CHAPTER IV

DISCRETION IN ARBITRATION

GABRIEL N. ALEXANDER*

I.

I recall, somewhat ruefully, the conversation between Dick Mittenthal and myself during which he asked if I would work up for delivery at this meeting a discourse about arbitrators and the exercise of discretion. We were seated in the lobby at the Chateau Champlain near the end of last year's annual meeting in April. I demurred a bit, as I remember it, and pointed out to Dick that, unlike himself and others, I have no bent for scholarly research. He continued to press me, of course, as any good Program Chairman should. I think he tried to be reassuring and made some reference to my tendency to philosophize about the arbitrator's function, which I foolishly took as a compliment, and I began to respond to his invitation with increasing enthusiasm. After 15 minutes or so of what at the time seemed like a lively exchange of ideas, I took the hook. But I asked Dick to do two things for me: first, to write me a letter sketching out what he had in mind, and second, to keep after me by phone about once a month. He promised to do so, and did. In his letter he said in part: "You asked me to write in more detail as to what I had in mind. That's not easy to express. For this is an elusive subject, one which concerns the many unstated assumptions and judgments which enter into our awards. . . ."

Over the months intervening since last April 1, I have from time to time grappled with the subject. It is indeed an elusive one. Eel-like, no matter at which point I sought to take hold of it, it slipped from my grasp and slithered on the desk before me. Eventually I managed to creel my prey, and with your

* Member and Past President, National Academy of Arbitrators, Oak Park, Mich.

indulgence for the next half hour or so I shall display it. Whether my catch is a delicacy to be savored or trash to be thrown on the garbage pile rests in the palate of you, my audience.

Insofar as any ultimate conclusions are concerned, I am probably no further ahead nor much behind where I was in 1962 when I addressed the Academy under the title "Reflections on Decision-Making." At that time I ventured into a brief analysis of what goes on in the mind of an arbitrator between the time the evidence and arguments are fully submitted to him and the time he affixes his signature to an opinion and award and sends it out for the parties, and perhaps others, to see.

My thesis then was that decision-making by arbitrators is a dynamic mental and emotional process which includes nonrational, as well as rational, elements, and that awareness of such dynamics is essential to a proper understanding of it. But the area of interest encompassed by this paper is intended to be narrower than that with which I previously dealt. Today I propose to explore those aspects of decision-making by arbitrators which may be encompassed by the word "discretion."

Roughly divided, what I have to say comprises three parts: an inquiry into the meaning and usage of the word "discretion"; a look at some of the pros and cons as to the exercise of discretionary authority by arbitrators; and an argument that arbitrators are affected by normative forces which constrain them toward objectivity and accepted notions of justice and fairness, when, occasionally, they exercise "discretion."

Much of the elusiveness which characterizes today's subject emanates from the variety and generality of the meanings suggested by the word "discretion." Webster's *New International Dictionary* lists about six definitions, some of which are clearly foreign to present interest. The definition from which I proceed toward closer analysis reads as follows: "Power of free decision; individual judgment; undirected choice."

In the administration of justice, "discretion" as thus defined is generally regarded as evil. For persons in authority to exercise "free decision; individual judgment; [or] undirected choice" smacks of tyranny and an authoritarianism which is incompatible with fundamental conceptions of liberty and justice.

As I shall attempt to make more clear hereinafter, however, it is impossible to avoid all indulgence in "discretion" in the administration of justice, and there have grown up two modified concepts which (with some misgivings) are generally regarded as beneficial. I have in mind the terms "judicial discretion" and "administrative discretion." The following observation by Professor Frank Cooper in his book *Living the Law* illuminates the point:

> "Exercise of discretionary powers (in the classical meaning of the term defined as 'unrestrained exercise of will') is alien to judicial tradition. True, judges are free to exercise a degree of discretion in ancillary matters (such as determining trial dates, or the order of proofs or whether to grant extraordinary equitable remedies). But even here, it is said that the Courts exercise a 'judicial discretion' meaning that the trial judge's freedom of choice will be limited by established norms and standards." [1]

Accordingly, in the literature of the law we find definitions of, and discourses upon, "judicial discretion," a term that implies something narrower than wholly unrestrained exercise of will, but something broader than close adherence to rules of law. Attempts to define the more benign meaning of discretion connoted by "judicial discretion" are fraught with semantic uncertainties. The following definition of "judicial discretion" taken from a respected dictionary of legal terms may draw some wry amusement from those of you who, as I try to do, look closely at words to discern exactly what they mean. "Judicial discretion" is there defined as:

> "A liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law." [2]

What to me is a more realistic definition is to be found in the following extract from a monograph by B. X. Meyer appearing in the *New York State Bar Journal* for April 1966. "Judicial discretion" was there defined as describing

> ". . . the area in which an appellate court will accord deference, but not finality to the determination of the lower court judge

---

[1] Cooper, *Living the Law* (Indianapolis: Bobbs-Merrill, 1958), 99.
[2] *Black's Law Dictionary*, 375 (2d ed. 1910).

> . . . [resulting] from the difficulty of establishing hard and fast rules . . . typically . . . reversal will be accompanied by the statement that the lower court 'abused' or 'improvidently exercised' its discretion." [3]

This definition affords greater recognition to the interrelationship between a lower court and a reviewing court. It takes into account the dynamics of such relation and points up the inescapable fact that a discretionary ruling by a lower court will be reversed when the reviewing court disagrees with the ruling so strongly that it will use the words "abuse" or "improvident" to describe that ruling.

Consider now the concept of "administrative discretion," so important in modern law that it is doubtful if our complex society could be regulated without resort to it. As Professor Cooper put it, "Administrative agencies, on the other hand, thrive on the grant of broad discretionary powers. It has been said that discretion is the very life blood of the administrative process." [4] Nevertheless, experience reveals an appellate court will, when sufficiently aroused, also reverse a discretionary choice made by an administrative agency. The following words by Mr. Justice Douglas, dissenting in *New York* v. *United States,* verbalize the traditional concern of courts for the "unrestrained exercise of will" by administrative authority:

> "Unless we make the requirements for administrative action strict and demanding expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion. *Absolute discretion like corruption marks the beginning of the end of liberty.*" [5] (Emphasis added.)

The point I would stress to you before leaving my analysis of the meaning of "discretion" is that exercises of both "judicial discretion" and "administrative discretion" are subject to review by appellate courts. Such review, of course, is only on the question, as commonly put, whether such discretion was "abused," but even as thus limited it places direct restraints on the freedom of choice which may be exercised by any court or tribunal vested with "discretionary" powers. It is to the appellate courts that one must look for practical application of

---

[3] Meyer, "Judicial Discretion in Matrimonial Actions," 38 *N.Y.S. Bar J.* 119 (1966).

[4] Cooper, *supra* note 1, at 99.

[5] Dissenting opinion in *New York* v. *United States,* 342 U.S. 882, 884; 72 Sup. Ct. 152 (1951).

the restraints upon "discretion" which modifies the concept from its classical definition, "unrestrained exercise of will," to its accepted meaning in the administration of justice.

The question then may be asked, how, if at all, may the notion of "arbitral discretion" be defined and utilized? Assuming for discussion that an arbitrator is empowered specifically or by reasonable implication to exercise his "discretion," what if anything in theory or practice narrows such discretion to the limits to which exercises of "judicial discretion" or "administrative discretion" are subjected? There are, of course, limits beyond which an arbitrator may not exercise his will without being subject to reversal by a reviewing court, but I am unaware of any legal principle which asserts that an award will be upset on the ground that a *discretionary power* clearly vested in an arbitrator was exercised improvidently. Does it follow that as to matters lying within an arbitrator's discretion, there are, or should be, no limits on his exercise of will? In other words, is or should the concept of "arbitral discretion" be equated with "discretion" in its classical sense? I do not relish such a consequence.

So much for the difficulties that emanate from the meaning and connotations of the word "discretion." I turn now to passing comment on three matters relevant to the necessity or advisability of authorizing or permitting an arbitrator to exercise "discretion" as to any matter.

II.

First: There exists a perceivable parallel between the complexities of society at large and the complexities of the industrial relations society in which arbitrators function as decision-makers. While a major thrust by organized labor and a major concession by the managers of enterprises have been in the direction of objectifying the rules and standards governing life in industrial establishments (to create a society "governed by laws, not men"), experience demonstrates the impossibility of putting into words specific rules and standards to cover all circumstances. Our late respected colleague, Harry Shulman, described the problem in his 1955 Holmes lecture. After expressing the view that it is wholly impractical for unions and em-

ployers to deal with labor relations problems on a purely case-by-case basis, he said:

> "So the parties seek to negotiate an *agreement to provide the standards* to govern their future action.
>
> "In this endeavor they face problems not unlike those encountered wherever attempt is made to legislate for the future in highly complex affairs. The parties seek to foresee the multitude of variant situations that might arise, the possible types of action that might then be available, the practicalities of each and their anticipated advantages and disadvantages . . . ." [6] (Emphasis added.)

And as to an agreement resulting from negotiations, Dean Shulman said that it

> ". . . becomes a compilation of diverse provisions: Some provide objective criteria almost *automatically applicable;* some provide more or less specific standards which require *reason and judgment* in their application; and some do little more than *leave problems to future consideration* with an expression of hope and good faith." [7] (Emphasis added.)

Second: Although, as Dean Shulman observed, parties engaged in collective bargaining face problems similar to those encountered in legislating complex affairs, experience reveals that by and large they did not resort to a device similar to the administrative agency: that is, they did not create offices, sole or *en banc,* with power to make and enforce *general rules* within *broadly defined policies.* Rather, employers and unions reserved to *themselves* the right and duty of applying their collective bargaining agreement directly to the incidents of day-to-day life in the factory and provided for third-party intervention only on the limited scale encompassed by the system of grievance arbitration as it generally exists. I assume that all would agree that, on the whole, with certain exceptions aside to which I will advert hereinafter, arbitrators are *not expressly* empowered to exercise "discretion" as to any matter.

From my own experience I had thought this was so. In my early deliberations on this discourse I could recall seeing only three collective agreements in which there are provisions expressly authorizing an arbitrator or umpire to exercise "discretion," as such, with respect to any matter. Being chary of

---

[6] "Reason, Contract and Law in Labor Relations," 55 *Harv. L. Rev.* 999, 1003 (1955).

[7] *Id.* at 1005.

generalizations based on one man's experience, however, I inquired by mail of 20 members of the Academy whether they could cite to me out of their experience any labor agreement usages of the word "discretion" to describe either by way of expansion or limitation the authority of an arbitrator. The replies received by me confirm my impression based on my own experience. I now regard it as a safe generalization to say that, ordinarily, express affirmative grants of authority to arbitrators to exercise "discretion" are found only in provisions relating to the modification of disciplinary action imposed on employees by management. Otherwise, in the grievance arbitration system as we know it, the authority of an arbitrator to exercise "discretion" emanates from the inherent nature of his role, or by implication from other contract provisions which do not contain the word.

Third: An explanation for the absence, by and large, of express delegation of "discretion" to grievance arbitrators probably lies in two factors. One is the voluntarism by which, particularly in the years prior to 1960, our grievance arbitration institution has been characterized. While government (at the level of the War Labor Board, the President's Labor Management Conference of 1945, and the Congress in the Labor Management Relations Act, 1947) has lent *impetus* to the acceptance of grievance arbitration, all important expressions of that impetus emphasize the notion that employers and unions would create and shape their own proceedings. For example, Section 206 (d) of the Act states only that

> "Final adjustment by a *method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." (Emphasis added.)

The other factor was *apprehension*, most marked in management circles but not unknown in labor circles, lest arbitrators issue awards which seriously diminished the rights or freedoms of the parties, or created impracticable results.

The most common manifestation of this apprehension is seen in the provision, found in almost all arbitration clauses, to the effect that the arbitrator shall have no power to add to, detract from, or modify any of the provisions of the agreement. More

forceful expressions in the same vein appear in some labor agreements, one example of which reads in part as follows:

> "He [the arbitrator] shall have no power to substitute his discretion for the Company's discretion in cases where the Company is given discretion by this Agreement or by any supplementary agreement,
>
> . . .
>
> ". . . In rendering decisions, an arbitrator shall have due regard to the responsibility of Management and shall so construe the Agreement that there will be no interference with such responsibilities except as they may be specifically conditioned by this Agreement."

III.

To recapitulate to this point, I have sought to explain that "discretion" in its classical sense is abhorrent to our fundamental conceptions of justice, but that as the complexities of life prohibit the formulation of specific rules to cover every contingency there have arisen a concept of "judicial discretion" within which the courts of first impression may act, and a concept of "administrative discretion" within which regulatory boards and commissions may act. Application of those limited concepts of discretion involve recourse to appellate courts, and the concepts are better understood by those who recognize the dynamics inherent in the process of judicial review. By contrast, labor arbitration agreements seldom specifically authorize arbitrators to exercise "discretion" although, as Harry Shulman and others have pointed out, companies and unions face problems not unlike those encountered in complex legislative matters.

Nevertheless, I submit, closer examination of the subject reveals that, as to a variety of matters, arbitrators are expected to, do, and indeed must act in a manner which, although not styled "discretionary," is identical with, or closely similar to, the exercise of discretionary power.

Let us put aside for the moment the word "discretion" and substitute for it its classical definition, "unrestrained exercise of will." Let us then look to the sources, if any, of restraint upon the exercise of will by arbitrators. The primary source, it is clear, is the text of the labor agreement or submission from which the arbitrator derives his authority. The arbitrator, faith-

ful to his trust, like the judge, applies the rule which is clearly prescribed by his source of law or principle. Judge Cardozo put it in these words: "The rule that fits the case may be supplied by the constitution or by statute. If that is so the judge looks no farther. *The correspondence ascertained, his duty is to obey.*" [8] (Emphasis added.)

But in the grist of the business coming before labor arbitrators, the terms of an agreement are seldom clear enough to supply the rule, and *pro tanto* the arbitrator is less than explicitly restrained in the exercise of his will. A contract may be devoid of any affirmative invitation to the arbitrator to exercise "discretion," as such, but it may be replete with words which are so general in their meaning as to compel him to exercise his will with little or no specific contractual restraint. I cite the following clauses as illustrative:

1. "An employee seniority shall be broken and all employment rights terminated if an employee is absent for three working days, unless he has a *satisfactory reason* for such absence."
2. "The arbitrator shall decide the question of *equitable incentive compensation.*"
3. "The Company shall not exercise its right to discipline . . . any employee except for *good and just cause.*"

None of these clauses, which are representative of many clauses which arbitrators are regularly called upon to interpret and apply, affirmatively grants arbitrators authority to exercise "discretion," but none of them provides much guidance or restraint upon the arbitrators' exercise of will with respect to the outcome of a dispute over the application of the clause to a situation.

In terms of the underlying consideration, "restraint upon the exercise of will," how much, if any, real difference can be found between a clause which grants an arbitrator authority to exercise "discretion" with respect to how much incentive employees should earn and a contract clause which empowers the arbitrator to decide whether incentive compensation available under a plan is "equitable"?

Illustrative of how arbitrators actually behave in this uncertain area are two lines of holdings, one by the United States

[8] Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 14.

Steel-Steelworkers Board of Arbitration and the other by the General Motors-United Automobile Workers umpires. In the former, the Board of Arbitration has made it clear that it will decide whether a plan provides "equitable incentive compensation" by reference to what is fair, just, and reasonable on a case-by-case basis, and will not establish any intermediate principle or precedent for such a determination.[9] In one opinion in this series, the Board said:

> "Since it [the Board] proceeds on a case by case basis . . . in applying the 'fair just and reasonable' test, it seems essential that the Board *refrain from theorizing or rationalizing the decision here announced.*" [10] (Emphasis added.)

In effect, as I see it, the Board has asserted that it will exercise its will to reach decision in these cases unrestrained by principles or concepts which are more specific than the terms, "fair, just, and reasonable." I find it hard to distinguish between such an assertion and one which says that these kinds of cases will be decided by exercise of "arbitral discretion." Indeed, in a recent incentive case heard by me involving another steel company, counsel for the Steelworkers used the word "discretion" to describe to me the latitude of consideration which permeates decisions on the question of equitable incentive compensation made by the Board of Arbitration.

The line of decisions to be found in the General Motors-United Automobile Workers umpire rulings arises under one of the few agreement clauses which does affirmatively grant "discretion" to an arbitrator. Since 1941 the GM-UAW national agreement has contained a clause which states in part, "The Corporation delegates to the Umpire full discretion in cases of violation of shop rules. . . ."

However, and for present purposes by way of contrast with the refusal of the United States Steel Board to lay down more specific guideposts, the umpires have said that they would generally adhere to the unifying concept of corrective discipline in exercising that delegated "discretion." In one opinion, it was put in these words:

"*Full discretion* is an extremely broad term and connotes a

---

[9] *U.S. Steel,* 5 Basic Steel Arbitrations [hereinafter cited as BSA] 3177 (1955); *U.S. Steel,* 6 BSA 3939 (1957); U.S. Steel, 6 BSA 4317 (1958).

[10] 4 BSA 2343 (1954).

> freedom of choice not hampered by formal rules or precedents. Nevertheless, in order that the parties might have some guide to indicate the probable outcome of disputes over the reasonableness of penalties, the Umpire has announced that, with certain exceptions not now material, he will exercise his contractual full discretion within the doctrine of 'corrective discipline'. . . ." [11]

The contrast between these two lines of decision is best understood as a manifestation of the importance which the respective arbitrators attached to considerations beyond those affecting the particular disputes ruled upon. In the line of decisions dealing with disciplinary penalties, the GM-UAW umpires were apparently most concerned lest lack of guideposts for the probable outcome of appeals would obstruct the settlement of discipline cases at the lower steps of the grievance procedure. In the line of decisions pertaining to equitable incentive wages, the Board of Arbitration was apparently most concerned lest the broad standard ("equitable incentive compensation") set forth in the contract become subservient to specific industrial engineering principles or incentive wage theories.

The results achieved by both arbitration tribunals are viable, having withstood tests of subsequent experience, and in my opinion were wise. The holdings illustrate not only that "discretion," or something closely akin to it, is a factor which affects decisions upon diverse matters, but also indicate that the extent to which "discretion" will be exercised by arbitrators is itself a question which at times may and properly should lie in the arbitrator's discretion. Nothing in either the General Motors agreement or the United States Steel agreement, as far as I can find, instructs the arbitrator as to the importance which he must attach to conflicting relevant considerations which are brought to bear on a dispute. In most arbitration cases where the outcome turns upon value judgments, the arbitrator has no alternative to making his choices on the broad basis of experience and wisdom.

Does it follow that as to any matter upon which the labor agreement does not specifically supply the rule to be applied, the arbitrator's will is wholly unrestrained? Not in the overall grievance arbitration system in which we practice. One important constraint which influences most arbitrators is the quasi-

---

[11] Decision G-15 (1951).

professional status of our calling, a status for which the National Academy has diligently exerted its efforts for almost 25 years. Rare indeed on today's labor arbitration scene is the well-meaning but uninformed prominent citizen called upon to act the role of Solomon. Grievance arbitrators are selected for qualities of expertise as well as their personal dedication to justice.

Another influential constraint upon the exercise of will by grievance arbitrators comes from the practice of explaining awards in written opinions. The necessity of recording a reasoned conclusion includes the necessity of calling forth reason to explain the decision. A reasoned exercise of will is not an unrestrained exercise of will. And Judge Paul Hays to the contrary notwithstanding, what to me are the legitimate and beneficial aspirations of arbitrators to maintain the respect of their fellows and of their clientele constitute a third source of constraint against the "unrestrained exercise of will," or arbitrary or tyrannical behavior.

IV.

What I have thus far discussed concerns the exercise of discretion, or something like it, by arbitrators as to the *substantive outcome* of a dispute. There are other aspects of arbitration as to which arbitrators are called upon to make rulings (exercise their will) entirely and frankly as a matter of "discretion." I have reference to the multitude of matters that arise with respect to the conduct of a hearing. Usually one does not find in a collective bargaining agreement a complete set of rules for the fixing of time and place of hearing, or the manner and sequence of the presentation of evidence and argument, or the winding-up of the case. Within the limits of "due process and fair hearing" to which the parties are entitled as of right, there are many details the resolution of which reposes in the "discretion" of the arbitrator by force of necessity from his role as president of the tribunal, and by force of customary expectations of the disputants. In this area the arbitrator exercises discretion identical with that exercised by a trial judge.

In another area, both substantive and procedural, arbitrators may be called upon to exercise discretionary authority. I refer to the formulation of a specific remedy for a proved violation of the agreement. This is a complex area, and time limita-

tions preclude me from delving deeply into it. I call your attention to the following:

1. On occasion parties will stipulate the issues to be decided in substantially the following terms: "Did the Company violate the Agreement when it did not promote Grievant to Electrician Leader? If so what shall the remedy be?" [12]

2. In *United Steelworkers* v. *Enterprise Wheel & Car Corp.* Mr. Justice Douglas said: "When an arbitrator is commissioned to interpret and apply the . . . agreement he is to bring his informed judgment to bear. . . . This is especially true when it comes to formulating remedies. There the need is for flexibility. . . ." [13]

3. The J&L Steel-Steelworkers Agreement states: "The decision of the Board will be restricted as to whether a violation of the Agreement as alleged in the written grievance . . . exists and if a violation is found, to specify the remedy provided in this Agreement."

So much for the arbitrator's discretion as to remedies. Let me call attention to another aspect of the grievance arbitration system as it exists today—the writing of opinions explaining decisions.

I think most experienced arbitrators would agree that the writing of opinions is an arduous task which does not become easier with the passage of years. The arbitrator is never more on his own with little or no restraint or guidance than when he is putting words to paper. Entirely within his "discretion" are the questions of what to say and how to say it. To whom is he addressing himself? His clients alone, or a wider audience? Shall he write broadly for the purpose not only of recording disposition of the subject case but also of giving guidance to the parties for the future? Or shall he write narrowly so as to avoid the pitfalls of affecting matters not known to him? Shall he call a spade a spade and characterize one or the other of the parties in strong or blunt terms? Or shall he let his words fall gently, either completely masking his feelings or only hinting at them? Or shall he say something nice about one or the other or both sides? It is almost entirely a matter within his discretion, or "style," or personality. Yet the arbitrator's writings are what most people rely on to form judgments about his skill and ability, and decision-writing forms a most important element of the system.

[12] See *Allied Chemical*, 47 LA 554 (1966), Carroll R. Daugherty; *General Slicing Machine Co.*, 49 LA 823 (1967), Louis Yagoda.

[13] 363 U.S. 593, 46 LRRM 2423 (1960).

And, finally, I call your attention to the one area, closely interwoven with both procedure and substance, as to which restraint or guidance to the exercise of the arbitrator's will is not only lacking, but is also unavailable from any reliable or authoritative source. I have reference to the jury function—the acceptance, qualification, or rejection of belief in conflicting versions of fact as related by witnesses. The real and underlying truth of this matter, as experienced practitioners recognize, is that the outcome of a case which turns upon which of conflicting versions is believed is a matter which lies wholly within the "discretion" of the arbitrator. It is at this point that the whole of the arbitrator's personality, experience, outlook on life, sympathies known to him or buried in his subconscious, etc., all come into play.

I have heard some men say they could always know who was telling the truth and who was lying. I have seen arbitrator's opinions which assert as a principle that a grievant is less credible than a contradicting foreman because the grievant has an interest in the outcome of the case but a supervisor does not. I would be more at ease with myself and the world if I shared those views, and in a way I envy others who do. But experience has not led me to do so, and I have searched in vain for authoritative principles of law, psychology, or any science or art upon which I could confidently rely for guidance or restraint upon my exercise of will as to matters of belief. I need not remind this audience that the "facts" upon which an arbitrator bases his conclusion are not the "facts" as they occurred at the time the dispute arose, but are rather the "facts" as understood by the arbitrator from the presentation made to him by the parties during the course of the hearing. No one who understands the psychological processes of observation, recall, and narration by witnesses can fail to perceive that difference and the dynamics that affect the understanding and decision-making by arbitrators, by administrative tribunals, by judges, and by juries.

As I said at the outset, I find myself not much ahead or behind the position I took in my 1962 discourse. We profess belief in a society governed by laws, not by men. We reject tyranny and absolutism. We find truth in the saying, "Power tends to corrupt; absolute power corrupts absolutely," and we share the

feelings of Mr. Justice Douglas when he said, "Absolute discretion, like corruption, marks the beginning of the end of liberty." But in 1971, as in 1962, I see no way of escaping the realities which affect our institutions for the administration of justice. One cannot ignore the necessity of resolving disputes on the basis of judgment, or the elements of personality that affect human judgment. Although seldom invested with specific authority to exercise "discretion," arbitrators could not reach or express their judgments without exercising their will. Justice demands that such exercise should not be wholly unrestrained, but it is simply not possible to restrain it to a degree that eliminates "discretion" in a sense comparable to "judicial discretion" or "administrative discretion."

Comment—

PHILIP G. MARSHALL *

Perhaps the soundest approach I could make in commenting on Gabe's dissertation would be to say "Amen" and be seated. But the program calls for something more than that, so for the next 10 minutes or so I shall try my analytical best to explore further the subject of "Discretion in Arbitration."

Gabe has said that he has "no bent for scholarly research," and indeed the very title of his paper gives evidence of that. The simple and descriptive title, "Discretion in Arbitration," has no scholarly clout. Anyone who pretends to be a scholar would have picked a title that has some real sock. Evidently Gabe doesn't know that at least 90 percent of all doctoral dissertations, papers, monographs, or just plain everyday academic speeches bear such titles as "The Impact of Something on Something Else" or "The Influence of Something Upon a Whole Flock of Other Things." Even though Gabe's original paper bore that simple title, "Discretion in Arbitration," the academicians on the Program Committee could not sit still for so simple and forthright a title. Hence, in the printed program, it was changed to "The Role of Discretion in Arbitral Decision-Making." Thus, we see that the key words to demonstrating erudition are "impact," "influence," and "role."

Quite properly, Gabe begins with a number of definitions of

* Member, National Academy of Arbitrators, Milwaukee, Wis.