N-202

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03/11/93

First Supplement to Memorandum 93-23

Subject: Study N-202 - Judicial Review of Agency Action--Scope of Review (Comments on Consultant's Background Study)

Attached to this memorandum are letters from Professors Ogden and Andersen commenting on preliminary drafts of Professor Asimow's study on the cope of judicial review of agency action. Both commentators strongly support Professor Asimow's recommendation to dispense with the "independent judgment" test in all cases of judicial review of agency factfinding, in favor of the "substantial evidence on the whole record" test for review of such decisions.

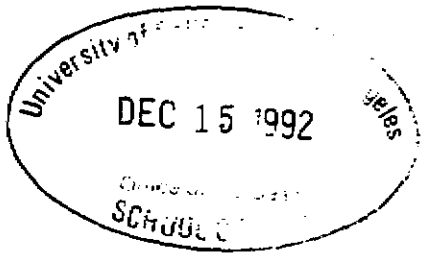
Respectfully submitted,

Nathaniel Sterling
Executive Secretary

PEPPERDINE UNIVERSITY

SCHOOL OF LAW

December 10, 1992



Professor Michael Asimow
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Re: Judicial Review study

Dear Michael,

Thank you for sending me a copy of your judicial review study. I could not agree with you more that the independent judgment test should be jettisoned. The arbitrary nature of the fundamental vested right test for that type of review is quite clear in your discussion of types of cases covered by independent judgment and substantial evidence review. There is no principled basis for the distinctions drawn in the cases between the circumstances in which the two types of review are applicable. The test itself is so fuzzy as to be a non-test. I also support your other rationales, deference to expert agency fact finders, as opposed to generalist judges, stronger law enforcement role for licensing agencies, and strengthening the agency fact finding role. The linkage between the California independent judgment test and discredited Supreme court cases such as Ben Avon is emphasized in Professor Bernard Schwartz's administrative law casebook, pp. 828-841.

However, as you point out in the study, there is opposition to changing the test from the attorneys who represent licensees' before professional licensing boards. I would discount that opposition as being solely motivated by self interest, but these attorneys may be politically powerful enough to block your recommended changes. Thus, I would support your fall back position of limiting the independent judgment test to professional licensing cases if the Commission does not accept your recommendation.

Since the January meeting is in Los Angeles, I plan on attending the Friday session devoted to your study.

Very Truly Yours,

Gregory L. Ogden
Professor of Law

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January 14, 1993

File:_____
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Dear Michael:

Thanks for your recent studies of Standing and Scope of Review. I am on sabbatical leave (doing some computer-related work here at Chicago-Kent) and your papers have just reached me.

What to do with Standing? I very much agree with you about the overly complex and restrictive nature of the federal standing cases. Had Washington had a California-like tradition of articulated generosity on standing, I would have liked to have found some statutory way to confirm it. But alas, the Washington cases speak with many voices and are simply unclear. Among the confusions, we have the "since remedies have not been exhausted, plaintiff has no standing" cases, as well as the "we'll deny defendant's motion to dismiss and return to his standing argument when we reach the merits" cases, and about every other variation you could mention.

Further, as I have bothered you about at length earlier, our whole drafting effort became a battle with the then Attorney General. His constant complaint was that the whole reform effort was aimed at turning the administrative process over to the courts. The standing doctrine was just another place where they were not in a mood to be generous. And the AG had all the political chips: if he had finally refused to support the proposal, the bill would never have gotten out of committee. (This seems to be the nature of administrative procedure reform that is not pushed by a more broadly based political constituency: the agencies largely determine for themselves the magnitude and direction of reform.)

The best we could do was to get a version of the Model Act provisions enacted, with the hope (urged in some law review writing and some amici filings since) that these highly elastic

formulas would be interpreted generously. We haven't had any standing rulings from the court yet, but our experience generally has not been wholly disappointing. In the Washington court's 5 to 4 decision in Neah Bay v. Dept. of Fisheries, 832 P. 2d 1310 (Wash. 1992), you'll see we narrowly prevailed in a dispute with the AG over the proper interpretation of the Act's standard for scope of review of informal rulemaking.

I much enjoyed your piece on scope of review. I find it difficult to write about: one seems to have to choose between being cosmic to the point of being meaningless or microscopic to the point of being generally irrelevant. You avoid both. I especially appreciated your reminding readers (at page 31) that scope varies de facto as a function of judicial confidence in agency procedures and that differences attributable to this variable may be much greater in magnitude than are those arising from different verbal formulas.

Not having to worry (as you do) about future relationships with your audience, I would have come down a good bit harder on the independent judgment rule than you did. It has always seemed to me a monstrous historical anachronism, persisting long after any utility it may have had because of the perceptions of an influential segment of the bar. I wonder even whether the medical profession--if its views could be obtained directly--really cares all that much about it. Lawyers can sometimes protest reforms much more vehemently than their clients. In any event, your analysis is devastating to any objective reader. I would only have added somewhere that if there is a problem of over-zealous officials, the better solutions are in designing better procedure, drafting better standards and selecting better people. Judicial review standards are blunt instruments for this sort of delicate surgery.

I'm a little uncomfortable with phrases like "relatively cursory examination" (p. 39) describing substantial evidence review, and the footnote reference (note 79) to pass/fail grading. The notions will imply to some that judicial review will not be thorough under the substantial evidence test. I think it would be enough to note that while it will still take time for a careful and discerning judge to apply the substantial evidence test conscientiously, it will not require the wasteful, time-consuming process of remaking all the basic fact findings again.

In the nitpicking department, I think you meant "criterion" not "criteria" at page 25.

I hope your visit at Duke was as pleasant and productive as my leave here. Do you suppose it has something to do with not having to attend committee and faculty meetings?

Sincerely,

William R. Andersen
Visiting Professor of Law

WRA:gam