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STUDENT NOTES

ADMINISTRATIVE PROCEDURE—JUDICIAL REVIEW—ABOLITION OF EXTRAORDINARY WRITS

An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies.¹

Thus Kenneth Culp Davis describes the use of extraordinary remedies in the judicial review of administrative decisions. In a broader context, however, the statement depicts the entire system of state judicial review of administrative decisions.² When seeking the proper remedy, the practitioner is faced with a bewildering number of choices;³ an improper choice may result in the loss of his case.⁴

The resulting complexity of review procedures has impeded the development of uniform standards of judicial review. Instead of focusing on the substance of the litigated claim, administrative decisions have tended to consider primarily the form of the review

¹ K. DAVIS, ADMINISTRATIVE LAW TEXT § 24.01 (3d ed. 1972) [hereinafter cited as DAVIS].

² The term “judicial review” in this article refers to the judicial review of administrative decisions. One authority has stated, “The statutory appeals procedures are ordinarily created separately, a method of appeal being enacted with creation of each new agency. The resulting patchwork is characterized by a lack of uniform pattern comparable to that of the old fashioned crazy quilt.” 2 F. COOPER, STATE ADMINISTRATIVE LAW 603-04 (1965). This resulting “patchwork” has been caused to some extent because administrative law has never been constitutionally sanctioned or theoretically well developed. J. LANDIS, THE ADMINISTRATIVE PROCESS 2-5 (1938). Administrative judicial review may be provided by (1) specific statutory provisions; (2) general statutory provisions; or (3) non-statutory review. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 113 (5th ed. 1970). Both specific and general statutory provisions permit judicial review on the theory that it is the will of the legislature. To obtain judicial review when no statutory review is available, the complainant usually must show that his individual rights have been violated. Id. at 116.

³ The practitioner may be able to use the extraordinary writs, statutory administrative review, or a declaratory judgment.

⁴ DAVIS at § 24.01. This point is illustrated in Kinsey v. Adkins, 201 S.E.2d 288 (1973) in which the claimant may have fared better if he had sought judicial review by appeal rather than mandamus.
chosen. Reform of the administrative judicial review system is required to provide swift, rational, and consistent decisions.\(^5\)

I. JUDICIAL REVIEW IN WEST VIRGINIA

Statutory authority for judicial review in West Virginia is in the Administrative Procedures Act which provides that "any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law."\(^6\) The second clause is the basis for the use of extraordinary remedies in the judicial review process. The Act also provides that the court may change the decision of an agency when the decision affects the "substantial rights" of the complainant, if the decision also is: (1) a violation of a constitutional or statutory provision; (2) an agency action made in excess of statutory authority or jurisdiction; (3) made by unlawful procedures; (4) affected by an error of law; (5) clearly wrong as shown by substantial evidence; (6) arbitrary, capricious or an abuse of discretion.\(^7\)

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\(^5\) This note does not discuss other issues pertinent to judicial review such as ripeness, exhaustion of administrative remedies, and standing. The practitioner should be well aware of the impact of these other factors on the availability of judicial review. See generally Note, Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard 1974 DUKE L.J. 382 in 1973 Federal Administrative Law Developments.

\(^6\) W. VA. CODE ANN. § 29A-5-4 (1971 Replacement Volume) (emphasis added). In addition to the extraordinary writs, the West Virginia Administrative Procedures Act permits a party to obtain a declaratory ruling from an agency. Such a ruling is binding on the parties and can be judicially reviewed by the court. Id. § 29A-4-2; Board of Educ. v. Board of Pub. Works, 144 W. Va. 593, 602-03, 109 S.E.2d 552, 557-58 (1959). A declaratory ruling on the validity of a rule promulgated by an agency can be sought in the circuit court of Kanawha County. The rule can be declared invalid if it: (1) exceeds constitutional limitations or statutory authority; (2) exceeds jurisdiction of the agency; (3) was adopted without compliance with rule-making procedures required by statute; or (4) is arbitrary or capricious. W. VA. CODE ANN. § 29A-5-1(b) (1971 Replacement Volume). This section requires the complainant to first seek a declaratory ruling from the agency. Harrison, The West Virginia Administrative Procedures Act, 66 W. VA. L. Rev. 159, 176 (1964).

\(^7\) W. VA. CODE ANN. § 29A-5-4 (1971 Replacement Volume). See also Comment, 65 W. VA. L. Rev. 143 (1963). One source has stated that the provision in this section for contested cases does not provide the right to a hearing but only the procedure to be used when a hearing is required statutorily or constitutionally. Comment, Administrative Law—Judicial Review Under West Virginia Administrative Procedures Act Not Applicable to Agency Actions Relating to Internal Management, 69 W. VA. L. Rev. 53, 56 (1966).
The West Virginia Code implies that extraordinary writs may be used in administrative judicial review. These writs, particularly those of mandamus, prohibition, and certiorari, have been employed extensively.

At common law mandamus was used to command an official to perform a duty. This writ has evolved to compel an official to perform a ministerial act and even a discretionary act if the reason for nonperformance was the officer's arbitrariness or capriciousness. In West Virginia mandamus is available statutorily and constitutionally, and both the Supreme Court of Appeals and the circuit courts have original concurrent jurisdiction of mandamus actions. The West Virginia court has held that mandamus will not lie unless: (1) the petitioner has a clear legal right to relief; (2) there is a legal duty on the part of the agency to do the thing petitioner desires; and (3) there is no other appropriate relief.

The Supreme Court of Appeals has taken a liberal approach to the application of mandamus, shaping the remedy to give the complainant the relief to which he is entitled. This expansion can

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9 State ex rel. Board of Educ. v. Miller, 153 W. Va. 414, 421, 168 S.E.2d 820, 825 (1969). The courts, in trying to distinguish between ministerial and discretionary acts, have created an all or nothing proposition; if the act is found to be ministerial, the court will compel the act to be done. The fallacy of such a proposition is that the complainant is advocating not that the official had no discretion, but rather that the denial of the relief sought for the reasons given was an arbitrary or capricious exercise of discretion. Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 333-34 (1967). There is a decided dearth of case law on the distinction between ministerial and discretionary acts, and Davis has said that any distinction is "undesirable, unworkable, and without practical justification." 3 K. Davis, Administrative Law Treatise § 23.11, at 356 (1958). Jaffe agrees, stating that any distinction is "unsound and unworkable" and is "apt to label the result rather than explain it." L. Jaffe, Judicial Control of Administrative Action 181 (1965).
also be noted in *Langenfelder & Son, Inc. v. Ritchie* in which the court stated that mandamus will not be granted if a sufficient alternative remedy is available, however, this remedy must be "equally beneficial, convenient and effective." 10

The West Virginia Code provides that prohibition shall lie as a matter of right where an inferior court, board, or tribunal either does not have subject matter jurisdiction or exceeds its lawful jurisdiction. 17 At common law this writ was used primarily to restrain inferior courts from extending their jurisdiction. 18 Today, prohibition is used chiefly to stop action by an agency in the exercise of its judicial or quasi-judicial powers. 19 It cannot be used, however, to prevent the performance of a ministerial act. Case law is unclear as to the exact criteria for distinguishing judicial or quasi-judicial functions from ministerial functions. It appears that if the agency action has involved discretion, most courts consider the action to be judicial or quasi-judicial. The use of the term "quasi-judicial" by the court illustrates the separation of powers problem. The court seems loath to label the agency's decision-making power as "judicial" because this would seemingly clothe the administrative agency with judicial powers. Therefore, the court often uses "quasi-judicial" or "administrative" to describe this power, thereby minimizing any separation of powers problem. 20
The West Virginia court's treatment of prohibition is indicative of the need for reform. One source has stated that the court has expanded the scope of prohibition by holding that when an agency has the right to conduct hearings in which factual determinations are made, the process is quasi-judicial, even if the agency primarily performs administrative duties.\(^2\) At the same time, the court has failed to recognize that prohibition is an inappropriate means of judicial review because it violates the doctrine of exhaustion of administrative remedies.\(^2\) The purpose of this writ is not to review agency action but to prevent it.\(^3\)

Certiorari, on the other hand, is designed to allow review of judicial or quasi-judicial action if there is no other available judicial review, but it is not available to review purely administrative action.\(^4\) This writ is statutorily authorized,\(^5\) but it does not replace common law certiorari.\(^6\) The purpose of the statutory writ is to enlarge the scope of common law certiorari for those issues that can be reviewed and for inferior tribunals to whom the writ applies.\(^7\) Certiorari, like the other extraordinary writs, will not lie unless the error made cannot be corrected by appeal or writ of error.\(^8\) Since the availability of certiorari depends upon judicial or quasi-judicial actions, rather than non-judicial actions, the definitional problems encountered with the other extraordinary writs are also present with certiorari.\(^9\)

\(^{11}\) Comment, 68 W. VA. L. REV. 62, 65 (1965).

\(^{22}\) This doctrine states that all the administrative review procedures available must be used before the complainant can seek judicial review, unless such an exhaustion would be meaningless.


\(^{25}\) W. VA. CODE ANN. §§ 53-3-1 to -6 (1966).

\(^{26}\) Id. § 53-3-2.

\(^{27}\) Alderson v. County Comm'rs, 31 W. Va. 633, 643, 8 S.E. 274, 280 (1888).

\(^{28}\) Ashworth v. Hatcher, 98 W. Va. 323, 325, 128 S.E. 93, 94 (1924).

\(^{29}\) One authority feels that certiorari is an appropriate remedy if: (1) there is no other means of review available and (2) the decision making body was required
The extraordinary writs in West Virginia provide an unsatisfactory means of judicial review since their utilization is hampered by ambiguous definitional requirements. The West Virginia Supreme Court of Appeals has not defined the terminology but has chosen instead to make determinations on a case-by-case basis. Therefore, it becomes impossible to predict whether a specific act is judicial, quasi-judicial, ministerial, or administrative. Consequently, an attorney faces a dilemma; he cannot choose with any certainty the proper remedy for his particular problem.

II. DUE PROCESS AND EXPANSION OF JUDICIAL REVIEW

Changes in the present system of judicial review are dictated not only by those inadequacies previously outlined but also by the prospect of increased demand for judicial review in the future. This prospective increase is based on the historical growth of judicial review30 plus an expansion in emphasis on due process in the administrative review process.31 Even if the statute creating an administrative agency precludes judicial review, the courts may ignore the provision or "judicially interpret" the provision in order not to preclude all review under all circumstances.32 This approach has been employed when the court feels the deprivation or sanction employed by the agency is not appropriate considering the purpose of the administrative act.33 In other words, due process is not afforded.

to follow a basic judicial process regardless of whether the action taken could be characterized as judicial, quasi-judicial, or non-judicial. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 134 (5th ed. 1970). See note 20 supra.


32 Note, Reviewability: Statutory Limitations on the Availability of Judicial Review, 1973 Duke L.J. 253, 272 in 1972 Federal Administrative Law Developments. This problem is often treated as a jurisdictional question that allows the courts to intervene regardless of statutory language if the court feels that the agency has exceeded its jurisdictional limitations. Of course, drawing the distinction of whether the disputed claim is jurisdictional is very difficult and has led to further blurring of the limits of judicial review. L. Jaffe & N. Nathanson, Administrative Law 193 (3d ed. 1968).

33 Note, supra note 32, at 267. Such judicial interpretations can lead to rather ludicrous results. As noted by Davis, the dicta of two Supreme Court cases read together indicates that the Court could "review all questions without determining whether they are reviewable." 4 K. Davis, Administrative Law Treatise § 28.01 at 5 (1958).
Although the case law is unclear, it appears that the courts are employing more stringent due process standards. Davis suggests that there is increased availability of judicial review if the agency's action affects property rights and personal liberties rather than governmentally conferred benefits and privileges. However, in light of the Supreme Court's holding in Goldberv. U.S., where the "benefit" is a statutory entitlement, the benefit-privilege argument should be rejected, and therefore this distinction appears to be non-existent.

Increased regard for due process has resulted in the expansion of judicial review into areas that had been exclusively within the jurisdiction of the administrative agency. For the first time, the courts have been reviewing informal agency rulings and even agency discipline of its employees. Furthermore, the courts have recently been requiring agencies to promulgate and publish standards used in decisions so that future decisions and policies are

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24 Comment, supra note 31, at 364.
26 397 U.S. 254 (1970). In this case the Court held that where the "benefit" is a statutory entitlement, the benefit-privilege argument should be rejected. Id. at 262. But see, Kinsey v. Adkins, 201 S.E.2d 288, 291 (W. Va. 1973), where the court acknowledged the general rule in Taylor v. Board of Educ., 152 W. Va. 761, 770, 166 S.E.2d 150, 157 (1969), that a pension from a public authority is not a contractual obligation but a gratuity in which the claimant has no vested right except for payments already due, yet decided that it would be unfair to apply this rule where the law requires the recipients of the fund to pay into it. In Nutter v. State Rds. Comm'n, 119 W. Va. 312, 193 S.E.2d 549 (1937), the court held that due process can be provided administratively as well as judicially. The nature of the interest being affected determines what due process safeguards are required. If the agency action is a valid exercise of the State's police powers, the due process requirements are lessened. Id. at 316-17, 193 S.E.2d at 551.
28 United States v. Moore, 427 F.2d 1020 (10th Cir. 1970); Comment, Administrative Law—Judicial Review—Agency's Discipline of Employees Stayed Pendent Lite, 46 N.Y.U.L. Rev. 353 (1971). But see State ex rel. Burchett v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 (1966), commented on in 69 W. Va. L. Rev. 53 (1966), where the court held that the agency's actions did not fall within the purview of the West Virginia Administrative Procedures Act because the action related solely to internal management and did not affect the public. The court in Burchett did recognize, however, that judicial review may lie if required statutorily or constitutionally. Thus, with the increasing emphasis on due process, the West Virginia court may take a more liberal approach to the availability of judicial review in an agency-employee discipline case in the future.
consistent with the previously announced standards. By requiring these standards to be published, the courts have in effect invited public participation in agency affairs. This allows the court to better weigh the competing societal values inherent in agency determinations.

III. Present Solutions for the Judicial Review Systems

It appears that the West Virginia Supreme Court of Appeals has recognized the inadequacies of extraordinary writs as a means of review and has attempted to modify their usage. The adoption of a new rule of practice by the court has greatly restricted the ability of a practitioner to invoke the court's original jurisdiction of extraordinary writs. Now the original jurisdiction cannot be invoked if adequate relief may be obtained from a court of concurrent jurisdiction, and the burden is on the practitioner to show that the concurrent court's remedy is insufficient. The practical effect of this change will make it difficult to bypass the circuit courts and go directly to the Supreme Court of Appeals. A second change has been an expansion of the scope of these writs so they can provide the remedy the court feels appropriate. These changes indicate a judicial recognition of the inherent limitations in the use of the extraordinary writs, but it is unlikely that these measures will...

39 Note, Recent Changes in the Scope of Judicial Control Over Administrative Methods of Decisionmaking, 49 Ind. L.J. 118, 120 (1973). The courts have been doing this by (1) requiring the agency to set standards before it can make a determination; (2) increasing reliance on stare decisis by not permitting the agency to change its policy unless it can justify the change; (3) establishing more stringent requirements for what constitutes a fair hearing; (4) requiring the agency to address issues raised by public interest groups; and (5) relaxing the criteria for standing. Id. at 140.


42 See notes 14-16 supra.

43 See notes 14-16 supra.
The best solution is Davis’s proposal to entirely eliminate extraordinary writs and replace them with a single means of judicial review. This solution offers several advantages. It would: (1) reduce and simplify the number of remedies available; (2) provide a uniform system of judicial review that would promote consistency in the decision making process; (3) reduce the separation of powers problem; and (4) allow more cases to be heard on their merits rather than on procedural questions. This concept has been implemented with varying degrees of success in eight states by either statute, rule of court or civil procedure, or constitutional amendment.

The most common method of abolishing extraordinary writs, by statute, has been used in New York, Missouri, Wisconsin, and Illinois. Analysis of cases decided under these statutes shows that many of the problems that were meant to be eliminated have not in fact disappeared. In New York, the special proceeding for review was intended to eliminate procedural distinctions of the extraordinary writs but preserve the remedies these writs provided. In interpreting this statute, the courts have used the nature of the alleged grievance to determine the form of the hearing, the questions to be determined, and the relief that can be granted. According to one authority, the result of these decisions has been a retreat from the intent of the statute because mandamus and certiorari have been restored except in name. Worst of all, the courts have denied relief because of the improper choice of

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44 Davis, supra note 1, § 24.01 at 459.
51 Id. at 122. The courts have been reluctant to say that the writs have been abolished because of the significant differences among actions in the nature of certiorari, mandamus, and prohibition plus the continued use of cases. N.Y. Civ. Prac. § 7801, Comment (McKinney 1963).
a writ, the very problem that Davis’s solution should avoid.52

The Wisconsin and Missouri statutes for judicial review have also been weakened by case law. In State ex rel. Thompson v. Nash, the Wisconsin Supreme Court held that statutory review provisions may not be followed if there is substantial showing of a denial of due process that cannot be rectified under this statute.53 In Missouri, the availability of the judicial review procedure depends on whether the action in question is characterized as a “contested case” and when this is not found, the extraordinary writs may be used.64 In Kopper Kettle Restaurant Inc. v. St. Paul, the plaintiff was faced with this problem and the fact that the choice of the wrong remedy would be fatal to its interests.65

In contrast to the problems of New York, Wisconsin, and Missouri, the Illinois system of judicial review has received more flexible treatment by its courts and thereby retained the advantages of Davis’s single system of review. The Illinois courts have recognized that application of the Illinois Administrative Review Act56 precludes the use of the extraordinary writs.57 Satisfaction of the Illinois legislature with this means of review is evidenced by the fact that the Act is incorporated into 175 separate provisions of the Illinois statutes.58 The only problem Illinois has had with this system is that it is only applicable to acts and procedures that expressly provide the Illinois Administrative Review Act as the means of judicial review.59 This requirement has led to a slight judicial retreat from the principle of unified judicial review where a more liberal reading of the statutory law was available.60

Colorado has abolished the use of extraordinary writs by a rule of the Supreme Court of Colorado,61 but in doing so it has not

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53 27 Wisc. 2d 183, 194, 133 N.W.2d 769, 776 (1965).
54 Mo. ANN. STAT. § 536.100 (1953).
55 439 S.W.2d 1 (Mo. App. 1969), commented on in 36 Mo. L. Rev. 444 (1971).
60 COLO. SUP. CT. R. 106(a).
avoided those problems previously mentioned. The Supreme Court of Colorado has held that the substantive aspects of the extraordinary writs are preserved and that the relief available by mandamus is to be granted in accordance with precedents under prior practices. 62 This holding indicates that Colorado is still tied to many of the procedural technicalities inherent in the use of extraordinary writs.

Utah has abolished the use of extraordinary writs by a rule of civil procedure 63 that is patterned after the Colorado rule. 64 This rule allows the use of extraordinary writs in a wide range of specific circumstances and when there is no speedy relief available. 65 Even though the Utah courts have strictly construed these statutory exceptions, the effect of case law has been to cling to many of the technicalities of the extraordinary writs. 66

New Jersey has combined a constitutional provision 67 with statutory provisions 68 to abolish extraordinary writs. This approach was intended to avoid the technical procedural problems inherent in the use of extraordinary writs but to retain their substance. 69 The New Jersey courts have recognized the flexibility of the judicial review system and have allowed other means of relief to be used to avoid multiplicity of actions. 70 Unfortunately, in allowing these additional writs, the courts still make distinctions such as ministerial or quasi-judicial to determine whether to allow these writs to be used. 71

Abolishing the extraordinary writs from the judicial review system has often meant a change in form rather than substance. This is unfortunate, because it tends to foster inequity in the judicial review process that will be further complicated by increased future demands for judicial review. The courts' reluctance to abol-

63 Utah R. Civ. Proc. 65(B).
64 Id., Comment.
65 Utah R. Civ. Prac. 65(B)(a).
67 N.J. Const. art. 6, § 5, ¶ 4.
69 Schnitzer, Procedure in Lieu of Prerogative Writs, 4 Rutgers L. Rev. 323, 324 (1949).
ish these writs is understandable in light of their historical significance and often unique remedies. It must be recognized that Davis's proposal was not to abolish these remedies but only to allow their usage in a more flexible manner. 2 This would allow the courts to provide the appropriate remedy without concern for the technicalities. Without judicial awareness of the reasons for a single system of judicial review, it will be fruitless to revamp the review procedure.

IV. A. Solution for West Virginia

The best method for reform of the judicial review process in West Virginia would be to abolish the use of extraordinary writs by modification of that section of the West Virginia Administrative Procedures Act that deals with judicial review. 3 Abolition of the writs is necessary because mere modification of their use will leave the possibility of circumvention of the desired goal. Statutory abolition would be more practical than a constitutional amendment which requires a vote of the electorate. Since the present system of judicial review in West Virginia has been legislatively established, statutory abolition is more appropriate than abolishment by a rule of the Supreme Court of Appeals.

To be effective, this statute must receive the proper judicial interpretation. 4 The reviewing court must recognize that although the extraordinary writs are abolished, the remedies these writs provide are still available to the court when it feels they are appropriate, and that the appropriate relief should be granted even though the practitioner may not accurately name or describe the writ he is seeking.

2 Davis, supra note 1, § 24.07.

3 W. Va. Code Ann. § 29A-5-4. By changing paragraph (a) of this section which presently reads: "Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law," to the one below, the extraordinary writs could be eliminated:

(a) Any person who is adversely affected by a final order or decision in a contested case is entitled to judicial review provided in this act. In all such cases, the use of mandamus, prohibition, and certiorari or any other statutory, equitable, or common law means of review of administrative decisions heretofore available shall not be employed after the effective date hereof.

4 See the problems encountered in other states discussed in notes 49-66 supra and accompanying text.
The development of administrative law is well documented, and the trend is toward even greater growth. With the growth of administrative agencies, there is a concomitant need for increased judicial review to protect against the possibilities of abuses of power. The increased emphasis on due process will also greatly expand the demands for judicial review into areas that are currently unreviewable. Thus, the time is ripe for the Legislature to reform the judicial review of administrative actions in West Virginia. The increased demand for judicial review, coupled with the current inadequacies, make the West Virginia system ill-equipped to provide the judicial review of administrative actions that is required.

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See notes 30 & 31 supra and accompanying text.


See notes 37 & 38 supra.