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THE PROBLEM OF JUDICIAL REVIEW OF
ADMINISTRATIVE ACTION

MILTON A. KALLIS*

THE present era is one of rapid change. To meet the demands of new political, economic, and social conditions certain practical adjustments must be made. We have accordingly seen a remarkable expansion of governmental agencies in the field of public administration. As a result, the subject of administrative law has for more than a generation been the fastest growing part of our legal system. Moreover, it presents vital problems which today are pressing for a well-informed and intelligent solution.¹

Because the subject is still in a formative stage, the courts have ample opportunity for displaying judicial statesmanship in deciding the difficult questions involved.² Instead of being slaves to precedent, they can draw on the lessons of history and at the same time use the tools of analysis and understanding to satisfy the needs of the people and to help maintain a stable and yet progressive nation.³

THE ROLE OF ADMINISTRATIVE AGENCIES IN GOVERNMENT

As life becomes more complex the processes of government increase. In simple society they are vested in a tribal

¹ In an address, "Modern Tendencies and the Law," delivered before the American Bar Association in 1933, Attorney General Homer S. Cummings said, "The field of administrative law, already clouded by much uncertainty, is being widely extended. The functions and limitations of the various departments and agencies of government have been taking on new aspects; and the attainment of administrative unity in this vast complex of powers presents a fascinating problem." 19 A.B.A.J. 576 at 578.

² See F. Frankfurter, "A Symposium on Administrative Law Based upon Legal Writing 1931-33," 18 Iowa L. Rev. 129.

³ "The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the mores of the day; and this I will call the method of sociology." B. Cardozo, The Nature of the Judicial Process, 30.
chief and his council of wise and trusted men. With the growth of civilization, they gradually become distributed among what are generally considered to be so-called legislative, executive, and judicial organs of the state. This division of activities leads to a specialization of function and to the origin and development of rules of procedure and technique peculiar to each. Some independence among the different political agencies naturally results. However, there exist a certain interrelation and interaction as well.

The foregoing facts focus our attention on two notable features which have emerged from the inconstancy of our present-day institutions. We have witnessed an unprecedented assumption by the government of activities which formerly were regarded as entirely within the purview of private affairs. Many administrative agencies, therefore, have been created which partake of legislative, executive, and judicial functions. A canvass of the laws of the national government and of the average state readily demonstrates how closely related to the public welfare they are. In addition, the last thirty years have been marked by a prodigious rise and growth of administrative tribunals. Although technically not courts in the constitutional sense, they nevertheless are invested with extensive authority in adjudicating matters of vital concern to individuals.

4 This point is lucidly developed by Frankfurter in his "The Public and its Government."


6 In 1926 there were seventy-eight provisions in the Illinois statutes vesting in nonjudicial officers authority to determine or control private rights. They might roughly be classified according to professions and trades, public health, public utilities, safety of investing public and creditors generally, agriculture, and miscellaneous. Since then the number has materially increased, mostly in the fields of labor, old age assistance, occupational disease, and unemployment problems. The Special Committee on Administrative Law of the American Bar Association in 1934 tentatively enumerated the federal administrative tribunals (emphasis being laid on those agencies to which judicial powers have been delegated). See 59 Rep. A.B.A. 559-560. Chief Justice Rosenberry of Wisconsin has listed fifty-five different types of administrative tribunals exercising so-called quasi-legislative and quasi-judicial powers. M. Rosenberry, "Administrative Law and the Constitution," 23 Am. Pol. Sci. Rev. 32 at 39.
There are certain practical reasons for these administrative bodies. Although they have often been attacked for usurping powers properly belonging to the judiciary, the courts have usually sustained their use of these powers subject to certain safeguards. Thus they have been upheld on the ground either that they are common-law exceptions to the rule that adjudication is basically a judicial function or that they are new devices created to cope with the problems of a civilization which becomes increasingly more complex. In consequence, there is a crying demand for quick and efficient administration in matters requiring specialization of training and knowledge in certain factual situations.\(^7\)

**The Problem of Judicial Review**

We are now facing what is perhaps the most critical problem in administrative law. For many years the question of the scope of judicial review and control of administrative agencies has caused much confusion. There has been a vast difference of opinion on this subject, and the Supreme Court has recently had occasion to express itself on certain aspects thereof. As a result, a bitter debate has taken place between persons who maintain the traditional attitude of the supremacy of law and those who see these new organs of government as genuine aids to the legislative and executive departments in furtherance of the democratic principle.\(^8\)

**The Separation of Functions**

To understand the problems involved in the question of judicial review, we can profitably turn to the doctrine of the

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separation of powers, not as a technical rule of constitutional law, but as a political maxim. The Founding Fathers so considered it; and in dividing the powers they were not primarily concerned with efficiency in government, but with safeguarding against tyranny. The limitation was designed to create checks and balances indispensable to the security of the people against political despotism. Jefferson once observed that "a single consolidated government would become the most corrupt government on earth." Woodrow Wilson expressed the same thought when he said, "The history of liberty is the history of divided power."

The federal and state constitutions do not define the terms legislative, executive, and judicial. In approaching possible definitions, we should understand that government is not an exact science and that political agencies do not function automatically. If effective work by our public officials be realized, a certain blending as well as separation of functions is desirable. We see this in legislative impeachments, executive vetoes, and judicial declarations of unconstitutionality. The difficulty of effecting even theoretical separation of powers is universally recognized. Accordingly, legislatures have adjudicated contempt charges, divorce cases, election contests, and claims against the government, and have also exercised many functions which are considered executive acts, such as organizing corporations. Obviously they must construe constitutions when they enact statutes. The executive department, in hearing cases involving workmen's compensation, revocation of various kinds of licenses, and removal of persons in the civil service, must know and interpret the law. The judiciary enforces the law by its power to hold in contempt and to issue writs of execution and other judicial

9 In the Federalist (No. XLVII), Madison refers to the doctrine of separation of powers as a "political maxim." For the same attitude expressed by the United States Supreme Court, see F. Frankfurter and J. M. Landis, "Powers of Congress over Procedure in Criminal Contempts in Inferior Federal Courts—A Study in Separation of Powers," 37 Harv. L. Rev. 1010 at 1012-16.

10 Mr. Justice Cardozo has put the situation in apt language: "But hereafter, as before, the changing combinations of events will beat upon the walls of ancient categories. 'Life has relations not capable of division into inflexible compartments. The moulds expand and shrink.' " B. Cardozo, The Growth of Law, 19.

11 This fact is readily exemplified by actions for divorce and for workmen's compensation. Neither existed at common law and both are entirely the creatures of statute. Yet, although the law applicable to the latter is much more technical than the former, divorces are perhaps invariably adjudicated
process. Moreover, it declares a rule of law applicable to the case at bar where none already exists.

All departments exercise some judgment and discretion in the performance of their duties. Furthermore, to decide, investigate, and deliberate is not necessarily a judicial function, because many executive officers must frequently render decisions on the law after hearing evidence on the facts. "But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact."12

Analytically, the courts have not furnished any absolute tests for legislative, executive, or judicial functions.13 Generally the basis of decision was either legal history or public policy. We can, however, generalize to some extent.

 Constitutions are limitations on the legislative, and grants to the executive and judicial, arms of the government.14 A

by courts, while compensation cases are usually heard in the first instance by an administrative tribunal.

12 Mr. Justice Curtis for the Supreme Court in Den v. Hoboken Land & Improvement Co., 18 How. 272 at 280, 15 L. Ed. 372 at 376 (1856), where he also said, "That the auditing of the accounts of a receiver of public money may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law." See also Clarence N. Goodwin in 59 Rep. Am. Bar Ass'n 149 (1934): "The finding of facts . . . is not a judicial function nor does it constitute in any true sense judicial action. It is a process gone through with not merely by every administrative agency, but by every person or group called upon to perform any function or transact any business, public or private, and it is incidental to the routine of our daily lives. That it is made the basis of governmental action does not make it judicial in its nature. The interpretation of the law and the construction of statutes are not judicial functions. Bodies, politic and private, as well as public officials and private individuals are required constantly to make such construction and interpretation both in the performance of public functions and in private business. Again we must say that the fact that such interpretation or construction is necessary to the performance of the official function does not make it judicial in its nature." See also Louisville & N. R. Co. v. Garrett, 231 U.S. 298 at 307, 34 S. Ct. 48, 58 L. Ed. 229 (1913).

13 See Thomas M. Cooley, Constitutional Limitations (8th ed.), I, 177, for citations in support of this point.

14 J. Dickinson, Administrative Justice and the Supremacy of Law in United States, p. 21; Frentis v. Atlantic Coast Line, 211 U.S. 210 at 226, 29 S. Ct. 67, 53 L. Ed. 150 at 158 (1908), where Mr. Justice Holmes, speaking for the court, said, "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."
legislature, accordingly, can do anything that is not prohibited by the supreme law of the state and the nation and, within the limits imposed by these instruments, can act on any subject within the scope of civil government. This power, in the absence of a constitutional prohibition, even extends to such retroactive statutes as bills of attainder, ex post facto laws, and validating acts. Although a legislature can pass a particular, local, or special law to deal with a past situation, it ordinarily enacts statutes to operate in the future and to take effect not upon certain specified individuals but generally. "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity." It is not required to give notice or hearing and does not publicly announce the reasons for its acts. Furthermore, it consists of a large, sometimes unwieldy body of men from all walks of life who are not by previous experience or education necessarily trained for their legislative duties. Principles of politics rather than those of law lie at the foundation of their work.

The executive is concerned with applying, enforcing, and carrying into effect the law. To do this properly, he must, of course, know the law applicable to his functions, but he is more frequently occupied in ascertaining facts and using his discretion. This does not so much involve the use of legal doctrine as it does personal judgment requiring experience with factual situations. These are so distinctively individual that they cannot or, for the sake of good government, should not be encompassed with a particularized and minutely detailed rule of law. Every combination of facts may be different from every other. The essence of the duties of the

15 J. Dickinson in his Administrative Justice and the Supremacy of Law in United States (1927) on page 168 discusses the difficulty of distinguishing between "questions of law" and "questions of fact."

16 "Preliminary resort to the commission is required . . . because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance is commonly found only in a body of experts." Mr. Justice Brandeis in Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922).
executive department is to deal with problems which require the use of discretion, special knowledge, and training in a busy workaday world—matters outside the ambit of jurisprudence. When an administrative official makes rules and regulations, as he often must, he does so subject always to the paramount policy or will of the legislature as manifested in the statutes. When he performs his adjudicative functions, which are held to be the exercise of non-judicial authority, he is merely effectuating a legislative purpose.

A definition of the judicial function is not easy to frame, because in many respects it closely resembles that of administrative adjudication. A court consists of a small body of professionally and technically trained and experienced men, who, by the use of authoritative legal materials, adjust past or present situations when disposing of justiciable cases or controversies between antagonistic parties whose existing interests are adverse and will be finally affected by the order, judgment, finding, or decree entered, subject to no review, revision, or reversal by any non-judicial officers. A court, moreover, can, at least to a certain extent, enforce such order without the aid of another department and, with some exceptions, is the only agency of government which can impose penalties and forfeitures. It is immaterial that in the performance of its duties it may be laying down a rule for the future guidance of the bench, bar, and public. In the judicial process, ample notice and hearing are given, and reasons for the decisions are stated in publicly announced opinions, no one but the parties themselves being affected by the proceedings. The judicial power, according to the mass

17 "Preliminary resort to the Commission is required . . . because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance is commonly found only in a body of experts." Mr. Justice Brandeis, in Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922).

18 William A. Robson in his book, Justice and Administrative Law, in Chapters V and VI elaborates the legal training of judges and technical training of administrative officials.


of decisions interpreting the separation of powers clause, embraces every kind of jurisdiction, activity, or authority seen in the courts of England when our Federal Constitution was adopted. Generally what these tribunals did before 1789 the courts in this country under the judicial power can do. Its essence is to adjudicate legal rights of individuals based on the common law and equity, with the power to enforce its acts, to inflict penalties for violations of the law, and to declare with authoritative finality what the law is or was in any dispute properly before it. If the vested rights in question are not those traditionally included in the common law or equity, but have been created since, or are merely additional privileges or new legal rights conferred by the government, or if they concern the latter in its corporate capacity or in its exercise of police power, then it is not always obligatory, though it is legally permissible, that a judicial tribunal, as contrasted with an administrative agency, have jurisdiction.22 “Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the constitution, whether the subject of the litigation be property or status.”23

LIMITS OF EFFECTIVE JUDICIAL ACTION

A vital factor in determining the proper scope of judicial review of administrative decisions is the functional ability of judicial tribunals. There are certain practical limitations on what courts in fact can do. They arise out of the nature of the judicial process, rather than constitutional prohibitions. Where a court cannot adequately protect or give effect to all the interests involved in a case before it or where the judicial machinery is unsuited for rendering justice as the facts require, judges should refrain from hearing the case.24

Another reason for judicial self-restraint is that courts

are usually more detached from every-day life than are certain administrative officials. Being freed from the bonds of purely technical rules of evidence, having familiarity with the problems peculiar to the particular type of agency, feeling the pulse of public opinion for the time being, and working with directness and speed, an administrative body can sometimes act within the law with a degree of effectiveness not possible to judicial tribunals. On the other hand, there are defects in the administrative process. Lacking forms and rules in some instances, they are not compelled to deliberate and occasionally do not guard against suggestion, impulse, and political pressure.25

Judicial Presumptions Favoring Administrative Findings

We have seen that if the judicial function has any distinctively individual characteristic it is the unique attribute of final, but not necessarily initial, determination of legal disputes as to both so-called questions of "law" and of "fact." With regard to the latter, the court has the last decision because law is clothed with facts. The question now arises as to the extent to which the courts review the decisions of administrative bodies. With regard to a purely factual situation, there is no reason for preferring a court's reaction to that of an administrative agency. On this account, a certain presumption of correctness should attach to the latter's finding of fact. Accordingly, a court should not substitute its own judgment for that of an administrative tribunal when the application of a legal standard is involved.26 Hence it is not a denial of due process of law for a court to give the same weight to a commission as it would to a lower court where the requisites of notice, hearing, and other relevant factors are present. Where the narrow line between possible confiscation and proper regulation presents a reasonable difference of opinion, the court should not set aside the order of

25 "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, other subservient." Chief Justice Hughes for the court in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 at 52, 56 S. Ct. 720, 80 L. Ed. 1033 at 1041 (1936).

26 For an instance of the application of a standard and the substitution by a reviewing court of its own judgment for that of the administrative agency, see Federal Trade Commission v. Klesner, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138 (1929).
the commission. It has been held in connection with appellate review of trial court proceedings that even where the facts are admitted but where a difference of opinion as to the inference that may legitimately be drawn from them exists, it is the province of the jury and not the court to draw the inference. The same weight and respect should be accorded an administrative body.

Another determining fact in the exercise of judicial review is the difficulty which courts sometimes have in examining the facts presented to an administrative commission. Quite often the record of the proceedings is too large for the court to examine intelligently with the limited time at its disposal. In one case, for example, a suit to enjoin a public utility rate as confiscatory, the record before the master in chancery comprised twenty-one volumes of testimony and proceedings.

**Methods of Presenting Facts to a Court**

There are various ways of presenting the facts to a court. One is upon the record of proceedings before the administrative body. Another is the trial of the case de novo. With respect to disputes involving jurisdictional facts where constitutional rights are involved the United States Supreme Court has sustained the right to a retrial in the court with disregard of the testimony before the commission. It is not ap-

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27 "Where the constitutional validity of a statute depends upon the existence of facts, the courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law maker." Radice v. New York, 264 U.S. 292 at 294, 44 S. Ct. 325, 68 L. Ed. 690 at 694 (1924).


30 In Crowell v. Benson, 285 U.S. 22 at 64, 52 S. Ct. 285, 76 L. Ed. 598 (1934), Chief Justice Hughes for the court said, "We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it." See also St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).
parent why the court should have to find the facts on a new record. Unless some special reason exists, it can examine the facts found by the commission on the record made before the latter. Even here it may be queried whether Mr. Justice Brandeis has been entirely consistent in his attitude. Although he dissented from the requirement of a trial de novo in *Crowell v. Benson*,\(^\text{31}\) which involved an application for compensation for a maritime employee, yet in deportation proceedings he held that citizenship was a fact to be found by judicial process.\(^\text{32}\) It is not apparent on what he based his distinction, for in each instance legal rights were involved. To say that one is statutory and the other is constitutional furnishes no answer, because not only the constitution but all laws and treaties made pursuant to it have the status of supreme law. Perhaps a difference of degree or type of legal interest secured is the controlling feature. An analysis of the decisions, however, hardly gives a workable criterion when problems of judicial review are presented.

Concerning the judicial determination of questions of fact, the Supreme Court of the United States has obtained its information in various ways. Sometimes when the validity of legislative or executive action depended on the facts involved, the court dealt with this question just as an ordinary question of law. Thus it assumed that the matter did not depend upon the facts but on reasoning or judicial precedent.\(^\text{33}\) On the other hand, it has obtained its information by taking judicial notice of materials incorporated in appellate briefs.\(^\text{34}\) At times the court has accepted evidence submitted at administrative proceedings or judicial trials relating to underlying questions of fact. On many occasions it has announced that legislative declarations as to the facts are entitled to great respect by courts. Likewise, the facts embodied in reports by committees in charge of bills have been accorded considerable weight, and the court has shown much defer-


\(^{32}\) Ng Fung Ho v. White, 259 U.S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922).

\(^{33}\) Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 837 (1905); McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819); Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287 (1871).

\(^{34}\) Muller v. Oregon, 208 U.S. 412, 23 S. Ct. 324, 52 L. Ed. 551 (1908); Bunting v. Oregon, 243 U.S. 426, 37 S. Ct. 435, 61 L. Ed. 830 (1917); Adkins v. Children's Hospital, 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923).
ence to findings of fact by state supreme courts. By analogy, a court should follow the same policy when it reviews a decision of an administrative body. Ordinarily all of the elements of deliberation, discretion, good faith, investigation, notice, hearing, and evidence which have been presumed by the Supreme Court as having accompanied legislative or other judicial action should be considered likewise to have attended the activities of administrative agencies.

METHODS AND SCOPE OF REVIEW

In defining the scope of judicial review of administrative decisions, we conclude that the old categories of review are satisfactory. The well established principles of common law and equity permit judicial review of administrative action when questions of jurisdiction or abuse of power are involved. Thus, an independent attack can be made directly on administrative decisions by mandamus, prohibition, quo warranto, certiorari, habeas corpus, injunction, tax-payer’s bill, and other specifically provided statutory proceedings. Moreover, a finding of an administrative body may be indirectly questioned when it is the basis of a suit between two persons. In addition to the foregoing direct and indirect independent attacks, there can be a true review by courts of administrative decisions. One instance is seen when the commission applies to the court for the enforcement of its order or finding. The same situation also applies where a statute provides for some kind of proceedings by way of appeal or writ of error. In either of these instances the court may conceivably consider for itself three points. Being a judicial tribunal and therefore the official and final arbiter in controversies as to what the law is, it must necessarily examine the conclusions of law reached by the administrative agency. Next it must, in passing upon constitutional right, decide for itself what


36 In Darnell v. Edwards, 244 U.S. 564 at 569, 37 S. Ct. 701, 61 L. Ed. 1317 (1917), the court said that “in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.” See also St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).
the facts are. Moreover, it can concern itself with questions of policy. In doing so, it then becomes an organ for the expression of the popular will. If it cannot clearly see that the particular problem involved is capable of general occurrence and therefore of generalization, it should not attempt to pass on the activities of another branch of the government. Only some authoritative legal material or compelling requirement of justice would warrant the court in doing so.

A further method of review consists of examining the manner in which the administrative body acted. In this sense judicial review is really trying the administrative trial, for it passes upon three questions: the good faith of the agency itself, the regularity or adequacy of its procedure, and its jurisdiction to act in the matter. Another means of actually reviewing the administrative decision is for a court to examine the proceedings and reach a conclusion of its own where the administrative body has failed to do so or has reached an erroneous conclusion.

An examination of the decisions dealing with the nature and scope of judicial review reveals certain reasons which have influenced the courts in adopting the policy of non-interference with administrative action. In the first place, we meet the principle that the sovereign state or nation is supreme and therefore cannot be sued without its consent.


38 See Dickinson, Administrative Justice and the Supremacy of Law (1927), 168, where the author says "the courts will overrule administrative discretion whenever it reaches a result inconsistent with some general proposition of law applicable to the entire class of similar cases. We here uncover the real distinction which lies behind the attempts to distinguish between so-called 'questions of law' and 'questions of fact' that have everywhere confused the language of the opinions. Where the only ground which a court can give for its difference from the administrative body is limited to mere difference of opinion as to some matter or matters peculiar to the case, or some difference in inference, from those matters, then the court should not disturb the opinion or inference of the fact-finding body unless the latter is plainly beyond the bonds of reason; for the difference is one of discretion or 'fact'. On the other hand, where the ground of difference between court and fact-finding body can be isolated and expressed as a general proposition applicable beyond the particular case to all similar cases, the court, if it holds the proposition one of sound law, must enforce it by overruling the administrative determination."
Another is that all things are presumed to be done in due form. A corollary flowing therefrom is that the administrative remedies must be exhausted before a person resorts to a court. The doctrine of separation of powers also has played its part. From it emerges the doctrine that a court must not interfere with the operation of other branches of government. Moreover, certain decisions are not "judicial" in the constitutional sense of distributing powers according to a tripartite division. In their nature some of them clearly involve the use of discretion by nonjudicial officers rather than a determination of law, or, in other words, an application of the law rather than the making or determination of law. Likewise, findings of fact are just as clearly administrative functions as they are judicial or legislative. However, when it is necessary in a dispute to decide what the law is, a legal question arises which can properly be presented to a court.39

Specific Questions of Law Involved in Judicial Review

The first question of law which confronts a court in reviewing the decision of an administrative body is that of the latter's jurisdiction. This is sometimes called the question of ultra vires. The basis of this inquiry is the principle that an administrative agency must not exceed the power given it. It must function within the limitations prescribed for it. No commission obviously should be the final arbiter of its own authority. Hence it is proper that a lack of jurisdiction should always be subject to collateral attack in a court of law. If the jurisdiction of the commission depends on the existence of a certain fact, the commission should not be the ultimate and unimpeachable judge and jury, so to speak, of its own power. Therefore it is a judicial question which the court must decide itself. We thus find that administrative decisions have been set aside by the Supreme Court, not necessarily because the effect thereof would be socially harmful, but because the commission in question had no legal power to act in the matter. An instance of this is the Raladam case.40

There the court held that the false claims made for a patented medical article were beyond the power of the Federal Trade Commission to consider because no competition was involved.

In exercising its power of judicial review, the court is sometimes confronted by the question of when and what to review when a specific form of judicial relief is provided by statute or otherwise. Ordinarily the question of ultra vires is raised in cases where no review is specified by statute. The Supreme Court has unanimously held that the extent of judicial review should be limited to the method selected. No quarrel can be found with this attitude.

The question of what amount of evidence should be sufficient for the reviewing court to sustain the administrative decision is related to the question of when, if at all, the court should review the order of the commission with respect to the elements of expediency, reasonableness, discretion, and application of legal standards. All of these involve questions of fact. If the decision is fairly reached on a matter of opinion, expediency, reasonableness, or application of the facts to a legal standard, it should not be supplanted by a judicial decision. There is no assurance that the substitution of the court's reaction to, or application of, the facts is preferable to that of an administrative body. What constitutes ample facts? The Supreme Court has said:

A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority.

In this connection, the question arises as to how the reviewing court should act when it finds that there was substantial evidence before the administrative body but that it does not constitute the weight of the evidence. This last element, namely the value to be given to testimony, may in a given situation be subject to a reasonable and honest difference of opinion. If the court, looking objectively at the record, can say that although it personally does not think that the

41 Booth Fisheries Co. v. Industrial Commission, 261 U.S. 208, 46 S. Ct. 491, 70 L. Ed. 908 (1926).
weight of the evidence was in favor of the administrative finding there might still be an honest divergence of views on this subject, then the finding should not be judicially disturbed. A kindred problem is whether the legal effect of the evidence is a question of law for the court. This again depends on whether there can be a difference of opinion as to the inference that may properly be drawn from the undisputed evidence. If there is, the court should adopt the version of fact found by the administrative agency.

Legislative policy is another vital factor for a reviewing court to keep in mind. Here there is ample opportunity for the judiciary to serve a useful purpose. The court, therefore, should scrutinize the statute involved to see whether the essence of the administrative action is in furtherance of the legislative function, even though there be no specific enactment on the subject but only a statutory objective expressed. It sometimes happens that an administrative agency is a direct arm of the legislature rather than an inherent part of the executive department. The court in performing its duty should see that such administrative agencies are free from improper interference by the executive part of the government. By all means the court should coöperate with the other political agencies, and, although it should regard them with understanding and tolerance, should require them at all times to be responsive to legislative will.

Arbitrary conduct has always been a basis for judicial review of administrative action. It sometimes happens that a statute makes possible unreasonable discrimination. Such an unrestricted authority has been held by some courts to be unconstitutional while others have felt that the delegation of the authority is valid, but that if it is exercised unjustly judicial relief is obtainable.43

In the foregoing situation the court should remember that in constitutional and public law litigation it should not anticipate any irregularity and thus foreclose a desirable trial of statutes and administrative orders. If there is an actual threat of a wrong to a person he should have access to

the courts, but a mere possibility of wrongful discrimination without more could swamp court dockets if it were permitted to be the basis of legal complaint. The court, therefore, should be reasonably sure that there is actually an injustice done or quite certain to occur before considering questions involved in review.

The element of a fair hearing has created much difficulty. In the discharge of its duties by an administrative tribunal, if the matter does not require summary treatment, a fair hearing may be a fundamental requirement of due process of law. It is difficult to express a general rule. It is not essential, however, that a hearing be given prior to the first order of an administrative body. If there is a full and fair hearing before the order becomes effective, due process of law has been satisfied. Furthermore, unless an impending danger requires instant action, a statute which makes no provision for a hearing and grants no opportunity for a review in any court is invalid.44

One workable guide in ascertaining the proper scope of review of administrative action is the principle that, before resort can be had to a court, a person must exhaust all his administrative remedies, unless, because the administrative agency is prejudiced, doing so would be merely an idle gesture.45 Keeping in mind that matters before administrative commissions often have the semblance of adversary litigation and that ordinarily due process demands notice, hearing, and good faith, we should nevertheless understand that the problem is rather difficult, involving not only questions of fairness but sometimes of speed, efficiency, and secrecy. Moreover, there may be a corrective means within the administrative proceeding itself or a traditional method pursued.46

44 "Congress in requiring a 'full hearing' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. . . . The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. . . . The proceeding had all the essential elements of contested litigation. . . . Upon the rates for their services the owners depended for their livelihood and the proceeding attacked them at a vital spot." Morgan v. United States, 304 U.S. 1 at 19-20, 58 S. Ct. 773, 82 L. Ed. 1129 at 1133 (1938).
45 Ng Fung Ho v. White, 259 U.S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922).
We must always adhere to the rule that no man may be a judge in his own cause. Therefore, if he is personally interested in the matter, he cannot exercise any authority therein.\textsuperscript{47}

An observation as to the manner and extent of review in cases involving alleged confiscation is here appropriate. If a public utility rate is too low or unreasonable the courts have many times considered it an unfounded exercise of power and accordingly tantamount to a mistake of law. One important fact we should keep in mind is that there is a real difference between fair valuation and confiscatory valuation. A valuation is confiscatory when it is unfair and unreasonable and ignores established principles of law, incontestable facts, or ordinary honesty.\textsuperscript{48}

A final consideration to be remembered in connection with the subject of judicial review is the matter of trial and error, particularly with respect to difficult questions. Occasionally the question of fact involved is extremely close. In a rate case for example, where there is a difference of opinion as to the valuation, it is desirable if possible that the rate as prescribed by the commission should be tried. There are so many intangible and unpredictable elements entirely beyond the grasp of both commissions and courts that the stamp of judicial disapproval should not, if reasonably avoidable, be placed on many types of administrative action. In a world of transition, where many of our established practices are being upset and consequent adjustments are difficult to make, we should draw on human experience more than on abstract reason.

**Conclusions**

The foregoing discussion of the extent to which the courts should review administrative decisions calls to our attention the vital but not always obvious fact that in the last analysis the problem of government are not always simple. The basis of the whole problem is one of policy. The doctrine of separ-

\textsuperscript{47} Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927).

ation of powers has been a useful principle of constitutional law and public administration. Administrative agencies are necessary to the welfare of the public but should function within due bounds. The courts by virtue of judicial review can use or abuse their office as final arbiter of both questions of law and fact involved in legal disputes. The criterion is the rule of reason and the protection of individual rights with a due regard for the public welfare. We should realize as Holmes once said that "the life of the law has not been logic: it has been experience." 49 Mr. Justice Stone reminded his associates in 1936 that "the only check upon our own exercise of power is our own sense of self-restraint." 50 The courts can be influential in maintaining a proper equilibrium between the various organs of government to the ends that public administration will be efficient and that government will function for safety rather than speed. In this way the judicial agencies of society can truly exhibit the possible and worthwhile attributes of judicial statesmanship. 51

49 Holmes, The Common Law, 1.

50 Dissent in United States v. Butler, 297 U.S. 1 at 79, 56 S. Ct. 312, 80 L. Ed. 477 at 495, 102 A.L.R. 914 (1936); see also Corwin, Court over Constitution (1938), Ch. 1.

51 For interesting discussions of the problem discussed in this article, see two essays entitled, "To What Extent Should Decisions of Administrative Bodies Be Reviewable by the Courts?" 25 A.B.A.J. 453 by Malcolm McDermott and ibid. 543 by Charles B. Stephens. See also J. Landis, The Administrative Process.