X. JUDICIAL REVIEW—SCOPE

Reviewability of Matters Committed to Agency Discretion

In *Hahn v. Gottlieb*[1] the Court of Appeals for the First Circuit held that the approval of rent increases by the Federal Housing Administration for apartments constructed pursuant to the National Housing Act[2] was agency action "committed to agency discretion by law"[3] and therefore not subject to judicial review. Tenants of a low-income housing project subsidized under the National Housing Act sought a hearing to protest their landlord's rent increase application to the Regional Director of the FHA. After the FHA denied their request, the tenants brought suit in federal district court for a preliminary injunction which was first granted but later vacated when the FHA agreed to provide a hearing. The tenants, at an informal hearing before FHA staff, presented evidence that the requested rent increases were attributable to construction defects rather than increased operating costs and were not fully necessary to maintain a fair return on investment. The Regional Director, however, granted an increase.[4] The tenants immediately renewed their request for a preliminary injunction to require that the agency afford them a "full and fair" hearing. The district court, recognizing the agency's broad discretion, refused to grant the requested injunction,[5] and the tenants appealed. The First Circuit affirmed the district court.

The federal common law of reviewability of agency action has undergone a transition from early cases in which the courts uniformly refused review to a more moderate standard with a presumption of reviewability.[6] In the 1840 case of *Decatur v. Paulding*[7] the Supreme Court refused to review a decision by the Secretary of the Navy, stating that "[t]he interference of the courts with the performance of the ordinary duties of the executive departments of government would be productive of nothing but mischief; and we are quite satisfied that

1. 430 F.2d 1243 (1st Cir. 1970).

2. 12 U.S.C. § 1715*l*(d)(3) (1964).

3. Administrative Procedure Act § 10, 5 U.S.C. § 701(a)(2) (Supp. V, 1970): "This chapter applies . . . except to the extent that . . . (2) agency action is committed to agency discretion by law."

4. Out of a requested $28 monthly increase, an $11 immediate increase and an additional $11 increase effective after one year were granted. 450 F.2d at 1245.

5. *See* 430 F.2d at 1245. The lower court opinion is unreported.

6. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.04-.07 (1958).

7. 39 U.S. (14 Pet.) 497 (1840).

such a power was never intended to be given to them."[8] In a later case, *Keim v. United States*,[9] the Supreme Court stated:

> These matters are peculiarly within the province of those who are in charge of and superintending the departments, and, until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.[10]

Although some later cases followed the early rigid standard,[11] a more flexible approach developed during the twentieth century. The Supreme Court's first recognition of the right to judicial review of an adverse agency decision came in *American School of Magnetic Healing v. McAnnulty*.[12] In that case, the Postmaster General had determined that the petitioner's business was fraudulent and denied him the use of the mails. While recognizing the general nonreviewability of findings of fact, the Court held that an aggrieved party has the right to invoke judicial review as a matter of law where it can be shown that the agency has acted in excess of its statutory authority.[13] In subsequent cases involving the ICC,[14] the Federal Reserve Board,[15] and the Department of Agriculture,[16] the Supreme Court has held in favor of reviewability in the absence of an adequate rebuttal of the presumption.[17] Thus, even before the enactment of the Administrative Procedure Act, federal common law had been steadily developing a doctrine of reviewability.

Under the APA, with its proviso of nonreviewability of action committed by law to agency discretion,[18] a difficult problem arises when a court is forced to decide whether to follow the judicial presumption and grant review of an agency decision or to decline review on the ground that the questions involved are more properly "committed to agency discretion by law." The Supreme Court, addressing itself to the problem in the recent case of *Abbott*

8. *Id.* at 516.
9. 177 U.S. 290 (1900).
10. *Id.* at 296.
11. *See* Perkins v. Lukens Steel Co., 310 U.S. 113 (1943); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943).
12. 187 U.S. 94 (1902).
13. *Id.* at 108.
14. Shields v. Utah Idaho Cent. R.R., 305 U.S. 177 (1938); Dismuke v. United States, 297 U.S. 167 (1936).
15. Board of Governors v. Agnew, 329 U.S. 441 (1947).
16. Stark v. Wickard, 321 U.S. 288 (1944).
17. *See* 4 K. DAVIS, *supra* note 6, § 28.07, at 31.
18. U.S.C. § 701(a)(2) (Supp. V, 1970).

Laboratories v. Gardner,[19] has emphasized a strong presumption of judicial review and called for rigid scrutinizing of congressional purpose before a court declines review. Citing a previous case,[20] the Court stated that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review."[21] The Court in *Barlow v. Collins*[22] added further clarity to the area by declining to find that statutory language phrased in permissible terms was clear and convincing evidence of congressional intent to limit review[23] and instead inferred a right of judicial review in plaintiffs who are members of a class whose interests Congress intended to protect.[24] Other 1970 cases, although finding a broad discretion in the agency involved, have refused to hold agency acts unreviewable if certain conditions are present. Thus, a denial by the SEC of the proxy solicitation rights of a dissident shareholder group was reviewed because it resulted from a misinterpretation of the federal proxy rules by the Commission.[25] And the awarding of a contract to an ineligible bidder by the FAA[26] as well as the awarding of a grant under the Model Cities program by HUD[27] to a recipient who failed to participate in the planning of the project were reviewed since the actions violated applicable statutory requirements. Decisions made by the Department of Agriculture in removing a product from the market with insufficient evidence as to its harmful effects,[28] and NLRB action in refusing to bring a complaint against an employer when it had not even considered the complainant's application[29] were

19. 387 U.S. 136 (1967).

20. Rusk v. Cort, 369 U.S. 367, 379-80 (1962).

21. 387 U.S. at 141.

22. 397 U.S. 159, 165-67 (1970).

23. The words "prescribe such regulations as he may deem proper to carry out the provisions of this chapter" did not preclude review of a regulatory change by the Secretary of Agriculture that substantially affected the rights of tenant farmers. *Id.* at 164-65. For other recent examples of judicial review of the Department of Agriculture's discretion, see Nor-Am Agricultural Prods., Inc. v. Hardin, 435 F.2d 1133, *rev'd on rehearing*, 435 F.2d 1151 (7th Cir. 1970); Peoples v. Department of Agriculture, 427 F.2d 566 (D.C. Cir.), *modifying* 427 F.2d 561 (D.C. Cir. 1970). *See also* JUDICIAL REVIEW—ACTIONS REVIEWABLE section *supra*.

24. 397 U.S. at 167. *Accord*, Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

25. Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970).

26. Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). *See also* STANDING TO SEEK JUDICIAL REVIEW section *supra*.

27. North City Area Wide Council, Inc. v. Romney, 428 F.2d 754 (3rd. Cir. 1970).

28. Nor-Am Agricultural Products, Inc. v. Hardin, 435 F.2d 1133 (7th Cir. 1970).

29. *See* Southern Cal. Dist. Council of Laborers v. Ordman, 27 AD. L.2D 608 (C.D. Calif. 1970).

held to merit review as arbitrary and capricious exercises of discretion. Even in denying review of a determination by the Department of Agriculture[30] to apply portions of the Wholesome Meat Act[31] to North Dakota and of a decision by the Justice Department as to which prison a federal convict should be assigned,[32] the courts, in addition to finding an intent by Congress to confer broad discretion on the agency, found that the relevant agency action was neither arbitrary, capricious, nor an abuse of discretion.[33] In the absence of specific guidelines, the recent cases, ascertaining whether Congress intended for the particular agency action to be unreviewable because committed to agency discretion, have examined the intent of Congress to benefit the class to which the plaintiffs belong and in addition have considered whether the agency action was arbitrary and capricious or extra-legal in nature.

In *Hahn v. Gottlieb,* the First Circuit readily acknowledged the existence of a "strong presumption in favor of review which . . . [would be] overcome only by 'clear and convincing evidence' that Congress intended to cut off review above the agency level."[34] Noting at the outset that the National Housing Act is silent regarding judicial review, the court addressed itself to the issue of whether the instant action would be non-reviewable because of a congressional intent to commit the action to agency discretion by law. Rather than attempt to ascertain Congress' intent by looking only to statutory language or legislative history, as do many of the recent cases, the First Circuit labeled three factors as determinative: first, are the issues presented appropriate for judicial review?; second, would the plaintiff's interests be irreparably harmed in the absence of review?; and third, would review inhibit the agency in carrying out its assigned role?[35] In considering the first factor, the court pointed out that it was ill-equipped to superintend economic and managerial decisions of the

30. Fargo Packing Corp. v. Hardin, 27 AD. L.2D 488 (D.N.D. 1970).

31. 81 Stat. 584 (1967).

32. *See* Mercer v. U.S. Medical Center for Fed. Prisoners, 27 AD. L.2D 484 (W.D. Mo. 1970).

33. *But see* Rasmussen v. United States, 421 F.2d 776 (8th Cir. 1970). There the Post Office Department was allowed to discontinue the transportation of mail on certain railroads without complying with the statutory requirement that the effect of discontinuance on the revenues to those railroads be considered. The court considered that the statute permitting the Secretary's aetion was permissive rather than mandatory, and thus the Postmaster General's action was committed to agency discretion by law.

34. 430 F.2d at 1249.

35. *Id.*

FHA.[36] Of the second factor, the threat of harm to the plaintiff's interests, the court decided that the long-run interests of these plaintiffs would not be well served by allowing judicial review of rent increases. While recognizing the weakness of the plaintiff's bargaining position and their limited choices, the court reasoned that the delays, hardships, and frictions engendered by the process of litigation would be contrary to the tenants' interests and would likely frustrate the legislative program of indirectly providing assistance to the plaintiffs by stimulating private construction of low-cost housing. Third, in considering the effect of judicial review on the agency, the court concluded that judicial scrutiny of FHA rent decisions would lead to a more formalized decision-making process which, because of the vast demands for agency time, would have an adverse effect on the agency's performance. The court also emphasized that allowing the review herein sought would impose additional restraints[37] on landlords and discourage private investment in low and middle income housing, thus defeating the statutory purpose. The court concluded "that Congress did not intend the courts to supervise FHA rent decisions"[38] and that such questions were "matters committed to agency discretion by law."

The First Circuit's three pronged test of whether an action is non-reviewable because "committed to agency discretion by law" appears to be a significant development in this area of administrative law. Courts, in determining which agency decisions should be unreviewable under the "committed to agency discretion" doctrine, have had difficulty in discerning from the language of the applicable statute the amount of discretion granted to the agencies. Rather, they have tried to discern whether Congress intended that the action of the particular agency be reviewed. Recognizing this need to discern intent, the First Circuit, borrowing from a recent commentator,[39] initiated a test that allows greater objectivity in evaluating the intent of Congress

36. Whereas rent decisions would be part of the FHA's normal workload, the court felt that its own lack of knowledge and experience in determining economic soundness of housing projects and reasonable returns on such investments would prevent it from effectively reviewing an FHA decision. *Id.; see* Saferstein, *Nonreviewability: A Funetional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 371 (1968).

37. The court cited several restraints on FHA landlords including requirements that building plans be approved and cost ceilings fixed, that rentals and rates of return pass agency scrutiny, and that there be no discrimination in the selection of tenants. 430 F.2d at 1250.

38. *Id.* at 1251.

39. *See* Saferstein, *supra* note 36, at 371.

than had previous case law.[40] This method requires balancing the competing interests: the need of the court to arrive at a meaningful decision; the effect judicial review would have on the agency's functions; and the effect review or abstention would have on the individual bringing the suit.[41] In *Hahn*, the court appears to have arrived at a suitable balance by the application of its announced test. As the court notes, the plaintiffs have no recourse other than judicial challenge to agency action that results in rent increases. They undoubtedly have a paramount interest in judicial review that should not be defeated simply because a court is reluctant to review a decision not within its field of expertise.[42] The function of appellate review of administrative action is to insure that the agency acts within its statutory framework. Decisions of the FCC, ICC, CAB, and almost all of the other federal agencies are based upon complicated factors requiring the exercise of administrative expertise. But these decisions, equally as complicated as a rent increase, are reviewed to insure that the findings of the agency are supported by substantial evidence. Thus, the lack of expertise in the court should not be sufficient reason in itself to deny review. The court's concern that the burden of review added to the other restraints already on the landlords might discourage private investment seems reasonable, although purely speculative. The court also points out that there would be no guarantee of lower rentals[43] and the adverse effects of the frictions of litigation could serve to deteriorate landlord-tenant relations.

When the intent of Congress—to benefit members of the plaintiffs' class under the NHA indirectly by providing low and middle income housing through the stimulation of private investment—is considered, the result reached under the *Hahn* test is reconcilable with *Barlow v. Collins*.[44] In the latter case tenant farmers appealed a decision of the Department of Agriculture which allowed payments under the upland cotton program to be pledged as rent for land. The landlord, after getting the pledges, could force the farmers to obtain all supplies from him at inflated prices since the tenants now

40. *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), which stated that only a "clear and convincing" showing of evidence of intent could limit judicial review but gave little enlightenment as to how to ascertain such intent of Congress.

41. 430 F.2d at 1249.

42. *Id.* at 1249: "[w]e note that courts are ill-equipped to superintend economic and managerial decisions of the kind involved here."

43. A cross-appeal by a landlord might even result in a greater increase in rent. *Id.* at 1250.

44. 397 U.S. 159 (1970).

lacked financial support. The Supreme Court, in granting review of the agency's action, recognized a congressional intent to allow judicial review to plaintiffs who are members of a class that is directly protected by a statute. In *Hahn,* however, the protection is indirect, and granting review would have been in derogation of the interests of those parties through whom Congress intended to provide benefit to the members of the plaintiffs' class. The First Circuit, since it allows for an opposite result in the event the agency ignores a plain statutory duty, exceeds its jurisdiction, or commits a constitutional error,[45] has instituted a suitable test for examining the interests of all the parties in discerning the intent of Congress as to the statutory limitations on judicial review of a particular agency's action under the "committed to discretion by law" doctrine.

45. 430 F.2d at 1251.