

PART FIVE

JUDICIAL REVIEW

CHAPTER 16

Availability and General Functions of Judicial Review

FOR a long time, it was believed by many that the courts should exercise a general superintending control over the actions of administrative agencies, and that the processes of judicial review should be relied on to correct any errors of administration. For various reasons, this has proved impractical, and it has become generally recognized that the function of the courts, in reviewing administrative determinations, must be for the most part limited to such matters as (1) checking excessive assumptions of power by the executive; (2) speaking the final word on important questions of statutory interpretation; (3) requiring fair procedure in administrative action; and (4) invalidating arbitrary or capricious administrative action. While the scope and effectiveness of judicial review vary widely in different case situations, so as to preclude the drawing of any categorical conclusions as to the purposes it may properly serve, yet the general trend of court decisions (except in cases where a statute prescribes a broad review) is in the direction of reducing the scope of review.

1. Practical Difficulties Limiting Effectiveness of Judicial Review

There are many purely practical considerations which limit the availability of judicial review as a general corrective for allegedly erroneous administrative action. In the first place, the number of administrative adjudications is so great as to preclude the possibility of court review in more than a small percentage of the cases decided. In the vast majority

of cases, the administrative determination must be the final one. Further, the expense incident to perfecting an appeal and obtaining judicial review is such that in many cases the parties cannot afford to take the case into court.

In certain types of cases, the delay involved in judicial review is a determining factor. Business transactions cannot always await the final outcome of time-consuming appellate procedures. In the fields of trade and finance, the situation which gave rise to the administrative order will often have been so changed during the course of six months or a year that the questions involved would have become moot before the court could pass judgment on the case. Then, too, the effect of administrative action cannot always be erased by a subsequent judicial reversal of the agency's determination. A stop order by the Securities and Exchange Commission, for example, or even a threat that such an order might be issued, effectively kills a proposed offering of securities; and a subsequent judicial determination that the order was improperly entered would never resurrect the deal.

Perhaps most important of the practical limitations on judicial review as a corrective device is the plain fact that the minutiae of a case cannot ordinarily be brought to the attention of the reviewing court. The records are so long, the factual situations so complex and technical, and the time available for argument so short, that it is impossible for the reviewing court to get more than the high lights of the questions actually fought out before the administrative agency. The details which perhaps should be controlling of the disposition of the particular case may be lost to sight. Slugging in the clinches may escape the referee's eye. The reviewing court often cannot obtain the intimate knowledge of the case which is requisite to fully informed consideration and judgment. Of course, the conclusive effect given to most of the

findings which have a factual aspect contributes to this difficulty. The reviewing court must consider the case in the light of the broad and general factual findings made by the agency, and these often tend to transform a case from a concrete practical situation to an abstract legalistic problem which does not reflect the hard realities involved.

2. Restraints on Judicial Action

(a) *Judicial self-restraint.* The doctrine that courts and agencies are to be regarded as co-ordinate instrumentalities of justice, sharing joint responsibilities to attain the ends sought by the legislature in passing a statute,¹ has had important effects in determining the availability and functions of judicial review.² It is fundamentally the attitude of the courts, rather than the provisions of statutes, which determines the actual scope of judicial review; and as both federal and state courts have come to grant increased respect to administrative determinations, the extent of review has been narrowed.

This tendency has had many repercussions. It can be seen in the increasing frequency with which courts, after holding an original determination invalid, remand the case for further consideration by the agency, rather than making a final decision.³ It can be seen in the tendency to treat as issues of fact what might well be considered as issues of law.⁴ It can be seen in suggestions that in some cases judicial review

¹ Cf., *United States v. Morgan*, 307 U. S. 183, 59 S. Ct. 795 (1939).

² Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 174; Landis, "Administrative Policies and the Courts," 47 *YALE L. J.* 519 (1938); Merrill, "Judicial Review of Administrative Proceedings, A Functional Prospectus," 23 *NEB. L. REV.* 56 (1944).

³ E.g., *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215 (1944).

⁴ E.g., *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 65 S. Ct. 829 (1945); *Gray v. Powell*, 314 U. S. 402, 62 S. Ct. 326 (1941).

should not be granted except as required by legislative mandate.⁵

There has developed, in short, a judicial disinclination to substitute the judgment of judges for the discretion of administrators. This has gone far to reduce the availability and limit the functions of judicial review.

(b) *Constitutional limitations.* Legislative attempts to provide extensive judicial review of administrative determinations have sometimes run afoul of the doctrine prohibiting courts from exercising nonjudicial powers. Particularly in the federal courts, there has been a consistent refusal to review what are deemed "administrative" questions.

One of the leading cases, illustrative of the problem, is *Federal Radio Commission v. General Electric Company*,⁶ where the matter involved was an administrative ruling reducing the permissible hours of service of a radio station. The lower courts, in accordance with the provisions of the applicable statute, revised the administrative order; but when review was sought in the Supreme Court, that court dismissed the writ of certiorari on the grounds that the question was purely administrative or legislative, and that thus no case or controversy within the judiciary article of the Constitution was presented. Somewhat similar rulings have been made as to review of certain issues in rate-making cases⁷ and trademark cases.⁸

But this doctrine does not, of course, bar judicial review of such questions as the "reasonableness" of an administrative order or whether it is "in conformity with law."⁹ The doc-

⁵ E.g., *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95 (1943).

⁶ 281 U. S. 464, 50 S. Ct. 389 (1930).

⁷ *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 445 (1923).

⁸ *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 47 S. Ct. 284 (1927).

⁹ *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 53 S. Ct. 627 (1933); *Public Service Commission of Puerto Rico v. Havemeyer*, 296 U. S. 506, 56 S. Ct. 360 (1936).

trine proscribes review only in those cases where the court is asked to substitute its judgment for the discretion of an administrative agency on a question which is not to be settled by deductive legalistic reasoning.

Nor does the doctrine apply to the so-called federal legislative courts. Such bodies as the territorial courts, the Court of Claims and the Tax Court may be vested with some administrative powers.¹⁰ Similarly, the courts of the District of Columbia may be required to discharge administrative duties.¹¹

While appellate state courts have often refused to review the decisions of administrative agencies where only administrative questions were involved,¹² nevertheless the state courts have been less strict in their insistence that certain types of administrative determinations are nonreviewable. In the state courts, judicial review of rate-fixing proceedings, determinations granting or denying licenses to operate common carriers, and even tax assessments, has not uncommonly been permitted. The distinction between what will be reviewed, and what not, is largely historical; where a particular state court has long exercised its powers in a particular type of case, the issues involved, even though not strictly legalistic, are deemed "subject for judicial determination,"¹³ and the court will continue to decide such issues, even though from a purely logical viewpoint they might be deemed administrative in character.

3. Constitutional Right of Review

The decreasing significance of judicial review in the field of administrative law is nowhere better illustrated than in the

¹⁰ *Williams v. United States*, 289 U. S. 553, 53 S. Ct. 751 (1933); *American Ins. Co. v. Canter*, 1 Pet. (26 U. S.) 511 (1828).

¹¹ *O'Donoghue v. United States*, 289 U. S. 516, 53 S. Ct. 740 (1933).

¹² E.g., *Hodges v. Public Service Commission*, 110 W. Va. 649, 159 S. E. 834 (1931).

¹³ *Murray's Lessee et al. v. Hoboken Land & Improvement Co.*, 18 How. (59 U. S.) 272, 284 (1855).

deterioration of the doctrines recognizing a constitutional right to obtain judicial review on certain types of issues. It has commonly been supposed that there existed an immutable right to obtain judicial review on questions of law, questions of jurisdictional fact, and questions of constitutional fact. The letter of the rule perhaps still stands; but its substance has been depleted to the extent that the rule is deprived of most of the significance long attributed to it.

(a) *Issues of law.* The commonplace that final decision on questions of law must be reserved for the courts traces back principally to the decision in *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*,¹⁴ holding invalid a state statute providing that an administrative determination as to the reasonableness of railroad rates should be final and not subject to judicial review. Such issue, the court said, was "eminently a question for judicial investigation." While the court was undoubtedly influenced by the apparent unreasonableness of the whole statutory scheme, under which there was no requirement of hearing and no provision for safeguarding private rights,¹⁵ and while therefore the decision does not really foreclose the question as to the permissibility of granting administrative agencies power to make final and nonreviewable determinations of legal issues, nevertheless it has commonly been supposed that the decision held exactly that.

It is undoubtedly true that the power of final decision on judicial matters involving private right cannot constitutionally be taken away from the courts; but this does not mean that the courts will review every such issue of law involved in an administrative determination.

Many types of administrative determination involving issues of statutory construction or other legalistic inquiries do

¹⁴ 134 U. S. 418, 458, 10 S. Ct. 462, 702 (1890). For a more modern view on the question as to the constitutionality of providing for administrative finality on questions of law, see comment: 26 CAL. L. REV. 683 (1938).

¹⁵ See Freund, THE POLICE POWER (1904) § 381.

not determine matters of absolute private right, but involve rather the granting or denial of some privilege. In such cases, it seems that the legislature may grant to administrative agencies the power to decide with finality issues of law.¹⁶ In this way, a variety of important legal issues may be removed from the sphere of judicial decision.

But far more significant, so far as concerns the extent of participation by the courts in matters committed originally to administrative decision, is the judicial doctrine that as a matter of comity or convenience, the courts will not concern themselves with every asserted error of law¹⁷ on the part of the agencies. It is not so much a matter of denial of the power of review, but rather a reluctance to exercise it. The administrative determination will be accepted, without close scrutiny, if it has "a reasonable basis in law."¹⁸ The courts hesitate to assert and exercise their power of judicial review, where the legislature has not expressly so required or authorized, unless the "type of problem involved and the history of the statute in question" indicate that judicial review should be supplied.¹⁹ In short, the courts will concern themselves only with the vital, fundamental questions of law involved in administrative determinations, and will often decline to review other issues which, although perhaps controlling of the result in the particular case, are not thought to have broad interest and significance.

Another path which has led to the diminution of effective judicial review has been by way of calling issues of fact what might with equal logic be deemed matters of law. The classic comment of Dickinson, pointing out that there is no fixed

¹⁶ *Van Horne v. Hines* (App. D. C. 1941), 122 F. (2d) 207; *Nolde & Horst Co. v. Helvering* (App. D. C. 1941), 122 F. (2d) 41.

¹⁷ *Dobson v. Commissioner of Internal Revenue*, 321 U. S. 231, 64 S. Ct. 495 (1944).

¹⁸ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 131, 64 S. Ct. 851 (1944).

¹⁹ *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95 (1943).

distinction between matters of fact and law, but that "The knife of policy alone effects an artificial cleavage,"²⁰ has been echoed by the Supreme Court.²¹ The general policy of judicial self-restraint has increasingly led the courts to characterize as issues of fact, and hence nonreviewable, issues which with equal logic, could have been deemed issues of law, and reviewable,²² had the courts desired to review them. Thus, questions as to the meaning of the term "employee," or the "appropriateness" of a formula employed in rate-fixing proceedings, are treated as presenting issues of fact.²³ Many issues of law, masquerading as matters of fact, thus escape judicial review.

While the power of the courts to review and settle issues of law must of course remain, yet the growing deference paid to administrative determinations has much diminished the extensiveness with which appellate courts probe into decisions which could be said quite properly to involve fundamentally issues of law.²⁴

The provisions of Section 10 (e) of the Federal Administrative Procedure Act of 1946 may have some effect to enlarge the scope of review of federal agency determinations, where the error alleged is predicated on what can fairly be termed a question of law; but it would appear that this statute does not deprive the courts of continuing to exercise judicial

²⁰ John Dickinson, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 55; and see Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 *HARV. L. REV.* 753 (1944); Brown, "Fact and Law in Judicial Review," 56 *HARV. L. REV.* 899 (1943); Isaacs, "The Law and the Facts," 22 *COL. L. REV.* 1 (1922); Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis," 58 *HARV. L. REV.* 70 (1944).

²¹ *Baumgartner v. United States*, 322 U. S. 665, 670, 64 S. Ct. 1240 (1944).

²² *Cf.*, Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 347-349.

²³ *Colorado Interstate Gas Co. v. Federal Power Commission et al.*, 324 U. S. 581, 65 S. Ct. 829 (1945); *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

²⁴ *Cf.*, *Skidmore et al. v. Swift & Co.*, 323 U. S. 134, 139, 65 S. Ct. 161 (1944).

prerogatives in deciding how broad the scope of review should be. The implications of this section are uncertain.²⁵

(b) *Jurisdictional facts*. The ruling in *Crowell v. Benson*²⁶ (which held that an employer was entitled to a judicial trial *de novo* on the factual questions on which depended the jurisdiction of the United States Employees' Compensation Commission to make an award against him,²⁷ and which marked the zenith if not the birth of the doctrine that a right to judicial review *de novo* exists on all questions of jurisdictional fact) has in the intervening years lost much of the practical significance it was originally thought by many to possess as establishing a minimum standard of judicial participation in administrative adjudication.

The case appears, indeed, to have been a departure from the logic of many earlier cases²⁸ and must be taken to be greatly limited by, if it has not in fact been disregarded in, subsequent decisions. It can scarcely be reconciled with the decision in *Myers v. Bethlehem Shipbuilding Corporation*,²⁹

²⁵ There are two schools of thought as to whether § 10 (e) authorizes or requires the courts to broaden the scope of judicial review. The Attorney General has suggested that it merely restated the then existing law (letter dated October 19, 1945, addressed to Senate Judiciary Committee and printed as App. B, Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945)); but there is indication in the Congressional debates that a broader scope of review is intended. (Congressional Record, May 24, 1946, 5654, 5657.) That the act should be construed to enlarge the scope of review is forcibly argued by John Dickinson, 33 A. B. A. J. 434 (1947). For additional views, see Shine, "Administrative Procedure Act: Judicial Review 'Hotspot?'" 36 GEO. L. J. 16 (1947); Hinman, "Effect of the Administrative Procedure Act on Judicial Review of Administrative Action," 20 ROCKY MT. L. REV. 267 (1948). The courts have not yet settled the question. Compare *Snyder v. Buck* (D. C. D. C. 1948), 75 F. Supp. 902; *Olin Industries, Inc. v. National Labor Relations Board* (D. C. Mass. 1947), 72 F. Supp. 225; *United States ex rel. Trinler v. Carusi* (C.C.A. 3d 1948), 166 F. (2d) 457.

²⁶ 285 U. S. 22, 52 S. Ct. 285 (1932). Many volumes of commentary have been written about this case. See for example, 80 U. PA. L. REV. 1055 (1932); 46 HARV. L. REV. 478 (1933); 22 CORN. L. Q. 349, 515 (1937).

²⁷ Those jurisdictional facts being: (1) whether the accident occurred on navigable waters; (2) whether an employer-employee relationship existed.

²⁸ 80 U. PA. L. REV. 1055 (1932); Pound, ADMINISTRATIVE LAW (1942) 28.

²⁹ 303 U. S. 41, 58 S. Ct. 459 (1938).

in which it was held that a federal district court had no jurisdiction to entertain a suit raising a question as to whether the National Labor Relations Board had jurisdiction of contemplated proceedings; and its philosophy was essentially repudiated in later cases where, there being doubts as to whether an administrative agency had jurisdiction in the premises, the court remanded the case to that agency for further findings on the jurisdictional question.³⁰

Similarly, the decisions in the state courts indicate that no broader scope of review will be applied to determinations of jurisdictional fact than to other factual determinations.³¹

Judicial redetermination of the facts on which depends the jurisdiction of the administrative agency can no longer be regarded as an absolute legal right.

(c) *Constitutional facts*. Closely related to the jurisdictional fact doctrine is the principle that where the existence of a private right asserted under the Constitution depends on a finding of fact, there is a right to judicial review *de novo* of that issue of fact. This doctrine appeared to have been reaffirmed, by a divided court, as late as 1936.³² But its vitality has since largely disappeared, and the more recent decisions suggest judicial acceptance of the argument that there is no logical basis for distinguishing between ordinary facts and constitutional facts.³³ Even in cases where confiscation is asserted, and this of course is the typical case for the application of the rule requiring full judicial review of questions of constitutional fact, the courts have not in more recent years

³⁰ See, for example, *City of Yonkers et al. v. United States et al.*, 320 U. S. 685, 64 S. Ct. 327 (1944); *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 65 S. Ct. 749 (1945).

³¹ E.g., *Dimino v. Independent Warehouses, Inc.*, 284 N. Y. 481, 31 N. E. (2d) 911 (1940); *Miles v. Colegrove*, 258 App. Div. 1014, 16 N. Y. S. (2d) 988 (1940), *aff'd* 284 N. Y. 609, 29 N. E. (2d) 929 (1940).

³² *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720 (1936); *cf.*, *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527 (1920). For law review comment on the doctrines of these cases, see: 4 ILL. L. Q. 44 (1921); 43 HARV. L. REV. 1249 (1930); 40 HARV. L. REV. 1033 (1927); 27 W. VA. L. Q. 207 (1921); 36 GEO. L. J. 337 (1948).

³³ *Cf.*, Landis, *THE ADMINISTRATIVE PROCESS* (1938) 124.

always consented to review the facts involved. Here again, increased deference for the judgment of administrative agencies has been reflected in the decisions of the courts. Thus, where it was claimed by an oil producer that a state order limiting its production was confiscatory, the Supreme Court observed that the inquiry was one for determination by an administrative agency possessing expertness in the particular subject, and that it was not for the court to pass upon the propriety of the order, even though it might appear to the court that a different order would be wiser.³⁴

There can be no disagreement with the somewhat conservative expression of opinion by several members of the Attorney General's Committee on Administrative Procedure who observed that "in the future, fact issues involving due process, equal protection, and doubtless also other constitutional guaranties will in all probability no longer be subject to court review as a matter of constitutional right."³⁵

While of course the power of the courts to review questions of law, questions of jurisdictional fact, and questions of constitutional fact, cannot well be doubted, yet the courts no longer feel bound to review every issue which can be so described. Rather, the courts are inclined to limit review to those cases and those issues which are deemed to be particularly important or which are thought to be more suitable for judicial determination than for determination by an administrative agency. Conversely, where it is thought that the problem is more suitable for administrative handling, no searching review will be supplied even on these fundamental questions. Increasing deference for administrative determinations decreases the scope of judicial participation in administrative law.

³⁴ *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 60 S. Ct. 1021 (1940); 311 U. S. 614, 61 S. Ct. 66 (1940); 311 U. S. 570, 61 S. Ct. 343 (1941).

³⁵ "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 210.