ADMINISTRATIVE LAW—JUDICIAL REVIEW OF AGENCY DETERMINATIONS, AN ASPECT-PROCEDURAL DUE PROCESS—*L'Enfant Plaza North, Inc. v. District of Columbia Redev. Land Agency* (D.C. CIR. 1970).

I. THE DILEMMA

> . . . (T)he scope of judicial review of administration action ranges from zero to one hundred percent, that is, from complete unreviewability to complete substitution of judicial judgment on all questions . . . .[1]

So speaks but one representative authority on Administrative Law. Such confusion and contradictory evidence exists regarding the scope of judicial review of agency decisions that many treatises attempt its delineation.[2] Thus, on the one hand, a court grappling with reviewability[3] has ample federal and state sanction to corroborate practically any desired course. On the other hand, because courts have ranged "from zero to one hundred percent," and because they have not established specific guiding grounds as to the where, when and why for such range, the courts have left themselves most vulnerable to legislative and executive attacks for specious abuse of judiciary authority. For example, assume Congress has established an agency, defined its role, and empowered it and it alone to make the decisions necessary to fulfill its purposes. Should the judiciary, because of a disputed agency decision, subsequently undertake all the agency has already done, come to a decision *de novo*, and thereby set itself (the court) up as the expert qualified and empowered to arrive at its own conclusion? Such actions are taken by courts and too frequently no principle is articulated as a basis. It is contended here that in at least one area of judicial review, where an agency's actions are found to have violated procedural due process,[4] the court can establish a basis which eliminates much confusion as to whether the court has exceeded

1. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1959).
2. *See, e.g.*, 4 K. DAVIS, ADMINISTRATIVE LAW TREATIES, entire vol. at 1-270 (1959) [hereinafter cited as DAVIS]; M. FORKOSCH, A TREATISE ON ADMINISTRATIVE LAW, Chs. 16,17,18, at 547-771 (1965). L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, at 1-720 (1965).
3. "Review" will refer, hereinafter, to the judiciary's review of Administrative Agency Determinations.
4. DAVIS, *supra* note 1 § 28.21(2).

its constitutional authority. Thus, the premise herein is: where a judicial finding is that plaintiff has suffered substantial harm due to defective agency procedure, this defect should be so identified and clearly labeled as a *violation* of *procedural due process.* When so categorized, whatever ultimate determination the court may make, its taking jurisdiction of the matter is not subject to attack upon the theory of abuse of the doctrine of separation of powers.[5] The justification of this contention may best be seen by 1) articulation of certain given assumptions and 2) illustration through the recent case *L'Enfant Plaza North, Inc. v. District of Columbia Redevelopment Land Agency.*[6]

II. ASSUMPTIONS

1) The legislature, within the enabling statute, does not excessively delimit or preclude allowable judicial review.[7] (The scope of this article does not include those agencies created *via* executive enactment.)

2) The court has determined that the administrative decision is ripe for review, *i.e.*, some final agency order has been imposed or a right denied.[8]

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5. The doctrine, in fact, is a theory because in no document is it specifically stated. However, its validity is unquestionable since every state constitution and the U.S. Constitution *imply* the separation of the legislative, executive, and judicial powers. "This tripartite form of government with each branch having its independent powers . . . was simply and naturally adopted. . . . The Constitution impliedly embodies this principle of the separation of governmental powers by creating in the first three Articles, a legislature, an executive and a judiciary. . . ." M. FORKOSCH, CONSTITUTIONAL LAW § 9 (2d ed. 1969). And, Mr. Justice Brandeis: "The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power." Myers v. United States, 272 U.S. 52 at 293 (1926).

Therefore, unless appellate review is granted in the statute that empowers the administrative agency, the logical implication is that the courts do not have the right to interfere with that agency's determinations at all, except where the judiciary must act to uphold the Constitution; *e.g.*, an agency acting in violation of due process or acting *ultra vires.*

6. 300 F. Supp. 426 (D.D.C. 1969), at trial level; 437 F.2d 698, 270 A.2d 698 (D.C. Cir. 1970), at appeals level. (Hereinafter cited as *L'Enfant*).

7. Many enabling statutes are phrased so as to refuse or to limit judicial review. But note that even in these instances frequently courts have found means to circumvent. *See*, generally, DAVIS, *supra* note 1 § 28.02.

8. *See, e.g.*, Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corporation, 333 U.S. 103, 112 (1948). "Administrative orders are not re-

3) The court has determined that the plaintiff has standing to sue.[9]

4) The statute delegating authority to the agency prescribed little or no procedural machinery, *i.e.*, wide discretion has been allowed the agency.[10]

5) The court chooses not to "escape" via the "rational basis" test.[11]

III. The Facts

Plaintiffs (later appellants) are seven corporations owning or leasing land within the District of Columbia Southwest Urban Renewal Area. The defendant is the Congressionally empowered supervising agency, District of Columbia Redevelopment Land Agency (RLA).[12] Plaintiffs, pursuant to their interpretation of language within the Urban Renewal Plan, as well as with tacit agency assurance, planned certain retail establishments to serve the needs of area employees. Upon Square 465, within the same project area and nearby the plaintiffs' establishments, a large office building was erected. The plaintiffs, to insure solvency, intended and needed to attract the employees therefrom as customers. However, a third party, (also an intervenor in this suit), who had leased space on the ground floor of that building, desired to operate establishments of the same nature as those intended by the plaintiffs. Therefore, plaintiffs' paramount concern was that the language of the Planning Commission Plan regarding accessory uses[13] of Square 465 should be narrowly limited to those uses enunciated and not interpreted to include a full panoply of commercial enterprises. A broad interpretation would cause substantial harm to the plaintiffs' business and investment interests. The particular language of the Planning Commission referred to states:

> . . . all buildings and the premises shall be limited to offices for governmental, professional, institutional or commercial use, *and accessory uses such as employee restaurants and off-street parking necessary to serve the primary uses.*[14]

Informal discussions followed, as well as exchanges of letters, the

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viewable unless and until they impose . . . a consummation of the administrative process."

9. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962).

10. *See, generally*, M. Forkosch, *supra* note 2, § 335-47.

11. *See*, discussion *infra* note 16 and *see also*, Davis, *supra* note 1, § 30.05 (1959).

12. 5 D.C. Code § 701 *et seq.*

13. *Defined* 12 D.C. Code § 1202. ". . . [a] use customarily incidental and subordinate to the principal use and located on the same lot therewith."

14. L'Enfant Plaza North, Inc. v. District of Columbia RLA, 300 F. Supp. at 428 (D.D.C. 1969).

last letter bearing the broad final agency determination that accessory uses were to include the full panoply of retail establishments, regardless of previous tacit agency assurances to the contrary. Excluded from further administrative consideration, plaintiffs filed their action in the District Court on the merits of the construction issue and asserted that there were other issues of fact requiring trial that rendered the agency's determination unfounded. The defendant filed a motion for summary judgment. *Held* at trial—grant of defendant's motion; *held* upon appeal, reversal of the summary judgment and remand to the district court for proceedings to determine other issues of fact.

In view of these decisions it is important to note that the enabling statutes make no mention of procedural adjudicatory machinery by which RLA is to settle disputes. Also, there is no doubt as to the wide latitude of discretion invested in this particular agency as declared by the United States Supreme Court.[15]

IV. APPLICATION

Before discussing the respective dispositions of the trial and appeals courts, it must be emphasized that the recited facts conjure the classic dilemma which courts reviewing agency decisions face: should the court choose the reasonableness test (often called "rational basis" test), or should it choose the rightness test (called also—substitution of judgment)?[16] The United States Supreme Court has never rendered an opinion which enunciated the factors to be considered in persuading the court to use one or the other scope of review.[17]

15. Berman v. Parker, 348 U.S. 26 (1954).
> In the present case the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.

16. The Reasonableness Test can be stated as: So long as there is any rational basis in the agency's record for the judgment of that expert body then the conclusion must stand. *See*, Rochester Tel. Corp. v. United States, 307 U.S. 125, 146 (1939). The Rightness Test can be stated as: When the dispute has to do with the meaning to be assigned to a legal concept or a refinement of that meaning in the light of particular facts the court will substitute its judgment for that of the agency and make the decision anew. *See*, DAVIS, *supra* note 1 § 30.01 at 190.

17. DAVIS, *supra* note 1 § 30.01 at 192.
> . . . [w]hatever explanation the Court may make when it reviews an application of a legal concept to facts, the Court sometimes uses

L'Enfant clearly illustrates these two conflicting positions. The trial court chose the reasonableness test; the appeals court chose the rightness test.[18] For perspective, it is significant to relate the trial court's "rational" test approach.

The trial court in *L'Enfant*, obviously avoiding separation of the issue as a question of law, or a question of fact, or mixed, (which strikes at the heart of the confusion of reviewing problems),[19] simply looked at whether the agency's actions were reasonable.

> . . . it would be an unnecessary exhibition of learning to cite authorities for the elementary proposition that an agency charged with carrying out a statute, and this urban renewal plan has the effect of a statute, has also the authority to construe the statute. The courts give weight to its construction. In fact, if the construction is *reasonable, the courts will adopt it and will not determine the question of interpretation de novo.* It has been said that there is a *rational basis* for the ruling or decision of an administrative agency, *that ends the matter as far as the courts are concerned.*[20]

This approach, although the easy way out, has great precedental heritage.[21] Underscoring its basis for determining that RLA's action was "rational" the court says ". . . there is a definitive ruling . . . whether this court would construe the restrictive clause in the same way . . . is obviously *immaterial.*"[22]

On appeal, the Circuit Court of Appeals, countered with the rightness test, stating:

> We think this was too limited a view of the court's function. . . . [t]his was not an agency decision arrived at pursuant to a statutory or otherwise established procedure for hearing and decision. . . . [i]nstead, after informal discussions and correspondence, the

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the reasonableness test. *Id.* § 30.14 at 269.

> Possibly the most important factor that explains the choice . . . (of tests) . . . is the judges state of mind with respect to agreeing or disagreeing with the administrative determination. *Id.* § 30.08 at 243.

In this writer's opinion, a classic reason was offered as justification for choosing the reasonableness test in N.L.R.B. v. Coca Cola Bottling Co., 350 U.S. 164 at 269. ". . . the administrative determination does not seem too farfetched."

18. *L'Enfant*, 300 F. Supp. 426 (D.D.C. 1969), at trial level; 437 F.2d 698, 270 A.2d 290 (D.C. Cir. 1970), at appeals level.

19. Historically, courts have strived to separate questions of law and of fact, claiming that questions of fact, usually, are not adjudicative. For an excellent treatment, with citations to the existing confusion in the courts, *see,* M. FORKOSCH, *supra* note 2, § § 339-341 at 735-744. *See also,* A. DICKENSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, 126-27 (1927).

20. 300 F. Supp. at 428 (D.D.C. 1969).

21. *See, e.g.,* I.C.C. v. Union Pacific R. Co., 222 U.S. 541 (1912); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); N.L.R.B. v. Coca Cola Bottling Co., 350 U.S. 164 (1956).

22. 300 F. Supp. 426 at 429 (emphasis added).

> agency merely expressed its opinion . . . disclaiming in the same breath that its action constituted a binding decision. No provision . . . has been made for an administrative determination . . . Such a decision can thus be made only by the courts . . . [t]he decision is an independent one to be made by the court, and not a mere supervisory examination of an agency to assure against administrative caprice.[23]

In directing the district court the opinion continued:

> The error of the District Court's approach . . . is . . . that it foreclosed the receipt . . . of *evidence conceivably relevant* to the interpretation question . . . and should be explored by the District Court on remand.[24]

The dichotomy of approach is a sad documentation of the evolution of review of an agency decision. Of even graver concern, is that the appellate court did not, would not, or worse, could not articulate what specific criteria guided its choice of the "rightness" approach. This, in effect, means that it plans to substitute its judgment for that of the agency's. Unfortunately, this failure to establish criteria is typical.[25]

The basic concern of *L'Enfant*, although never explicitly articulated, and at best vaguely implied, is *procedural due process.* The appeals court surmised that the plaintiffs were not fully heard; *i.e.*, certain reasonable procedures were not made available which would have assured that the agency not act *ultra vires* and therefore have accorded petitioners the constitutional right of due process. Disappointingly, this was not even made clear, when, in a footnote, the court states: "The controversy . . . is an instance of a legal dispute . . . for which no adjudicatory machinery has been specially provided by the Congress."[26] Why did not the court unequivocally state its position at this point, *i.e.*—procedural due process is violated? Instead, as frequently occurs, the court subjects itself to the attack of abuse of constitutional authority.[27]

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23. 437 F.2d 698 at 702.
24. *Id.* (emphasis added).
25. L. JAFFE, JUDICIAL REVIEW: QUESTION OF LAW, 69 HARV. L. REV. 239 (1955), in which Professor Jaffe, a recognized authority, attempts to resolve the perplexities. *See also*, DAVIS, *supra* note 1, § 30.07.
26. 437 F.2d at 702, quere: Can it be said that the appeals court is directing the legislature with regards to statutory enactments? Is the court slapping the legislature's wrist? Of these questions, this writer believes that the former is the better point of view.
27. *See, supra* note 2 for references to detailed analysis.

Such confusion is needless in both this and future instances where the court's concern is that the petitioner has had a fair hearing.

What constitutes a "fair agency hearing" so that a court, where it finds "unfairness," may establish that its actions are not exceeding the Constitutional judicial boundaries? There are authoritative guidelines. Mr. Justice Frankfurter has stated that:

> . . . [d]ue process . . . is not a technical conception with a fixed content . . . . [it] is not a mechanical instrument . . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom . . . [are] entrusted with the unfolding of the process.[28]

Thus, due process appears to possess considerable flexibility; this is demonstrated even more clearly in *Bauer v. Acheson* when in referring to an agency's actions:

> . . . the particular procedure to be adopted may vary as appropriate to the disposition of issues affecting interests widely varying in kind.[29]

What the Supreme Court has done is to permit the agency to develop its own procedures "so long, of course, as it observes basic requirements designed for the protection of private as well as public interest."[30]

Furthermore, a *minor* deviation can be no objection to what a court considers a fair agency hearing.

> . . . due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of the parties.[31]

and

> The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights.[32]

A leading authority has characterized "fair hearing" accordingly:

> (1) that the exercise of discretion is relevant to the making of procedural decisions;
> (2) that . . . a reasonable procedural decision should withstand judicial interference; and
> (3) that reasonableness should be considered in terms of the responsibility of the agency for the total program, allowing for the fact that the agency's resources are limited.[33]

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28. Concurring opinion, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951).
29. 106 F. Supp. 445 (1952), citing F.C.C. v. WJR, 337 U.S. 265 (1948).
30. Wallace Corp. v. N.L.R.B., 323 U.S. 248 (1944).
31. Market Street Railway Co. v. Railroad Commission, 324 U.S. 548, 562 (1945).
32. N.L.R.B. v. Mackay Radio and Telegraph Co., 304 U.S. 333, 351 (1938).
33. L. JAFFE, *supra* note 2 at 567. (His conclusions resulted from a study of the performance of the United States Court of Appeals for the District of Columbia.)

We might conclude that when a court grapples with the question of whether a plaintiff has been accorded procedural due process by an agency, it is essential that the court not compare agency procedure to the conventional manner by which courts conduct their business. The gravamen of a determination of "fair agency procedure" is whether there has been a *substantial* violation of rights; otherwise, almost certainly, there would be an unreasonable confinement of the vitality so necessary to the administrative process.

V. CONCLUSION

From the foregoing, is it not reasonable to expect that at least in some instances an identification of lack of procedural due process is possible? Assuredly, as in *L'Enfant*, mixed law and fact situations will produce unavoidable and difficult problems, but logically, many of these problems can be surmounted by application of the procedural due process principle. When the label is provided, the judiciary thereby quashes qualms of exceeding constitutional authority; in short, the court would be explicitly asserting its constitutional authority to intervene *at all.* Consequently, its final disposition of the matter would be less questionable since the court is the petitioner's final resort. It cannot be overstated that in these situations of review, which immediately induce constitutional questions of separation of powers, it is the court's *duty* to render that decision which is the least questionable. What could be a better basis for precisely such action than the firm affixture, "lack of procedural due process," where, in fact this is the court's ultimate concern.

It is not to be denied that had the appeals court in *L'Enfant* stated its proper basis for action, this would have automatically precluded further controversy. For example, should the appeals court have remanded in general for a new hearing to RLA rather than to the district court?[34] Should the appeals court have remanded to RLA with specific procedural instructions to be followed?[35] Assuming remand to the District Court, should that court

34. In some instances, remanding to agency may be preferable particularly when the issue is technical, but fundamentally the procedure is flexible. *See*, New York v. United States, 331 U.S. 284 at 335 (1947).

35. Such action is rare. The judiciary is severely condemned for dictating procedures to administrative agencies in F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 140-4 (1940).

include review of the agency's record[36] or should it make an independent determination, *i.e.*, trial *de novo*?[37] Such examples by no means exhaust the variety of controversies that are brought into issue.

However, such examples are significant since it is controversies of this nature that the courts allow to rage as the penult of concern, causing concomitant disparagement of the court's constitutional authority. Conversely, the court in a *L'Enfant* situation, could unequivocally assert its basis for intervention—the violation of plaintiff's right to procedural due process, thereby limiting the confusion and uncertainty currently obscuring the scope of judicial review of agency decisions.

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36. It appears that such action would be acceptable. *See*, Baltimore and Ohio R.R. v. United States, 298 U.S. 349 (1936). The substantial evidence rule would govern in this instance. For definition and related information, *see*, Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938); N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404 (1962).

37. Such conduct also would be acceptable. Here the court decides against utilization of the substantial evidence rule and instead decides ". . . upon its own record and the facts elicited before it." Crowell v. Benson, 285 U.S. 22, 64 (1932).