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## ADMINISTRATIVE DETERMINATIONS AND PERSONAL RIGHTS IN THE PRESENT SUPREME COURT

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Among the decisions of the United States Supreme Court during the final month of 1948 is one which, viewed with reference to the distribution of powers in the Federal Government, is indicative of the continued authority of the courts under our system of widespread judicial concern with matters of administration. In *Vermilya-Brown Co. v. Connell*<sup>1</sup> a group of employees of contractors who performed work at the Bermuda naval base, leased by the United States from the British government, succeeded in overcoming executive contentions as to the interpretation of the lease agreement in an action under the Fair Labor Standards Act. By a 5-4 vote of the Justices, the Act was held to apply to the naval base as against a previous adverse interpretation of the Wage-Hour Administrator<sup>2</sup> and strong representations to the Court by the Department of State and the Depart-

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1. 69 Sup. Ct. 140 (1948).
2. The Administrator's rulings are cited in notes 21 and 22 of Mr. Justice Jackson's dissenting opinion, in which Chief Justice Vinson and Justices Frankfurter and Burton concurred. *Id.* at 155. The explicit rulings were not published, but took the form of letters written to inquirers by the Administrator in 1942. They were reflected in a subsequently published list of territories and possessions deemed covered by the Act, 29 CODE FED. REGS. § 776 (Supp. 1947) and are printed in an appendix to the brief of the United States as *Amicus Curiae* in the case, at 55-57. The Administrator later deferred a renewed interpretation on the point in deference to anticipated determinations by the courts and other agencies. *Id.* at 17. Published interpretations by the Administrator, although lacking statutory force, are ordinarily accorded considerable weight by the courts. *Cf.* *Skidmore v. Swift & Co.*, 323 U. S. 134 at 137-140 (1944).

ment of Justice.<sup>3</sup> The Government argued vigorously that affirmance of the decision of the Court of Appeals, which was favorable to the employees' contention, would be unfortunate in its effects upon our foreign relations. The dissenting opinion regards these effects as attaching to the result in the Supreme Court.

On the merits the decision seems sensible and sound.<sup>4</sup> The question was whether the Bermuda base was embraced by the language of the Act defining the statute's coverage as extending to commerce to or from "any State of the United States or the District of Columbia or any Territory or possession of the United States."<sup>5</sup> Concededly the word "possession" was the only one that might include the Bermuda base and others similarly leased from the British and other foreign governments. The lower court's holding that the language included the base was predicated upon the view that "the areas are subject to fully as complete control by the United States as obtains in other areas long known as 'possessions' of the United States," such as the territories, the smaller island possessions, and the Panama Canal Zone.<sup>6</sup> This reasoning was not followed by the Supreme Court which held, rather, that the word in the Fair Labor Standards Act had reference to areas subject to the economic regulatory power of Congress, without regard to other attributes of sovereignty. The Court made it clear that the base "is not territory of the United States in a political sense, that is, a part of its national domain."<sup>7</sup> No direct evidence of Con-

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3. *Vermilya-Brown Co. v. Connell*, 69 Sup. Ct. 140, 153, 155 (1948) (dissenting opinion).

4. The action of the Court of Appeals, here affirmed, reversed a dismissal of the employees' action by the district court and remanded the proceedings. Hence it does not conclude the case. It remains necessary for the plaintiffs to establish, in addition to the details of their claims, that their employment was in commerce, or, conceivably, in the production of goods for commerce, within the meaning of the Fair Labor Standards Act. The Supreme Court opinion, by Mr. Justice Reed, refers to the employees as "allegedly in commerce"; the dissenting opinion concludes that "there is not and under the lease there can not be in the leased area any 'commerce' subject to the Act." The lower court, in the light of an affidavit of one of the eleven plaintiffs, could "not say they were not engaged in commerce." *Connell v. Vermilya-Brown Co.*, 164 F.2d 924, 929 (C. C. A. 2d 1947).

5. § 3(c), 52 STAT. 1060 (1938), 29 U. S. C. § 203(c) (1940).

6. 164 F.2d at 927.

7. *Vermilya-Brown Co. v. Connell*, 69 Sup. Ct. 140, 142 (1948).

gressional intent was or could have been found, since the Fair Labor Standards Act was adopted before the Bermuda base or others similarly obtained were acquired,<sup>8</sup> and no subsequent statutory provision to cover the point had been made or proposed. Nor was the matter mentioned in the arrangements with Great Britain, covering the base. In these circumstances the Court proceeded "to construe the word 'possession' as our judgment instructs us the law-makers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind,"<sup>9</sup> and it concluded that "there is no reason for saying" that the Act was not intended to bring "its minimum changes into the labor market of the bases."<sup>10</sup> The Court felt reinforced in its conclusion by a belief that "the house of assembly of Bermuda would not also undertake legislation similar to our Fair Labor Standards Act to control labor relations on the base."<sup>11</sup>

The concern of the executive branch over the case and that of the dissenting Justices over the decision stemmed from the possibility that apprehensions on the part of the British government and "in more critical quarters abroad"<sup>12</sup> might be aroused. Unilateral definition by American courts of the rights conferred upon this Government by arrangements to which other governments are party involve, according to Mr. Justice Jackson, "a philosophy of annexation and . . . a psychological accretion to our possessions. . . ."<sup>13</sup>

8. The arrangements were concluded in 1940, by negotiations and agreements to which both opinions in the case refer. The brief of the United States, *supra*, note 2, argues, at 43-44, that extension of the Act's coverage to leased bases would go unjustifiably beyond the legislative purpose to improve domestic conditions of employment and increase purchasing power in the economy of the country. The Court pointed out, however, that "citizens of this country would be numerous among employees on the bases." *Vermilya-Brown Co. v. Connell*, 69 Sup. Ct. 140, 147 (1948).
9. *Id.* at 146.
10. *Ibid.*
11. *Id.* at 147.
12. *Id.* at 157.
13. *Ibid.* The controversy within the Court over the present case was doubtless affected by the parallel issue of the Court's power to review the judgments of the Military Tribunal set up by General MacArthur as the agent of the Allied powers, which sentenced Japanese leaders for war crimes. The Court has now concluded with apparent wisdom that it lacks the power in question. See *Koki Hirota v. MacArthur*, 69 Sup. Ct. 157, 197 (1948).

It must be conceded that the British may well resign themselves to the likelihood that other legislation by Congress, made applicable to outlying areas administered by this Government in terms capable of including the leased bases, may be held to extend to American operations and even to other businesses, if any, at the bases.<sup>13a</sup> The evident answer to such fears is twofold. First, if a foreign government has surrendered rights to the United States, there is no good reason for it to object to the American courts' recognition of the surrender.<sup>14</sup> Second, if a court decision extending a statute of the United States to a leasehold should be deemed erroneous by the contracting governments or harmful in effect, there is nothing to prevent a further agreement to clarify the situation; or the administration might propose legislation to set matters aright in case it wished to take unilateral action.<sup>15</sup>

## I

But it is neither the merits of the Supreme Court's decision on the question of statutory interpretation nor in the main the desirable locus of power to construe the international commitments of this Government that concerns us

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- 13a. The Federal Tort Claims Act has been held applicable to negligence of a United States Government officer at a leased base, partly in reliance upon the principal case. *Spelar v. United States*, 171 F.2d 208 (C. C. A. 2d 1948).
  14. Mr. Justice Jackson's suggestion that the Court here overreaches a commitment to which the executive branch has agreed, *Vermilya-Brown Co. v. Connell*, 69 Sup. Ct. 140 at 157 (1948), seems inconsistent with his apparent earlier concession, *id.* at 150-151, that the extension of wage-hour legislation to the bases might be "deliberately and consciously done by the Congress, . . . perhaps after consultation with the United Kingdom or Colonial authorities." The dissenting Justices' answer as to this asserted inconsistency might be that the real evil of the decision lies in extending the offensive word "possessions" to the bases. If so, the majority opinion's point that the word has different meanings in different contexts and that the decision goes as far as it goes and no farther, seems sound. *Id.* at 145.
  15. Here, of course, one must reckon with the inertia of legislatures and the difficulty of securing changes in legal situations to which vested interests have attached. Mr. Justice Jackson has given realistic expression to this factor in another context. See his concurring opinion in *Duckworth v. Arkansas*, 314 U. S. 390, 400-401 (1941). Where, however, someone must lose as the result of a decision, it is difficult to see why it should be the party that establishes a legal right, merely because someone else may find himself in difficulties as a consequence. Were the decision to go the other way, the shoe would simply be on the other foot.

here. Attention in this discussion is to be directed, rather, to the situation in the Government of the United States which places it within the competence of a system of courts, headed by the Supreme Court, to continue to render decisions from time to time which override the conclusions or desires of the executive branch in matters falling primarily within the province of that branch. The problem is the old one of judicial regard for administrative determinations. That problem has assumed new aspects of late, as will appear; but the central issue continues to be the fascinating one of the proper distribution, or separation, of the powers of government, viewed not primarily as an issue of binding constitutional law but as one of jurisprudence and sound statesmanship.

Judge Clark, writing the opinion of the Court of Appeals in the *Vermilya-Brown Co.* case, was very clear with regard to the duty and authority of the court in the situation presented: "We must determine this private controversy, even as to areas affected by an agreement between nations."<sup>16</sup> The court's relationship to the problem would have been essentially the same if the controversy had arisen in a proceeding that was one-half public, between the Government on the one hand and a private litigant on the other. There, to be sure, the administrative determination<sup>17</sup> might have had the benefit of recognized or prescribed rules to limit the scope of judicial review.<sup>18</sup> The decision of judges would nevertheless have been invoked in such a proceeding; and in the end "judicial self-limitation"<sup>19</sup> would have determined the actual boundaries to the judges' readiness to set their own conclusions above those of the administrative authorities. Such is the consequence of a system that permits invocation of judicial proceedings to vindicate private rights even when these are tinged with a strong element of public interest.

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16. *Connell v. Vermilya-Brown Co.*, 164 F.2d 924 at 927 (1947) (italics supplied).

17. The discussion at this point does not attempt to distinguish between determinations of law, such as the crucial determination in the *Vermilya-Brown Co.* case, and other determinations. For the effect of such distinctions see *infra*, pp. 188, 190.

18. Such as those now given general applicability by § 10 of the Federal Administrative Procedure Act, 60 STAT. 243, 5 U. S. C. § 1009 (1946).

19. See FINAL REP. ATT'Y. GEN. COMM. AD. PROC. 75 (1941).

The resulting distribution of power is especially characteristic of American government. It does not prevail to the same extent even under the English system which, like the American, avoids a scheme of general administrative courts to review the actions of officials. There, for example, some public regulation of wages<sup>20</sup> and other important classes of administrative decisions<sup>21</sup> are screened from becoming a subject of judicial scrutiny. The objections of workers or others adversely affected by such administrative determinations, whether resulting from foreign-affairs considerations or from others, must then be directed through political channels when administrative recourse has been exhausted.<sup>22</sup> With us, the courts more usually afford the recognized means of relief, whether by virtue of statutory provision or by reason of traditional remedies, such as injunction or habeas corpus, that have not been foreclosed.<sup>23</sup> In fulfilling their functions in such proceedings the courts must of necessity encounter the likelihood of clashes with administrative points of view and strive as best they can to draw a proper boundary

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20. See Kahn-Freund, *Legislation Through Adjudication. The Legal Aspects of Fair Wages Clauses*, 11 MOD. L. REV. 269, 429 (1948).

21. See ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (2d ed., 1947), 107 (transport licensing), 171 (unemployment insurance), 178 (general national insurance).

22. The opinion in *Local Government Board v. Arlidge*, [1915] A. C. 120, which severely restricted the scope of the judicial review possible in a proceeding to challenge an order to close a tenement, and which had wider implications, justified the decision in part upon the ground that the aggrieved owner might seek recourse to questioning of the responsible cabinet minister by the owner's member of the House of Commons. For recognition of a counter-tendency to extend judicial review as to some matters of administration in England see Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L. J. 538, 562 (1938).

23. There are exceptions, of course, since in this country also judicial review of some classes of administrative actions is precluded by explicit statutory provision or by judicially-determined limitation. National Mediation Board cases, *infra*, at p. 175; *Barnett v. Hines*, 105 F.2d 96 (App. D. C. 1939), *cert. denied*, 308 U. S. 573. See Davis, *Nonreviewable Administrative Action*, 96 U. OF PA. L. REV. 749 (1948). The tendency is strong in recent legislation, on the other hand, to make specific provision for judicial review of even such administrative acts as general regulations. See FINAL REP., *op. cit. supra*, note 19, at 116-117. The Supreme Court in 1942, over the dissent of Justices Frankfurter, Reed, and Douglas, grounded the power to review the validity of the Federal Communications Commission's chain broadcasting regulations upon a doubtful statutory base. *Columbia Broadcasting System v. United States*, 316 U. S. 407 (1942). The regulations were later sustained. *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943).

between matters that are determined elsewhere with binding effect upon the courts and those that are open to judicial examination.

It is a commonplace that the present Supreme Court is on the whole far more deferential to administrative determinations than the "old Court." The reasons usually given by the Court come down, in the main, to legislative reliance upon the special competence of administrative agencies established by statute to deal with specified matters, coupled with judicial duty to recognize the authority of the agencies to make the determinations entrusted to them.<sup>24</sup> The *Vermilya-Brown Co.* case did not, of course, present precisely such a situation, since Congress did not specifically entrust to any particular agency the determination of the Fair Labor Standards Act's geographical coverage. Yet the problem presented might easily have been settled on the basis of deference to executive determination, both in the utterances of the Administrator and in the expressed conclusions of the foreign-policy agency of the Government.<sup>24a</sup> The case presents, therefore, an instance of occasional strong insistence upon judicial power to scrutinize administrative determinations, with which the present Court has from time to time accompanied its more usual deference to administrative action. The inquiry in this article is directed to certain situations in which this insistence has emerged; to the reasons for the results reached; and to the question whether these results reflect a sound distribution of governmental authority.

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24. *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U. S. 134 (1940) (agency authority with respect to matters of administrative procedure); *National Labor Relations Bd. v. Waterman Steamship Corp.*, 309 U. S. 206 (1940) (conclusiveness of administrative determinations of fact); *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943), and *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218 (1943) (administrative authority in matters of discretion); *Dobson v. Commissioner*, 320 U. S. 489 (1943), and *National Labor Relations Bd. v. Hearst Publications*, 322 U. S. 111 (1944) (finality attaching to determinations to which administrative expertness has contributed). The Court has again invoked the philosophy of deference to agency expertise at the present term, in *Ayrshire Collieries Corp. v. United States*, 69 Sup. Ct. 278, 289 (1949).

24a. Cf. Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. OF PA. L. REV. 79 (1948).

## II

It is not irrelevant to note that the plaintiffs in the *Vermilya-Brown Co.* case were employees asserting their individual rights and that in the field of foreign relations such persons are peculiarly likely to have their claims overborne by considerations of "high policy" to which officials are prone to give effect.<sup>25</sup> The Court has been alert in various recent instances to which Mr. Justice Frankfurter has just alluded in a concurring opinion,<sup>26</sup> to protect the legitimate interests of such parties, so far as feasible judicially, against power that in one way or another might strike them down.

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25. See Mathews, *Labor Standards Provisions in Foreign Procurement Contracts*, 42 ILL. L. REV. 141 (1947), for a reflection of the difficulties within the United States Government which, during wartime, beset a project of administrative origin for relieving the condition of severely oppressed Bolivian workers employed in production for the United States. A government Memorandum in support of a petition for rehearing filed in the instant case contains statements from the affected departments with regard to the alleged difficulties imposed by the decision upon defense operations at bases all over the world, upon foreign relations, and upon wage-hour administration. According to the statement of Secretary of the Army Royall, wage-hour litigation would heighten the difficulty of maintaining "appropriate secrecy" as to "classified" construction projects. Memorandum, at 13-14. Most serious would be the application of the Fair Labor Standards Act's wage provision to "native workmen" outnumbering American workmen by about 10 to 1, which would encounter the "militant opposition" of the local foreign governments. *Id.* at 14-15. Although the construction projects listed as affected are located in Canada, Newfoundland, Bermuda, Iceland, and Greece, in addition to the South Pacific (*id.* at 13), the nature of some of the local economies is perhaps indicated by the wage scales prevailing in the Trust Territory of the Pacific Islands, now being governed by the Department of the Navy, which, in addition to 7½¢ an hour for domestic help, range from 9.3¢ an hour for common labor to 14.3¢ for skilled labor, with somewhat higher rates on Saipan. See TRUST TERRITORY OF THE PACIFIC ISLANDS (July, 1948), containing information conveyed by the United States to the Secretary-General of the United Nations, at 94. Improvement may of course occur, with or without the Supreme Court, because of the President's "bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of under-developed areas," to the end that, "by helping the least fortunate of its members," the human family may "achieve the decent, satisfying life that is the right of all people." This program was announced in the Inaugural Address in January, after the petition for rehearing in the *Vermilya-Brown Co.* case and the Memorandum in its support had been filed. Actually the number of workers affected by the decision may be quite small, because of the requirement that commerce or production of goods for commerce must be involved.
26. *American Federation of Labor v. American Sash & Door Co.*, 69 Sup. Ct. 258, 260, 262 (1949).



In *Elgin, Joliet & Eastern R. Co. v. Burley*,<sup>27</sup> which is among the cases cited by Mr. Justice Frankfurter, it protected individual interests by upsetting the foundation for a decision of an administrative agency, the National Railroad Adjustment Board, over the strong dissent of four Justices and over the protest of the principal labor organizations, filed with the Court upon a rehearing of the case. The principal question was whether the Railway Labor Act of 1934<sup>28</sup> conferred authority upon a labor union to settle with a carrier certain claims of individual employees for sums alleged to be due them under the terms of a collective agreement. The action which gave rise to the decision was brought in court by the employees upon the claims in question in the face of an alleged settlement by their union which had resulted in withdrawal of a proceeding before the National Railroad Adjustment Board to enforce the same claims. In a later administrative proceeding upon the claims the Board had also held the settlement final. The Court, fastening upon a point which the Board had almost certainly ignored, held that the settlement was binding upon the employees only if they had in some manner individually authorized the union to represent them in the negotiation with the employer. Similarly, the decision of the Board giving effect to the settlement was held not to be conclusive upon the employees<sup>29</sup> unless the union was authorized by them to bring the later proceeding before the Board.<sup>30</sup> The Court noted that long-standing administrative practice had recognized the authority of unions to negotiate with the carriers with regard to the claims of employees whom they represented in collective bargaining, as part of their function of carrying on relations with the employers, and that in practice the privilege of bringing employee claims before the National Railroad Adjustment Board had been confined to the railway unions as distinguished from individual employees.<sup>31</sup> The Court

27. 325 U. S. 711 (1945), *aff'd upon rehearing*, 327 U. S. 661 (1946).

28. 48 STAT. 1185 (1934), 45 U. S. C. § 151 *et seq.* (1946).

29. Under the provision of § 3 First (m) of the Act, 45 U. S. C. § 153 First (m) (1946), that "awards shall be final and binding, except insofar as they shall contain a money award."

30. The Court expressly refrained from deciding whether an award denying a money claim might be a "money award" within the statutory exception to the rule of administrative finality. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711 at 720 (1945).

31. *Id.* at 732-733. The practice of confining the initiation of pro-

held, nevertheless, that the Railway Labor Act drew a distinction between the settlement of "grievances" of individual employees as to past matters and the negotiation of collective agreements, including agreements as to the subsequent application of previous contracts. The formation of agreements falls within the sphere of collective bargaining, as to which the unions designated under the statute<sup>32</sup> have exclusive authority; the adjustment of grievances is a process—normally, but not necessarily, making use of union machinery—in which the individual's claim is primary and subject to his control.

The Court's decision was influenced by consideration of the situation of non-members of the railway unions and members of minority unions in the employ of the carriers, which the opinion emphasizes. Upon the rehearing Mr. Justice Rutledge, speaking for the Court as he had in the initial decision, discussed mainly the position of the majority union member, emphasizing the numerous ways in which he may be deemed to have bound himself to accept the union's disposition of a claim belonging to him. These include "appropriate provisions in by-laws, constitution, or other governing regulations, as well as by usage or custom,"<sup>33</sup> and

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ceedings before the Board to the unions had been maintained upon the insistence of the employee representatives, composing one-half of the Board's membership, but had never been agreed to by the carrier representatives or been authoritatively established as correct. Monograph of the Att'y Gen. Comm. on Ad. Proc., Nat'l R. R. Adj. Bd., SEN. DOC. NO. 10, PART 4, 77th Cong., 1st Sess. 7 (1942). The Attorney General's Committee noted the situation but refrained from making a recommendation with regard to it. FINAL REP., *op. cit. supra*, note 17, at 188. It is pointed out in a brief filed with the Court by the Government as *Amicus Curiae* upon the reargument of the *Burley* case, p. 10, that a recognized railway union was permitted to file proceedings in behalf of employees whether or not it represented them as collective bargaining agent in the craft or class to which they belonged. Hence some minority unions were not barred from the Board.

32. Section 2 of the Act prescribes the manner of designating the representatives of each craft or class of employees of a carrier for this purpose. Sec. 2 Second and Ninth imposes the duty upon the carrier to treat with the representatives as designated. 48 STAT. 1189 (1934), 45 U. S. C. § 152 Second, Ninth (1946). See *Virginian R. Co. v. System Federation*, 300 U. S. 515 (1937). The representative bargains for all members of the craft or class, whether or not they are or can become members. *Order of R. R. Telegraphers v. Railway Express Agency*, 321 U. S. 342 (1944); *Steele v. L. & N. R. Co.*, 323 U. S. 192 (1944).
33. *Elgin, Joliet & Eastern R. Co. v. Burley*, 327 U. S. 661 at 663 n.2 (1946).

acquiescence in the known handling of his claim by union representatives.<sup>34</sup> As a result Mr. Justice Frankfurter was led to remark in his reiterated dissent that the Court adhered to its original decision "by extracting from it almost all of its vitality."<sup>35</sup> Only union members were involved in the case; but the opinion of the Court is careful to reject the propriety of a union's attempting to "usurp" an employee's right to control the handling of his own claim on the basis of the previous "erroneous conception" that the statute "confers exclusive statutory power upon the collective agent to deal with the carrier concerning individual grievances and to represent the aggrieved employee in Board proceedings."<sup>36</sup> This warning has particular force in relation to nonunion employees. In its original opinion the Court, noting that the Act forbade closed shop agreements and that "the interests of unorganized workers and members of minority unions are concerned in the solution" of the problem presented,<sup>37</sup> expressed the view that "It would be difficult to believe that Congress intended . . . to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation."<sup>38</sup>

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34. *Id.* at 665-666.

35. *Id.* at 668.

36. *Id.* at 664.

37. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711 at 734 n.31 (1945).

38. *Id.* at 733-734. The Government took the position in its brief, *supra* note 31, at 27-37, that it should be a sufficient safeguard to individual employees to recognize (as had been the practice) their right to negotiate in their own behalf if they desire and to permit them to bring proceedings before the Adjustment Board (as the labor members of the Board had refused to permit them to do), without also requiring affirmative authorization in order to permit a union to represent and bind them in the absence of such self-representation. Problems of notice where a union proceeds without express authorization obviously arise; but, as the brief points out, these inhere in numerous situations coming before the Board, in which the identity of many of the employees affected by a dispute (*e.g.*, as to seniority) may not be known until the stage of actual application of the award is reached. See Monograph, *op. cit. supra*, note 31, at 7-10. Individual employees have the additional option to bring suit in federal court upon a "grievance" claim, without resort to processes of adjustment or to the Adjustment Board. *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941).

The Court had previously had occasion to condemn—this time unanimously—a viciously unfair subversion of minority interests for which the Railway Labor Act's provisions had been employed. In *Steele v. L. & N. R. Co.*<sup>39</sup> and *Tunstall v. Brotherhood*<sup>40</sup> actions were brought in state and federal courts, respectively, by Negro firemen on certain railroads to enjoin the enforcement as to them of certain collective agreements between the Brotherhood of Locomotive Firemen and Enginemen and certain southern railroads. These agreements, on a basis of race discrimination, operated to deprive the plaintiffs of desirable employment. The plaintiffs were not even eligible for membership in the carefully guarded "white" union but, by virtue of the statute, were nevertheless "represented" by it in collective bargaining with the carriers. Holding that the union owed a statutory duty to represent in good faith, without discrimination, all members of the craft or class for which it bargained, including the plaintiffs, and to accord to the plaintiffs a voice in the consideration of the employees' problems, the Court concluded that the judicial jurisdiction and duty to enforce the statute existed. In so doing, it considered that the plaintiffs had no available administrative remedy—for two reasons. One was that the union itself, whose conduct was the basis of complaint, afforded the only channel through which a proceeding in the National Railroad Adjustment Board<sup>41</sup> could be brought. The other was that one-half of the membership of the Board itself was chosen, under the provisions of the Act, by a group of unions, many of whom pursued the same exclusionary policy.<sup>42</sup>

In reaching its decision in the *Steele* and *Tunstall* cases the Court overcame a formidable barrier of immunity of administrative determinations under the Railway Labor Act from judicial interference, erected by its own decisions of only the year before.<sup>43</sup> In *Switchmen's Union v. National*

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39. 323 U. S. 192 (1944).

40. 323 U. S. 210 (1944).

41. The assumption was made that the plaintiff's case fell within the jurisdiction over "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements," conferred by § 3 First (i) of the Railway Labor Act, 48 STAT. 1189 (1934), 45 U. S. C. § 153 First (i) (1946).

42. *Steele v. L. & N. R. Co.*, 323 U. S. 192 at 205-206 (1944).

43. In so doing it was perhaps aided by a brief *amicus* filed by the Solicitor General, the successful advocate in the principal previous cases.

*Mediation Board*,<sup>44</sup> *General Committee v. M.-K.-T. R. Co.*,<sup>45</sup> and *Brotherhood of Ry. & S. S. Clerks v. United Transport Service Employees*,<sup>46</sup> a variety of determinations of the National Mediation Board, companion agency to the National Railroad Adjustment Board under the Railway Labor Act, were held immune to judicial review. The view was taken in these cases that the Act confers exclusive and final authority upon the Board to determine certain disputes or, in some situations, gives authority to the parties to arrive at their own solutions with the aid of the Board when they choose to invoke that aid. The several determinations of the Board in these cases related to the Board's own authority to consider the claims of a group of employees upon a portion of the New York Central System to be separated from those on the System as a whole for the purpose of choosing a collective bargaining representative; to the authority of one union as against another to bargain with a carrier in a situation where the same duties might at various times be performed by the members of each; and, in the third case, to the authority of a white union to represent the members of an open union in collective bargaining. All of these points related to the authority, or jurisdiction, of collective bargaining representatives. It would not have been difficult for the Court to conclude that the controversy in the *Steele* and *Tunstall* cases also related to that authority, rather than to the manner of its exercise, and hence fell either within the matters subject to exclusive determination by the National Mediation Board or within the "many areas" of railroad labor relations "where neither the administrative nor the judicial function can be utilized" because Congress left them to be governed exclusively by "those voluntary processes whose use Congress had long encouraged. . . ."<sup>47</sup> Instead, it chose to regard them as justiciable controversies under the Railway Labor Act, determinable by the courts when brought there.<sup>48</sup> The reason the Court did so seems almost

44. 320 U. S. 297 (1943).

45. 320 U. S. 323 (1943).

46. 320 U. S. 715, 816 (1943).

47. *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323 at 337 (1943).

48. As such they are reviewable by the Supreme Court under § 237 (b) of the Judicial Code, 28 U. S. C. § 344(b) (1946), when determined by the highest court of a state, and are within the jurisdiction conferred upon the federal district courts by § 24(8)

necessarily to lie in its concern over the interests to be protected. A similar concern had earlier led it to hold that the basic duty of a carrier to bargain collectively under the Act could be enforced judicially despite the silence of Congress upon the point.<sup>49</sup> The cases referred to above, involving determinations of the Mediation Board, on the other hand, concerned inter-union disputes of a rather technical nature, affecting rights that seemed to balance each other and to call less clearly for judicial solicitude.

In the more recent cases involving the Adjustment Board, it seems fair to say, a shifting majority of the Supreme Court fashioned a powerful wedge of judicial surveillance from conceptions of legislative purpose, theories as to adjudication, and ideas of the proper relation of courts to administrative agencies as material, driving it deeply into the area of employment relations where the protection of individual and minority interests seemed to call for such action. It did so despite earlier application of the doctrine of finality to other administrative determinations in the railway labor field. Among individual Justices who participated in both the earlier and later cases, the attitudes ranged from adherence to the doctrine of judicial non-intervention in all but the *Steel* and *Tunstall* decisions, which was shared by Chief Justice Stone and Justice Frankfurter, to Justice Reed's assertion of judicial authority in all of the cases.<sup>50</sup>

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of the Judicial Code, 28 U. S. C. § 41(8) (1946), relating to "suits and proceedings under any law regulating commerce."

49. *Virginian R. Co. v. System Federation*, 300 U. S. 515 (1937).

50. Mr. Justice Reed dissented for himself, Mr. Justice Roberts, and Mr. Justice Jackson in the *Switchmen's Union* case. The latter two, however, joined the Chief Justice and Mr. Justice Frankfurter in the *Elgin, Joliet & Eastern* dissent. Mr. Justice Douglas and Mr. Justice Murphy made the opposite transition between the two cases. Mr. Justice Rutledge, who did not participate in the *Switchmen's Union* case, would doubtless have occupied the same position as Mr. Justice Reed, since he participated in the case in the United States Court of Appeals for the District of Columbia, from which it came, when he was still a member of that bench, and would have set aside the Board's order. *Switchmen's Union v. National Mediation Board*, 135 F.2d 785, 796 (App. D. C. 1943). Mr. Justice Black likewise did not participate in that case in the Supreme Court, but joined the majority in the *M.-K.-T.* decision, as did Mr. Justice Jackson and Mr. Justice Rutledge. On the present Court, Justices Reed and Rutledge have written in behalf of judicial intervention and have been joined in the *Elgin, Joliet & Eastern* case by Justices Black, Douglas, and Murphy, in which Justices Frankfurter and Jackson were on the other side.

These attitudes have been compounded of numerous elements, but the factor that has emerged as most influential appears to be the appeal of threatened interests, valid in the eyes of the Justices,<sup>51</sup> for protection at the hands of the courts. And the type of interest safeguarded in the Railroad Adjustment Board cases is quite similar to that which has led the same majority of the Court<sup>52</sup> to set its views against those of the executive branch in the *Vermilya-Brown Co.* case at the present term of Court.

### III

The individual chosen for compulsory induction into the armed forces or for assignment to work of national importance under the Selective Service Act, who found himself pitted against the Government's war machine in a dispute over a claimed exemption, was also accorded increased opportunity to challenge the administrative determination under the view taken by the majority of the Court in a series of recent decisions. The series began in the midst of the war with an apparently sweeping interpretation of the rule of administrative finality expressed in the statute.<sup>53</sup> In *Falbo v. United States*<sup>54</sup> the petitioner had been convicted of violating the Act by willfully refusing to report for work of national importance, to which he had been ordered pursuant to classification as a conscientious objector. He claimed to be a minister of religion within the meaning of the statutory provision<sup>55</sup> according complete exemption to persons classified as such. In the district court he urged that the merits of his claimed exemption should be tried or that at least the court should review the local board's action to determine whether it had been rendered "prejudicial, unfair, and arbitrary" by refusal to admit certain evidence, by

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51. It is not intended to suggest that the appraisal of interests in this connection is purely or even mainly subjective. Rather, as will appear more fully below, it is an appraisal in which objective considerations of far wider range play a dominant part.

52. Justices Black, Reed, Douglas, Murphy, and Rutledge. See note 50, *supra*.

53. Selective Service and Training Act of 1940, 54 STAT. 885, § 10(a) (2) (1940), 50 U. S. C. App. § 310(a) (2) (1946): "The decisions of . . . local boards shall be final except where an appeal is authorized. . . . The decision of . . . appeal boards shall be final . . . unless modified or changed by the President. . . ."

54. 320 U. S. 549 (1944).

55. Sec. 5(d), 54 STAT. 887 (1940), 50 U. S. C. App. § 305(d) (1946).

alleged antipathy of board members to the Jehovah's Witness sect to which Falbo belonged, and by decision against the overwhelming weight of the evidence. The court refused to consider these objections and instructed the jury to convict if they found that Falbo had failed to report as ordered. The Court of Appeals for the Third Circuit affirmed.

In sustaining the decision below the Court pointed out that Falbo had not exhausted his administrative recourse before offering his challenge in court to the denial of his exemption. The Act provided that induction should not take place until physical and mental fitness had been determined—a process which under the regulations then in effect took place after the individual reported for induction. It was entirely possible that Falbo would be rejected at that stage; and Congress clearly did not intend to “allow litigious interruption of the process of selection.” Moreover, “the complete absence of any provision for challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made.”<sup>56</sup> Mr. Justice Rutledge, concurring, pointed out that the abuse Falbo claimed in the action of the local board, even if committed, was cured by the appeal board proceeding to which he resorted. Further, he said, “Apart from some challenge upon constitutional grounds, I have no doubt that Congress could and did exclude judicial review of Selective Service orders like that in question.”<sup>57</sup> Only Mr. Justice Murphy dissented, contending that in the absence of a statutory review procedure or a specific statutory prohibition, “The power to administer complete justice and to consider all reasonable pleas and defenses must be presumed,” lest “an individual should languish in prison for five years without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action. . . .”<sup>58</sup>

Since concededly a person inducted into the armed forces could, as had been the case under the Selective Draft Act of 1917, challenge the validity of his induction on limited grounds in a habeas corpus proceeding,<sup>59</sup> the *Falbo* decision

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56. *Falbo v. United States*, 320 U. S. 549 at 554-555 (1944).

57. *Id.* at 555.

58. *Id.* at 557, 560-561.

59. See *Estep v. United States*, 327 U. S. 114, 123-124 (1946).



seemed quite definitely to remit those who would question their induction under the 1940 Act to the same remedy.<sup>60</sup> Under this scheme, as Mr. Justice Frankfurter was later to emphasize, the effectiveness of the draft procedure would be complete. Subject only to review by habeas corpus, in which "The issues . . . are quickly joined, strictly limited and swiftly disposed of by a single judge," "the men having submitted to induction would be in the army, available as such, and not in prison for disobedience."<sup>61</sup> In this way the "united and continuous process designed to raise an army speedily and efficiently," to which the Court had referred in the *Falbo* opinion,<sup>62</sup> would be completely operative, with protection to the individual against abuse resting upon careful administrative procedure and the possibility of resort to habeas corpus in unusual cases.

Such, however, was not to remain the picture for long. Less than three months after the *Falbo* decision, the case of *Billings v. Truesdell*<sup>63</sup> disclosed that under the Selective Service Act the inception of military control of drafted personnel took place when the induction ceremony was performed—not upon the appearance of the individual pursuant to the order to present himself as had been the case under the Draft Act of 1917. Hence Billings, who had refused to take the oath of induction after having been accepted by the Army, was ordered released upon habeas corpus from the custody in which he was held to await trial by court martial for his refusal. The offense he had committed, if any, said the Court, was punishable in a civil court under the Selective Service Act, not under the Articles of War.

Here, obviously, was a possible opportunity to challenge the process of selection for military service at a stage when the administrative proceedings had undoubtedly run their course and all possibility of rejection had ended.<sup>64</sup> In *Estep*

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60. The authorities taking this view are cited in the concurring opinion of Mr. Justice Frankfurter in the *Estep* case, 327 U. S. 114 at 140-141 (1946).

61. *Estep v. United States*, 327 U. S. 114, 141, 140 (1946) (concurring opinion).

62. 320 U. S. at 553.

63. 321 U. S. 542 (1944).

64. Changes in the Selective Service regulations which occurred very soon after the *Falbo* decision provided for pre-induction physical examinations in the registrant's locality and eliminated the possibility of rejection at the time of reporting for induction.

*v. United States* and *Smith v. United States*<sup>65</sup> the opportunity was seized. The defendants, petitioners in the Supreme Court, were indicted for willfully refusing to submit to induction after having reported and having been accepted for military service. Both sought to defend upon the ground that they were ministers of religion who had been wrongly denied exemption as such; but the district courts, which were sustained in their conclusions by the courts of appeals, held that no such defense could be offered. The Supreme Court came to the contrary conclusion, holding that the absence in fact of statutory exempt status on the part of a Selective Service registrant was jurisdictional to the authority of a board to classify him as eligible for induction. Hence the administrative conclusion as to the fact was subject to judicial review in a criminal proceeding. The opinion by Mr. Justice Douglas, speaking for the majority composed of Justices Black, Reed, Murphy, Rutledge, and himself, undertook, further, to enumerate other possible circumstances in which a local board would lack jurisdiction—circumstances which, if alleged to exist, could be examined into by a criminal court in a prosecution for refusal to submit to induction. These included discrimination because of race, creed, color, or activity or membership in a labor, political, religious, or other organization; incumbency of a political office which the statute and regulations made a basis for exemption; and disregard of an explicit order from higher administrative authority to reopen the classification of the registrant.<sup>66</sup> Mr. Justice Burton and Chief Justice Stone dissented. Mr. Justice Frankfurter concurred on other grounds but differed vigorously with the reasoning of the majority opinion.

As regards the weight to be given the administrative determination when a challenge to jurisdiction was offered in a criminal prosecution, the Court in the *Estep* case noted that "Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes" and that "the question of juris-

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Hence, as the Court later held in *Dodez v. United States*, 329 U. S. 338 (1946) with reference to reporting for work of national importance, the registrant under these regulations exhausted his administrative recourse without reporting and, if prosecuted for refusing, might at that stage offer his defenses going to the jurisdiction of the Selective Service Board.

65. Both reported at 327 U. S. 114 (1946).

66. *Estep v. United States*, 327 U. S. 114 at 121 (1946).

diction . . . is reached only if there is no basis in fact for the classification . . . [of] the registrant." The scope of judicial inquiry would in essence be the same as in habeas corpus proceedings after induction and in similar proceedings in deportation cases.<sup>67</sup> Whether the criminal court should receive evidence in addition to that in the administrative record in considering a challenge to a Selective Service board's jurisdiction is not stated in the *Estep* opinion; but in *Cox v. United States*<sup>68</sup> the Supreme Court held that it should not, since there is no constitutional requirement of a judicial trial of the issue raised. The opinion in that case by Mr. Justice Reed points out that the registrant has full opportunity to introduce evidence in the administrative proceeding; hence, "it is quite in accord with justice to limit . . . review" to the evidence there presented.<sup>69</sup> The review, moreover, is properly by the court and not by the jury, and is directed to the question whether there is "any substantial basis . . . in fact" to support the board's classification. When that has been determined, nothing relating to the classification remains relevant to the issue of guilt.<sup>70</sup> Justices Murphy and Rutledge contended in dissent that the requirement of substantial evidence in support of a board's jurisdictional determinations should apply in such cases, as distinguished from the

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67. *Id.* at 122-123. In a habeas corpus proceeding inquiry may be made into the fairness of the administrative procedure, in addition to substantive "jurisdictional" factors. See *Eagles v. Samuels*, 329 U. S. 304 (1946); *Eagles v. Horowitz*, 329 U. S. 317 (1946). If release is ordered on such a ground the administrative process may be repeated; or the court may remand the petitioner to await further proceedings instead of releasing him entirely, "as law and justice may require" [REV. STAT. § 761 (1878), 28 U. S. C. § 461 (1946)]. See *Tod v. Waldman*, 266 U. S. 113 (1924). Such remission to custody, even if appropriate, would not be possible after an acquittal. In the *Estep* and *Smith* cases themselves, which were criminal, challenges were made to the local boards' procedure as well as to the validity of the classifications. 327 U. S. at 117, 118. The Court's opinion is not explicit as to whether the challenges to procedure might be considered. If they could, an acquittal on this ground alone might be required, provided a possibility existed that the jurisdictional determination might have been otherwise had the procedural unfairness not occurred. A reopened classification proceeding would, of course, then be in order.

68. 332 U. S. 442 (1947).

69. *Id.* at 454.

70. *Id.* at 452-453. Apparently the Justices were in agreement as to the restriction of review to examination of the administrative record by the court, since disagreement would have led to dissent. Four Justices dissented on other grounds and Mr. Justice Frankfurter concurred in the result of the case.

lesser quantum of support which, in their view, the principal opinion sanctioned. They also contended, with Justices Douglas and Black, that the board classifications in the three cases decided together under the *Cox* case style could be supported only if part-time ministers of the gospel were less fully entitled to Selective Service exemption than full-time ministers. Such a view ascribed "to Congress an intention to discriminate among religious denominations and ministers on the basis of wealth and necessity for secular work."<sup>71</sup>

The philosophy of the five Justices who together determined the ultimate position of the Court in the Selective Service cases, except for the difference that developed among them in the *Cox* decision, had its roots in immigration and deportation cases a quarter-of-a-century earlier, as will appear. As elaborated and applied in the Selective Service decisions, however, the rationale had reference particularly to the position of the individual who, when threatened with criminal punishment, contends that the administrative action giving rise to the threat is in some respect invalid. Mr. Justice Murphy, in the *Falbo* case, first expressed the view in this series of decisions that in such circumstances, if the administrative action should actually turn out to be invalid, it would "not be in keeping with the high standards of our judicial system" to permit punishment to be inflicted.<sup>72</sup> Mr. Justice Rutledge suggested at the same time, in a passage already quoted,<sup>73</sup> that at least such challenges to administrative action as are based on constitutional grounds must be open to the individual charged with violation. Later in the same term of Court he elaborated upon this thought, writing in dissent for himself and Mr. Justice Murphy in an O. P. A. case. A provision of the Emergency Price Control Act which required the federal courts to entertain prosecutions of alleged violators of price control orders, while withholding from those courts the authority to inquire into the constitutional validity of challenged orders, was, he contended, invalid. He adhered to this view notwithstanding the provision of the statute for challenges to such orders for limited periods after their issuance, whereby administrative deter-

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71. *Id.* at 459.

72. See *Falbo v. United States*, 320 U. S. 549, 561 (1944) (dissenting opinion).

73. *Supra*, p. 178.

mination was followed by review in the Emergency Court of Appeals. One reason for his contention was that the contrary conclusion supplied a way to avoid "the guaranteed protections of persons charged with crime in the trial of their causes."<sup>74</sup> In this view, the "high standards of our judicial system" become a constitutional requirement so far as necessary to give opportunity to offer constitutional defenses to a prosecution. In the *Estep* case Mr. Justice Murphy's *Falbo* reasoning became that of the majority, which could ". . . not readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency."<sup>75</sup>

#### IV

The same vivid consciousness of the human effects of sustaining certain administrative determinations also accounts, at least in part, for the broadened grounds for invalidating deportation orders which emerged in the case of *Bridges v. Wixon*.<sup>76</sup> The same majority of the Court as in the *Vermilya-Brown*, the *Elgin, Joliet & Eastern*, and the Selective Service cases there released Harry Bridges from custody to await deportation upon the ground that in making a crucial determination leading to the deportation order the Attorney General had misinterpreted a term in the statute and had acted invalidly upon evidence which was hearsay and admitted at the hearing in violation of the regulations of the Immigration and Naturalization Service. Concededly the courts had been "liberal in relaxing the ordinary rules of evidence in administrative hearings,"<sup>77</sup> even to the point of approving the admission of hearsay and sustaining reliance upon it as a basis for conclusions. Moreover judicial deference had in general been paid to the administrative interpretation of statutory terms on the ground that Congress had invoked the judgment of "those whose experience in a particular field gave promise of a better-informed" result.<sup>78</sup>

74. *Yakus v. United States*, 321 U. S. 414, 483 (1944).

75. 327 U. S. 114 at 122 (1946).

76. 326 U. S. 135 (1945).

77. *Id.* at 154.

78. *Gray v. Powell*, 314 U. S. 402, 412 (1941); *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111 (1944). See

Here, however, prejudicial use of hearsay was not to be tolerated;<sup>79</sup> and the Attorney General was not free to adopt "too loose a meaning of the term" "affiliation," applied to an organization of the subversive character attributed administratively to the Communist Party, giving ground, when found, for deportation.<sup>80</sup> The reason as to both points was that, "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom"<sup>81</sup> and hence "may result in the loss of 'all that makes life worth living.'"<sup>82</sup> "Where the fate of a human being is at stake,"<sup>83</sup> an administrative determination adverse to him cannot be allowed to stand unless soundly based. Recently the Court has again held invalid a deportation order based upon an interpretation of the statute that would give it "a capricious application"—an interpretation, this time, of the term "entry" in relation to a return to the United States following an involuntary sojourn on foreign soil.<sup>84</sup>

The explicit justification of more thorough judicial review of certain administrative determinations in deportation proceedings than is obtainable in other cases found its classic expression in *Ng Fung Ho v. White*,<sup>85</sup> from which the opinion in the *Bridges* case quotes.<sup>86</sup> There it was held that the fact of alienage is jurisdictional to the administrative authority to deport<sup>87</sup> and that the Fifth Amendment secures a judicial trial of that fact upon habeas corpus, if citizenship is claimed and a showing is made which demonstrates that the claim is not frivolous. Mr. Justice Brandeis, who wrote the opinion in the *Ng Fung Ho* case, argued for narrower judicial

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Stern, *Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 99-109, (1944), for an illuminating discussion of the leading cases involving such judicial deference.

79. *Bridges v. Wixon*, 326 U. S. 135 at 153-155 (1945).

80. *Id.* at 149.

81. *Id.* at 154.

82. *Id.* at 147.

83. *Id.* at 149.

84. *Delgado v. Carmichael*, 68 Sup. Ct. 10 (1947).

85. 259 U. S. 276 (1922).

86. See *supra*, at note 82.

87. The Court recognized on the basis of earlier decisions that the same rule does not apply in exclusion cases. *Ng Fung Ho v. White*, 259 U. S. 276 at 282 (1922).

review of other administrative determinations in his later dissent in *Crowell v. Benson*.<sup>88</sup> Under the Longshoremen's and Harbor Workers Compensation Act, involved in that case, and numerous other statutes a careful administrative procedure and statutory judicial review are provided. Under such statutes, Mr. Justice Brandeis contended, the review should be confined to the administrative record, even when such constitutional issues as alleged confiscation of property are raised.<sup>89</sup> The *Ng Fung Ho* opinion itself did not recognize this distinction, however, and consequently remains as authority for expanded judicial review of any proceedings that threaten an individual with loss of "all that makes life worth living." In the Selective Service cases this reasoning was applied, despite the existence of a safeguarded administrative procedure, to a threat arising from prosecution for violation of an administrative order. In the deportation cases the threat arises from direct enforcement of the order. In the Selective Service cases the *Ng Fung Ho* case was influential,<sup>90</sup> but in *Cox v. United States*,<sup>91</sup> the last of the series, it was differentiated on the ground that whereas due process requires a judicial hearing of the claim to citizenship, there is no such requirement, but only a statutory right to judicial review of the record, connected with determination of a claim to ministerial exemption from Selective Service.

A more broadly-stated theory, measuring rights to judicial review of administrative determinations where there is no specific statutory provision for such review, appears in the opinion of the Court, written by Mr. Justice Reed, in *Stark v. Wickard*,<sup>92</sup> with which only Mr. Justice Frankfurter, who wrote an opinion, and Mr. Justice Black took issue.<sup>93</sup> The question in that case was whether certain milk producers, not members of a cooperative, who had sold milk in an area covered by a milk-marketing order of the Secretary of Agriculture, might seek to enjoin the deduction of certain payments to cooperatives which the order directed should be

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88. 285 U. S. 22 (1932).

89. *Id.* at 88-93, esp. at 90, n.26.

90. See the *Estep* opinion, 327 U. S. 114 at 120, 122 n.14 (1946).

91. 332 U. S. 442 at 454 (1947).

92. 321 U. S. 288 (1944).

93. Mr. Justice Jackson did not take part in the decision.

made. The payments would come from a fund out of which the plaintiffs would be paid for their milk and would reduce their compensation as well as that of cooperative members; and the contention was that the payments were unauthorized by the Act. The Act made provision for judicial review of orders in proceedings brought by processors and dealers, but none for challenges by producers. Doubtless the reason was that producers were deemed beneficiaries of the orders whose primary purpose was to establish minimum prices for milk. Nevertheless the Court held that producers may invoke the general equity powers of the federal courts to determine whether an order contains "provisions entirely outside of the Secretary's delegated powers."<sup>94</sup> They may do so because such review is necessary to "protect justiciable individual rights against administrative action fairly beyond the granted powers."<sup>95</sup> Such rights reside in producers under the Act because "The statute and the Order create a right in the producer to avail himself of the protection of a minimum price afforded by Governmental action," from which he cannot be barred.<sup>96</sup> Such a right rises "to the dignity of an interest personal to him . . .," and where it is alleged to be jeopardized by administrative action for which authority is lacking, "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts. . . ."<sup>97</sup> Here, moreover, analogously to the situation in the *Elgin, Joliet & Eastern case*,<sup>98</sup> the protection of "minority producers" was involved; for the action of majorities voting in referenda, which were part of the statutory process for formulating milk orders, might be influential in producing "unlawful exactions."<sup>99</sup>

The Court's estimate of the importance of the producer interests at stake seems sound, whether or not the extension

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94. *Stark v. Wickard*, 321 U. S. 288, at 307 (1944). In *United States v. Rock Royal Cooperative*, 307 U. S. 533 (1939), the issues which a handler might raise in an enforcement proceeding were held to be limited to those as to which the handler could show an identifiable interest.

95. *Id.* at 310.

96. *Id.* at 303.

97. *Id.* at 304, 309.

98. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711 (1945), *aff'd upon rehearing*, 327 U. S. 661 (1946).

99. *Stark v. Wickard*, 321 U. S. 288 at 307 (1944).



of judicial review for their protection was justified under the statute. Mr. Justice Frankfurter's able dissent argued strongly that Congress left the protection of producers, like that of consumers,<sup>100</sup> to the Secretary and to the safeguarding procedures surrounding his actions; yet practically speaking both interests may be at the mercy of dominant groups whom judicial relief, when invoked, may occasionally serve to check. Here as in the cases previously reviewed the Court majority has employed the process of statutory interpretation in the service of a philosophy of government which calls for the availability of judicial protection, at least to a minimum extent, to interests that may need it if freedom, economic justice, and decency are to be preserved. In so doing it has in a number of instances, as Mr. Justice Frankfurter pointed out in his *Estep* concurrence, revived "all the casuistic difficulties spawned by the doctrine of 'jurisdictional fact'" when it was harnessed to other causes.<sup>101</sup> It is not possible to ascertain from the Court's opinions or from theoretical considerations what determinations of fact or of law, other than those specifically covered in the opinions, should be deemed to affect the agencies' "authority" or "jurisdiction" so as to open these determinations to judicial review in the absence of specific statutory provision for such re-

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100. Judicial review of administrative determinations at the instance of consumers presents a vexed question. In *Atlanta v. Ickes*, 308 U. S. 517 (1939), the Court by *per curiam* action took the position that a consumer of coal could not invoke the general equity power of a federal court to enjoin the establishment of minimum prices for coal under the Bituminous Coal Act. In a later case the Court of Appeals for the Second Circuit, giving the matter extensive consideration, distinguished the *Atlanta* case and held that consumers might be "persons aggrieved" under the same Act, entitled as such to bring a statutory proceeding to review a minimum-price order. *Associated Industries of New York v. Ickes*, 134 F.2d 694 (1943). In *Parker v. Fleming*, 329 U. S. 531 (1947) the Court, although it recognized that the Emergency Price Control Act precluded the challenge of price and rent orders by consumers and tenants, held that tenants were persons "subject to" an order which granted specific permission to their landlord to commence eviction proceedings in the state courts, and hence might under the statute maintain protest proceedings before the Administrator, followed by judicial review proceedings, directed against the order. In doing so the Court overrode the administrative interpretation of the Act. Chief Justice Vinson and Justices Frankfurter and Burton dissented.
101. *Estep v. United States*, 327 U. S. 114 at 142 (1946) (concurring opinion).

view. Under the doctrine of *Crowell v. Benson*,<sup>102</sup> which required a retrial in court of "jurisdictional facts," it was similarly impossible to discover what facts were jurisdictional and what not. As a result, the doctrine was largely ignored or limited to the facts of *Crowell v. Benson* itself.<sup>103</sup> Now, however, the doctrine is reestablished in relation to other administrative agencies as a means of overcoming the absence of statutory provision for review.

When this action of the Court majority is coupled with its close scrutiny of administrative conclusions of law in certain other situations not here discussed,<sup>104</sup> despite their technical character or relationship to such executive provinces as foreign affairs,<sup>105</sup> it is evident that major qualifications must be attached to the generalization that the present Supreme Court is more willing than the old to permit the deter-

102. 285 U. S. 22 (1932).

103. GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS 1068-1070, (2d ed. 1947), and authorities cited.

104. *Parker v. Fleming*, 329 U. S. 531 (1947); *Thomas Paper Stock Co. v. Porter*, 328 U. S. 50 (1946); *Ashbacker Radio Corp. v. Federal Communications Comm.*, 326 U. S. 327 (1945); *Addison v. Holly Hill Co.*, 322 U. S. 607 (1944); *Norton v. Warner Co.*, 321 U. S. 565 (1944); cf. *Hecht Co. v. Bowles*, 321 U. S. 321 (1944); *United States v. Carolina Carriers Corp.*, 315 U. S. 475 (1942). In two instances the Interstate Commerce Commission was informed that it had more power than it thought to give effect to statutory policies. *Schwabacher v. United States*, 334 U. S. 182 (1948); *Interstate Commerce Commission v. Railway Labor Executives Ass'n.*, 315 U. S. 373 (1942). In *Board of Governors v. Agnew*, 329 U. S. 441 (1947) the Court, while sustaining an order of the Board of Governors of the Federal Reserve System removing a bank director because of financial connections which disqualified him, took pains to assert the authority of the judiciary to review the question of law involved, in a suit to enjoin the removal. Justices Rutledge and Frankfurter disagreed as to this point. In other cases the authority of administrative agencies with respect to matters entrusted to their discretion has been strongly reaffirmed. *Securities & Exchange Commission v. Chenery Corp.*, 332 U. S. 194 (1947); *New York v. United States*, 331 U. S. 284 (1947); *American Power & Light Co. v. Securities & Exchange Commission*, 329 U. S. 90 (1946); *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591 (1944). See cases cited note 24 *supra*.

105. As in the *Vermilya-Brown Co.* case with which this discussion began. In *In re Yamashita*, 327 U. S. 1 (1946) several aspects of the legality of the proceedings of the military commission which tried Japanese General Yamashita as an offender against the laws of war were judicially examined in habeas corpus proceedings. See the opinion of the Court at 8-9 and the summary in the dissenting opinion of Mr. Justice Murphy at 31. The review of military acts affecting civilians is possible by similar means. See the summary by Chief Justice Stone concurring, in *Duncan v. Kahanamoku*, 327 U. S. 304, 336 (1946). Cf. *Ex parte Endo*, 323 U. S. 283 (1944).

minations of administrative authorities to stand.<sup>106</sup> It is clear that, among other reasons, the Court's deference ceases at the point where it sees a need for protection to individuals or to minority interests. When that point is reached, its ingenuity in finding doctrinal bases for intervention by the courts is fully equal to that of the predecessor bench in discovering grounds for invalidating the rate orders of public utility commissions.<sup>107</sup>

## V

The judicial statesmanship embodied in these tendencies on the Court must be appraised with reference to, on the one hand, its effects in particular areas of administration and, on the other hand, its potentialities in the future government of the United States. Nothing that the Court has done nullifies administrative effectiveness to a large extent,<sup>108</sup> as did

106. Cf. *supra*, notes 24, 78, 104.

107. It is not without interest that Mr. Justice Murphy, concurring in the *Estep* case, cited some of the principal older cases which subjected the rate orders of public utility commissions to broad review, as authority for according "no less respect" to the protection of individuals than to safeguards "for the benefit of corporations." 327 U. S. 114 at 127 (1946). Such decisions as *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1922), have, however, generally been regarded as abandoned. Cf. Benjamin, *Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals*, 48 *Col. L. Rev.* 1, 19-25 (1948).

108. The Selective Service decisions following that in the *Falbo* case, which might have done so, came after hostilities had ended and the draft had run its course. In that opinion Mr. Justice Black pointed out that, following administrative consideration of Falbo's claim for exemption for more than a year, "Petitioner, 25 years of age, unmarried, and apparently in good health," was "still litigating the question" 16 months after the final order to report. The Court does not explain in the later cases how the procedural obstructions to prompt induction that were recognized as legitimate could be reconciled with the previous sense of urgency to augment the armed forces and the personnel in conscientious-objector camps. Petitioner Cox used 3½ years in litigation. *Cox v. United States*, 332 U. S. 442, 444 (1947). The Supreme Court phase of such litigation would, it is true, have been eliminated in many later instances by earlier cases' settlement of the issues of law involved. To a large extent the question of the probable effect of procedural delays turns on the practical relation of prosecutions for disobedience to entry into service. Mr. Justice Murphy proceeded upon the assumption that the defendants were lost to the service in any event; the question was simply whether they should be imprisoned. See *Falbo v. United States*, 320 U. S. 549 at 559 (1944) (dissenting opinion); *Estep v. United States*, 327 U. S. 114 at 128-129 (1946) (concurring opinion). This view ignores the probability that disobedience might not occur in many cases if review of administrative orders could not be had in criminal proceedings. The

the decisions of the former Court in public utility matters. Where agency determinations have been overruled on points of law<sup>109</sup> the issues have been relatively narrow and the effects have been limited to the particular kinds of situations presented. On the whole, the enlarged freedom of the regulatory agencies from judicial surveillance over their discretionary determinations<sup>110</sup> has cast the responsibility for sound administrative policies upon the only authorities equipped to discharge that responsibility, namely Congress and the regulatory bodies themselves. Where the Court has pried open the door to judicial scrutiny of administrative determinations, it has been modest in regard to the scope of the judicial inquiry, as in the *Cox* case. Its object has been to guard against the possibility that lesser persons and groups may be without means of protection against powerful interests or against officials who may become oblivious or indifferent to legitimate claims. Without erecting safeguards in all situations,<sup>111</sup> it has brought into being impressive judicial protections. Although these have not been raised to the level of constitutional requirements, they seem unlikely to be removed by legislative action.<sup>112</sup>

The work of the Court in the areas here examined is of the same cloth as its treatment of constitutional safeguards in criminal proceedings and its extension of First Amendment and due process protection to civil liberties. In these constitutional matters the prevailing Justices have expressed more effectively the considerations that have moved them than in the cases reviewed above.<sup>113</sup> The opinion of Mr. Justice Reed in *Stark v. Wickard* enunciates a general jurisprudential theory which asserts that some interests "rise to the dignity" of possessing a valid claim to judicial cognizance. However, the opinion does not identify those interests except for the

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opinion of the Court in *Billings v. Truesdell*, 321 U. S. 542 at 549 n.2 (1944), points out, on the other hand, that conviction for violation of the Selective Service Act might well be followed by parole to the Director of Selective Service for induction.

109. See note 104 *supra*.

110. *Ibid.* See also notes 24, 78 *supra*.

111. *Supra*, note 23; *infra*, p. 191-2.

112. The Selective Service Act of 1948 contains the same provisions for administrative finality as the Act of 1940. Pub. L. No. 759, 80th Cong., § 10(b) (3) (1948).

113. Their rationale has been subjected to keen analysis in Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L. J. 571 (1948).

recognition, already noted, that the individual and minority interests involved in the case were such as should be accorded standing to sue.<sup>114</sup> The rationale here, coupled with that underlying the other cases, parallels closely the philosophy stated by Mr. Justice Stone in his famous Footnote 4 of *United States v. Carolene Products Co.*,<sup>115</sup> stressing protection to democratic political processes and to minorities, when threatened by legislation, as sufficiently important to balance the presumption that statutes are constitutional, as against attack based on the Fourteenth Amendment and the Bill of Rights. Democratic processes and minority rights have their place in economic affairs as well as in political. The danger that administrative action may strike them down or deprive individuals of their freedom may need to be averted by judicial intervention from time to time, just as legislation or the zeal of law enforcement officers may require checking. Such, at any rate, is the conclusion of the majority of the Court.<sup>116</sup>

Since not all members of the Court are equally determined and thorough in seeking to give effect to policy considerations that move them, and since history or clear legislative expression may control inclination, interests similar to those usually accorded protection go without it upon occasion. An instance of this sort occurred at the 1947 Term<sup>117</sup> when it was decided by a majority of five Justices that habeas corpus could not be used to challenge the procedure by which the Attorney General, as delegate of the Presi-

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114. *Stark v. Wickard*, 321 U. S. 288 at 307 (1944).

115. 304 U. S. 144, 152 (1938). In *Thomas v. Collins*, 323 U. S. 516, 530 (1945), "the indispensable democratic freedoms secured by the First Amendment" were recognized as coming within the principle stated.

116. Mr. Justice Frankfurter's belief in adherence to an indicated legislative intention that particular administrative determinations shall not be reviewed is set forth with clarity and vigor in his dissents in *Stark v. Wickard*, 321 U. S. 288, 311 (1944), and *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 749 (1945), and in his concurring opinion in *Estep v. United States*, 327 U. S. 114, 134 (1946). Necessarily this belief calls for close studies of particular enactments, which in these instances led to rejection of the suggestion that the congressional action should receive limiting interpretation to avoid infringement of "very sacred rights." Mr. Justice Frankfurter's philosophy does not entirely reject the possibility of such interpretation from time to time. Cf. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 517, 539 (1947).

117. *Ludecke v. Watkins*, 335 U. S. 160 (1948).

dent's power, determined that an enemy alien should be deported pursuant to the Alien Enemy Act of 1798.<sup>118</sup> The majority's conclusion that the Act does not contemplate judicial review is convincing;<sup>119</sup> but it is true, as pointed out in the dissenting opinion of Mr. Justice Douglas, that judicial review of deportation orders affecting non-enemy aliens is built upon no firmer foundation of statutory text than existed here. The majority,<sup>120</sup> including Mr. Justice Reed who with the dissenters had formed the majority in many of the other cases here studied, was moved either by what was deemed to be the clear meaning of the statute, or by a sense that there is a significant difference between an enemy alien's claim to judicial protection and the claims of other aliens.<sup>121</sup>

One may criticize the Court for not being more vigorous in pursuit of essential objectives in a case such as that just discussed, as was the "old Court" in pursuit of its ends.<sup>122</sup> Yet a degree of modesty as to the judicial function, coupled with a sense that logic limits legitimate judicial innovation, are desirable too; for the Court should be a coordinator, developer, and critic, rather than an innovator, of policy.<sup>123</sup> The significant question with regard to its work is whether it has chosen soundly the issues and the occasions upon which to be bold and whether the logical limits which it has observed have aided in knitting together a body of law that has been

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118. REV. STAT. 4067 as amended (1878), 50 U. S. C. § 21 (1946).

119. Not so the further conclusion of law that the power to deport outlasted the period of hostilities because of the continuance of a technical state of war for certain purposes.

120. Perhaps also Mr. Justice Black as to this point, since he dissented on the point referred to in note 119, *supra*, relating to the effect of the termination of hostilities, and did not join in Mr. Justice Douglas's dissent on the point here dealt with.

121. The fact of enemy alienage was not disputed in the *Ludecke* case. Had it been, judicial determination of that fact, no doubt with "trial do novo," could have been had. In other deportation cases, however, the adequacy of the administrative procedure is also subject to judicial check, as it was not here. *Bridges v. Wixon*, 326 U. S. 135 (1945).

122. Cf. Hamilton, Book Review, 56 YALE L. J. 1458 (1947).

123. The distinction is not a sharp one, of course. In developing the body of case law under the First Amendment and incorporating the prohibitions of that enactment into the Fourteenth Amendment, the Court has set the tone for opinion and legislative action throughout the country—at least for the time being. In doing so it has, however, drawn upon the fundamental thought embodied in the Constitution, rather than manufactured a philosophy out of whole cloth.

at once coherent and vital. Reasons are not lacking for valid objection on such grounds to some of the work of the present Court.<sup>124</sup> In the portion of that work here examined, the potentiality for protecting individual and minority interests against group domination of administration and against expanded governmental power, which the Court has created,<sup>125</sup> seems wholly good. In the Selective Service cases the effort to overcome a false start in the *Falbo* case without repudiating it resulted in obfuscation. The reversal probably was unnecessary as well; for habeas corpus afforded a recognized remedy which need not have been inadequate in scope, and there seemed to be little justification for erecting another remedy beside it. The administrative process was also surrounded with statutory safeguards. It must be conceded, however, that uncooperative military authorities might seriously obstruct access to counsel and courts by an inducted individual, and that for this reason, if for no other, the opportunity to resist before induction and to test the justification for resistance in court has something to be said for it.<sup>126</sup> The decision in *Bridges v. Wixon* also seems legalistic and

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124. Outstandingly, to *United Mine Workers v. United States*, 330 U. S. 258 (1947).
125. The Court has been criticized for twice denying certiorari in *Friedman v. Schwellenbach*, 330 U. S. 838 (1947); 331 U. S. 865 (1947), involving the dismissal of a government employee because of doubt concerning his loyalty, Black and Douglas, JJ., disagreeing. The case, however, involved a transfer from a non-civil service to a civil service position under the War Service Regulations. The transfer had been authorized by the Civil Service Commission conditionally upon the outcome of the investigation, which was required of it, into the transferee's "suitability." Hence the "dismissal" was technically and in reality a denial of appointment which, nevertheless, was accompanied by a full explanation of the reasons for it. The Court would have had to go far indeed to make the case a vehicle for the assertion of constitutional or implied statutory power to review administrative action affecting the tenure of government employees. At the same term it entertained a proceeding to inquire into an alleged invasion of the constitutional rights of a federal employee by the statute under which he was threatened with dismissal. *United Public Workers v. Mitchell*, 330 U. S. 75 (1947).
126. During the war the military authorities seem on the whole to have been cooperative with personnel desiring to test the validity of their induction. Less cooperative authorities might have created difficulties not only in the original bringing of actions but also by moving petitioners to points distant from those where actions were brought. Whether such removals might be stayed is by no means clear. As a practical matter, in any event, the effectiveness of habeas corpus proceedings as against the armed forces rests largely upon continued respect for judicial authority on the part of military personnel, the Commander-in-Chief, and his civilian aides.

not particularly fruitful,<sup>127</sup> since essentially fair procedure had been observed at the administrative level; yet one can scarcely object to the rule that on evidence points the safeguards that operate in a criminal proceeding should prevail in a deportation proceeding which may be personally disastrous to the affected individual. In the railway labor and other cases examined, in which protection has been extended to interests seeking it, the decisions seem justified and are adequately, even if disputably, grounded. The denial of judicial review in the Mediation Board cases, on the other hand, seems needlessly narrow.<sup>128</sup>

At the conclusion of his dissent in *Ludecke v. Watkins*<sup>129</sup> Mr. Justice Black suggests his belief that "because of today's opinion individual liberty will be less secure tomorrow than it was yesterday." If so, the reverse is nevertheless true as a result of the body of cases and opinions here examined. When personal interests or freedoms seem threatened as a result of administrative action, the Court manifests readiness to extend judicial safeguards to them, in the guise of review of the fairness of the administrative procedure or review of the administrative determination of jurisdictional points, whether of fact or of law.<sup>130</sup> To this end it has used the traditional legal method of harnessing technicalities to the service of ends which are deemed important. Since technicalities may obscure issues and limit conclusions as well as serve essential purposes, however, and since the Justices' schemes of value are not uniform, firm majorities in favor of identified ends cannot be forecast with assurance. But on the whole the Court, by its readiness to check abuse at the hands of the powerful, serves the cause of that liberty which it was and is the primary purpose of the separation of powers to secure.

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127. The writer was on the staff of the Solicitor General at the time of the *Bridges* case and several of the Selective Service cases herein discussed, but did not participate personally in any of them.

128. See the opinion of Rutledge, J., dissenting, in *Switchmen's Union v. National Mediation Board*, 135 F.2d 785 (App. D. C. 1943), for a statement of the possible need of minority unions for protection in such cases.

129. 335 U. S. 160 at 183 (1948).

130. The Federal Administrative Procedure Act, *supra*, note 18, may increase somewhat the opportunities for judicial scrutiny of administrative action. See *United States ex rel. Trinler v. Carusi*, 166 F.2d 457 (C. C. A. 3d 1948), and Comment, 34 IOWA L. REV. 91 (1948).