Separation of Powers: Administrative Exercise of Legislative and Judicial Power
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Source: *Political Science Quarterly*, Vol. 28, No. 1 (Mar., 1913), pp. 34-48
Published by: The Academy of Political Science
Stable URL: https://www.jstor.org/stable/2141194
Accessed: 11-01-2019 02:45 UTC

SEPARATION OF POWERS: ADMINISTRATIVE EXERCISE OF LEGISLATIVE AND JUDICIAL POWER[1]

II. PRINCIPLES OF JUDICIAL REVIEW

1. Introduction

ALTHOUGH in many instances administrative authorities may perform functions which cannot be differentiated from those commonly exercised by the legislature or by the judiciary, it is not to be inferred that the attempt to transmute the theory of the separation of powers into a rule of law has been wholly ineffective. Inroads upon the theory have been permitted only where the courts find some over-ruling governmental necessity or where the interest subjected to administrative interference is not within the fold of constitutional protection.

It is true that in most of the instances where the doctrine has been invoked in judicial proceedings to resist the action of administrative authorities, the contention has not been sustained. But this is due to the fact that the legislatures have been cautious in not extending the power of the administration beyond the boundaries which the courts have described. The subject matters which continue to be dealt with by courts and legislatures far exceed both in number and importance those committed to the care of administrative authorities. With the increasing complexity of social and economic conditions and the consequent widening of the field of governmental activity, the scope of administrative power is being constantly enlarged. But the hand of the court is always at the throttle to stay any advance which in its opinion is an unwarranted invasion of private right. Where for any reason the power vested by statute in an administrative body is deemed to exceed that permitted by the Constitution, the courts will treat any action taken under the delegation as entirely invalid.[2]

[1] The first part of this study was printed in the POLITICAL SCIENCE QUARTERLY, vol. xxvii, pp. 215–238.

[2] Portland *v.* Bangor, 65 Me. 120 (1876); *cf.* part i, of this study, *loc cit.*, p.

Even where the courts concede that the administration has power to act, the specific action taken remains subject to judicial supervision. A distinction is to be noted, however, between the relief which may be granted in reviewing an administrative regulation, which promulgates a general rule to govern all future instances that may arise within the scope of its provisions, and the relief available when the court is considering an administrative finding of fact or application of law to facts found.

Where the administrative action is in the nature of an adjudication, the court may reëxamine the evidence and determine the fact for itself[1] or apply some other rule of law than that adopted by the administration.[2] It may itself do the very work entrusted to the administration, if in its opinion this work was improperly performed. But if for any reason the court disapprove of an administrative regulation, judicial relief must be confined to nullifying the administrative action and treating the matter in litigation as though no provisions beyond those contained in the statute had been promulgated or authorized. The court cannot put forth a new regulation, although its opinion may indicate what new regulation would be sustained. If the provisions of the regulation are separable, the regulation may of course be declared invalid in part only. In so far as prosecutions for violation are concerned, special orders of individual application are controlled by the same considerations which apply to general regulations. The court can merely declare the order void or valid. If, however, the administration is seeking judicial enforcement of some order directing specific remedial action, the court is not confined to the two alternatives of granting the decree prayed for or of denying all relief. Such part of the order as the court deems excessive may be regarded as separable. The court may, in practical effect,

233, n. 2. Wong Wing *v.* United States, 163 U. S. 228 (1896); *cf.* part i, *loc cit.*, p. 235, n. 3.

[1] State *ex rel.* McCleary *v.* Adcock, 206 Mo. 550 (1907). Miller *v.* Horton, 152 Mass. 540 (1891).

[2] Johnson *v.* Towsley, 13 Wallace, 72 (1871). Turner *v.* Williams, 194 U. S. 279 (1904).

modify rather than annul the administrative order,[1] which amounts to much the same thing as annulling it and issuing a new order in its place.

The reason underlying this distinction must be as follows. The promulgation of regulations partakes of the nature of action commonly exercised by legislative bodies. Power to take such action may, from the point of view of actual practice though not in judicial theory, be delegated to administrative bodies, but it may not be exercised by the courts, save in certain matters relating to judicial procedure. On the other hand, the function of reaching conclusions of fact from evidence submitted and that of applying rules of law partake of the nature of action regularly exercised by judicial authorities. Though an order directing specific remedial action in respect to a designated concrete thing may be issued by a legislature, such orders are also issued by the courts where the general requirements of a statute have been violated. In these realms, therefore, the courts may substitute their own judicial action for what they regard as the improper action of a judicial nature taken by the administration.

2. *Judicial control over administrative regulations*

An ordinance or regulation will of course always be held invalid for any reason that would nullify the same provisions in a statute. In Illinois Central Railroad Company *v.* McKendree,[2] a quarantine regulation of the secretary of agriculture was held invalid because sufficiently broad to apply to commerce wholly within a state. Regulations made in the exercise of the police power are regarded with the same critical eye cast upon statutes. In State *v.* Speyer,[3] the regulation of a state board of health prohibiting any pig-pen within one hundred feet of an inhabited dwelling was held void, on the ground that it reached beyond the scope of necessary protection and prevention into the domain of restraint of lawful business and use of property.

[1] Health Department *v.* Dassori, 81 N. Y. State Reporter (47 N. Y. Supp.), 641 (1897). Health Department *v.* Rector of Trinity Church, 145 N. Y. 32 (1895), *semble.*

[2] 203 U. S. 514 (1906).

[3] 67 Vt. 502 (1895).

In fact, these regulations of administrative bodies are accorded even less judicial respect than that given to a statute. In Potts *v.* Breen[1] it was held that, in the absence of express authority from the legislature, a certain rule of the state board of health was invalid because unreasonable. The courts exercise the same supervision over the regulations of such state boards as over municipal ordinances. The power to declare these void, when in the opinion of the court they are unreasonable, has long been exercised. It is often justified, however, on the ground that the legislature cannot be presumed to have delegated authority to do a thing unreasonable, the court seeming to assume that the judicial estimate of unreasonableness was the test in the subconsciousness of the legislature.

Since the regulations of the administration are to supplement the provisions of some statute and the power to make them rests upon legislative grant, it is clear that the exercise of the power must not transcend the authority delegated. In Little *v.* Barreme,[2] a naval officer who had seized a vessel on its voyage *from* a French port, under a regulation of the secretary of the navy ordering seizure of vessels sailing *to or from* a French port, was held not protected from civil liability for his act, when the statute by virtue of which the secretary issued his orders authorized the president to instruct commanders to seize vessels only when these were going *to* a French port.[3] So also where the statute made provision for the free introduction of animals imported for breeding purposes, "upon proof thereof satisfactory to the secretary of the treasury and under such regulations as he may prescribe," the court held invalid a provision in the regulations that the collector must be satisfied that the animals are of superior stock,[4] as an attempt to incorporate a limitation into the statute where it clearly intended to include animals of all classes. The regulation was in effect an amendment of a revenue law, which could be made only by Congress.

Regulations may not impair rights which flow from the

[1] 167 Ill. 67 (1897). [2] 2 Cranch 170 (1804).

[3] *Cf.* Hendricks *v.* Gonzales, 67 Fed. 351 (1895).

[4] Morrill *v.* Jones, 106 U. S. 466 (1882).

statute by imposing requirements inconsistent with its provisions. It has been held that the department cannot, upon discovering that the color test prescribed by statute for determining the standard of sugar is fallacious, remedy the defect by substituting a chemical test; for Congress alone has authority to levy duties.[1] And where a statute required oath as to contemplated alienation upon making entry for public land and failed to require such oath at the time of securing patent, though prescribing oath on other matters, it was held to be manifest from this omission that the motives of the applicant, though material on making entry, were not significant at the time of receiving patent; and the requirement of such oath at the later time was held void because it defeated the right given by the statute to make contract for alienation in the interim.[2]

Compliance with regulations less stringent than the requirements of the statute will not excuse an individual as against the government from full compliance with the law. In an action against the collector, under a statute permitting suit if protest be filed within ten days from the time of the liquidation of the duties, it was material when such liquidation took place. The protest complied with the regulations of the secretary of the treasury, which regarded such liquidation as not complete in the case of goods in bond until their final withdrawal. The court held that this was erroneous, and that the importer who had complied with the regulations had not complied with the law.[3]

A curious modification of the doctrine that regulations inconsistent with the delegation are void is suggested in a dictum in La Bourgogne,[4] where the statute under consideration authorized the board of supervising inspectors to make regulations as to the equipment of vessels with life-boats, rafts *etc.*, and provided

[1] Merritt *v.* Welsh, 104 U. S. 694 (1881).

[2] Williamson *v.* United States, 207 U. S. 425 (1908). For examples of rulings by the law advisers of various executive departments as to regulations and usages in conflict with statutory provisions, *cf.* Wyman, Administrative Law, chapter xii, *passim*.

[3] Merritt *v.* Cameron, 137 U. S. 542 (1890).

[4] 210 U. S. 95 (1908). Also *sub nom.* Deslions *v.* La Compagnie Générale Transatlantique.

that such regulations, when approved by the secretary of the treasury, should have the force of law. Failure to comply with the law subjected the company to a penalty and also deprived it of the right to certain limitations on its liability for damages in case of accident. In the case at bar, the company had complied with the *regulations*, but it was contended that the regulations were inconsistent with the statute and that the company had therefore not complied with the *law*. The court was of opinion that the regulations were not inconsistent with the statute, but observed:

> Even, however, if it were otherwise, as compliance on the part of the petitioner with the regulations adopted by the board was compelled by law, it cannot be that upon it was cast the duty of disobeying the regulation at its peril, thus, on the one hand, subjecting it in case of non-compliance to the infliction of penalties, and, on the other hand, if it fully complied with the regulations, imposing a liability upon the assumed theory that there had been a violation of law.

It would thus appear that third parties cannot take advantage of inconsistency between the statute and the regulations when they have been complied with by those whose conduct they are to govern, although the latter may allege such inconsistency as an excuse for non-compliance, or after compliance may find it a bar to the acquisition of rights claimed from the government under the statute. If, however, the government may enforce a penalty for violation of the law after there has been compliance with the regulations, it may through its own officers contrive for the individual the same unpleasant dilemma from which the court desired to spare him in La Bourgogne.[1]

When the regulation is, in effect, merely the interpretation of the statute, the court will determine for itself whether the interpretation is correct.[2] In United States *v.* Symonds,[3] where the

[1] *Cf. infra*, p. 44.

[2] Though the courts often declare that great respect is due to the interpretation of the administration, and sometimes even that, when long continued, it "must be regarded as absolutely conclusive"—United States *v.* Hill, 120 U. S. 169 (1887)—the actual results of the decisions justify the assertion that this is merely a presumption, which serves as a convenient crutch to aid the courts when they desire to sustain the

statute provided that no service should be regarded as sea service unless performed at sea under the orders of the department, the regulations of the department declared service on practice vessels in harbors and inlets to be shore service. The court holds that such service was in fact performed at sea, within the meaning of the statute, and that the regulations of the department could not convert it into shore service.

The authority of the secretary to issue orders, regulations and instructions, with the approval of the president, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the president, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his power or conferring rights upon others.[1]

Finally, the regulations must relate to matters which the court regards as "mere details." As to what is a mere detail and what relates to the substance of the result sought by the legislation, the courts are more critical in criminal prosecutions than in civil controversies. It would seem that some regulations are considered sufficiently valid to support acts done under them, and therefore, in a sense, "have the force of law" and are "prescribed by law," and yet are not regulations "prescribed by law" when it is sought to base upon them a

contention of the administration, but which is never permitted to fetter them when inclined towards an opposite conclusion. In Houghton *v.* Payne, 194 U. S. 88 (1904), the court sustained the ruling of the postmaster-general classifying publications in the Riverside Literature Series as books, although for sixteen years his predecessors had classified them as periodicals and Congress, though often urged by the department to amend the statute, had declined to do so. "We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving a classification of them as periodicals, notwithstanding the length of time such classification obtained. . . . It is well settled that it is only when the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute."

[1] 120 U. S. 46 (1887).

criminal prosecution under a statute providing penalties for "failure to do the things required by law."[1] In the case cited, a *wholesaler* in oleomargarine was indicted for failure to keep such books as were prescribed by the regulations. The statute required *manufacturers* to keep such books as the department might prescribe but made no such requirement as to *wholesalers*. The court seemed to regard the departmental regulations specifying the books to be kept by wholesalers as authorized by the general power to prescribe regulations, but held that the statute did not with sufficient distinctness make the failure so to do a criminal offence. In another case,[2] however, where the statute required packages of oleomargarine to be marked and branded as the commissioner of internal revenue should prescribe, and provided a penalty for packing oleomargarine in any manner contrary to law, it was held that the criminal offence was "fully and completely defined by the statute," and that the designation by the commissioner of the particular marks and brands to be used was a "mere matter of detail." The distinction between this and the Eaton case was said to be that the requirements of the department there related to matters which were in no way referred to in the various sections of the statute prescribing the duties resting upon manufacturers or dealers in oleomargarine, while here the statute expressly required the acts to which the regulations referred.

Two cases more difficult to distinguish have been decided in the lower federal courts. In the earlier of these cases[3] the statute authorized the secretary of war to make regulations to protect the navigation of rivers, and provided that violation of the regulations should constitute a misdemeanor. The secretary made a regulation as to the speed of vessels. The court held that the secretary did not make any act punishable, but merely promulgated a rule—that it was the statute which made the act punishable. In a later case[4] the statute authorized the

[1] United States *v.* Eaton, 144 U. S. 677 (1892).

[2] *In re* Kollock, 165 U. S. 526 (1897).

[3] United States *v.* Breen, 40 Fed. 402 (1889).

[4] United States *v.* Matthews, 146 Fed. 306 (1906).

secretary of the interior to make regulations as to the occupancy of certain public lands, the violation of which was to be punished as provided in another statute. The regulations forbade sheep-grazing without a permit. The court held that the grazing of stock had been prohibited by no congressional act, that the prohibition rested entirely on the regulation of the secretary and amounted to an unauthorized exercise of legislative power, since it was the secretary who had designated what should constitute the crime. It would seem that in the earlier case it might have been said as easily that excess of speed was prohibited by no statute, and that the secretary alone had designated what should constitute the crime.

The decisions on this topic cannot be reconciled on any line of general principle. In the last analysis the distinctions are those of degree. A test which may prove helpful is to ask whether the requirements of the regulations should clearly have been anticipated from a reading of the statute. It is clear that the statute need not state in detail every circumstance or contingency under which an act prohibited by law shall constitute a criminal offence. Thus a defendant may be punished under a statute penalizing false swearing, where the oath in question was taken before a local land officer in a contest in respect to the validity of a homestead entry, as prescribed by departmental regulations, although such proceedings in a contest as to homestead entries were not specifically authorized by any statute.[1] This was said to be, not a case where the defendant was punished for the violation of a departmental regulation, but merely an instance where the regulations provided the place, occasion and opportunity for the defendant to violate the statute against perjury. In another case[2] the defendant was punished for false swearing in an affidavit before a state magistrate, where such oath was prescribed by a departmental regulation issued under general authority to "adjust and settle claims," although no express authority was given by any federal statute to any state magistrate to administer such an oath,

[1] Caha *v.* United States, 152 U. S. 211 (1894).

[2] United States *v.* Bailey, 9 Peters (U. S.) 238 (1835).

and the court doubted whether a state magistrate could be compelled by any federal authority to administer an oath.

3. *Effect of the failure of the administration to take action*

Although in the Campbell case the Supreme Court declared that the administration may not, by disregard of its own regulations, withhold the action which follows by law from the compliance of an individual therewith,[1] it may defeat a right conditioned on compliance with regulations by its failure to make any regulations whatever. Thus, where a statute was construed as granting, not a right *in præsenti* to all persons who might after its passage use alcohol in the arts, but a right conditioned on use in compliance with regulations to be prescribed, the court regarded the legislation as incomplete until regulations were made to fill in its details, in the absence of which the right of the manufacturer could not so vest as to create a cause of action by reason of the unregulated use.[2] The comment on the Campbell case indicates that the decision there would not have been different had it involved the failure of the department to make regulations rather than its failure to comply with regulations made. For the court observed that in that case the right to the drawback depended on the statute and not on the secretary's regulations, which related merely to the ascertainment of the amount. Hence there the inaction of the secretary was immaterial, and the drawback must be paid whether ascertained under his regulations or not, where the amount could be proved to the satisfaction of the court as completely as if every reasonable regulation had been duly observed. The distinction between the statute in the two cases was said to be that one required that the thing itself should be done under official regulations; the other, merely that the proof of the doing of the act should be made in the manner prescribed.

It must also be true that no one may be punished for the violation of regulations which have not been made. If authority

[1] Campbell *v.* United States, 107 U. S. 407 (1882); *cf.* part i of this study, *loc. cit.* p. 231.

[2] Dunlap *v.* United States, 173 U. S. 65 (1899).

be necessary to establish so self-evident a proposition, it may be inferred from United States *v.* Randall,[1] where failure to comply with the command of a statute, that masters of vessels arriving in port should repair at once to the office of the chief officer of the customs, was held excused by showing that such officer had no office and thereby made performance impossible. It was declared in the opinion, however, that the mere failure of the officer to exact compliance with the statute would not excuse the failure of the master to comply therewith.

Where such failure to exact compliance is partial only, as where regulations are promulgated that do not meet the full requirements of the statute, compliance with the regulations is not compliance with the statute for the purpose of acquiring any right.[2] But it should not follow from this that a penalty could be imposed for non-compliance with the law, where there was full compliance with the regulations. This would in effect place on the individual the burden of himself contriving regulations which would meet the demands of the statute. In a suit for a penalty it should be held that he has the same right to assume the validity of the regulations which seems to be accorded when the question arises in a suit between individuals.[3]

If the failure of an officer to require compliance with a statute cannot excuse complete non-compliance, it would follow that non-compliance with administrative regulations could not be excused by any waiver of their requirements on the part of a subordinate official. It might be argued that, if the officer who makes the regulation cannot himself disregard it to defeat the right of an individual,[4] he cannot authorize the individual to disregard it and thereby escape from a duty or from the imposition of a penalty for its non-performance. Knowing his duty, he might be held to accept any favor at his peril. But where the regulations do not relate directly to the duties or the rights of individuals, but pertain merely to the orderly transaction of

[1] 1 Sprague, 546 (District Court of Massachusetts, 1853).

[2] Merritt *v.* Cameron; *cf. supra*, p. 38.

[3] La Bourgogne; *cf. supra*, pp. 38, 39.

[4] Campbell *v.* United States, 107 U. S. 407 (1882); *cf.* part i, *loc. cit.* p. 231, and *supra*, p. 43.

the business of the department, it seems that they may be waived by the authority of the one who promulgated them, either expressly or by the approval of a transaction which disregards them.[1]

Where the right is conditioned, not on the making of a regulation or an administrative finding of compliance therewith, but on the ascertainment of some state of facts whose existence is named as a condition under which the statute is to become operative, the executive ascertainment is requisite to the creation of the right. This was held in Bong *v.* Campbell Art Company,[2] where the action of the president was held a condition precedent to the right of an alien to the benefits of a copyright act, whose provisions were to be applicable only to those aliens whose governments were declared by the proclamation of the president to have granted corresponding privileges to American citizens. From the doctrine of the courts with respect to judicial control over acts in their nature diplomatic or political,[3] it clearly follows that such proclamation rests entirely within the discretion of the executive.

But where the individual is aggrieved by the failure of the administration to adjudicate the facts relating to his particular case, he may, as in the Campbell case,[4] establish his right before the court. Thus, where the secretary of the interior failed to ascertain what was swamp land and to furnish the state with notice, under a statute of Congress construed to confirm a present vested right in such lands, it was held that the land nevertheless belonged to the state when the facts existed under which it was to be entitled, and that if the secretary would not determine the facts they could be determined by the court.[5]

There are, however, numerous instances where the court construes the statute to mean that the determination or adjudi-

[1] Indian Regulations, 3 Comptroller's Decisions, 218 (1896). Cited in Wyman, Administrative Law, section 4.

[2] 214 U. S. 236 (1909).

[3] Jones *v.* United States, 137 U. S. 202 (1890). Luther *v.* Borden, 7 Howard 1 (1848).

[4] Cf. part i, *loc. cit.* p. 231, and *supra*, p. 43.

[5] Railroad Company *v.* Smith, 9 Wallace, 95 (1869).

cation of the department is the exclusive method of establishing the individual right.[1] It was held in United States *v.* McLean[2] that the right of a postmaster to an increase of salary was conditioned on a re-adjustment by the postmaster-general and that no suit could be maintained in the absence of such re-adjustment. By a strictly logical inference it was decided in United States *v.* Verdier[3] that a postmaster must pay interest on a judgment against him in favor of the government, although at the time it was rendered the government was equitably his debtor, as became established by a subsequent re-adjustment of the postmaster-general. Interest on the amount found to be due him was not allowed to begin from the time of the transaction on which it was based, because the debt was held to have come into existence at the time of the re-adjustment.

But in the McLean case the court suggested that, while it could not perform executive acts or treat them as performed when they have been neglected, it might by *mandamus* compel the executive to do his duty. And where the duty to promulgate regulations is absolute, their promulgation may be constrained by *mandamus*, although the court could not dictate their provisions. Under some statutes, however, the administration seems to be treated as vested with discretion to decline to promulgate regulations when in its judgment it is inadvisable.[4]

4. *Finality of administrative orders and adjudications*

It is clear that the power of the administration to issue orders or regulations does not necessarily imply the validity of the action taken. When the validity of administrative action is examined in the course of judicial proceedings, the question of the conclusiveness or finality of the action taken may perhaps be said to be before the courts, whether it be an administrative regulation or an administrative determination or adjudication that is under consideration. But only in the latter class of cases may the court itself perform the task entrusted to the administration by substituting an adjudication or determination of

[1] *Cf. supra*, pp. 43, 45.
[2] 5 Otto, 750 (1877).
[3] 164 U. S. 213 (1896).
[4] Dunlap *v.* United States, 173 U. S. 65, at p. 75.

its own for that of the administration. The use of the term "judicial review" is sometimes misleading. It seems to be loosely applied, not only to the inquiry whether power to act is lawfully vested or exercised, but also to the process of nullifying the administrative action or of substituting a judicial determination in its stead.

Judicial review of administrative action is always possible, if we mean that the courts may always inquire as to its validity. But the courts have themselves established the rule of law that in many instances, where power to act is lawfully vested, they will assume, without examination of the evidence, the correctness of the administrative determination. This doctrine obtains with respect to administrative ascertainment of facts in determinations relating to the assessment of property for taxation,[1] the admission of aliens[2] or imports,[3] reception or classification of mail matter[4] and disposition of the public lands.[5] And there is a growing tendency to hold officers not answerable in damages for what the court adjudges erroneous findings of facts in proceedings for protecting the public health, which result in partial deprivation of liberty or property,[6] or possibly, in total destruction of property where the owner failed to take advantage of some opportunity to secure judicial review before the administrative determination was finally executed.[7]

These decisions are based primarily upon a recognition of the dictates of governmental necessity, but partially also upon a

[1] Hilton *v.* Merritt, 110 U. S. 97 (1884).

[2] United States *v.* Ju Toy, 198 U. S. 253 (1905).

[3] Buttfield *v.* Stranahan, 192 U. S. 470 (1904).

[4] Public Clearing House *v.* Coyne, 194 U. S. 497 (1904). Bates and Guild Company *v.* Payne, 194 U. S. 106 (1904). Here, in connection with the classification of mail matter, it was said: "Where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

[5] Smelting Company *v.* Kemp, 104 U. S. 636 (1881). *Cf. American Political Science Review*, vol i, pp. 583-607.

[6] Beeks *v.* Dickinson County *et al.*, 131 Iowa 244 (1906). Valentine *v.* Englewood, 76 N. J. Law 509 (1908).

[7] Van Wormer *v.* The Mayor, 15 Wendell (N. Y.), 262 (1836). Raymond *v.* Fish, 51 Conn. 80 (1883). *Cf. Harvard Law Review*, vol. 24, pp. 441–459.

realization that when the courts reverse an administrative adjudication they assume a burden which the statute places on other shoulders. For if the adjudication of the administration is set aside, a new decision must be reached by the courts. In annulling a regulation, on the other hand, the task of the court is completed.

There is no doctrine that an administrative regulation is immune from the power of the courts to review. It is true the courts themselves, in declining to revise administrative adjudications, frequently assert that the administrative action is not subject to judicial examination and revision, but this limitation upon their reviewing power is self-imposed, and it may be discarded whenever they deem it prejudicial to the interests which the Constitution was designed to protect. In the Monongahela Bridge case[1], Mr. Justice Harlan notes that "learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers," and makes reply as follows:

> It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so constrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.

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[1] Monongahela Bridge Company *v.* United States, 216 U. S. 177 (1910). In this case Mr. Justice Harlan declared: "It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the secretary of war that would have been accorded to direct action by it upon the subject." The function of the court was held to be limited to ascertaining whether the executive officers conform their action to the mode prescribed by Congress.

Though the courts are often deaf to the plea that the administrative decision is erroneous, they will always entertain a complaint as to the procedure by which that decision was reached. Chin How *v.* United States, 208 U. S. 8 (1908). *Cf.* 22 *Harvard Law Review*, 360.