1970); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(f) (1970); Medicare Act, 42 U.S.C. § 1395ff(c) (1970).

3. "One who seeks review in absence of specific statutory provision for review normally seeks it under the APA." K. DAVIS, *TREATISE* § 28.05, at 942 (Supp. 1970); *see, e.g.*, Rothman v. Hospital Serv., 510 F.2d 956, 958 (9th Cir. 1975) (Medicare Act does not provide for review but APA does give right of review, absent specific bar); Hayes Int'l Corp. v. McLucas, 509 F.2d 247, 258-60 (5th Cir. 1975) (although not specifically provided for by statute or regulations, judicial review of Defense Department contract award may be had by unsuccessful bidder under APA); Air Line Dispatchers Ass'n v. NMB, 189 F.2d 685, 689 (D.C. Cir. 1951) (although Railway Labor Act does not specifically provide for review of National Mediation Board jurisdictional determination, the APA permits such review). Before review of an agency decision is available, various preliminary requirements must be satisfied, including standing, finality, and exhaustion of administrative remedies. *See generally* K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 28.01 (3d ed. 1972).

4. 5 U.S.C. § 701(a) (1970). "This chapter applies, according to the provisions

The scope of this limitation on judicial review under the APA has been a matter of controversy. A similar common law doctrine of statutory preclusion existed prior to the enactment of the APA.<sup>5</sup> At that time, the courts felt free to deny such review whenever it was discerned that Congress, in a particular agency enabling act, intended no such review. The congressional intent was divined through the traditional process of judicial construction: if a court decided that the purpose or legislative history of a less than explicit statute revealed a congress-

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thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* This introductory clause modifies the entire chapter governing judicial review, *id.* §§ 701-06, and is thus a limitation on the review which the section would otherwise make available. One limitation, the unavailability of review because of the "committed to agency discretion" clause, has been the subject of much litigation, *see, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), and is beyond the scope of this Note. *See generally* K. DAVIS, *TEXT*, *supra* note 3, § 28.05; Berger, *Administrative Arbitrariness: A Synthesis*, 78 *YALE L.J.* 965 (1969).

Standing to seek review is a concept which must be distinguished from reviewability. In *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the Court defined "standing" in terms of a two-part test. First, the complainant must allege "that the challenged action has caused him injury in fact, economic or otherwise." *Id.* at 152. Second, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

Reviewability presumes that the standing prerequisite has been satisfied and then adds the element of the court's power to judge a certain administrative decision. Correspondingly, "unreviewable" administrative actions are those which will not be judicially scrutinized, despite the fulfillment of all prerequisites such as standing and finality, either because Congress has cut off the court's power to review or because the courts deem the issue "inappropriate for judicial determination." K. DAVIS, *TEXT*, *supra* note 3, § 28.01, at 508.

Even "unreviewable" administrative action may be judicially reviewed under exceptional circumstances, such as where there has been a clear departure from the agency's statutory authority. *See Manges v. Camp*, 474 F.2d 97, 99 (5th Cir. 1973) (order of Comptroller of Currency reviewable because outside his statutory authority, despite 12 U.S.C. § 1818(i)'s withdrawal of review). In light of such limitations, this Note will use the term "unreviewable" to designate administrative agency actions which are not scrutinized by the judiciary, in spite of the conceded fulfillment of all prerequisites such as standing and exhaustion of all administrative remedies, unless abuse of jurisdiction is involved.

It should be noted that the limitations on reviewability under the APA are phrased to allow for *pro tanto* nonreviewability. *See* 5 U.S.C. § 701(a) (1970). As originally enacted, the APA was phrased "except so far as statutes preclude review. . . ." Administrative Procedure Act, ch. 324, § 10, 60 Stat. 243 (1946). Thus, a statute may preclude review of some decisions by an agency, or may preclude review by certain plaintiffs. As Professor Davis noted: "The [APA] is thus carefully framed to avoid the all-or-none fallacy; the Act recognizes that the previous law often cut off review to some extent without cutting it off altogether, and the words 'so far as' left the law as it was." 4 K. DAVIS, *TREATISE* § 28.08, at 33-34. *See also* *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 159, 169 n.2 (Brennan & White, JJ., concurring).

5. See notes 8-18 *infra* and accompanying text.

sional intent to prohibit or limit review, review was unavailable just as though the statute so declared on its face.

The enactment of the APA, however, apparently brought with it a narrowing of this exception to judicial review.<sup>6</sup> Several Supreme Court decisions indicate that the APA created a presumption in favor of reviewability, and further that agency decisions will be held unreviewable only where a statute precludes such review "upon its face."<sup>7</sup> Yet other Court statements and lower court decisions suggest that this apparent narrowing of unreviewability may represent no more than misleading dicta.

This Note examines the preclusion-by-statute doctrine under the APA, inquiring first into the historical development of the doctrine, and then focusing on two principal questions: first, whether judicial review under the APA may be precluded by statute only if the statute limits or prohibits review on its face, and, second, if an express preclusion is not required, what sort of showing is necessary to overcome the presumption of reviewability said to be created by the APA.

#### THE DOCTRINE OF "PRECLUSION BY STATUTE" UNDER THE APA

Prior to enactment of the APA in 1946, the availability of judicial review, where not specifically enumerated by an agency statute, was governed by what has been termed a "common law of judicial review."<sup>8</sup> Under this early approach, the reviewing court was required to determine, prior to hearing the merits, whether Congress had intended to authorize judicial review of the particular administrative action in question.<sup>9</sup> The congressional intent, in turn, was divined through the traditional process of judicial construction. In addition to the obvious need to look at the language of the statute, the valid indicia considered by the judiciary in making this determination included

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6. See notes 25-34 *infra* and accompanying text.

7. *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 156-57 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 n.2 (1946) (both cases quoting H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946)).

8. See 4 K. DAVIS, *TREATISE* § 28.07; Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 410 (1958).

9. See, e.g., *Switchmen's Union of N. America v. National Mediation Bd.*, 320 U.S. 297, 301 (1943) ("constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced," and Congress in enacting the Railway Labor Act did not intend judicial review of certain National Mediation Board decisions); *United States v. Griffin*, 303 U.S. 226, 233-34 (1938) (intent of Congress was central consideration in decision that Urgent Deficiencies Act did not allow judicial review of certain order by ICC). For a more detailed discussion of *Switchmen's Union*, see text accompanying notes 14-20 *infra*.

the pattern of the statutory scheme,<sup>10</sup> the purpose of the statute,<sup>11</sup> and legislative history of the statute.<sup>12</sup> Thus, if the court decided, for example, that the purpose or legislative history behind a statute not expressly addressing the question of judicial review revealed a congressional intent to prohibit or limit such review, the statute was construed as precluding review as effectively as if it so declared on its face.<sup>13</sup>

In the leading pre-APA decision of *Switchmen's Union of North America v. National Mediation Board*,<sup>14</sup> the Supreme Court held that a decision of the National Mediation Board to certify a certain union to represent railway men under the Railway Labor Act<sup>15</sup> was not judicially reviewable, despite the fact that the statute itself did not explicitly forbid review of such decisions. The Court's holding turned on an interpretation of the Railway Labor Act taken as a whole<sup>16</sup> and the legislative history of the statute, including committee hearings and comments of the statute's sponsor.<sup>17</sup> *Switchmen's Union* typifies the pre-APA approach to reviewability: the congressional intent to withhold review was derived through the orthodox process of statutory construction.<sup>18</sup>

10. See *Switchmen's Union of N. America v. National Mediation Bd.*, 320 U.S. 297, 304-06 (1943).

11. See *United States v. Griffin*, 303 U.S. 226, 233 (1938) (congressional purpose in enacting Urgent Deficiencies Act indicated that Act did not authorize judicial review of certain ICC orders).

12. See *Switchmen's Union of N. America v. National Mediation Bd.*, 320 U.S. 297, 301 (1943) ("Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied.").

13. See *id.* at 302, 305-06.

14. 320 U.S. 297 (1943).

15. Railway Labor Act, 45 U.S.C. § 152(Ninth) (1970). The statute provides:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees . . . it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. . . . In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. *Id.*

16. See 320 U.S. at 305-06.

17. See *id.* at 302-03.

18. See K. DAVIS, TEXT, *supra* note 3, § 28.04, at 513 (discussing *Switchmen's Union*).

Whether the APA merely codified the existing "common law" of reviewability or was intended by Congress to change the law has been the subject of some debate. One position is that the *Switchmen's Union* approach was continued under the APA, so that judicial review should be precluded whenever a statute is *judicially interpreted* so to preclude it, whether that interpretation rest on explicit language, legislative history, or other factors.<sup>19</sup> A contrary argument is that the APA created a presumption that review is available and that only an explicit statutory preclusion of review should overcome that presumption.<sup>20</sup>

Early Supreme Court decisions applying the APA seem to be in accord with the first position. *Ludecke v. Watkins*<sup>21</sup> held that the Alien Enemy Act<sup>22</sup> precluded judicial review of a wartime alien deportation order. In fact, the Act contained no specific language either authorizing or forbidding judicial review of such deportation orders. The Court's finding of unreviewability turned on its observation that "controlling contemporaneous [judicial] construction" had precluded review, and that "every judge before whom the question has since come has held that the statute barred judicial review."<sup>23</sup> *Ludecke* thus suggests that a statute, neutral on its face toward reviewability, could be one which, through judicial interpretation, precludes review.<sup>24</sup>

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19. See 4 K. DAVIS, TREATISE § 28.08, at 37, 41.

20. Jaffe, *The Right to Judicial Review II*, 71 HARV. L. REV. 769, 793 (1958). See also W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS 218-20 (6th ed. 1974) (suggesting that preclusion of judicial review will rarely be implied from a statute); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 374 (1965).

21. 335 U.S. 160 (1948). The Alien Enemy Act, 50 U.S.C. § 21 (1970), empowers the President to determine and promulgate the restraints to be placed on aliens of hostile countries. Pursuant to executive order during World War II, Ludecke was ordered deported as a German alien. The Court held that the Alien Enemy Act precludes review by the courts of the deportation decision by the President. 335 U.S. at 163-64.

22. 50 U.S.C. § 21 (1970). The statute provides:

Whenever there is a declared war between the United States and any foreign nation . . . all natives, citizens, denizens, or subjects of the hostile nation or government . . . who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

23. 335 U.S. at 164-65.

24. This proposition was reinforced by *Heikkila v. Barber*, 345 U.S. 229 (1953). Petitioner there sought review of a deportation order issued by the Attorney General under the Immigration Act of 1917. While the Court admitted that the "finality" language of the statute was insufficient of itself to bar review, *id.* at 233, it found that

In later cases, however, the Supreme Court began with increasing frequency to suggest that statutory preclusion must be explicit. In the 1967 case of *Abbott Laboratories v. Gardner*,<sup>25</sup> drug manufacturers sought judicial review of regulations on drug labeling issued under the Federal Food, Drug, and Cosmetic Act.<sup>26</sup> The Government attempted to block review, asserting that the Act precluded it by implication.<sup>27</sup> In rejecting this argument and holding that the Act did not preclude such an action for judicial review,<sup>28</sup> the Court first declared that the APA "embodies the basic presumption of judicial review to one [suitably aggrieved by agency action] so long as no statute precludes such relief or the action is not one committed by law to agency discretion . . . ."<sup>29</sup> Specifically addressing the statutory preclusion question, the Court then quoted, in a footnote, from material in the APA's legislative background which it thought "elucidated" the congressional intent behind the provision: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must *upon its face* give clear and convincing evidence of an intent to withhold it."<sup>30</sup>

Three years later, in *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>31</sup> a decision concerned primarily with the standing requirement, the Supreme Court once again dealt with the question of statutory preclusion of judicial review. The Comptroller of the Currency had issued a ruling permitting national banks to provide data processing services. A group of vendors of such equipment

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the statute did preclude review because the requisite congressional intent was shown by legislative and judicial history. See *id.* at 233-35. When *Heikkila* was decided, the statute read in part: "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final." Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889, as amended 54 Stat. 1238, formerly codified 8 U.S.C. § 155(a) (1946), repealed Act of June 27, 1952, ch. 477, § 403(a)(13), 66 Stat. 279.

25. 387 U.S. 136 (1967).

26. 21 U.S.C. § 301 (1970).

27. The Government argued that since the Act specifically enumerated review procedures for certain categories of regulations, Congress by implication intended no review of all other regulations. The labeling regulation involved in the case was outside the categories for which review was provided by the Act. 387 U.S. at 141. The Court specifically rejected the *expressio unius* basis for preclusion of judicial review, stating that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Id.*, quoting L. JAFFE, *supra* note 20, at 357.

28. 387 U.S. at 148.

29. *Id.* at 140.

30. *Id.* at 140 & n.2, quoting H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946) (emphasis added).

31. 397 U.S. 150 (1970).

sought judicial review of the ruling since it reduced their own business opportunities. After finding the standing requirement satisfied, the Court went on to hold that review of the Comptroller's ruling was not precluded by any "relevant" statute.<sup>32</sup> Implicit in the decision is the Court's recognition of the presumption favoring judicial review mentioned in *Abbott Laboratories*.<sup>33</sup> Moreover, the *Data Processing* opinion elevated the statement quoted in *Abbott Laboratories*—that preclusion of review must appear on the face of a statute—from mere footnote status to textual discussion,<sup>34</sup> suggesting increased emphasis of the point.

From the treatment given the issue of limitation or preclusion of judicial review by statute in the *Abbott Laboratories* and *Data Processing* decisions, one might conclude that the APA mandates a presumption that judicial review of agency action is available, and that the presumption will not be overcome except by a showing that some other statute "upon its face" clearly reveals a congressional intent to bar such judicial review. These tentative conclusions, however, require a more thorough examination.

#### THE "UPON ITS FACE" REQUIREMENT FOR STATUTORY PRECLUSION

Despite the pronouncements of *Abbott Laboratories* and *Data Processing* that a statute will bar judicial review only when it expresses such a prohibition "upon its face," the weight of judicial authority does not support such a proposition. Since *Abbott Laboratories*, the federal courts have consistently stated that the APA does provide a "presumption" in favor of judicial review,<sup>35</sup> but whatever may be the nature and

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32. *Id.* at 157. The "relevant" statutes were the Bank Service Corporation Act, 12 U.S.C. § 1864 (1970), and the National Bank Act, 12 U.S.C. § 24 (1970). With little elaboration, the opinion declares: "We find no evidence that Congress in either [Act] sought to preclude judicial review of administrative rulings by the Comptroller . . . ." 397 U.S. at 157.

33. In addressing the reviewability question, the Court began by questioning "whether judicial review . . . has been precluded." 397 U.S. at 156 (emphasis added). Thus, it apparently did not think it necessary even to address as a separate stage the *availability* of review, indicating that it presumed review was in fact available unless affirmatively precluded.

34. *Id.*

35. See *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated."). See also *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) ("[t]he strong presumption that Congress did not mean to prohibit all judicial review of [the Sec. of Labor's] decision"); *Sabin v. Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975) ("there is a basic presumption of judicial review" for those aggrieved by agency action); *Roth-*

strength of this presumption,<sup>36</sup> it is now clear that review may be precluded by a statute even in the absence of any limitation on the face of the statute itself.<sup>37</sup>

There is but slender support in the legislative history of the APA for the view that a statute may bar judicial review only when it in terms addresses the issue or bears language negating such review on its face. The language of the House Judiciary Committee,<sup>38</sup> although repeatedly accepted by the Supreme Court as being the definitive expression of congressional intent in the APA, is not representative of the APA's legislative history.<sup>39</sup> The pre-APA law, as typified by the *Switchmen's Union*<sup>40</sup> decision, did not require statutory prohibition of judicial review to be express. And the weight of the legislative statements surrounding the APA's enactment, aside from the one exception already noted,<sup>41</sup> shows no congressional inclination to overturn the law of *Switchmen's Union* and to impose a strict requirement of express preclusion.

In initial deliberations on the APA, for example, the Senate committee stressed that the introductory limitations<sup>42</sup> on judicial review were merely a statement of existing law on the preclusion of judicial review.<sup>43</sup> In the House committee hearings, a proponent of the bill stated that he had no intent to alter the existing "principles of review."<sup>44</sup> In response to congressional solicitation of his opinion, the Attorney General expressed the view that the bill would, so far as it related to the preclusion of judicial review, declare the existing law.

man v. Hospital Serv., 510 F.2d 956, 958 (9th Cir. 1975) (APA "provides jurisdiction for review of agency action . . . unless such jurisdiction is otherwise barred"); *Hayes Int'l Corp. v. McLucas*, 509 F.2d 247, 258 (5th Cir. 1975) ("there is virtually a presumption in favor of judicial review . . . unless a contrary purpose is fairly discernible in the statutory scheme"); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) ("[p]reclusion of judicial review is not lightly to be inferred [and] requires a showing of clear evidence of legislative intent").

36. This issue is discussed at text accompanying notes 66-96 *infra*.

37. See *Consumer Fed'n of America v. FTC*, 515 F.2d 367 (D.C. Cir. 1975). For a discussion of this case, see text accompanying notes 53-58 *infra*.

38. Quoted in text accompanying note 30 *supra*.

39. See generally *Davis, Unreviewable Administrative Action*, 15 F.R.D. 411, 431 (1954).

40. 320 U.S. 297 (1943). See text accompanying notes 14-18 *supra*.

41. H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946) (quoted in text accompanying note 30 *supra*).

42. 5 U.S.C. § 701(a) (1970) (quoted in note 4 *supra*).

43. "The introductory exceptions state the two *present* general or basic situations in which judicial review is precluded . . ." S. Doc. No. 248, 79th Cong., 2d Sess. 36 (1946) (emphasis added).

44. *Id.* at 84 (remarks of Congressman McFarland).



He cited as an example of that law the *Switchmen's Union* decision.<sup>45</sup> It does not appear from the legislative history that the Senate or House committees ever took issue with the Attorney General's interpretation of the bill. Thus, the "upon its face" language twice quoted by the Supreme Court<sup>46</sup> seems misrepresentative of the contemporaneous understanding of the Congress as to the effect of the APA's enactment on reviewability.

In both Supreme Court decisions citing the proposition that preclusion of review must appear on the face of a statute, the reference is dictum.<sup>47</sup> Moreover, as already discussed, such dicta run directly contrary to earlier holdings of the Court.<sup>48</sup> And in *Barlow v. Collins*,<sup>49</sup> decided on the same day as *Data Processing*, the Court observed that preclusion of judicial review might be found in "implied terms,"<sup>50</sup> further weakening the *Data Processing* suggestion that preclusion must be found on the face of the statute.

When faced directly with the problem, the lower federal courts have not hesitated to ignore the "upon its face" dicta. Thus, where the circuit courts have been forced to deal with statutes which contain no express prohibition of review,<sup>51</sup> several have ignored such dicta and

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45. "Section 10: This section, in general, declares the existing law concerning judicial review . . . . A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union* . . . ." S. Doc. No. 248, 79th Cong., 2d Sess. 229-30 (1946) (advisory opinion of Attorney General of the United States).

46. *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 156 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 n.2 (1967).

47. In *Abbott Laboratories*, the Court observed that "[t]here is no evidence at all that members of Congress meant to preclude . . . judicial relief," and so had no need to decide if such evidence appearing other than on the face of the statute was relevant to the inquiry. See 387 U.S. at 142. *Data Processing* also was a case where no evidence of congressional intent to preclude review was shown, so it was not necessary for the Court to decide whether evidence not apparent from the face of the statute itself would be ignored. See 397 U.S. at 157.

48. See text accompanying notes 21-24 *supra*. Professor Davis, after discussing the conflict between the Court's language in *Data Processing* and its holdings, concludes: "A flat assertion that the dictum in *Data Processing* is not the law is not too strong." 4 K. DAVIS, TREATISE § 28.08, at 947 (Supp. 1970).

49. 397 U.S. 159 (1970).

50. *Id.* at 165. Tenant farmers sought judicial review of certain Agriculture Department regulations concerning land diversion payments. In holding that the farmers did have standing and that no statute precluded such judicial review, the Court stated that it must determine "if Congress has in express or implied terms precluded judicial review . . . ." *Id.* (emphasis added).

51. While some agency organic statutes do expressly preclude review, others are much less clear. Among statutes carrying specific preclusion language are those limiting review except in a specified manner and those prohibiting review altogether. In the latter category are 38 U.S.C. § 211(a) (1970) (no court has power to review certain

inferred a preclusion of review.<sup>52</sup> A recent example is the decision of the District of Columbia Circuit in *Consumer Federation of America v. FTC*,<sup>53</sup> which held that the Federal Trade Commission Act<sup>54</sup> (FTCA) precludes review of FTC refusals to order corrective advertising for any persons not subject to cease and desist orders.<sup>55</sup> Since the FTCA is on its face wholly neutral toward the availability of review for persons outside the category of those "subject to cease and desist orders,"<sup>56</sup> the holding that the Act precludes review within the meaning of the APA<sup>57</sup> obviously does not conform to the dicta of *Abbott Laboratories* and *Data Processing*. Accordingly, *Consumer Federation* plainly rejects the proposition that statutory preclusion of judicial review must be express.<sup>58</sup>

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Veterans Administration decisions on claims) and 5 U.S.C. § 8128(b) (1970) (no court has power to review administrative denials of claims under Federal Employees' Compensation Act). Restrictions in the former category include prohibition of review except in a certain forum. See *UMC Indus., Inc. v. Seaborg*, 439 F.2d 953 (9th Cir. 1971) (decisions of Board of Patent Interferences to award patent to Atomic Energy Commission unreviewable in district court because 42 U.S.C. § 2182 specifies that appeal lies to Court of Customs and Patent Appeals); 42 U.S.C. § 1857h-5 (petition to review EPA promulgation of air quality plan "may be filed only in the United States Court of Appeals for the appropriate circuit . . .").

52. See *Alabama Power Co. v. Alabama Elec. Coop., Inc.*, 394 F.2d 672 (5th Cir.), cert. denied, 393 U.S. 1000 (1968) (preclusion of review based on repeated judicial construction of REA, 7 U.S.C. §§ 901 et seq. (1970), and failure of Congress to override such interpretation); *Western Pac. R.R. v. Habermeyer*, 382 F.2d 1003, 1009 (9th Cir. 1967), cert. denied, 390 U.S. 980 (1968) (no express denial of review but provisions of Railroad Unemployment Insurance Act, 45 U.S.C. § 355 (1970) construed *in toto* said to manifest intent to preclude review). In *Western Pacific*, while conceding that the rule of *Abbott Laboratories* is that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review," the court nonetheless held that the statute did preclude review despite the lack of express language of preclusion. 382 F.2d at 1007, quoting 387 U.S. at 141. Its holding is thus an implicit rejection of the strict "on its face" requirement in *Abbott Laboratories*. 387 U.S. at 140 n.2. In *Alabama Power* (1968), on the other hand, the court failed even to mention the 1967 *Abbott Laboratories* decision.

53. 515 F.2d 367 (D.C. Cir. 1975). Petitioner, a consumer group, sought judicial review of the FTC's refusal to order corrective advertising by a baking firm found to have misrepresented its product's nutritional value. Although the Federal Trade Commission Act (FTCA) guarantees that parties subjected to FTC cease and desist orders shall be entitled to judicial review, it says nothing denying or providing a right of review to aggrieved persons outside that category. 15 U.S.C. § 45(c) (1970).

54. 15 U.S.C. § 45(c) (1970).

55. 515 F.2d at 373. While the court cites *Abbott Laboratories*, it does not make reference to the "upon its face" language. *Id.* at 370.

56. Section 5(c) of the FTCA, 15 U.S.C. § 45(c) (1970), provides: "Any person, partnership, or corporation required by an order of the [Federal Trade] Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States . . . ."

57. 5 U.S.C. § 701(a)(1) (1970).

58. The court based its finding of preclusion on the legislative history behind the

The Supreme Court itself, in *Dunlop v. Bachowski*,<sup>59</sup> indicated that, although it held the administrative action in question reviewable, it had listened to arguments that the legislative history showed "a congressional meaning to prohibit judicial review . . ." and had simply found the argument unsupported by the legislative record.<sup>60</sup> While clearly dictum, the statement does suggest that the Court might well have held the statute to preclude review had a congressional intent to do so been evidenced by legislative history.<sup>61</sup>

If the statements that review may be precluded only where a statute "upon its face" so directs were taken literally, it might require that a court ignore clear and convincing evidence that Congress meant to prohibit review although it did not so indicate in terms. Yet the orthodox rules of statutory construction recognize that "what is implicit is as much a part of a statute as what is explicit . . ."<sup>62</sup> Even a pro-

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FTCA. While not indicated by the court in its opinion, the FTCA had in fact been construed some years earlier to preclude reviewability for anyone not subject to a cease and desist order. *Wholesale Grocers' Ass'n v. FTC*, 277 F. 657 (5th Cir. 1922). Therefore, an alternative approach to precluding review in *Consumer Federation* might have been to observe that the FTCA as judicially interpreted prior to the enactment of the APA did preclude such review, and that therefore such review was now precluded under 5 U.S.C. § 701(a)(1). An analogous approach was the basis of a holding of preclusion of review in *Kirkland v. Atlantic Coast Line R.R.*, 167 F.2d 529 (D. C. Cir.), cert. denied, 335 U.S. 843 (1948).

59. 421 U.S. 560 (1975). The Secretary of Labor had refused to interfere with a union election as permitted under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 481 *et seq.* (1970), and the disappointed office-seeker sought judicial review under the APA. 421 U.S. at 563-64. The Supreme Court agreed that review was not precluded by the statute. *Id.* at 568. The case is also discussed at note 96 *infra*.

60. 421 U.S. at 567.

61. Some lower federal decisions also suggest that, if legislative history had shown a congressional intent to bar review, the result would have been a holding of non-reviewability. For cases holding agency action reviewable but containing such dicta, see *Rothman v. Hospital Serv.*, 510 F.2d 956, 958 (9th Cir. 1975) ("clear and convincing evidence of congressional intent to preclude review expressed in the statute itself or in its legislative history" sufficient to bar review); *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 689 (D. C. Cir. 1951) ("since there is no explicitness in the Railway Labor Act or indication in its history of a Congressional intention to leave it exclusively to Board determination," APA review provisions apply).

At least two members of the Supreme Court who concurred in the result (reviewability) in both *Data Processing* and *Barlow* thought that the question of whether Congress intended review involved an inquiry beyond the face of the statute itself. See 397 U.S. 159, 173 (Brennan & White, JJ., concurring and dissenting) ("Pertinent statutory language, legislative history, and public policy considerations must be examined to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the plaintiff belongs.").

62. 4 K. DAVIS, TREATISE § 28.08, at 37. The point is illustrated by Professor Davis in his discussion of the landmark pre-APA decision of *Switchmen's Union of N. America v. National Mediation Bd.*, 320 U.S. 297 (1943).

The decision rested upon analysis of legislative history, which, according to

ponent of the "explicit preclusion only" view of nonreviewability has conceded that no *logical* differentiation in terms of consequences can be drawn between explicit and implicit commands of a statute.<sup>63</sup>

When the dicta requiring preclusion of review to appear "upon the face" of a statute are weighed against the earlier holdings of the Supreme Court in cases such as *Ludecke v. Watkins*<sup>64</sup> and more recent dicta in *Dunlop v. Bachowski*, the District of Columbia Circuit appears to state the law correctly in holding that a statutory "prohibition [of judicial review] need not be express."<sup>65</sup> It can thus be stated confidently that statutory preclusion of judicial review may be accomplished by something less than a prohibition appearing on the face of a statute. Questions remaining are whether the APA mandates a presumption of review, and if it does, what the strength of any such presumption is and what indications of congressional intent to preclude review are required to overcome it.

#### OVERCOMING THE PRESUMPTION OF REVIEWABILITY

The cases interpreting the APA, beginning with *Abbott Laboratories v. Gardner*,<sup>66</sup> uniformly recognize the existence of some sort of presumption that agency decisions are subject to judicial review. From the various formulations given by the Supreme Court, it may be generalized that the APA provides a "strong," but not an irrebuttable, presumption that judicial review is available to any person aggrieved by the actions of administrative agencies.<sup>67</sup>

Certain aspects of the presumed availability of judicial review emerge from the cases as well-settled doctrine. The mere absence

the Court's findings, called for unreviewability. If, as the Court thought, it was the intent of Congress that the courts should refuse review, then the statute precluded review, for our whole tradition of statutory interpretation is that what is implicit is as much a part of a statute as what is explicit, and that the meaning of a statute includes what courts find through the processes of interpretation. 4 K. DAVIS, TREATISE § 28.08, at 37.

63. See Jaffe, *supra* note 20, at 791.

64. 335 U.S. 160 (1948). See text accompanying note 21 *supra*.

65. *Consumer Fed'n of America v. FTC*, 515 F.2d 367, 370 (D.C. Cir. 1975).

66. 387 U.S. 136, 140 (1967).

67. See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) ("[the agency] bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision"); *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("judicial review . . . is the rule, and nonreviewability an exception which must be demonstrated"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1961) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("judicial review . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

of a review provision in the organic legislation for a particular agency is not of itself sufficient to constitute statutory preclusion, and hence does not overcome the presumption of reviewability.<sup>68</sup> If the affirmative expression of the Congress in the APA that reviewability should be the norm<sup>69</sup> is to be given effect at all, it ought not be defeated merely because other legislation does not reiterate that expression.

It is likewise clear that the presumption of reviewability is not overcome merely by the fact that Congress in a particular agency statute has expressly provided a right of review for a certain category of persons and made no mention of other persons who might be aggrieved by the agency action.<sup>70</sup> Nor is the presumption rebutted solely by the fact that the statute expressly provides the right to review of certain types of decisions by an agency but makes no mention of review of other decisions by that agency.<sup>71</sup>

Taken together, the cases in this area show clearly that the presumed availability of review will not be defeated by any demonstration that Congress was simply passive or oblivious to the issue of reviewability of a particular administrative agency's actions. If the specific statute creating an agency merely omits or ignores the reviewability of certain agency decisions or for certain categories of aggrieved persons,

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68. "Clearly the absence of statutory language expressly authorizing judicial review is insufficient to offset the presumption that administrative action is reviewable." *Hayes Int'l Corp. v. McLucas*, 509 F.2d 247, 259 (5th Cir. 1975); see *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 157 (1970), quoting H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946) ("The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.").

69. See 5 U.S.C. § 704 (1970) (quoted at note 1 *supra*).

70. *Consumer Fed'n of America v. FTC*, 515 F.2d 367, 370 n.8 (D.C. Cir. 1975) (dictum); *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 735-36 (D.C. Cir. 1970); *Peoples v. USDA*, 427 F.2d 561, 565 (D.C. Cir. 1970). In *Finch*, the court stated: "The fact that the [Social Security Act, 42 U.S.C. § 1316 (1970)] explicitly gave judicial review to the states and said nothing about welfare recipients is not 'clear and convincing evidence' that Congress intended to deny review to the primary beneficiaries under the statute." 429 F.2d at 736. Similarly, in *Peoples*, the court noted that although the Food Stamp Act, 7 U.S.C. § 2022 (1970), specifically provided a right of review to blacklisted food distributors, "no . . . implication [of an intent] to curtail or negative the judicial review otherwise presumed to be available for the protection of the poor" could be discerned. 427 F.2d at 565.

71. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) ("The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." (citation omitted)); see *Aquavella v. Richardson*, 437 F.2d 397, 401 (2d Cir. 1971) (fact that Medicare Act, 42 U.S.C. § 1395ff(c) (1970), expressly provides for review of certain HEW actions does not show "Congress intended to have no other determinations reviewed").

then, the cases show, the courts will look to the APA to fill the void; its presumption of reviewability stands undisturbed.<sup>72</sup>

At the opposite end of the spectrum is the situation where the presumption of reviewability is obviously displaced. It is evident from the cases that express statutory preclusion will serve to make judicial review unavailable. For example, a statute specifying that no court shall have power or jurisdiction to review any Veterans Administration decision on claims for benefits<sup>73</sup> was held to bar judicial review of the Administrator's decision on entitlement to a soldier's death gratuity.<sup>74</sup> Similarly, judicial review of denial of a death benefit was held precluded by a statute<sup>75</sup> making such decisions "not subject to review . . . by any court by mandamus or otherwise . . ."<sup>76</sup> Such express statutory commands are quite clearly "statutes precluding" review and hence eliminate the otherwise available APA review.<sup>77</sup>

But, as previously discussed,<sup>78</sup> it is not necessary that the congressional intent to preclude review appear expressly in a statute in order to bar judicial review. It is in this middle ground—where a statute is facially neutral toward the question of judicial review but where Con-

72. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975). Finding that "there is not even the slightest intimation that Congress gave thought to the matter of the preclusion of judicial review," *id.* at 567, the Court in *Dunlop* held that "§§ 702 and 704 [of the APA] subject the Secretary's decision to judicial review . . ." *Id.* at 566.

73. 38 U.S.C. § 211(a) (1970), formerly 38 U.S.C. § 11a-2 (1952).

74. *Ford v. United States*, 230 F.2d 533 (5th Cir. 1956) (per curiam). The court found that the "categorical declaration" of the statute that agency decisions on all questions of law or fact concerning VA benefits claims were final and "beyond the power of any court to review" was clearly sufficient to preclude review under the APA. *Id.* at 534.

75. 5 U.S.C. § 8128(b) (1970), formerly 5 U.S.C. § 793 (1952).

76. *Blanc v. United States*, 244 F.2d 708, 710 (2d Cir.) (per curiam), cert. denied, 355 U.S. 874 (1957). Following the final administrative denial of the claim by a postal worker's widow for benefits under the Federal Employees' Compensation Act, the widow sought judicial review of the agency proceedings under the APA. The court held that APA review was "expressly and clearly prohibited" by the statute, 5 U.S.C. § 8128(b), which provided that such decisions were not subject to review by any court. 244 F.2d at 710.

77. *But cf. Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958). In *Wellman*, the court held a statute providing that "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 conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision," 38 U.S.C. § 211(a) (1964) (emphasis added), did not preclude review of an administrative decision terminating benefits. Congress amended the statute to clarify the express preclusion intended. See 38 U.S.C. § 211(a) (1970). See generally *W. GELLHORN & C. BYSE*, *supra* note 20, at 223.

78. See text accompanying notes 35-65 *supra*.

gress arguably intended to preclude such review—that the vitality of the reviewability presumption is tested.

Before considering the judicial treatment of the question in specific cases arising under the APA, it seems appropriate to look first at the APA itself. Section 10(a) of the Act grants the right of judicial review to any person “adversely affected or aggrieved by agency action.”<sup>79</sup> Section 10(c) goes on to provide that “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.”<sup>80</sup> In a mechanical sense, these provisions may be viewed as a statement of the statutory norm (or presumption) that agency actions are reviewable. The exceptions listed in the introductory clause of section 10, one of which is the preclusion-by-statute exception,<sup>81</sup> are the legislative enumeration of what will exempt a specific agency decision from that statutory norm (or overcome the presumption of reviewability).<sup>82</sup> It is of central importance, then, to determine what Congress meant by the phrase “statutes preclude” as it is used in the introductory clause.<sup>83</sup>

An obvious starting point is to look at the plain meaning of the word “statutes.”<sup>84</sup> In the common sense of the word, “statutes” derives meaning through the normal process of interpretation by the judiciary.<sup>85</sup> Unless Congress meant to attach some unusual significance to the word “statutes” when it enacted the APA, then, “statutes” is but shorthand for the legislative expression of intent, which must be divined by the entire arsenal of aids to construction.<sup>86</sup> As already discussed, the weight of the APA’s own legislative history shows that Congress did *not* attach any unusual significance to the concept of statutory preclusion,<sup>87</sup> the contemporary understanding was that *Switchmen’s*

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79. 5 U.S.C. § 702 (1970).

80. *Id.* § 704.

81. *Id.* § 701(a)(1) (quoted in note 4 *supra*).

82. The Supreme Court used essentially this approach in *Dunlop v. Bachowski*, 421 U.S. 560, 566-67 (1975). *Accord*, *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 156 (1970) (APA judicial review provisions apply except as modified by 5 U.S.C. § 701(a) (1970)); *Barlow v. Collins*, 397 U.S. 159, 165 (1970) (APA allows judicial review except as limited by 5 U.S.C. § 701(a) (1970)).

83. 5 U.S.C. § 701(a)(1) (1970).

84. *See Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (“the words of statutes . . . should be interpreted where possible in their ordinary, everyday senses”).

85. *See* 4 K. DAVIS, *TREATISE* § 28.08, at 37.

86. Among the commonly employed aids to statutory construction are the various canons concerning surplusage, *expressio unius*, plain meaning, legislative preambles and recitals, amendments during passage, debates, and legislative committee reports. *See generally* 82 C.J.S. *Statutes* §§ 345-51 (1953).

87. *See* text accompanying notes 41-46 *supra*.

*Union of North America v. National Mediation Board*<sup>88</sup> typified such statutory preclusion.<sup>89</sup> A straightforward view of the APA thus suggests that, in keeping with the *Switchmen's Union* principle, the rule that judicial review is unavailable "to the extent statutes preclude it" means simply that where a statute as judicially construed (whether from its text, its legislative history, its preamble, or other indicia of congressional purpose) bars review, judicial review is unavailable.<sup>90</sup>

The mainstream of case law decided since the APA's enactment demonstrates that in fact the courts have continued the pre-APA approach to reviewability with one possible shift of emphasis. Under the pre-APA "common law of judicial review,"<sup>91</sup> at least before 1920, a statute wholly neutral on the question of reviewability, both in its terms and in its background (such as the legislative history), might be construed as prohibiting judicial review; Congress by its silence would be seen as hostile to review.<sup>92</sup> Now, under the APA, in the situation where Congress is entirely silent about the question of judicial review, the APA itself acts as a grant of reviewability.<sup>93</sup> Except for this possible modification, however, it seems that the APA continues the earlier approach illustrated by *Switchmen's Union*.

Thus, where it is persuasively shown<sup>94</sup> that Congress, by a particular statute, intended to withhold or foreclose review of an agency decision,<sup>95</sup> wholly or by certain persons, the presumption of reviewability

88. 320 U.S. 297 (1943).

89. See note 18 *supra* and accompanying text.

90. See 4 K. DAVIS, TREATISE § 28.08, at 41.

91. See text accompanying notes 8-18 *supra*.

92. See *Reaves v. Ainsworth*, 219 U.S. 296, 306 (1911) (army officer discharged for disability by military tribunal had no right to judicial review of the tribunal's decision). "If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board . . . and carry them over the head of the President to the courts, and there litigated, it may be . . . such intention would have been explicitly declared." *Id.* The argument that this early "common law" presumption against reviewability, in the absence of any legislative expression for or against such review, had been weakened and indeed reversed even prior to the APA, is fully developed by Professor Davis. 4 K. DAVIS, TREATISE § 28.07, at 30-31.

93. See cases cited in notes 68 & 72 *supra*.

94. Since the relative strength of the presumption has been variously phrased, see note 67 *supra*, no precise characterization of the required counter-showing can profitably be made. The weight assigned to any given demonstration of congressional intent is inherently subjective. At the expense of precision, it appears that the terms 'convincing' or 'persuasive' describe the showing of congressional intent to preclude review which will be adequate to overcome the presumption of reviewability.

95. In two particular situations the courts have placed greater emphasis on the presumption of reviewability and required a correspondingly stronger showing of intent to bar review in order to overcome the presumption. First, "where agency action is challenged as a denial of due process, it is 'immune from judicial review, if ever, only by



created by the APA is overcome.<sup>96</sup> That congressional intent may be found from various indicia.

Evidence of legislative intent to preclude judicial review may be textual: the express language of the statute may provide that a certain administrative decision shall not be subject to any form of review by

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the plainest manifestation of congressional intent to that effect.'” *Aquavella v. Richardson*, 437 F.2d 397, 402 (2d Cir. 1971) (citation omitted) (Medicare Act, 42 U.S.C. § 1395 (1970), did not preclude judicial review of HEW decision to withhold reimbursement for services provided by nursing home); *Gonzalez v. Freeman*, 334 F.2d 570, 575 (D.C. Cir. 1964) (Commodity Credit Corporation Charter Act, 7 U.S.C. § 1429 (1970), did not preclude judicial review of the Secretary of Agriculture’s decision to allow debarment of a contractor from the program, allegedly without due process); *Americana Nursing Centers, Inc. v. Weinberger*, 387 F. Supp. 1116 (S.D. Ill. 1975) (Medicare Act, 42 U.S.C. § 1395 (1970), does not preclude judicial review of HEW “reasonable cost determination” allegedly made in violation of due process).

Second, section 12 of the APA, 5 U.S.C. § 559 (1970), provides that “a subsequent statute may not be held to supersede or modify . . . chapter 7 [Judicial Review] . . . except to the extent that it does so expressly.” Surprisingly, few of the decisions concerning statutory preclusion of judicial review by post-1946 legislation have considered this requirement. In two cases dealing with the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.* (1970), the Supreme Court did place emphasis on section 12. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), held that an alien was not precluded from having judicial review of a deportation order, despite the fact that the statute, 8 U.S.C. § 1252(b) made the Attorney General’s deportation decisions “final” and despite the fact that the Court had in *Heikkila v. Barber*, 345 U.S. 229 (1953), construed similar language in the Immigration Act of 1917 to bar such review. *Shaughnessy* distinguished *Heikkila* by noting that *Shaughnessy* involved the 1952 Act, enacted subsequent to the APA, and by deciding that in the 1952 Act “there is no language which ‘expressly’ supersedes or modifies the expanded right of review granted by § 10 of the Administrative Procedure Act.” 349 U.S. at 51. The *Shaughnessy* opinion adds that the purpose of the APA in sections 10 and 12 “was to remove obstacles to judicial review of agency action under subsequently enacted statutes . . . .” *Id.* In *Brownell v. We Shung*, 352 U.S. 180 (1956), the Court decided that an alien was not precluded from judicial review of an exclusion order, despite the fact that 8 U.S.C. § 1226(c) made exclusion decisions of the Immigration Service officers “final unless reversed on appeal to the Attorney General.” 352 U.S. at 184. The Court stressed that this provision was enacted subsequent to the APA and that “unless made by clear language or supersedure the expanded mode of review granted by [the APA] cannot be modified.” *Id.* at 185.

It is surprising that the courts have not used the “express modification” requirement of section 12 more often to counter agency arguments that statutes enacted subsequent to the APA preclude review of their decisions, given the precedents of *Shaughnessy* and *Brownell*.

96. See *Consumer Fed’n of America v. FTC*, 515 F.2d 367 (D.C. Cir. 1975) (discussed at text accompanying notes 53-58 *supra*); cf. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (by implication). In rejecting the Secretary of Labor’s contention that his decision under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 482(b) (1970) (discussed more fully at note 59 *supra*) should be unreviewable because of preclusion by the statute, the *Dunlop* Court noted:

The Secretary urges that the structure of the statutory scheme, its objectives, its legislative history, the nature of the administrative action involved, and the conditions spelled out with respect thereto, combine to evince a congressional meaning to prohibit judicial review of his decision. We have ex-

the courts.<sup>97</sup> As discussed earlier, such express preclusion is common in the area of federal employee benefit payments.<sup>98</sup>

The congressional intent may also be shown by acquiescence in a long tradition of judicial construction barring review.<sup>99</sup> In such situations, the statute precludes review because Congress has not seen fit to disturb "the impressive gloss of history" that previously made the administrative decision unreviewable by the courts.<sup>100</sup> For instance, one court found that a statute precluded review under the APA without even looking at the statute itself; "since the Supreme Court had decided [before the APA was enacted] that the Railway Labor Act precludes judicial review, the [APA] leaves the situation unchanged."<sup>101</sup>

In addition, an intent to preclude review could arguably be found in the pattern of a particular statutory scheme.<sup>102</sup> Thus, a statute which enumerates a right of review for a certain type of agency action and indicates by language of exclusivity that *only* that action shall be reviewable may be interpreted to preclude review.<sup>103</sup>

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amined the materials . . . . They do not reveal to us any congressional purpose to prohibit judicial review. Indeed, there is not even the slightest intimation that Congress gave thought to the matter of the preclusion of judicial review. 421 U.S. at 567 (citation omitted).

The Court implies, by not dismissing the argument without first examining the legislative background materials, that *had* the materials provided a convincing showing that Congress intended to preclude review, the result might well have been a holding of unreviewability. See cases cited in note 52 *supra*.

97. See, e.g., *Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955) (15 U.S.C. § 717r (1970) precludes review of FPC orders by parties prior to seeking FPC rehearing); *Blanc v. United States*, 244 F.2d 708, 710 (2d Cir.), *cert. denied*, 355 U.S. 874 (1957) (5 U.S.C. § 8128(b) (1970) bars review of Labor Secretary's denial of death benefit claim); *Ford v. United States*, 230 F.2d 533, 534 (5th Cir. 1956) (*per curiam*) (38 U.S.C. § 211(a) (1970) precludes review of VA award of soldier's death gratuity); *Feldman v. Local Board*, 239 F. Supp. 102, 105 (S.D.N.Y. 1964) (50 U.S.C. App. § 463(b) (1970) is statute precluding judicial review under APA of draft board decisions).

98. See text accompanying notes 73-76 *supra*.

99. See *Ludecke v. Watkins*, 335 U.S. 160, 163 (1948) (discussed in text accompanying notes 21-24 *supra*); *Alabama Power Co. v. Alabama Elec. Coop., Inc.*, 394 F.2d 672, 674 (5th Cir.), *cert. denied*, 393 U.S. 1000 (1968) (preclusion of review based on repeated judicial construction of Rural Electrification Act and failure of Congress to override such interpretation).

100. *Ludecke v. Watkins*, 335 U.S. 160, 164-65 (1948).

101. *Kirkland v. Atlantic Coast Line R.R.*, 167 F.2d 529, 530 (D.C. Cir.) (*per curiam*), *cert. denied*, 335 U.S. 843 (1948).

102. This approach was followed in *Switchmen's Union of N. America v. National Mediation Bd.*, 320 U.S. 297, 304-06 (1943), and thus arguably could be utilized by a court to determine whether a statute was one which precludes review under the APA. See note 18 *supra* and accompanying text.

103. *Dickson v. Edwards*, 293 F.2d 211, 214 (5th Cir. 1961) (Soil Bank Act, 7 U.S.C. § 1831 (1970), barred the review sought because "only one decision was made subject to judicial review and as to that the statute carefully fenced it in").

Finally, that Congress had the purpose of prohibiting review when it enacted a particular statute may be shown by reference to the underlying legislative history.<sup>104</sup> If a persuasive showing is made that it was the understanding of the sponsoring legislators and the committees which favorably reported a bill that it would limit the availability of judicial review, then the statute will be construed to preclude review. The court in *Consumer Federation of America v. FTC*<sup>105</sup> quoted extensively from congressional debates which preceded the FTCA's enactment and concluded that the legislative history of the statute "presents clear and convincing evidence of a legislative intent" to preclude all review of FTC cease and desist orders except when sought by parties subject to the orders.<sup>106</sup>

### CONCLUSION

Under the APA, as under the "common law" approach which preceded its enactment, the availability of judicial review as an avenue of relief for persons aggrieved by the actions of federal administrative agencies is a question which will be answered by judicial determination of whether Congress intended such judicial review. The chief significance of the APA in the area of reviewability is that it provides a presumption that Congress did intend to make review available unless convincing evidence of a contrary congressional purpose is demonstrated, thereby eliminating the possibility that a court might construe the mere omissions by Congress of any provision for judicial review of certain agency decisions or upon petition by certain parties as being itself a manifestation of the intent to prohibit review. But the APA makes clear that the review which is ordinarily presumed to be available is barred "to the extent that statutes preclude judicial review."<sup>107</sup> Statutes may preclude review by express prohibition, or they may be judicially construed to preclude review, whenever persuasive evidence that Congress intended to limit judicial review is found in any of the sources traditionally utilized for statutory construction.

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104. *Consumer Fed'n of America v. FTC*, 515 F.2d 367, 370 (D.C. Cir. 1975); see *Rothman v. Hospital Serv.*, 510 F.2d 956, 958 (9th Cir. 1975) (dictum) ("clear and convincing evidence" of congressional intent to preclude review expressed in the statute itself or in its legislative history would be sufficient to bar review); *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 689 (D.C. Cir. 1951) (dictum) (APA review available because Railway Labor Act did not explicitly or in its history indicate congressional intent to make the National Mediation Board decision unreviewable).

105. 515 F.2d 367 (D.C. Cir. 1975) (discussed at notes 53-58 *supra* and accompanying text).

106. *Id.* at 370-73.

107. 5 U.S.C. § 701(a)(1) (1970).