

# TO WHAT EXTENT SHOULD THE DECISIONS OF ADMINISTRATIVE BODIES BE REVIEWABLE BY THE COURTS?

Essay Which Received the Award in 1939 Contest Conducted by the American Bar Association Pursuant to Terms of Bequest of the Late Judge Erskine M. Ross

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A KEY to the practicable answer to this question is implicit in a statement by Mr. Justice Brandeis in his separate opinion in a recent case involving court review of an administrative adjudication:

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."<sup>1</sup>

As here indicated, the question is one of supremacy and, at the same time, one of policy in limiting that supremacy. In making answer thereto we are put to the task of deciding for the future, on the basis of sound considerations of policy, how far the tribunals labeled "courts," which derive judicial powers from our written constitutions, should assume a position of supremacy over the rapidly multiplying host of administrative agencies, which in the main derive their powers from the legislature. Obviously, we are not bound by the present state of the authorities, modes of procedure, or trend of enactments, nor are these of any moment here except insofar as they may shed light on the problem involved and indicate a safe path for the future. The conclusions reached herein may call for changes in the existing law, both statutory and judge-made, but that is beside the point.

In Anglo-American jurisprudence "supremacy of law" has long been regarded as fundamental in the proper administration of justice. Dicey's oft quoted passage undertakes to explain the orthodox meaning of the phrase:

"We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law, established in the ordinary legal manner before the ordinary courts of the land."<sup>2</sup>

This idea carried into literal application places judicial bodies in a position of complete supremacy in the field of adjudicating rights. No other bodies can supplant them, nor preclude their passing on all the questions incident to the judicial functions vested in them. As well pointed out by Dean Landis, such a view nullifies administrative adjudications except as they may serve to enlighten the courts which must later

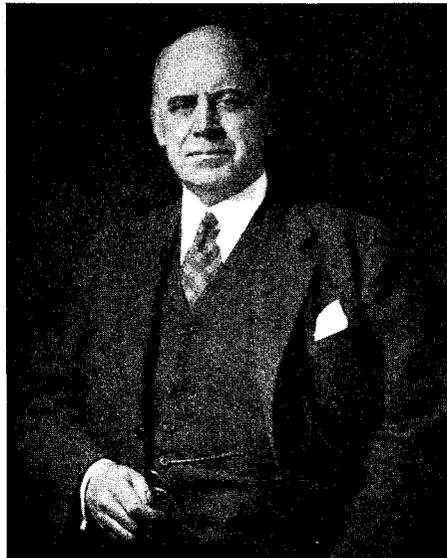
hear and determine *de novo*.<sup>3</sup>

Dicey's sweeping statement certainly is not in accord with present practice, nor was it accurate when written something over fifty years ago. For generations courts have been saying, and they continue to say, that there are limits to their power to review administrative determinations.<sup>4</sup> Whether such limitations are purely self-imposed, whether they proceed from an interpretation of our written constitutions, or whether they derive from legislative enactments deemed to be valid, are likewise questions beside the point.

What we here seek is a sound guiding principle for courts, legislatures and executives in the molding of the law in this difficult field. In this quest we shall assume the continued existence of those established basic rules of our constitutional system as expressed in bills of rights and other constitutional guaranties.

These are not likely to be discarded even for the sake of administrative development, though present interpretations may be modified.

It must be apparent that in our organized system for dispensing justice there is nothing magic in the term "court of law," nor can there be anything inherently inimical in the term "administrative body." Originally, one or the other set of words might have been selected to designate a tribunal of either type. The same may be said of the word "judge" and the words "administrative officer." All of these are but



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1. *St. Joseph Stockyards Co. vs. United States*, 298 U. S. 38, 84 (1936).

2. Dicey, *Law of the Constitution* (8th ed. 1923), p. 183.

3. Landis, *The Administrative Process* (1938), p. 124.

4. For an early case, see *Easton vs. Calendar*, 1 Wendell

convenient designations of instrumentalities designed to protect human rights and to promote the welfare of society.

It is true, however, that in the growth of our legal institutions certain well-defined characteristics have come to mark and to differentiate these two classes of tribunals as they are now generally known. Each has its weaknesses and each its peculiar merits. The two exist today separately, side by side, just as once did courts of law and that tribunal of the king's chief administrative officer, the Chancellor. The patent difference is that, whereas the Chancellor undertook in some degree at least to override and to supplement the functioning of law courts, the present situation is one wherein courts of law are doing somewhat the same sort of thing with respect to administrative boards. That the two systems may later coalesce, as did law and equity, is a possibility too remote to offer a solution for the immediate problem. Generations were required in which to develop the Chancellor's jurisdiction into the science of equity which could be merged into law. It will require a longer period in this complicated modern world to work out any systematized concepts that might be termed administrative jurisprudence, when the agencies involved are necessarily heterogeneous in character and in purpose.<sup>5</sup> Meantime the existing situation must be reckoned with.

In considering the scope that should properly be accorded under the present state of affairs to court review of administrative adjudications, the nature of these two kinds of tribunals must first be scrutinized. As already mentioned, each possesses its peculiar attributes.

The term "court" connotes a tribunal which is impartial, open to all alike who seek redress therein, presided over by one or more jurists learned in the law, removed from the passing pressure of politics and prejudice, governed by more or less fixed principles in arriving at its decisions, bound by the rule that no final adjudication is to be made until after due notice to all the parties with opportunity for a full and fair hearing. Under the American constitutional system, we have further come to regard courts as the ultimate arbiters of the meaning of the law, and particularly of that law embodied in written constitutions, even to the extent of passing on the validity thereunder of acts by all other branches of government.

On the other hand, the term "administrative body" signifies an authority or body composed of one or more officials and which is designed: to carry on certain of the business of government, to dispense certain services or privileges accorded by government, to regulate certain public callings, to promote the general welfare through police regulations, to determine rights of individuals in certain cases where a strong social policy is involved, to use a varying degree of discretion in arriving at decisions and, often, to proceed without being bound by some of the so-called technical procedure of law courts. Such bodies are conceived of as being staffed by men who, if not so at the outset, are deemed to become something of experts in their particular fields; frequently they are commissioned by the statute under which they function or by the complexion of the authority appointing them, to exercise their powers in accordance with a pre-determined policy.

The advantages on the side of courts may be said

5. "It is impossible . . . to find and apply rules and principles in the administrative field similar to those said to exist in the common law and statute law fields." O. R. McGuire, *Federal Administrative Action and Judicial Review*, 22 A.B.A. Journal, 495 (1936).

to lie in the independence of these tribunals, the fixity of rules applied uniformly in all cases of a given type, expert knowledge of the law applicable to each case, and fairness of the procedure followed which insures due notice and opportunity to be heard. The disadvantages are delay, cumbersomeness, lack of expertness on the part of both judge and jury in the matter of fact finding in complicated fields, and especially the inherent limitations on a court's functioning, in that (1) it must await the coming of a litigant to set its processes in motion, (2) its decrees operate in general only on the parties before it, which fact in turn tends to limit a court's perspective, and (3) it is confined, except in extraordinary cases, to adjudicating with respect to past happenings.

The advantages incident to administrative boards are promptness of action, a possible combination of legislative, executive and judicial functions thereby promoting effectiveness and making possible the prevention of future harm, expert handling of particular classes of cases by men skilled therein, the use of discretion which permits of the development of a defined, social policy based on a broad perspective, and independent initiative without the necessity of intervention by a litigant. The well-recognized disadvantages pertaining to administrative action are the tendency toward arbitrariness, lack of legal knowledge, susceptibility to political bias or pressure, often brought about by uncertainty of tenure, a disregard for the safeguards that insure a full and fair hearing, and a dangerous combination of legislative, executive and judicial functions.

By the foregoing summary it is not meant to imply that all the features, advantages, and disadvantages enumerated are to be found in every tribunal of the types described. These are but the outstanding characteristics that are common and which have come to be regarded as typical. As such they will serve as a basis for our further consideration of the subject.

Administrative boards have undoubtedly become an essential part of our legal system.<sup>6</sup> The numerous factors that have led to their coming need not here be reviewed. The significant point is that they do possess attributes which render them indispensable. Those attributes have been set out above in the list of advantages peculiar to such bodies. At the same time it must be borne in mind that administrative tribunals have their inherent weaknesses and defects, the more pronounced of which have likewise been enumerated.

With these considerations clearly in mind, we are now in position to state the broad general principle that should govern in formulating a policy of court review of administrative adjudications. It is here submitted that such review should be limited so as not to destroy the peculiar benefits of administrative action, while it should be extended so as to remedy the weaknesses of such action. To state it otherwise, court review should obtain only at the points where administrative action is defective and where court action is effective, in the functioning of our governmental system. Insofar as administrative action can fulfill its need, thereby supplementing and fortifying our legal system, there should be no occasion for court review, except at those points where judicial tribunals can make a superior contribution.

While this may seem to be a nebulous and ephemeral doctrine, it is basically sound, as will more clearly appear when it is hereinafter applied to the various types of cases.

6. See Address of Chief Justice Hughes, *New York Times*, February 13, 1931, p. 18.

In the further discussion of the problem it will be assumed that administrative boards have been set up and will continue to be set up in those situations where the nature of the circumstances involved calls for tribunals possessing peculiar advantages over courts, as already outlined. It seems obvious, therefore, that the functioning of courts in relation to these bodies should be so regulated as not to destroy those advantages which ought to be accorded full play, but rather to serve as a check and safeguard against the inherent disadvantages of such tribunals.

Again it must be emphasized that we are not here primarily concerned with what statutes do provide on this subject, nor with what the courts have done in respect thereto. We seek to find what should be provided, and what should be done, as a guide for the legislative draftsman and for judges as well.<sup>7</sup>

Within the limits of this article it is not possible to apply the doctrine of limited court review as formulated herein to all the different kinds of administrative boards known to our law. Nor would such an attempt prove helpful with respect to boards as yet unborn. On the other hand, broad generalization cannot be indulged in, for the subject matter is too diverse for wholesale treatment. It is possible, however, as some writers have well observed, to group administrative boards into classes depending on the general nature of the functions they have to perform. While there exists no general agreement on the details of such classification, the following may be adopted as a logical and suitable one:

1. Bodies set up to function in situations wherein government is offering some gratuity, grant or special privilege.

2. Bodies set up to function in situations wherein government is seeking to carry on certain of the actual business of government.

3. Bodies set up to function in situations wherein government is performing some business service for the public.

4. Bodies set up to function in situations wherein government is seeking to regulate business affected with a public interest.

5. Bodies set up to function in situations wherein government is seeking under the police power to regulate private business and individuals.

6. Bodies set up to function in situations wherein government is seeking to adjust individual controversies because of some strong social policy involved.

It is clear that with respect to all of these types of administrative bodies there are certain questions which should always be open to court review. The first of these is, logically, whether a particular board is authorized by the statute creating it, to do what it has assumed to do. This presents the problem of *ultra vires*, and generally is a question of law in that it calls for an interpretation of the statute under which the board functions. It should be the province of judges, who are experts in the interpretation of statutes, to

pass on such a question.<sup>8</sup> This is peculiarly necessary when it is observed as a fact that there exists a natural tendency on the part of administrative boards in their zeal for the cause they serve, to go further in their activity than the statutes authorize.<sup>9</sup> A similar right should, of course, be vested in the courts to determine the constitutional validity of any act by an administrative board even though it may be authorized by statute. Here again is involved a pure question of law which properly should be passed on by those expert in the construction and application of constitutional provisions.

A more difficult situation is presented where a valid statute gives the administrative board jurisdiction to act only when certain facts shall have been found to exist. This sort of mixed question of law and fact may arise with respect to many of the types of boards above classified. We are confronted with the problem of whether the court, expert in the law, should be permitted to review the facts found by the administrative body which is deemed expert in the determination of facts within that particular field, simply because the question of jurisdiction is raised. Since there are different factors involved depending upon the type of administrative board concerned, the consideration of this problem is postponed until the various types are considered separately. As has well been pointed out by an astute critic of the entire subject, it will not suffice to attempt to draw a hard and fast line between questions of law and questions of fact, in this matter of delimiting court review, since such a line cannot actually be drawn, as evidenced in this instance by what must be termed a mixed question of law and fact.<sup>10</sup>

A question more analogous to the one first stated arises where, on the face of the record of the administrative action involved, it affirmatively appears that some rule of law has been ignored or misapplied. Here again, is an appropriate place for court review of the administrative action, since this is the field in which the court rather than the administrative body is peculiarly skilled. It should be noted that we do not here include that class of cases wherein merely the effect of the administrative action is claimed to amount to an invasion of the complaining party's rights under the constitution; the consideration of such cases is likewise temporarily postponed. But it should at the same time be noted that there is here included that large group of cases where administrative action involves the finding of certain facts and it affirmatively appears in such record as is required, that there is no substantial evidence to support the findings arrived at. This clearly presents a question of law, for a finding without substantial evidence is contrary to law, and the subject is properly one for court review on the grounds above stated.

It is submitted, therefore, that court review of all administrative action should be permitted with respect to the kinds of questions of law indicated, not because they are questions of law, but because courts are better

7. As a striking example of the fact that there is no certain legislative policy on this question of court review, see the new Food, Drug and Cosmetic Act, 21 U. S. C. A. sec. 371 (Supp. 1938) which provides for broad court review of general regulations which can be adopted only after public notice and hearing and only where there is some supporting substantial evidence. This apparent change in legislative attitude toward administrative action was adopted by Congress despite the Supreme Court's recent holding in *Pacific State Box and Basket Co. vs. White*, 296 U. S. 176 (1935), to the effect that general administrative regulations, being legislative in character, need not be supported by findings.

8. Some early opinions have gone so far as to state that the court will not review an administrative officer's interpretation of the law under which he acted. *Riverside Oil Co. vs. Hitchcock*, 190 U. S. 316, 324 (1902). This and similar cases might be explained on the ground that the method of review invoked was an application for a writ of mandamus, which may account for the courts use of broad language in declining to review administrative discretion.

9. A recent illustrative case is, *Jones vs. Securities and Exchange Commission*, 298 U. S. 1 (1936).

10. See *Dickinson, Administrative Justice and the Supremacy of Law*, p. 54 ff. (1927).

qualified to pass thereon than are administrative boards, and because the ordinary handicaps incident to court action do not prevent courts in such cases from performing the valuable service of keeping administrative action within its proper bounds and indicating general rules for future procedure that will tend to protect against administrative aggression and error.

The debatable ground is that embraced within the domain of fact. The tendency has been to make findings of fact, by certain types of boards at least, conclusive on the courts where such findings are required and if they are sustained by any substantial evidence when a record of the evidence is necessary. Here, again, different factors are involved with respect to the different types of boards, and this matter will be discussed under the separate headings. It must be said in behalf of courts that they have been quite ready to apply the rules of conclusiveness by way of self-imposed restraint, and have shown little disposition to invade the field except where they have felt constrained to do so in exceptional cases.<sup>11</sup> It will not do, however, broadly to assert that there should be no review on questions of fact. Such a position leads to unfortunate results as hereinafter shown.

When Mr. Justice Brandeis used the latter part of the language quoted at the outset, saying that supremacy of law demanded that court review should be confined in part to deciding whether the proceeding in which facts were adjudicated "was conducted regularly," he had reference, undoubtedly, not only to the requirement that the administrative board must function in accordance with statute law, but also that those requirements of notice and hearing essential to due process must be observed in the cases where notice and hearing should be accorded. It goes without saying that notice and hearing are not essential to the validity of all administrative action, any more than is fact finding, and hence these requirements of regularity will be considered in their proper place under the several types of boards considered.

We are now in position to consider specifically the six types of administrative boards as above defined, with a view of determining the extent to which court review should be allowed as to each, aside from the general power of review on the kinds of questions of law already shown to be applicable to all such boards, applying the guiding principle heretofore laid down.

1. *Bodies set up to function in situations wherein government is offering some gratuity, grant or special privilege.* Examples of such administrative authorities are those dealing with pensions, land grants, unemployment compensation, and the like.

a. *Discretion.* In these situations the citizen is ordinarily an applicant, without right other than that created by the statute setting up the board to administer it. Here it would seem that the exercise of discretion by the board should be final unless clearly illegal or, what amounts to the same thing, capricious, fraudulent or arbitrary. These administrative authorities are peculiarly adapted to the functions to be performed, giving continuous and expert attention to these particular types of cases. Courts can make no contribution of value in a separate judgment on the facts. Hence, there should be no review on mere questions of fact. Questions of jurisdictional facts may and do arise in such cases, as where the Land Department undertook to determine that certain lands were above

high water mark and hence subject to government patent which was granted.<sup>12</sup> The contention was made that the land involved lay below this mark, and thus was raised a so-called mixed question of law and fact. Assuming that the administrative authority has erred in its judgment on such issue of fact, is there any assurance that a court may not err? Of course, if the case be one where the authority has acted wholly without lawful warrant, then it would seem that an error of law has been committed and the matter should be subject to court review on that ground.<sup>13</sup> But on the mere allegation of mistake or erroneous adjudication in some detailed determination, even though it abstractly relates to jurisdiction, the finding of the administrative authority is as likely to be correct as is that of a court. Government is a party in interest merely to dispense bounty to individuals. It is not going too far to say that individuals shall be bound by the judgment of administrative officials commissioned by government for this purpose.

b. *Notice and Hearing.* It cannot successfully be urged that notice and hearing are essential to due process in cases before such boards. Since government is dispensing gratuities it may do so on such terms as it sees fit. Therefore, when the statute is otherwise complied with, the proceeding is "regular" even though the individuals interested have not been accorded these features of a court proceeding. Thus there exists no occasion for review on this ground.

2. *Bodies set up to function in situations wherein government is seeking to carry on a part of the business of government.* Examples of such administrative authorities are those dealing with taxation, customs duties, draft, control of public officers, matters of state, immigration, and the like.

a. *Discretion.* In all such cases government is the direct party in interest, engaged through its executive officers in carrying on the business essential to its very existence. When that business is being carried on pursuant to lawful authority, there is no ground for substituting the judgment of a court for the judgment of those charged with the duty of administration. Here, again, courts as such can make no superior contribution by their decisions on the facts. Courts have long since recognized this in the tax and customs cases, holding that they will not interfere with the valuations fixed by the administrative authorities.<sup>14</sup> Undoubtedly, injustice is done by erroneous valuations, but the court is quite as likely to err as is the assessing body experienced in such matters. A somewhat similar answer applies in the raising of armies, appointing and removing of public officers, and in so-called matters of state. We have here arrived at the very heart of executive discretion. It was for this work that the executive branch of government was created, and courts should not assume to interfere except in the clearest cases of illegality wherein, of course, would be raised a question of law. The immigration cases belong under this heading, for it is part of the business of government to determine who shall be admitted to this country. It may be said that no expert knowledge is required in finding the fact of the place of an immigrant's birth, and yet it is a finding logically committed to immigration officials. Congress has gone so far as to provide that such findings when made by these administrative officials shall be conclusive, notwithstanding

12. Knight vs. United Land Association, 142 U. S. 161 (1891).

13. Newhall vs. Sanger, 92 U. S. 761 (1875).

14. State Railroad Tax Cases, 92 U. S. 575 (1875).

11. Thomas Reed Powell, Political Science Quarterly, XXVIII, p. 47 (1913).

it is essentially a jurisdictional fact, and the Supreme Court upheld this statutory exclusion of court review.<sup>15</sup> It is submitted that this provision and holding are in accord with sound policy. Courts cannot add anything of value here. All of these situations are more or less directly related to the very maintenance of government. Prompt and efficient action are called for. There is no basis for turning over each case to a judicial tribunal for the working out or application of some settled rule. Administrative action is the appropriate type. The business of government must be carried on effectively, even though a court might disagree with the conclusions reached by those charged with the duty of acting on the facts before them.

b. *Notice and Hearing.* Since these boards are functioning in that realm of necessarily arbitrary powers of government, it seems clear that there is no requirement of notice and hearing for the individuals affected, unless, of course, statute expressly so provides. This statement may be qualified in the immigration cases, since there a degree of personal freedom is involved, but even here the formal requirements incident to court procedure should not be rigidly enforced, for "prompt and vigorous action" is contemplated, as stated by the Supreme Court in one such case.<sup>16</sup> This seems sound, because all such vital executive action should be unhampered as far as possible. The tendency of later Supreme Court decisions in immigration cases has been to review where a fair hearing has been arbitrarily denied the immigrant,<sup>17</sup> and it may well be that a demonstrated tendency toward arbitrary action on the part of immigration officials makes necessary court review in this particular kind of case.

3. *Bodies set up to function in situations wherein government is seeking to perform some business service for the public.* Examples of such administrative authorities are those dealing with the post office, publicly operated railroads, power and water works, and other public utilities conducted through governmental agencies.

a. *Discretion.* It must be observed that in such situations government has a monopoly enforced by law (as in the case of the post office) or one which naturally results when government enters a particular business field (as in the case of T.V.A.). In all such cases there is opportunity for official oppression. If the administrative authorities are to be left free to conduct these businesses according to their personal judgments, then the public is at their mercy. This is a field in which administrative action is on a steady increase. To treat executive discretion as binding may well result in creating an intolerable situation wherein all the evil influences of political activity may come into play. Here the courts, by their very nature, can safeguard the public interest against the inherent weaknesses of administrative authority. It is submitted, therefore, that in this class of cases, the discretion of officials working for government in the field of private business should be subjected to the same degree of judicial review as is applied to private public utilities hereinafter considered. Rates must be reasonable, rules and regulations must be reasonable and reasonably enforced, and discrimination must be prevented.

b. *Notice and Hearing.* Where an individual or group of individuals is directly affected by a ruling of the administrative authorities here being considered, it

would seem that notice and hearing ought to be required except in a few cases where prompt action is essential. A ruling of the Postmaster General may spell ruin to a legitimate enterprise which is made to suffer without even an opportunity to present its side. On the other hand, there are cases where clear and palpable fraud may be consummated unless a fraud order may be issued without an hour's delay; in such instances notice and hearing would nullify the very purpose of the order. With respect to other government operated utilities, it seems that no notice and hearing should be required as a prerequisite to the issuance of general rules and regulations, these being in the nature of legislative acts. However, where the ruling is not general, but is directed solely against one individual or one special group of individuals, then "regularity" would seem to require notice and hearing. The direct interest of the individuals thus affected should be safeguarded by court review on this vital point, for the same reasons stated above in regard to administrative discretion in such cases.

4. *Bodies set up to function in situations wherein government is seeking to regulate business affected with a public interest.* Examples of such administrative authorities are the well known public utility commissions.

a. *Discretion.* Regulation of public utilities, in order to be effective, should allow of an exercise of discretion not subject to court review where there is any substantial evidence to sustain the findings of the board. This applies to rates (subject to later qualifications), service and discrimination. In this field all the beneficial attributes of administrative action are called for. Continuous expert attention is needed, legislative as well as quasi-judicial action is necessary for the laying down of rules governing future conduct, promptness of action is essential, the working out of a policy based on a broad perspective is highly desirable, and the ability to act without the necessity of a complaining party is of utmost importance. To permit court review of administrative discretion in this type of case and to allow a court to substitute its view for that of the commission adds nothing of value, but destroys all the salutary effects of administrative control.

We now approach the most difficult problem in the entire field which is presented when a utility complains of a rate that has been established by a commission, upon the ground that it is confiscatory and hence unconstitutional. The utility is entitled to a reasonable return on the value of its property devoted to the business. To deny it such a return, being forced as it is to continue to render service to the public, is construed as virtual confiscation of its property contrary to due process. Shall the court be permitted to review this controversy as one based on a question of law, or shall the rate and the valuation on which it is predicated be sustained as a finding of fact if there be substantial evidence to support the commission's action? The controversy revolves around the question of "value" in such a case, and whether it be one subject to review because of the constitutional implications involved. It is the doctrine of the United States Supreme Court that in such a case the court will review the evidence and determine according to its own judgment what is a proper valuation.<sup>18</sup> This holding of the Supreme Court has been severely criticized.<sup>19</sup> The gist of the reasoning behind the holding is stated by Chief Justice

15. *United States vs. Ju Toy*, 198 U. D. 253 (1905).

16. *Yamataya vs. Fisher*, 189 U. S. 86 (1903).

17. *Kwock Jan Fat vs. White*, 253 U. S. 454 (1920).

18. *Ohio Valley Water Co. vs. Ben Avon Borough*, 253 U. S. 287 (1920). *St. Joseph Stock Yards Co. vs. United States* (supra).

19. *Landis, op. cit. supra*, p. 128 ff.

Hughes in the *St. Joseph Stock Yards* case: "But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards." It is submitted that this reasoning is sound. Granted that courts are not experts in valuation, that delay and expense will be entailed by a re-valuation, and that some of the beneficial effects of rate regulation may be lost, still there is here a basic principle of constitutional right involved, and on this a court should pass, even though a question of fact is at the bottom of the inquiry. The critics, including Mr. Justice Brandeis,<sup>20</sup> insist that this holding of the court means according to the finding of an expert board less weight than is given to the finding of a jury in the ordinary case. There are several answers to this objection. One appears in the report of the Special Committee on Administrative Law of the American Bar Association submitted in 1936, where it is pointed out that the institution of the jury sprang from a desire to have issues of fact passed on by "independent umpires even further removed from control by the Executive than were judges."<sup>21</sup> In keeping with such a policy, it is no ground for objection that less weight is given to an administrative finding than is ordinarily given to a jury's verdict. Another answer is that merely because "valuation" is a question of fact should not preclude court review. Even Mr. Justice Brandeis, in his opinion already referred to, admits that review should be had on the constitutional questions of notice and hearing where such are essential to due process, and yet whether notice was given or whether a hearing was had may well be a pure question of fact in a particular case. The vital nature of these questions, wrapped up as they are in the determination of constitutional rights, demands that court review be allowed even though the inquiry involves an intricate question of fact. It is better here to sacrifice some of the benefits of administrative action than to preclude the courts from safeguarding constitutional rights. It may even be said that what in substance is here being determined by the courts is whether an erroneous rule of law has been applied in the regulatory process in the form of a confiscatory rate.

b. *Notice and Hearing.* In the promulgation of regulations and rates for the future, it may be said that a utility commission acts legislatively, and it is usually conceded that notice and hearing are not requisite to the constitutional validity of purely legislative action. However, the application of such reasoning must be limited to situations where the action of the administrative body applies generally and to a large number of persons for whom notice is impracticable. In the nature of things regulations of public utilities are in large measure personal, for there are few duplications of these services in a given territory. It follows that notice and hearing are generally practicable. Since a particular regulation or rate being considered will directly affect the rights and property of the utility in the territory involved, it comports with a proper sense of "regularity" that the one or several against whom the action about to be taken is directed should receive due notice with an opportunity to be heard, and such

is the present law.<sup>22</sup> Nothing of value is lost in administrative action, if this requirement be imposed, while the courts can make a valuable contribution by insisting that these essentials shall characterize the proceeding. There is no such urgency involved in the matter of rates, service regulations and discrimination orders as to warrant discarding these features of "regularity." It follows that court review should here be permitted to insure their being observed.

5. *Bodies set up in situations wherein government is seeking under the police or other power to regulate private business and individuals.* Examples of such administrative authorities are those dealing with health, licensing, unfair competition, building operations, nuisances and a host of other matters affecting general welfare.

a. *Discretion.* The need for administrative action in these cases is clear, particularly promptness of action, coupled with an exercise of discretion without being bound by general rules, all of which we have seen characterizes this type of authority. On the other hand, such bodies are usually staffed by petty office holders at whose hands the individual citizen may likely find himself subjected to a species of tyranny. Such officials are judges of their own actions, frequently keeping no record of their proceedings and not subject to the public scrutiny generally visited upon the more important administrative tribunals. In an effort to solve the vexing problem of how far the exercise of discretion by such boards should be subject to court review, it has been suggested<sup>23</sup> that three situations must be considered: (1) those which require expert knowledge, (2) those which require summary action, and (3) those which require neither. There may exist various combinations of the three.

Illustrations of boards functioning in the first of these situations are to be found in the cases of condemnation of non-perishable goods, and the licensing of practitioners in the learned or technical professions. Here scientific knowledge is required, and in this the administrative authority is expert while the court is not. In such situations the discretion of the board ought not to be disturbed when there is any substantial evidence to support its conclusion reached in good faith on the facts before it. To substitute a court's view for that of the board would obviously result in positive harm. The court can make no contribution of value in the circumstances.

Similar reasoning applies in the class of cases where summary action is required, as where quarantine regulations are invoked, or perishable food is destroyed. To resort to court action, or to permit court review of such administrative discretion, either before or after action is taken, would nullify the very purpose of the statute. Courts by their nature are not fitted for these tasks. Whether an individual injured by erroneous exercise of discretion in such instances ought to be compensated out of the public treasury, is a question to be considered in some other place. For this inquiry it is sufficient to point out that the paramount benefits to the community of administrative action in such cases preclude allowing court review of the administrative discretion exercised, even at the cost of suffering by one or more individuals who may be harmed thereby.

In the third situation where neither expert nor

20. *St. Joseph Stock Yards Co. vs. United States* (supra), p. 73.

21. 61 American Bar Assn. Reports, p. 730 (1936).

22. *Interstate Commerce Comm. vs. L. & N. R. Co.*, 227 U. S. 88 (1913).

23. Dickinson, *Administrative Justice and the Supremacy of Law*, p. 253 (1927).

summary action is required, the need for administrative action is not dominant, and the court can make a valuable contribution in a review of the facts to the end that oppression and injustice shall not result. Delay will do no harm, the processes of the court are suited to the inquiry, no question of general policy is involved. In fact, the most likely need is for protection of the individual against misguided, ignorant or oppressive administrative action.<sup>24</sup> Such cases arise under many modern statutes establishing licensing authorities for common non-technical occupations, and those authorizing administrative abatement of nuisances. In these and similar instances the affected party should have the right to show the actual facts to a court and obtain its judgment thereon, because of the recognized likelihood of injustice being perpetrated by over zealous or biased administrative officers.

What has just been said does not apply to a regulatory body such as the Federal Trade Commission, for with respect to that type of body an entirely different situation does exist. The Federal Trade Commission, for example, is an authority of high standing, naturally subject to public scrutiny, functioning much like a court, and presided over by officials of recognized ability who naturally become experts in the matter of trade practices and the results thereof. No reason can be discovered for authorizing court review of such a body's conclusions on questions of fact. No court can add anything here except to substitute its own view for that of the Board, and as heretofore pointed out when such is the bare result court review should be denied.

b. *Notice and Hearing.* Court review ought to be accorded in most of these cases on the matter of due notice and hearing in behalf of the party affected by such police and other regulations. Generally such regulatory action is directed against one individual or a small group of individuals, and thus notice and hearing are feasible. Liberty of action and property rights are being curtailed, and it is of the essence of justice that the party thus affected be afforded a fair hearing. Thus the courts can here by the process of review render the service of insuring the recognition of these rights. The only qualification of this view is to be made in the situations where summary action is essential. Here notice and hearing would result in rendering nugatory the regulation sought to be imposed. Because of the strong need for police regulation in such cases, notice and hearing should be dispensed with, and accordingly court review on such ground denied.

c. *Legislative Action.* Much of this type of police regulation is by way of rules or regulations governing future action and promulgated under general statutory authority to fill in the gaps. As indicated elsewhere such rules of a general nature are properly regarded as legislative in character and do not have to be supported by evidence nor made after notice or hearing, hence there should be no court review on these grounds. Where the effect of the regulation is to deprive the complaining party of some legal right not subject to being thus taken away, it is evident that in such case a question of law, either statutory or constitutional, is being raised and hence court review is proper under the general rule already dealt with. Of course, a situation may be encountered, as may have been the case with respect to the new Food, Drug and Cosmetic Act already referred to, where administrative legislative regulations affecting large interests engaged in inter-

state commerce are regarded as of such consequence that court review thereof is provided for. Obviously, this is the unusual case, and can be justified only on the ground that the magnitude of the private interests involved demands the added protection of judicial review.

6. *Bodies set up to function in situations wherein government is seeking to adjust individual controversies because of some strong social policy involved.* Examples of this kind of administrative authority are those dealing with workmen's compensation and labor relations.

a. *Discretion.* Such administrative bodies sit more nearly in the position of a court than do any of the others heretofore considered, since they undertake in large part at least to determine controversies between individuals. The justification for injecting administrative authority into these private controversies is because something more is involved than the mere claims of the contesting parties. Society is materially interested in the prompt, efficient and expert settlement of such controversies, for obvious reasons unnecessary here to mention. This is a sound policy and one that the constituted authorities should be permitted to work out with a minimum of court review, despite the fact that courts have long functioned in their own way in these fields. It follows that court review should not be allowed in regard to facts found by such boards where there is any substantial evidence to sustain these findings. Courts are not equipped to work out the social policy in view, and to allow them to substitute their own findings for those of these boards would directly defeat the very purpose of the statutes. This reasoning is supported by the current authorities.<sup>25</sup>

A more difficult problem is presented where the facts found by the administrative body are such as are essential to its having jurisdiction over the controversy. The United States Supreme Court and most authorities follow the view that such facts are subject to court review and to independent findings by the court.<sup>26</sup> To permit court review here tends to keep the administrative agency within the legal bounds of its activity, but at the same time to hamper it in the attainment of its proper objectives. To deny court review makes the administrative body final judge of its own jurisdiction, and renders possible an overreaching into fields never intended to be included. Which alternative to choose must be determined by balancing the advantages of having this kind of administrative action unhampered by court review on the facts of jurisdiction, against the advantage of having courts restrict such administrative bodies to their lawful bounds in assuming control over these types of private controversies. The scales would seem to be rather evenly balanced, but it must be borne in mind that these are situations where administrative authority is being thrust into the region of private litigation of private rights. Surely the thrust should go no farther than it is authorized to go. Those tribunals which are being displaced thereby ought to be the judges of how far such authority lawfully extends and when it is operative. It is safer that the invader should not be the judge of the extent of his own invasion. In this type of case, therefore, where private parties are being kept from resorting to an ordinary court, and are forced to submit their private rights

25. In re Burns, 218 Mass. 8 (1914).

24. See Goodnow, 41 American Bar Assn. Reports, p. 256 (1916)

26. Crowell vs. Benson, 285 U. S. 22 (1932); Consolidated Edison Co. vs. N. L. R. Board, 59 Sup. Ct. Rep. 296 (1938); Borgnis vs. Falk, 147 Wisc. 327 (1912).

to an administrative body for adjudication, court review ought to obtain with respect to the jurisdictional facts. As Mr. Justice Brandeis complains in his dissent in *Crowell vs. Benson* (supra), this holding may at times operate to the disadvantage of the poor litigant and in favor of the wealthy, but the answer is that the weaknesses of the administrative process render court review essential at this point despite the inconvenience that may at times result therefrom to certain individuals.

b. *Notice and Hearing.* The very fact that these proceedings are in the nature of judicial adjudications of private controversies renders all the more imperative that the parties be accorded due notice and a fair hearing. To dispense with these would serve no useful purpose in promoting the administrative policy in view, but would mean sacrificing the fundamental elements of fairness. The vital importance of these, from the point of view of the individuals involved, makes court review a proper and desirable safeguard.

It has not been feasible within the narrow limits of this article to include a detailed consideration of court review of decisions of administrative bodies with respect to the exclusion or admission of evidence. Wherever findings of such bodies are required to be supported by substantial evidence, the safe policy requires evidence that is unobjectionable on any ground other than what amounts to bare technicality. This test will give proper leeway to both administrative action and judicial safeguards.

All of the foregoing discussion leads to the following conclusions:

1. There is no uniform rule applicable to administrative bodies generally that will satisfactorily govern in determining the proper extent of court review of the decisions of such bodies.

2. There is a sound principle that will serve as a guide in determining when court review of decisions by administrative bodies should be allowed, which may be stated as follows: court review should be provided where the inherent weaknesses of the administrative process can be remedied by the superior qualities of the judicial process.

3. In applying this principle regard must be had for the nature of the functions of the administrative body involved, in balancing the advantages and disadvantages of making its actions final or having them subject to court review.

4. There are certain respects in which court action is superior to administrative action in all cases, and as to these judicial review should always be permitted:

a. Decisions on pure questions of law, including the determination of whether findings of fact are supported by any substantial evidence where this requirement is the appropriate test for sustaining such findings.

b. Decisions on questions affecting constitutional rights, even though they turn on factual determinations.

c. Decisions on questions relating to regularity and fairness of procedure.

5. There are situations in which court action is superior to administrative action because of peculiar defects inherent in the administrative process, and at such points court review should be provided, otherwise administrative decisions should stand.

These conclusions are but an application of the rule as stated by Mr. Justice Brandeis and quoted at the beginning, with a somewhat broader scope given to the meaning of "regularity" than that eminent jurist has been willing to concede.

EDITOR'S NOTE: We publish the 1939 winning Ross Prize Essay herewith in full, including the footnotes. The formal bestowal of the award and the \$3,000 prize will take place before the Assembly, at the Annual Meeting in San Francisco. An account of this year's competition, with a sketch and photograph of the recipient of this notable prize, are published elsewhere in this issue. In subsequent issues, the Journal will print several other essays from this year's competition—essays which have great merit but did not receive the award. Together this series of essays by noted scholars and practitioners will constitute an outstanding symposium of varied views upon this year's vital topic, and will greatly advance the purpose of the bequest in the will of the late Judge Erskine M. Ross, of California, who sought to encourage an annual contribution by the American Bar Association to the enlightened discussion of some subject of great importance to the public and to the profession.

## Administrative Law Bill Gets Unanimous Favorable Report

THE Senate Committee on the Judiciary has made a favorable and unanimous report on the Administrative Law Bill. The measure as reported differs from Senator Logan's original Bill (S. 915) principally in the elimination of the provision that the United States Supreme Court make uniform rules for practice and procedure.

The Senate Report gives the arguments for the measure which Chairman McGuire has advanced so cogently and says:

"It has not been possible to draft an administrative law bill which would be entirely satisfactory to everyone, but it is doubtful if there has been legislation proposed in a century which has had more extended and careful study than that given to this bill. It was under consideration for more than 3 years by the American Bar Association and the principles thereof have been approved by the Board of Governors and the House of Delegates of that association and by the State bar associations of California, Colorado, Illinois, Nebraska, Ohio and Oregon as well as by the city bar associations of Boston, Chicago, Cleveland, Dallas, and St. Louis. . . .

"The object of all concerned has been to leave the administrative agencies as free as possible to function consistent with the supremacy of the law and to provide only such judicial review as is necessary to insure both the supremacy of the law and substantial justice in controversies between the United States and individuals. Of course, much of the success of the reform will depend upon the able and wise use made by the administrative agencies of the power conferred upon them by this proposed legislation as well as upon the restraint and ability of the courts in their exercise of their reviewing jurisdiction. However, it is believed that we may safely trust this matter to the wisdom of all concerned to the end that there may be developed in this country a body of administrative law in accordance with the received common-law traditions with both the administrative agencies and the courts jealously concerned to remain within their respective allotted spheres—both being anxious to interpret and apply the constitutional statutes as enacted by the elected representatives of the people."