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Forrest R. Black

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THE "JURISDICTIONAL FACT" THEORY AND ADMINISTRATIVE FINALITY†

FORREST R. BLACK

II

The discussion thus far has considered the historical clash for supremacy between administrative and judicial bodies and the growth of administrative autonomy. In order that a clear picture of the modern application of the jurisdictional fact theory might be presented, there has been a critique of *Crowell v. Benson*. And finally, the distinction between the judicial and administrative concept of "jurisdiction" has been set forth in connection with the consideration of legislative and administrative efforts in England and America to immunize administrative bodies from judicial review.

Our discussion thus far leads us to the conclusion that the courts exercise a wide and at times an almost unpredictable jural freedom in reviewing administrative action. Although the case material to date cannot be reduced to a logical system,¹²⁹ it remains to consider three additional factors which condition the

†This study was made possible by a Social Science Research Council Grant-in-Aid. The first installment of this article appeared in (1937) 22 CORNELL L. Q. 349.

¹²⁹Alpert, *Suits Against Administrative Agencies* (1935) 12 N. Y. U. L. Q. REV. at 433, 434, states in summary fashion the major principles of judicial review of administrative action as follows: (1) Findings of fact are conclusive if supported by the evidence. *Anchor Coal Co. v. United States*, 25 F. (2d) 462, 471 (S. D. W. Va. 1928); *Tollefson, Administrative Finality* (1931) 29 MICH. L. REV. 839, 840. (2) The legal effect of evidence is a question of law for the court as are all questions of law. *Marion & Rye Valley Ry. Co. v. United States*, 270 U. S. 280, 285 (1926). (3) The court will review to determine whether the commission exceeded its statutory powers. *So. Pac. Co. v. I. C. C.*, 219 U. S. 433, 442 *et seq.* (1911); *United States v. N. Y. R. Co.*, 263 U. S. 603 (1924); *United States v. New River Co.*, 265 U. S. 533, 540 (1924); *Western Paper Makers Chem. Co. v. United States*, 271 U. S. 268, 271 (1924); *Assigned Car Cases*, 274 U. S. 564 (1927); *Anchor Coal Co. v. United States*, 25 F. (2d) 462, 471 (S. D. W. Va. 1928); *Beaumont, S. L. & W. Ry. Co. v. United States*, 36 F. (2d) 789, 793 (W. D. Mo. 1929), *aff'd*, 282 U. S. 74 (1930); *Denver Union Stock Yard Co. v. United States*, 57 F. (2d) 735, 739 (D. Colo. 1932). (4) The court will review to determine whether the statute under which the commission operates is constitutional. *Dickinson, Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"* (1932) 80 U. OF PA. L. REV. 1055. (5) The court will review to determine whether the "jurisdictional facts" existed which give the commission power to hear and decide the controversy. *Crowell v. Benson*, 285 U. S. 22, at 54 *et seq.* (1932); *Comment* (1932) 41 YALE L. J. 1037; *Dickinson, Crowell v. Benson* (1932) 80 U. OF PA. L. REV. 1055, 1059 ff. (6) The court is reluctant to interfere where the problem is one of discretion. *Tollefson, supra*, at 841. (7) The courts allow less review where a question of privilege is involved. *Tollefson, supra*, at 842. (8) As to mixed questions of law and fact, the courts adhere to the rule that where the court cannot separate the questions, the decision of the tribunal to which the law has confided the matter is conclusive. *Tollefson, supra*, at 843; *Albertsworth, Judicial Review of Administrative Action* (1921) 35 HARV. L. REV. 149-151. (9) Opportunities for, or the lack of, judicial review depend largely upon the adequacy of the process, including the right of appeal that is provided within the administrative tribunal. *Tollefson, supra*, at 844.

application of the jurisdictional fact theory and whose presence and influence either singly or in combination, will at least warrant a prediction as to the general judicial trend. Those factors are (1) the type of governmental power involved (public lands, post office, control of aliens, taxation, regulation, etc.); (2) the form of action employed by the plaintiff (certiorari, mandamus, injunction, etc.); and (3) the type of administrative finding, (a) summary, (b) after hearing with procedural safeguards, or (c) complicated investigation based upon expert appraisal.

In attempting to show the influence of these three factors, the enormity of the case material precludes exhaustive study of each.¹³⁰ Rather the purpose shall be to present in outline form the chief principles involved, as illustrated by a few selected leading decisions. Inasmuch as two or more of these factors are usually present in a case, a separate treatment of each factor would not only be artificial but also misleading as to the holding of the court. Consequently, for convenience I shall use as my outline the type of governmental power involved, and in discussing the leading cases in each group I shall emphasize, wherever the court has done so, the two other factors.¹³¹

Public Land Cases

Here the power-renouncing attitude of the courts has found its fullest expression. Various reasons have been assigned for this attitude.¹³² (a) Congress has the sole power to declare the dignity and effect of titles emanating from the United States.¹³³ In *Gibson v. Chouteau*,¹³⁴ the Court declared that "with respect to the public domain, the Constitution (Art. IV, Sec. 3, Cl. 2) vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations." (b) Since Congress "has constituted the Land Department as a *special tribunal*,"¹³⁵ it is to be expected that the courts would evidence a strong reluctance to review decisions of the Land Office. (c) It has also been suggested that the power to dispose of and survey public lands belongs exclusively "to the

¹³⁰Several Treatises have been written. THE FEDERAL TRADE COMMISSION by McFARLAND (1933); BLAISDELL (1932); HARLAND AND McCANDLESS (1916); BUTLER AND LYNDE (1915); HENDERSON (1924); HOLDT (1922). See also THE INTERSTATE COMMERCE COMMISSION by SHARFMAN (1931) and BERNHARDT (1923); Van Vleck, ADMINISTRATIVE CONTROL OF ALIENS (1932). See the list of unpublished doctors' dissertations in the Harvard Law School Library.

¹³¹Dickinson, *Administrative Justice and the Supremacy of Law* in HARVARD STUDIES IN ADMINISTRATIVE LAW (1927), must have the credit of pioneering in the analysis of this intricate problem. His work stands today as the most authoritative discussion.

¹³²For general treatment see McClintock, *The Administrative Determination of Public Land Controversies* (1925) 9 MINN. L. REV. 420, 542, 638; also WHITE, THE ADMINISTRATION OF THE LAND OFFICE (unpublished doctor's monograph in Widener Library, Harvard, 1911); THE GENERAL LAND OFFICE (U. S. Service Monograph, No. 13, Institute of Government Research, 1923).

¹³³*Bagnell v. Broderick* 13 Peters 450 (U. S. 1839).

¹³⁴13 Wall. 99 (U. S. 1871).

¹³⁵U. S. *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U. S. 317 (1903).

political department of the government and the action of that department within the scope of its authority, is unassailable in the courts except by a direct proceeding."¹³⁶ (d) Further, Congress has never specifically provided for review by the courts of the Land Department, although there has been some demand for such review, at one time supported by President Taft.¹³⁷ (e) In disposing of public lands to private individuals, the government is in effect dispensing a bounty, and while the distribution must be made in accordance with statutory requirements, the would-be beneficiary has no standing to object to a fairly wide latitude of discretion on the part of the land officials.¹³⁸ Insofar as the decision affects the relation of the applicant and the government, the final determination of the rights of the applicant by the government may be made a condition precedent to the disposition of the government's property.¹³⁹ This principle is sometimes stated to be that "the acts of the Land Department are *discretionary* until the right to the land has become vested in the applicant."¹⁴⁰ (f) Often the courts insist that these special tribunals act "*judicially*" and that, therefore, "their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment."¹⁴¹ In the *Kemp* case, the Court went further and declared:

"If in issuing a patent its officers *took mistaken views of the law*, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or *even from corrupt motives*, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief; and even there his complaint cannot be heard unless he connect himself with the original source of the title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and must possess such equities as will control the legal title in the patentee's hands."¹⁴²

(g) At other times the Court insists that the function of the Land Office as a special tribunal

"is not judicial; it is *administrative, executive and political* in nature, The abstract right to interfere in such cases has been uniformly denied by judicial tribunals, as breaking down the distinction so important and

¹³⁶Knight v. United Land Association, 142 U. S. 161 (1891).

¹³⁷See Finney, *The Board of Appeals, Department of the Interior* (1916) 10 AM. POL. SCI. REV. 290, 292.

¹³⁸See DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) p. 277.

¹³⁹See McCLINTOCK, *op. cit. supra* note 132, p. 650.

¹⁴⁰Noble v. Union River Logging Co., 147 U. S. 165 (1893); Lane v. Watts, 234 U. S. 525 (1914).

¹⁴¹St. Louis Smelting and Refining Co. v. Kemp, 104 U. S. 636 (1881).

¹⁴²*Ibid* p. 647.

well defined in our system between the several, separate and independent branches of our government."¹⁴³

(h) While a patent may be attacked directly by the government in a proceeding in equity to set it aside because secured through fraud¹⁴⁴ or mistake,¹⁴⁵ it should be noted that the court will exercise this jurisdiction with extreme caution and the relief will be refused unless the fraud is proved not merely by a preponderance of the evidence but beyond a reasonable doubt.¹⁴⁶ In subsequent suits in equity to determine the title to what was originally public land, the courts accept the findings of the Department on controverted questions of fact.¹⁴⁷ In one case, the Court apparently held that the decision of the Land Department could be set aside for fraud consisting only of perjury in the proofs submitted.¹⁴⁸ But in later cases the courts have declined to grant relief for perjury at the hearings, the consideration of which would require a retrial of the issues¹⁴⁹ and have followed the rule that the fraud must be more than false testimony at the hearing.¹⁵⁰ (i) Expediency of litigation has also been advanced to justify the power-renouncing attitude of the courts in public land cases. In *St. Louis Smelting and Refining Company v. Kemp*,¹⁵¹ the Court said:

"The patent of the United States is the conveyance by which the nation passes title to portions of the public domain. Such a patent is conclusive in an action at law as to the legal title . . . otherwise instead of being a means of peace and security, it would subject his [the patentee's] rights to constant and ruinous litigation."

(j) In determining questions of law on which the Department has previously passed, the courts in the public land cases give special force to the rule that the construction of a statute by the executive department which is entrusted with its enforcement is entitled to great weight.¹⁵² In a leading public land case, the Court declared that "a continuous administrative construction, unless clearly erroneous will not be upset by mandamus, even though in its absence the courts might be disposed to construe the statute differently."¹⁵³ In *Heath v. Wallace*,¹⁵⁴ the Supreme Court followed a departmental con-

¹⁴³*Downs v. Hubbard*, 123 U. S. 189 (1887).

¹⁴⁴*Williams v. United States*, 138 U. S. 514 (1890).

¹⁴⁵*Germania Iron Co. v. United States*, 165 U. S. 514 (1896).

¹⁴⁶*Maxwell Land Grant Case*, 121 U. S. 325, 380, 381 (1886).

¹⁴⁷*Baldwin v. Stark*, 107 U. S. 463 (1882); *Lee v. Johnson*, 116 U. S. 38 (1885); *United States v. Atkins*, 260 U. S. 220 (1922).

¹⁴⁸*Minnesota v. Bachelder*, 1 Wall. 109 (U. S. 1863).

¹⁴⁹*United States v. Throckmorton*, 98 U. S. 61 (1878); *Steel v. St. Louis Smelting and Refining Co.*, 106 U. S. 447 (1882).

¹⁵⁰32 Cyc. 1052 and cases cited n. 15.

¹⁵¹104 U. S. 636 (1882).

¹⁵²*Hawley v. Diller*, 178 U. S. 475 (1900); *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, 45 (U. S. 1885).

¹⁵³*United States ex rel. Ness v. Fisher*, 223 U. S. 688 (1912). See also *Logen v. Davis*, 233 U. S. 613 (1913).

¹⁵⁴138 U. S. 573 (1890).

struction which went directly to the jurisdiction of the Department. The question presented was whether land marked on the official plat as "subject to periodic overflow" was to be interpreted as "Swamp and overflowed" within the meaning of the Swamp Land Act. If this interpretation were adopted, title would have passed directly to the state government at the date of the act, and the jurisdiction of the Land Department would have been ousted. The Land Office had ruled that such land was not within the terms of the act, and the Supreme Court sustained the Land Office's position on the following grounds: (1) The administrative construction of a statute ought not to be overruled except upon the most cogent reasons; (2) the question was "*one of the definition of words or terms rather than of the interpretation of the statute*"; and (3) therefore the question was one of fact and not of law. (k) Finally, the leading case of *United States ex rel. Riverside Oil Company v. Hitchcock*¹⁵⁵ illustrates the obstacle of technical limitations on the procedure available for relief. The Court held that "neither injunction nor a mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion." It should be noted that in this case the Court refused to review even a construction of the statute by the land officials. The Court declared:

"Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The writ of mandamus never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. Their responsibility as well as the power rests with the Secretary uncontrolled by the courts."

Pension Cases

From the standpoint of judicial review of administrative action, the pension cases have a history very similar to the public land cases. The courts have stressed the fact that pensions are bounties of the government which Congress has the right to give, withhold, distribute, or recall at its discretion.¹⁵⁶ No pensioner has a vested legal right to his pension;¹⁵⁷ therefore, when a Federal Pension Board has denied a claimant the right to a pension, it is the general rule that the federal courts have no power to review the decision.¹⁵⁸ Following the decisions in the Land Cases, courts have held that

¹⁵⁵190 U. S. 317 (1903).

¹⁵⁶Walton v. Cotton, 19 Howard 355 (U. S. 1856).

¹⁵⁷United States v. Black, 128 U. S. 40 (1888) 44 STAT. 882 (1926), 38 U. S. C. A. 620 (1927) provides that the decisions of the pension officials shall be final and conclusive.

the United States cannot recover monies paid out as pensions because procured by fraud, where the fraud is proved merely by a preponderance of the evidence and not beyond a reasonable doubt.¹⁵⁹ In one of the leading pension cases,¹⁶⁰ there is an excellent discussion of the manner in which the type of action sought by the plaintiff effects the court in its review of administrative action. This decision analyzes two of the leading mandamus cases, *Kendall v. United States ex rel. Stokes*¹⁶¹ and *Decatur v. Paulding*.¹⁶² In the *Kendall* case the mandamus was granted. Stockton and Stokes, as contractors for carrying the mails, had certain claims against the government for extra services which they insisted should be credited to their accounts, and a controversy arose between them and the post-office department. Congress passed an act for their relief by which the Solicitor of the Treasury was authorized to settle and adjust their claims and to allow them such credit as upon a full examination of all the evidence might seem to be equitable and just. The Solicitor, after due investigation, made his report and stated therein the sums due to Stockton and Stokes on the claims made by them; but the Postmaster General, Mr. Kendall, refused to give them credit as directed. The Court held that he could be compelled to do so by mandamus since there was simply a ministerial duty to be performed and not an official act requiring any exercise of judgment or discretion. The Court said:

"He [the Postmaster General] was not called upon to furnish the means of paying such balance, if any should be found. He was simply required to give them credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."

In the *Decatur* case the mandamus was refused. There, Congress had passed a general act providing pensions for the widows of naval officers who had died in the service. A special resolution was also passed at the same time granting a pension to the widow of Commodore Stephen Decatur. The Secretary of the Navy ruled that she might make her election to receive either pension, but was not entitled to both. Mrs. Decatur applied for a writ of mandamus to compel the Secretary to make payments to her under both the Act and the resolution. The ease obviously turned upon the interpretation of the resolution granting the special pension, and whether or not it was intended to increase the amount of the pension payable under

¹⁵⁹*Lalane v. United States*, 164 U. S. 255 (1896).

¹⁶⁰*United States v. Black*, 128 U. S. 40 (1888).

¹⁶¹12 Peters 524 (U. S. 1838).

¹⁶²14 Peters 497 (U. S. 1840).

the general act. But the Supreme Court refused to take jurisdiction of this question, and, speaking through Chief Justice Taney, said:

"The duty required by the resolution was to be performed by the Secretary of the Navy as the head of one of the executive departments of the government in the ordinary discharge of his official duties. The head of an executive department in the administration of the various important concerns of his office must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney-General to assist him with his counsel and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments unless their duties were regarded as executive in which judgment and discretion were to be exercised. If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by a head of a department and if they supposed his decision to be wrong they would of course so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the case before them. The court could not entertain an appeal from the decision of one of the secretaries nor revise his judgment in any case where the law authorized him to exercise discretion and judgment."

Professor Ernst Freund has pointed out that in pension and public land cases involving a government bounty, the Court is justified in assuming that Congress intended minor points of legal construction in the application of federal statutes to be determined by administrative officers and not to be controlled by the courts through mandamus.¹⁶³

"This accounts in a very simple manner for a number of cases in which it has been held that mandamus does not reach the 'executive' function of interpreting a statute. If this however were generalized into a rule that the construction of a statute is not a ministerial act, and therefore uncontrollable by mandamus,¹⁶⁴ the value of the writ, as the Supreme Court has observed, would be very greatly impaired, since every official duty to some extent requires statutory construction, and the result would be a most unfortunate limitation of the powers of the court.¹⁶⁵ It would also run counter to the principle that, barring very exceptional cases, questions of law are always subject to judicial re-examination."¹⁶⁶

The Relation of Public Officials Inter Se and to the Government

In this field, the courts have always been reluctant to review administrative findings, and the leading decisions indicate special reasons for this attitude, reasons not advanced in the public land and pension cases. (1) An official hier-

¹⁶³United States v. Hitchcock, 190 U. S. 316 (1912); Ness v. Fisher, 223 U. S. 683 (1911); Decatur v. Paulding, 14 Peters 497 (U. S. 1840).

¹⁶⁴American Casualty Co. v. Fyler, 60 Conn. 448, 22 Atl. 494 (1888).

¹⁶⁵Robers v. United States, 176 U. S. 221, 231 (1900).

¹⁶⁶ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY p. 257.

archy constitutes one big family; and the proper relation of superior to inferior, which tends to promote operating efficiency, often precludes the right to an appeal over the heads of superiors to a court of law. In the leading case of *Murray v. Hoboken Land Company*,¹⁶⁷ the Court upheld as within due process of law a summary method of proceeding by distress warrant against a delinquent tax collector. In its decision, the Court recognized the distinction "between public defaulters and ordinary debtors." The Court, after observing that Congress could not withdraw from judicial cognizance any matter which, from its very nature, is a subject of suit at common law, in equity, or in admiralty, said:

"At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

(2) The concept of discipline runs throughout the public officer cases but finds its most compelling application against judicial interference when the rights of persons who enlist or are drafted in the military and naval service¹⁶⁸ are involved. The autonomy of the military and naval establishments is generally recognized, and the rights of their members to life and liberty are often determined by military court martial.¹⁶⁹ (3) Further, an appointment to public office is not a contract, and vested interests are not at stake.¹⁷⁰ In the absence of some specific constitutional limitation, the legislature may terminate the official relation by abolishing the office, shortening the term, declaring the office to be vacant, or transferring the duties of one office to another.¹⁷¹ (4) The appointment to an official position in the government, even to a clerical position, is not a mere ministerial act, but one involving the exercise of discretion. In the absence of a specific provision to the contrary, the power of removal from office is incident to the power of appointment. (5) In *Keim v. United States*,¹⁷² the Court declared:

"if courts should not be called upon to supervise the results of a civil service examination (a duty which is, at least, more administrative than judicial) equally inappropriate would be an investigation into the actual work done by the various clerks, a comparison of one with another as

¹⁶⁷18 Howard 272 (U. S. 1856).

¹⁶⁸*Crenshaw v. United States*, 134 U. S. 99 (1890); *Blake v. U. S.*, 103 U. S. 227 (1880); *Reeves v. Ainsworth*, 219 U. S. 296 (1911).

¹⁶⁹*In re Reed*, 100 U. S. 13 (1879); *Smith v. Whitney*, 116 U. S. 167 (1886); *Johnson v. Sayre*, 158 U. S. 109 (1895).

¹⁷⁰*Butler v. Pennsylvania*, 10 Howard 402 (U. S. 1850); *United States v. Fisher*, 109 U. S. 143 (1883); *Crenshaw v. United States*, 134 U. S. 99 (1890). See GOODNOW, *PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905) p. 286.

¹⁷¹*State v. Douglas*, 26 Wis. 428 (1870); *Bunting v. Gales*, 77 N. C. 283 (1877); *Attorney General v. Squires*, 14 Cal. 12 (1859); *Butler v. Pennsylvania*, 10 Howard 402 (U. S. 1850). See GOODNOW, *op. cit. supra* note 170, p. 315.

¹⁷²177 U. S. 290 (1900).

to competency, attention to duty, etc. These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.”

(6) The courts generally have adopted a *laissez faire* attitude in cases involving the power of removal from public office. An appointment for a four-year term has been considered as a term of four years subject to prior removal.¹⁷³ Where a statute provided for removal “for causes prescribed by law” and no causes were affirmatively specified by statute, the power of removal was held to be absolute.¹⁷⁴ Where a statute provided for three grounds of removal, the Supreme Court has held that the enumeration of these specific grounds did not preclude removal on other grounds.¹⁷⁵ Where the statute requires an opportunity for notice and hearing before removal, if these procedural requirements have been met, the courts will not go behind a determination ordering a removal.¹⁷⁶ (7) It is interesting to note that as an aftermath of the famous case of *Kendall v. United States ex rel. Stokes*,¹⁷⁷ referred to above, a suit for damages was instituted seven years later by Stokes against the Postmaster General. In the later case, *Kendall v. Stokes*,¹⁷⁸ is found dicta by the Court inconsistent with the former holding. In the first case, a mandamus was granted on the theory that the Postmaster General, in crediting the amount which the Solicitor determined to be due to Stokes, was performing a mere ministerial act. In the later case, the Court by way of dictum referred to the identical act as “not merely a ministerial one, but . . . one in relation to which it is his duty to exercise judgment and discretion.” (8) The prevailing view of the courts concerning the relation of public officers inter se and to the government is well expressed in the leading case of *Keim v. United States*,¹⁷⁹ in which the Court quoted with approval from an earlier opinion as follows :

“It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and actions of the various administrative departments of the government . . . the interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief and we are quite satisfied that such a power was never intended to be given to them.”

Administrative Control over Aliens

An authority in this field has declared that :

“We have devised a system of administrative procedure of executive

¹⁷³Parsons v. United States, 167 U. S. 324 (1897).

¹⁷⁴Reagan v. United States, 182 U. S. 419 (1901).

¹⁷⁵Shurtleff v. United States, 189 U. S. 311 (1903).

¹⁷⁶Dullam v. Willson, 53 Mich. 392 (1884). In re Guden, 171 N. Y. 529 (1902); People v. Brady, 166 N. Y. 44 (1901).

¹⁷⁷12 Peters 524 (U. S. 1838).

¹⁷⁸3 Howard 7 (U. S. 1845).

¹⁷⁹177 U. S. 290 (1899).

justice, with a maximum of powers in the administrative officers, a minimum of checks and safeguards against error and prejudice, and with certainty, care and due deliberation sacrificed to the desire for speed."¹⁸⁰

Even with our restricted immigration policy during the calendar year ending June 30, 1930, 446,214 immigrants were admitted and 8,233 were rejected. The very fact that more than one thousand immigrants are arriving each day is an eloquent reminder of the necessity for summary administrative action. The Immigration Act sets up boards of special inquiry for exclusion cases but does not do so for deportation cases.¹⁸¹ Further, the act provides that the decisions of these administrative boards shall be final, unless reversed on appeal to the Secretary of Labor. The administrative body is also given considerable leeway in regulating its own procedural conduct.¹⁸²

The courts, in permitting administrative officers to exercise a free hand in this field have emphasized the right of the United States to control the admission of aliens as "inherent in sovereignty and essential to self preservation."¹⁸³ Other nations have placed that control finally in the hands of administrative officers. The English courts have justified the final refusal of executive officials to admit an alien as coming within the doctrine of "acts of state."¹⁸⁴ In *Buron v. Denman*,¹⁸⁵ an English court took the position that if the defendant could show that the question at issue was properly a "matter of state," the court would give judgment in his favor without going into the merits.¹⁸⁶ This power cannot be restricted even by treaty. In the *Chinese Exclusion Case*,¹⁸⁷ the Court said:

"Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are *not questions for judicial determination*. If there be any just ground for complaint on the part of China, it must be made to the *political* department of our government, which is alone competent to act upon the subject."

A summary administrative power over immigrants was upheld in *Oceanic Steamship Company v. Stranahan*.¹⁸⁸ The Immigration Act provided that

¹⁸⁰VAN VLECK, ADMINISTRATIVE CONTROL OF ALIENS (1932) p. 224.

¹⁸¹39 STAT. 889 (1917), (*U. S. C. A.*); *Soo Hoo Yee v. United States*, F. (2d) 592 (C. C. A. 2d 1924).

¹⁸²Wigmore, *Administrative Boards and Commissions* (1922) 17 ILL. L. REV. 263, 265, 272, 282.

¹⁸³*United States ex rel. Turner v. Williams*, 194 U. S. 279 (1904).

¹⁸⁴*Musgrove v. Toy*, (1891) A. C. 272.

¹⁸⁵2 Ex. 167 (1848).

¹⁸⁶"Acts of State" is the English doctrine that is similar in many respects to the American doctrine of "political questions." See W. HARRISON MOORE, *ACT OF STATE IN ENGLISH LAW* (1906).

¹⁸⁷*Sub. Nom. Chao Chan Ping v. United States*, 130 U. S. 581 (1889).

¹⁸⁸214 U. S. 320 (1909).

when the Secretary of Labor found that an alien was afflicted with a loathsome or contagious disease at the time of foreign embarkation, and that the existence of the disease might have been detected at that time, the owner or consignee of the vessel should pay a specified penalty and no vessel should be granted clearance papers while the fine so imposed remained unpaid. Professor Ernst Freund has said:

“This provision is extraordinary as permitting the imposition of a penalty by administrative act, contrary to American constitutional usage, the withholding of clearance being merely a means of enforcing the penalty.”¹⁸⁹

The Supreme Court of the United States sustained the provision as an expression of the broad power of Congress over foreign commerce and made a distinction between criminal punishment and the imposition of a penalty.

It is the general rule that an administrative decision will not be reversed because the court believes it to be erroneous,¹⁹⁰ unless it is so clearly incorrect that it could not reasonably have been reached.¹⁹¹ However, the entrant is entitled to a fair hearing¹⁹² and may raise that issue in the courts through a writ of habeas corpus.¹⁹³ But even in those cases wherein the court may intervene ultimately by habeas corpus, it should be noted that before he is entitled to judicial relief, the burden is on the petitioner to show that he has completely exhausted his administrative remedies as provided by statute. Mr. Justice Holmes has said:

“If the allegations of a petition for habeas corpus setting up want of jurisdiction . . . are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings by means of the writ is not always a matter of right.”¹⁹⁴

In the famous case of *United States v. Ju Toy*,¹⁹⁵ characterized by an English commentator as “the origin of American Administrative Law,”¹⁹⁶ we find the most conspicuous instance in which an administrative finding of a jurisdictional fact was held conclusive by the courts. The petitioner, having exhausted his administrative remedies, brought his case before the Supreme Court of the United States upon a certificate from the court below on the question of whether the court should treat the finding of fact by the administrative officers as final and conclusive “unless it be made affirmatively to appear that such officers in the case submitted to them, abused the discretion vested in them, or in some other way, in hearing and determining the

¹⁸⁹ ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY p. 199.

¹⁹⁰ *Dharandas Tulsidas v. Insular Collector of Customs*, 262 U. S. 258 (1923).

¹⁹¹ *Lisotta v. United States*, 3 F. (2d) 108 (C. C. A. 5th 1924).

¹⁹² *Chin Yow v. United States*, 208 U. S. 8 (1908).

¹⁹³ *United States ex rel. Karamian v. Curran*, 16 F. (2d) 958 (C. C. A. 2d 1927).

¹⁹⁴ *United States v. Sing Tuck*, 194 U. S. 161 (1904).

¹⁹⁵ 198 U. S. 253 (1908).

¹⁹⁶ HAROLD LASKI, *AUTHORITY IN THE MODERN STATE* (1919) p. 99.

same, committed prejudicial error." This was an exclusion case and *Ju Toy* claimed to have been born of Chinese parents in the United States. Hence the administrative finding was as to a pure "question of fact"—where *Ju Toy* was born. There was no dispute as to his Chinese parentage. It should be noted that the immigration statutes apply in terms to aliens only; hence the issue of citizenship or alienage is a jurisdictional fact. The Court held that the administrative decision as to the status of the petitioner, no abuse of authority being shown, was to be regarded as final and conclusive and in conformity with due process of law.¹⁹⁷

The courts have held that the *Ju Toy* doctrine does not apply in the two following types of cases. (a) If the question of alienage depends upon a "matter of law." This question is always one for the court, and judicial relief will be granted even before recourse is had to the administrative remedies offered.¹⁹⁸ In the *Gonzales* case the Court considered whether or not a native of Puerto Rico, who was an inhabitant of that island at the time of its cession to the United States, was upon her arrival at a port of this country to be treated as an alien immigrant within the meaning of the Act of Congress of 1891. Here, only a question of law was involved based upon a proper interpretation of the statute. (b) The second type of case not covered by the *Ju Toy* doctrine concerns the expulsion rather than the exclusion of an alleged alien.¹⁹⁹ In an expulsion case, when the issue of citizenship is raised, the person is entitled to a judicial trial of the issue.²⁰⁰ In the *Ng Fung Ho* case the Court said:

"Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of the essential jurisdictional fact. . . . If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus where the prisoner claims citizenship, and makes a showing that his claim is not frivolous, then, obviously, deportation of a resident may follow upon a purely executive order, whatever his race or place of birth. . . . To deport one who so claims to be a citizen obviously deprives him of liberty. . . . Against the danger of such deprivation without the sanction afforded by judicial proceedings, the 5th Amendment affords protection in its guaranty of due process of law."

Although the courts have reiterated that the proceedings to expel are not strictly criminal, nevertheless, in its essential elements the exclusion process

¹⁹⁷This holding was forecast in *United States v. Sing Tuck*, 194 U. S. 161 (1904) and has been followed in later exclusion cases. *Tang Tung v. Edsell*, 223 U. S. 673 (1912); *Quon Quon Poy v. Johnson*, 273 U. S. 352 (1927). For a defense of the *Ju Toy* case see T. R. Powell, *Judicial Review of Administrative Proceedings* (1909) 22 HARV. L. REV. 360; for an adverse criticism see FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY pp. 292-293. Three dissenting judges in the *Ju Toy* case characterized the doctrine of the majority as "appalling."

¹⁹⁸*Gonzales v. Williams*, 192 U. S. 1 (1903).

¹⁹⁹This distinction was first recognized in *Moy Suey v. United States*, 147 Fed. 697 (C. C. A. 7th 1906).

²⁰⁰*Ng Fung Ho v. White*, 259 U. S. 276 (1922).

partakes largely of the nature of criminal justice. Exclusion has been characterized as "quasi criminal" because of the nature of the charges made, the facts which must be proved, and the issues which must be decided and, more especially, in its effect upon the interests of the persons against whom it is brought.²⁰¹

The case of *United States ex rel. Tisi v. Tod*^{201a} illustrates the principle that although the existence of a fact may be "essential" to the authority to deport, such "essential" fact is not necessarily "jurisdictional." Tisi, an alien, was arrested in deportation proceedings. The reason specified for his arrest was *knowingly* having in his possession, for the purpose of distribution, printed matter which advocated the overthrow of the government of the United States by force. The procedure prescribed by the rules of the department was followed, and no abuse of discretion was shown. The Court held that:

"Under these circumstances mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law. . . . What Tisi urges is that there was no evidence to sustain the finding that he knew the seditious character of the printed matter. Such knowledge is not, like alienage, a jurisdictional fact. But it is an essential of the authority to deport."

In the case of *Pearson v. Williams*,²⁰² the Court recognized that the decision of an immigration board was not "res judicata in a technical sense." Although the first decision of the board of inquiry was unanimous in permitting the immigrant to land, a second hearing, within the three-year period provided by the statute, reversed the first finding and ordered his deportation. The Court in permitting this second finding to stand as final, said:

"The board is an instrument of the executive power, not a court. . . . The decisions necessarily are made in a summary way in order to reach the 'prompt determination' declared by section 25 to be an object. . . . Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute res judicata in a technical sense."

Post Office Cases

The national government has managed to make the seemingly unimportant and innocent grant of authority to establish "post offices and post roads" serve as the constitutional peg upon which to hang a very sub-

²⁰¹VAN VLECK, ADMINISTRATIVE CONTROL OF ALIENS (1932) p. 224; REPORT OF MINORITY OF COMMITTEE ON IMMIGRATION, H. R. REP. No. 10078, 70th Cong. 1st Sess. H. R. 484, p. 8. It has been suggested that perhaps the case of *Quon Quon Poy v. Johnson*, 273 U. S. 352 (1927) may be used as a basis for a third classification, i.e., exclusion in a case wherein the person "had never resided in the United States." Perhaps a distinction may be built up later on the basis of these quoted words to allow a judicial hearing in cases where prior residence has been established. See VAN VLECK, *supra* p. 191.

^{201a}264 U. S. 131 (1924).

²⁰²202 U. S. 281 (1906).

stantial federal police power.²⁰³ In establishing a postal system, Congress must of necessity determine what is to be regarded as mail matter and what is not. "In establishing such a system, Congress may restrict its use to letters and deny it to periodicals; it may include periodicals and exclude books; it may admit books to the mails and refuse to admit merchandise; or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise."²⁰⁴ Congress has seen fit to bar from the mails obscene books, papers, pictures,²⁰⁵ packages or letters which have libellous or indecent matter on their wrappers or envelopes,²⁰⁶ letters or packages containing lotteries or gift enterprises and schemes,²⁰⁷ packages or writings which are part of a scheme to defraud,²⁰⁸ and letters or writings advocating treason.²⁰⁹ The courts have held that the determination of what is mailable under the statutes is within the executive branch of the government.²¹⁰

The reasons for the power-renouncing attitude on the part of the courts in favor of the administrative officers in this field are outlined in the cases now to be considered. (1) In *Public Clearing House v. Coyne*,²¹¹ the Court stresses governmental necessity as a reason for administrative finality. "If the ordinary daily transactions of the departments which involve an interference with private rights were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government." (2) Congress has a proprietary interest in the postal system which it does not have in interstate commerce. Since Congress has created the postal system and is the source of all postal privileges, the exercise of the power to deny those privileges and to confer final determination on executive officials with reference thereto is broader than in the field of interstate commerce. The Court was apparently influenced by this in the leading case of *Ex Parte Jackson*²¹² when it said:

"But we do not think that Congress possesses the power to prevent the transportation *in other ways* as merchandise, of matter which it excludes from the mails."

In two District court cases the inference seems to be that since the government is the proprietor, the use of the mail service by the individual is a privi-

²⁰³Cushman, *National Police Power under the Postal Clause of the Constitution* (1920) 4 MINN. L. R. 402.

²⁰⁴*Public Clearing House v. Coyne*, 194 U. S. 497 (1903).

²⁰⁵U. S. CODE TITLE 18 § 334.

²⁰⁶*Ibid* § 355.

²⁰⁷*Ibid* § 336.

²⁰⁸*Ibid* § 338.

²⁰⁹*Ibid* § 344.

²¹⁰*Missouri Drug Co. v. Wyman*, 129 Fed. 623 (C. C. E. D. Mo. 1904).

²¹¹194 U. S. 497 (1904).

²¹²96 U. S. 727, 735 (1877).

lege rather than a constitutional right.²¹³ (3) The courts have held that there is a strong presumption in favor of the legality of the actions of the Postmaster General, and his action "will be upset only when it is tainted with fraud, absolutely without authority of law, clearly outside the statute, or perhaps clearly, palpably and obviously wrong."²¹⁴ (4) In the leading case of *Bates & Guild Company v. Payne*,²¹⁵ the Court refused to go behind the ruling of the Postmaster General in a matter which apparently involved a question of law—the interpretation of a statutory term. The plaintiff in error insisted that a monthly musical publication, each issue of which was complete in itself and treated of the works of a particular master musician, was a "periodical publication" and entitled to the statutory rate for such publications. The Postmaster General rejected this contention and the Court in refusing to review the administrative decision said:

"Although a comparison of the exhibit with the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a *mixed question of law and fact.*"

By way of comparison, consider the case of *Houghton v. Payne*.²¹⁶ Here the Court overruled an administrative construction of the term "periodical publications" which had been followed by Postmaster Generals for sixteen years and which permitted books, complete in themselves because published at stated intervals, to take advantage of the second class mailing rates. The Court declared:

"A custom of the Department, however long continued by successive officers, must yield to the positive language of the statute. Contemporary construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of the construction."

(5) In *American School of Magnetic Healing v. McAnnulty*,²¹⁷ a limitation was placed on administrative finality. The Court held that the Postmaster General was not justified in prohibiting the delivery of letters to a corporation, which assumed to heal disease through the influence of the mind, under

²¹³*People's United States Bank v. Gilson*, 140 Fed. 1, 5 (C. C. E. D. Mo. (1905)); *Missouri Drug Co. v. Wyman*, 129 Fed. 623 (C. C. E. D. Mo. 1904); See Cushman, *supra* note 203 p. 423; *United States v. Delaware and Hudson Co.*, 164 Fed. 215 (C. C. E. D. Pa. 1908), *rev'd* on other grounds in 213 U. S. 366 (1909). For the distinction between "privilege" and "right," see Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16. Cf. Corwin, *Congress's Power to Prohibit Commerce* (1933) 18 CORNELL L. Q. 477. See Lindsay Rogers, *The Postal Power of Congress* JOHNS HOPKINS UNIV. STUDIES IN HISTORICAL AND POLITICAL SCIENCE Series XXXIV, No. 2.

²¹⁴*Hoover v. McChesney*, 81 Fed. 472 (C. C. Ky. 1897).

²¹⁵194 U. S. 106 (1904).

²¹⁶194 U. S. 106 (1904).

²¹⁷187 U. S. 94 (1902).

provision of the statute which authorized the detention of letters directed to any person obtaining money through the mails by false pretenses. The Court declared:

"The effectiveness of such treatment is a *mere matter of opinion* and the statute is intended to cover only actual cases of fraud. . . . There is no exact standard of absolute truth by which to prove the assertion false and a fraud. The Postmaster General's order being the result of a mistaken view of the law, i.e., a legal error, does not bind the courts."

In *Leach v. Carlisle*,²¹⁸ the plaintiff in error contended that the question decided by the Postmaster General was that the substance which he was selling did not produce the results claimed for it, that this in the record was a matter of opinion as to which there was a conflict of evidence, and that, therefore, the case was within the scope of the *McAnnulty* doctrine. The Court overruled this contention by holding that:

"The question really decided was not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud on the public. This was a *question of fact* which the statute committed to the decision of the Postmaster General and the settled rule of law is that the conclusion of a head of an executive department on such a question when committed to him by law will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary."

(6) In connection with the revoking of second class mailing privileges and the issuance of fraud orders (without a statutory provision for notice and hearing) by the Postmaster General, a potential danger inheres in the administrative action because of its scope. A fraud order when issued necessarily prevents the delivery of *all* mail to the defrauder.²¹⁹ The Fourth Amendment prohibits the opening of first class mail without a search warrant,²²⁰ and Congress has never authorized a search warrant for the search of first class mail which has been seized. In *United States ex rel. Milwaukee Social Democratic Publishing Company v. Burleson*,²²¹ the Court held that the Postmaster General's revocation of the second class mailing privilege to a newspaper "would not be disturbed by the courts unless they are clearly of the opinion that his conclusion is wrong." As to the scope of the revoking power, the Court said that it was not limited "merely as to a single issue of such paper" containing objectionable matter, but that it would continue in effect "until a proper application and showing shall be made for a renewal of such

²¹⁸258 U. S. 138 (1921).

²¹⁹Public Clearing House v. Coyne, 194 U. S. 497 (1903).

²²⁰*Ex parte* Jackson, 96 U. S. 727, 733 (1877).

²²¹255 U. S. 407 (1931).

privilege." The dissent in the *Milwaukee* case characterized the Postmaster General under such a set-up as "the universal censor of publications . . . in view of the practical finality of his decisions." Professor Ernst Freund²²² has pointed out that "the political power thus recognized is all the more remarkable in that it is not explicitly given but rests upon a controverted construction of the statute." If future Postmaster Generals are to find encouragements in certain broad judicial dicta to the effect that "the legislative body in establishing a postal service may annex such conditions as it chooses"²²³ and that "in respect to the mails, the United States is certainly not a common carrier,"²²⁴ then, in the absence of Congressional intervention, we may expect a dangerous exercise of administrative power.²²⁵

(7) A fraud order case, *Degge v. Hitchcock*,²²⁶ is one of the best illustrations of the extent to which judicial review of administrative action may be conditioned by the form of action chosen by the plaintiff. Here an attempt was made by writ of certiorari to review a ruling of the Postmaster General who had issued a fraud order. The Court in a unanimous decision stated that "this case is the first instance (1913) in which a federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States." The Court, in refusing to review the administrative finding by certiorari, said:

"It is true that the Postmaster General gave notice and a hearing to the persons specially to be affected by the order, and that in making his ruling he may be said to have acted in a quasi judicial capacity. But the statute was passed primarily for the benefit of the public at large, and the order was for them and their protection. That fact gave an *administrative quality to the hearing and to the order*, and was sufficient to prevent it from being subject to review by writ of certiorari. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or certiorari. Not being a judgment, in the sense of a final adjudication, the plaintiffs in error were not concluded by his decision, for had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. *American School v. McAnnulty*, 187 U. S. 94.

"The fact that there was this remedy is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice. Besides, if the common-law writ, with all of its incidents, could be construed to apply to administrative and quasi judicial rulings, it could, with a greater show of

²²²ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY p. 442.

²²³Public Hearing House v. Coyne, 194 U. S. 497, 506 (1903).

²²⁴Leach v. Carlisle, 245 Fed. 103, (C. C. A. 7th 1910).

²²⁵DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW p. 301.

²²⁶229 U. S. 163 (1912).

authority, issue to remove a record before decision, and so prevent a ruling in any case where it was claimed there was no jurisdiction to act. This would overturn the principle that, as long as the proceedings are in fieri, the courts will not interfere with the hearing and disposition of matters before the Departments. *Plested v. Abbey*, 228 U. S. 42, 51."

The Court admitted that there were many state precedents for the use of the writ of certiorari attempted here under state statutes which had enlarged the scope of the writ at common law, but concluded "that none of these decisions are in point in a federal jurisdiction where no such statute has been passed." It is this diversity in statutory extensions of these extraordinary writs in the various jurisdictions which makes impractical a general discussion of the manner in which the form of action conditions the judicial review of administrative determinations.

Tax Cases

The dictum of Mr. Justice Holmes that "the power to tax is not the power to destroy while this court sits"²²⁷ does not describe accurately the role of the courts in tax cases. Frank J. Goodnow comes nearer the truth when he says:

"The individual is by the American law of taxation quite commonly subjected to the arbitrary discretion of the tax authorities, so far as concerns questions of assessment and valuation; and because of the inadequacy of the judicial remedies available finds it difficult—if not impossible—in many cases, to secure a judicial review even on questions of law. This is particularly true of the smaller taxpayers."²²⁸

The judiciary, in permitting broad and often final power to be exercised by the taxing authorities has stressed the following considerations: (1) A tax is a demand of sovereignty and essential to its very existence. "The power to tax is, therefore, the strongest, the most pervading of all of the powers of government. . . . Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited."²²⁹ (2) In *Springer v. United States*²³⁰ the Court stressed the notion that

". . . prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the laws here in question involve any wrong or unnecessary harshness, it was for Congress, or the people who make Congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

²²⁷Dissent in *Panhandle Oil Co. v. Knox*, 277 U. S. 218 at 223 (1927).

²²⁸(1916) XII REP. AMER. BAR ASS'N. 408 at 414.

²²⁹*Loan Association v. Topeka*, 20 Wall. 663 (U. S. 1874).

²³⁰102 U. S. 586 (1880). See also *Dows v. Chicago*, 11 Wall. 108, 110 (U. S. 1870).

(3) In *Bartlett v. Kane*,²³¹ the Court denied any review of administrative appraisement, even though the Court did not favor the administrative method used. The necessity for the decision was justified in the following language: "The interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion and embarrassment." (4) Another reason for administrative finality was advanced in *Hilton v. Merritt*.²³² The Court said:

"If in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs' officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods."

(5) It should be noted that the *Bartlett* and *Hilton* cases involved the power of final valuation by customs officers. However, on the question of classification, the courts formerly went behind the administrative determination.²³³ However, by the Act of 1909,²³⁴ Congress created a special Court of Customs Appeals and transferred to it the appellate jurisdiction previously exercised by the regular federal courts over the board of general appraisers. Its decisions were at first made absolutely final, but by the Act of 1914²³⁵ it has been made possible for the Supreme Court in its discretionary use of certiorari to review decisions which it regards as of sufficient importance. Congress has thus created a specialized mechanism whereby the details of tariff administration have been put beyond the reach of the ordinary courts with opportunity reserved for the protection of ultimate substantive rights by the Supreme Court of the United States.²³⁶ (6) A somewhat similar development is taking place in the administration of the internal revenue and income tax laws.²³⁷ Mr. Justice Brandeis, speaking for a unanimous Court in *Williamsport Wire Rope Co. v. United States*,²³⁸ stressed some of the reasons for administrative finality in the office of the Commissioner of Internal Revenue. (a) In the first place, he pointed out, the subject matter is highly technical and involves many types of skill other than legal. Engineers, accountants, valu-

²³¹16 Howard 263 (U. S. 1853). See T. R. Powell, *Conclusiveness of Administrative Determinations in the Federal Government* (1907) 1 AM. POL. SCI. REV. 583.

²³²110 U. S. 97 (1884).

²³³In *Holmes v. Collector*, 1 Wall. 486 (U. S. 1863) the Court determined whether almonds were dried fruit; in *Toplitz v. Heden*, 146 U. S. 252 (1892) whether "Scotch bonnets" were hats or caps; in *Sonn v. Magone*, 159 U. S. 417 (1894) whether dried beans were seeds or vegetables; in *Bogle v. Magone*, 152 U. S. 623 (1893) whether anchovy and bloater paste were a "sauce." See *Eisner v. Macomber*, 252 U. S. 89 (1919).

²³⁴Act of Aug. 5, 1909 c. 6, 36 STAT. 100.

²³⁵Act of Aug. 22, 1914 c. 267, 38 STAT. 708.

²³⁶DICKINSON, *supra* note 225, p. 276; LEVETT, *THROUGH THE CUSTOMS MAZE* (1923).

²³⁷Roswell Magill, *The Finality of Determinations of the Commissioner of Internal Revenue* (1930) 30 COL. L. REV. 147; Chas. D. Hamel, *The United States Board of Tax Appeals* (1924) 10 BULLETIN OF THE NATIONAL TAX ASS'N. 41-51.

²³⁸277 U. S. 551 (1927).

ation experts, and statisticians are essential to the proper functioning of the Bureau of Internal Revenue. (b) Therefore, the conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof. The Bureau can and does consider facts which would be difficult or impossible to prove under common law rules of evidence, but which are, nevertheless, highly material to the cases. (c) Very often the Treasury's determination in a particular case is dependent upon or greatly aided by the facts found in a whole series of similar cases. (d) The federal courts have no technical staff, nor have they much opportunity of obtaining detailed technical information except as it may be laboriously presented on the witness stand in the particular case. (7) Because of the necessity of prompt assessment and collection of taxes, the courts have taken a very liberal view of due process of law in the tax cases, especially as it relates to notice, hearing, and the right of judicial review.

The following principles have received general recognition by the courts. Personal notice relating to the assessment of taxes is not essential to due process of law.²³⁹ However, if the statute requires personal notice, no other form will suffice; and proof of such notice is a jurisdictional fact.²⁴⁰ Provisions for notice and hearing in a statute are to be regarded as mandatory.²⁴¹ To constitute due process, notice is not required at every stage.²⁴² All that is necessary is that an opportunity for a hearing must be given at some stage before the liability for the tax becomes final.²⁴³ This is true whether back or current taxes are involved.²⁴⁴ However, due process does not necessarily require a judicial hearing.²⁴⁵ If the tax statute provides for no notice whatsoever, the law will be unconstitutional; but the tax itself cannot be attacked if notice in fact was given.²⁴⁶ Notice by publication, when authorized by law, is sufficient.²⁴⁷ Notice by statute, when the statute itself fixes the time and place for the meeting of assessors or the Board of Equalization, is sufficient notice and opportunity for a hearing to satisfy the requirements of due process of law.²⁴⁸ A hearing to be valid demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal. It is not necessary that there be an opportunity to submit in writing all objections.²⁴⁹ Where a taxpayer has an opportunity to be heard, the due process clause is not violated because the

²³⁹*Merchant's Bank v. Pa.*, 167 U. S. 461 (1896).

²⁴⁰*Scott v. Brackett*, 89 Ind. 413 (1833).

²⁴¹*Lyon v. Alley*, 130 U. S. 177 (1888).

²⁴²*Gallup v. Schmidt*, 154 Ind. 196 (1899).

²⁴³*Pullman Co. v. Knott*, 235 U. S. 23 (1914).

²⁴⁴*Winona Land Co. v. Minn.*, 159 U. S. 527 (1895).

²⁴⁵*State v. Sponagle*, 45 W. Va. 415 (1899).

²⁴⁶*Security Trust Co. v. Lexington*, 203 U. S. 323 (1905).

²⁴⁷*Wright v. Davidson*, 181 U. S. 371 (1900).

²⁴⁸*Merchants Bank v. Pa.*, 167 U. S. 461 (1896).

²⁴⁹*Londoner v. City of Denver*, 210 U. S. 373 (1907).

taxpayer has no right to appeal from the decision.²⁵⁰ One hearing is sufficient to constitute due process.²⁵¹

(8) Congress, in order to facilitate the collection of taxes and to prevent ruinous delay by litigation, enacted Section 3224²⁵² which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." A literal interpretation of this Code provision enacted sixty years ago would prohibit any interference by an equity court in the taxing process. However, the federal judiciary by interpretation has considerably restricted the scope of the Congressional declaration. Two exceptions have been created. (a) Section 3224 has been held not to apply in the case of "special and extraordinary facts and circumstances." The leading case is *Miller v. Nut Margarine Company*.²⁵³ The plaintiff here began the manufacture and sale of a product, which was not taxable under the Oleomargarine Act, after a ruling by the Commissioner of Internal Revenue that its product was not taxable and after court determination that similar products were not taxable. The Commissioner changed his ruling after the plaintiff had been manufacturing the product for more than a year and attempted to levy a 10 cents per pound tax, whereas the plaintiff's profit was only 3 cents per pound. The Commissioner made no attempt to assess the tax on manufacturers of similar products. In a suit to enjoin the collection of the tax, the Court said:

"His [the Commissioner's] determination that respondent's product was oleomargarine and taxable under the Act was erroneous and, in view of his earlier interpretations and the Court decision which had become final, must be held arbitrary and capricious. It was without force. . . . The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying section 3224 apply, if at all, with little force. . . . Such discrimination conflicts with the principle underlying the constitutional provision directing that excises laid by Congress shall be uniform throughout the United States. It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the *special and extraordinary facts and circumstances*, section 3224 does not apply."²⁵⁴

(b) The second exception by which section 3224 has been held to be inap-

²⁵⁰*McLeod v. Receveur, Treas.*, 71 Fed. 455 (C. C. A. 7th 1896).

²⁵¹*Michigan Central R. R. v. Powell*, 201 U. S. 373 (1905).

²⁵²REV. STAT. 1875 § 3224, 26 U. S. C. A. § 154 (1928). The recent filing of over 1600 suits demanding injunctions in apparent contravention of the statute only emphasizes the confusion which has marked its checkered career. (1935) 3 U. S. LAW WEEK 45; note (1935) 49 HARV. L. REV. 109.

²⁵³284 U. S. 498 (1931).

²⁵⁴See also *Hill v. Wallace*, 259 U. S. 44 (1921). Compare *Bailey v. George*, 259 U. S. 16 (1921); *Dodge v. Osborne*, 240 U. S. 118 (1915); *Snider v. Mark*, 109 U. S. 189 (1883).

plicable by the courts relates to a case where the "tax" is held to be in fact a "penalty." *Regal Drug Company v. Wardell*²⁵⁵ and *Lipke v. Lederer*²⁵⁶ held that the "tax" imposed by Section 35 of the National Prohibition Act was in fact a "penalty" in the nature of a punishment for a criminal offense. In the *Regal* case, the collector had actually seized possession of the plaintiff's store and was proceeding to sell his stock of goods; and in the *Lipke* case, the collector had stated that he was about to levy a warrant of distress. In both cases, the Court held that an injunction against the collection of the tax was absolutely necessary to prevent irreparable injury by the utter destruction of the plaintiffs' businesses.

(9) In the field of the so-called general property tax, which supplies so large a part of the revenue of our state and local governments, it is a matter of common knowledge that the taxing authorities violate the state constitutional and statutory requirements of "uniformity" of taxation and assessment at "the actual value" of all property liable to taxation. The Supreme Court of the United States has admitted that the rule of uniform assessment "is habitually disregarded,"²⁵⁷ yet judicial relief is only rarely obtainable.²⁵⁸ Value is a matter of opinion, and there is no judicial relief against error of judgment.²⁵⁹ However, if fraud²⁶⁰ or intentional and wilful overvaluation,²⁶¹ which constitutes constructive fraud, is present, a court of equity will give relief.

There are two principal types of cases involving unequal assessment in the general property tax field. One is where certain real property is assessed in a non-uniform manner as compared with other real property; the other is where real and personal property are not assessed uniformly. Two illustrative cases will indicate the dilemma confronting the courts if they attempt to give relief. *Taylor v. Louisville and Nashville Railroad*²⁶² involved an unequal treatment of real property by the taxing authorities of the State of Tennessee. The state constitution directed that taxes should be "equal and uniform" and that "no one species of property should be taxed higher than any other of the same value." Further, a state statute provided that all property should be assessed at its "full value." All real estate, other than railway property, was habitually assessed at 75% of its real value, while railroad property was assessed at 100%. This arrangement required the railroads of the state to bear one-sixth, rather than one-eighth, of the whole state

²⁵⁵260 U. S. 386 (1922).

²⁵⁶259 U. S. 557 (1922).

²⁵⁷*Cummings v. National Bank*, 191 U. S. 163 (1879).

²⁵⁸JUDSON, TAXATION § 467.

²⁵⁹*People v. Hibernian Banking Ass'n*, 245 Ill. 522 (1910).

²⁶⁰*Pacific Postal Telegraph Cable Co. v. Dalton*, 119 Cal. 604 (1898).

²⁶¹*Cincinnati Southern Railway v. Guenther*, 19 Fed. 395 (C. C. E. D. Tenn. 1884); COOLEY, TAXATION § 1144.

²⁶²88 Fed. 350 (C. C. A. 7th 1898).

tax burden. The court, in refusing to raise the assessments of all property to meet the statutory requirements said:

"The court is placed in a dilemma from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one and secures that uniformity which was the sole end of the constitution . . . The same dilemma has been presented to other courts. They have not always taken the same horn."²⁶³

In *Mercantile National Bank v. Mayor*,²⁶⁴ personal property was assessed at its full value and real estate was assessed at not more than 60% of its real value. The taxpayer claimed that personal property should be assessed in the same manner as real property, and he, therefore, tendered 65% of the tax demanded on his personal property. The collector refused to accept anything less than the full tax, and the taxpayer brought suit to restrain the collection of the excess over the amount tendered. The court said:

"A general statutory rule has been disregarded by the assessors in the exercise, presumably, of an honest and reasonable judgment, as nothing is charged to the contrary; but their action was impartial, and with reference to the whole community. . . . It is a fact of common knowledge and discussion that a disproportionate share of the public burdens is thrown on certain kinds of property because they are visible and tangible, while others are of a nature to elude vigilance."

The effect of this decision is, in the language of a critic, to declare

". . . that the assessors may lawfully disobey the law; that in their discretion they may use a standard of valuation which the people of the state through the legislature have expressly declared that they may not use."²⁶⁵

Professor John Dickinson has pointed out that this case is significant "in that it emphasizes in an extreme form the predisposition of the courts to sustain the action of tax officials in every case."²⁶⁶ Judge Cooley, the great authority on taxation, after a review of a myriad of cases, concludes that

". . . many serious errors may be committed and many wrongs done in the exercise of the power to tax, which the parties wronged must submit to. . . . The chief protection of the citizen must at last be sought in the intelligence of public officers, and where these fail, as too often they do, the injury must frequently prove irreparable."²⁶⁷

Police Power Cases

In this field "there is, if possible, an even greater variety and uncertainty

²⁶³See JUDSON, TAXATION § 472; *Wagoner v. Loomis*, 37 Ohio St. 571 (1881); *Lowell v. County Commissioners*, 152 Mass. 372 (1890); *Central Railway v. Assessors*, 48 N. J. L. 1 (1886).

²⁶⁴172 N. Y. 35 (1902).

²⁶⁵ABBOT, JUSTICE AND THE MODERN LAW p. 221.

²⁶⁶ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW p. 274.

²⁶⁷LAW OF TAXATION § 1610.

in the decisions"²⁶⁸ as to the respective spheres of administrative finality and judicial review than in the other types of governmental power already considered. (1) The courts are in hopeless confusion as to whether administrative determination of the existence of a nuisance shall be final and conclusive. In this perplexing conflict between public welfare and private rights,²⁶⁹ the problem is aggravated further by the fact that in addition to common law nuisances, which have been recognized by a slow process of judicial decision, we have legislative nuisances and attempts by the legislature to delegate the nuisance creating and the nuisance determining power to administrative officers.²⁷⁰ Perhaps the weight of the more recent authority is in accord with the view that no decision of an administrative official will be allowed to conclude the owner upon a question of nuisance,²⁷¹ especially if the need for haste and summary action is not compelling.²⁷² It is the general rule that the legislature may delegate the abatement power to administrative officers, but in those cases where abatement is had without a previous determination by due process of law that a nuisance in fact exists, the officer is held to act at his peril.²⁷³ However, it is usually a good defense if the officer acted in good faith and with reasonable grounds for believing, even though mistakenly, that a nuisance in fact existed. But it should be noted that this formula as to whether the officer had reasonable ground for believing that his action was justified sometimes enables the jury to take an extreme view, with the result that the officer may be held liable in damages even when, to the ordinary layman, there appear to have been facts furnishing adequate reason for the officer to believe that he was justified in taking the action. In *Lowe v. Conroy*,²⁷⁴ an officer destroyed hides which were allegedly contaminated with the hide of an anthrax-infected steer. The value of the hides and the meat destroyed was \$239. The steer's blood was examined by a doctor and a state veterinarian, and both said that the steer was infected with anthrax. The jury, however, found that the steer was not infected and held the officer to be liable in damages. This case is also of interest in that it overruled the

²⁶⁸DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW p. 60.

²⁶⁹Goodnow, *Summary Abatement of Nuisances* (1902) 2 COL. L. REV. 203.

²⁷⁰*People v. Polinski*, 73 N. Y. 65 (1878); *Commonwealth v. Siston*, 189 Mass. 246 (1905).

²⁷¹*Trinity Church case*, 145 N. Y. 32 (1895); *Yates v. Milwaukee*, 10 Wall. 497 (U. S. 1871); *Hutton v. Camden*, 39 N. J. L. 122 (1876); *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1 (1893); See T. R. Powell, *Administrative Exercise of the Police Power* (1911) 24 HARV. L. REV. 339. See, *contra*, *Kennedy v. Board of Health*, 2 Pa. 366 (1845); *Green v. Mayor*, 6 Ga. 1 (1848); *City of St. Louis v. Stern*, 3 Mo. App. 48 (1876); *Metropolitan Board v. Hesiter*, 37 N. Y. 661 (1868); *Van Wormser v. Mayor*, 15 Wend. 262 (N. Y. 1836)—earlier cases wherein the courts gave administrative determinations a "judicial" finality.

²⁷²*Raymond v. Fish*, 51 Conn. 80 (1883); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320 (1909); *Brown v. Purdy*, 8 N. Y. St. Rep. 143 (1887); *Beeks v. Kickinson County*, 131 Iowa 244 (1906); *Valentine v. Englewood*, 76 N. J. L. 509 (1908).

²⁷³See Goodnow, *supra* note 269.

²⁷⁴120 Wis. 151 (1904).

doctrine of *Fath v. Koepfel*²⁷⁵ which involved an action against a meat inspector for the destruction of fish which the plaintiff claimed were not in fact unwholesome. In the *Koepfel* case the court said that the meat inspector was performing a judicial function.

“The officer exercising such a power is within the protection of the principle that a judicial officer is not responsible in an action for damages to any one for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act in rendering it, if the act was within his jurisdiction.”^{275a}

(2) The famous case of *Commonwealth v. Sisson*²⁷⁶ illustrates how an administrative agency may in the same case make and apply a rule to a concrete situation. The Fish and Game Commissioners, without a hearing, directed an order to the defendants who operated a saw mill to cease discharging sawdust into a stream and to erect a blower to dispose of the sawdust, in order to protect the fish in the Konkapot River. The court held that the order, although addressed to but one individual, was legislative in character and, therefore, no hearing was necessary. The court said:

“We do not agree that, because it is not a general regulation, it is a judicial action. . . The Board is no more required to act on sworn evidence than is the legislature itself, and no more than the legislature itself is it bound to act only after a hearing, or to give a hearing to the plaintiff when he asks for one; and its action is final, as is the action of the legislature in enacting a statute. And being legislative, it is plain that the questions of fact passed upon by the commissioners in adopting the provisions enacted by them cannot be tried over by the court. . . The practical result is that the defendants are forbidden to conduct their sawmill as they had conducted it for thirty years by a board who have not heard evidence and have refused the defendants a hearing; that the action of the board is final, and that no compensation is due them. This result may seem strange. But it is no less strange than the practical results in cases which are decided law.”

It has been pointed out that “this strained interpretation struck down at one blow not merely the right to judicial review of the administrative finding, but the very possibility of review; for in the absence of a hearing there cannot well be any finding, properly so called.”²⁷⁷

(3) The license is a common mechanism in the field of police power to regulate the practice of technical occupations. In the granting of such licenses, expert knowledge is often required and the courts are inclined to permit the administrative officers to exercise a final determination of questions of fact or mixed questions of law and fact. A typical illustration is *Granville v. Gregory*.²⁷⁸ A state board of medical examiners had refused a license to an

²⁷⁵72 Wis. 289 (1888).

^{275a}189 Mass. 246 (1905).

²⁷⁷DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW p. 61.

²⁷⁸83 Mo. 123 (1884).

applicant on the ground that the institution from which he had been graduated was not a medical college in good standing. The applicant applied to the courts to compel the board by mandamus to issue the license. The writ was denied. The court declared that if it assume revisory powers in this case "it would be palpably usurping functions conferred exclusively by law upon others." The judicial branch of the government made it clear that it did not relish the task of "wandering amid the mazes of therapeutics or bogging at the mysteries of the pharmacopoeia."²⁷⁹ At times, the rationale of the decision in this type of case seems to be conditioned in part by the form of action used by the plaintiff,²⁸⁰ and in part by the court's theory as to the nature of a license.²⁸¹

(4) In the administration of state Workmen's Compensation Acts, administrative boards have been created for the purpose of adjudicating the rights of litigants under the Acts. Although the statute is usually predicated on the jurisdictional fact theory, the courts generally refuse to determine for themselves the existence of the "jurisdictional fact," but rather limit themselves to inquiring whether there was substantial evidence upon which the board could reasonably have found that the fact existed. A typical illustration of this attitude is expressed in *Milwaukee Coke Co. v. Industrial Commission*²⁸² wherein the court declared that

"... there is evidence in the case which supports the findings of fact made by the Commission, hence it cannot be said that the board acted without or in excess of its powers, *even though this court, if trying the fact, might reach a different conclusion.* If there was substantial credible evidence supporting the findings of the Commission, the courts cannot interfere."

(5) The practical application of the jurisdictional fact theory is conditioned by means of a corollary to the separation of powers doctrine which often restricts or completely denies the availability of certain forms of action when directed against high ranking officers. The necessary effect of this doctrine makes for administrative finality. The judiciary will not interfere with executive officers in the performance of duties which are discretionary

²⁷⁹The same principle was applied in *People v. Scott*, 86 Hun. 174 (N. Y. 1894) (plumbing license); *State v. Briggs*, 45 Ore. 366 (1904) (barber license); *Illinois State Board of Health v. People*, 102 Ill. App. 614 (1902) (medical license).

²⁸⁰See *State Board v. White*, 84 Ky. 626 (1887); *State v. Adcock*, 206 Mo. 505 (1907); *State v. Prendegast*, 8 Ohio Cir. Ct. Rep. 401 (1906).

²⁸¹The older view of license as announced in *Basset v. Godschall*, 3 Wilson 121 (1770) was that an applicant has no right to a license unless the authorities grant him one, and he is, therefore, deprived of no right by their refusal. This theory is becoming less tenable as more and more occupations are brought under licensing provisions, and the possibilities of making a living in unlicensed occupations are becoming proportionately narrower.

²⁸²160 Wis. 247 (1915). See also *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686 (1915); compare *Borgnis v. Falk*, 147 Wis. 327 at 359 (1911). See also *Field v. Clark*, 143 U. S. 649 (1892).

in their nature,²⁸³ and, in a majority of jurisdictions, it has been held that the Governor is immune from judicial control in the discharge of both discretionary and ministerial duties.²⁸⁴ Although this immunity is limited in theory by the doctrine that it is applicable only to acts within the scope of executive authority,²⁸⁵ in practice it is often complete because of the vague contours of the concept of "political" duties and of "discretionary" power. Seventeen of our state courts have held that mandamus will not issue to the Governor to compel him to perform even a "ministerial" act.²⁸⁶ In *Kendall v. Stokes*,²⁸⁷ the Court, in referring to the Postmaster General, said:

"Sometimes erroneous constructions of law may lead to a final rejection of a claim in cases wherein it ought to be allowed. But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even though an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs."

(6) Some courts have been influenced to assume a power-renouncing attitude in the review of administrative action by emphasizing the specialized training and experience of the personnel of many of these new administrative agencies. An extreme illustration is the case of *Steener v. Great Northern Railway*²⁸⁸ involving a rate determination by the Minnesota Railroad and Warehouse Commission. The Supreme Court of Minnesota, after paying a tribute to the learning and ability of this commission of experts declared in deep humility:

"How is a judge, who is not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decisions of commissioners, who should have it and should act upon it. It seems to us that such a judge is not fit to act in such a matter. It is not a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question. Before a judge can act intelligently in such a matter, he must have an amount of this special knowledge and experience which it will take him years to acquire. It is not sufficient that he take his first

²⁸³*Decatur v. Paulding*, 14 Peters 497 (U. S. 1840); *Gaines v. Thompson*, 7 Wall. 347 (U. S. 1869); *Cox v. United States*, 9 Wall. 298 (U. S. 1870); *Litchfield v. Richards*, 9 Wall. 579 (U. S. 1870).

²⁸⁴12 R. C. L. 1008.

²⁸⁵*Ekern v. McGovern*, 154 Wis. 157 (1913). Quo warranto may be an effective remedy.

²⁸⁶H. Kumm, *Mandamus to the Governor* (1924) 9 MINN. L. REV. 21. Twelve states have held in the affirmative.

²⁸⁷3 Howard 87 (U. S. 1845); see *Spaulding v. Vilas*, 161 U. S. 483 (1895).

²⁸⁸72 N. W. 713 (Minn. 1897).

lessons from the partisan and perhaps perjured, experts, or so-called experts, produced by the parties at the trial."

The court, by emphasizing "the technical learning, knowledge and information" of the commission not only gave an extended breadth and vitality to the doctrine that "the court must resolve every reasonable doubt in favor of the commission's finding," but also, in effect, reduced to its nadir the possibility of utilizing the jurisdictional fact theory.

Conclusion

In conclusion, I have attempted in this article to analyze one of the most perplexing doctrines in the field of administrative law. I have traced (a) the historical development of the clash between the forces of judicial and administrative supremacy and (b) have outlined several doctrines (other than the jurisdictional fact theory) that have had the ultimate effect of contributing to administrative autonomy, although in some instances such was not their original purpose. (c) I have traced the historical development of the jurisdictional fact theory; and (d) I have attempted to show its relation to the doctrines of ultra vires and (e) liability of public officers. (f) In order that the reader, by way of background, may have a clear picture of the nature and effect of the modern jurisdictional fact theory as applied in an actual legal setting, I have presented a critique of the case of *Crowell v. Benson*. (g) I have attempted to distinguish the problem of jurisdiction as applied to courts as contrasted with administrative bodies and (h) to distinguish between "jurisdictional" and other facts. (i) There has been a discussion of legislative efforts to immunize administrative orders against judicial review in England and in America and (j) administrative attempts to immunize administrative bodies from judicial review. Finally, I have considered three factors which condition the exercise of the jurisdictional fact theory and whose presence, either singly or in combination, will at least warrant a prediction as to the general judicial trend. Those factors are: (1) the type of governmental power involved; (2) the form of action employed by the plaintiff; and (3) the type of administrative finding, whether summary, after hearing with procedural safeguards, or complicated investigations based upon expert determinations.