



Notre Dame Law Review

Volume 14 | Issue 3

Article 1

3-1-1939

Problem of De Novo Judicial Review of Administrative Action

James J. Kearney

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

Recommended Citation

James J. Kearney, *Problem of De Novo Judicial Review of Administrative Action*, 14 Notre Dame L. Rev. 233 (1939).

Available at: <http://scholarship.law.nd.edu/ndlr/vol14/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XIV

MARCH, 1939

NO. 3

THE PROBLEM OF DE NOVO JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

IN considering the problems inherent in the subject matter of this writing, as indicated by its title, a somewhat heterodoxical plan will be followed. Although de novo is the focal point of this research its problem will be considered last. In successive order summary treatment will be accorded: administrative action, its nature and necessity; review of administrative action, why and when it is necessary and the forms it may take; judicial review of administrative action, its necessity, the forms it may take, and its advantages and disadvantages in relation to other forms of review; the scope of review of administrative action generally; and, in conclusion, the problem of de novo judicial review of administrative action will be discussed in the belief that the mere statement of the problem with a showing of the dangers inherent therein might serve as a warning to those faced with the problem and prevent future inconsistent treatment thereof.

I. ADMINISTRATIVE ACTION.

By administrative action, as distinguished from other forms of action, is meant the action by an administrative agency of government. Such agency is almost impossible of

general definition because it is universally the creature of statute.¹ Due to the variety of provisions in the enabling statutes few abstract concepts, common to all administrative agencies, are possible of formulation. In general it may be said that every administrative agency has been born out of necessity, and has been created to assist one or more of the customary branches of our tripartite government in their efforts to police or to govern a particular industry, business occupation or profession.

The powers of the administrative agency are purely statutory,² and are, therefore, as variable as the objectives occasioning their creation. They become distinguished from ordinary governmental bureaus, because they commonly combine powers of the several departments of the government, and in time come to be known as administrative agencies, and still later their law as administrative law.

“Action” is used in an all-inclusive sense, so as to include within its meaning investigations, findings, orders, regulations, rules, opinions and any other form of conduct of administrative agencies.

So numerous have been the writings establishing the necessity for administrative action that it is no longer considered available for elaborate discussion at this time. It is now generally accepted that any list of the reasons for administrative action must include: necessity, due to the inexpertness of either or both the legislative and judicial branches of the government; necessity, due to the fact that continuous supervision, on the part of a legislature not constantly in session, is impossible; necessity, occasioned by the delay in judicial determination which is at best a slow and costly process;³ necessity for experienced personnel which is not

¹ “Statute” is used in its broadest connotation. It is appreciated that a Commission of Bar Examiners may be an administrative agency although not technically created by a statute.

² See note 1, *ante*, relative to the broad use of the term statutory.

³ See discussion of the telephone rate cases in the dissenting opinion by Mr. Justice Brandeis in the case of *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 88-92 (1936).

generally available either in the legislature or in the courts. In truth it has been correctly stated that “. . . this apparent anomaly in government must simply be charged to necessity.”⁴

In passing judgment upon administrative conduct prudence demands a consideration of the reason why such acts are being exercised by an administrative agency instead of by one or several of the three customary departments of the government. If the reason for the existence of the administrative agency is the inadequacy of the court's⁵ previous treatment of the subject matter, before the court superimposes restrictions upon the agency and usurps its power to itself, it should reflect upon the fact that the agency was created largely because the court was unable to handle the matter. If the agency is created because the judges are insufficiently expert or without the resources to make the independent research necessary to a completely satisfactory adjudication, the court in passing upon the validity of administrative power and actions should hesitate and be very reluctant to nullify the acts, because of a failure to provide all the protections of a judicial determination. Courts should realize that if they were unable to handle the problem before the creation of the administrative agency they will be equally impotent upon a trial de novo in reviewing the agency's action.⁶

4 Stason, *THE LAW OF ADMINISTRATIVE TRIBUNALS*, 4 (1937).

5 Due to the nature of this subject matter this article is taken solely in its judicial aspect.

6 “The courts, as the agency charged with the application and development of the whole law have a sweep as broad perforce as the needs of society, seem well fitted to adjust the narrower judgment of specialists to the larger considerations which the habits and dominant desires of the community make it necessary or desirable to take into account. But in the exercise of their power to effect such adjustments, they must use extraordinary tact and self-restraint if the special advantages of expert administration are to be preserved unimpaired. This fact is all the more needful because, apart from statutory regulation, and even to some extent in the teeth of such regulation, the scope of the courts' power to disregard administrative policy is almost as wide as they themselves choose to make it.” Dickinson, *Judicial Control of Official Discretion* (1928) 22 AM. POL. SCI. REV. 275.

II. REVIEW OF ADMINISTRATIVE ACTION.

That there is a necessity for review of administrative action may be admitted without admitting that the review should be so extensive as to take the place of the administrative agency itself. Review is generally considered necessary in order that there be a government of laws and not of men, and it is thought that by providing for review, in one form or another, relief from arbitrary action upon the part of the administrative agency is afforded.

A most effective way of controlling discretionary action, other than by judicial review, is by the inclusion of "standards" in the enabling act creating the administrative agency.⁷ This places considerable premium upon the skill and technique of the individual draftsman of the enabling act, and although proper draftsmanship is not to be deprecated, to satisfy the exacting and varying court tests for the adequacy of such standards the lawmaker must possess among other attributes the power ordinarily associated with the *clairvoyant*.⁸ This device is also objectionable in that it disregards the often important fact that a too great imposition of checks upon the administrative will nullify its conduct altogether, for in many instances broad discretion is the reason for the agency itself.

Another effective way of controlling the possible abuse of discretion is by a provision in the enabling act for administrative review. But this provision for review within the agency itself is strenuously objected to on the ground that it enables the administrative agency to be the judge of its own case, which is allegedly contrary to sound political theory. Too infrequently is it realized by the critic of administrative review that it is not the combination of the author-

⁷ Two important cases held the provisions of the National Industrial Recovery Act invalid because of the lack of such "standards" see: *Panama Refining Co. v. Ryan*, 293 U. S. 389 (1935), and *United States v. A. L. A. Schechter Poultry Corp.*, 295 U. S. 495 (1935).

⁸ Landis, *THE ADMINISTRATIVE PROCESS*, 51 (1938). Relative to the reliance placed upon the capabilities of the individual draftsman.

ity of the judge and prosecutor in one person that is to be feared, but it is the power of prosecution which is pragmatically the real threat. This becomes evident when it is considered that the mere threat of prosecution will deter any business man from doing any contemplated action which is allegedly illegal when he is so advised by the administrative agency. Most frequently he will not risk possibility of such suit, and therefore, will infrequently if ever make a test of the case so that he will seldom be judged by the commission or agency itself.⁹

III. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.

A. *Necessity for Judicial Review.*

Despite the frequent statement that review is unnecessary for due process of law,¹⁰ courts laboring under the misapprehension that "due process of law" means judicial due process, have frequently held that those aggrieved by the conduct of an administrative tribunal or agency are entitled to judicial review of such administrative action, notwithstanding the propriety and fairness of the agency's action. The United States Supreme Court early held in the leading case of *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*,¹¹ that a railroad company was entitled to judicial review of a finding of the Railroad and Warehouse Commission relative to a rate for the carriage of milk, although the statute creating the commission made final its findings as to the reasonableness of the rates. Speaking through Mr. Justice Blatchford the majority of the court held that such reasonableness was "eminently a question for judicial investigation,"¹² whereas Mr. Justice Bradley in dissenting believed that judicial review was improper unless there was a "clear and unmistak-

⁹ *Id.*, 91 *et seq.*

¹⁰ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272 (1855).

¹¹ 134 U. S. 418 (1890).

¹² See *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908), holding that ratemaking is a *legislative* function.

able" invasion of rights, and that such invasion was not evident in the instant case.

Thirty years later the same Court speaking through Mr. Justice McReynolds held in the well-known case of *Ohio Valley Water Co. v. Ben Avon Borough*,¹³ that not only was an order of the Pennsylvania Public Service Commission fixing water rates subject to judicial review but that the statutory form of judicial review by way of injunction was insufficient to satisfy the requirements of due process.

Ten years later the same Court in *Federal Radio Commission v. General Electric Co.*,¹⁴ in construing the review provisions of the Radio Act of 1927, held that the proceeding in the Court of Appeals in the District of Columbia to review the Radio Commission's action in issuance of a license was purely administrative and not a "case or controversy" subject to review in the United States Supreme Court under the Judiciary Article of the Federal Constitution.

To bring such Commission within the review of the Supreme Court Congress amended section 16 of the Radio Act limiting review by the court of appeals to questions of law, and making findings of fact conclusive if supported by substantial evidence. This was held to make the review judicial in nature and therefore subject to review by the Supreme Court.¹⁵ As to the validity of the provision making findings of fact conclusive, see *infra*, where this problem will be discussed along with the corollary problem of jurisdictional and constitutional facts.

In holding that although "the reserved power to repeal a grant of special privileges implies that it may be exerted at the pleasure of the Legislature or other authority in which the power to repeal is vested," if the grant is repealed because of condition broken judicial determination is neces-

¹³ 253 U. S. 287 (1920).

¹⁴ 281 U. S. 464 (1930).

¹⁵ *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 (1933).

sary. The Supreme Court almost created a distinction without a difference in its endeavor to preserve judicial review. Indeed, did they strain logic when they said in *Public Service Commission of Puerto Rico v. Havemeyer*¹⁶ that although the Public Service Commission could repeal a grant of authority to take water for irrigation purposes, by a simple appropriate declaration of such repeal, it could not "cancel for violation of the terms of the grant, without giving to the holder an opportunity to have the asserted default judicially determined."

B. *Methods of Judicial Review.*

Having summarily surveyed the Supreme Court's view as to the alleged necessity for judicial review of administrative action, before considering the scope of such review a cursory examination of the possible methods available for the review is necessary. It is at once apparent that the available forms are capable of being classified into two main divisions with a varying number of sub-divisions in each.

In the first division may be placed the accepted "common law"¹⁷ or traditional methods of review which have had limited use in the review of administrative conduct, such as, certiorari, prohibition, mandamus, quo warranto, injunction, habeas corpus, and the more indirect method of collateral attack in a suit between private individuals wherein the action of the administrative agency is decisive of the point in litigation. In the second division may be placed the review had when a party aggrieved adopts the method of judicial review provided by the act creating the administrative agency, or when the administrative agency itself appeals to a court under the enabling act for the enforcement of its orders.

¹⁶ 296 U. S. 506 (1936).

¹⁷ As used in contradistinction with "administrative law."

1. *Writ of Certiorari.*

Certiorari is a writ issuing out of a superior tribunal commanding the production of the record of an inferior tribunal for examination by the higher authority. Originally it was used to review only the action of a lower court, but for some time it has been an accepted method of reviewing administrative action, provided such action is judicial in nature.

Paradoxically it is very difficult to determine whether action is judicial in nature, and it seems that courts frequently label the activity in question as judicial when they wish to accord it review, and term it non-judicial when review is sought to be denied. A few of the more recent cases involving the use of certiorari follow; from them the trend of the courts is evident, as is the inconsistency sometimes manifested.

Certiorari was held not to lie to review an order of the Fish and Game Commission of California, determining the monthly capacity of a fish packing plant, because of the non-judicial character of the commission's functions.¹⁸ In the same state certiorari was granted to review the determination by a county board of supervisors that the notice of election for a proposed fire protection district had been given in a proper newspaper, since it was considered that such matter was quasi-judicial;¹⁹ but certiorari was denied to review an order of the Corporation Commissioner of California denying permission to sell securities because the proposed plan of business was "unfair, unjust, or inequitable," since such was considered solely an administrative function.²⁰

In Florida, and elsewhere, the statutory exercise of quasi-judicial functions by a court or commission is reviewable by certiorari, where no other remedy is afforded.²¹ In Georgia

¹⁸ *Van Camp Sea Food Co. v. State Fish & Game Commission*, 75 Cal. App. 764, 243 P. 702 (1925).

¹⁹ *Norman v. Cogswell*, 82 Cal. App. 159, 255 P. 251 (1927).

²⁰ *Blue v. Division of Corporations, Department of Investments*, 8 Cal. App. (2d) 485, 48 P. (2d) 80 (1935).

²¹ Order regarding the operation of bus lines. *Florida Motor Lines v. Railroad Commissioners*, 100 Fla. 538, 129 So. 876 (1930).

the judgment of county commissioners relative to the establishment of cemeteries and other institutions was considered not of a judicial nature and therefore not reviewable by certiorari.²² In Illinois a board of review passing on the property rights of tax-payers was held to act judicially, and its judgments were reviewable.²³

Michigan and Mississippi have adopted varying views as to the legislative or judicial nature of an administrative act regarding the addition or removal of lands from a political district. Michigan holding the addition of lands of the non-appelling petitioners to a township district was judicial in nature and amenable to review by certiorari.²⁴ Whereas Mississippi denied certiorari to review an order eliminating territory from a school district on the ground such order was legislative and judicial.²⁵

Not only has certiorari been held not available to review legislative acts of an administrative agency, but acts purely ministerial,²⁶ or discretionary in nature if the administrative official acts within his jurisdiction²⁷ also have not been reviewable by certiorari. Admitting, of course, that such review is permitted when the officer abuses his discretion.²⁸

The number of cited cases could be multiplied many times, but further elaboration of this problem, ancillary to the main theme, is deemed unnecessary because certiorari is now large-

²² *Hallman v. Atlanta Child's Home*, 161 Ga. 247, 130 S. E. 814 (1925).

²³ *Jarman v. Board of Review of Schuyler County*, 345 Ill. 248, 178 N. E. 91, 77 A. L. R. 1350 (1931). See elaborate note following this case in A. L. R.

²⁴ *School Dist. No. 1 Fractional of the Townships of Bethany & Pine River and the City of St. Louis v. Joint Township Boards of Bethany & Pine River Tps.*, 233 Mich. 327, 207 N. W. 5 (1925).

²⁵ *Anderson v. Franklin County School Board*, 164 Miss. 646, 146 So. 134 (1933).

²⁶ *Assessing omitted moneys and credits. State v. Canfield*, 166 Minn. 414, 208 N. W. 181 (1926).

²⁷ *Building Inspector denying building permit. Livingston v. Peterson*, 59 N. D. 104, 228 N. W. 816 (1930).

²⁸ *Granting building permit in violation of zoning ordinance. Morgan v. Zoning Board of Review of Town of Warwick*, 52 R. I. 338, 160 A. 922 (1932).

ly a problem of local statutory construction, and because it is inextricably intertwined with the concept of judicial power, which defies definition.²⁹

2. *Writ of Prohibition.*

Although less commonly used the writ of prohibition represents another extraordinary legal remedy which may be used at times to obtain a measure of review of administrative action. As in the case of the writ of certiorari it is usually available to arrest the proceedings of a lower tribunal only when the function of the lower tribunal sought to be arrested is of a judicial nature. Courts in passing upon this writ's issuance in such cases encounter the same difficulty with the concept of "judicial" as has been seen in the certiorari cases.

A Nevada court held that the writ did not lie to arrest the Board of Governors of the State Bar from hearing a de novo disciplinary proceeding, because such was not an exercise of a judicial function.³⁰

In connection with elections and returns therein and the placing of names on ballots prohibition has been used with varying results. In Ohio it was used to prevent the board of elections from placing on the ballot the names of candidates whose nominating petitions had not been filed within the prescribed time;³¹ and in Missouri prohibition was held to be the appropriate remedy to prevent election commissioners from printing on the ballot the name of a candidate for state senator, although in the instant case the secretary of state's unauthorized certification of the candidate's name to the election commissioners was held sufficient to justify prohibition issuing against the commissioners.³² Prohibition was

²⁹ For a likewise non-exhaustive treatment of this problem, see the anonymous editorial note, *Review of Acts of Non-Judicial Bodies by Certiorari* (1933-34) 19 IA. L. REV. 609.

³⁰ *Haviland v. Foley*, 39 P. (2d) 198 (Nev., 1935).

³¹ *State ex rel. Bernon*, 127 Oh. St. 204, 187 N. E. 733 (1933).

³² *Bates v. Remmers*, 325 Mo. 1175, 30 S. W. (2d) 609 (1930).

held to be the proper procedure to restrain the secretary of state of South Dakota from recognizing a petition nominating a candidate for governor in 1930;³³ and the same court four years later held that the writ of prohibition would not lie to restrain the secretary of state from certifying the name of a Democratic nominee for state senator because of an alleged insufficiency of signatures to the nominating petition, when it appeared that the certificate of the canvassing board, which purported to be made in complete compliance with law, was conclusive on the secretary of state.³⁴ The writ is seen therefore to be ineffective to arrest acts of a ministerial nature.

Among many other cases involving administrative review by use of the writ of prohibition is the recent case of *Simpkins v. Corporation Commission of Oklahoma*,³⁵ wherein it was held that prohibition was the proper remedy to prevent the enforcement of a contempt order of the corporation commission against the petitioner for violation of its order denying petitioner a certificate to construct and operate a telephone exchange and connecting toll line.

3. *Writ of Mandamus.*

Mandamus, which was formerly a high prerogative writ, is a writ which issues from a court of superior jurisdiction directed to a private or municipal corporation or to any of its officers, or to an executive, judicial, or administrative officer commanding the performance of a particular act, which act is within the official duty of the respondent therein, or to restore the petitioner to some rights or privileges of which he has illegally been deprived.

The writ of mandamus is an accepted form of review of the acts of administrative officers or boards which have acted

³³ *Putnam v. Pyle*, 57 S. D. 250, 232 N. W. 20 (1930).

³⁴ *State ex rel. Jacobsen v. Morrison*, 63 S. D. 31, 256 N. W. 150 (1934).

³⁵ 180 Okl. 108, 67 P. (2d) 961 (1937).

arbitrarily or in abuse of the discretion vested in them.³⁶ In the absence of abuse, however, it is not available to compel the performance of a discretionary act,³⁷ but it differs from the writs of certiorari and prohibition, which are negative in nature, in that mandamus will lie to compel the exercise of a ministerial act.³⁸

Although mandamus may be used in a variety of ways to effect a judicial review of administrative action its uses will not be considered exhaustively. It is most commonly used to effect a judicial review of administrative action in proceedings to revoke, grant or procure licenses to petitioners before administrative agencies. The writ was held to be available to compel issuance of bail bond permit by the insurance commissioner, if established that the commissioner had denied the license arbitrarily and capriciously.³⁹ It was held not to lie where the discretion of the board of registration in medicine was arbitrarily exercised in the denial of a certificate of registration based on reciprocity with other states.⁴⁰

A New York court in passing upon a petition for writ of mandamus to compel the issuance of a theater license, held that although an arbitrary refusal of a license to a fit and proper applicant was a wrong remediable by writ of mandamus, the court must consider the discretion vested in the licensing officer, but found that the discretion had not been abused.⁴¹ The same court later held that mandamus would lie to compel a village board and building committee to grant

³⁶ *People ex rel. Freeman v. Department of Public Welfare*, 368 Ill. 505, 14 N. E. (2d) 642 (1938).

³⁷ *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission*, 68 App. D. C. 396, 98 F. (2d) 268 (1938).

³⁸ *United States ex rel. United States Borax Co. v. Ickes*, 68 App. D. C. 399, 98 F. (2d) 271 (1938).

³⁹ *Ex Parte McDonough*, 80 P. (2d) 485 (Cal. App., 1938). This was decided in a habeas corpus proceeding.

⁴⁰ *Salowitz v. Michigan State Board of Registration in Medicine*, 235 Mich. 214, 280 N. W. 737 (1938).

⁴¹ *Small v. Moss*, 277 N. Y. 501, 14 N. E. (2d) 808 (1938).

petitioner a permit for the erection of petroleum storage tanks.⁴²

To warrant the issuance of a writ of mandamus the petitioner must show his undeniable legal right to what he asks, for mandamus lies to compel an officer to exercise his discretion but not the manner of such exercise. It was because of his failure to do so, since he had not made previous demand upon the Park Board, that the reverend Father Coughlin was denied a permit to hold a mass meeting and speak in a municipal stadium located in a public park in Chicago.⁴³

4. *Writ of Quo Warranto.*

The single jurisdiction of Illinois is seen to supply sufficient cases representative of this problem involving the use of the writ of quo warranto, which is commonly used to try title to a corporate or other franchise or to a public or corporate office.

It may be used to test the right of an administrative officer to hold office,⁴⁴ and to test the legality of the organization of an administrative body.⁴⁵ Ordinarily the writ cannot be used as a direct review of the validity of administrative acts.⁴⁶ Under a statute quo warranto was also used to test the legality of the issuance of licenses by an administrative body.⁴⁷

5. *Writ of Injunction.*

The writ of injunction, whereby a superior tribunal restrains a person from doing something complained of, is per-

⁴² Beckman v. Talbot, 278 N. Y. 146, 15 N. E. (2d) 556 (1938).

⁴³ Coughlin v. Chicago Park District, 364 Ill. 90, 4 N. E. (2d) 1 (1936).

⁴⁴ People ex rel. Jones v. Woodrum, 356 Ill. 427, 190 N. E. 916 (1934).

⁴⁵ People v. Zoeller, 337 Ill. 362, 169 N. E. 228 (1924).

⁴⁶ But see, People ex rel. Longress v. Board of Education of City of Quincy, 101 Ill. 308 (1882), where under a statute, *quo warranto* was held to be the proper remedy where the board of education ordered a segregation of colored students in violation of the constitution; but this case is perhaps weakened by the later case of People ex rel. Nelson v. Taylor, 281 Ill. 355, 117 N. E. 1047 (1917).

⁴⁷ Dram-shop license. People v. Heidelberg Garden, 233 Ill. 290, 84 N. E. 230 (1908).

haps the extraordinary writ most frequently used to curb administrative agencies, and to review their actions. The United States Supreme Court has considered this problem frequently.⁴⁸ In one of its more recent cases it held that to justify the use of the extraordinary power of a court of equity to enjoin the action of the Kentucky Public Service Commission from prosecuting an investigation of rates for gas sold by complainants, something more must be involved than the application of a statute in an unconstitutional manner against complainant, and there must be an allegation and proof of threatened injury under some of the recognized sources of equitable jurisdiction.⁴⁹

In an action to enjoin the Secretary of Interior from consummating a proposed exchange of public lands in New Mexico for private lands, it was held that the existence of a statute enabling the transfer would not preclude the grant of the injunction when the proposed transfer was to be carried out in an unlawful manner. In this case it was also concluded that since the statute under which the Secretary of Interior was purporting to act was clear and unambiguous that he could not contend by way of defense that an injunction would not lie to control administrative officials in their construction of a statute.⁵⁰

In many cases involving the construction of pure food laws it has been held that an injunction would not lie to restrain the seizure and destruction of unwholesome food, since due process of law in such cases of inherent emergency does not require a hearing in advance of the destruction, and the petitioner whose food is destroyed may bring an action for damages at law in the event of an illegal or unjust destruction.⁵¹

⁴⁸ And so have the courts of many states, but it is to be stressed that this writing does not intend to exhaust the case material on the divers problems considered therein.

⁴⁹ *Petroleum Exploration v. Public Service Commission of Kentucky*, 304 U. S. 209 (1938).

⁵⁰ *Red Canyon Sheep Co. v. Ickes*, 69 App. D. C. 29, 98 F. (2d) 308 (1938).

⁵¹ *North American Cold Storage Co. v. Chicago*, 211 U. S. 306 (1908), *S. H. Cranston, Inc. v. Department of Health of City of New York*, 168 Misc. 749, 6 N. Y. S. (2d) 275 (1938).

Mr. Justice Holmes in speaking for the Supreme Judicial Court of Massachusetts summed up the law on this problem when he said: "Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand he may be heard afterwards. The statute may provide for paying him in case it should appear that his property was not what the legislature has declared to be a nuisance, and may give him a hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."⁵²

An injunction is ordinarily considered a proper remedy, however, to restrain administrative action when the public welfare does not demand urgent action and when the probable damage is considered irreparable.⁵³

6. *Writ of Habeas Corpus.*

The extraordinary writ of habeas corpus has been used to review administrative action most frequently in cases involving the deportation of aliens. In such cases jurisdiction of the administrative to issue the deportation order exists only if the person is an alien, and the courts have many times held that the existence of this jurisdictional fact may be determined on a writ of habeas corpus.⁵⁴

In connection with this problem Dean Landis has recently made an interesting observation, that in cases involving deportation⁵⁵ an alien is held to be entitled to a judicial hear-

⁵² *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891).

⁵³ *Southern Ry. Co. v. Virginia*, 290 U. S. 190 (1933). Injunction restraining order requiring elimination of a grade-crossing.

⁵⁴ *Ng Fung Ho v. White*, 259 U. S. 276 (1922). See also Van Vleck, *ADMINISTRATIVE CONTROL OF ALIENS* (1932).

⁵⁵ *Id.*

ing on the jurisdictional question of whether he is an alien; whereas in cases involving the exclusion⁵⁶ of an alien the administrative finding is held conclusive and not susceptible of review by a court.⁵⁷

7. *Collateral Attack Upon Administrative Action.*

A less direct attack upon and review of administrative action may result from suit between private parties. This may occur in a variety of judicial proceedings wherein the existence of one or more facts of a jurisdictional nature in a previous controversy is necessary to the validity of the prior proceedings. The commonest case illustrating this problem is that involving title to land predicated upon a government grant or patent.

The validity of a government patent is ordinarily conclusive, and it may not be impeached in a collateral proceeding unless it is void, and not merely irregular.⁵⁸ Nor can a patent be collaterally impeached although it was issued by the land department in reliance upon false representations.⁵⁹

Administrative action may be collaterally attacked and thereby reviewed in a civil damage suit against the administrative officer performing the action complained of. Such suits are discouraged, however, because they infringe upon the sovereign immunity from suit, and as a practical matter they unduly result in a self-imposed restriction upon the administrator's exercise of lawful discretion. They are frequently the result of administrative action in the destruction of unwholesome food, because, as we have seen, an injunction will not lie to restrain the action sufficiently to permit a hearing on the jurisdictional question of the wholesomeness of the food before the food is destroyed.⁶⁰

⁵⁶ United States v. Ju Toy, 198 U. S. 253 (1905).

⁵⁷ Landis, *op. cit. supra*, note 8, at 131-132.

⁵⁸ Noble v. Union River Logging R. Co., 147 U. S. 165 (1893).

⁵⁹ *Id.*

⁶⁰ Cases cited note 51, *supra*.

8. *Direct Review of Administrative Action.*

The more developed and better drafted acts creating administrative agencies usually contain extensive provisions for judicial, (and sometimes, administrative) review of the proceedings of the administrative agency. These provisions may provide for appeal in one form or another to the courts, or they may demand that the administrative agency itself resort to the courts for the enforcement of its orders.

This method of direct review is admittedly less complex, but it retains within it all the complexities inherent in the major problem of the scope and extent of all methods of review of administrative conduct.

IV. SCOPE OF REVIEW OF ADMINISTRATIVE ACTION.

Notwithstanding the summary manner in which the methods of judicial review of administrative action have been treated, it seems to be evident from what has gone before that the main problem is not so much the proper form or method the review should follow, as it is the scope, content and extent of such review. This is readily appreciated when one considers that if the administrative findings of fact are to be conclusive that it matters little whether review is sought directly or indirectly as by injunction, or the other seven methods examined.

Any attempt at classification of the problems inherent in the general problem involves an investigation into the meaning of basic terms such as law and fact. Nathan Isaacs⁶¹ classifies the possible scope of review into review of law, fact, and discretion. But because questions of pure law, fact or discretion are so rare it is felt that any classification along such lines would be of little value.

In passing upon the finality and conclusiveness of ordinary verdicts in a trial court, courts adopt one of several

⁶¹ *Judicial Review of Administrative Findings* (1921) 30 YALE L. JOUR. 781.

rules. Some affirm the judgment of the lower court if there is any evidence to support it; others require substantial evidence to support it; others reverse unless the court of review would have held the same as the trial court if it had been in its place; others reverse only when the verdict is against the manifest weight of the evidence. Which of these is to be adopted by the judiciary in its consideration of the finality of administrative actions?

In determining the conclusiveness of administrative action it becomes of great importance to consider the scope of the review accorded it in the reviewing court. It can be of many types: The reviewing court can decide only upon the evidence found in the record, it can hear evidence in addition to that heard by the administrative agency, or it can grant a trial de novo of the entire case. The wisdom of following the latter procedure will be the subject matter of the consideration of the remainder of this writing.

V. THE PROBLEM OF DE NOVO JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.

As has already been indicated courts, laboring under the belief that if there is to be government of laws and not of men have concluded that a judicial review of administrative action must be preserved. The "supremacy of the law" has been eloquently advanced as a reason for such review by courts that are quite conscious of the rapidity of the administrative encroachments upon the province of the judiciary.

In 1936 the Supreme Court of the United States in the leading case of *St. Joseph Stockyards Co. v. United States*,⁶² elevated⁶³ "supremacy of the law" to its present position of judicial domination of the administrative.

⁶² 298 U. S. 38 (1936).

⁶³ Strictly speaking it had been "elevated" prior to this case, and this case represents the "coronation."

In this case the Supreme Court was asked to review a decree of a federal district court dismissing a suit to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for services rendered by the petitioning stockyards company, under the authority vested in him under the Packers and Stockyards Act.⁶⁴ The alleged ground for the issuance of the injunction sought was that the order was confiscatory in violation of the due process provision of the Fifth Amendment of the United States Constitution.

The entire Court agreed that the decree of the district court sustaining the Secretary's order should be affirmed, but Mr. Justice Brandeis sharply dissented from a portion of the reasoning of Chief Justice Hughes, on the finality to be accorded findings of fact made by the Secretary of Agriculture.

Following the earlier cases of *Crowell v. Benson*⁶⁵ and *Ohio Valley Water Co. v. Ben Avon Borough*,⁶⁶ a majority of the court, speaking through Chief Justice Hughes, definitely questioned the finality to be accorded administrative fact findings when it said: "But to say that their (legislative agencies') findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."⁶⁷ Although the Court felt that the district court should not have accorded the Secretary's findings the degree of finality it indicated was proper in its opinion, when it said "Is there anything in the Constitution which expressly makes findings of fact by a jury of inexperienced laymen, if sup-

⁶⁴ 42 Stat. at L. 159, ch. 64, 7 U. S. C. A. §§ 181-229.

⁶⁵ 285 U. S. 22 (1932).

⁶⁶ 253 U. S. 287 (1920).

⁶⁷ 298 U. S. 38, 52 (1936).

ported by substantial evidence, conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?"⁶⁸ The Supreme Court nevertheless found that the district court as a fact did hear evidence and examine into the Secretary's findings. Therefore, it held that the erroneous language was not so prejudicial as to require a reversal.

In his concurring opinion Mr. Justice Brandeis attacked the position of the Chief Justice on the conclusiveness of administrative determinations as to facts, quoting the statement of the judge of the district court, concerning the relative weight given the findings of an inexperienced lay jury, and that accorded the findings of an expert administrative official. In addition he assailed the supremacy of law concept implied in the opinion of the Chief Justice in these words: "The supremacy of law demands that there be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of facts by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command."⁶⁹

Continuing with his opinion he dissented from the "majority's" position on the ground of its improper application of the doctrine of jurisdictional fact found in *Crowell v. Benson*;⁷⁰ on the impracticability of its result; on the ground

⁶⁸ 11 F. Supp. 322, 327.

⁶⁹ 298 U. S. 38, 84 (1936).

⁷⁰ 285 U. S. 22 (1932).

that due process did not require judicial process, and contended in conclusion that "Responsibility is the great developer of men," and asked concerning the majority's result, "May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?"⁷¹

To understand the majority's position at all, in the light of the scathing denunciation by Mr. Justice Brandeis, partially depicted above, two prior cognate cases must be examined because upon them Chief Justice Hughes predicated his reasoning in the *St. Joseph Stockyards* case.

The Supreme Court of the United States in the case of *Ohio Valley Water Company v. Ben Avon Borough*,⁷² held that a determination by the Public Service Commission of Pennsylvania of the valuation of property for rate making purposes which did not provide for submitting that issue of value to a judicial tribunal for its own independent judgment on the law and facts, was invalid without looking to the reasonableness of the particular rates. This case evoked a storm of criticism.⁷³ Justices Brandeis, Holmes, and Clarke dissented, Brandeis being the articulate member of the dissenting group.

In the case of *Crowell v. Benson*⁷⁴ the Supreme Court extended the doctrine of judicial review of administrative findings of facts, and held that such review was mandatory with regard to all "constitutional facts" and that such review must be by trial de novo.

"The case grew out of a proceeding for compensation under the Federal Longshoremen's and Harbor Workers' Com-

⁷¹ 298 U. S. 38, 92 (1936).

⁷² 253 U. S. 287 (1920).

⁷³ See partial list of articles listed in note 30 of anonymous student editorial note (1936), *Judicial Review of Rate Orders of Administrative Boards: A Re-examination*, 50 HAR. L. REV. 78, 82.

⁷⁴ 285 U. S. 22 (1932).

pensation Act. The defendant had brought the compensation proceeding against the petitioner, alleging among other things that he had been injured while in the petitioner's employ and while performing services on the navigable waters of the United States. The petitioner's answer denied that the relation of employer and employee existed between himself and the defendant. Under the administrative procedure provided by the Act there was a hearing and evidence presented before a deputy commission of the Federal Employees' Compensation Commission, who made a finding that the injury had occurred in the course of employment and awarded compensation. Thereupon the petitioner brought the present bill for an injunction in the federal district court under section 21 (b) of the Act, which provides that "if not in accordance with law a compensation order may be suspended or set aside in whole or in part through injunction proceedings . . . instituted in the Federal district court." The ground of attack on the award was that it was contrary to law because the applicant was not in fact at the time of the injury in the petitioner's employ and his claim was therefore, as a matter of law, not "within the jurisdiction" of the deputy commissioner. The fact of employment was thus made the decisive issue. The district court declined to decide this issue on the record of the testimony in the administrative proceeding, or even to consider that record, but held that it must be determined on wholly new evidence presented in court, since the statute would be unconstitutional unless construed to provide for such a judicial hearing *de novo*. The case having been heard on the new evidence, the court found, contrary to the administrative finding, that the applicant at the time of the injury was not in fact in the petitioner's employ and therefore enjoined enforcement of the award. This decree was affirmed first by the Circuit Court of Appeals, and now by the Supreme Court in an elaborate opinion by Mr. Chief Justice Hughes. Mr. Justice Brandeis filed a persuasive dis-

sending opinion, in which Mr. Justice Stone and Mr. Justice Roberts concurred.”⁷⁵

Having seen that the Supreme Court apparently requires a review by trial de novo of facts found by an administrative body whenever confiscation contrary to the due process clauses is charged,⁷⁶ it becomes of interest to see the reaction of courts when such review is made mandatory by statute.⁷⁷

To be consistent with the decisions of the Supreme Court already examined it would seem that statutes providing for review by trial de novo should be welcomed by the courts as being declaratory of the law as laid down by the Supreme Court of the United States. Strangely enough such statutory provisions are usually considered unconstitutional.

In the recent case of *Borreson v. Department of Public Welfare*,⁷⁸ the supreme court of Illinois held invalid a provision of the Old Age Assistance Act which permitted an unsuccessful applicant to petition a circuit court for a trial de novo on his application for assistance. The ground of decision was that the invalid section of the Act delegated an executive power to the judiciary in violation of the doctrine of separation of powers.⁷⁹

This case and the many which conform to it represent a trend toward a judicial abdication of power that is strangely inconsistent with the judiciary's grab for power made by the

⁷⁵ Quoted from Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determination of Questions of "Constitutional Fact"* (1932), 80 U. OF PA. L. REV. 1055.

⁷⁶ See Note, *Finality of Administrative Findings of Fact Since Crowell v. Benson* (1938), 24 VA. L. REV. 653, for discussion of the judicial interpretation of *Crowell v. Benson*.

⁷⁷ It is true that perhaps the reviewable facts are limited to constitutional or jurisdictional facts, but it is frequently difficult to see any distinction between them and other kinds of facts. In fact, the same fact is construed to be of different kinds in the cases involving aliens seen *supra*.

⁷⁸ 369 Ill. 425, 14 N. E. (2d) 485 (1938). This case is by no means the only case. It has been selected because it is typical of other cases involving the same problem, and because it indicates the recent trend of the courts.

⁷⁹ Justice Stone, dissenting pointed out that the act in question was comparable to the Workmen's Compensation Act which had never been considered invalid.

Supreme Court under its extension of the doctrine of "supremacy of law." This judicial self-limitation has been based upon several grounds.⁸⁰ The Court in the early case of *Luther v. Borden*⁸¹ declined to review a political question. Other cases show a reluctance to exercise a power when the court lacked the jurisdiction to enforce its decree.⁸² And frequently courts have declined review on the ground that no case or controversy existed within the Judiciary Article of the Constitution.⁸³

The theory that the doctrine of separation of powers compels the judicial renunciation of a statutory power of de novo review of administrative action is fraught with dangers. The difficulty of defining the three powers of government and of classifying them into mutually exclusive departments has already been considered, along with the possibility that a court seeking more power might take advantage of the statute by deciding that the matter to be thus reviewed was judicial in nature, and therefore, reviewable notwithstanding the doctrine of separation of powers. On the other hand a court wishing to abdicate in favor of the administrative agency could decline the statutory power of review by labeling the matter to be reviewed as either legislative or executive.

VI. CONCLUSION.

A simple example reveals the anomalous condition of the law on this subject. The Supreme Court of the United States has decided that rate-making is a legislative function.⁸⁴ It has also held that when confiscation is alleged to result from the application of a rate fixed by an administrative agency that the aggrieved party is entitled to a de novo judicial

⁸⁰ See, Finkelstein, *Judicial Self-Limitation* (1924), 37 HAR. L. REV. 338; and (1925) 39 HAR. L. REV. 221.

⁸¹ 7 How. U. S. 1 (1849).

⁸² *Muskrat v. United States*, 219 U. S. 346 (1911).

⁸³ *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464 (1930).

⁸⁴ *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908).

review of the propriety of the rate.⁸⁵ This latter result seems contrary to the theory of separation of powers in that it vests in the judiciary the power to perform a legislative function.

No attempt will be made at a solution of this dilemma, as the purpose of this writing is to present the problem in its several aspects in the hope that once it is appreciated in its entirety further inconsistencies will no longer creep into the law on the subject.

A solution is possible if the Supreme Court alters its view as to the finality that is to be accorded to the actions of the divers administrative agencies. Dean Landis predicts this,⁸⁶ and since it is dialectically sound it seems probable that once more the dissenting opinions of Mr. Justice Brandeis will become the view of a majority of the Justices of the Supreme Court.

James J. Kearney.

College of Law, University of Notre Dame.

⁸⁵ This is the theory of the Ohio Valley Water case, *Crowell v. Benson*, and the *St. Joseph Stockyards* case.

⁸⁶ Landis, *op. cit. supra*, note 8, at 141.