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# Judicial Review of Administrative Proceedings, a Functional Prospectus

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# Judicial Review of Administrative Proceedings, A Functional Prospectus‡

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(Continued from August Issue)

There are occasional instances in which an administrative body, formulating policy[78] or exercising power traditionally involving merely the common man's faculties of observation and judgment,[79] as in the assessment of taxes,[80] may be free to act without evidence. Usually, however, the right to a hearing connotes an opportunity to support one's position, so far as it depends upon matters of fact, "by proof, however informal."[81] Some judicial policing of this realm of administrative procedure is indicated by experience. Unfortunately, we have with us the administrator who refuses to listen to evidence,[82] or who will not even permit it to be offered,[83] or who denies the opposing party the right of cross-examination.[84] There can be no quarrel with the exercise of judicial power to relieve against such arbitrary conduct, even at the expense of some delay in the final effectiveness of the administrative process.

The difficult question of what rules of evidence should be applied in administrative trials has received thorough examination elsewhere. It would be presumptuous to review it in detail here. There exists a wide

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[78]Hewitt's Appeal, 76 Conn. 685, 58 A. 231 (1904) (granting liquor license); United States v. Douglass, 8 Mackey 99 (Dist. Col. 1890) (same); State v. Cooney, 102 Mont. 521, 59 P. (2d) 48 (1936) (maintenance of high school); Dodd v. Francisco, 63 N. J. 490, 53 A. 219 (Sup. Ct. 1902) (location of cemetery).

[79]Doenbecher Mfg. Co. v. Commissioner of Internal Revenue, 95 F. (2d) 296 (C. C. A. 9th, 1938) (reasonable salary).

[80]Olympia Water Works v. Gelbach, 16 Wash. 482, 48 P. 251 (1897).

[81]Per Moody, J., cited *supra* note 43.

[82]Central Ohio Lines v. Public Utilities Commission, 123 Ohio St. 221, 174 N. E. 765 (1931).

[83]Narragansett Racing Assn. v. Kiernan, 59 R. I. 90, 194 A. 692 (1937). Candor compels the admission that this fault may be found in judicial proceedings as well, necessitating a similar corrective. Smiley v. Oakland Circuit Judge, 235 Mich. 151, 209 N. W. 191 (1926); Moore v. State, 118 Ohio St. 487, 161 N. E. 532 (1928).

[84]Ott v. Board of Registration in Medicine, 276 Mass. 566, 177 N. E. 542 (1931).

variety of opinion[85] and of practice.[86] On the whole, I am inclined to the view that the most satisfactory results can be reached through judicial acceptance of the standard of "convincing evidence,"[87] such as "responsible persons are accustomed to rely [upon] in serious affairs,"[88] as the test of what these tribunals may admit and use. Necessarily, in the application of this standard, some variations in ruling will have to be made according to the character and the functions of particular administrative bodies and the nature of individual cases. However, it should not be too difficult to work out certain rules which might be made generally applicable and enforcible by judicial supervision.[89]

Unlikely to provoke dissent, I should think, is the well-established jurisdiction to examine the information-gathering expeditions of the administrators to prevent infractions of the constitutional safeguards against self-incrimination and unreasonable searches and seizures or to compel adherence to the restrictions set by statutory authority.[90] This accords with our traditional method of securing such interests. The power must be exercised with that wise restraint and vigilant apprehension of all the factors involved[91] that characterizes our best judicial technique in dealing with issues of public law,[92] but it is indispensable to our method of securing individual rights under statutes and constitu-

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[85]*See* WIGMORE, EVIDENCE, §4b (3d ed. 1940): STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE, Ch. VII (1933); Stephan, *The Extent to Which Fact Finding Boards Should Be Bound by Rules of Evidence*, 24 A. B. A. J. 630 (1938); Seymour, *The Professor Soliloquizes on Fact Finding Boards and the Rules of Evidence*, 24 A. B. A. J. 891 (1938); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

[86]*See* WIGMORE, EVIDENCE, §4c (3d ed. 1940); STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE, Chs. II-VI (1933); Ross, *Applicability of Common Law Rules of Evidence Before Workmen's Compensation Commissions*, 36 HARV. L. REV. 263 (1923). Of course, the freedom from the requirement of a hearing at all in rule-making proceedings [*see* footnote 53, *supra*] allows complete informality as to rules of evidence in such hearings as may be accorded. Opp Cotton Mills v. Administrator of Wages and Hours, 312 U. S. 126, 85 L. ed. 624, 61 S. Ct. 524 (1941); Highland Farms Dairy v. Agnew, 16 F. Supp. 575 (E. D. Va. 1936).

[87]*See* International Assn. v. National Labor Relations Board, 71 App. D. C. 175, 110 F. (2d) 29 (1939).

[88]*See* National Labor Relations Board v. Remington Rand, Inc., 94 F. (2d) 862 (C. C. A. 2d, 1938).

[89]I have made some suggestions along this line, though primarily with reference to the practice in one state, in an article entitled *Rules of Evidence in Administrative Proceedings*, 14 OKLA. B. A. J. 1934 (1943).

[90]Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 S. Ct. 115 (1908): Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 68 L. ed. 696, 44 S. Ct. 336 (1924).

[91]*See* the discussion of Jones v. Securities and Exchange Commission, 298 U. S. 1, 80 L. ed. 1015, 56 S. Ct. 654 (1936), in LANDIS, THE ADMINISTRATIVE PROCESS, 136-140 (1938) and *cf.* Securities and Exchange Commission v. Hoover, 25 F. Supp. 484 (N. D. Ill. 1938); Daugherty v. Superior Court, 23 Calif. A. (2d) 739, 74 P. (2d) 549 (1937).

[92]Newfield v. Ryan, 91 F. (2d) 700 (C. C. A. 5th. 1936), [cert. den. Ryan v. Newfield, 302 U. S. 729, 82 L. ed. 563, 58 S. Ct. 54 (1937)]; Bartlett-Frazier Co. v. Hyde, 65 F. (2d) 350 (C. C. A. 7th, 1933); [cert. den. Bartlett-Frazier Co. v. Wallace, 290 U. S. 654, 78 L. ed. 567, 54 S. Ct. 70 (1933)].

tions, a method the propriety of which, for reasons I suggest later, does not seem open for discussion in an investigation of this kind.

A question frequently before the courts has been how far the administrative boards may go in taking account of matters not in the record as a basis for their decisions. Obviously, one would feel, the tribunal is not justified in jumping to conclusions, without any supporting information.[93] Similarly, even were there no due process clauses in our constitutions, I think there can be no doubt that we should deem it essential to fair play that the commissions should be restrained from relying upon information which they have gleaned through the reports of subordinates upon *ex parte* investigations not made available to the other side,[94] or from scientific works or periodicals not called to the other's attention,[95] or from the voluminous files of the boards themselves under similar conditions.[96] The objection to such procedure is twofold: the opponent has no opportunity to refute or to explain the matter to which the administrative resorts[97] and, if it is not placed in the record, an effective judicial review of the order is precluded by the court's inability to ascertain the basis of judgment.[98] The possibilities for arbitrary edict or uninformed justice lurking in such a situation are obvious.

The points made against judicial insistence upon including this foundation material in the record are that, so far as such material consists of reports made to the administrative by parties to the proceeding, explanation or rebuttal is unnecessary since the reports should speak the truth,[99] that it is impossible to know in advance just what data will be found necessary, and that subsequent introduction and opportunity for refutation produce delay and inefficiency in the administrative process.[100]

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[93]Oklahoma Tax Commission v. First National Bank & Trust Co., 178 Okla. 260, 62 P. (2d) 1220 (1936).

[94]Farmers' Elev. Co. v. Chicago, R. I. & P. Ry., 266 Ill. 567, 107 N. E. 841 (1915); McAlester Gas & Coke Co. v. Corporation Commission, 102 Okla. 118, 227 P. 83 (1924). This tendency must be guarded against in the judiciary, also. Recent examples include Carter v. Kubler, — U. S. —, 88 L. ed. adv. op. 13, 64 S. Ct. adv. sh. 1 (1943); Bestel v. Bestel, 153 Ore. 100, 53 P. (2d) 525 (1936).

[95]Ohio Bell Tel. Co. v. Public Utilities Commission, 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724 (1937).

[96]United States v. Abilene & So. Ry., 265 U. S. 274, 68 L. ed. 1016, 44 S. Ct. 565 (1924); Oklahoma Nat. Gas Co. v. Corporation Commission, 90 Okla. 84, 216 P. 917 (1923).

[97]Farmers' Elev. Co. v. Chicago, R. I. & P. Ry., 266 Ill. 567, 107 N. E. 841 (1915).

[98]United States v. Abilene & So. Ry., 265 U. S. 274, 68 L. ed. 1016, 44 S. Ct. 565 (1924); McKay v. State Board of Medical Examiners. 103-Colo. 305, 86 P. (2d) 232 (1938); Atchison T. & S. F. Ry. v. State, 72 Okla. 271, 180 P. 849 (1919). This, of course, is inapplicable to a review afforded in an independent proceeding, not based on the record before the administrative tribunal. *See* Ohio Bell Tel. Co. v. Public Utilities Commission, *supra* note 95.

[99]*See* Hanft, *Utilities Commissions as Expert Courts*, 15 N. C. L. REV. 12, 30 (1936).

[100]*Ibid.*, 35.

These objections seem lacking in substance. Reports made in the utmost good faith may need correction or may call for explanation in the light of particular circumstances. Parties are in no sense responsible for material gathered from extrinsic sources and the opportunity for rebuttal is indispensable to assured justice. Efficient judicial review may be had only if the court has access to the stuff from which decision was formed. Important as are celerity and efficiency, they should not be achieved at the expense of essential justice and the incentive to careful administration afforded by an intelligent corrective process.[101] The cases disclose frequent resort by the commissions to these extrinsic materials. Judicial review of their action may well find one of its most useful functions in restricting so dangerous a practice.

The burden cast upon the administrative machinery by forbidding these excursions outside the record may be minimized in various ways. In many instances it should be possible to substitute written proof, often in the form of concise summaries, for the extensive presentation of oral evidence,[102] or to permit the commission's data to be set out in tentative findings with an opportunity for the submission of proof in rebuttal.[103] The problem of drawing upon information gained in other proceedings, which has given the courts so much trouble,[104] might be solved by incorporating summaries of such information in the record, accompanied by specific citations to the original sources. In special instances, the commission might be permitted to rely upon knowledge acquired in another case, closely related in time, substance and parties, simply by a reference

[101]As to the necessity of an adequate record to such corrective review, *see* Cardozo, J., in West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 79 L. ed. 761, 55 S. Ct. 316 (1935).

[102]*See* the suggestions in Gerkin, *How to Shorten Rate Procedure*, 17 PUBLIC UTILITIES FORTNIGHTLY, 177 (1936); BROWN, *Public Service Commission Procedure—A Problem and a Suggestion*, 87 U. PA. L. REV. 139, 159 (1938).

[103]*See* Hanft, *Utilities Commissions as Expert Courts*, 15 N. C. L. REV. 12, 35 (1936). *Cf.* Carter v. Kubler, — U. S. —, 88 L. ed. adv. op. 13, 64 S. Ct. adv. sh. 1 (1943); Steamboat Canal Co. v. Garson, 43 Nev. 298, 185 P. 801 (1919); Heaney v. McGoldrick, 286 N. Y. 38, 35 N. E. (2d) 641 (1941).

[104]*Cf.* City of Elizabeth v. Board of Public Utility Commissioners, 99 N. J. L. 496, 123 A. 358 (Err. & A. 1924) (commission permitted to check inventory and appraisal by experience gained in other proceedings); McCarthy v. Industrial Commission, 194 Wis. 198, 215 N. W. 824 (1927) (commission permitted to disregard expert testimony as to cause of hernia because at variance with knowledge gained from prior cases) with Johnson v. Industrial Accident Commission, 11 Calif. A. (2d) 672, 54 P. (2d) 485 (1936) (commission not permitted to override expert testimony by its own experience in hernia cases); Los Angeles & S. L. R. R. v. Public Utilities Commission, 81 Utah 286, 17 P. (2d) 287 (1932) (commission not allowed to rely on evidence as to nature of region involved in a former proceeding). In Garrity v. District of Columbia, 66 App. D. C. 256, 86 F. (2d) 207 (1936) a zoning commission's refusal to hear evidence as to the merits of a particular type of zoning on the ground that it had already "a world of testimony about that subject" was upheld, in an opinion by Stephens, J., on the ground that the commission was not "bound by the rules applicable to court hearings."

thereto.[105] A tribunal composed of technical experts should be allowed to bring their specialized learning into play by stating the conclusions to which it leads and the foundations upon which it rests.[106] In all cases, of course, there should be full disclosure to the party affected, and an opportunity to attempt a refutation if he desires. A possible exception to the duty of disclosure, suggested by the decision of the Supreme Court of the United States in *Tang Tun v. Edsell*,[107] might be allowed where the administrative tribunal resorts to matters appearing in its records tending merely to corroborate evidence already called to the attention of the party affected. However, since this would increase the difficulty of administering the rule without any very substantial advantage to the administrators, I am inclined to regard it with disfavor.

In a variety of other forms, judicial control over matters of administrative procedure has come to the fore in recent years. The requirement that the basic facts upon which administrative adjudicatory action is taken be found,[108] an invaluable aid to the performance of the judicial task of determining whether the commission has kept within the bounds set by the legislature,[109] is becoming, by judicial interpretation, one of the essential components of due process of law.[110] This seems to impose no serious burden upon the process of administration. A little care in draftsmanship will make the orders safe from attack, even in a tribunal possessed of the very commendable opinion that findings should be more

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[105]*Cf.* Pennsylvania R. R. v. United States, 40 F. (2d) 921 (W. D. Pa. 1930). But *cf.* Los Angeles & S. L. R. R. v. Public Utilities Commission, 81 Utah 286, 17 P. (2d) 287 (1932).

[106]*Cf.* McKay v. State Board of Examiners, 103 Colo. 305, 86 P. (2d) 232 (1938), holding that, in a proceeding for revocation of a physician's license for malpractice, tried by a professional board subject to judicial review by *certiorari*, there must be expert testimony as to the demands of proper practice. Young, J., said, "Obviously the reviewing court cannot be left to speculate on what was in the minds of the individual board members as constituting proper diagnosis or treatment." The language suggests the possibility of a different result had the board presented the reasons for its judgment by a statement in the record.

[107]223 U. S. 673, 56 L. ed. 606, 32 S. Ct. 359 (1912). *See* discussion in VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS, 168 (1932).

[108]Wichita R. R. & Lt. Co. v. Public Utilities Com., 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51 (1922).

[109]*Cf.* Baltimore & O. R. R. v. United States, 22 F. Supp. 533 (N. D. N. Y. 1937); Elite Dairy Products, Inc. v. Ten Eyck, 271 N. Y. 488, 3 N. E. (2d) 606 (1936); Tillotson v. City Council of Cranston, 61 R. I. 293, 200 A. 767 (1938).

[110]Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241 (1935). While the case just cited involved an exercise of the rule-making power, seems definitely inconsistent with Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159 (1935), and likely may not represent the law of today, as suggested by the note in 146 A. L. R. 209, 212 (1943), the rule for which it stands seems peculiarly fitted to proceedings involving adjudication against specific respondents. Such cases as Phelps-Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 85 L. ed. 1271, 61 S. Ct. 845 (1941), go far toward recognizing it as so essential to the proper exercise of the function of judicial review as to justify treating it as a necessary part of due process of law.

than formal recitations couched in the terms of the statute conferring authority on the commission.[111]

Another field for judicial review of administrative procedure is opened up by the decision in the first *Morgan* case.[112] Its fundamental doctrine is well expressed in the Chief Justice's terse statement that "he who decides must hear." Closely safeguarded as the opinion is by denial of any intent to forbid the conduct of inquiry and the analysis of evidence by subordinates, and leaving the door open for even the delegation of the authority to decide in a proper case,[113] it seems to establish an eminently desirable safeguard against the possibility of uninformed or ill-considered action. No doubt the scope of oversight over the hearing may be carried farther with profit, as in the concept of a right to a "fair hearing" in immigration and deportation proceedings[114] and in the insistence that all relevant evidence be considered (although not necessarily followed) in arriving at a decision.[115] Care must be observed, however, to protect this salutary supervision, insuring standards of fair conduct in the hearing, from such application as would supplant trial by the administrator with trial by the court.[116] A striking example of such unwarranted supervision seems to be afforded by a decision invalidating an award of workmen's compensation because the trier of fact, confronted with an injury not satisfactorily explained by the testimony, in his search after truth procured the expert whose evidence afforded a ground for decision.[117]

## JUDICIAL REVIEW AS TO MATTERS OF SUBSTANCE

When we turn from the exercise of review over procedural determinations of administrative tribunals to control over their decrees in respect to matters of substance, we encounter the age-old distinction between law and fact. Since the interpretation and the application of law is traditionally the task of the judges, we should concede their right to determine the legal propriety of administrative action with little question.[118] The occasion for the exercise of this supervision may arise from

[111]Missouri Broadcasting Corp. v. Federal Communications Com., 68 App. D. C. 154, 94 F. (2d) 623 (1938).

[112]Morgan v. United States, 298 U. S. 468, 80 L. ed. 1288, 56 S. Ct. 906 (1936).

[113]But consult State Tax Com. v. Katsis, 90 Utah 406, 62 P. (2d) 120, 107 A. L. R. 1477 (1936) for an improper delegation of decision.

[114]*See* VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS, 159-170 (1932).

[115]Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U. S. 329, 77 L. ed. 341, 52 S. Ct. 167 (1932).

[116]United States v. Morgan, 313 U. S. 409, 85 L. ed. 1429, 61 S. Ct. 999 (1941).

[117]Deadwyler v. Consolidated Paper Co., 260 Mich. 130, 244 N. W. 484 (1932). *Cf.* National Labor Relations Board v. Remington Rand, Inc., 94 F. (2d) 862 (C. C. A. 2d, 1938).

[118]*See* the discussion by Blatchford, J., in Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 S. Ct. 462 (1890).

a claim that the administrative order is in violation of constitutional provisions, or that it goes beyond the jurisdiction prescribed by statute for the tribunal or that it proceeds upon an erroneous view of controlling legal principles.[119]

Over review as to constitutionality we need not linger long. It is merely an application to administrative tribunals of our general theory of a government limited by constitutional provisions interpreted and applied by the courts.[120] The vices and the virtues which it displays in operation are those common to our whole system of constitutional law. While I suggested at the outset that we ought not to confine our appraisal of judicial review to the bounds prescribed by the Constitution as it is presently phrased and interpreted, I do not feel that we should open the door to what Alexander Pope called a fools' contest over the respective merits of various forms of government. Our own system presents a method of dealing with the vexing problem of adjusting the claims of individual liberty with the needs of governmental authority which is familiar, indigenous and suited to our needs.[121] We are content therewith. Of it, judicial review over administrative action with regard to its constitutionality is and should continue to be an essential part, subject only to such limitations as are applicable to the judicial process in constitutional cases generally.

Questions of law relating to "jurisdiction," that is, to the conditions precedent to the authority of the administrative tribunal to act at all, and those relating to the extent to which it may exercise its powers, may be grouped together for our purposes. These present the opportunity for one of the most useful applications of judicial review over executive boards. A few examples will illustrate the point. A workmen's compensation commission may assume jurisdiction over an employment not covered by the act.[122] A public utilities commission may attempt regulation of a calling which the legislature has not subjected to its supervision.[123] A motion picture censor may expand a statutory standard of "immorality" to include heretical economic or political views.[124] A liquor commission may interpret an authority to prescribe rules for law enforcement so broadly as to subject a social club to excessive and unwelcome intrusion by the local police.[125] A zoning board may con-

[119]*Cf.* the statement of Lamar, J., in Interstate Commerce Com. v. Union Pac. R. R., 222 U. S. 541, 56 L. ed. 308, 32 S. Ct. 108 (1912).

[120]*See* the statement by Hughes, C. J., in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 80 L. ed. 1033, 56 S. Ct. 720 (1936).

[121]"This is one of the most effective and least offensive of the means which have been devised for securing the liberties and privileges that the people have reserved, in their constitution of government, from legislative encroachment." Manning, J., in Walker v. Griffith, 60 Ala. 361 (1877).

[122]Slick v. Boyett, 160 Okla. 111, 16 P. (2d) 237 (1932).

[123]*In re* Milo Water Co., 128 Me. 531, 149 A. 299 (1930).

[124]Schuman v. Pickert, 277 Mich. 225, 269 N. W. 152 (1936).

[125]Manchester Press Club v. State Liquor Comm., 89 N. H. 442, 200 A. 407 (1938).

strue its power to permit nonconforming uses on the ground of unnecessary hardship too broadly, to the detriment of neighboring owners.[126] In cases of this sort, effective relief may be obtained through the power of the courts to review the administrative determinations of law.

The chief other function of review for mistake of law rests upon the foundation furnished by the theory that an order made without supporting evidence is erroneous in law.[127] It is a potent weapon of control over those unfortunate proceedings sporadically occurring wherein a truly arbitrary use of power is involved.[128] It is useful also as an auxiliary defense against mistaken assumptions of ungranted power.

The occasions for invoking redress upon these grounds are myriad, as even a casual examination of the books attests. It is natural that boards entrusted with the achievement of policy should seek to utilize their powers to the utmost.[129] Often untrained in the law, their members are not in the best position to arrive at an acute and unbiased decision as against those who deny their authority. Pressed with the need for prompt disposition of numerous issues, they tend naturally to entertain few doubts concerning the legal propriety of desired ends and to resolve all such incertitude in favor of what seems the expedient course.[130] This is just what, in the interest of efficient governance, they should do. But exactly because of these characteristics of the administrative action, there arises the need for an effective check in the form of a review upon questions of law. The judges, by training, by experience and by professional tradition, are fitted to correct precisely the deficiencies we have enumerated as likely to warp the administrator's estimate of his own legal power. Accustomed to weighing issues, to listening to both sides, to considering the various factors affecting any decision, and specializing in the determination of legal questions, they provide a tribunal before which the clashing claims of administration and of citizen may be well adjusted. No doubt some lost motion, some reduction in administrative efficiency, may result, but the gain in protection against the exercise of ungranted power clearly outweighs these disadvantages.

Nonetheless, there must be a discriminating wisdom in the exercise of judicial review of this sort. There is much justice in the complaint that reviewing judges often construe administrative powers with an unsympathetic bias,[131] to the detriment of the proper performance of ad-

[126]Thayer v. Board of Appeals, 114 Conn. 15, 187 A. 273. (1931).

[127]The Chicago Junction Case, 264 U. S. 252, 68 L. ed. 667, 44 S. Ct. 317 (1924).

[128]*Cf.* Narragansett Racing Assn. v. Kiernan, 59 R. I. 79, 194 A. 49 (1937).

[129]"An official or an administrative authority is almost as likely to stretch the law against an individual as is a private person concerned with his own welfare." Jennings, *Courts and Administrative Law*, 48 HARV. L. REV. 426, 454 (1936).

[130]For a late example, *see Recent Case*, 52 HARV. L. REV. 694 (1939).

[131]*See* Laski, *Judicial Review of Social Policy in England*, 39 HARV. L. REV. 832 (1926); Jennings, *Courts and Administrative Law*, 49 HARV. L. REV. 426 (1936).

ministrative duties.[132] The judge must bear in mind that the administrator has a legislative commission to enforce a desired policy and that professional nostalgia for the repudiated system of the common law[133] has no place in the exercise of judicial review. Only by free acceptance of the legislative directions as to the course to be followed, confining judicial supervision to the enforcement of the plain limitations of constitutions and statutes and to the annullment of arbitrary acts, may that supervision be made a legitimate component of modern administrative law.

Issues of fact present a different problem in court review of administrative action than do issues of law. Celerity, vigor, expert judgment, sympathetic interpretation, and all the other special values we seek to promote through the use of administrative tribunals, are subverted by throwing open the door to wholesale reconsideration of all sorts of fact issues. Despite some feeling that review of administrative findings of fact should involve as full a re-examination of the evidence as, for instance, an equity appeal,[134] I think we must approve the generally existing practice of refusing so extensive a review[135] and confining the court's sphere to deciding the "question of law" whether there is evidence sustaining the administrative finding.[136] Not only does too broad a revisory jurisdiction bethrall the administrative commissions: it overwhelms the courts.[137] The analogy to review in equity or in admiralty fails because the reviewing tribunal has no community of function, of experience, or of jurisdiction with the bodies whose determinations it is to scrutinize. Only paralysis, discrimination, and error can result from the exercise of so far-reaching a review of the facts.

More plausible is the contention that there should be an "independent judgment" by the courts "as to both law and facts" where the fact determination is decisive of issues of constitutional right.[138] The argument in its favor is nowhere better put than in the opinion by Mr. Chief

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[132]*Cf.* McFarland, *Judicial Control of the Federal Trade Commission*, 1920-1930, 47, 110 (1936); Hale, *The "Fair Value" Merry-Go-Round*, 1898-1938, 33 ILL. L. REV. 517 (1939).

[133]*See* Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). An example of this professional nostalgia appears in the complaint against commissions that they do not apply the ancient rules. *See* Boyd, *The Court System Contrasted With the Bureau System*, 24 IOWA L. REV. (Bar Association Section) 25, 28 (1938).

[134]*See* Vanderbilt, *The Bar and the Public*, 62 A. B. A. REP. 464, 470 (1937).

[135]There are a few instances, where administrative action is taken summarily and without hearing or the preservation of a record, in which, if there is to be judicial review, inevitably it must extend to all relevant facts. *See* Dickinson, *Judicial Control of Official Discretion*, 22 AM. POL. SCI. REV. 275 (1928).

[136]St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 80 L. ed. 1033, 56 S. Ct. 720 (1936).

[137]*See* McGuire, *A Government of Laws or a Government of Men*, 13 IND. L. J. 433, 447-451 (1938).

[138]Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 64 L. ed. 908, 40 S. Ct. 527 (1920). But *cf.* United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 S. Ct. 644 (1905).

Justice Hughes in the *St. Joseph Stock Yards* case.[139] He suggests to us the ease wherewith astute administrators might evade constitutional limitations by findings based upon tenuous evidence, and emphasizes the magnitude of this threat to limited government in the face of the rapid multiplication of administrative agencies. The opposite position is set forth in the concurring opinion of Mr. Justice Brandeis, which stresses the impotence, the delay, and the irresponsibility imposed on the administrative process by the review of fact issues even in matters of constitutionality and the extreme congestion of the court's dockets involved in the general exercise of such jurisdiction.

Each argument presented the claims of values essential to a proper development of our public law. Neither spoke in absolute terms. The Chief Justice sought to avoid undue interference with administrative functions by imposing a heavy burden of proof upon the complainant and by according great deference to the executive finding. Mr. Justice Brandeis wished to preserve constitutional rights against administrative subversion through the exercise of judicial review, if "the regulating body has, in reaching its conclusions, ignored established principles or incontestable facts, or been guilty of dishonesty or of other irregularity in the proceeding."[140] Hence there is little difference in the ends sought; the distinction lies chiefly in means and in emphasis. Choice is difficult when the factors are so evenly balanced. Upon the whole, there seems a slight advantage in the Brandeis approach. In its emphasis upon mistake of principle, arbitrary judgment, or insincerity as the bases for review, it seems more likely to focus attention upon the need for real grievance, discouraging the development of routine resort to the courts by every discontented party with its accompanying threat of palsy to the administration and congestion to the judiciary. It may be significant that the course of decision in the Supreme Court evinces a tendency against fully logical application of the rule laid down by Chief Justice Hughes.[141]

## THE TECHNIQUE OF REVIEW—TRIAL DE NOVO

The plethora of methods available for invoking judicial review over administrative action[142] for the most part creates no problem within

[139]St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 80 L. ed. 1033, 56 S. Ct. 720 (1936).

[140]*See* concurring opinion by Brandeis, J., in St. Joseph Stock Yards Co. v. United States, *supra*, note 125. The learned justice quotes repeatedly the phraseology of Holmes, J., in San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 S. Ct. 571 (1903) that the test is whether "it was impossible for a fair-minded board to come to the result which was reached."

[141]*E. g.*, the rule seems disregarded in Voehl v. Indemnity Ins. Co., 288 U. S. 162, 77 L. ed. 676, 53 S. Ct. 380 (1933) and Washington, Va. & Md. Coach Co. v. National Labor Relations Board, 301 U. S. 142, 81 L. ed. 965, 57 S. Ct. 648 (1937). *See also* Davis, *Emasculation of Administrative Action and Oil Proration*, 19 TEX. L. REV. 29, 58 (1940).

[142]*See* Stason, *Methods of Judicial Relief from Administrative Action*, 24 A. B. A. J. 274 (1938).

the scope of our subject. One, however, merits our consideration: Shall the review be upon the record before the administrator or shall there be a trial *de novo* before the reviewing court?

In some instances the summarily rudimentary nature of the administrative process leaves no choice. Thus where a health officer destroys property thought to be so infected as to be a source of danger to the general well-being, the want of a formal hearing and its consequent record necessitates that the issues be determined on the basis of new evidence before the court in which his action is challenged.[143] The same need occurs where the attack is upon a general regulation issued without full hearing.[144] But by the great majority of our highly developed modern tribunals, action is taken only after a formal trial, producing an elaborate record which may serve as the basis for judicial review. Except as to so-called "jurisdictional" or "constitutional" facts,[145] there is no question that this record constitutionally may be made the sole basis for review.[146] Ought it to be?

The argument in favor of *de novo* trial stresses a suppositious superiority of the record in judicial proceedings over that made before a board;[147] "the difference in security of judicial over administrative action,"[148] arising, perhaps, from the employment of common law rules of evidence[149] or from the superintending function of the judge;[150] and the ease with which "some" evidence may be contrived to support the administrative finding.[151] These factors, in the last analysis all coming down to the effectiveness with which judicial supervision may be exercised, do not seem conclusive. There is no good reason why review upon the administrative record may not be made equally efficient to that resulting from *de novo* hearing. To preserve an adequate record is the lawyer's business and he can be as diligent in it before a board as before a court.[152] Common law evidential rules do not afford the sole guarantee

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[143]True, whether the issue is as to the correctness of the officer's act, Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 A. S. R. 983 (1904), or as to his good faith, Raymond v. Fish, 51 Conn. 80 (1883).

[144]*See* Health Department v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579 (1895).

[145]Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285 (1932); Baltimore & Ohio R. R. v. United States, 298 U. S. 349, 80 L. ed. 1209, 56 S. Ct. 797 (1936).

[146]Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285 (1932).

[147]*See* Burgess, *Recent Efforts to Immunize Commission Orders Against Judicial Review*, 16 IOWA L. REV. 58, 58 (1930).

[148]Ng Fung Ho v. White, 259 U. S. 285, 66 L. ed. 943, 42 S. Ct. 492 (1922).

[149]United States v. Woo Jan, 245 U. S. 552, 62 L. ed. 466, 38 S. Ct. 207 (1918).

[150]Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285 (1932).

[151]Chicago, B. & Q. R. R. v. Osborne, 265 U. S. 14, 68 L. ed. 878, 44 S. Ct. 431 (1924).

[152]*See* Merrill, *Recent Efforts to Immunize Commission Orders Against Judicial Review: A Reply*, 16 IOWA L. REV. 62, 69 (1930).

of reliability.[153] The superintending judicial function may find application in review upon the record as effectively as in trial *de novo*.[154] Tenuous evidence, as we have seen, may be sterilized by a record so convincing as to present a clear instance of insincere decision. Hence *de novo* trial does not seem an indispensable safeguard against arbitrary acts.

Against the relatively minor benefits of the *de novo* review are to be set serious disadvantages. The double hearing wastes time, energy and money.[155] Experience shows that parties commonly withhold testimony from the administrative hearing to produce it at the judicial trial,[156] an unfair practice which renders the administrative procedure a useless farce. *De novo* trials, if commonly employed, would so clutter the judicial dockets that a thoughtful student of administrative law rightly has termed the notion of such use "fantastic."[157] Judges, moreover, do not possess those unique facilities for investigation and that specialized expertness which have been named as peculiar virtues of the administrative tribunal. *De novo* trial tends to futilize the employment of these advantageous tools. These objections apply just as strongly to the determination of issues of "jurisdictional" or "constitutional" fact as to other issues.[158] Accordingly, it is suggested that, viewing the problem in the light of governmental expediency, dissociated from existing decisions, the *de novo* trial of fact issues of any sort in the review of administrative action, taken after an adequate hearing, should be abandoned.

## CONCLUSIONS

By way of summary, it may be suggested that our survey has disclosed a most useful field for judicial review of administrative action in the oversight of procedure. The enforcement of procedural amenities offers one of the most effective means of safeguard against the perils of a possibly arbitrary bureaucracy. Similarly, judicial review in matters of law may be employed with advantage to restrain the executive tribunals within the bounds of their delegated authority and to prevent

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[153] *See* Stephan, *The Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence*, 24 A. B. A. J. 630 (1938).

[154] *E. g., see In re* Assessment of Kansas City Southern Ry., 168 Okla. 495, 33 P. (2d) 772 (1934), same case on second appeal, 175 Okla. 444, 53 P. (2d) 536 (1936).

[155] *See* Braxton, *The Virginia State Corporation Commission*, 38 AM. L. REV. 480, 491 (1904); DODD, THE ADMINISTRATION OF WORKMEN'S COMPENSATION, 370 (1936).

[156] *See* FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT, 149 (1927); 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, 24 (1931); DODD, *loc. cit., supra* note 155.

[157] McGuire, *"A Little Practical Virtue Is to Be Preferred to Theory"—Control of Administrative Responsibility*, 7 GEO. WASH. L. REV. 304, 317 (1939). *See also* FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT, 149 (1927).

[158] *See* Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determination of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932).

bizarre results based upon error or fraudulence.[159] Review upon questions of fact yields far less return in the preservation of private right in proportion to the burden imposed upon the administrative process. It should be employed sparingly, wisely, and with much caution.

And that last plea for cautious wisdom leads naturally to the thought with which I would close this discussion. The problem of the relationship between the older and the newer tribunals cannot be solved satisfactorily upon the assumption that all administrative agencies are composed of especially vicious members of the genus wolf, species big, subspecies bad. It cannot be solved upon the opposite assumption that the judges are surly dogs in the manger, petulantly guarding a jurisdiction they are unable usefully to exercise. It must be approached with a tolerant recognition of the special competencies of the respective agencies, administrative and judicial, which will assent to the exercise, by each type of tribunal, of those functions for which it is best fitted. In such a division of labor, the appropriate task of the courts is the preservation of procedural decency, including fair and honest decision, and the administration of the broad standards of substantive law which hedge about the executive domain; that of the administrators is to determine and to execute policies, within the sphere constitutionally assigned to them by the legislature, and to investigate and to decide the issues of fact incident to their application.[160] To promote this adjustment should be the aim of our administrative law.

[159]Stammer v. Board of Regents, 287 N. Y. 359, 39 N. E. (2d) 913 (1942) [affg. 262 App. Djv. 372, 29 N. Y. S. (2d) 38 (1941)] affords a timely example of the effective and politic use of judicial review for this purpose, and warns us to be slow in urging complete abdication by courts in favor of commissions.

[160]*See* the able discussion by Mr. Justice Frankfurter in Railroad Commission v. Rowan & Nichols Oil Co., 311 U. S. 570, 85 L. ed. 358, 61 S. Ct. 343 (1941).

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## Corrections

We feel that lawyers who devote a considerable amount of time to bar association committee work should have adequate public notice of that fact. We, therefore, regret that two errors have recently occurred in listing members of committees. In listing the members of the rules committee of the Colorado Supreme Court in the July issue, the name of Jean Breitenstein should have been included as a member of the committee. In listing the members of the Legal Aid committee of the Denver Bar Association in the August issue, the name of Judge Charles C. Sackmann should have been included as a member of the committee.