Judicial Review of Administrative Decisions

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JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

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YEAR 1840, A.D.

"The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief, and we are satisfied that such power was never intended to be given them."

YEAR 1936, A.D.

"Arbitrary power and the rule of the Constitution cannot both exist. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well."

WITHIN a span of 100 years, the attitude of American courts toward review of the decisions of administrative bodies has changed completely. The relatively simple structure of the administrative branch of government in the early part of the 19th century en-

1 Decatur v. Paulding, 14 Pet. 497, 516, 10 L.Ed. 559 (1840).
2 Jones v. S. E. C., 298 U.S. 1, 24, 56 Sup. Ct. 654, 661, 80 L.Ed. 1015 (1936).
couraged the attitude of restraint adopted by the courts in reviewing decisions of executive boards and officers. With the growth of administrative departments in complexity and power, the courts became more and more concerned over the disappearance of the traditional separation of powers.

At present, the problem of the extent of court review of administrative decisions is receiving much serious attention. Any attempt to solve the difficulty must include not only an understanding of the nature and scope of administrative bodies as they exist today, but also an evaluation of the reasons which prompted the formation of existing rules of review. Therefore attention is first directed hastily to the types and powers of administrative bodies. This will be followed by a discussion of rules of review as developed in certain classes of cases. On the basis of such study, a conclusion will be attempted.

I

Nature of Existing Administrative Bodies

Legislators throughout the nation have seen fit to entrust administrative determinations to almost every conceivable type of administrative body, particularly during the last fifty years. Executive officials have been loaded with duties ranging from questions of changes in personnel within their staff to matters affecting the life and health of the general public. Boards and commissions of all sizes have sprung up like mushrooms. These agencies have been utilized not only to formulate rules and regulations, but to investigate, prosecute, and adjudicate claims. Thus the scope ranges from settling claims of the immediate parties involved, to affecting rights of the entire consuming public, and from dealing with completed events to establishing a course of future conduct.

Where administrative orders are given legal effect, they become subject to judicial review. One type of statute provides for trial de novo by the reviewing court. In others, the court may inquire into

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4 For the extent of the influence of administrative agencies, see: Howard L. Bevis, Administrative Commissions and the Administration of Justice (1928) 2 U. of Cin. L. Rev. 1.

both the law and fact, but solely on the basis of the certified record of the administrative agency. In another, the facts are final, but the courts may review the law. Finally, there is no review except possibly on the question of jurisdiction.\footnote{Ibid. p. 389; F. Blachly and M. Oatman, Administrative Legislation and Adjudication (1934) p. 179; E. B. Stason, Methods of Judicial Relief from Adm. Action (1938) 12 U. of Cin. L. Rev. 227. Citation of statutory reference is deemed purposeless, since examples of the various types are so numerous as to be without the uniqueness worthy of individual note.}

The work of these administrative agencies begins usually with consideration of whether or not there is jurisdiction over the matter before them. Because of the practical impossibility of wording a statute to cover all conceivable fact situations, it becomes the duty of the administrative body to interpret the law. This may involve not only a careful analysis of the statutes involved, but also a study of judicial decisions. The largest portion of the work of these agencies, of course, consists of fact-finding. Regardless of the apparently clear separation of fact and law in some situations, it must be conceded that, in general, the two are so closely interwoven as to be inseparable.\footnote{Hyneman, op. cit. supra, p. 410. For an astute distinction between law and fact from the standpoint of function of administrative body and court see John Dickinson, Administrative Justice and Supremacy of Law (1927) p. 168.} Lastly, the administrative bodies are forced to formulate policy where the statutes are silent, and in this respect are engaged in the important function of steering the course of public control of business.\footnote{For a complete discussion of the work of administrative agencies see Hyneman, op. cit. supra, p. 398 ff.}

II

EVALUATION OF EXISTING RULES OF REVIEW

Because of the detailed body of law which has developed on judicial review of administrative decisions, it will be impossible to consider more than the most important principles which have been used. A classification of the cases has been attempted to aid in discussing the desirable extent of review, and in reaching a conclusion.

At the outset, it may be said that the courts have looked with skepticism, if not jealousy, on the exercise by administrative bodies of any power outside of fact-finding. The intensity of this feeling has been developed in proportion to the public importance of the matters falling within the jurisdiction of the administrative agency.

A. Determinations involving functional affairs and existence of government.

In this group, consideration is given to cases dealing with discharge of personnel, taxes, and immigration.
1. Discharge of Personnel.

In line with the attitude expressed in the quotation with which this study began, the courts decided at an early date that, in the absence of statutory provision, they would not review the discharge by an administrative officer of members of his department. The legal justification for this principle was said to be that the power to appoint included the power to remove when the tenure of office was not fixed. With the passage of time this general doctrine was extended to cases where the tenure was fixed by statute and to cases where the President alone discharged an executive officer who had been appointed by him with the consent of the Senate.

The court has even gone so far as to hold that a general appraiser might be removed by the President, for reasons other than those enumerated in the statutes, without the consent of the Senate, where no term of office was fixed by law.

The case of Humphrey's Executor v. United States brought the power of removal to the forefront once more. In that case, the executor of the estate of a former member of the Federal Trade Commission sued for salary claimed to be due after the deceased had been removed from the Federal Trade Commission by the President of the United States. The Supreme Court, in answering certain questions certified to it by the Court of Claims, said that the President had no power to remove a member of an administrative body exercising legislative and judicial functions for any reasons other than those specified in the statutes. The duties of the Commission were said to be such that the Commission must be free from executive control in accordance with the theory of separation of powers. The Shurtleff and Myers cases were distinguished on the ground that the officers involved in those cases were subordinates in executive departments.

Between the Myers case on the one hand, and the Humphrey case on the other, is a doubtful zone which future decisions will clarify. It is apparent that the Supreme Court has set out to protect the autonomy of the independent regulatory commissions regardless of the extent to which it believes the decisions of such bodies should be subject to judicial control. Along with this viewpoint the Court has evidently decided to follow the long established principle of keeping out of the

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14 Civil service laws do not change these rules much. If procedural requirements are met, the court will not go behind the determination, ordering removal. Dickinson, op. cit. supra, p. 266.
internal affairs of the executive departments, particularly those involving personnel. Both of these tendencies might be justified on the separation of powers doctrine, as well as on other grounds. Practically, since neither private property rights nor vested interests are at stake, and operating efficiency demands free discretion in the executive to mould his organization unhampered and undelayed, the court tries to interfere as little as possible.\textsuperscript{15}

This judicial attitude has much to commend it. It is justified by the doctrine of separation of powers; it allows free exercise of executive powers, without permitting an arbitrary invasion of individual rights; it prevents long delays through lengthy court hearings and further crowding of already over-crowded court calendars; it leaves the designation of reasons for discharge within the control of the administrative officers or of legislators where it properly belongs.

Because of the refusal of the Supreme Court to issue a writ of mandamus in cases where discretion of an administrative officer is involved,\textsuperscript{16} the question of discharge is usually presented in suits started in the Court of Claims for unpaid salary. This Court is a federal legislative court, the decisions of which may be reviewed on certiorari to the Supreme Court.\textsuperscript{17} The Court may certify distinct questions of law to the Supreme Court. Such a procedure satisfies every demand of fairness and justice, so that any change in the present extent of review would be undesirable.

2. Taxes.

In this class of cases the courts have been impressed with the necessity of non-interference, perhaps more than in any other case. The reasons for such an attitude seem to center about the theory that exercise of the taxing power is essential to sovereignty\textsuperscript{18} and prompt payment is vital to the very existence of government.\textsuperscript{19} Erroneous taxes resulting from honest mistakes in over-valuing property,\textsuperscript{20} honestly discriminating against taxpayer by unequal assessment,\textsuperscript{21} and purely ministerial mistakes in preparing tax records,\textsuperscript{22} are subject only to direct attack. On the other hand, if there is fraud\textsuperscript{23} or mistake in assessing or listing

\textsuperscript{15} Dickinson, \textit{op. cit. supra}, p. 265.
\textsuperscript{16} See \textit{Ex parte Hennen}, \textit{supra} note 9.
\textsuperscript{17} For description see Wilbur G. Katz, \textit{Federal Legislative Courts} (1930) 43 \textit{HARV. L. REV.} 894, and Blachly & Oatman, \textit{op. cit. supra}, p. 128.
\textsuperscript{18} Loan Ass'n. v. Topeka, 20 Wall. 663, 22 L.Ed. 455 (1874).
\textsuperscript{19} Dows v. Chicago, 11 Wall. 108, 20 L.Ed. 65 (1871).
\textsuperscript{20} Bartlett v. Kane, 16 How. 263, 14 L.Ed. 931 (1853); Hilton v. Merritt, 110 U.S. 97, 3 Sup. Ct. 548, 28 L.Ed. 83 (1883); Dickinson, \textit{op cit. supra}, p. 271.
\textsuperscript{21} Mercantile Nat. Bank of N. Y. v. The Mayor, 172 N.Y. 35, 64 N.E. 756 (1902); People v. Hibernian Banking Ass'n., 245 Ill. 522, 92 N.E. 305 (1910).
\textsuperscript{22} E. B. Stason, \textit{Judicial Review of Tax Errors} (1929) 28 \textit{MICH. L. REV.} 637.
\textsuperscript{23} Fac. Postal Tel. Cable Co. v. Dalton, 119 Cal. 604, 51 Fac. 1072 (1898).
property for taxation, the court will review on collateral attack.\textsuperscript{24} Generally, the administrative remedies need not be exhausted in the second group of cases just discussed, but there is some authority to the contrary.\textsuperscript{25} Because of the necessity of prompt assessment and collection, the courts have applied liberal rules of due process as far as notice and hearing are concerned. No personal notice of assessment is necessary,\textsuperscript{26} but there must be notice and opportunity to be heard at some stage of the collection process.\textsuperscript{27}

Tax questions usually involve highly technical details which the courts are ill-equipped to consider. When this fact is coupled with the necessity for prompt decision, it is apparent that there is justification for the attitude of non-interference which has been adopted. But the danger of inadequate protection of the taxpayer's rights looms large in this type of case. Very often the notice to which the taxpayer is entitled is a mere technical gesture which does not come to his attention.\textsuperscript{28} If such notice is adequate to apprise the taxpayer of his rights,\textsuperscript{29} and if adequate administrative appeals are provided, the balance swings in favor of judicial review as it exists at present.\textsuperscript{30} The remedy for any apparent hardship on the taxpayer lies in the proper selection of administrative officials rather than judicial review.

3. Immigration Cases.

Like the tax cases, the courts have considered administrative control over aliens as going directly to the existence and safety of government and thus inherent in sovereignty.\textsuperscript{31} All other considerations are to be subordinated. Furthermore, the power is not restricted by treaty.\textsuperscript{32} On the basis of such considerations, the courts have generally refused to review a decision because it was erroneous.\textsuperscript{33} However, if it was


\textsuperscript{28} Stason, \textit{op. cit.} p. 664.


\textsuperscript{30} Dickinson believes that the court should review the exercise of discretion of petty tax officials in all cases not involving matters calling for expert or technical judgments of fact. See Dickinson, \textit{op. cit. supra}, p. 270.

\textsuperscript{31} United States \textit{ex rel.} Turner v. Williams, 194 U.S. 279, 24 Sup. Ct. 719, 48 L.Ed. 979 (1904).

\textsuperscript{32} Chae Chan Ping v. United States, 130 U.S. 581, 9 Sup. Ct. 623, 32 L.Ed. 1068 (1889).

\textsuperscript{33} Dharandas Tulsidas v. Insular Collector of Customs, 262 U.S. 258, 43 Sup. Ct. 586, 67 L.Ed. 969 (1923).
rendered without any substantial evidence to support it, the court will reverse it as being arbitrary and unreasonable.\textsuperscript{34} In this class of cases the courts have preserved the requirements of due process by ruling that there must be an opportunity for a fair hearing,\textsuperscript{35} though the procedure and rules of evidence applicable in a law court need not be followed.\textsuperscript{36} The trend of the cases is toward an insistence upon greater procedural safeguards.\textsuperscript{37} The courts have also insisted upon the exhaustion of administrative remedies before habeas corpus proceedings will be permitted.\textsuperscript{38}

In regard to questions of fact and law, the courts have refused to review the first\textsuperscript{39} but will review the second.\textsuperscript{40} The refusal to review determinations of fact has been carried even to jurisdictional facts in exclusion cases\textsuperscript{41} though not in expulsion cases.\textsuperscript{42}

During the fiscal year ending June 30, 1937, 50,244 immigrants came to the United States\textsuperscript{43} and 8,829 were deported.\textsuperscript{44} Compared to the decade ending in 1930, this is a small annual figure but it is large enough to prove conclusively that control of aliens cannot be assumed by the courts. Furthermore, the policy of non-interference which the courts are apparently following is amply justified by the reasons which have heretofore been pointed out.\textsuperscript{45} The distinction between “fact” and “jurisdictional fact” was shown to be flexible enough to permit its use in one type of case and not in another.

B. Determinations involving governmental grants and services.

The cases in this class fall into three divisions—land grants, pensions, and postal decisions.

1. Land Grants.

Here the power-renouncing attitude of the courts has found its fullest expression. Among the reasons assigned are that Congress has exclusive power over the public domain by the Constitution, that Con-

\textsuperscript{34} Lisotta v. United States, 3 F. (2d) 108 (1924); Tillinghast v. Wong Wing, 33 Fed. (2d) 290 (1928).
\textsuperscript{35} Chin Yow v. United States, 203 U.S. 8, 28 Sup. Ct. 201, 52 L.Ed. 369 (1908).
\textsuperscript{36} Moy Said Ching v. Tillinghast, 21 F. (2d) 810 (1927).
\textsuperscript{37} Kwock Jan Pat v. White, 253 U.S. 454, 40 Sup. Ct. 566, 64 L.Ed. 1010 (1920); Dickinson, op. cit. supra, p. 295.
\textsuperscript{38} United States v. Sing Tuck, 194 U.S. 161, 24 Sup. Ct. 621, 48 L.Ed. 917 (1904).
\textsuperscript{39} Lem Moon Sing v. United States, 158 U.S. 538, 15 Sup. Ct. 967, 39 L.Ed. 1082 (1895).
\textsuperscript{40} Gonzales v. Williams, 192 U.S. 1, 24 Sup. Ct. 177, 48 L.Ed. 317 (1904).
\textsuperscript{42} Ng Fung Ho v. White, 259 U.S. 276, 42 Sup. Ct. 492, 66 L.Ed. 938 (1922).
\textsuperscript{43} Twenty-Fifth Annual Report (Secretary of Labor 1937) p. 83.
\textsuperscript{44} Ibid., p. 89.
\textsuperscript{45} Dickinson suggests that questions of citizenship be tried by a jury, and that applicant be permitted to make a \textit{prima facie} case by affidavits of two or more domiciled citizens not of his own race. See Dickinson, op. cit. supra., p. 296.

It is submitted that such a plan would increase delays, uncertainties and costs without adding appreciable advantages.
gress has constituted the Land Department as a special tribunal, that the power to dispose of and survey public lands belongs exclusively to the political department of government, that acts of the Land Department are discretionary until the right to the land is vested in the applicant, and lastly the pragmatic reason that expediency requires non-interference. Like the tax cases, the courts have refused to upset an erroneous decision by injunction or mandamus unless there is mistake, fraud or imposition proved beyond a reasonable doubt. Also, if the decision is clearly beyond the power of the officers, it will be subject to court review.

Here too, law and fact has been made a basis for determining whether the decision will be scrutinized by the courts. Great weight will be given to the administrative construction of questions of law.

In summary, the effect of the decisions is that the courts refuse to treat as matters for the application of legal rules, or lay down such rules to govern, many of the details of procedure, and even of classification and interpretation which they properly prefer to regard as the subject matter for a body of technical administrative officers. This group of cases emphasizes that what are questions of law is properly a matter for the courts to determine depending on the desirability or feasibility of establishing fixed rules of permanent and universal application. They may be characterized as involving privileges rather than fundamental rights, and in the absence of arbitrary or fraudulent favoritism, there is no good reason for court interference.

2. Pensions.

The history of the pension cases is very similar to that of the land cases just considered. Non-review of administrative decisions has been justified by stressing the bounty characteristic and the absence of a

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50 Santa Fe Pac. R. R. Co. v. Fall, 259 U.S. 197, 42 Sup. Ct. 466, 66 L.Ed. 696 (1922).
53 Dickinson, op. cit. supra, p. 287.
vested right in the pension.\textsuperscript{55} Findings of fact are conclusive, though equity will relieve for fraud if proved beyond a reasonable doubt.\textsuperscript{56} An arbitrary or capricious finding will be set aside, the procedure will be examined, and questions of law will be reviewed.\textsuperscript{57}

Comments similar to those expressed about land cases are applicable to this type of case.


The sale of governmental services, of which the postal service is an outstanding example, has not been interfered with by the courts, on the grounds that this activity is a privilege, offered by the government, which it is not obligated to supply and therefore may be limited as the government may desire.\textsuperscript{58} The action of the Postmaster-General is presumed to be correct unless shown to be tainted with fraud, absolutely unlawful, clearly outside the statute, or perhaps clearly, palpably and obviously wrong.\textsuperscript{59} Even on some questions of law, the action of the Post-Office Department is final unless clearly erroneous,\textsuperscript{60} and questions of fact are conclusive.\textsuperscript{61}

A danger lurks in this group of cases because of the restraint which the courts have exercised, particularly in reviewing fraud orders of the Postmaster-General. The rule in such cases is that the court will not interfere unless clearly of the opinion that the Postmaster-General was wrong.\textsuperscript{62} This attitude of the courts results in constituting the Postmaster-General the universal censor\textsuperscript{63} and is an example of the possibility of serious interference with individual rights of property and liberty which may develop from the unhampered extension of monopolistic control of public services.\textsuperscript{64} To prevent this tendency from expanding unduly, a policy of review similar to that in the public utility cases should be adopted.

\textsuperscript{55} United States v. Black, 128 U.S. 40, 9 Sup. Ct. 12, 32 L.Ed. 354 (1888).
\textsuperscript{56} Lalone v. United States, 164 U.S. 255, 17 Sup. Ct. 74, 41 L.Ed. 425 (1896).
\textsuperscript{57} See Dismuke v. United States, 297 U.S. 167, 56 Sup. Ct. 400, 80 L.Ed. 391 (1936).
\textsuperscript{59} See Hoover v. McChesney, 81 Fed. 472 (1897).
\textsuperscript{63} See dissent in Burleson case, \textit{supra}, at p. 423.
\textsuperscript{64} See comment on such danger: E. Freund, \textit{Administrative Powers Over Persons and Property} (1928) p. 442; Dickinson, \textit{op. cit. supra}, p. 301.

In the case of municipal public services, more judicial control has been exercised on the ground that the municipality in supplying such service is acting in the capacity of a private corporation. Dickinson, \textit{supra}, p. 302.
C. Determinations in the exercise of police power.

This classification includes, among others, rulings of commissions, boards and officers on health, welfare, and safety regulations, conservation measures, issuance of licenses, and industrial accidents.

The courts are hopelessly confused on the extent of review in these cases, and it will be impossible to consider more than a few general principles. The weight of the more recent authority in nuisance cases is that an administrative official will not be allowed to conclude the owner upon the question of existence of a nuisance. This is especially true if the need for haste and summary action is not compelling. Abatement power may be delegated, but the officer acts at his peril if there is no previous determination by due process of law that a nuisance exists.

The courts have gone so far as to declare that a hearing was unnecessary where the commission issued an order to cease and desist discharging sawdust into a stream.

Where the granting of a license requires expert knowledge, determinations of mixed question of fact and law have been held final.

In order to suggest a desirable extent of review in this group of cases, further subdividing must be done. A basis for classification which is very suitable is whether expert knowledge and summary action are required. Determinations which require expert knowledge but not summary action, such as granting of licenses to practice technical occupations, condemnation of drugs and non-perishable foods, etc., should not be reviewed by the courts except when arbitrary or absolutely unreasonable. Every reason for administrative regulation rather than court action is found in this type of activity. The same reasoning may be applied to cases which require summary action, such as isolation of contagiously diseased persons and destruction of perishable food. On the other hand, those decisions of administrative bodies which require neither expert knowledge nor summary action ought to be subject to review. Such decisions are usually in the jurisdiction of petty officials and the likelihood of government oppression is very great. The considerations of expert knowledge and summary action, which overshadowed this point in the first two groups of cases, are

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65 F. R. Black, op. cit. supra, p. 538; Thomas Reed Powell, Administrative Exercise of the Police Power (1911) 24 Harv. L. Rev. 333, 339.
66 Black, supra, p. 538.
68 Granville v. Gregory, 83 Mo. 123 (1884).
69 See Dickinson, op. cit. supra, p. 253 ff.
70 Ibid. p. 256.
absent here. If notice and opportunity to be heard are assured in every case, there is a large measure of control, even in the first two groups.\textsuperscript{71}

It is difficult to summarize the attitude of the courts on review of decisions of industrial accident boards, but a few of the significant principles developed in these cases can be pointed out. Questions of due process seemed particularly important in this class of cases and a number of points developed by the courts include the principles that the right to a jury trial is not essential,\textsuperscript{72} technical rules of evidence and procedure may be inapplicable,\textsuperscript{73} and that the right of appeal from an administrative tribunal to the courts is not a requirement of due process,\textsuperscript{74} providing proper notice and opportunity to be heard are given at primary hearing. In general the statutes permit court review on appeal.\textsuperscript{75} However, the extent of the review cannot be determined from the language of the statutes alone. It has been found that in some states where judicial review is applied to both law and fact, the courts are reluctant to reverse the administrative finding except in cases of necessity.\textsuperscript{76} In some states where the review of facts is not expressly required, the courts limit themselves primarily to issues of law.\textsuperscript{77} Finally, in states where administrative determinations of fact are made final, the courts always have the opportunity to discover issues of law, or to determine that the administrative finding has no support in the evidence.\textsuperscript{78} Despite much argument to the contrary the courts are still maintaining a right to review "jurisdictional" facts in all cases.\textsuperscript{79}

The extent of variance in the administrative machinery for dealing with these cases is hardly exceeded in any other part of the administrative field. After careful study in New York, the National Industrial Conference Board concluded that under conditions actually existing in the United States, as well as constitutional safeguards which should be preserved, it is desirable to have judicial review of administrative determinations of this type of claim.\textsuperscript{80} It is not intended that every

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\textsuperscript{71} Adequate notice and hearing are said to be among the most effective safeguards against gross errors of judgment, over-zealous extensions of authority, arbitrariness, oppression, and disregard of long-established and socially beneficial private rights. H. J. S., \textit{supra}, note 29.


\textsuperscript{74} Ohio v. Akron Park District, 281 U.S. 74, 50 Sup. Ct. 228, 74 L.Ed. 710 (1930). Even the right to stipulate away any resort to the courts does not render Workmen's Compensation Law void. Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209, 37 L.R.A. (n.s.) 489 (1911).

\textsuperscript{75} WALTER P. DODD, \textit{ADMINISTRATION OF WORKMEN'S COMPENSATION} (1936) p. 401. See also 5 \textit{ROCKY MOUNTAIN L. REV.} 17.

\textsuperscript{76} Dodd, \textit{op. cit. supra}, p. 381 and notes thereto.

\textsuperscript{77} \textit{Ibid.}, p. 381.

\textsuperscript{78} \textit{Ibid.}


\textsuperscript{80} \textit{THE WORKMEN'S COMPENSATION PROBLEM IN NEW YORK STATE} (1927) p. 43.
decision should be carried to the courts, but general oversight to prevent arbitrary and discriminatory rulings, and to provide an independent agency for the interpretation of Compensation Acts, is desirable.\textsuperscript{81}

The extent of court review should not be so great as to permit trial \textit{de novo}. Such review is open to all the objections that are applied to court administration in the first instance. It is cumbersome and expensive; it adds to the lack of uniformity,\textsuperscript{82} and affords opportunity to withhold testimony on the administrative hearing which is later presented in the court hearing.\textsuperscript{83} Under such circumstances the decisions of experts on questions of fact lose most of their value and seriously endanger adequate protection of the claimants' rights.\textsuperscript{84}

The experience of various states and analysis of reported decisions lead one to the conclusion that finality of fact-determination in compensation proceedings is more desirable and leads to justice, promptness, and more efficient administration.\textsuperscript{85}

The plan of review which has worked most satisfactorily for industrial accident cases is that adopted in Wisconsin and New York. In Wisconsin the case is originally heard by an examiner, with appeal on all questions to the Industrial Commission. If either party is dissatisfied with the decision of the Board, an action may be started against the Commission in a special circuit court by summons and complaint setting forth the grounds for review. On such review the findings of fact are conclusive, but the court may review the evidence to determine if the Commission acted within its powers, if the order or award was procured by fraud, or if the findings of fact support the order or award. Final appeal may be taken to the State Supreme Court.\textsuperscript{86}

\textsuperscript{81}Ibid.\textsuperscript{p. 43.}

The board or commission should be entitled to rely upon its own experience derived from previous decisions. W. H. Pillsbury, \textit{Review of Decisions of Administrative Tribunals—Industrial Accident Commission} (1931) \textit{19 Calif. L. Rev.} 286.

\textsuperscript{82}A jury trial would increase this disadvantage tremendously. In neither Ohio nor Maryland has the jury system proved successful on judicial review. The Governor's Interim Committee on Workmen's Compensation in Oregon said appeal to the jury on questions of fact has resulted in an unbalanced distribution of compensation benefits. \textit{Report, Governor's Interim Committee}, (1931).

\textsuperscript{83}Dodd, \textit{op. cit. supra}, p. 370.

\textsuperscript{84}The inferential requirement by the court of trial \textit{de novo} in \textit{Crowell v. Benson}, \textit{supra}, note 73, cannot be sustained on ground of policy. Felix S. Wahrhaftig, \textit{Judicial Review of Administrative Findings on Fundamental or Jurisdictional Facts} (1933) \textit{21 Calif. L. Rev.} 266, 274.

\textsuperscript{85}Dodd, \textit{op. cit. supra}, p. 383.

\textsuperscript{86}Wis. Stats. (1937) §§ 102.23-25. See also Ray A. Brown, \textit{Administration of Workmen's Compensation}, 10 Wis. L. Rev. 345. For New York procedure see Cahills Consolidated Laws of New York (1930), Chapter 60, and particularly §§ 20 to 23 inclusive.
Recently, there has been a strong tendency to invest officers and boards with powers to regulate businesses which are closely connected with the health and welfare of the public. This tendency was extended to an attempt to regulate all business by the N.I.R.A. on the grounds that an emergency existed which demanded such regulation. The primary legal question raised through this movement was the extent to which legislative power might be delegated. For example, in those states where boards and commissions were given power to fix the minimum and maximum prices for milk, the courts have refused to interfere, saying there has been no unlawful delegation of legislative power.\(^7\)

If the legislature has established standards, it may delegate authority to a board or officer to make rules and regulations concerning the application of such standards, the reasonable variations therefrom,\(^8\) and to determine whether the standard applies in such case.\(^9\) On the other hand, if the legislature does not set out standards, there is unlawful delegation of power to administrative bodies if they are permitted to make rules and regulations.\(^9\) The theory is that it is a wholesome and necessary principle for an administrative agency to be limited to making rules and regulations subordinate to and in accordance with the framework of policy defined by the legislature.\(^9\)

Though consideration of the N.I.R.A. does not fall under the present heading, but rather under another class of cases to be discussed later, it is inserted here because of its importance in any discussion of the doctrine of delegation of powers.

The non-delegability of powers is really a corollary of the doctrine of separation of powers, and has been revived to support efforts to resist legislative grant of authority to administrative agencies.\(^9\) Until 1935, it had been used only occasionally since our earliest history successfully to attack the grant of administrative powers.\(^9\) It has served a purpose since that year of justifying a need for legislative standards for administrative action. There is some doubt as to the value of such standards,\(^9\) but it may be said that until the pressure of legislative work becomes overwhelming and until experience justifies increased confi-

\(^{91}\) Panama Refining Co. v. Amazon Petroleum Corp. supra, note 90.
\(^{92}\) McFarland, op. cit. supra, p. 7 ff.
\(^{93}\) JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938) p. 50.
\(^{94}\) Ibid., p. 51 ff.
dence in administrative agencies, there is value in the requirement of such standards.

D. Determinations involving supervision of business.

In some respects the classification adopted for this study breaks down at this point, but no grouping of cases will satisfy every demand because of the wide variance in types of administrative agencies.

Though no sub-classification will be attempted, the agencies might be grouped under the heads of policing and regulatory bodies. Examples of the first are the Federal Trade Commission and National Labor Relations Board, the duties of which are like those of a business court. The second group is represented by the Interstate Commerce Commission as the most outstanding example.

Because of the great number of administrative bodies which fall in this group, and the varied principles which have been developed, only the most significant judicial rules of review of the decisions of the most representative agencies will be considered.

No better illustrations of the futility of trying to separate questions of fact from questions of law can be found than in this group of cases. Although the findings of fact of the Federal Trade Commission are conclusive if supported by the testimony, the court has not hesitated to substitute its own opinions for those of the Commissioners. Every phase of the proceedings and every part of the record has been examined when a party sought review of an order, or the Commission applied to the courts for enforcement. The Supreme Court has further announced that what constitutes "unfair method of competition" is a question for the courts and not the Commission. The implication is that the statute has set up merely a legal standard, rather than a standard dependent upon expert practical judgment. The result is that the Commission is a fact-finding body in a very limited sense of determining conclusively whether physical facts exist or not.

It was not until 1912 that the Supreme Court brought the doctrine of divisibility of law and fact into public utility law. The attitude of 

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99 Henderson, op. cit. supra, p. 102.
the Court on the extent of review had previously been stated as follows: The Court will consider (a) all relevant questions of constitutional power or right, (b) all pertinent questions as to whether the administrative order is within the scope of delegated authority, and (c) whether the order in substance is within the delegated power regardless of the form.101 The new distinction was developed in later cases as follows: A pure finding of fact would not be set aside unless there was no substantial evidence to support it.102 In reparation cases much less weight has been given to the findings than in non-reparation cases.103 In considering the reasonableness of rates, the courts have decided that there must be an independent judicial determination of the facts relating to value.104 Such facts were called "jurisdictional," and such holding is part of the present tendency of the courts to review findings of "constitutional" and "jurisdictional" facts.105

Outside of the tendency just discussed, the courts have followed a hands-off policy, particularly in railway cases, and in adopting the doctrine of primary jurisdiction of the Commission,106 as well as the doctrine of non-review of refusals by the Commission to act.107 Of course, questions of law have been open to review at all times.108

At the present time the chief problem with which the courts are concerned, as regards decisions of independent regulatory bodies, is

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108 The above two cases also required trial de novo on jurisdictional and constitutional facts. Compare Manufacturers' R. R. Co. v. United States, supra, note 103, which required all pertinent evidence to be submitted to the administrative agency in the first instance.
whether or not the procedural steps satisfy the demands of due process.\(^{109}\)

The distinction between law and fact has served no purpose except perhaps to indicate the complete irrationality of the courts' explanation of the duties of the administrative bodies.\(^{110}\) The necessity for judicial determination of value in the *Ben Avon* case conflicts with the ruling that valuations of property for tax purposes shall be final if supported by the evidence. The doctrine of review of jurisdictional facts found in *Crowell v. Benson* and deportation cases conflicts with the rule that findings of fact on citizenship in alien exclusion cases and on facts in general in other administrative cases shall be final.\(^{111}\) The result of the *Ben Avon* case, when coupled with the insistence that reproduction cost must be given fair consideration in determining value, has been to prolong administrative proceedings interminably. The *Crowell* case is also a serious blow to the efficiency of the administration of workmen's compensation legislation.

The problem of review of the decisions of the independent regulatory commissions has centered about the fundamental difference between governmental administration and the task of adjudication. The Federal Trade Commission, for instance, combines the duties of investigator, prosecutor, and judge. Because of the press of these varied duties, the adjudication and delimitation of rights is necessarily secondary. Realization of this fact may account in part for the close supervision which the courts have exercised over decisions of the Commission, a supervision like that of a higher court over a lower one.\(^{112}\) Substantially the same difficulties are characteristic of the Interstate Commerce Commission and other independent regulatory bodies. In these agencies, however, there is the added requisite of technical qualifications for the personnel. This added fact is justification for the greater restraint which the courts have exercised when asked to review.


\(^{112}\) There is a distinct feeling that such supervision is necessary and beneficial. Gilbert H. Montague, *Enforcement of Anti-Trust Laws by the Courts or a Commission* (1930) 147 Annals 179; see also Frank B. Fox, *What About Administrative Tribunals* (1935) 21 A.B.A.J. 876.
The real problem of review, as far as the independent regulatory commissions are concerned, is to what agency shall be left the development of legal rules under the prevailing theory of supremacy of the law, and that question will now be discussed generally in the conclusion.

III
CONCLUSION

It must be apparent from the foregoing discussion that administrative law in this country has been compelled to crowd its way into a legal system in which no place had been prepared for it. Furthermore, it has been superimposed upon doctrines of fundamental law which are diametrically opposed in theory. Our Constitution sought to establish a separation of powers, which, if carried to its logical limits, would leave no place for most of the administrative agencies as they exist today. Through the pressure of insistent demand for administrative assistance in disposing of the ever-growing mass of governmental duties, the courts were forced to find a place for such agencies. With customary ingenuity in interpreting the Constitution, judges were able to develop sufficient legal reasons for permitting such bodies to exist.

Conceding the necessity for the existence of administrative agencies, and for their continued growth, the balance of power between the judiciary and the administrative becomes of prime importance. Somewhere between the Scylla of complete judicial control and the Charybdis of unhampered administrative dominance lies the answer to our problem. The relegation of the administrative to a mere investigative clerkship means the assumption of a fatally over-powering mass of duties by the courts. On the other hand, the enforced withdrawal of judicial attention means the supremacy of purely political power.

Any answer will reflect in part the philosophy of law to which the replier adheres. One who believes in the "supremacy of law" or "rule of law" propounded by Dicey in 1885 will advocate a trial de novo on every question. Those who agree with the restatement of that rule made by Justice Brandeis will be satisfied if court review is limited to inquiry whether an erroneous rule of law was applied, and whether the administrative proceeding was conducted regularly.

Conceding the advisability of continuing to believe in the supremacy of law, the question still remains as to its practical meaning as far as division in scope of duties between administrative and judiciary is concerned. Traditionally, the courts have been the "law-givers." "Law"

113 State ex rel. Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N.W. 929 (1928).
has meant the rules administered and developed by the courts. In the last analysis, the judiciary still remains the most expert body for the development of general rules of human conduct.

Thus, however far from judicial control the independence of administrative bodies is permitted to go, there is a limit which is reached before such bodies are completely immunized from the courts. As long as this country continues under the present constitutional form of government, the final arbiter of the rights and privileges of life and liberty, as well as the protector of property, will be the courts. Whether or not existing courts are satisfactory for these purposes is beside the point.

Aside from the constitutional reasons which compel this conclusion there are others which sustain it. Not the least of these is the difficulty inherent in administrative bodies of insuring justice. The administrative officers and boards often combine legislative, judicial, and executive functions. In making regulations and orders, they are exercising the first; in deciding cases, they are operating under the second; and in enforcing their judgments or decisions, they are carrying out the third.

In forming regulations and administrative orders, they may be subject to all the political pressures which besiege legislative bodies on every hand. In deciding cases, such pressures as well as the control of executive officers must be eliminated. On the other hand, the enforcement of orders and regulations falls naturally under the control of the executive department. In addition it is felt that some administrative bodies are created as militant crusaders to carry out certain social and economic changes advocated by particular groups. Also, the necessity of some boards and commissions to act both as prosecutor and judge is a dangerous hindrance to the exercise of the proper judicial attitude.

The personnel of many administrative agencies consists of political appointees, who may or may not be qualified to deal with technical details impartially. Delegation of duties to deputies further adds to the dangers by separating performance of duties from responsibility.

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116 Landis, Administrative Policies and the Courts, op. cit. supra, note 111.
118 Several plans to remodel the court system have been suggested of which the most outstanding is the plan of the Special Committee on Administrative Law of the A. B. A. (1936), 61 A. B. A. 720. See also a study of the English System in Report of the Committee on Ministers' Power, London (1932).
Under the circumstances just outlined, if individual rights are to be protected, some separate authority, judicial in its nature, must test the conformity of administrative action with the laws or superior rules and regulations safeguarding rights, forms, and procedure.\(^{121}\) It is not enough that the administrative body is subject to control by legislatures, because it is impossible for the latter to pass laws which will cover every circumstance.\(^{122}\) The most that can be expected of legislatures is the establishment of clear basic principles, standards, and criteria within the limits of which the administrative bodies are required to act.\(^{123}\)

Let us turn back at this point to the quotation which headed this study. The idea there expressed is permeated with the *laissez faire* philosophy of the era in which it was uttered. It was conditioned upon a governmental structure which did not include the "self-willed" administrative bodies which seek to plan the legal relationships of American citizens today. It was occasioned by questioned use of the common law remedies of mandamus and injunction. The passing years have witnessed the decline of any test for court review based on the degree of discretion exercised by the administrative agency.

The second quotation sprang from intense feeling against a new philosophy of government which may be characterized as planned control by experts.\(^{124}\) It was prompted by the feeling that the eager assumption of independence by the administrative was based upon a scornful disregard of restraints thought to be outmoded. It was occasioned by a questionable discretionary act of an administrative body, arising in the course of the application of a rule of practice designed empirically to meet a particular problem of administration. It implies an attitude of restraint against interference with legal rights and privileges, and a desire to balance the distribution of governmental power.

There is a place for both the administrative and the judiciary. Between them must be distributed the work which each is best suited to do. It lies with the administrative to serve, regulate, and control the citizens, in accordance with the mandates of their legislative represen-


\(^{122}\) The final determination of large policy is in the direct representatives of the public. F. Frankfurter, *Democracy and the Expert*, *supra*, note 3, p. 659.

\(^{123}\) For difficulties which arise when there is an absence of clear legislative standards see T. C. Blaisdell, *The Federal Trade Commission* (1932) p. 290.

\(^{124}\) Described as administrative absolutism by some observers, see Roscoe Pound, *Some Implications of Recent Legislation* (1938) 5 *Vital Speeches of the Day* 90.
tatives, with all the abilities which it can command. It becomes the function of the courts to guarantee the application of constitutional principles and general rules of law—to insure, in other words, the application of a judicial attitude in the administration of government.

"In the latter's keeping are precious ultimate interests; but not less so are those entrusted to the administrative by legislatures. In humble realization by each of their respective functions lies in large measure the trembling hope for the maintenance of our democracy."\textsuperscript{125}