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ADMINISTRATIVE TRIBUNALS-JUDICIAL REVIEW OF ADMINISTRATIVE INTERPRETATIONS OF STATUTORY PROVISIONS-RECENT FEDERAL DEVELOPMENTS

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COMMENTS

ADMINISTRATIVE TRIBUNALS—JUDICIAL REVIEW OF ADMINISTRATIVE INTERPRETATIONS OF STATUTORY PROVISIONS—RECENT FEDERAL DEVELOPMENTS—The first half-century of experience with administrative tribunals demonstrated that prediction of the scope of judicial review in any particular case was impossible because so many factors entered into determination of the question.¹ Constitutional limitations began

¹Stern, "Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis," 58 HARV. L. REV. 70 (1944).

to receive less emphasis as practical necessity for according this new "fourth branch" of government a place in the broad scheme of administration of justice became more apparent.² Doubtlessly the courts felt that "supremacy of law" demanded closest scrutiny of the activities of this new governmental instrumentality, which was beginning to occupy areas traditionally thought reserved exclusively for the judiciary.³ As the courts' respect for the ability and fairness of agency personnel increased, the inquiry into the lawfulness of administrative action was more likely to be restricted.⁴ The nature of the subject matter affected by the action was often controlling.⁵ Where the administrative activity consisted of governmental largess or carrying on the actual business of government, decisions of the agencies were readily treated as final.⁶ On the other hand, where administrative activity impinged on private rights, as in regulation of business, courts were quick to review.⁷

Recent years have witnessed a revamping of judicial treatment accorded administrative action, paralleling the Supreme Court's current treatment of the exercise by Congress of powers granted under the Constitution. Instead of regarding the problems of each agency as *sui generis*, the courts have gradually evolved a policy of non-intervention, uniformly applicable to the entire field of administrative law. This attitude is best exemplified in the courts' treatment of administrative interpretations of statutes. The purpose of this comment is to examine the development of this attitude from the standpoint of the courts and of the legislature.

² The principal limitations are due process and the separation of powers doctrine. See generally, Hickey, "Administrative Finality and Due Process of Law," 36 GEO. L. J. 337 (1948); Hart, "Limits of Legislative Delegation," 221 ANN. AM. ACAD. POL. AND SOC. SCI. 87 (1942).

³ See DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, 1st ed. (1927).

⁴ "Judge Hough . . . said in effect: 'When I have before me a case on review from the Interstate Commerce Commission, almost instinctively I want to sustain their order. When I have before me a case to review of the Federal Trade Commission, almost instinctively I want to reverse it.'" Frankfurter, "Summation of the Conference," 24 A.B.A.J. 282 at 285 (1938).

⁵ McDermott, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?" 25 A.B.A.J. 453 (1939). DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, 1st ed., 67 (1927).

⁶ United States ex rel. Dunlap v. Black, 128 U.S. 40, 9 S.Ct. 12 (1888); Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 23 S.Ct. 698 (1903).

⁷ F.T.C. v. Klesner, 280 U.S. 19, 50 S.Ct. 1 (1929); F.T.C. v. Curtis Publishing Co., 260 U.S. 568, 43 S.Ct. 210 (1923). The "policing" agencies such as the N.L.R.B. encroach on private affairs to a lesser extent than the regulatory agencies, and are thus subject to less review. Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S.Ct. 881 (1941).

A. *Judicial Developments of Standards of Review.*

Statutes setting up the agencies usually contain some provision for direct judicial review. The typical provision declares that administrative findings of fact are to be conclusive when supported by substantial evidence, with independent review by the courts limited to questions of law.⁸ Implicit in the legislative mandate ordering such vitally different treatment for matters of fact, as distinguished from questions of law, is the assumption that a given issue invariably falls on one side or the other of the fact-law line of demarcation. This assumption has proved to be a choice target of criticism for legal scholars.⁹ As to whether the process of interpreting a statute and applying it to a given factual situation is a determination of "fact" or "law," the unsatisfactory conclusion is invariably that it is both.¹⁰ This accounts for attachment of the realistic label, "mixed question of law and fact."

Unfortunately, statutes providing for judicial review have never included this accommodating phrase. Consequently, courts have felt compelled to hand down opinions giving at least lip-service to the statutory proclamation that there is a dividing line. An examination of Supreme Court cases purporting to make the decisions turn upon the distinction is not illuminating except insofar as it substantiates the proposi-

⁸ For example, see Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. L. 1436 (1927), 33 U.S.C., §921 (1946); Federal Trade Comm. Act, 52 Stat. L. 113 (1938), 15 U.S.C., §45 (1946); Federal Administrative Procedure Act, 60 Stat. L. 243 (1946), 5 U.S.C., § 1009 (1946); cf. Veterans' Administration (Pensions, Veterans' Relief, etc.), 48 Stat. L. 9 (1933), 38 U.S.C., § 705 (1946).

⁹ Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 (1944); Stern, "Review of Findings of Administrators, Judges, and Juries," 58 HARV. L. REV. 70 (1944); Isaacs, "The Law and the Facts," 22 COL. L. REV. 1 (1922). A typical rationalization of the cases, in non-judicial terms, is the assertion, "The crux of the distinction is whether the decision to be made can stand as a rule or standard generally applicable in the future, or whether the given case is so unique that from its determination no such general rule or standard can be evolved." Brown, "Fact and Law in Judicial Review," 56 HARV. L. REV. 899 at 911 (1943).

¹⁰ At the point where an answer to a given question can be determined only by reference to a rule prescribed by statute, the determination obviously becomes one of law, at least in some degree. Brown, "Fact and Law in Judicial Review," 56 HARV. L. REV. 899 (1943). ". . . [T]he interpretation of statutes is ordinarily referred to as a process of a legal nature and not mere fact finding. An error in interpretation is usually spoken of as an error of law. But where do we stop *interpreting* the statute (i.e., finding the meaning of the written law), and commence *application* of the statute (i.e., determining whether or not the facts in the given case fall within the statute)?" STASON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS, 2d ed., 655, n. 11 (1947).

tion that the distinction is artificial.¹¹ In recent years the Court itself has freely conceded that the line cannot be drawn with certainty.¹² Moreover, those viewing the judicial process from without have simply concluded that questions which a court does not wish to review are deemed matters of fact, whereas those which it desires to review are called questions of law.¹³

The past decade has witnessed a change in the inner workings of the judicial process on this question. Instead of couching the decisions in terms of "law" or "fact," there has been a tendency not to consider either as a criterion for review, but rather to place the major emphasis on the relative ability, as between judges and administrators, to decide the particular issue. Presumably the ultimate aim is to have judicial review only of those matters as to which the courts can make a superior contribution.¹⁴ Any other test either fetters the administrative system or leaves matters to an agency which can better be decided elsewhere.

The starting point of this change was *Gray v. Powell*,¹⁵ which presented the issue whether the companies involved were "producers" of coal so as to obtain exemption from coverage by the Bituminous Coal Act of 1937.¹⁶ In upholding the administrative determination that the

¹¹ Administrative interpretations of the following statutory language have been held sufficiently "factual" to preclude independent review: *Seaboard Air Line Ry. Co. v. United States*, 254 U.S. 57, 41 S.Ct. 24 (1920) (likeness of contemporary transportation services rendered under substantially similar circumstances and conditions); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 59 S.Ct. 754 (1939) (whether one company was "controlled" by another); *Skidmore v. Swift*, 323 U.S. 134, 65 S.Ct. 161 (1944) (whether time spent on employer's premises, or within hailing distance, by fireguards subject to call was "working time"); *Western Paper Makers' Chemical Co. v. United States*, 271 U.S. 268, 46 S.Ct. 500 (1926) (whether a rate is "unreasonable" or "discriminatory"); *L. T. Barringer Co. v. United States*, 319 U.S. 1, 63 S.Ct. 967 (1943) (whether a difference in rates constitutes "unjust discrimination").

These questions have been said to be matters of law: *I.C.C. v. Railway Labor Ass'n*, 315 U.S. 373, 62 S.Ct. 717 (1942) (whether, in authorizing abandonment of a railway line, the I.C.C. may attach conditions for the benefit of employees displaced by the abandonment); *United States v. Chicago North Shore R. Co.*, 288 U.S. 1, 53 S.Ct. 245 (1933) (whether defendant is an "inter-urban electric railway"); *Brown Lumber Co. v. L. and N. R. Co.*, 299 U.S. 393, 57 S.Ct. 265 (1937) (whether a prescribed formula should be applied to certain shipments on the ground that there was "no published through rates . . . in effect from point of origin to destination").

¹² *Baumgartner v. United States*, 322 U.S. 665, 64 S.Ct. 1240 (1944); *United States v. Ruzicka*, 329 U.S. 287, 67 S.Ct. 207 (1946).

¹³ DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW*, 1st ed., p. 55 (1927); Landis, "Administrative Policies and the Courts," 47 *YALE L. J.* 519 (1938).

¹⁴ Merrill, "Judicial Review of Administrative Proceedings, A Functional Prospectus," 23 *NEB. L. REV.* 56 (1944); Hamilton and Braden, "The Special Competence of the Supreme Court," 50 *YALE L.J.* 1319 (1941); McDermott, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?" 25 *A.B.A.J.* 453 (1939).

¹⁵ 314 U.S. 402, 62 S.Ct. 326 (1941).

¹⁶ 50 Stat. L. 72 (1937), 15 U.S.C., § 828 (1946).

exemption did not apply, the Court reasoned that since Congress did not define the term "producer" more explicitly itself, the legislators felt the experience of an enlightened agency could make a better determination. Except for enforcing requirements of procedural due process, the court's reviewing function was said to be performed fully once it determined the agency applied the statute in "a just and reasoned manner."¹⁷ It remained for later cases to point out what the Court meant by this phrase.

It is here that *National Labor Relations Board v. Hearst Publications, Inc.*,¹⁸ becomes a case of extraordinary importance. The N.L.R.B. had found that newsboys distributing papers on city streets were "employees" under the National Labor Relations Act.¹⁹ In reversing the circuit court of appeals and upholding the board's determination, the Court echoed statements made in *Gray v. Powell* concerning deference to administrative expertness, particularly where Congress intimated that broad economic factors were to enter into determination of the act's applicability. The Court then stated that in cases involving the application of a broad statutory term in a proceeding in which the agency administering the statute must necessarily interpret it, the agency's determination "is to be accepted if it has 'warrant in the record' and a reasonable basis in the law."²⁰ The only cases relied on by the Court for this proposition are those in which the Court had spoken of the issues as factual. In such a background the statement would startle no one. But, as in *Gray v. Powell*, the dissenting opinion points out that the process of interpreting a statute had always been regarded as a matter of law. This new method of avoiding independent examination, without labelling the question as one of "fact" or "law," purports to be a test of "reasonableness." The theory that "law" as set forth in a statute has but one meaning is discarded. Instead, it is freely admitted that a given statutory term may be sus-

¹⁷ 314 U.S. 402 at 411. Justice Roberts, dissenting, took the majority to task for allowing the agency to work out aims which the Legislature might have intended but failed to express. If there was error in the case it was one of statutory interpretation, ". . . under all relevant authorities [it] is subject to court review. . . . This court obviously fails in performing its duty and abdicates its function as a court of review if it accepts, as the opinion seems to do, the Director's definition of 'producer' and then proceeds to accommodate the meaning of related provisions to the predetermined definition. So to do is a complete reversal of the normal and usual method of construing a statute." 314 U.S. 402 at 418, 420, 421.

¹⁸ 322 U.S. 111, 64 S.Ct. 851 (1944); cf. *United States v. Amer. Trucking Assoc., Inc.*, 310 U.S. 534 at 544, 60 S.Ct. 1059 (1940), where Justice Reed states, "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." See also *Niagara Falls Power Co. v. F.P.C.*, (C.C.A. 2d, 1943) 137 F. (2d) 787; *Duquesne Warehouse Co. v. Railroad Retirement Bd.*, (C.C.A. 2d, 1945) 148 F. (2d) 473.

¹⁹ 49 Stat. L. 450 (1935), 29 U.S.C., §152 (1946).

²⁰ 322 U.S. 111 at 131, 64 S.Ct. 851 (1944).

ceptible of several interpretations. To the extent that they are all reasonable, the choice of the agency must prevail.²¹ Judicial review extends only far enough to determine the question of reasonableness.

As might have been predicted, the Court finally began to apply the doctrine in cases where it expressly admitted the problem was legal. *Cardillo v. Liberty Mutual Co.*²² sustained a compensation award under the District of Columbia Workmen's Compensation Act²³ where, on undisputed facts, the issue was "whether an injury arose out of and in course of employment. . . ." Even if the opposite inference were thought to be more reasonable than the one chosen by the administrative tribunal, or even if that chosen by the administrator were "factually questionable,"²⁴ the Court held that it could not substitute its own view for that of the agency. Even though the issue be considered "more legal than factual,"²⁵ it was enough that the Court found the agency interpretation not "*forbidden*" by the law.²⁶ This indicates that the Court may be withdrawing even from the limited scope of review suggested in the *Hearst* case. Instead of looking to see whether the agency has chosen a reason-

²¹ The *Hearst* case seems to be an actual decision on this point. In *Gray v. Powell* the Court seemed to agree with the agency's interpretation. Thus the assertion that any reasonable interpretation by the agency would satisfy the Court could be passed off as dictum. Supporting this view, at least indirectly, is the citation by Justice Douglas in *Billings v. Truesdell*, 321 U.S. 542 at 553, 64 S.Ct. 737 (1944), of *Gray v. Powell* as standing for the proposition that administrative interpretations are entitled merely to "persuasive weight." However, that the statement was not made inadvisedly is seen in subsequent decisions. For example, in applying the *Hearst* doctrine to a case involving the interpretation of the phrase, "active progress," *Unemployment Comm. v. Aragon*, 329 U.S. 143, 67 S.Ct. 245 (1946), Chief Justice Vinson asserted at p. 153; "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Cf. the opinion written by Chief Justice, then Judge, Vinson in *Railroad Retirement Board v. Bates*, (App. D.C., 1942) 126 F. (2d) 642. See also Justice Rutledge's concurring opinion in *Bd. of Governors v. Agnew*, 329 U.S. 441, 67 S.Ct. 411 (1947); *L. Gillarde Co. v. Joseph Martinelli and Co., Inc.*, (C.C.A. 1st, 1948) 169 F. (2d) 60; *O'Loughlin v. Parker*, (C.C.A. 4th, 1947) 163 F. (2d) 1011.

The *Hearst* doctrine should not be confused with the conventional attempt to relate the administrative interpretation to a narrow concept of legislative intent by looking to see whether the legislature has re-enacted the statute while a particular administrative interpretation was being used, whether long-continued legislative silence indicates approval of the administrative interpretation, etc. In many instances this approach really negatives the *Hearst* rationale and is based on the premise that there is only one allowable interpretation. See generally, ten Broek, "Interpretative Administrative Action and the Lawmaker's Will," 20 *ORE. L. REV.* 206 (1941), "Supreme Court Evaluation of Administrative Determinations of Law," 56 *HARV. L. REV.* 100 (1942).

²² 330 U.S. 469, 67 S.Ct. 801 (1947).

²³ 45 Stat. L. 600 (1928), D.C. Code, §36 (1940).

²⁴ 330 U.S. 469 at 477.

²⁵ *Id.* at 478.

²⁶ *Id.* at 478 (italics supplied).

able interpretation, the Court has almost created a presumption in the agency's favor.

Subsequent cases have been consistent with the *Hearst* doctrine in limiting it to the factors there relied on by the Court in its retreat from independent review. In order for the administrative interpretation to stand: (1) it must be found to result from expertness peculiar to the agency; and (2) it must not be palpably unreasonable. If the agency manifestly reaches its interpretation by relying on judicial precedents rather than on its own superior ability to appraise the "policy" factors involved, the Court will readily review the issues independently.²⁷ Likewise, if the agency attaches a peculiar connotation to a statutory term thought by the Court to have a well understood meaning, the agency's interpretation will not be accepted.²⁸

B. *Legislative Treatment: The Federal Administrative Procedure Act*

The problem of confining administrative action within the limits set out by the legislature has for years been of primary concern to the American Bar Association. The Federal Administrative Procedure Act²⁹ is largely the handiwork of this organization. Section 10e of the act states, "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, [and] interpret . . . statutory provisions. . . ."³⁰ There is little doubt that the association hoped

²⁷ *Conn. Light and Power Co. v. F.P.C.*, 324 U.S. 515, 65 S.Ct. 749 (1945). In his dissenting opinion Justice Murphy accuses the majority of remanding the case chiefly because the commission cited two Supreme Court cases in a footnote supporting its interpretation of the statute. He further suggests that the agency will be able to satisfy the majority simply by removing the footnote. This is not the first helpful hint Justice Murphy has given an agency; see *N.L.R.B. v. Va. Elec. and Power Co.*, 314 U.S. 469, 62 S.Ct. 344 (1941). See also *Va. Elec. and Power Co. v. N.L.R.B.*, (C.C.A. 4th, 1942) 132 F. (2d) 390; *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 66 S.Ct. 637 (1946); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454 (1943); *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575 (1947). *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 66 S.Ct. 1105 (1946), announces an additional limitation by refusing to apply the *Hearst* doctrine to administrative interpretations not made in adversary proceedings.

²⁸ The word "wages" is such a term. *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 66 S.Ct. 637 (1946); see also *I.C.C. v. Railway Labor Ass'n.*, 315 U.S. 373, 62 S.Ct. 717 (1942); *Norton v. Warner*, 321 U.S. 565, 64 S.Ct. 747 (1944); *Brown Lumber Co. v. Louisville & Nashville R. Co.*, 299 U.S. 393, 57 S.Ct. 265 (1937). Where a change in a long-continued agency interpretation will work substantial hardship, the new interpretation will not be accorded great weight. *United States v. North Shore R. Co.*, 288 U.S. 1, 53 S.Ct. 245 (1933). This is probably grounded on its unreasonableness.

²⁹ 60 Stat. L. 237 at 243 (1946), 5 U.S.C., §§1001 et seq. (1946).

³⁰ *Id.*, §10e.

these words would be construed literally.³¹ The plain meaning seems to order courts to exercise independent judgment in deciding questions of law and statutory interpretation, thus indicating a legislative rejection of the *Hearst* case.

Whether the section will have the desired effect is debatable. Both the commentators³² and the cases already reaching the lower federal courts³³ are in discord as to whether the section is merely declaratory of existing law or creates new law.

If the courts desire, they can easily evade the spirit of the provision. In the first place, the section is not applicable where "agency action is by law committed to agency discretion."³⁴ A court may avoid independent review by saying that Congress has called for discretionary action on the part of the administrator in construing a particular statutory term. This was, in large part, the rationale of *Gray v. Powell*.³⁵ Within the permissible bounds of the discretion thought by the Court to be delegated to the agency, the agency does not merely interpret the law, but rather makes the law. In such cases, Congress has asked for administrative judgment on the matter, and the Court, in deferring to "a sensible exercise of judgment"³⁶ on the part of the agency, is merely allowing the legislative will to be carried out. Secondly, the courts may indirectly reject the mandate of section 10e as an undue interference with what the courts conceive to be their own private affairs. Conceding that the right to judicial review

³¹ Dickinson, "The Judicial Review Provisions of the Federal Administrative Procedure Act (Section 10) Background and Effect," N.Y.U. INST. PROCEEDINGS 546 (1947). See also S. REP. 752, 79th Cong. 1st sess., p. 28 (1945).

³² Dickinson, "Judicial Review Provisions of the Federal Administrative Procedure Act (Section 10) Background and Effect," N.Y.U. INST. PROCEEDINGS (1947); Hinman, "Effect of the Administrative Procedure Act on Judicial Review of Administrative Action," 20 ROCKY MOUNT. L. REV. 267 (1948); Shine, "Administrative Procedure Act: Judicial Review 'Hotchpot?'" 36 GEO. L.J. 16 (1947).

³³ *Kirkland v. Atlantic Coast Line R. Co.*, (App. D.C., 1948) 167 F. (2d) 529; *United States ex rel. Trinler v. Carusi*, (C.C.A. 3rd, 1948) 166 F. (2d) 457; *United States ex rel. Cammarata v. Miller*, (D.C. N.Y. 1948) 79 F. Supp. 643; (*Unger v. United States*, (D.C. Ill. 1948) 79 F. Supp. 281; *Snyder v. Buck*, (D.C. D.C. 1948) 75 F. Supp. 902; *Olin Industries v. N.L.R.B.*, (D.C. Mass. 1947) 72 F. Supp. 225. None of these cases involved the point here under discussion, but the language in all is clearly applicable to §10 in its entirety.

³⁴ F.A.P.A., supra, note 29, § 10.

³⁵ 314 U.S. 402 at 411, 412, 62 S.Ct. 326 (1941): "Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other."

³⁶ *Id.* at 413.

may be greatly affected by statutes,³⁷ once the right is accorded, the scope is largely up to the court. Whether or not it chooses to exercise its judgment independently on a complex issue may be a matter for the court, not the legislature, to decide. After a decade of working out a policy of deference to administrative reasonableness, the Supreme Court may be reluctant to change its mind.

Assuming that a given problem should be decided by the body most fit to make the decision, the real controversy is whether the judiciary or the administrative is that body.³⁸ Although the current retreat from independent judicial examination may be nothing more than a recognition of the assertion, "Courts are not the only agency of government that must be assumed to have capacity to govern,"³⁹ it seems likely that, in the end, judicial prestige can only suffer.

Moreover, very real dangers may exist in allowing administrators the final word on questions of interpretation. There is always the possibility that those in high places of administrative responsibility will so magnify their importance and powers as to exceed the authority granted and even the general policy laid out by the legislature.⁴⁰ Especially where this self-inflation on the part of several agencies may lead to an attempted overlapping of jurisdiction among the agencies themselves, it seems obvious that an outsider should be referee. Another danger usually thought to be inherent in allowing administrative finality on questions of statutory interpretation is that government may thus degenerate into one of men rather than remaining one of law.⁴¹ The fear

³⁷ Even on this point the Court has recently been astute to find methods of avoiding the express legislative mandate. See *Chicago & Southern Air Lines v. Waterman Corp.*, 333 U.S. 103, 68 S.Ct. 431 (1948); *Ludecke v. Watkins*, 335 U.S. 160, 68 S.Ct. 1429 (1948); *Switchmen's Union v. Nat'l. Mediation Bd.*, 320 U.S. 297, 64 S.Ct. 95 (1943).

³⁸ Hamilton and Braden, "The Special Competence of the Supreme Court," 50 *YALE L.J.* 1319 (1941); Davis, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?" 25 *A.B.A.J.* 770 (1939); DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW*, 1st ed., 124, 234 (1927).

³⁹ Chief Justice Stone, dissenting in *United States v. Butler*, 297 U.S. 1 at 87, 56 S.Ct. 312 (1936).

⁴⁰ *So. Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 62 S.Ct. 886 (1942).

⁴¹ Dean Pound has pointed out the dangerous rationalization in many quarters which defines, as law, everything done by administrative agencies. "What they do is law because they do it. . . . Instead of our fundamental doctrine that government is to be carried on according to law we are told that what the government does is law." Pound, "Administrative Agencies and the Law," 68 *N.J. L.J.* 165 at 165 and 177 (1945). Compare the Hearst doctrine with the principle laid down by Justice Story in *United States v. Dickson*, 15 *Pet.* (40 U.S.) 141 at 162 (1841) ". . . it is not to be forgotten that ours is a government of laws, and not of men, and that the judicial department has imposed upon it by the Constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it."

is perhaps well founded, but all too often it rests upon the bland assumption that only courts can, and will, decide questions according to law.

One commentator suggests that the *Hearst* doctrine accomplishes little of affirmative value that could not be achieved by the conventional rule that courts, in exercise of their independent judgments on problems of statutory construction, will attribute great weight to administrative interpretations.⁴² At the same time, he believes it may lead to destruction of traditional safeguards inherent in the concept of judicial review of administrative action.⁴³ However, at least to the extent that the troublesome "mixed questions of law and fact" are now treated like questions of fact, thus allowing administrative action whenever "reasonable," the doctrine is perhaps excusable. The courts cannot long be expected to attach labels which everyone else agrees are artificial. On the other hand, the net effect is undeniably another step towards defining "law" as "whatever the administrators do."⁴⁴ It is not surprising that many persons disapprove such a step.

L. B. Lea, S. Ed.

⁴² Benjamin, "Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals," 48 COL. L. REV. 1 (1948).

⁴³ *Id.* at 14.

⁴⁴ Pound, "Administrative Agencies and the Law," 68 N.J.L.J. 165 (1945).