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Erratum
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NOTES AND COMMENTS

JUDICIAL REVIEW OF PRELIMINARY ORDERS OF NATIONAL LABOR ADMINISTRATIVE AGENCIES AFTER LEEDOM v. KYNE*

With the ever-increasing importance of administrative law on the national level, two conflicting policy considerations have vied for the attention of the courts: (1) the desire for informality and minimization of delay and (2) the need to protect individual rights from unrestrained administrative power. The first contender has made itself felt through explicit prohibitions of judicial review in statutes setting up administrative agencies, or, more frequently, through implied prohibitions read into statutes on the basis of congressional intent. The second has exhibited itself in the reluctance of the courts to forebear review of administrative action[1] and in statutes such as the Administrative Procedure Act[2] which, on its face at least, appears to assure broad availability of review of administrative decisions.[3] The adjustment of these competing policy considerations is a continually recurring problem in all fields, but it seems of particular current interest in the field of labor-management regulation. It is here that the subject of this comment is set: the extent to which judicial intervention in or review of labor certification proceedings is available other than via statutorily prescribed channels.[4]

General Background

The availability of judicial review is not a subject which can be readily compartmentalized, however, and a glance at its general background as it has evolved on the federal level is an appropriate prelude to examination of the effect of the subject upon labor administration in particular.

The orthodox view in the nineteenth century was that even in the absence of specific statutory prohibition of judicial review the courts could not interfere with an administrative decision unless review was particularly prescribed. Such interference, it was felt, would lead to confusion in the management of the executive department.[5] Thus, where a widow of a naval officer was apparently qualified to receive two pensions, the decision of the Secretary of the Navy

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* 79 S.Ct. 180 (1958).

1. The general original jurisdiction of the district courts is relied upon to justify judicial review where no provision for review is contained in the specific statutory scheme. "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Judicial Code, 28 U.S.C. §1337 (1952).

2. 60 Stat. 237 (1946), 5 U.S.C. §§1001-1011 (1952).

3. Administrative Procedure Act §10, 60 Stat. 243 (1946), 5 U.S.C. §1009 (1952).

4. We assume in this comment that qualifications such as the prior exhaustion of administrative remedies and standing to sue have been met. Although our inquiry in a sense involves the question of scope of review, this issue too is ancillary to our principal and narrow subject-matter, the presence or absence of an *avenue* or *means* of review outside specifically prescribed statutory channels.

5. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Decatur v. Paulding, 39 U.S. (14 Pet.) 496 (1840); Hadden v. Merritt, 115 U.S. 25 (1885); United States ex rel. Dunlap v. Black, 128 U.S. 40 (1888); Keim v. United States, 177 U.S. 290 (1900).

that she could accept only one of them was considered non-reviewable even though the propriety of his decision depended upon the correctness of his interpretation of a statute.[6]

With the twentieth century (which has seen the rapid development of the administrative system as an alternative to the more rigid procedures of the courts),[7] the reluctance of the courts to encroach on the administrative function has softened to the extent that, in the view of some authorities, a rebuttable presumption favoring reviewability presently prevails in the absence of clear congressional intent to the contrary or overriding policy considerations militating against such review.[8] *American School of Magnetic Healing v. McAnnulty*,[9] decided in 1902, was the leading case in this trend. There, the Postmaster General had issued a fraud order depriving the American School of mail privileges under authority of a statute which permitted such action "upon evidence satisfactory" to the Postmaster General and neither provided for nor expressly prohibited judicial review. The Court accepted jurisdiction to review because the power conferred by the statute was subject to abuse of individual rights in the absence of judicial reviewability.[10] In the previous century, this argument had been brushed aside with the dogma that all power is susceptible to abuse, but not necessarily subject to judicial control for that reason alone.[11]

In twentieth century litigation, where, as in the *American School* case, there has been no specific provision regarding judicial review, the courts have seemed to consider practicalities of result in determining whether or not review would be available. Thus, two years following the *American School* decision, the Supreme Court decided that the denial by the Postmaster General of a second class mail permit would not be reviewable inasmuch as the courts would be swamped with such appeals if it were to allow them.[12] By and large, the court's own opinion of the merits of reviewability in the particular type of case presented has governed, and this has led to varying decisions and considerable dissent in particular cases.[13]

More difficulty was encountered when Congress had denominated the administrative decision process as "final" or "final and conclusive." But this has

6. Decatur v. Paulding, *supra* note 5.

7. "About one-third of federal peacetime agencies were created before 1900, and another third before 1930." DAVIS, ADMINISTRATIVE LAW 4 (1951).

8. See Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 420 (1958). Jaffe does not include areas excluded from judicial review because of their peculiar executive nature, primarily foreign affairs and defense functions, in this "presumption" category. Jaffe, *The Right to Judicial Review II*, 71 HARV. L. REV. 769, 778 (1958).

9. 187 U.S. 94.

10. *Id.* at 109-110.

11. "Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. . . . It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse." Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31 (1827).

12. Bates & Guild Co. v. Payne, 194 U.S. 106 (1904).

13. DAVIS, ADMINISTRATIVE LAW 814 (1951).

presented only a minor hurdle where the courts have considered review to be desirable, the terms being variously construed, for example, as final in the absence of fraud,[14] as final if valid,[15] or as reducing the scope of review only.[16] In one instance, indeed, a statute which used the words "final and conclusive" was interpreted as making the administrator's decision "final, at least unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious."[17] Such facile interpretation of preclusionary language leaves the courts with little less power of review than that normally exercised by them in the absence of any preclusionary language whatever. Probably the import of these varying decisions is that the courts are loathe to deny themselves the power to review the *jurisdiction* of administrative action even when it has been characterized statutorily as "final." However, where Congress has gone further and left no doubt as to its intent to preclude, the courts will generally respect the congressional desire,[18] at least to the extent that it does not cut off the possibility of raising a constitutionality challenge in the courts.[19]

Congress injected an uncertain element into the area by the enactment in 1946 of the Administrative Procedure Act.[20] Section 10 of that Act provides for judicial review of "any agency action" except to the extent that such review is precluded by statute or agency action is a matter of agency discretion.[21] However, there is authority for the proposition that preclusion by

14. Auffmordt v. Hedden, 137 U.S. 310 (1890).

15. Elgin, Joliet & Eastern Railroad v. Burley, 327 U.S. 661 (1946). The Court did not actually hold that review would be available wherever the administrative ruling was invalid, but came to the same result in effect by refusing to consider the question of power of judicial review unless it were first shown that the administrative award was valid.

16. Estep v. United States, 327 U.S. 114, 122 (1946). Note at 120: "It is only orders 'within their respective jurisdictions' that are made final."

17. United States v. Williams, 278 U.S. 255, 257-258 (1929).

18. See, *e.g.*, Barnett v. Hines, 105 F.2d 96 (D.C.Cir. 1939), *cert. denied*, 308 U.S. 573 (1939); United States ex rel. Farmer v. Thompson, 203 F.2d 947 (4th Cir. 1953); Killian v. United States, 105 Ct.Cl. 393, 63 F.Supp. 748 (1946). The statute involved in the foregoing cases provided that "[a]ll decisions rendered by the Administrator . . . 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." Act of Mar. 20, 1933, ch. 3, Tit. I, §5, 48 STAT. 9 (now Act of Sept. 2, 1958, 38 U.S.C.A. §211). The courts have not necessarily felt themselves restricted by explicit language, however. See, *e.g.*, *Siegel v. United States*, 87 F.Supp. 555 (E.D.N.Y. 1949), where the court refused to review the merits but ordered a rehearing by the administrative agency.

19. Some cases have suggested that judicial review is constitutionally required. Note, for example, *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936), Brandeis, J. (concurring opinion): "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." Mr. Justice Frankfurter argues that judicial review should be required under a proper interpretation of the Constitution only in "rare instances." Stark v. Wickard, 321 U.S. 288, 312 (1944) (dissenting opinion). See cases cited, *infra* note 45. Also see DAVIS, ADMINISTRATIVE LAW 856-865 (1951).

20. *Supra* note 1.

21. *Supra* note 2. Section 10 reads as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

statute includes preclusion resulting from the interpretation of congressional intent where the particular statute is silent as to whether judicial review is to be available.[22] This viewpoint has been contested by some who understand the Act as not being simply declaratory of the law which had existed prior to its enactment but as extending judicial review in all cases where Congress has not *specifically* proscribed it.[23] Although it appears that the Supreme Court may incline toward this view,[24] the Court has not decided that only explicit preclusion within the statute involved will effectively bring the exception of section 10 into play. A generally held opinion is that the effect of section 10 is to make the mere fact that provisions for review are not included in a statutory plan, standing alone, insufficient to justify the inference that Congress meant to preclude judicial review.[25]

Thus, the availability of review is still apparently a matter of statutory interpretation, and the major area of dispute is largely the interpretation of congressional silence. This is particularly so in the politically explosive field of labor legislation where the statutory product is often the somewhat ambiguous result of compromise.

THE DEVELOPMENT OF A NATIONAL LABOR POLICY

The main features of federal labor regulation are presently encompassed in two statutes, the Railway Labor Act[26] (applying generally in the transportation field) and the Labor Management Relations Act (Taft-Hartley Act),[27] the

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(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. . . .

22. Kirkland v. Atlantic Coast Line Railway Co., 167 F.2d 529 (D.C.Cir. 1948); Olin Industries v. National Labor Relations Board, 72 F.Supp. 225 (D.C.Mass. 1947).

23. American President Lines v. Federal Maritime Board, 112 F.Supp. 346, 349 (D.D.C. 1953), Holtzoff, D.J.: ". . . The Administrative Procedure Act is no mere codification of pre-existing law. If that were all that was accomplished by the enactment of this far-reaching statute, the prodigious labor that had been put into it, would have gone for naught."

24. In *Brownell v. We Shung*, 352 U.S. 180 (1956), the Court permitted the review of an exclusion order (directed against an alien seeking entry into the country) under and by virtue of the Administrative Procedure Act, although prior thereto, such an order could only be reviewed by a habeas corpus proceeding after the individual was in custody. The statute provided that the administrative decision was to be "final," but this was not a sufficiently explicit preclusion direction on the part of Congress to make the section 10 exception in the Act applicable.

25. This view did not emanate from section 10 of the Administrative Procedure Act, but was set forth by the Supreme Court in *Stark v. Wickard*, 321 U.S. 288 (1944). See also Estep v. United States, 327 U.S. 114, 120 (1946). In *Air Line Dispatchers Association v. National Mediation Board*, 189 F.2d 685, 688-89 (D.C.Cir. 1951), *cert. denied*, 342 U.S. 849 (1951), the District of Columbia Court of Appeals, though recognizing that preclusion, as referred to in section 10, might be accomplished either expressly or by judicial interpretation, suggested that statutory interpretation in areas not theretofore adjudicated must be approached differently in light of the general policy favoring review in the Administrative Procedure Act. For full discussion of the Act, see Schwartz, *The Administrative Procedure Act in Operation*, 29 N.Y.U.L.REV. 1173, 1237 (1954); Jaffe, *The Right to Judicial Review II*, 71 HARV. L. REV. 769, 790 (1958).

26. Railway Labor Act, 45 U.S.C. §§151-188 (1952).

27. 61 STAT. 136 (1947), 29 U.S.C. §§141-188 (1952), as amended, 29 U.S.C. §§154, 172, 178, 188 (Supp. V 1958).

successor of the National Labor Relations Act (Wagner Act),[28] applying primarily in the non-transportation interstate industries.

The Railway Labor Act was enacted in 1926 as a result of general dissatisfaction with Title III of the Transportation Act of 1920[29] which had sought to deal with the problem of strikes of carriers' employees. That statute had been grounded entirely upon voluntary mediation, the Railway Labor Board, which was established thereunder, having no sanctions of enforcement other than the rather uncertain effect of bringing adverse public opinion to bear upon parties who did not abide by the spirit of the statute.[30] By contrast, the 1926 statute, operating through two boards, imposed limited coercive sanctions[31] and recognized the right of employees to designate representatives by majority choice without the intervening interference, influence, or coercion of employers.[32] Although the statute did not provide any internal method of enforcement of the restrictions against the employer's interference, the injunctive process was made available by the courts for this purpose.[33] In 1934, the Act was amended to provide for certification of majority bargaining representatives by the National Mediation Board so as to avoid the deadlock of collective bargaining by jurisdictional disputes between unions and also to impose a duty on the employer to "treat with" the so-certified representative.[34] This, too, was enforced by injunctive relief.[35]

The Wagner Act (now the Taft-Hartley Act), which became law in 1935, followed the certification procedure of the Railway Labor Act closely, but went further to provide for limited judicial review. Section 8 of the Act characterized certain acts as unfair labor practices and section 10 empowered the Board to issue cease and desist orders enjoining unfair labor practices, permitting judicial review of such orders in a federal Court of Appeals.[36] Preliminary orders,

28. Act of July 5, 1935, ch. 372, 49 STAT. 449 (1935).

29. Transportation Act of 1920, ch. 91, Tit. III, 41 STAT. 456, 469.

30. Pennsylvania Railroad Company v. United States Railroad Labor Board, 261 U.S. 72, 79 (1923).

31. Under section 9 of the Act, means of enforcement of arbitration awards were provided; under section 10, a thirty-day waiting period could be imposed, where a controversy had not been submitted to arbitration, by the appointment of an emergency board by the President to investigate the dispute. Railway Labor Act, ch. 347, §§9, 10, 44 STAT. 585, 586 (1926), 45 U.S.C. §§159, 160 (1952).

32. Railway Labor Act, ch. 347, §2 Third, 44 STAT. 577, 45 U.S.C. §152 Third (1952).

33. Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548 (1930).

34. Railway Labor Act, ch. 691, §2 Ninth, 48 STAT. 1188 (1934), 45 U.S.C. §152 Ninth (1952).

35. Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937).

36. Labor Management Relations Act, ch. 120, Tit. I, §10(e) and (f), 61 STAT. 147-48 (1947), 29 U.S.C. §160(e) and (f) (1952) provides:

> (e) The Board shall have power to petition any United States Court of Appeals . . . for the enforcement of such order [to cease and desist from the commission of unfair labor practices] and for appropriate temporary relief or restraining order. . . .
>
> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business. . . .

including primarily those issued in the course of certification proceedings under section 9, are not reviewable under the Act except that under section 9(d), where a cease and desist order has been made the subject of review in the Court of Appeals, any certification proceedings preliminary to the unfair labor practice action are made a part of the record on review and thereby subjected to judicial scrutiny.[37]

A strong inference from rather plain legislative history suggests that review was not intended to be available directly from the certification finding, since Congress, when considering the Wagner Act, had before it the experience of an earlier short-lived experiment under Public Resolution #44, promulgated under the National Industrial Recovery Act of 1934.[38] That resolution had permitted direct judicial review of certification proceedings in labor disputes, with the result that efforts to certify representatives and get the bargaining process going were readily thwarted by the employer's taking of any certification to court for review.[39] Even though he lost in court, he could reap the interim benefits of delay in his local fight with the union.

Thus, the Supreme Court found no difficulty in determining that the statutory appeal to the Court of Appeals from the Board was available only from unfair labor practice findings.[40] A more difficult problem was presented, however, as to whether the district courts, in the exercise of their general equity powers and extraordinary remedies,[41] could review certification action under the Railway Labor Act, which was completely silent concerning judicial review, or under the Wagner and Taft-Hartley Acts, which provided for judicial review only with respect to unfair labor practice orders.

Nonstatutory Review of Administrative Decisions in Labor Cases

The question whether the general powers of the district courts could be invoked in connection with labor legislation without specific legislative authority first arose in connection with the failure of the Railway Labor Act to provide means of enforcement of the duties thereunder. *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*[42] is the first important

37. Labor Management Relations Act, ch. 120, Tit. I, §9(d), 61 Stat. 144 (1947), 29 U.S.C. §159(d) (1952).

38. Act of June 16, 1933, ch. 90, 48 Stat. 195. See references to committee reports regarding Public Resolution 44 in *American Federation of Labor v. National Labor Relations Board,* 308 U.S. 401, 410 (1940).

39. American Federation of Labor v. National Labor Relations Board, *supra* note 38, at 409.

40. American Federation of Labor v. National Labor Relations Board, 308 U.S. 401 (1940).

41. *Supra* note 1. Customarily the court's power in equity is appealed to as well as the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 (1952). It has been held, however, that the Declaratory Judgment procedure does not enlarge the court's equity power of review and its use thus has no particular significance. Bradley Lumber Co. v. National Labor Relations Board, 84 F.2d 97 (5th Cir. 1936), *cert. denied,* 299 U.S. 559 (1936). *Inland Empire District Council v. Millis,* 325 U.S. 697 (1945), was a case involving the alternative pleading of the Declaratory Judgment form of relief, without special significance being attached thereto.

42. *Supra* note 33.

case for our purposes. There, the Supreme Court sustained an injunction restraining an employer from "interfering with, influencing or coercing the clerical employees of the Railroad Company in the matter of their organization and designation of representatives."[43] The fact that the Act had not provided a penalty was not deemed controlling, it being sufficient that a specific legal right had been created—the right to organize. As the prohibition was capable of enforcement by the use of the general powers of the courts, particularly the injunctive power, and as the obvious intent of Congress to prohibit would be meaningless if no enforcement were allowed, the courts asserted power under their general equity jurisdiction to command obedience. Similarly, after the 1934 amendment imposing the duty to bargain upon the employer, the absence of any specific statutory relief was remedied by means of the mandatory injunction.[44]

A different result obtained in 1943, however, in *Switchmen's Union of North America v. National Mediation Board.*[45] Two unions competed for certification as bargaining representatives for the New York Central System, one, the Switchmen's Union, desiring to represent the employees on certain geographical segments of the system only while the other sought to have the Board find a bargaining unit encompassing the entire system appropriate. The Board ruled that it did not have the power under the Railway Labor Act to split the system into more than one bargaining unit and accordingly certified the latter union after an appropriate system-wide election. The Switchmen, claiming the Board's interpretation of its statutory power to be mistaken in law, sued for an injunction. The lower courts affirmed the Board on the merits,[46] but the Supreme Court, in a carefully written opinion, rejected jurisdiction. Congress had carefully surrounded the Board with protective devices to prevent the sterility of action that had occurred under the Railway Act's predecessor and clearly intended that the parties be brought into negotiation as quickly as possible so as to further the aims of the Act, voluntary settlement of labor disputes without disrupting strikes. The cases in the thirties that had permitted injunction to enforce duties under the Act[47] were not apropos. There, no relief had been available under the Act, and failure to permit injunctive relief would have resulted in the complete sacrifice of legally created rights. Here, on the other hand, Congress had created a right, representation by majority will, and provided an appropriate remedy, certification by the Board after full investigation of what the majority of the employees desired. Interference by the courts would not serve to preserve a legally protected right which would otherwise be lost.

43. *Id.* at 555.
44. *Supra* note 35.
45. 320 U.S. 297.
46. Switchmen's Union of North America v. National Mediation Board, 135 F.2d 785 (D.C.Cir. 1943).
47. Texas and New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, *supra* note 33; Virginian Railway Co. v. System Federation No. 40, *supra* note 35.

> All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. . . . In such a case the specification of one remedy normally excludes another. . . .[48]

The interpretation of the *Switchmen's* case by the lower courts varied. Some authority held that the case precluded review by the district courts unless constitutional issues were presented, in which case, so long as the constitutional issues alleged were not "transparently frivolous" or "plainly untenable", jurisdiction was acquired for consideration by the court of all questions, even the ones not grounded on constitutional rights.[49] Others interpreted the decision as being restricted to Board handling of jurisdictional disputes between competing unions, with problems other than those left open for future consideration.[50] Where the problem presented was one of jurisdictional power or duty of the Board to act, injunctive relief might yet be obtained in the district court.[51]

The Supreme Court avoided making any definite decision on the question of the availability of the equity powers of the district courts to appeal from certification proceedings under the Wagner and Taft-Hartley Acts, however, until fifteen years after the *Switchmen's* decision. The question had been expressly reserved in a 1940 case until a proper record was presented "showing . . . that unlawful action of the Board [had] inflicted an injury . . . for which the law, apart from the review provisions of the Wagner Act, [would afford] a remedy."[52] Five years later, the Court, following this dictum, exhibited the somewhat curious approach, in a case directly presenting the question whether jurisdiction was present in the district court to enjoin Board action, of first determining the *merits* of the complaint against the Board action in order to determine whether or not the required unlawful action and resultant injury were present so as to permit a decision concerning the *jurisdiction* of the court to review the merits of the Board action at all.[53] Finding that, in fact, the Board had not acted unlawfully, the Court did not answer the question of judicial power to examine the propriety of the Board action.

Lacking any compelling lead from the Supreme Court, the lower courts diverged in their handling of the cases under Wagner and Taft Act circumstances. Some authority considered the area to be governed by the *Switch-*

48. Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 301 (1943).

49. Fay v. Douds, 172 F.2d 720, 723 (2d Cir. 1949); Worthington Pump and Machinery Corp. v. Douds, 97 F.Supp. 656 (S.D.N.Y. 1951).

50. Airline Dispatcher's Association v. National Mediation Board, 189 F.2d 685, 687-88 (D.C.Cir. 1951), *cert. denied,* 342 U.S. 849 (1951).

51. *Ibid.* See also Farmer v. United Electrical Workers, 211 F.2d 36 (D.C.Cir. 1953), *cert. denied,* 347 U.S. 943 (1954).

52. American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 412 (1940).

53. Inland Empire District Council v. Millis, 325 U.S. 697 (1945). The Court held that the jurisdiction of the district court to review should not be determined "in the absence of some showing that the Board has acted unlawfully . . . whether by way of departure from statutory requirements or from those of due process of law." 325 U.S. at 700.

men's preclusion of district court review,[54] while another line of cases seemed to follow a more liberal trend in the wake of the *Inland* decision,[55] permitting district court action where the Board had acted outside of its lawful jurisdiction or in a manner contrary to the statute under which the Board operated.[56] Some of the cases viewed the problem as, to a great extent, one of exhaustion of administrative remedies and of prematurity of suit,[57] arguing that the merely preliminary procedures of the representation proceeding action under section 9 of the Act were not conclusive and could not in their nature deprive any party of rights. The major premise of this argument was that only after a petition for enforcement or review of a cease and desist order, rendered at the conclusion of an unfair labor practice hearing, had been submitted to and decided by a Court of Appeals could an enforceable duty against a party exist, from the violation of which it might incur sanctions. Since, under section 9(d) of the Act, the representation proceeding actions would be part of the reviewable record in the subsequent unfair labor practice enforcement proceeding, judicial review would, in due course, be obtained. The fallacy in this analysis was three-fold: (1) it assumed that substantial rights could not be adversely affected by the mere declaration of duties by the Board, even though not immediately enforceable;[58] (2) it assumed that, as a practical matter, review under section 10 of the Act would be, in due course, available to parties prejudiced in the representation phase of labor administration; and (3) perhaps most significantly, it assumed that some sort of review was required for disappointed parties before the Board.[59]

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54. Millis v. Inland Empire District Council, 144 F.2d 539 (D.C.Cir. 1944), *aff'd,* 325 U.S. 697 (1945); Madden v. Brotherhood and Union of Transit Employees, 147 F.2d 439, 444 (4th Cir. 1945); Fitzgerald v. Douds, 167 F.2d 714 (2d Cir. 1948).

55. *Supra* note 53.

56. Airline Dispatchers Association v. National Labor Relations Board, 189 F.2d 685 (D.C.Cir. 1951), *cert. denied,* 342 U.S. 849 (1951); Farmer v. United Electrical, Radio and Machine Workers of America, 211 F.2d 36 (D.C.Cir. 1953), *cert. denied,* 347 U.S. 943 (1954). See DePratter v. Farmer, 232 F.2d 74 (D.C.Cir. 1956) (jurisdiction denied because of lack of showing that Board action was unlawful).

57. See, *e.g., Myers v. Bethlehem Shipbuilding Corporation,* 303 U.S. 41 (1937), an action to enjoin the holding of a hearing by the N.L.R.B., particularly at 50-52. Also see Zimmer-Thomson Corp. v. National Labor Relations Board, 60 F.Supp. 84 (S.D.N.Y. 1945). Compare Employers Group of Motor Freight Carriers, Inc. v. National War Labor Board, 143 F.2d 145 (D.C.Cir. 1944), *cert. denied,* 323 U.S. 735 (1944).

58. The Supreme Court recognized this fallacy in *American Federation of Labor v. National Labor Relations Board,* 308 U.S. 401, 408 (1940), Stone, J.: "In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders.'"

59. The Supreme Court did not presume in *Switchmen's* (*supra* note 45) that judicial review was necessary. It was sufficient that a forum was available for the enforcement of the statutory right even though it was an administrative forum. The Fourth Circuit, applying the *Switchmen's* decision to the Wagner Act cases in *Madden v. Brotherhood and Union of Transit Employees* (*supra* note 54), quoted approvingly the testimony of the Solicitor General before a congressional committee considering an amendment to the Wagner Act which would have explicitly allowed for review of certification proceedings: "It is better to suffer dissatisfaction with some unit determinations, than to have each bound

The practical difficulties presented to a party disappointed in a certification proceeding had been evident in the *Switchmen's* situation. With no right to appeal from the Mediation Board's certification of the opposing union, the Switchmen's Union had no choice but to await an opportunity to intervene in a suit between the certified union and the employer to contest the propriety of the certification. But it had no power to bring about such litigation, and, assuming that the employer complied with its duty to "treat with" the certified union, or if it did not, that the certified union relied upon economic pressure to force such bargaining rather than the bringing of a suit in court for that purpose, no opportunity would present itself for the review of the Switchmen's grievance. The same situation presents itself under the National Labor Relations Act; unless the employer or the certified union were so inclined and were able to induce the General Counsel of the Board to issue a complaint for an unfair labor practice and a cease and desist order were ultimately issued, the opportunity for review under section 10 would not present itself. Under *Switchmen's*, the answer had been that this was a choice of policy on the part of Congress in favor of expeditious commencement of the bargaining process by the uninterrupted completion of certification; judicial review was precluded unless it could be legally accomplished after the election had been held and bargaining had commenced.

The Supreme Court finally dealt with the question under the National Labor Relations Act in *Leedom v. Kyne*,[60] decided in 1958. There, the Board had found a bargaining unit appropriate which included 233 professional engineers and nine non-professionals, who, as the Board found, shared "a close community of employment interest" with the professionals.[61] This was in accord with the practice of the Board where such inclusion would not destroy the "predominantly professional character of such a unit."[62] However, it appeared to violate section 9(b)(1) of the Taft-Hartley Act which prohibited such inclusion without the prior approval of a majority of the professionals,[63] which the Board did not obtain in this instance, in accordance with its interpretation of this restriction as applying only where professional employees would be in

up in long drawn-out litigation easily initiated by rival or minority groups." (147 F.2d at 444.) Also see *supra* note 19.

60. 79 S.Ct. 180 (1958).

61. The job classifications of the non-professionals were "Engineer Order Service," "Engineer Test Record," and "Engineer Contact" respectively, each position being intimately connected with the work of the professionals. Western Electric Corporation, 115 N.L.R.B. 1420, 1423 (1956).

62. *Id.* at 1424. The Board has devised these criteria as a qualification of §9(b)(1) of the Taft-Hartley Act (*infra* note 63). See, *e.g.*, Federal Telecommunications Laboratories, Inc., 92 N.L.R.B. 1395, 1398 (1951); Westinghouse Electric Corp., 80 N.L.R.B. 591, 594 (1948); Continental Motors Corp., 77 N.L.R.B. 345, 347 (1948).

63. "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof; *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. . . ." Labor Management Relations Act, ch. 120, Tit. I, §9(b)(1), 61 STAT. 143, 29 U.S.C. §159(b)(1) (1952).

the minority in any such unit, since only then would the professional employees be injured by inclusion of the others in the unit.

After the election and certification of the union, the president, in both his individual and his representative capacities, brought this suit in the district court to set aside the Board unit determination. The Supreme Court held that the district court had had jurisdiction to set aside the unit determination inasmuch as the Board action was made "in excess of its delegated powers and contrary to a specific prohibition in the Act"[64] and was "plainly" unlawful.[65] It distinguished *Switchmen's* by holding the instant case to fall within the category of the *Texas*[66] and *Virginian*[67] cases of the 1930's, which had been distinguished in the *Switchmen's* opinion as instances where absence of judicial jurisdiction would entail "a sacrifice or obliteration of a right which Congress" had given and for which no other remedy would be available. Here, in the majority's view, there were "no other means" than the instant suit within the control of the petitioner to protect the right created by statute to have the approval of the professional employees for inclusion of others in the same unit.

However, as the dissent points out,[68] the distinction of *Kyne* from *Switchmen's* and the comparison between *Kyne* and the *Texas* and *Virginian* cases is of dubious validity. The *Switchmen's* case had held that as long as a forum, the National Mediation Board, was available for the enforcement of the right of majority representation, it did not matter that no review from the determination of that Board was available, even though the alleged error of the Board in that instance emanated from a misinterpretation of law as to its power to act in a certain manner. In the *Texas* and *Virginian* cases, it was the absence of any forum other than the courts in which to enforce the statutory rights (self-organization without employer interference in *Texas,* the duty of the employer to bargain in *Virginian*) which impelled the Court to permit the use of general judicial remedies. The similarities between *Switchmen's* and *Kyne* are more discernible than the differences. In both, the appropriateness of a unit determination preparatory to certification of a bargaining representative was involved. In both, the error of the Board was alleged to have emanated from an erroneous interpretation of statute on its part. In both, the practical inadequacy of normally available appellate review, in the absence of district court review of the certification, was pleaded as justifying allowance of equitable interference by the district courts. The difference in result appears not to be derived from any valid distinction in the cases presented, but from the different inference drawn in the later decision from the lack of specific statutory provision for direct review of representation questions. In *Switchmen's,* such silence

64. Leedom v. Kyne, 79 S.Ct. 180, 184 (1958).
65. *Ibid.*
66. *Supra* note 33.
67. *Supra* note 35.
68. Leedom v. Kyne, 79 S.Ct. 180, 185-91 (1958).

on the part of Congress was interpreted to preclude interference; in *Kyne*, review was to be permitted unless specific statutory provisions prevented it.

The dissent saw this change introduced by the majority as opening a "gaping hole in the congressional wall against direct resort to the courts"[69] which would permit "the ingenuity of counsel"[70] to avoid any restrictions theretofore imposed against direct, and dilatory, review of representation proceedings. Although the majority seemed to restrict review to situations where the Board had violated clear statutory rules, an examination is appropriate to determine if the effect of the decision is indeed that restrictive.

The Court of Appeals, in arriving at the same conclusion as the Supreme Court, had placed some emphasis upon the practical inadequacy of section 10 review. The union, desiring to represent only professional employees, was hardly in a position to instigate review, if not by direct challenge in the district court. It could not do so by refusing to bargain with the employer, a step which would have permitted a complaint by the employer to the Board for the unfair labor practice thereby committed and possibly a cease and desist order from the Board which would have opened the door to appellate review. The employer would be more inclined to deal directly with the unrepresented employees individually. Nor could the employees themselves be relied upon to force review if such a step were taken. They would hardly favor compelling an unwilling union to represent their employment interests.[71]

The Supreme Court, discussing this element as a justification for its holding, introduced the criterion whether or not review under the statute was "within the control" of the injured party.[72] A fair interpretation of the majority opinion probably is that although mere inadequacy of review under section 10 would not be enough to justify district court review in and of itself,[73] the presence of the factor of illegality of the Board action under the statute will provide the necessary additional element for district court jurisdiction. Essentially, though the Court leaves the impression that inadequacy of section 10 review in this situation is one of the reasons for finding district court jurisdiction, the rule seems to be simply that the district courts may not review Board action when the Board was correct or the matter was purely one of administrative discretion, but may review if the Board was wrong.[74] Adequacy or inadequacy of review plays little if any part, as review is never adequate under the modern labor statutes, if by "adequate" one means that it is "within the control" of the party concerned.[75]

69. *Id.* at 187.
70. *Ibid.*
71. Leedom v. Kyne, 249 F.2d 490, 492 (D.C.Cir. 1957).
72. *Supra* note 67 at 185.
73. See, *e.g.*, Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943); Norris, Inc. v. National Labor Relations Board, et al., 177 F.2d 26 (D.C.Cir. 1949).
74. It is noteworthy that the Court continues the "cart before the horse" approach used in *Inland, supra* note 53, of determining first the merits (in order to find illegality) and then finding jurisdiction to review.
75. The Board cannot issue an order concerning alleged unfair labor practices until

The effect of the *Kyne* decision seems to be to adopt a jurisdictional test which permits immediate review by the district courts without waiting for any statutory review procedures which might prove available under section 10, but to apply that jurisdictional test in the most broadly encompassing manner. The inadequacy of this test arises from the basic difficulty of limiting the standard to any ascertainable extent, since the basic criterion which is applied, the presence or absence of an "unlawful act" of the Board, is fundamentally ambiguous; the definition of what amounts to such an "unlawful act" will be determinative of the practical effect which the decision will have in the reviewability of Board decisions in the labor field.

Certain provisions of the Act would seem clearly adaptable as bases for challenges similar to that in *Kyne*. Section 9(b), in addition to prohibiting the Board from finding a unit appropriate which includes both professional and non-professional employees, forbids decisions that any craft is inappropriate on the basis that a different unit has been established by prior Board determinations (unless the proper consent is obtained) and deciding that any unit is appropriate which includes guards together with other employees. Not so clear, but nonetheless possible sources of challenge, are other commanding words throughout the section governing the conduct of representation proceedings generally, requiring that the Board "shall investigate" when presented with petitions from specified persons and with specified allegations, that regulations and rules be applied impartially, that no election be held within a year of a prior election, and so on. That the problem is not simply one of interpretation of plain statutory language, however, is indicated by the difficulty which the Supreme Court itself has had in the interpretation of language no less plain than the statutory prohibition in *Kyne*—for example, the various interpretations which have been assigned to "final," "final and conclusive," *et cetera*, and the disagreement among the justices as to what these "plain" words meant.

The present posture of the law of judicial review can be more readily assessed, however, in the light of two lines of authority in the labor field itself, which, though not considered by the Supreme Court in their jurisdictional significance, are intimately connected with the problem presented by the *Kyne* decision.

In *Farmer v. United Electrical, Radio and Machine Workers*,[76] the Court of Appeals of the District of Columbia Circuit was presented with a test of the power of the Board to demand additional affidavits of union officers reaffirming their previously filed non-communist oaths, with the threat of de-compliance by Board order if their reaffirming affidavits were not duly filed. Evidence of

the General Counsel issues a complaint, and the General Counsel has discretion to issue or decline to issue a complaint. Hourihan v. National Labor Relations Board, 201 F.2d 187 (D.C.Cir. 1952), *cert. denied*, 345 U.S. 930 (1953), *rehearing denied*, 345 U.S. 961 (1953), *rehearing denied*, 346 U.S. 843 (1953), *rehearing denied*, 346 U.S. 880 (1953), *rehearing denied*, 346 U.S. 917 (1953); National Labor Relations Board v. Lewis, 249 F.2d 832 (9th Cir. 1957), *aff'd*, 357 U.S. 10 (1958).

76. *Supra* note 56.

the falsity of the previously filed oaths had arisen in connection with an investigation by a federal grand jury. The district court injunction restraining the Board from requiring the additional affidavits during the period for which the original affidavits had been filed was affirmed by the Court of Appeals on the ground that investigation of the truth or falsity of affidavits filed with the Board were within the province of the Attorney General only and that it would be unfair to the members of the union to deprive them of Board privileges (as would be the result of an order of de-compliance) because of the culpability of their officers. The case was again presented on a record showing knowledge on the part of the members of the falsity of the previously submitted affidavits, but the Court of Appeals again held that the verity of the affidavits was without the Board's province.[77] A subsequent case, *Leedom v. International Union of Mine, Mill and Smelter Workers,*[78] involving the same problem and decided by the Court of Appeals[79] in accord with the *United Electrical Workers* decision,[80] reached the Supreme Court, which affirmed the district court's injunctive award, without, however, considering the question of the jurisdiction of the district court. The Court held that the Board's function was of a purely ministerial nature, to determine whether the required affidavits had been filed. It was up to the Attorney General to inquire into the truthfulness of the affidavits and to take action where perjury was indicated.

Here, there was no "specific prohibition" as the *Kyne* case later implied to be necessary. Rather, the reliance in these cases had been upon the fact that there was no statutory authority specifically *permitting* the Board to take such action. And the *Mine, Mill and Smelter Workers* decision can be further criticized in that its conclusion of a clear congressional intent dictating the decision reached is at least questionable. Section 9(h) of the Act[81] provides that the Board shall not take any action on behalf of any labor union which has not filed the required non-communist affidavits. Congress had carefully refrained, after due consideration, from *requiring* the Board to inquire into the truthfulness of the affidavits so filed because of the delay that requirement would necessarily impose in the handling of certification petitions and unfair labor practice charges.[82] But, although the primary responsibility for inquiring into the truthfulness of the affidavits was left to the penal procedures of the Department of Justice, it is not crystal clear that the Board was forbidden from considering the truthfulness of affidavits when it desired to do so; at least, it was not thus clear until after the Supreme Court had rendered the decision.[83]

77. 221 F.2d 862 (D.C.Cir. 1955).
78. 352 U.S. 145 (1956).
79. 226 F.2d 780 (D.C.Cir. 1955).
80. *Supra* note 56.
81. Labor Management Relations Act, ch. 120, Tit. I, §9(h), 61 STAT. 146, 29 U.S.C. §159(h) (1952).
82. See *Leedom v. International Union of Mine, Mill, and Smelter Workers,* 352 U.S. 145, 149-50 (1956), for applicable legislative history.
83. The Sixth Circuit held in *National Labor Relations Board v. Lannom Manufacturing Company,* 226 F.2d 194 (6th Cir. 1955), that it was open to the Court to determine

The other Supreme Court decision useful for comparison here is *Hotel Employees v. Leedom*,[84] decided shortly before the *Kyne* decision, also involving a review of an injunction proceeding against the Board without consideration of the district court's jurisdiction. The Board had frequently during its history declined to assume jurisdiction of cases even though they were admittedly subject to the Taft-Hartley Act on the ground that exercise of jurisdiction in a given case would not further the purposes of the Act because of the relatively insignificant effect of the situation presented upon interstate commerce.[85] This practice of selectivity on the part of the Board, dictated by practical considerations, such as lack of funds or sufficient personnel, has been recognized by the courts on several occasions. Nonetheless, the Supreme Court held early in 1957 that refusal to consider a petition for representation solely on the basis of the fact that a particular class of employment or industry was involved was arbitrary and capricious; selectivity could be exercised only on the basis of *ad hoc* decision on the particular case presented.[86] The case here involved was brought under section 10 of the Taft-Hartley Act and thus presented no jurisdictional questions. Nonetheless, the *Hotel Employees* case had been brought in the district court just prior to the Supreme Court decision in the section 10 controversy. The district court accepted jurisdiction but rendered summary judgment for the Board on the merits, finding that the selectivity on the basis of an entire industry (the hotel industry) was not arbitrary and capricious due to the essentially local effect which hotel management induced.[87] This decision reached the Supreme Court and was reversed on the merits on the authority of the prior holding.[88]

Since the petitioner in this case had alleged both violations of the Constitution and of the statute, it is impossible to determine upon what ground jurisdiction of the district court was placed. However, in view of the fact that all three of the representative cases, *Kyne*, *International Union*, and *Hotel Employees*, had come from the District of Columbia Circuit which had not adopted the views expressed elsewhere that extra-statutory review was restricted to cases involving constitutional issues[89] and that neither the *International Union*

whether the non-communist oaths were true or perjured in considering whether or not to grant the petition (under §10 of the Taft-Hartley Act) of the National Labor Relations Board for enforcement of a cease and desist order directed to an employer. Although this case was subsequently reversed [*sub nom. Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. National Labor Relations Board*, 352 U.S. 153 (1956)], it demonstrates at least reasonable doubt as to what the proper interpretation of the congressional intent was at the time the principal case was before the Board. See also, National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 650 (6th Cir. 1954).

84. 79 S.Ct. 150 (1958).

85. National Labor Relations Board v. Denver Building & Construction Trades Council, 341 U.S. 675, 684 (1951); Checker Cab Co., 110 N.L.R.B. 683 (1954); Hotel Association of St. Louis, 92 N.L.R.B. 1388 (1951).

86. Office Employees International Union v. National Labor Relations Board, 353 U.S. 313 (1957).

87. Hotel Employees v. Leedom, 147 F.Supp. 306 (D.D.C. 1957), *aff'd per curiam*, 249 F.2d 506 (D.C.Cir. 1957).

88. *Supra* note 84.

89. *Supra* note 49.

nor the *Kyne* decision had constitutional issues, it would not appear that the constitutional allegations here were essential to the court's jurisdiction.

The *Hotel Employees* decision suggests two possibilities, although it is perhaps dangerous to attempt to read too much into a cursory *per curiam* opinion such as it is. In the first place, as indicated in the section 10 case on the authority of which this decision was decided, a criterion utilized in determining illegality of Board action may be its arbitrariness,[90] and this criterion is probably no less a ground where review is sought under the equity powers of the district courts. Secondly, it is possible that *Hotel Employees* stands for the proposition that the Court will consider plain illegality present on the basis of a prior case holding settling the question and not just on the basis of the words on the face of the statute. This says no more, of course, than that a statute says what the Court says it says, and is perhaps too obvious to be mentioned. Moreover, the prior Supreme Court decision had not been handed down at the time the Board rendered its opinion. Of greatest interest to our inquiry is the possibility, clearly suggested in this case, that, in the absence of any specific expression of intent in the statute restricting the manner in which exercise of jurisdiction is to be accomplished by the Board, any requirement of illegality of Board action may be satisfied if arbitrary and capricious action is established.

Unlike *Hotel Employees*, the *International Union* decision operates purely on the question of statutory power to act rather than on constitutional restrictions. However, both cases share a basic similarity in that they relate to the exercise or the refusal of exercise of jurisdiction by the Board and in that in neither case was there an effective mode of appeal otherwise available than by district court action. This is patent in *Hotel Employees*; in *International Union*, it is no less real. If the required re-affirmations had been supplied, there would have been no opportunity to review by virtue of the question being moot; on the other hand, refusal to supply them would bar the processes of the Board in any future action.[91] What is important, however, is that, even assuming that these cases might validly be justified upon a restricted concept of jurisdiction, distinguishable from *Switchmen's* by the presence of questions not within the purview of certification proceedings *per se*, the alleged illegality of Board action (indicated in the lower court opinions as being prerequisite to district court jurisdiction in line with the dictum in *Inland Empire*[92]) was found not in the violation of a "specific statutory prohibition" but in an inarticulate prohibition discerned by the Court from an examination of legislative history.

The treatment of illegality, impliedly given in the prior cases, lends con-

90. "We therefore conclude that the Board's declination of jurisdiction was contrary to the intent of Congress, was arbitrary, and was beyond its power." Office Employees v. National Labor Relations Board, 353 U.S. 313, 320 (1957).

91. The alternative to refusal to file the affidavit confirming the original oaths was to be an order of de-compliance. Leedom v. International Union of Mine, Mill, and Smelter Workers, *supra* note 68 at 146-47.

92. *Supra* note 53.

siderable weight to the conclusion that the "specific" prohibition required by the Court in *Kyne* need not unduly restrict the district courts in interfering with the administrative process, especially when one considers that even in *Kyne,* more than one interpretation of the "specific" prohibition might reasonably have been arrived at.[93] Since the majority sought to categorize *Kyne* as a jurisdictional case where failure of the district courts to review would result in "sacrifice" of legal rights, the same class as that to which such cases as *Hotel Employees* and *International Union* appear to belong, the same approach to the definition of "illegality" ought to be available in all.

Another pertinent fact that is apparent from these cases is that the substantiality of damage is not a significant element in determining whether or not district court review is available. Although substantial injury might readily be spelled out in both the *Hotel Employees* and *International Union* cases, such was certainly not the case in *Kyne.* The presence of nine non-professionals, holding quasi-professional jobs,[94] in a unit of 233 professionals, was at best a technical legal error without substantial injury, district court review of which was all the more unjustified since section 10 review would be available to the same extent as in the case of an allegedly mistaken finding of fact within an area of initial Board discretion.

The result seems to be a much more liberal treatment of judicial review than was contemplated when the labor statutes were first enacted. The *Switchmen's* decision undoubtedly retains its vigor to the extent that district court review will not be accorded solely because of an erroneous finding of fact by the Board, the appropriateness of a unit determination not involving statutory prohibitions, for example. However, it appears that the Board is no longer effectively insulated from district court review when allegedly erroneous findings of law are concerned; at least, there are no clear standards defined which can separate those questions of law initially reviewable by the district courts and those which must await an unfair labor practice finding under the Taft-Hartley Act or an enforcement injunction proceeding under the Railway Labor Act. The result must necessarily be the frequent interjection of delay, as and if desired by a litigating party.

Conclusion

The present Supreme Court position seems to accord with the view of Jaffe that the courts apply a presumption favoring reviewability in the absence of dominant considerations to the contrary.[95] He interprets *Switchmen's* itself

93. Statements in the "legislative history" of the Taft-Hartley Act indicate congressional concern for professional employees who were swallowed up in units of predominantly non-professional employees. Note, for example, S.R.Doc. No. 105, 80th Cong., 1st Sess. 9 (1947), 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 417 (1947): "Since their [professional employees] number is always small in comparison with production or clerical employees, collective agreements seldom reflect their desires." See also H.R.Rep. No. 510, 80th Cong., 1st Sess. 10 (1947), 1 LEGISLATIVE HISTORY 540 (conference report).

94. *Supra* note 61.

95. Jaffe, *The Right to Judicial Review I, supra* note 8, at 420.

as an unjustified deviation from this judicial attitude, inspired by an overexuberance of the period traceable to the New Deal.[96] Whether the *Kyne* decision is viewed as a correction of an historical aberration, as a result (which it does not purport to be) dictated by a changed public policy gleaned from the Administrative Procedure Act,[97] or as simply a natural result of the frailty of the judiciary overzealously guarding its function as the final arbiter of legal disputes, it is not simply a different situation calling for different results. It should, in the future, require fundamentally different approaches than have been utilized in the past. Given reasonably close questions of law, the injunction proceeding may well be, in practical effect, a necessary step in the certification process.

WILLIAM H. GARDNER

COLLATERAL ATTACK ON FOREIGN DIVORCES: PROOF OF THE FOREIGN LAW

I

The expanding industrial complex of the United States and the rapidly growing mobility of its population, fostered by improvements in the fields of transportation and communication, have led to increasing limitations on the traditional independence of the state in areas heretofore considered local in nature. The Supreme Court, recognizing the need for developing the state court systems into an integrated judicial framework, has utilized the Full Faith and Credit Clause as one means of reaching that objective.[1]

These efforts were bound to raise new problems. Certainly one of the most sacrosanct local areas is marriage and divorce; local policy governs these institutions with zeal, and infringements by federal law naturally result in a great deal of controversy. The advent of the "divorce mill state" created new resentments which inevitably led to a tenacious grasping of divergent views. An early attempt to gain order out of the chaos and to adjust the conflicting interests of the states was doomed to failure.[2]

The controversy is largely focused on the problem of a sister state's obligation to enforce the decree of the divorcing state. Since jurisdiction, or power, is a necessary prerequisite to the giving of full faith and credit to any decree or judgment, the states searched this area for a weakness upon the basis of which

96. "This decision is in some measure, I believe, an expression of the mood of judicial self-deprecation and abdication into which the Court of that period had fallen. Haunted by a past of judicial arrogance, beguiled by the promise of administrative action, a majority of the judges who participated were easily persuaded of the irrelevance of the judicial role." *Id.* at 430.

97. Air Line Dispatchers Association v. National Mediation Board, 189 F.2d 685 (D.C.Cir. 1951), *cert. denied*, 342 U.S. 849 (1951). See *supra* note 25.

1. EHRENZWEIG, CONFLICTS OF LAWS, part one, p. 17.
2. Haddock v. Haddock, 201 U.S. 562, 26 Sup.Ct. 525 (1906).