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## Chief Justice White and Administrative Law

### Cover Page Footnote

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# CHIEF JUSTICE WHITE AND ADMINISTRATIVE LAW

SISTER MARIE CAROLYN KLINKHAMER, O.P.†

EVALUATION of the contributions of a jurist to constitutional law, or to some other widely known legal field, has become a rather common method of measuring the legal stature of such a person. Notably small has been the number of such studies within the realm of administrative law, undoubtedly because this phase of jurisdiction has been the most recent to appear, and is as yet the most amorphous. Its characteristics lend themselves to, and indeed render imperative, some preliminary consideration of the history of this branch of the law, for only then can the activities of Edward Douglas White, in relation to administrative law, be seen in their proper perspective.

A combination of circumstances, added to his own natural aptitudes and skills, allowed White to assume the position of director of the new legal growth of the late '90's and early 1900's. One of these was the passage of three acts: the Sherman Anti-Trust Act, the Interstate Commerce Act, and the Federal Trade Commission Act. These laws,

"owing to the Court's interpretation in general and White's in many particular instances, were the subject of subsequent perfection by the Congress. Especially is the large body of administrative law associated with the enforcement of the Act to Regulate Commerce the result of White's direct pronouncements upon judicial questions. His inclination to leave to administrative determination questions of fact rather than have the Courts pass upon them, resulted in the formation of a code of administrative law which today is invaluable in the enforcement of congressional statutes."<sup>1</sup>

The other circumstances responsible for White's position in this field were: the rapidly changing social and economic conditions of the country, together with the national faith in the ability of government to solve their attendant problems; the presence of sympathetic executive and legislative officials; the appearance on the bench of a gradually increasing number of like-minded justices; and his own background of training and practice in both the civil and common law. Impelled by

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1. Hartman, *Constitutional Doctrines of Edward Douglass White* (Unpublished doctoral dissertation, Cornell University, 1936) 352.

these circumstances and abilities, he made for himself a secure place in a field of law whose importance and ramifications were increasing at an unprecedentedly rapid pace.

Historically, administrative law has occupied a strongly analogous position in the common-law world to that which equity once occupied in relation to its older brother, chancery. The famed constitutional historian, A. V. Dicey, indeed, refused even to admit the existence of such an apparently exotic growth. Others followed his example, or shared his views, and for this reason alone, writings on the subject have been conspicuous by their absence until very recently. American administrative law has likewise been adversely affected by the confusion seemingly inevitable in consideration of the departments of government. Students of political science have been bewildered when they have tried to find the lines of demarcation between one department and another. The problem here is no new one, for James Madison remarked, with feeling, in *The Federalist*:

"Experience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."<sup>2</sup>

As though these two factors were not enough, recent legal research has been complicated by yet another, and more potent because hidden, one. Legal writers finally began to recognize the existence of administrative law and to fill legal periodicals with articles concerning the subject about twenty years ago; this period coincided with the date of White's death, and may partially account for the comparatively infrequent mention of White's name in the studies of administrative lawyers. At about the same time, however, there was arising a popular feeling against bureaucracy which impelled Felix Frankfurter to declare: "Perhaps the dominant feeling about government today is mistrust. The tone of most comment, whether casual or deliberate, implies that ineptitude and inadequacy are the chief characteristics of government."<sup>3</sup> For most of the period intervening between White's death and the present, therefore, such material as has appeared in American writings

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2. 37 MADISON, FEDERALIST (1831) 152, quoted by McGuire, *The Need for a Federal Administrative Court* (1936) 5 GEO. WASH. L. REV. 47.

3. FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930) 3.

has been characterized by a tone of extreme caution, not to say suspicion. Only very recently has this attitude begun to disappear, and only very recently has it become possible for any jurist to be proclaimed a leading figure in the field of administrative law without having attached to him, at the same time, the label of bureaucrat.

### *Meaning of Administrative Law*

The precise meaning of administrative law has been difficult to determine, and much of the cloudiness which has surrounded the discussion of it has undoubtedly arisen from a lack of nicety in its definition. One of the reasons for the nebulous character of the term has been the time-lag between its first use—in 1869 by Austin—and its present status.<sup>4</sup> If a writer on common law were to return from a time prior to Austin's to our own day, he would, in the language of the present Chief Justice of the United States,

"encounter strange intruders within the sacred precincts of the law, beyond the ken of Blackstone and Kent and Story, and only vaguely hinted at now and then in the judicial opinions of a generation ago. He would find new types of procedure, and an administrative system, growing by leaps and bounds, in which non-judicial officers determine rights by methods, quasi-judicial and enforce them often without resort to the courts. He would observe a vast system of statutory rights and liabilities in large measure founded upon the idea, new to English law, that the basis of liability is not the fault of a wrongdoer, but such method of distributing the burden of loss as accepted social policy dictates."<sup>5</sup>

Parenthetically, it may be observed that White's first law case, *Police Jury v. Tardos*,<sup>6</sup> is an exact illustration of so distributing the burden of loss.

The formidable and mushroom-like growth of administrative law which confronts the American lawyer today has been variously defined at diverse stages of its existence. To a pioneer in its American phase, Frank Goodnow, it appeared that "administrative law and administration have to do with the functions, the physiology of government, so to speak."<sup>7</sup> This was an oversimplification of the problem according to a later writer, who stated:

"Broadly conceived, administrative law includes the law that is *made by*, as

4. Max Radin, *The Courts and Administrative Agencies* (1935) 23 CALIF. L. REV. 469.

5. Stone, *The Common Law in the United States* (1936) 50 HARV. L. REV. 4.

6. 22 La. Ann. 58 (1870).

7. GOODNOW, *ADMINISTRATIVE LAW* (1905) 3.

well as the law that *controls*, the administrative authorities of a government. By the term *law* is here meant all those regulations, orders, and decisions, whether of general or particular applicability, that have consequences in terms of a postulated legal order. By the term *administrative authorities* is here meant all those public officers and organs that are charged with the amplification, application, and execution of statutory law and the exercise of common-law and constitutional executive powers. . . . The administrative law that controls administrative authorities is made by constituent or constitution-making authorities, by legislatures, by the courts, and by administrative superiors in giving directions to their administrative subordinates."<sup>8</sup>

This is perhaps the most comprehensive of definitions, although there are certainly large numbers of others to be found.<sup>9</sup>

There are, furthermore, shades of meaning and niceties of thought which must be added to the definition before it will be sufficiently comprehensive for the purposes of most writers. This necessity arises out of the peculiar and contingent character of this type of law.<sup>10</sup> Probably for this reason, Dean Roscoe Pound maintains that the definition should be still further expanded.

"In its widest sense it includes the entire system of laws under which the machinery of the state works and by which the state performs all governmental acts. . . . In a narrower sense, and as commonly used today, administrative law implies that branch of modern law under which the executive department of government, acting in a quasi legislative or quasi judicial capacity, interferes with the conduct of the individual for the purpose of promoting the well-being of the community. . . ."<sup>11</sup>

Such a definition is far removed from the early one of Ernst Freund,<sup>12</sup> and accounts amply for the explanatory comment of John Dickinson, that "the provenience of the term is far from reassuring."<sup>13</sup> The definitions given by earlier writers are definitely anachronisms now. Thus, for example, Nathan Isaacs was perhaps correct in his explanation of the precarious position of administrative law in our system twenty years ago, the time when White had just concluded his writing and when his

8. HART, *ADMINISTRATIVE LAW* (1940) 3.

9. Frankfurter, *The Task of Administrative Law* (1927) 75 U. OF PA. L. REV. 619.

10. *Ibid.*, and FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930).

11. Pound, *Constitutional Aspects of Administrative Law* (1923) 9 A. B. A. J. 411.

12. SEARS, *CASES ON ADMINISTRATIVE LAW* (1938), vii, citing FREUND, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923).

13. Dickinson, *Administrative Law and the Fear of Bureaucracy* (1928) 14 A. B. A. J. 513.

contributions could not be evaluated because few writers were sure of the proper sphere of 'administrative law', but today who could argue that "the concept of administrative law in our system is really an aggregate of negative rather than positive propositions?"<sup>14</sup> And one of the reasons that this is no longer true is that administrative law has progressed, surely and rapidly, from the foundations laid by White and his associates, to the present commanding position it occupies.

The executive ordinances and bureau decisions which supplement the statutory authority upon which a commission or bureau rests and which form administrative law must be understood to include the sub-legislation which always accompanies it, and which forms the nucleus around which the courts and Congress have built the entire system. Succeeding portions of this chapter will show that White pronounced on this quasi-legislation, and drew, in broad outlines, the boundaries of restraint. Among the types of this sub-legislation as commonly defined are the following seven:

1. delegation of power to the executive to organize the governmental authorities
2. delegation of power to make rules and regulations affecting legal rights of government employees
3. delegation of power to make regulations affecting the rights of citizens
4. allowance of discretion to officials to fill in details in the general act
5. delegation of power to find fact or to start an action
6. delegation of power to establish standards, norms, or principles
7. delegation of authority to the executive with power to re-delegate.<sup>15</sup>

#### *The Origin and Development of Administrative Law*

The extraordinary rapid growth of administrative law has occurred during the last fifty years since the establishment of the Interstate Commerce Commission. This span includes in its earliest and most formative years the period of Edward Douglas White's service on the supreme bench. One of its most marked characteristics was the enormous multiplication of governmental officials and agencies vested with regulatory functions.<sup>16</sup> These bodies together with their powers owe much to White's interpretation of the law, made necessary by a congeries of causes which include:

1. inadequacy of state regulation of child labor, pure food and drugs, lotteries, bankruptcies, banking and corporation practices

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14. Isaacs, *Judicial Review of Administrative Findings* (1921) 30 YALE L. J. 783.

15. BLACHLY AND OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION* (1934) 21.

16. Dickinson, *supra*, note 12, at 513.

2. uneven distribution of wealth
3. technological, commercial, industrial superiority of the national government over state governments
4. public regulation of private enterprise

and at least a dozen more.<sup>17</sup>

While it is a commonplace that the American law is derived chiefly from the English common law, the complexity of the current American system was not present in the earlier English legal system, although many kinds of writs did tend to divide and subdivide life for legal treatment.<sup>18</sup> Not in reaction to this early practice, but rather in opposing the system to which he had been subjected, "the Puritan was averse to administration, as involving subordination rather than consociation, and the pioneer, who had little need of it, was by instinct opposed to regulation or supervision as involving needless interference with the freedom of grown men."<sup>19</sup> Hence, using the forms, terms, and phraseology of the common law, the early American settler was tending to build up a system subtly but unmistakably different from the English in many respects. These doctrines were embodied in the Constitution and were interpreted by the courts. "They are what the courts, thinking largely in terms of the common law, have long declared them to be."<sup>20</sup> Since most of our legal thinking and legal action is controlled by what the courts, particularly the Supreme Court, say, it follows that their doctrines are peculiarly important in the development of administrative law.

One of the doctrines enunciated by the Court, that of sovereignty, is paramount to an understanding of the law, for it is the concept which "in the last analysis, gives the federal government such absolute powers in respect to foreign relations, war, immigration, taxation, and customs. The principle of jurisprudence that the government cannot be sued without its consent is another expression of the common law conception of sovereignty."<sup>21</sup> Invested with the attribute of sovereignty, the federal government has been in a most favorable position for the furtherance of many legal doctrines, and among these were a number upon which has been conferred the name administrative law. Here can be observed the

17. Blachly, *op. cit. supra*, note 14, 2-9; Haines, *Effects of the Growth of Administrative Law upon Traditional Anglo-American Legal Theories and Practices* (1932) 26 *AM. POL. SCI. REV.* 875-894.

18. Oliphant, *A Return to Stare Decisis* (1928) 6 *AM. L. SCHOOL REV.* 219.

19. Pound, *Administrative Application of Legal Standards* (1919) 44 *A. B. A. REP.* 450.

20. BLACHLY AND OATMAN, *FEDERAL REGULATORY ACTION AND CONTROL* (1940) 8.

21. *Id.* at 8.



importance of White's theories of sovereignty and the inherent powers of the federal government. Had he not been thoroughly impressed before he came to the bench, as his Senate speech<sup>22</sup> indicates that he was, with the necessity of allowing the national government to exercise its extensive powers in numerous and carefully regulated channels, it is doubtful that the course of administrative law could have been so firmly traced in the beginning of this century. It must not be supposed, nevertheless, that this development has taken place outside the realm of the common law or the Constitution. The course of its history has been devious, but it has been, on the whole, consistent with the traditional legal and constitutional growth.<sup>23</sup>

The reception which was given this supposed intruder into the field of law was by no means a cordial one.<sup>24</sup> To the common-law lawyer, the field of administrative law was a bewildering and irritating region, wherein his own familiar terminology was tortured and extended into senses he had never imagined. The resultant recasting of political and legal theory—always a painful process in the quickly congealed element of the law—and the tortuous struggles between the branches of the federal government in their efforts to determine precisely their own status, have not added to the happiness of the common law practitioner.<sup>25</sup> These difficulties were practically non-existent for the civilian lawyer, and for one who had practiced both kinds of law, it was a matter of comparative simplicity to translate the new legal forms into understandable terms in either kind of law.

#### *Early Growth of Administrative Law in the United States*

The courts had explained, as early as 1825, that Congress did possess the right to delegate to others the powers which it might rightfully exercise itself. In the case of *Wayman v. Southard*,<sup>26</sup> the Court held that this was proper to Congressional action, but this early *dictum* had been forgotten in the acceleration of application of law to the problems arising after the War between the States. It was an unusual situation that this acceleration was directed on its precipitate course by a man who at

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22. 23 CONG. REC. 6513-6520, 6560-6582 (1892).

23. BLACHLY, *FEDERAL REGULATORY ACTION* (1940) 8.

24. Rosenberry, *Administrative Law and the Constitution* (1929) 23 AM. POL. SCI. REV. 44.

25. *Id.* at 34; McGuire, *supra*, note 2, at 43.

26. Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892, 896 citing the case (1825) Wheat. I, 42. It is ordinarily given as 10 Wheat. 1 (U. S. 1825).

least had attempted to prevent the preliminary actions necessary to its growth.

It is reasonably safe to conclude that the phenomenon accompanying most of the increase in administrative law was the preoccupation of government with the control of economic aspects of private business, or with the social and economic status of groups within the American populace. "The administrative tribunal was used as the mechanism to carry the public will as expressed in the form of legislation to its point of application to our social and economic scheme."<sup>27</sup> The kinds of decisions, and the kinds of tribunals, have multiplied as rapidly as the law has grown, and the Justices who had most influenced the course of administrative development have been White, Holmes, Taft, and Brandeis.<sup>28</sup> The latter two inherited a series of precedents established by White and by his younger—in point of service—colleague, Holmes. From the most rudimentary kind of administrative activity, decisions have come to be given in the form and with the force of general rules and regulations, thereby becoming practical components of the working law, while the pronouncements of so-called quasi-judicial tribunals have come to be truly judicial by reason of their decisions dealing with questions of definite rights.<sup>29</sup>

Since the time of the establishment of the Interstate Commerce Commission notable strides have been made in the delimitation of administrative law. As one may cite *M'Culloch v. Maryland*,<sup>30</sup> the *Legal Tender Cases*,<sup>31</sup> the *Associated Press v. National Labor Relations Board*<sup>32</sup> in the field of constitutional law, so one may cite almost any Interstate Commerce Commission case, or the equally well-known landmarks of *Prentis v. Atlantic Coast Line*,<sup>33</sup> *Londoner v. Denver*,<sup>34</sup> and *Ohio Valley Water Company v. Ben Avon Borough*<sup>35</sup> in the field of administrative law. The large number of Interstate Commerce Commission cases de-

27. Stason, *Study and Research in Administrative Law* (1939) 7 GEO. WASH. L. REV. 684, 685.

28. Aitchison, *Justice Holmes and Administrative Law* (1933) 1 GEO. WASH. L. REV. 165, 169.

29. BLACHLY, *ADMINISTRATIVE LEGISLATION* (1934) 1.

30. 4 WHEAT. 316 (U. S. 1819).

31. 12 Wall. 457 (U. S. 1872).

32. 301 U. S. 103 (1937):

33. 211 U. S. 210 (1908).

34. 210 U. S. 373 (1908).

35. 253 U. S. 287 (1919).

cided by White and the strength which his opinions gave to this body alone would denote his importance in this field.<sup>36</sup>

In the final analysis, however, it is not the regularly established system of courts which produces most administrative law, but the administrative tribunals proper, which are not entirely composed of lawyers, and which have rules of procedure proper to themselves.<sup>37</sup> The regularly constituted courts often review the decisions of these bodies, or the actions of administrative officials, and in some cases they refuse to do so.<sup>38</sup> Ground for consideration or refusal of consideration is usually based upon the practice of the tribunal itself.<sup>39</sup> "If the statute is ambiguous, and extrinsic aids must be employed, the court indicates a preference for 'the practical and long continued construction' by administrative officers rather than legislative history and Congressional debates."<sup>40</sup> This attitude is largely based upon White's own stand in regard to such situations, and wherever *stare decisis* is found in administrative law, it operates most surely in securing the application of this principle to the case in hand.

The crossing and re-crossing of the lines which theoretically separate the branches of government is overwhelmingly manifested in the consideration of administrative law. "It is a commonplace that the exigencies of effective administration permit little more than lip service to the classic notion that all government activity should be chopped into blocks and handed out, like Gaul, to three separate custodians."<sup>41</sup> Since this is true, the three departments each exercise some control over administrative law, with the judiciary occupying by far the most extensive territory, as one might anticipate.

Congress, however, is the branch which must act first, for it not only determines governmental policies and functions, but it ordinarily establishes the administrative agencies to carry them out. The extent to which it defines duties of officers or details of governmental organization varies greatly, although in the case of regulatory agencies such as the

36. *E.g.*, *Interstate Commerce Comm. v. Illinois Cent. R.R.*, 215 U. S. 452 (1910); *Interstate Commerce Comm. v. Chicago and Alton R.R.*, 215 U. S. 479 (1910); *Baltimore and Ohio R.R. v. U. S. ex rel. Pitcairn Coal Co.*, 215 U. S. 481 (1910).

37. Radin, *supra*, note 4, 470-476.

38. Albertsworth, *Judicial Review of Administrative Action* (1921) 35 HARV. L. REV. 127, 134, 135, citing *International Contracting Co. v. Lamont*, 155 U. S. 303 (1894).

39. BLACHLY, *FEDERAL REGULATORY ACTION* (1940) 193.

40. (1932) 1 GEO. WASH. L. REV. 112, citing *United States v. Shreveport Grain and Elevator Co.*, 287 U. S. 77 (1932).

41. Hyneman, *Administrative Adjudication* (1936) 51 POL. SCI. Q. 383.

Interstate Commerce Commission it usually lays down the broad terms of procedure, and it may do so in other cases. The vagueness of these criteria is generally characteristic of any norms laid down for administrative legal matters. Chief control, naturally, is exercised through Congressional power over appropriations.<sup>42</sup>

Mere mention of Congressional authority to constitute administrative agencies and tribunals would be misleading if it did not include reference to one of the most hotly disputed questions in this connection. There is a principle often quoted by writers on legal matters to the effect that *delegata potestas non potest delegari*. Stated concretely, and in reference to the instant case, this implies that Congress, which, within its delegated power, possesses all legislative power, cannot delegate any part of this authority to a subordinate agency. If it can do so at all, to what extent and under what conditions may it delegate? That these are not idle questions is demonstrated by the decision in *A. L. A. Schechter Poultry Corporation v. United States*,<sup>43</sup> where the decision indicated that a more stringent regulation of the delegated power would have resulted in a different outcome.<sup>44</sup> This was a vital question in the early years of administrative law's growth, and it was one with which White's unique background found him peculiarly fitted to deal. Administrative courts, with their *droit administratif*, were a permanent feature of the civil law system which had given him his first practical experience, and the state and municipal governments of Louisiana offered additional opportunities for observation of administrative tribunals.

In the national government the executive exercises strong and extensive control over many administrative agencies, since most of them function under the authority of an executive department. Increasingly, the authority of the executive over many of these agencies is circumscribed by the terms of the legislative enactments which constitute them, and such stringent provisions have recently been upheld by the courts,<sup>45</sup> as in the case of *Rathbun v. United States*.<sup>46</sup> Nevertheless, since the growth

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42. BLACHLY, FEDERAL REGULATORY ACTION (1940) 107.

43. 295 U. S. 495 (1935).

44. Much earlier Mr. Justice J. R. Lamar had observed, in the case of *United States v. Grimaud*, 220 U. S. 506, 517 (1911): "It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations." He continued, at 521, "But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."

45. BLACHLY, FEDERAL REGULATORY ACTION (1940) 107.

46. 295 U. S. 602 (1935).

of administrative law began, the power of the executive over it has grown increasingly, but largely for extraneous reasons. The forum of last resort is still the court, and not the legislator or the executive. Relying upon the Constitution, Congressional statutes, and previous pronouncements of the courts, the present courts have maintained a most effective check upon administrative tribunals, with the result that they have firmly established control over the administration, holding it within its field of competence and within the bounds of law, over conduct, by preventing abuse of power, and over individuals, by guaranteeing their rights.<sup>47</sup>

As a consequence of the vigilance of the courts over administrative practice individual rights, whether positive, negative, or procedural, are sought to be safeguarded.<sup>48</sup> All the ordinary methods of procedure may be resorted to; or only some of them, or perhaps none. The courts must consider not only what were the jurisdictional attributes of the tribunal being considered, the powers granted to it by the statute of its creation, the inter-relationships of state government and the tribunal, and the type of work performed, but they must also notice what power they may exercise themselves in case of appeal. In addition to these issues, there are more abstruse questions: whether the case involves law, fact, or mixed law and fact, discretion or procedure, what was the form of the original administrative action, and what were the nature and form of the original proceeding.<sup>49</sup> Even stated so baldly, this is a rather formidable list of requirements for a reviewing court. The difficulties become more and more imposing and disquieting when it is realized that each kind of administrative agency operates under its own peculiar kind of procedure, and, in almost every case, with its own distinctive rules of evidence. Hence, the complexities of administrative law, staggering enough even before they come into conjunction with the legislative and executive branches, become almost overwhelming when the judiciary enters the picture.

This is the picture of administrative law as it has developed within the framework of the American legal system. While it is evident that it did not confront White with all the complexity that it has since assumed, it is nevertheless certain that all the problems which administrative law presents today existed in embryo at the time that White first delivered a decision in a case involving administrative law. There is,

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47. BLACHLY, *FEDERAL REGULATORY ACTION* (1940) 108-110.

48. *Id.* at 110-111.

49. *Id.* at 113.

furthermore, no doubt that many cases classified in other fields of the law—taxation, immigration, due process under the Fourteenth Amendment, government of territories, to mention a few types—really relied most heavily upon the determination of some administrative principle for their solution. Reference to such cases must necessarily be made in connection with those types to be considered in later chapters of this study. Where the cases were concerned primarily with administrative law, however, and where White's opinions were determinative of that law, or indicative of the course which it was to follow, they will be discussed as administrative law cases, properly denominated. At least fifty of the nine hundred odd cases with which White was concerned form landmarks in this field of the law, and many others shed important light on it even when they are bounded by some other department of the law.

#### *Chief Justice White and Administrative Law*

There is a parallel between the position of John Marshall in the case of *Marbury v. Madison*<sup>50</sup> and in White's treatment of a number of questions in administrative law. Superficially considered, each Justice was presented with an opportunity to enlarge greatly the power of the judiciary; in each case, by rejecting the apparent advantage, both Marshall and White added to the prestige of the Court by defining more firmly its limitations and prerogatives. Perhaps nowhere is this better illustrated, in the latter Justice's career, than in his opinion in the leading case of *Oceanic Steam Navigation Co. v. Stranahan*.<sup>51</sup> Discussing the validity of a Congressional statute empowering an administrative officer, here a customs official, to impose penalties, he refuted the contention that imposition and enforcement of penalties is primarily a judicial function. Such a contention, he averred, "magnifies the judicial to the detriment of all other departments of the Government,"<sup>52</sup> and is therefore contrary to, and outside of, the common constitutional practice of the courts. The effect of the pronouncement was to allow administrative action of this kind to be applied in appropriate instances, and to draw a sharply defined line of cleavage between administrative practice and judicial action.

In general, White's attitude in his dissenting opinion in *Interstate Commerce Commission v. Chicago, Rock Island and Pacific Railway*

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50. 1 Cranch. 137 (U. S. 1803).

51. 214 U. S. 320, 338 (1909).

52. *Ibid.*

Co.<sup>53</sup> is a fair indication of the method which he followed in deciding all questions of law, but particularly those of administration. Where a case fell under some broad principle of interpretation, he was content to follow the accepted construction, or to express his disbelief in the principle; when, on the other hand, a case was distinguished by particular features which withdrew it from any inclusive principle, he was equally content to leave the determination of original questions to a tribunal of a specialized nature, or to express his dissent from his colleague's failure to follow this course, in the minimum amount of space.<sup>54</sup>

### *The Sherman Anti-Trust Act*

The Sherman Anti-Trust Act was second only to the Interstate Commerce Act with its perfecting amendments in bringing noteworthy litigation before the courts, although the latter act was far more responsible for the early direction followed by administrative law. Because of the nature of the Sherman Act, and the prominence of the parties involved in the suits arising under it, great publicity was given the decisions rendered therein, and voluminous has been the literature since published upon the subject. Mr. Justice Holmes, nevertheless, remarked that great cases make bad law,<sup>55</sup> precisely because of the undue amount of attention excited by their entirely accidental qualities. For this reason, probably, White's opinions under the Sherman Act, while provocative of attention, did not contribute as solidly to the development of administrative law as did those he gave in cases heard under the Interstate Commerce Act. In his first expression of opinion under the Sherman Act, he defined what was later to arouse so much opposition, the rule of reason.

This definition was formulated in a dissent in *United States v. Trans-Missouri Freight Association* in 1897. Mr. Justice Peckham, for the majority, had already distinguished reasonable from unreasonable restraints of trade, and White simply argued along the same path to a quite different conclusion. Not in an attempt to play upon words, as he was charged with doing in a later case, but in an effort to point out the inevitable consequences of the opinion reached by the majority, he protested their failure to exercise the rule of reason in determining what constituted reasonable restraints of trade. The later Clayton Act and the cases which arose thereunder, as well as those which continued to

53. 218 U. S. 88, 112 (1910).

54. *Ibid.*

55. See *Northern Securities Co. v. U. S.*, 193 U. S. 197, 400 (1904) (dissenting opinion).

appear until the passage of the Norris-LaGuardia Act, furnished corroboration for his assertion that "the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition."<sup>56</sup>

His lengthy examination of the case continued with a pertinent query as to the utility of the establishment by Congress of a Commission charged with the duty of determining rates which the Court had seemingly declared non-determinable.<sup>57</sup> From this he proceeded to a conclusion that the Interstate Commerce Commission had demonstrated by its own actions its belief in the practicality of reasonable restraints of trade, since some of its rulings had already taken the position that they were to be encouraged.<sup>58</sup>

Fourteen years later the same arguments were adduced, this time for the majority, in *Standard Oil Co. of New Jersey v. United States*.<sup>59</sup> This litigation found White the Chief Justice, which partially explains the widespread publicity of his decision. He examined minutely the charter of the Standard Oil Company, pointed out that it was a combination in restraint of trade, and thence proceeded to dissolve it on the ground that the restraint as exercised was unreasonable. Seven of his brethren shared his opinion, but Harlan dissented violently therefrom, although he, too, maintained the illegality of the corporation.<sup>60</sup> Harlan's last paragraph epitomized the censure bestowed upon White.<sup>61</sup> He was charged with having performed a purely political act, one which was "legislation pure and simple."<sup>62</sup> There was no doubt of the weight

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56. 166 U. S. 290, 356 (1897).

57. *Id.* at 372.

58. *Id.* at 374.

59. 221 U. S. 1 (1911).

60. 2 PRINGLE, LIFE AND TIMES OF WILLIAM HOWARD TAFT (1939) 664.

61. "I dissent from that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority, in this court to insert words in the Anti-Trust Act which Congress did not put there, and by which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare." 221 U. S. 1, 106 (1911). Comparison of this remark with White's opinion in the Employers' Liability Cases, 207 U. S. 463 (1908) is interesting; there White announced: ". . . the argument is this, that. . . the words 'any employe' as found in the statute should be held to mean any employe when such employe is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it." *Id.* at 500.

62. 2 GRESHAM, LIFE OF WALTER QUINTON GRESHAM (1919) 655; see also p. 811.



and moment of the decision, although it was declared to have been couched in a "singularly cumbersome and obscure English style."<sup>63</sup>

There were divergent results from this one decision, much after the manner which White himself had predicted would follow the *Trans-Missouri* decision. In some quarters action was taken in the form of letters; in others, articles, brochures, or books were written in attempts to clarify the issue, or more practically, to persuade the country of the truth or falsity of one side of the controversy.<sup>64</sup> The furore eventually died away, but the Sherman Act, despite its having been sustained by the decision, was discovered to be a poorly written statute, particularly, as White had earlier pointed out, in respect to labor unions. White's reasoning was lauded by President Taft at a later date, and the con-

63. FLYNN, *GOD'S GOLD* (1932) 444.

64. President Taft, for instance, in *THE ANTI-TRUST ACT AND THE SUPREME COURT* (1914) 20, wrote: ". . . we find that the state of the common law when Congress passed the anti-trust statute was that contracts in restraint of trade, in so far as they restrained a party to the contract, were void, unless they were reasonable in the sense that they were merely ancillary to a main contract which was lawful in its purpose, and were reasonably adapted and limited to that purpose, and that all contracts or combinations in which the contradicting parties agreed to combine to restrain the trade of a third party or affect it injuriously were void at common law, and there were no reasonable contracts or combinations in restraint of trade of that kind. . . . Our anti-trust statute, however, now makes such restraints, which were thus only void and unenforceable at common law positively and affirmatively illegal, actionable, and indictable." Albert H. Walker, author of a book on the Sherman Act, wrote "*Unreasonable*" as *Applied to Trusts*, 11 *MOODY'S MAGAZINE* (1911) 395. He later reprinted it as a monograph: *The "Unreasonable" Obiter Dicta of Chief Justice White in the Standard Oil Case* (n.p., n.p.) (1911). Former President Roosevelt received two letters from C. G. Washburne, and replied, in reference to an enclosure from Senator Francis E. Warren, "I shall read that letter with the utmost interest. As you know, I believe that the attempt to suppress corporations is all nonsense, and that we must put forth an effort to regulate them in wise fashion. . . ." This letter was written on October 6, 1911: October 24 found him writing to Washburne: "I agree with your letter excepting that instead of repealing the Sherman Act it comes to me that such an act as I desire, and one substantially what you wish, could be so drawn as to supercede sic the Sherman Act, wherever the latter was in conflict with it." These letters form part of the Roosevelt collection in the Library of Congress.

In this connection it is noteworthy that a list of prosecutions under the Sherman Act was compiled by the Department of Justice at Taft's request. Extending, in all probability, to November 1911, of his administration, it shows:

Under Harrison	— 4 bills in equity, 3 indictments
Under Cleveland	— 4 bills in equity, 2 indictments, 2 informations for contempt
Under McKinley	— 3 bills in equity
Under Roosevelt	— 18 bills in equity, 25 indictments, 1 forfeiture proceeding
Under Taft	— 14 bills in equity, 27 indictments

Taft Papers, case 14, series 2

troversy was characterized as the unfortunate outcome of verbal differences.<sup>65</sup>

### *Police Power*

Notwithstanding the wide public interest in this case, it failed to indicate the scope of White's interest in problems of administration. The division of authority inherent in the dual nature of American government was the cause of a long series of his decisions in administrative law. They define the limits beyond which neither the state nor the national governments may go in exercising power granted them by Congress or secured to them by the Constitution. It is a commonplace of American governmental theory that an extensive twilight zone exists between the two clearly defined spheres of national and state jurisdiction. Within this zone fall a number of the powers generally designated as the police powers of government. Their description and classification often become the subject of opinions in administrative law, partially because such powers are frequently redelegated, and partially because they occasionally conflict with an already existing administrative tribunal.

The earliest case of this type in which White was concerned was that of *Adams Express Co. v. Ohio*,<sup>66</sup> wherein he wrote the dissenting opinion in the 5-4 decision. The situation involved an Ohio statute, the Nichols law, which had created a state board of assessment to determine the valuation of state-owned property of telegraph and telephone companies. Since these companies were in interstate commerce, the findings of the board inevitably conflicted with the jurisdiction of the Interstate Commerce Commission. While the majority of the Court joined Chief Justice Fuller in upholding the Nichols law, Field, Harlan, and Brown concurred in White's assertion that no state, by means of a board or by any other means, had a right to tax property with a situs in another state, or to use such property as a basis for taxing other property within the state.<sup>67</sup> Reflecting his well-crystallized views on the spheres of action occupied by the respective jurisdictions is his definition of the taxing power:

"It is elementary that the taxing power of one government cannot be lawfully exerted over property not within its jurisdiction or territory, and within the territory and jurisdiction of another. The attempted exercise of such power would be a clear usurpation of authority, and involve a denial of the most

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65. N. Y. Times, June 7, 1914, #6, p. 8, col. 1.

66. 165 U. S. 194 (1897).

67. Cf. *Frick v. Pennsylvania*, 268 U. S. 473 (1925) and *Panhandle Oil Co. v. Knox*, 277 U. S. 218 (1928).

obvious conceptions of government. This rule, common to all jurisdictions, is peculiarly applicable to the several states of the Union, as they are by the Constitution confined within the orbit of their lawful authority, which they cannot transcend without destroying the legitimate powers of each other, and, therefore, without violating the Constitution of the United States."<sup>68</sup>

His dissenting opinion was repeated in the following case, that of *American Express Co. v. Indiana*,<sup>69</sup> in which a similar set of circumstances produced a similar result.

The next example of supervision of state police power, the case of *Rhodes v. Iowa*,<sup>70</sup> evoked from White little more than the declaration that moving packages from a platform to a warehouse did not constitute removing them from interstate commerce. Simply stated thus, it is difficult to see the reason for the dissent of Gray, Harlan, and Brown, but their assertion that the decision acts as a curtailment of the police power of the state reveals that the Interstate Commerce Commission's authority has been sustained, an important consideration in view of the later Wilson, Webb-Kenyon, and Ashurst-Sumners Acts.

Not the shipment of freight alone, but also the carrying of passengers was the theme of an Ohio statute which brought the *Lake Shore and Michigan Southern Railway Co. v. Ohio* suit before the Court.<sup>71</sup> White dissented from Peckham's opinion here, upholding, as it did, a law which required all companies operating three or more trains a day to stop at every town of three thousand or more. Employing more prominently than usual his customary sorites,<sup>72</sup> White held that the statute operated in a discriminatory fashion, both as to railway companies, and as to communities served. As he pointed out, the figures chosen were entirely arbitrary ones, but the majority could not be persuaded to accede to this view.

The next case involving police power also found White arrayed with the opposition, although he was content to agree with Peckham's dissent from Brewer's opinion in the suit, one by *Lindsay and Phelps Co. v. Mullen*.<sup>73</sup> The state statute here protested was one empowering an inspecting official to impose a lien upon lumber which had come under his supervision. Brewer, for the majority, upheld the grant on the theory

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68. 165 U. S. 194, 230 (1897).

69. 165 U. S. 255, 256 (1897).

70. 170 U. S. 412 (1898).

71. 173 U. S. 285 (1899).

72. *Id.* at 336.

73. 176 U. S. 126 (1900).

that it afforded a legitimate channel for the exercise of the state's police power, but Harlan and Brown joined Peckham and White in a dissent based upon a belief that the state's action constituted a coercion sufficiently serious to impose a burden upon interstate commerce.<sup>74</sup>

These cases in which White dissented show clearly his belief in the possibility of distinguishing the national from the state government as to police power, and they indicate at the same time his insistence on the superior power of the national government. This attitude is what has impelled some writers to speak of his dual federalism, and his nationalism, but it is also an indication of the consistency with which he followed out the ideas presented in his earlier political career. Although a philosophy of states' rights had never existed for him, his expressions became increasingly nationalistic, and his explorations of administrative problems became of ever greater importance.

Yet his tendency to assert the nationalist position was not so strong as to cause forgetfulness of the realm of state authority. In *Andrews v. Andrews*,<sup>75</sup> for example, he repeated the consistent decision of the Court that a state may not be prevented from exercising its "inherent authority to preserve the public morals" by the application of the contract clause of the Constitution.<sup>76</sup> Brewer, Shiras, and Peckham dissented from the opinion in which White explained the connection of the police power with the authority of the state over marriage and divorce.

Again, in his dissent in the case of *Northern Securities Co. v. United States*,<sup>77</sup> White adopted the same mode of reasoning. One of the contentions of the majority had been that the concentration of stock of foreign corporations within the confines of the home state of the corporation constituted a direct burden upon interstate commerce. To this assertion, White posed the question:

"Can it in reason be maintained that to prescribe rules governing the ownership of stock within a State in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?"<sup>78</sup>

And he answered his own query some pages later by declaring:

"True, the instrumentalities of interstate commerce are subject to the power

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74. *Id.* at 154.

75. 188 U. S. 14 (1903).

76. *Id.* at 34.

77. 193 U. S. 197 (1904).

78. *Id.* at 369.

to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. . . . This difference was pointed out in the cases which have been referred to [in the arguments], and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the States on the other."<sup>79</sup>

The conclusion unavoidably following from the action upheld by Harlan and four of his associates was, in White's view, that "the sum of property to be acquired by individuals or by corporations, the contracts which they make, would be within the regulating power of Congress."<sup>80</sup> To the extent that White's dissent here expresses the belief that Congress may not locally regulate business or production, the decisions in *United States v. Butler*<sup>81</sup> and *Mulford v. Smith*<sup>82</sup> offer interesting confirmation that such is now the attitude of the Court.

State authority was defined by White as the object which Congress had endeavored to strengthen in the passage of the Wilson Act, a statute which had been enacted in an effort to delimit and describe the power of the Interstate Commerce Commission over shipments of liquors moving into areas which had prohibited their sale or use. The problem of the precise effect of the statute was decided by White in *Pabst Brewing Co. v. Crenshaw*,<sup>83</sup> wherein he declared that Congress had legitimately exercised its power over interstate commerce to confer upon the states the authority to deal with alcoholic beverages as though they were a part of domestic commerce.<sup>84</sup>

Yet authority conferred upon the state either by the Constitution or by Congress was not sufficient, in White's opinion, to allow the state to act in an arbitrary or capricious fashion toward foreign corporations located within her jurisdiction. Writing an opinion concurring with that of Harlan in *Western Union v. Kansas*,<sup>85</sup> he maintained:

"It is to be observed that the view taken by me does not deprive the State of power to exert its authority over the corporation and its property in the

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79. *Id.* at 393.

80. *Id.* at 397.

81. 297 U. S. 1 (1936).

82. 307 U. S. 38 (1939).

83. 198 U. S. 17 (1905).

84. *Id.* at 27.

85. 216 U. S. 1 (1910).

amplest way subject to constitutional limitations. It simply prevents the State from driving out the corporation which is in the State by imposing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, except upon the assumption that the corporation is not in the State, and that the illegal exactions are the price of the privilege of allowing it to come in."<sup>86</sup>

As Holmes remarked on another occasion, he often looked to the consequences of his decisions, as he did here in denying the validity of the tax. Similarly, he concurred with McKenna's dissent in *Caminetti v. United States*,<sup>87</sup> since he shared his colleague's view that greater evils would arise from the Mann Act than those which it was intended to prevent.

Cases customarily joined with this are *United States v. Doremus*,<sup>88</sup> and *Webb v. United States*,<sup>89</sup> in each of which White also dissented. They arose under the Harrison Narcotic Act, which was upheld by Day and four other Justices, but which White attacked on the ground that Congress had exercised authority not delegated but retained by the state within its police power. These dissents are not of as great significance, however, as the preceding ones in this category of cases arising under interpretations of administrative law.

#### *Delegation of Power by Congress*

Of far greater significance is the series of decisions which White wrote, or from which he dissented, under the generic heading of delegation of legislative power. These were interpenetrated with subtle distinctions concerning delegation and sub-delegation of authority originally granted by the Constitution to Congress, or by state constitutions to their own legislatures. The extent and nature of the original grant had to be examined, of necessity, before the ability to make new delegations could be affirmed. Earliest of such decisions written by White was that in *United States v. Santa Fé*,<sup>90</sup> which involved the construction of an old Spanish statute allegedly granting four leagues of territory to every town in the Spanish New World containing thirty inhabitants. Displaying great familiarity with both Spanish language and law, White examined at length the allegations of the city as to its right to the area claimed. More

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86. *Id.* at 51.

87. 242 U. S. 470, 502 (1917).

88. 249 U. S. 86 (1919).

89. 249 U. S. 96 (1919).

90. 165 U. S. 675 (1897).

important for the development of administrative law, however, was his examination of the delegation of the Congressional authority to survey land and to confer the right to hear controversies arising from the surveys upon the Commissioner of the General Land Office and his subordinates throughout the country. Such a delegation, he declared, must be strictly defined and limited. The jurisdiction of administrative tribunals created by Congress must be marked out in definitive terms, and cases which are brought before such bodies must be similarly clarified, so that it may be seen that they fall within the competence of the act.<sup>91</sup> So clearly and firmly was the principle stated that its applicability in later situations has become axiomatic, and it is a settled rule of construction that the courts examine the statute and the action of the administrative courts in each case arising before them, to determine the exactness with which the constituent act has been followed.<sup>92</sup>

White dissented from Peckham's opinion in *American School of Magnetic Healing v. McAnnulty*<sup>93</sup> without explaining his reason for so doing. In a substantially similar case, *Public Clearing House v. Coyne*,<sup>94</sup> he concurred in Brown's opinion, but again without giving a reason. He concurred in Brown's opinion in *Benson v. Henkel*,<sup>95</sup> a 5-4 decision in which Day, Peckham, and McKenna comprised the remainder of the majority. This was a case involving the alleged bribery of a Land Office official in California, in which Day's most revealing statement in the realm of administrative law was that an "order or removal involves judicial rather than mere ministerial action, and must be issued by the Judge of the District when the case made warrants it,"<sup>96</sup> thereby asserting the jurisdiction of the customary procedure of court practice over precedent administrative action.

It was nearly three years after this decision before White again expressed himself in this division of the law, and the cases were the highly interesting *Employers' Liability Cases*.<sup>97</sup> Attacking the statute

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91. *Id.* at 714.

92. *Cf.* Blachly, *op. cit. supra*, note 20, *passim*.

93. 187 U. S. 94 (1902). The school had been charged with using the mails to defraud, and the postmaster had refused to deliver mail addressed to the school or its officers. Mr. Justice Peckham held that questions of fact within an administrative department are for the department to decide, but this does not prevent the courts from redressing grievances, since otherwise administrative action would be uncontrolled.

94. 194 U. S. 497 (1904).

95. 198 U. S. 1 (1905).

96. *Id.* at 16.

97. 207 U. S. 463 (1908).

which had sought to impose upon employers the responsibility for injuries to employees engaged in interstate commerce occupations, whether such injuries were or were not due to their own carelessness or negligence, and which thereby destroyed the old fellow-servant rule, White denied its legality on every head. His final argument furnishes an excellent illustration of the method he pursued in arriving at a decision:

"It remains only to consider the contention . . . that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."<sup>98</sup>

The preceding quotation contains within it several features characteristic of White. He often used the expression "even although," an awkward substitute for the much more common, and perfectly correct, "even though." Another favorite locution was the statement of a proposition in such form as would enable him to declare it self-refuted, as in the first sentence above. Finally, and more substantively, the quoted paragraph contains another statement of the inherent powers of Congress and of the states, a doctrine which was implicit in all White's decisions.

Much administrative practice had settled into position by the time White wrote his definitive opinion in the aforementioned case, *Oceanic Steam Navigation Co. v. Stranahan*.<sup>99</sup> The litigation involved the authority of Congress to provide for inspection and collection of money penalties by executive officers, and while White upheld the navigation company's contention that the penalties had been unfairly imposed, he sus-

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98. *Id.* at 502.

99. 214 U. S. 320 (1909).



tained Congressional authority to provide for their imposition. It was established judicial construction, he declared, to concede the legality of such action by Congress, and to allow executive officers to impose and enforce penalties "without the necessity of invoking the judicial power."<sup>100</sup>

The reasoning by which White arrived at this conclusion was not involved, but came directly from a consideration of the treatment by the courts of parallel authority of Congress. Viewing one such treatment, White asserted:

"the plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority to impose the penalty, and its complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance as a means of enforcing the penalty which there was lawful authority to impose."<sup>101</sup>

By alluding to the Court's failure to consider the question which would arise if an executive officer were to exercise authority proper to the judiciary, he further delineated the status of administrative law at the time in which he spoke.<sup>102</sup> Since this question did not arise in the instant case, it was not, according to settled judicial practice, further noticed; indeed, the attention given to the possibility in this one remark is a departure from custom.

#### *The Federal Income Tax Act*

One of the leading cases in administrative law, *Brushaber v. Union Pacific*,<sup>103</sup> was the next, chronologically, in this series decided by White. It came before the Court under the Federal Income Tax Act of 1913, on the charge that the administrative provisions of the Act were unconstitutional. Discussion of income taxation was always one of White's chief interests, judging from his earliest dissents and opinions, and his remarks in this case as to the conflict between the taxing power and the due process clause are enlightening from this viewpoint, as well as for the insight they give into his constitutional interpretations of each clause. The due process clause, he explained, "is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other

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100. *Id.* at 339.

101. *Id.* at 101.

102. *Ibid.*

103. 240 U. S. 1 (1916).

words, . . . the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away on the other by the limitations of the due process clause."<sup>104</sup> The Act in question was upheld chiefly on this basis, and it was only in the last paragraph that he referred to the administrative question which had originally brought the case before him. Again resorting to one of his favorite devices, he contended that merely to state the objection that the Secretary of the Treasury had been wrongfully empowered to enforce the act was simultaneously to refute it. The apparently cavalier dismissal of the case is explained by his reference to preceding decisions of the Court,<sup>105</sup> of which this one was at once the summation and the definitive decision.<sup>106</sup>

The same Income Tax Act was involved in suits decided less than a month later, those of *Dodge v. Osborn*,<sup>107</sup> and *Dodge v. Brady*.<sup>108</sup> Declaring at the outset that it had been long settled that suits may not be brought to enjoin the assessment or collection of taxes on the basis of unconstitutionality, he dismissed both cases despite their argument that the appeal to the Commissioner of Internal Revenue was wanting in due process.<sup>109</sup> In both of these cases, and in the one considered immediately above, White's words give little indication of the power he conceded to Congress. This power allowed administrative questions, which were, as noticed early in this chapter, quasi-legislative or quasi-judicial or both, to be decided by officers occupying positions created by Congress and exercising authority which belonged, in its essence, to that body. In the opinion of White, such exercise of authority was quite natural, and scarcely to be questioned, but the mere fact that it was so often made the subject of lawsuits shows how ill-defined and badly-understood an authority it had been.

There is a logical sequence of thought between these cases and the next case, which arose under the Naturalization Act of 1906. Decided on November 13, 1916, *Cross v. United States*<sup>110</sup> gave White occasion to declare that fees charged by clerks for drafting declarations of intention to become citizens must be determined on the basis of the specific

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104. *Id.* at 24.

105. *Lyons v. Woods*, 153 U. S. 649 (1894); *Buttfield v. Stranahan*, 192 U. S. 470 (1904), and *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320 (1909).

106. 240 U. S. 1, 24 (1916).

107. 240 U. S. 118 (1916).

108. 240 U. S. 122 (1916).

109. *Id.* at 118, 121, 122.

110. 242 U. S. 4 (1916).

statutes involved, and not according to some other law. Here again the significance of the case is not indicated by the words of the decision, for it imports that administrative actions must be defined and described by single statutes, a practice which has resulted in the enormous multiplicity of administrative statutes, and which has impelled some writers to favor codification of administrative law. The decision reflects, too, White's wariness of allowing a too-comprehensive statute to include specific cases, and is thus indicative of another characteristic of the law which was so recently exemplified in *Carter v. Carter Coal Co.*<sup>111</sup>

When he came to consider the case of *Clark Distilling Co. v. Western Maryland Railway Co.*,<sup>112</sup> White saw no difficulty in upholding the assailed Webb-Kenyon Act, an ingenious extension of the Wilson Act which he had earlier sustained. Reviewing at length the decisions of the Court under the interstate commerce clause, he redefined the positions of the state and national governments, contending that there is no essential difference between subjects regulable by states in the absence of congressional action, and those free of state regulation under the same condition. Such accidental considerations, he stated, were not the criteria by which Congressional legislation and delegation of authority were to be considered, but rather "the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated."<sup>113</sup> It followed that, granting that Congress had the authority to make laws over the subjects to be regulated, its authority to control them by means of delegated officers was likewise secure.

Following this identical line of reasoning was his opinion in *Wilson v. New*,<sup>114</sup> the first case arising under the Adamson Law of 1916. Whether this opinion was "unquestionably . . . the most important opinion that he wrote in his judicial career,"<sup>115</sup> must remain a matter of conjecture, but it served to re-emphasize those principles upon which he had been insisting for two decades, and it involved, to some extent, a redress of those grievances which he had foreseen would result from the Sherman Act.

More concisely stated than the same principle had been in the *Clark* case is his assertion that: "It is equally certain that where a particular

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111. 298 U. S. 238 (1936).

112. 242 U. S. 311 (1917).

113. *Id.* at 331.

114. 243 U. S. 332 (1917).

115. Spring, *Two Chief Justices* (1921) 64 REVIEW OF REVIEWS (AMERICAN) 169.

subject is within such authority [of Congress to regulate commerce] the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation."<sup>116</sup> Examining the background and history of the railway emergency which brought about the passage of the Act questioned, he could see no reason for concluding therefrom that the statute was unconstitutional. On this contention he remarked in words echoed twenty years later by his onetime colleague and second successor, Mr. Chief Justice Hughes, in *Home Building and Loan Association v. Blaisdell*,<sup>117</sup> that "although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."<sup>118</sup>

The living power, in his view, was the control of Congress over interstate commerce, and therefore over its instrumentalities, even when they were persons, and insofar as public rights were concerned. It is this supervision of public rights, placing the statute partially within the national police power, which serves to explain the importance of the case in administrative law. The fact that the law required specific administration and came within the purview of the Interstate Commerce Commission was no less important, for this circumstance allowed administrative law to be applied more widely to real persons, and forced administrative tribunals to inaugurate changed procedure to meet the new situation.

Even though the position of persons was so sweepingly affected by White's decision in the *Wilson* case, a similar case failed to elicit from him anything but a dissent unaccompanied by comment. This was in *Bunting v. Oregon*,<sup>119</sup> where even McKenna's challenging statement that "the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies,"<sup>120</sup> did not sufficiently arouse White to cause him to write an answering statement. It was two years later before he wrote an opinion dealing with this aspect of administrative law, in *United States v. Ferger*.<sup>121</sup> The statute attacked was one enacted in 1916, making it a contradiction to the interstate commerce clause to forge, utter, or publish bills of lading. Returning to the argument adduced in *Wilson v. New*, White contended that the

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116. 243 U. S. 332, 346 (1917).

117. 290 U. S. 398 (1934).

118. 243 U. S. 332, 348 (1917).

119. 243 U. S. 426 (1917).

120. *Id.* at 438.

121. 250 U. S. 199 (1919).

ability of Congress to legislate under the commerce clause resulted from the effect of subjects considered in relation to commerce. The presence of fraudulent bills of lading would have a sufficiently damaging effect, he felt, to make it quite feasible for Congress to legislate upon the matter.<sup>122</sup> Accordingly, the breach, or alleged breach, of the statute would come within the authority of the Interstate Commerce Commission, and also within that of the Secretary of the Treasury, thus allowing the possibility of administrative action from either group of officers, and accomplishing a delegation of Congressional authority over currency as well as over commerce.

The last cases arising under this aspect of administrative law were the *National Prohibition Cases*.<sup>123</sup> The opinion was written by McReynolds, but White contributed concurring remarks. It had been charged that the concurrent grant of power to the state and national governments to enforce the Volstead Act was unconstitutional. White remarked, in this connection, that such a grant could not be construed to mean that Congress had no power to "create by definition and sanction, an enforceable amendment."<sup>124</sup> Allying himself with the majority, he sustained the administrative measures adopted by Congress to support the Eighteenth Amendment, and thereby also gave an impetus to the tremendous growth of administrative law which occurred during the next two decades.

#### *The Interstate Commerce Commission*

It will have been observed, throughout the foregoing discussion, that while the decisions given concerned Congressional delegation of power to designated agencies, in many instances such delegation was specifically or by implication made to the Interstate Commerce Commission. Since the largest number of cases arose under the interstate commerce clause, or under statutes implementing this clause, the situation was natural and inevitable. The powers, rights, and duties of the Commission, however, were also the subject of legal action, and it is this type of case which forms the last large group considered as administrative law. These cases defined the position of the Commission, and furnished criteria for its own action, as well as for that of other tribunals.

The first such case to be decided by White was *East Tennessee, Virginia and Georgia Ry. Co. v. Interstate Commerce Commission*.<sup>125</sup> The

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122. *Id.* at 203.

123. 253 U. S. 350 (1920).

124. *Id.* at 392.

125. 181 U. S. 1 (1901).

Commission had issued a cease and desist order to the company, commanding it to refrain from discriminating among cities in Tennessee by varying its rates on a long-haul, short-haul basis. White disposed of the matter of rate discrimination in short order, by declaring that the Commission's "elaborate findings of fact" had been made after hearings, and that since these had not been questioned in the lower courts they were not now subject to review.<sup>126</sup> This simple statement was often repeated in subsequent cases of this type, and its effect was to guarantee as binding upon the courts the Commission's findings of fact. The breadth of scope thereby given to that body was tremendous, and the precedent stated by White secured to it power which might otherwise have been much lessened.

Notwithstanding this affirmative grant, White's next statement in the case was to have an opposing effect. The Commission had, in its findings, ruled that dissimilarity of conduct in carriers because of conditions or circumstances outside their control could not be taken into account by them without the Commission's consent. In effect, declared White, this amounted to saying "that the dissimilarity of circumstances and conditions became a factor only in consequence of an act of grace or a discretion flowing from or exercised by the commission."<sup>127</sup> He continued:

"But it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive points."<sup>128</sup>

The plenary power of the Commission over determinations of circumstances and condition was thus denied, and the effect of the denial following so closely upon the admission of the power to find facts concerning rates was sharply to delineate the authority which could be exercised by the Commission. This result was further elaborated by the action of White in continuing to discuss the Commission's procedure in ordering the railway to cease charging more for a short than for a long haul. A desist order of this kind, he ruled, would be insufficient by reason of its vagueness, for allowing the carrier to charge another rate at his own election would not prevent his charging another unreasonable rate.<sup>129</sup>

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126. *Id.* at 3.

127. *Id.* at 11.

128. *Id.* at 12.

129. *Id.* at 23.

Yet the Commission's action was not left condemned or censured in the slightest degree by White's words, for he concluded his opinion with a further clarification of the relationship between the courts and the Commission. It was the duty of the latter, according to White's estimate of the Interstate Commerce Act, to furnish aid to the reviewing courts by determining in the first instance those original causes and questions of fact proper to the cases appearing before it. The courts were "entitled, before approaching the facts, to the aid which must necessarily be afforded by the previous enlightened judgment of the commission upon such subjects."<sup>130</sup> Hence it can be seen that in this one case White had performed three services in regard to the power of the Commission: he had declared its findings of fact binding upon the courts; he had warned the Commission that its orders must be of a specific nature, and incidentally he had informed Congress that its grants of power must be more detailed; he had affirmed the dependence of the courts upon the preliminary activity of the Commission, and had thereby taken an important step in establishing a reciprocal relationship between the courts and the Commission. The functions of the Interstate Commerce Commission were thereafter more clearly recognized and accepted, both internally as to the Commission, and externally as to entities outside it, although it is doubtful whether there was an immediate recognition that White had ruled affirmatively upon the legislative as well as the judicial power of the Commission.

On the same day that this decision was given, a similar one was handed down in the somewhat similar case of *Interstate Commerce Commission v. Clyde Steamship Co.*,<sup>131</sup> and for the same reasons. The next year, however, saw a more rigid ruling in the matter of ascertainment of facts. The case at bar, in one of White's often-used expressions, was *Interstate Commerce Commission v. Chicago, Burlington, and Quincy Railroad Co.*<sup>132</sup> Facts found by the Commission here were not of a sufficiently substantial character to sustain the type of order which had been issued, and White could conclude only that it was not incumbent upon the courts to undertake an independent investigation of the facts in order to substantiate the order.<sup>133</sup> The conclusions from this statement are obvious; they have regulated the relation of the courts and the Commission ever since, for while findings of fact are not questioned nor re-investigated

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130. *Id.* at 27.

131. 181 U. S. 29 (1901).

132. 186 U. S. 320 (1902).

133. *Id.* at 341.

by reviewing courts, the appropriateness of the Commission's decisions thereon have always been ruled as within judicial review.

When there has been no finding—or no substantial finding—of fact as to alleged dissimilarity of circumstances and conditions, White ruled, in the case of *Interstate Commerce Commission v. Louisville and Nashville Railroad*,<sup>134</sup> the order of the Commission must likewise be rejected. Elucidating the Interstate Commerce Act, he pointed out that its fourth section referred to “an actual dissimilarity of circumstances and conditions, not a conjectural one,”<sup>135</sup> and since in the instant case the Commission's order had been issued in view of a dissimilarity which it only suspected would inhere in the future, the Court was constrained to overrule it.

The next case in point of time was *Buttfield v. Stranahan*.<sup>136</sup> It differed from most cases in that it involved a determination of the question of allowing a general administrative rule to apply in similar cases, instead of making specific rules, at an administrative official's discretion, in particular cases.<sup>137</sup> After a preliminary discussion of the power of Congress over commerce, White asserted that “a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution.”<sup>138</sup> It was but a step from this assertion, in view of previous decisions under the Interstate Commerce Act and other acts, to the conclusion that since Congress was unable to act in individual cases it might legitimately allow executive officials to bring about the result intended in the statute. “To deny the power of Congress to delegate such a duty would, in effect,” he insisted, “amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.” He also said that “the statute was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.”<sup>139</sup>

The far-reaching decision here announced was strengthened and confirmed by the decision of the next two cases on its authority.<sup>140</sup> From

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134. 190 U. S. 273 (1903).

135. *Id.* at 283.

136. 192 U. S. 470 (1904).

137. Fairlie, *Administrative Legislation* (1920) 18 MICH. L. REV. 191.

138. 192 U. S. 470, 493 (1904).

139. *Id.* at 496.

140. *Buttfield v. Bidwell*, 192 U. S. 498 (1904); *Buttfield v. U. S.*, 192 U. S. 499 (1904).



these cases involving situations other than those of common carriers, White returned to the adjudication of the more frequent type of litigation in *New Haven Railroad Co. v. Interstate Commerce Commission*.<sup>141</sup> It was the contention of the company that its position was unlike that of other railroads, since it acted as a dealer in commodities as well as common carrier. Admitting the existence of these facts, White nevertheless maintained that the conclusion drawn therefrom was untenable; the power of the Commission over every common carrier was not to be denied.<sup>142</sup> He referred also to rulings in two similar cases<sup>143</sup> of an antecedent period and remarked:

" . . . without reviewing the rulings made by the Interstate Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution . . . must be treated as read into the statute."<sup>144</sup>

The familiar rule here noted was the one he had himself formulated in the *East Virginia*<sup>145</sup> case, that is, that the Commission's findings of fact which had not been questioned in the lower courts would be accepted by the Supreme Court without investigation.

Familiar though this rule had grown to be, it was not until the leading case of *Texas and Pacific Railway v. Abilene Cotton Oil Co.*<sup>146</sup> that the exact relationship between rulings made by the courts and those made by the Commission was defined. The binding force of the Commission's ruling was again asserted, but in stronger terms, for if, as White contended,

"without previous action by the Commission, power might be exerted by courts

141. 200 U. S. 361 (1906).

142. *Id.* at 399.

143. *Haddock v. Delaware, L. & W. R. Co.*, 4 I. C. C. 296 (1890), and *Coxe Bros. & Co. v. Lehigh Valley R.R. Co.*, 4 I. C. C. 535 (1891).

144. 200 U. S. 361, 401 (1906).

145. *East Tenn., Virginia and Georgia Ry. Co. v. Interstate Commerce Commission*, 181 U. S. 1 (1901).

146. 204 U. S. 426 (1907).

and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission. . . ."<sup>147</sup>

He had devoted three pages to an exhaustive discussion of the duties of the Commission,<sup>148</sup> and by finally securing to it this exclusive power to declare, establish, and maintain rates he had denied to the courts any original jurisdiction over such matters.<sup>149</sup> It is this feature of the decision which has caused it to be recognized as precedent-forming; this subordinate administrative body had now been declared, in an unbroken series of decisions by White, to be outside the ordinary course of law both as to executive and judicial functions, as well as to those legislative acts which had been originally assigned to it. Yet this declaration did not result in a usurpation of power by the Commission, nor in a cessation of litigation under the terms of the Interstate Commerce Act, as it would seem must have happened had undue advantage been taken of the situation.

The next three cases to come before the Court and to be decided by White were those of which the Secretary to the Commission had written to President Taft, assuring him that the decisions strengthened the power of the Commission so materially. They were *Interstate Commerce Commission v. Illinois Central Railroad*,<sup>150</sup> *Interstate Commerce Commission v. Chicago and Alton Railroad*,<sup>151</sup> and *Baltimore and Ohio Railroad v. United States ex rel. Pitcairn Coal Co.*<sup>152</sup> In what was one of his clearest decisions, White examined the steps which he felt the Court was required to take in determining whether an order of the Commission should be suspended or set aside, and then explained them, remarking, "Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power, or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it

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147. *Id.* at 440.

148. *Id.* at 436.

149. *Id.* at 442.

150. 215 U. S. 452 (1910).

151. 215 U. S. 479 (1910).

152. 215 U. S. 481 (1910).

purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."<sup>153</sup>

This clear distinction of judicial from administrative authority was supplemented by his remark in the last-named of the trio of cases, in which he rejected the assertion that the grievances in controversy were outside the administrative competence of the Commission. Such a contention, according to his decision, would be more worthy of notice if it had first been brought before the Commission so that that body might have had an "opportunity to exert its administrative functions."<sup>154</sup> From this censure of the litigants, he proceeded to explain in greater detail than that given in the first case decided that day the reason for assuring to the Commission its competence as a rate-making body. Positing two cases involving rates, one fixed by a judicial court and one determined by the Commission, he queried pertinently, "Which would prevail?" The answers possible under any circumstance were then given:

"If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."<sup>155</sup>

It is evident from this last remark that White could not be charged with abdicating any essential judicial authority in favor of an adminis-

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153. 215 U. S. 452, 470 (1910).

154. 215 U. S. 481, 493 (1910).

155. *Id.* at 494.

trative body. The next decision he wrote, in *Southern Pacific Co. v. Interstate Commission*,<sup>156</sup> offered an illustration of his attitude on this point, for he here declared that the Commission had not the authority to revise rates merely to bring about a conjectural equality of treatment among shippers.<sup>157</sup> So to act would have been an assumption of judicial competence and discretion which had never been granted to the Commission.

On the other hand, such an assumption of authority by a common carrier was even less excusable, according to his view of *Interstate Commerce Commission v. Delaware, Lackawanna and Western Railroad*.<sup>158</sup> This case contested, in White's words, "the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured."<sup>159</sup> He had no hesitancy in rejecting the existence of such a right, and in reaffirming the cardinal principle that the Commission's declaration that such a practice would be discrimination embodied "a conclusion of fact beyond our competency to reexamine."<sup>160</sup>

It should not be concluded, from the fact that these cases had all dealt with the Interstate Commerce Commission that a similar principle would not govern state commissions of like description. White demonstrated this very clearly in *Texas and Pacific Ry. Co. v. La. R.R. Commission*,<sup>161</sup> by simply restating his principle that the findings of fact unquestioned in the lower courts were not reviewable in the Supreme Court.<sup>162</sup>

All of these decisions had been directed to the definition for the courts or for the Commission of the duties, rights, and restrictions proper to them under the Interstate Commerce Act and its subsequent perfecting amendments. In 1920 a departure from this line of decisions was made in *United States ex rel. Kansas City Southern Railway v. Interstate Commerce Commission*.<sup>163</sup> This suit arose out of an amendment to the original Act which empowered the Commission to investigate and evaluate property owned by a common carrier. The Commission failed to employ this power, even at the request of the railway, professing the utter impossibility of arriving at an evaluation. White maintained that the Com-

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156. 219 U. S. 433 (1911).

157. *Ibid.*

158. 220 U. S. 235 (1911).

159. *Id.* at 251.

160. *Id.* at 255.

161. 232 U. S. 338 (1914).

162. *Id.* at 339.

163. 252 U. S. 178 (1920).

mission had erred in refusing to perform a duty exacted by the statute, and his ruling was that in refusing to exercise the authority granted to it the Commission was actually assuming authority it did not possess.<sup>164</sup>

From this deviation from the logical course of the decisions in this type of case, White returned to the more usual pattern in *Quong Ham Wah v. Industrial Commission*,<sup>165</sup> in which he extended his rule concerning reviewability by the courts to prohibit reconsideration of a state statute in terms other than those sanctioned by the state court of last resort.<sup>166</sup>

The *Quong Ham Wah* case was the last one in which White was concerned primarily with administrative law and its problems, for within two months after its decision, illness and death had removed him from the supreme bench. The cases involving, directly and indirectly, administrative law had been so crystallized along the pattern conceived by White that they have continued to rule subsequent decisions of the Court. Particularly may this be said of the last subdivision of cases, in which White's chief concern was the determination of the position of the Interstate Commerce Commission, and by the influence of the precedents created therein, on all succeeding commissions of a similar character.

It will be noticed that White gave every one of the opinions in this classification, whereas in the others he was sometimes content to be represented by a dissenting or concurring opinion or mere record. While all these cases except two involve the Interstate Commerce Commission itself, the principles which they contain are sufficiently inclusive to be applicable to all other types of commissions, and since the Interstate Commerce Commission was so much a pioneer in the field of administration, it is fitting that the judicial principles enunciated by White in its behalf should also have been precedent-creating.

White's contribution to the other types of administration, noted in this chapter before consideration of his contribution to the growth and position of the Commission, need not be minimized by the pre-eminent position he took in the latter instance. Difficult as it may be to evaluate a jurist on the basis of written opinions only, it would seem impossible to avoid the conclusion that in these opinions White demonstrated his juridical ability, and formulated principles which succeeding jurists have been content to follow or to amplify.

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164. *Id.* at 187.

165. 255 U. S. 445 (1921).

166. *Id.* at 448.

*Appendix*

Significant changes in the course of development of American administrative law, phenomenal growth and multiplication of agencies, continuous—and occasionally acrimonious—discussion of the role of this field of law, and a tremendous outpouring of literature on the subject have characterized the legal history of America for the past five years. In some cases, perhaps, administrative law has developed as might have been expected; in other cases, some writers contend, it has proceeded in an utterly unpredictable and sometimes incomprehensible fashion. What are the highlights of this growth, as they appear to those most closely associated with the law?

In an effort to discover the answer to this question, the most recent legal literature on the subject was examined. Administrative law, it is a truism to say, is not a static but a dynamic factor in the field of American law today. The foregoing pages show a fairly representative portion of the material which has appeared on this subject to the time that the manuscript was placed in the hands of the printers. Since that time eighteen months have elapsed, and it seemed desirable to explore the more recent literature on administrative law, with the intention of noting the amount and scope of such writings and of determining whether any noticeably new trends in the consideration of the subject could be discerned.

During the past four years there have been published more than five hundred articles on administrative law. They include every type of discussion, from discursive historical treatments of the subject, through highly specialized and technical writings, to symposia which vary greatly in value and content, but which all have a common aim—to explore the subject from as many angles as possible.

“That American administrative law is in a ferment of thought must be sensed by all. There have been many informal gatherings and formal conferences and institutes called to explore the subject. The law review literature, including symposia, is growing apace. Case books are beginning to multiply. Individual scholars are conducting special researches. . . . All the diagnostic activity mentioned above means a conscious effort to examine administrative law *as a field* and to locate the heart of the problem of reconciling ‘administrative justice’ with the *spirit* of the ‘rule of law’.”<sup>167</sup>

Obviously, it would be impossible to read and digest the valuable information in all these articles; many of them, moreover, had no applica-

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167. Hart, *Administrative Justice and the Supremacy of Law* (1941) 29 GEO. L. J. 545.

bility to a discussion of administrative law as it affects the American people as a whole, since the writers of these articles were occupied with some purely local, or technically involved, special problem. From the articles remaining after this elimination, about one-tenth of the total number were examined. One other consideration was here operative: if a writer had already been cited in the discussion of White's influence on this field of law, his later writings were consulted for evidences of changed or strengthened opinion. This was true particularly of Blachly and Oatman, Dickinson, and Hart.

Two tendencies appear almost immediately. One is an exemplification of what a British authority on the subject has well noted as the possibility of predicting

"a man's opinion of the so-called encroachment of the executive upon the legislative and judicial powers from a knowledge of his social philosophy. . . In both countries [England and America] much opposition to departmental activities springs from a fundamental disagreement with the legislative policy which the department has to enforce. In both countries a loser may well wish to multiply the opportunities of judicial review or of appeal from administrative tribunals, and in this desire he may rely on forensic acquiescence. The academies are divided; if some schools seem to encourage expansion, others are loyal to the constitutional principle of separated powers and to the common-law faith in an orthodox judicature. . . ."168

Possibly this was true in the earlier writings on the subject, but there seems very little doubt that Sir Cecil's contention is, in the main, true, and that much of the discussion of administrative law has sprung from a preoccupation with settled convictions concerning the nature of government.

The other tendency is apparently a healthier and more promising one for the future of administrative law. This attitude regards the field in question as containing, or as being a "mass of problems to be solved rather than as something to be resented or ignored."<sup>169</sup> When practitioners and writers began to adopt this attitude it was evident that the amount of uncertainty and confusion in the field had yet to be fully realized.<sup>170</sup> Out of this attitude, however, have come three encouraging approaches to the problem.<sup>4</sup>

The first of these is the dispassionate consideration, based upon extensive and intensive researches, of the present condition of administra-

168. Carr, *Administrative Adjudication in America* (1942) 58 L. Q. REV. 487.

169. Isenbergh, *Developments in Administrative Law 1930-1940* (1940) 27 VA. L. REV. 29.

170. *Id.* at 30.

tive law. Studies such as those of Blachly and Oatman show that it is possible to clarify many problems by comparing the techniques and procedures of numbers of administrative agencies.<sup>171</sup> By distinguishing types of procedures, these investigators make it possible for other groups to suggest a constructive reform in administrative law.<sup>172</sup> They offer an enviable pattern for similar investigations.

As a direct result of this type of investigation, the second approach, that of specific recommendations for reform, appears. Not only do private investigators suggest these reforms,<sup>173</sup> but official agencies of differing character—*e.g.*, the American Bar Association, the Attorney-General's Committee on Administrative Procedure, and the Moreland Commissioner of the State of New York—make concrete, practical, and specific suggestions as to reform and simplification of administrative law.<sup>174</sup> Though it is true that these agencies have been very sharply criticized, their reports have at least the merit of foundation on research, and of recommendation of specific action. Whether or not they are adopted, they have certainly rendered invaluable service already. Stemming from such reports is probably the most concrete suggestion that has been made—the establishment of an Office of Federal Administrative Procedure.

The final approach is that adopted first by the Attorney General's Committee, and now being adopted gradually by other groups. It is simply that of realizing that one of the biggest handicaps under which administrative law labors is that of mystifying obscurity in the minds of the citizens. The Acheson committee particularly noted this characteristic of administrative law, and regarded it as regrettable. If there were no other outcome of all the researches and reports than an interest and activity in clarifying the operation of administrative law, it is hardly too much to say that none of the efforts of those concerned have been lost.

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171. Blachly and Oatman, *A New Approach to the Reform of the Regulatory Procedure* (1944) 32 GEO. L. J. 327.

172. *Id.* at 370; Norwood, *Administrative Evidence in Practice* (1941) 10 GEO. WASH. L. REV. 17.

173. Blachly, *supra* note 171, at 374; Norwood, *supra* note 172, at 16.

174. Carr, *supra* note 168, at 490; Blachly, *supra* note 171, at 325.



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