

JUSTICE ROBERT JACKSON AND THE EVOLUTION OF ADMINISTRATIVE
LAW

by

Susan Jane Buck Cox

A dissertation submitted to the Faculty of the
Virginia Polytechnic Institute and State University
in partial fulfillment of the requirements for the degree of
DOCTOR OF PHILOSOPHY

in

Public Administration and Public Affairs

APPROVED:

John A. Rohr

Gary L. Wamsley

Charles T. Goodsell

Justin J. Green

Robert J. Ingram, Jr.

August, 1983
Blacksburg, Virginia

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ACKNOWLEDGMENTS

Often in acknowledgements of this sort, the author divides the people to whom she owes thanks into two groups: those who have helped professionally and those--often family--who have provided personal support. I am most fortunate to have only one category of people to acknowledge with gratitude, for all of the people who have helped me write this dissertation are also friends.

Dr. Justin Green, Assistant Dean of the College of Arts and Sciences and a member of the faculty of Political Science, has assisted by more than his valuable critiques of the dissertation prospectus and the dissertation. He has provided a perspective on teaching in a university atmosphere that has helped me clarify my own orientation towards students. Robert Ingram, Jr. has given freely of his time, energy, legal expertise, and practical experience as an attorney to help me through the labyrinth of legal research necessary in such a study. He has borne with astonishing good grace my occasional aspersions on the legal profession. He is also a good third baseman. Dr. Charles Goodsell of the Center for Public Administration and Policy (CPAP) has been of incalculable value throughout my entire doctoral program. His courses have been among the most

innovative and exciting; his careful craftsmanship are as evident in his teaching as in his own work. His analyses of my work are always pertinent and constructive. Dr. Gary Wamsley, Director of CPAP, has provided intensive intellectual stimulation during my graduate program; the idea which eventually grew into this dissertation resulted from a long and rigorous debate with him on the nature of administrative law.

Dr. John Rohr has chaired my dissertation committee. Working with Dr. Rohr during my three years at CPAP has been the most rewarding experience of my academic career. The breadth of his academic knowledge coupled with his astonishing belief that students have something to offer make his classes both a challenge and a pleasure. His concern for his students is evident in the respect he accords their work and their opinions. His comments on the dissertation have been penetrating, illuminating, and timely. He has been committed throughout the study to helping me achieve the best result possible. This project has been conducted under the most expert guidance, and whatever strengths it has owe much to Dr. Rohr.

Judi Hoover has typed--and retyped--this dissertation, and her care is evident in the quality of her work. She has spent many late nights to help meet deadlines that were

rushing upon us because I was slow, and her unfailing good humor, patience, and helpfulness have made the process of producing this dissertation as simple as possible.

The one person I wish to acknowledge who is not also part of my academic life is my daughter Bethany, although she has often patiently listened to me explain my academic work. I have discovered that if I cannot explain a point so that she understands it, I probably don't understand it either. Bethany was eight years old when I began the doctoral program. She has given up a great deal of her own amusements because I was too involved with studying to take time for her. She has also given actively in her help at home during times of stress. She has been a real partner in this endeavor.

It is difficult to separate out of our life together the part in this dissertation played by my husband, Raymond Cox. He is both colleague and husband, which means that in the small hours of the morning he is likely to be assailed by academic questions and to these he usually returns academic answers. We have discussed every facet of this work from its inception to what might be done with it in subsequent years. I wrote that it is difficult to isolate his contribution; I think I won't try because I doubt it could be done.

...there is nothing greater and better than
this--when a husband and wife keep a household in
oneness of mind, a great woe to their enemies and
joy to their friends....

Homer

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CHAPTER I

INTRODUCTION

"The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

Oliver Wendell Holmes, Jr., 1881

BACKGROUND OF STUDY

The major concern of this work is the evolution of administrative law, especially during the critical New Deal and post-New Deal years when the administrative state became a reality and administrative law became a recognized field of law.

Although executive agencies such as the Veterans Administration and the Customs office can trace their historical antecedents to the eighteenth century, 1887 is usually given as the date at which public administration became a self-conscious activity. Two events of 1887 combined to initiate public administration: the founding of the Interstate Commerce Commission, and Woodrow Wilson's essay, "The Study of Administration." Despite this auspicious beginning, the real impetus to the administrative state came in the 1930's with the inauguration of the New Deal.¹

Administrative law was equally slow to develop. Frank Goodnow is generally credited with being the first to discern the importance of administrative law with the publication of his book, Comparative Administrative Law, in 1893.² However, the field was not generally recognized as an important and defined area of study until the New Deal.³ The New Deal created agencies with control over previously unregulated sectors of national life, leading to serious questions about the fairness and regularity of agency procedures. For students of the law, the impact of such enormous, rapid, and unprecedented expansion was to put a previously marginal area of legal inquiry into the forefront of concern.⁴ The years that followed the New Deal were critical in defining the field.

In 1939, the Attorney General's Committee on Administrative Procedures was formed, headed by Dean Acheson who was later to become Secretary of State. The final committee report, published in 1941 together with twenty-seven monographs on the operations of individual agencies, dealt with three points of criticism which had been raised against the agencies: "the exercise of power to adjudicate in individual cases"; the limits on scope of review of administrative processes by the courts; "and the exercise of delegated power to legislate by rules and regulations."⁵

The Report also proposed legislation to formalize its recommendations. In 1945, Congress resumed its consideration of the Report after the hectic activity of the war years, and in 1946, the Federal Administrative Procedure Act (APA) was enacted by a unanimous Congress. Thus, within a decade, the "legitimacy of a markedly transformed and enlarged administrative system was established and its formal processes for making policy were defined."⁶ In the years which followed, the agencies and the courts were forced to accommodate themselves to the new requirements of the APA.

FOCUS OF ANALYSIS

This is a period of history which has been the subject of innumerable analyses--a veritable embarras de richesses. The work of Robert Jackson, serving as a government attorney during the New Deal, as Solicitor General and then Attorney General at the time of the Attorney General's Report, and finally as Associate Justice of the Supreme Court, provides a fortuitous medium through which to examine this critical period in the evolution of administrative law. Jackson's usefulness lies in the public roles he filled during the years 1934-1954. Consequently, in this study biographical details are subordinated to Jackson's impact.⁷ His

influence on administrative law due to those public roles is considerable; the influence he brought to bear by virtue of his private concerns remains to be discovered. His service at Nuremberg influenced his decisions on the Court from 1946 to 1954; in addition to changes in his views on civil liberties, his intense exposure to continental law and his attempts to reconcile continental procedure to American legal philosophy had a significant impact on his opinions. If these opinions in turn were influential on the Court, Jackson's personal impact on American administrative law may be considerable. However, that such a direct impact exists is not my thesis. My primary concern with Jackson is to use his work to focus my effort to find some coherent pattern in the wealth of data and speculation which surround the years that are so important in shaping modern American administrative law.

IMPORTANCE OF THE STUDY

The emphasis of this study of the evolution of administrative law is on the conception of administrative law held by practitioners and scholars within the field of public administration. The study is not intended to present an analysis of case law or of the concepts within particular substantive sub-fields such as the regulation of the securities industry.

RETROSPECTIVE EXAMINATION OF ADMINISTRATIVE LAW

Why is this conceptual history important? Phillip Cooper writes that "there is no single commonly accepted definition of 'administrative law'."⁸ He continues by presenting a wide range of definitions found in the legal literature before settling on a definition suited to his purpose. This diversity of definition is deceptive. The principal reason that people in public administration are uncertain about the meaning of administrative law is not simply that a variety of definitions exist from which to choose. It is rather that these definitions are drawn from a ninety year historical progression--from Goodnow in 1893 to Cooper in 1983--which provides a variety of definitions which are tailored to the concerns of each historical period. We have been too quick to reach into the past to find facile definitions for a discipline that is constantly changing. To draw on Goodnow's 1893 definition in 1983 is to ignore ninety years of social change. However, just as we cannot let the past impose its definitions on the present, neither can we afford to ignore the past. Thus the first reason this study is of importance is that it provides a panoramic view of "where we've been" in defining administrative law, and this retrospective view then provides the basis for describing where we are today. In

this development, few periods have been more vital than the years when Robert Jackson served first as Attorney General and then on the Supreme Court. Thus, a full examination of the legal issues of the period will deepen the public administration community's understanding of administrative law.

DEVELOPMENT OF THE ADMINISTRATIVE PROCEDURE ACT

A second reason this study is of importance is the illumination of the events which led up to the Administrative Procedure Act. The Administrative Procedure Act of 1946 is of particular concern to public administration. It codified many of the procedures in use by contemporary administrative agencies. It settled to a large extent the issue of scope of judicial review and the most pressing procedural issues of that time. The enactment of the Administrative Procedure Act may have presaged a drastic change in American political norms which led in turn to acceptance by the American people of a new basis and direction for their government. An examination of the process which produced the Administrative Procedure Act will aid in analyzing the subsequent effects of the Act.

ROBERT JACKSON AND ADMINISTRATIVE LAW

A third justification for this work is its study of the views of Justice Jackson on administrative law, a subject which has not been explored previously. His opinions and extra-judicial writings provide an opportunity to test and to illustrate the new conceptualizations of administrative law which are emerging in the literature. The application of new ways of thinking about administrative law raises questions and concerns which are not readily apparent in studies of a purely theoretical nature.

Jackson is an especially appropriate choice. During the Roosevelt years, Robert Jackson had an intimate involvement with selecting and prosecuting the cases brought by the government before the Supreme Court. In his thirteen terms on the Court (1941-1953, with 1945-1946 term in Germany), he saw the report he submitted as Attorney General form the basis of the Administrative Procedure Act. From the passage of APA in 1946 to his death in 1954, Justice Jackson sat on the Court that interpreted the Act. He is therefore a central figure in understanding APA.

Justice Jackson is also interesting in that he came to the Court from the Executive branch. While this is by no means unique among the justices, his experience in the New Deal gave him a dual perspective on issues before the Court.

This dual perspective is of value for research because in those areas such as the Morgan cases, where Jackson expressed his non-judicial opinions, several sides of an issue are exposed. However, great care must be taken in attributing to Jackson as personal opinion those comments made in his role as government attorney. Jackson himself said:

The Attorney General is the attorney for the Administration. I don't think he should act as judge and foreclose the Administration from making reasonable contentions. I would do the same thing with the Administration as with a private client. I would give it the benefit of a reasonable doubt as to the law. I would tell my client what his chances were, what his risk was, and support him as best I could. That is what I did with the Administration.⁹

Thus Jackson's official comments on issues while he was serving as Solicitor General or Attorney General deserve the same scrutiny as those of any lawyer engaged in the adversary process.

The judicial writings of Robert Jackson are an especially rich field for legal scholarship because of the number of his dissents. In his thirteen years on the Court, Justice Jackson wrote 324 opinions, 109 of which are dissents.¹⁰ Because dissents are usually an individual effort, they often provide more insights about a particular justice's views and reasoning they can be found in a majority opinion. The dissents of Jackson are also

important because of his own opinions on the value and use of judicial dissent. He did not think highly of indiscriminate use of dissent:

The technique of the dissent often is to exaggerate the holding of the Court...[or to] force the majority to take positions more extreme than was originally intended.... The right of dissent is a valuable one.... But there is nothing good, for either the Court or the dissenter, in dissenting per se. Each dissenting opinion is a confession of failure to convince the writer's colleagues, and the true test of a judge is his influence in leading, not in opposing, his court.¹¹

Written just before Jackson's death in 1954, this excerpt indicates what great weight must be placed on those cases where Jackson felt compelled to dissent.

In addition to Justice Jackson's legal opinions there is a voluminous supply of extra-legal writings, many of which bear directly on administrative law.

Robert Jackson's views are also of interest because of his participation at the Nuremberg war trials. The trials changed his views on the legal process; the "once libertarian judicial activist...had become profoundly cautious, a markedly conservative interpreter of the Bill of Rights....Yet he remained an apostle of judicial restraint in the economic-proprietarian sphere, supporting governmental authority to regulate and thus remaining true to his basic New Deal commitments."¹² To investigate this

statement that Jackson's experience as Prosecutor led to an abrupt change in his judicial activity is a worthwhile project in itself and adds an element of human and historical interest that may enhance the value of the research.

SUMMARY

This dissertation is of value to the discipline of public administration because it provides an historical and conceptual background in which to place the field of administrative law. It suggests future trends in the conceptualization of administrative law and provides an opportunity to test and to illustrate these conceptualizations.

The work of Robert Jackson is especially appropriate for several reasons. First, as Attorney General he helped prepare the report on which the Administrative Procedure Act is based. Second, he spoke and wrote on many issues from both the Executive and the Judicial viewpoint. Third, his writings, both judicial and extra-judicial, clearly address the concern of this dissertation. Fourth and finally, the reported changes in his judicial behavior occasioned by the Nuremberg trials makes his works and opinions of more than ordinary interest.

SUMMARY OF CONTENTS

This study is divided into seven chapters. This chapter, Chapter One, "Introduction," furnishes the background of the study, discusses the importance of the study for public administration, and summarizes the chapters that follow.

Chapter Two, "Conceptual History of Administrative Law," divides the development of administrative law into three historical periods. The first period is from 1893 to 1933 and is dominated by the work of Frank Goodnow, Ernst Freund, and Felix Frankfurter. In this period was set the basis for the explosion in administrative government during the New Deal. The Roosevelt-dominated years between 1933 and 1946 form the second period. This period is marked more by events than by individuals, and the discussion of these years is structured around the Walter-Logan Bill, the Attorney General's Committee on Administrative Procedure and its Report, and the Administrative Procedure Act of 1946. The final period is the post-war years--from 1945 to 1982. In this period new concepts of administrative law emerged and, at least for a while, dominated the field. K.C. Davis' work on discretion had considerable impact. In retrospect, the evolution from the discretionary aspects of administrative law to the policy-formulating aspects seems

inevitable. Administrative law became viewed as a managerial tool by some groups of public administrators, and the academic field of administrative law began to define it not as a field characterized by uniform and generalizable principles but rather as a grouping of substantive policy areas which utilize administrative procedures to achieve policy implementation. The chapter concludes with a discussion of future trends in the conception of administrative law.

Chapter Three, "Government Attorney," begins the examination of the work of Robert Jackson. In this chapter his work as an attorney in the executive branch is examined in order to present the basis upon which Jackson's later work was built. The chapter serves, in effect, as an introduction to Jackson's views. His extra-legal writings, his briefs on the Morgan cases, and official opinions as Attorney General provide most of the source material for this chapter. Jackson's primary impact on the changing field of administrative law came during his tenure as Attorney General, but the clearest expression of his ideas came in his extra-legal writings. It can be easily seen in his opinions as Attorney General that he was willing to utilize whatever tool of law, e.g., administrative discretion, was necessary to achieve desired government

policy. Two themes emerge from his early work: that the traditional judicial model of justice and the administrative process are partners in the administration of justice; and that on occasion, practicality in the application of law must override an absolutist application of law.

Chapter Four is "Robert Jackson as Associate Justice, 1941-1946." Jackson served on the Supreme Court for thirteen years, with a full year's interruption in 1946 when he was Chief Prosecutor for the United States at Nuremberg. The year of the trials provides a convenient point at which to break the discussion of his judicial career, especially in light of the frequently repeated assertion that Jackson's legal philosophy was significantly changed as a result of that experience. During these five years, Jackson wrote opinions on several cases of interest to students of administrative law. Chapter Four discusses not only those cases but also cases which, while not bearing directly on administrative law, do offer useful insights into Jackson's thoughts on the legal issues of the day. These insights illuminate Jackson's position on administrative law. In this chapter, extra-judicial writings were not considered as a separate category. Although nearly one-third of Jackson's opinions were written before he left for Nuremberg, very few of them were of great import in administrative law. What

can be gleaned from these cases is the beginning of a judicial philosophy--a deference whenever possible to administrative expertise, a concern for stare decisis, an affirmation of the right of the government to regulate the national economy. These early cases do not shed much light on Jackson's view of administrative expertise and discretion. But the cases do provide a forum for some of Jackson's beliefs that developed during this period and were of importance when he returned to the Court.

In Chapter Five, "The Nuremberg Trials," the effect of Nuremberg on Jackson's philosophy and career is described. This chapter is in some ways an interlude in the discussion of administrative law, but it is necessary in order to understand the work of Jackson's last years on the Court. Those final years can only be understood if they are viewed through the filter of the Nuremberg experience. His experience in designing the trials to be fair by the standards of both Anglo-American and Continental law gave him a unique perspective on American views of justice. His thorough examination of the events leading up to the Nazi domination of Germany changed his view of individual rights. We might have expected that Nuremberg would have given Jackson a horror of suppression of any kind, but what he learned was in fact the converse: had the Weimar Republic

suppressed the Hitler minority, the Republic might have survived. He felt that in his role as Chief Prosecutor he had reached the peak of his career as a lawyer; he had probably lost forever any chance of becoming Chief Justice. He returned from Nuremberg to face a new President, a new Chief Justice, and the Administrative Procedure Act.

Chapter Six, "Return to the Bench: 1946-1954," is the last chapter to focus primarily on Jackson's work. One point which is immediately clear upon reading Jackson's opinions is the extraordinary diversity of positions he espoused. In Chapter Two a conceptual history of administrative law was presented which suggests that administrative law can only be properly understood in the context of substantive policy. In this chapter, Jackson's opinions are analyzed in terms of both traditional analysis and substantive policy. It is relatively simple to draw procedural parallels between cases, but to discover substantive similarities is more difficult and uncertain. Jackson's opinions in six selected alien cases are discussed in an effort to find the substantive similarities; how effective this is and how useful is in part the subject of the concluding chapter, Chapter Seven.

In Chapter Seven, the several lines of thought developed throughout the study are brought together. The

chapter has three major sub-divisions. The first concludes the direct discussion of Jackson's work. His ultimate view of administrative law and the administrative process is presented, as is his personal impact on our present views of administrative law. The second section discusses the ramifications of using substantive law and policy to frame our conceptualization of administrative law. Four possible levels of analysis and the usefulness of each are discussed. Finally, section three presents the lessons for public administration which may be learned from this study.

NOTES

¹Glen Robinson, Ernest Gellhorn, and Harold Bruff, The Administrative Process, 2nd ed. (St. Paul: West Publishing, 1980), pp. 4-5.

²Edward A. Harriman, "Development of Administrative Law in the U.S.," Yale Law Journal 25 (1916):658. Goodnow's text is Comparative Administrative Law (New York: Putnam's, 1893).

³Robert Rabin, "Administrative Law in Transition: A Discipline in Search of an Organizing Principle," Northwestern University Law Review 72 (1977):120.

⁴Rabin, p. 121.

⁵U. S. Congress, Senate, Final Report of the Attorney General's Committee on Administrative Procedure. S. Doc. No. 8, 77th Cong., 1st sess., 1941: pp. 1-2, quoted in Robinson, Gellhorn, and Bruff, p. 35.

⁶Rabin, p. 125.

⁷Robert H. Jackson was an active proponent of Roosevelt's New Deal. In 1934, he left private practice in New York State to join the Bureau of Internal Revenue as General Counsel. In 1935, he served as special counsel to the SEC while retaining his Revenue position. In 1936, he became the Assistant Attorney General in charge of the Tax Division in Department of Justice, and in 1937 he moved within Justice to become the Assistant Attorney General in charge of the Antitrust Division.

In 1938, Roosevelt appointed Jackson to be Solicitor General under Attorney General Cummings who was soon replaced by Frank Murphy. It was Murphy who appointed the Attorney General's Committee on Administrative Procedures. In 1940, Murphy was appointed to the Supreme Court and Jackson replaced him as Attorney General. Thus, the Attorney General's Report was released during Jackson's tenure in office. In July of 1941, Jackson was sworn in as an Associate Justice of the Supreme Court.

In May of 1945, President Truman appointed Jackson to serve as chief prosecutor for the United States at the Nazi war criminals' trial in Nuremberg. Jackson took a year's leave of absence from the Court and thus was in Germany when the Administrative Procedure Act was passed in 1946. He returned to the Court in October of 1946. Jackson continued to serve on the Court until his death in 1954. [For a full biography of Jackson, see Eugene Gerhart, America's Advocate: Robert H. Jackson (Indianapolis: Bobbs-Merrill, 1958).]

⁸Phillip Cooper, Public Law and Public Administration (Palo Alto, CA: Mayfield, 1983), p. 5.

⁹Robert Jackson, personal interview with Eugene Gerhart, 16 June 1951. Quoted in Gerhart, p. 504.

¹⁰Gerhart, p. 504.

¹¹Robert H. Jackson, The Supreme Court in the American System of Government (Cambridge, MA: Harvard University Press, 1955).

¹²Henry Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court (New York: Oxford University Press, 1974), pp. 219-220.

CHAPTER II

CONCEPTUAL HISTORY OF ADMINISTRATIVE LAW

"...the future of administrative law lacks the clarity calculated to appeal to orderly minds."

N. Nathanson, 1956

INTRODUCTION

In 1893 Frank Goodnow published Comparative Administrative Law,¹ generally regarded as the first American work on administrative law.² He defined administrative law as "that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights."³ Ninety years later, Phillip Cooper writes that "there is no single commonly accepted definition of 'administrative law,'"⁴ and he proceeds to employ an extremely broad definition: "the branch of law that deals with public administration, providing the authority on which administrative agencies operate as well as the limits necessary to control them. The term is broadly defined to include both substantive and

procedural concerns, internal as well as external issues, and aspects of the legal environment of administration that exceed simply quasi-legislative and quasi-judicial categories."⁵ Between these two definitions rests ninety years of conceptual development.

Bernard Schwartz wrote that "[a]n analysis of the history of American law would surely show a basic stream of development. Within it, however, are inconsistent currents, at variance with, and even at cross purposes to, the underlying drift of the stream."⁶ Administrative law also shows a basic stream of development. In the early years of administrative law--from 1893 to the New Deal--the central issues were delegation of power and separation of powers. By 1940 the field had coalesced into a definite discipline concerned with the three issues of delegation of power, exercise of power, and judicial review.⁷ After these issues were temporarily resolved in 1946, the year of the passage of the Administrative Procedure Act, the field became concerned with discretionary action. While discretion in the administrative process is by no means exhausted as a field of inquiry, recent literature, from Woll's 1963 book, Administrative Law: The Informal Process, to Cooper's 1983 text, points to the discovery of the vital necessity to include substantive law with administrative law if any order

is to be found in the field. All of these views have been present in varying degrees throughout the period being examined, but the extraordinary emphasis placed on each view at different historical periods enables a pattern of conceptual development to emerge.

THE EARLY YEARS: 1893-1933

Three names dominate the early years in the development of administrative law: Frank Goodnow, Ernst Freund, and Felix Frankfurter. While certainly the contributions of scholars such as Roscoe Pound⁸ and Bruce Wyman⁹ should not be discounted, Goodnow, Freund, and Frankfurter represent differences in their approaches to administrative law that are significant to the changing definitional emphases.

Goodnow, Freund, and Frankfurter

Frank Goodnow, whose definition of administrative law began this chapter, was primarily a political scientist interested in public administration. He viewed administrative law as a supplement to constitutional law which he defined as the relations of government with individuals from the standpoint of the rights of individuals; administrative law was viewed as the relations of government with individuals from the perspective of the powers of government.¹⁰ He wrote:

[a]dministrative law is therefore that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights.¹¹

Thus Goodnow's definition includes virtually all of public administration¹² but excludes substantive law, i.e., the law made by the agencies. This omission was challenged in later years.¹³

Ernst Freund, writing in 1894, cited Goodnow's 1893 book approvingly.¹⁴ He asserted that general principles of administrative law could be found:

[Public statutes regulating the administration of government] must, in the nature of things, follow certain uniform principles and forms, and the relations thereby created must raise corresponding legal problems. The body of law which is thus developed regulates and limits governmental action without involving constitutional questions. Its subject matter being the administration of public affairs, as distinguished from legislation on the one side and from the jurisdiction of the courts on the other, it has been aptly called administrative law.¹⁵

Freund distinguished administrative law from constitutional law. Constitutional law is involved when the issue is "directly between liberty and sovereignty--between individual right and power" but administrative law is concerned when "merely the legality of official action is involved, (when) the fiscal rights and liabilities of the government are in issue, (and when) the question of remedy

against the government (arises,) since the constitution, even where it defines rights, rarely points out the means of enforcing and protecting them."¹⁶

Freund did not, however, include all of public administration under the rubric of administrative law. In 1911 he wrote that

[i]n so far as [law regulating matters of public administration] involves problems of public policy and of administrative efficiency, it concerns the student of political science and of public administration. The chief concern of administrative law...is the protection of private rights, and its subject matter is therefore the nature and the mode of exercise of administrative power and the system of relief against administrative action.¹⁷

Thus Freund, like Goodnow, excluded the substantive law made by administrative agencies from his definition of administrative law. However, twenty years later he conceded that "with the growth of administrative tribunals, and particularly of a practice of publishing reports of administrative decisions and of abiding by precedents, there is every reason to suppose that such a body of commission or departmental administrative law will gradually establish itself."¹⁸ Thus by 1931, Freund was including in his definition the substantive law developed by the agencies.

Felix Frankfurter's influence was directly felt in this early period in administrative law as well as in the subsequent years. While much of Frankfurter's impact came

from the bright young lawyers he sent to Roosevelt's New Deal and from his opinions as Supreme Court Justice, his 1932 casebook on administrative law, co-authored with J. Forrester Davison, provided a broad and innovative view of the field.¹⁹ This new perspective was foreshadowed by Frankfurter's 1927 article, "The Task of Administrative Law," which openly rejoiced that administrative law, the field of law so presciently foretold by Elihu Root in 1916,²⁰ had at last become recognized. "And so," he wrote, "this illegitimate exotic, administrative law, almost overnight overwhelmed the profession, which for years had been told of its steady advance by the lonely watchers in the tower."²¹ Frankfurter viewed administrative law as a field "inextricably bound up with constitutional law"²² whose task was "fashioning instruments and processes at once adequate for social needs and the protection of individual freedom."²³ He endorsed administrative discretion (i.e., the application of standards²⁴) because it "avoids the oppression and injustice due to abstractions."²⁵ His definition of administrative law was not the static definition of legislative control of agencies; administrative law was "law in the making; with fluid tendencies and tentative traditions...markedly influenced by the specific interests entrusted to a particular

administrative organization, and by the characteristics--the history, the structure, the enveloping environment--of the administrative [sic] to which these interests are entrusted."²⁶ Thus Frankfurter saw administrative law at least influenced by substantive issues, if not defined by them, and encompassing the broad concerns defined by Cooper in 1983.

The Frankfurter and Davison textbook reflected the perspective of its senior editor, Frankfurter.²⁷ Great emphasis was placed on separation of powers and delegation of powers, two doctrines which are "basic in our administrative law,"²⁸ primarily because Frankfurter felt that "thorough consideration of the history, the philosophy and the application of these doctrines is essential to an understanding of the problems which beset the field."²⁹ The text emphasized a comparative perspective, drawing 29 foreign cases in the total of 167,³⁰ and thus followed the path originally broken by Goodnow whose 1893 text was also comparative in orientation. However, most notable was the use of non-judicial materials such as essays, semi-public correspondence, parliamentary debates, and Presidential messages.³¹ Once again, Frankfurter was stressing the idea that administrative law is neither static nor purely legalistic.

DEVELOPMENT OF THE ADMINISTRATIVE PROCESS: 1887-1937

What were the forces in the early part of the twentieth century which led to the change in conception from the relatively static tri-partite view of delegation, exercise of authority and judicial review to the more dynamic discretionary and substantive approach? Ernest Gellhorn and Glen Robinson, viewing administrative law from the longer perspective of 1975, wrote that "[t]he changing conception of administrative law, of course, mirrors, at least in general outline, movement in the underlying character of administrative law which in turn reflects developments in the nature and scope of administrative government."³² Hence, the explanation of change comes first from examining the development of the administrative process.

Although executive agencies such as the Veterans Administration and the Customs Office can trace their historical antecedents to the eighteenth century, 1887 is usually given as the date at which public administration became a self-conscious activity. Two events of 1887 combined to initiate public administration: the founding of the Interstate Commerce Commission, and Woodrow Wilson's essay, "The Study of Administration."³³ Previously the American government had adhered to the principle of separation of powers, at least in theory. However, in the nineteenth century the

insistence upon the compartmentalization of power along triadic lines gave way...to the exigencies of governance. Without too much political theory but with a keen sense of the practicalities of the situation, agencies were created whose functions embraced the three aspects of government. Rule-making, enforcement, and the disposition of competing claims made by contending parties, were all intrusted to them. As the years passed, the process grew. These agencies, tribunals, and rule-making boards were for the sake of convenience distinguished from the existing governmental bureaucracies by terming them 'administrative.' The law the courts permitted them to make was named 'administrative law,' so that now the process in all its component parts can be appropriately termed the 'administrative process.'³⁴

In the early years, then, the administrative process was viewed primarily as involved in the work of the independent regulatory agencies.³⁵ This is partly attributable to the French origin of the concept of administrative law:

Because droit administratif concerned the disposition of claims between the government and the individual, and because the major emphasis of our newer administrative agencies appeared to concern the same category of claims, a superficial similarity was present. Moreover, the term 'administrative law' had had neither analytic nor historical definition. It was thus easy to employ it to describe governmental lawmaking and law enforcement by agencies that for one reason or another fail to submit to convenient classification within one of the three historic branches of government.³⁶

Later developments in government, such as the New Deal and its proliferation of agencies that were not necessarily either independent or regulatory, were to expand this view of the administrative process, but in the early years the

focus was on the new agencies. The focus was by no means exclusionary, for all administrative activity was under increasing scrutiny by the burgeoning new field of public administration.

Early in the century, central issues in establishing administrative processes were the issues of delegation of power--more specifically, delegation of legislative power to executive agencies--and concern for the doctrine of separation of powers. Prior to the 1860's, the legislature had held a dominant position in the national political structure; Roscoe Pound asserts that

[f]rom independence to the Civil War the hegemony of the legislative department is clear enough....As late as the impeachment of Andrew Johnson [1868] it was confidently asserted in Congress that the executive was accountable to the legislative for exercise of powers committed to the executive by the constitution....

After the Civil War the hegemony shifted for a time to the judiciary.... In the present generation [1940] the hegemony has quite as definitely shifted to the executive.³⁷

Thus in Pound's chronological scheme, the turn of the century saw the executive branch of government begin to develop its domination over the judiciary. Not unnaturally, the legal profession sought to retain its control over government processes, and this led to the battles to impose judicial models of behavior on the administrative process. These battles made their impact felt in the diversity of

definition circulating during the early parts of this century. Goodnow, a political scientist and one of the founders of the discipline of public administration, found administrative law to encompass all of public administration. Freund was "concerned primarily with the effect of administrative action on private rights...[and] stressed the importance of legislation in its bearing on administrative law."³⁸ Frankfurter, who emerged as a leader in the late twenties, stressed constitutional law and judicial review; "Frankfurter saw more clearly than Freund at that time [1932] the shift in judicial emphasis in matters relating to administrative powers and discretion. Freund relatively neglected the significance of both the separation of powers and constitutionality."³⁹

This confusion of definitions finally reached some resolution in the years just prior to the New Deal. Scholars such as Freund regretted "that the non-constitutional side of administrative law [received] such relatively meager treatment."⁴⁰ To have administrative law studied required the subject be "palatable to old-line lawyers" by having it accepted as part of the law school curricula.⁴¹ The practicing attorneys and judges who "wished it would go away but knew it was going to stay, wished to make it look as legal and judicial as possible."⁴² The two sides compromised:

Administrative law ceased to be the law that administrative agencies made and became instead the rules that governed when, where, and how courts would review agency findings and the rules governing the procedures of agencies.⁴³

This definition shifted the emphasis in administrative law away from the agencies and toward the courts for several reasons. First, it directed attention to the interface between courts and agencies. Secondly, since the courts largely define the rules for judicial review, and these rules are found in judicial opinions, the "law student continued his traditional study of court cases rather than turning to agency practice, and administrative law became simply another pigeonhole into which court cases could be sorted." Finally, by producing a definition of administrative law which was the law of procedure, the study remained respectable; this "procedural focus tended to leave in some sort of nonlegal limbo the substantive policies and decisions of administrative agencies."⁴⁴

However, this perception of administrative process and of administrative law did not remain static. One influence for change is found in the simple process of judicial attrition. Prior to the 1930's, the judges followed the precepts of Herbert Spencer's Social Darwinism. However, by 1937 many of these older judges raised with the Spencerean philosophy were gone and the "laissez-faire theory of

governmental function"--Roosevelt's "horse-and-buggy definition"⁴⁵--was demolished.⁴⁶ Thus judicial philosophy in the first half of the century changed from Legal Darwinism to the Legal Realism of Justice Holmes whose dissents were used as the basis for new interpretations.⁴⁷ This new jurisprudence took the position that law is not a science: there is no legal certainty.⁴⁸ Holmes wrote in 1921 that "[t]he prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," and nine years later Jerome Frank wrote that "[l]aw...is either (a) actual law, i.e., a specific past decision...or (b) probable law, i.e., a guess as to a specific future decision."⁴⁹ In any case, there were no longer any clear cut definitions nor were there any real expectation that such definitions would or could emerge.

A second influence for change in the Thirties was the new view of the administrative process itself. Richard Stewart calls the early view of the administrative process the "transmission belt theory," a traditional model which sees the agency as a "mere transmission belt for implementing legislative directives in particular cases."⁵⁰ This view of the administrative process has its roots in Pound's legislative hegemony of the nineteenth century. The transmission belt theory of the administrative process tries

to reconcile "government authority and private autonomy by prohibiting official intrusions on private liberty or property unless authorized by legislative directives."⁵¹ The new emphasis on the judiciary, incorporated with the law school compromise, led to an increased judicialization of the administrative process. By 1933, this theory of how the administrative process ought to work was firmly entrenched in the judicial mind. It excluded discretionary action; it ignored the substantive aspects of agency decision; it provided a basis to defend the judicial hegemony of the formative years.

However, a new era was forming in the evolution of the administrative process and thus in the conception of administrative law. The New Deal years saw the creation of agencies with control over previously unregulated sectors of national life, leading to serious questions about the fairness and regularity of agency procedures. For students of the law, the impact of such enormous, rapid, and unprecedented expansion was to put a previously marginal area of legal inquiry into the forefront of concern.⁵²

YEARS OF TURMOIL: 1933-1946

This period is marked more by events--such as the Walter-Logan Bill, the Attorney General's Report, and the Federal Administrative Procedure Act (APA) of 1946--than by individuals.

CONFUSION OF DEFINITIONS

Despite the progress made in defining administrative law during the first third of the century, the New Deal and post-New Deal era did not bring any resolution of the definition of the field. In 1941, Pennock could still write--as Phillip Cooper was to echo forty-two years later⁵³--that "[i]n fact usage is so confused that we cannot hope to arrive at categorical definitions of terms [for 'administration,' 'executive,' 'law,' etc.]."⁵⁴

By 1939, J. Forrester Davison, who had co-authored with Frankfurter the 1932 Cases on Administrative Law, was less confused about terminology than Pennock but still noted several definitions in circulation. The first of these, that administrative law is a "branch of constitutional law dealing with the separation of powers and with judicial review of administrative action," Davison thought had been "very carefully explored by a great company of legal scholars;" he felt that although the definition was still

viable, it had been done to death as a starting point for useful inquiry. The second definition was that administrative law is "primarily a series of statutory enactments which create new quasi-judicial tribunals or quasi-legislative bodies together with the decisions of those bodies dealing with cases...and the formulation of rules of procedure and of substantive law." Once again the issue of substantive law was raised as germane to the study of administrative law. Davison's final definition was "the study of tribunals in action with particular reference to their relations with the courts, the legislature, and the executive branches of government." He conceded that all of these meanings were in current use but that the most pressing problem of his day (1939) was "tribunals in action, their rules of procedure, and formulations of substantive law."⁵⁵ Since his delineation of the problems of the field encompasses the major portions of the last two definitions, it appears that he accepts both definitions summed together as defining administrative law.

While the breadth of this definition reduces its heuristic usefulness, the same breadth gives public administration an entree into the field that had been closed by the more narrow law-school definitions. The themes identified in Davison's definitions--substantive law, rules

of procedure, quasi-judicial and quasi-legislative agencies--provide the foundations for the new directions of administrative law in the decades that followed. One additional theme--the proper use of agency discretion--also has its roots in this period. The Final Report of the Attorney General's Committee on Administrative Procedure (Attorney General's Report)⁵⁶, released in 1941, contains an entire chapter on "Informal Methods of Adjudication;" one of the young lawyers hired to staff the Committee's research project was Kenneth Culp Davis, who would later take the lead on legal scholarship on discretion.⁵⁷ However, before discussion of these new trends, which properly belong in the post-APA years following 1946, the three major events pertaining to administrative law--the Walter-Logan Bill, the Attorney General's Report, and the Administrative Procedure Act of 1946--should be discussed.

The Walter-Logan Bill

Noted for many changes in the United States, the New Deal was distinguished in part because it "radiated a faith in the capacity of the administrative process perhaps exceeding that of any previous administration."⁵⁸ The unmistakable power of the agencies led at least one writer to affirm that administrative law was recognized when the

"doctrinal deadweight" of Dicey's legacy was shaken off by the legal profession during the New Deal;⁵⁹ it was impossible to maintain with Dicey that administrative law simply did not exist.⁶⁰ However, a more likely explanation for the burgeoning concern of the legal profession with administrative law was the simple matter of self-protection. The agencies were invading court-held territory with frightening alacrity.

In 1934, the second year of the New Deal, the American Bar Association (ABA) formed an administrative law committee which issued annual reports stressing the reduced power of the judicial branch.⁶¹ Joining these critical voices were conservatives who used procedural complaints to cloak opposition to agencies' substantive programs.⁶² However, many of the critics voiced sincere concerns with threats from the administrative process to traditionally protected rights. Preliminary concerns were with delegation of legislative powers to the agencies and with the extent to which the legislature could give judicial powers to agencies.⁶³ The judicial powers question was expanded further: "[t]he vesting of judicial powers in administrative agencies not only involves the political and constitutional aspects of the doctrine of the separation of powers, but also raises a question in the sphere of

jurisprudence in the validity of our definition of law." This basic question was how the political system can maintain justice if "one man or body is legislator, prosecutor, judge, and enforcing agent."⁶⁴

The controversy of court versus agency soon polarized the opponents, and the two camps may be characterized as "pro-court" (i.e., in favor of judicialization) and "pro-agency."⁶⁵ The pro-court legal faction saw the courts as "unique sources of fairness and wisdom against the arbitrary, unwise, and self-aggrandizing" agencies,⁶⁶ a view of the agencies which was similar to the view of the Brownlow Report, which complained that the independent agencies were a "headless 'fourth branch' of Government, a haphazard deposit of irresponsible agencies and uncoordinated powers."⁶⁷ "Courts, staffed by successful lawyers most of whom had been representing business interests, tended to be hostile to administrative activity. Administrative agencies were, quite naturally, staffed largely by men with a commitment to government programs,⁶⁸ and this was particularly true in the first years of a new agency's operation when it was likely to have to litigate most frequently;" this distinction was especially marked in the New Deal.⁶⁹

The lawyer-administrator controversy seemed to be resolved with the 1940 Walter-Logan bill. The Special Committee on Administrative Law of the ABA had managed in 1935 to engineer the passage of the Federal Register Act.⁷⁰ Encouraged by this success, the Committee, led by Roscoe Pound, lobbied successfully for the Walter-Logan Bill. Proponents of the bill defended it as providing "safeguards to protect the individual" which would be furnished by the courts in a review based on "issues of law and upon general familiarity with the law, independently of specialization....Judicial review deals not so much with technical facts as with fairness of hearing--a matter not for technical experts but for impartial courts."⁷¹ It was felt that a rigid procedural code would remove political pressures from the agencies by providing standards upon which to base decisions and by promoting rule-making rather than case-by-case adjudication.⁷²

However, although the bill passed Congress, Roosevelt, with the official support of Attorney General Jackson, vetoed the bill.⁷³ Opponents of the bill charged that the act was an "extreme attempt to control administrative procedure."⁷⁴ The true explanation of the Walter-Logan bill "was given on the floor of the Congress by one of the leading pilots of the bill, who, to paraphrase his words,

said to his colleagues: 'why delude ourselves...for we all know it is an effort to cut down upon [sic] the powers of the New Deal administrative agencies.'⁷⁵ The bill was "symbolic of the friction between traditional concepts of the 'rule of law' and the newer demands for governmental intervention in social and economic affairs."⁷⁶

Jackson's message accompanying Roosevelt's veto, while less flamboyant, was still resolutely opposed.⁷⁷ He set out a reasoned argument for vetoing the bill. He objected in three major areas of concern: inclusion of military affairs, interference by improperly applied judicial review with the efficiency of administrative agencies, and lack of deference to Congress. His first objection to the bill was that certain defense-critical agencies, such as the Maritime Commission, the Interstate Commerce Commission, the Civil Aeronautics Board, and Treasury (Coast Guard), were not excepted from the bill's provisions. In view of the procedures mandated by the bill, failure to except these and other agencies might interfere substantially with the ability to wage war.

Jackson's second objection rested on the bill's expansion of judicial review. Section 3 of the bill gave to the District of Columbia Court of Appeals the power "to hear and determine whether any [administrative] rule...is in

conflict with the Constitution of the United States or the Statute under which issued" after receiving a "petition filed by any person substantially interested in the effects of any administrative rule within thirty days from the date any approved administrative rule is published in the Federal Register."⁷⁸ Jackson was offended: "The vice of this innocent-looking provision is that it opens the door to abstract litigation over the validity of administrative rules" and therefore voids the "principle that [Federal] courts sit only to decide actual litigations and not to weigh abstract legal questions."⁷⁹ In addition to allowing "abstract litigation" of announced rules, a disappointed litigant could re-challenge when the rule was applied in an agency decision: the "bill puts new and advantageous weapons in the hands of those whose animus is strong enough and whose purse is long enough to wage unrestricted warfare on the administration of the laws."⁸⁰ Such a bill, if signed, might even put the appeals process beyond the reach of the Supreme Court: the "provision purporting to give the Supreme Court jurisdiction to review advisory decisions of the District Court of Appeals is, in view of the constitutional definition of Supreme Court jurisdiction, of very doubtful validity."⁸¹

The third area in which Jackson objected was the restrictions placed on Congressional activity. "Until now," wrote Jackson, "it has been the policy of the Congress to set up in the organic act creating a new agency at least a rough outline of procedures suitable to its distinctive functions....This bill, however, lays down a series of blanket requirements for the promulgation of rules and the conduct of hearings by administrative agencies and for judicial review of their action."⁸² Jackson finds these blanket requirements offensive because the bill "abandons all account of underlying diversities and imposes the same procedures upon [all] agencies,"⁸³ a uniformity of procedure which the interim report of Attorney General's Committee indicated was not possible.⁸⁴

Jackson closed his message with a pointed reference to the real aims of the proponents of the bill: "The discretion which must be exercised in performance of executive duties would, to a considerable extent, be transferred to the courts" because judicial review had been expanded to include items never before considered reviewable.⁸⁵ For all the reasons discussed, and because the Final Report of the Attorney General's Committee was imminent, Jackson recommended that Roosevelt refuse to sign the bill into law.

Roosevelt agreed with both his Attorney General and the less restrained opponents of the bill. In his veto message he noted that the professed objective of the bill was the "assurance of fairness in administrative proceedings" but "in reality the effect of this bill would be to reverse and, to a large extent, cancel one of the most significant and useful trends of the twentieth century in legal administration."⁸⁶ He singled out for opprobrium two particular groups: lawyers and large business interests.⁸⁷ Although many "lawyers, jurists, educators, administrators, and the more progressive bar associations" recognized the need for administrative tribunals, "a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play all the speaking parts." Also opposed were "powerful interests which are opposed to reforms that can only be made effective through the use of the administrative tribunal [which is] the very heart of modern reform administration...Great interests, therefore, which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterilizing the administrative tribunal which administers them, they will have effectively destroyed the reform itself." Roosevelt summarized his view

of the proponents of the bill: "The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation."

Roosevelt knew that the Final Report of the Attorney General's Committee would be completed soon. The Committee, which had been appointed on 24 February 1939, presented its final report on 22 January 1941.⁸⁸ In December of 1940, Roosevelt vetoed the Walter-Logan Bill partly in anticipation of legislation proposed in the Attorney General's Committee report.

THE ATTORNEY GENERAL'S REPORT

According to Dean Acheson, the Attorney General's Committee

grew out of criticism of one of the tenets of liberal faith...--that the expertise involved in the decisions of administrative agencies could not be attained by reviewing courts; hence these decisions should be well nigh final. Not only was the premise denied, but the charge was made that many of these agencies had become prosecutor, judge, and executioner in their own causes. The remedy suggested was to turn them into little more than makers of records for court consideration and decision.⁸⁹

The Committee "was able to help point the debate [on judicial review] away from a confrontation of absolutes to

find [the] solution in a reform of administrative procedure itself."⁹⁰

The work of the Committee was unique; "[i]nstead of taking volumes of testimony and producing a dust-gathering report, it made its own investigation and produced legislation."⁹¹ For the first time the administrative process was studied on the

basis of knowlege rather than of hypothesis or preconceived ideas...: [the Committee] studied the administrative establishment from the inside, thoroughly and dispassionately. Its acute discussion of the characteristics of the administrative process, its conclusions as to defects existing in the process, and its proposals to remedy them all sprang from and were buttressed by facts laboriously ascertained and carefully weighed.⁹²

The Attorney General's Report affirmed the necessity for and value of the administrative process. It found that agencies were "an inevitable development of a highly complex industrial society; and that traditional legislative and judicial modes provided inadequate means to accomplish the specialized, comprehensive, continuing tasks which the rational management of that society demanded."⁹³ This was at least the view of the majority report; the minority (Carl McFarland, E. Blythe Stason, Arthur T. Vanderbilt, and D. Lawrence Groner) extended the recommendations of the majority report in an attempt to judicialize the administrative process, and it is their bill which actually

provides the basis for the Administrative Procedure Act of 1946.⁹⁴

The Attorney General's Report proposed legislation to create the office of Federal Administrative Procedure to continue on an on-going basis the work of the Committee.⁹⁵ It also proposed to "legalize the delegation by agency heads of the power to dispose informally of complaints...and generally to exercise powers other than those of major policy and 'final adjudication;'"⁹⁶ to require publication of rules and of facts of internal organization; and to establish Hearing Commissioners who are nominated by the agency and appointed by the office of Federal Administrative Procedure and who would have fixed tenure of office and substantial salaries.⁹⁷ The majority report suggested each agency make an annual report to Congress of rules, regulations, and proposed rules and regulations,⁹⁸ and provided for "declaratory rulings" which are as final as a final order.⁹⁹

The minority report, while agreeing in principle with the majority, indicated that the four minority members felt the Report did not go far enough. Judge Groner insisted that all controversial adjudications be decided by commissioners who are wholly independent of the agency. The other three minority members were willing to accept

partially dependent commissioners; they did, however, have two major differences with the majority. First, they objected to the current policy of interpreting the "substantial evidence rule" to mean that any evidence to support the finding of an administrative agency--even if such evidence contradicted evidence against the agency's finding--was sufficient for the reviewing court to uphold the agency decision. They felt that "the support of findings of fact by adequate evidence...should, obviously we think, mean support of all findings of fact, including inferences and conclusion of fact, upon the whole record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and discretionary authority of each agency."¹⁰⁰ Second, the minority felt Congress should adopt a "Code of Fair Administrative Procedure;" the majority felt the issues were too complex for a code and could be handled by the Permanent Office of Administrative Procedure.¹⁰¹

Although extensive hearings were held in the summer of 1941 on the proposed legislation, America's entry into World War II delayed further consideration of any administrative procedure legislation.¹⁰² The war years, while certainly eventful, were not critical years in developing the concept of administrative law.

During the war, the Supreme Court did little more than confirm the actions taken by the government....Perhaps it is unfair to expect the justices to have done more than stamp their imprimatur on measures deemed necessary by those wielding the force of the nation.¹⁰³

However placid the war years may have been, close to the end of the conflict the ABA began again to agitate for legislation.¹⁰⁴ In 1946, the Administrative Procedure Act was passed.¹⁰⁵

THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA) was the culmination of "years of pressure to achieve uniform standards"and was a "landmark in the history of due process."¹⁰⁶ The amended bill which passed the Senate was the result of collaboration between representatives of the Senate Judiciary Committee, Attorney General Tom C. Clark, and the American Bar Association,¹⁰⁷ and it found a middle ground between the minority report of the Acheson Report and the proposed legislation of the majority, although it favored the stronger judicialization of the former.¹⁰⁸ The APA was passed by the Senate "without indication of dissent;"¹⁰⁹ passage in the House was also unanimous.¹¹⁰

The principal contribution of the APA is in "codifying the best existing practice and law;"¹¹¹ hence it does not represent a major departure from previous modes of

administrative processes. Further evidence of the codifying nature of the APA is found in the relative stability of administrative law and process since the passage of the APA. Gellhorn and Robinson, writing in 1975, note that the APA cannot be considered as having been enacted in the infancy of administrative law since administrative law has changed little in its "conventional conception" since 1946;¹¹² Jerre Williams agrees, writing that "the second most important development [in administrative law between 1920 and 1970, the first being the APA] has been the lack of [substantial] amendment to the Administrative Procedure Act and lack of radical change in the structure and function of the administrative agencies..."¹¹³

Three aspects of the APA are particularly noteworthy: the "acceptance and adoption of the substantial evidence rule in the judicial review of administrative decisions based upon records;" the rulemaking procedures, in particular the notice and hearing provision;¹¹⁴ and the establishment of independent hearing examiners.¹¹⁵ Thus the APA regularized "several fundamental principles which now pervade administrative law."¹¹⁶ There is, however, some disagreement over the legislative intent in passing the APA. Robinson, Gellhorn, and Bruff find that the APA reaffirmed Congressional acceptance of the "concept of combined

functions," while Schwartz finds that the APA "gave clear evidence of a congressional desire to call a halt to the process of administrative expansion" and that subsequently the Supreme Court "interpreted [APA] in such a way as to give full effect to its remedial intent." Davis writes that the APA "improved the administrative process instead of weakening or crippling it [as ABA had wanted], and in general gave assurance that further efforts to cripple the power of the agencies would be unlikely to succeed."¹¹⁷ However, the legislative intent ascribed to Congress does not alter the fact that with the passage of the APA, the struggle over the administrative process was no longer over fundamentals such as the scope of judicial review, hearing examiners, and the most pressing due process questions of the time.¹¹⁸ Instead, the concerns of the field moved to enlarge the definition of administrative law by stressing agency discretion, the use of administrative law as a managerial tool to implement policy, and the inclusion of substantive law.

THE POST-WAR YEARS: 1945-1982

The years that followed the close of World War II were eventful in administrative law. The Administrative Procedure Act, while left essentially intact, was amended. For example, in 1966 the Freedom of Information Act amended Section 3 of the APA to require public access to agency records unless otherwise prohibited; in 1974, Section 552 was amended to reduce undue agency secretiveness and also in 1974 the Privacy Act added Section 552a to control disposal of government records on individuals; and in 1976 the "Government in the Sunshine Act" added Section 552b which required open meetings except where exempted.¹¹⁹ In addition, some agencies have been removed from the reach of the Administrative Procedure Act: one example is the Immigration and Naturalization Service which is not required to conform to the hearing requirements of APA when holding a deportation hearing.¹²⁰

A second change in administrative law was the "due process explosion"¹²¹--the dramatic expansion of the application of the Due Process clause to cover non-regulatory areas. This explosion peaked with Goldberg v. Kelly¹²² which since has been tied to welfare cases,¹²³ but it is clear that the right-privilege distinction, which holds that due process requires a hearing only if a right is at stake, is endangered if not extinct.¹²⁴

However, vital as these changes are in the development of legal doctrine, they do not affect the conception of administrative law held by scholars and practitioners. To expand the scope of procedural due process to include pre-termination hearings for welfare benefits is not to change the definitions of administrative law. For the first few decades following the passage of APA, the field of administrative law adjusted itself to the requirements of the Act, testing the provisions and responding to judicial and legislative qualifications to the Act. The first major change in the conception of administrative law came in the emphasis on discretionary justice, usually associated with the work of Kenneth Culp Davis. The second change, less dramatic than the first because it is not associated with the work of one person, is the increasing recognition of the role of substantive law and policy considerations in administrative law.

ADMINISTRATIVE LAW AS DISCRETION

Although concern with agency discretion is most often associated with the work of Davis (e.g., Discretionary Justice, 1969 125), as early as 1894 Ernst Freund wrote "[t]he greatest drawback of our system, however, lies in the fact that it makes no provision for the review of

discretionary action....It would be dangerous to vest such a power in the courts...; for the power to decide between conflicting interests is not judicial in the proper sense of the term...."¹²⁶ Forty-seven years later Pennock also was concerned with discretionary action, although he does not imply that intervention by the courts is inappropriate. He felt that the largest danger rested with "administration in the sense of regulation, for it is here--where official discretion is broadest and private rights are most affected--that the relationship between law and administration" is most important.¹²⁷ The Attorney General's Report of 1941 devotes an entire chapter to "Informal Methods of Adjudication,"¹²⁸ and by 1954, administrative law casebooks were giving more attention to "informal administrative methods and to legislative, executive, and judicial mechanisms of control."¹²⁹ However, Davis justly deserves credit for shifting the emphasis in administrative law to concern with discretionary behavior of agency officials, and it is in this context that he is best known to present-day students of public administration. His impact on administrative law in the 1960's was considerable, not the least because his pronouncements on the nature of administrative law may well be held today by administrators and scholars who received their training during that period.

In 1960, Davis defined administrative law as the

law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action....The administrative process is the complex of methods by which agencies carry out their tasks of adjudication, rule making, and related functions....[Administrative law] does not include the enormous mass of substantive law produced by the agencies.... Apart from judicial review, the manner in which public officers handle business unrelated to adjudication or rule making is not part of administrative law....¹³⁰

This appears on the surface to be clear enough: administrative law is viewed as a tripartite field concerned with the three areas of delegation, exercise of authority, and judicial review; for example, the Civil Aeronautics Board's administrative law is concerned with the authority to regulate airlines, the process by which airlines are regulated, and the judicial review of objections by passengers or airlines to the process. Davis is, however, foreshadowing his later position on the importance of discretionary action. He goes on: "[t]he heavy emphasis [in administrative law] is now upon the administrative process itself--rule making and adjudication, and such incidental powers as investigating, supervising, prosecuting, advising, and declaring."¹³¹ By 1973, he had published the fifth edition of his administrative law casebook which "for the first time in legal education, made forays into the neglected eighty or ninety percent of the

administrative process involving informal and unreviewed action."¹³² Davis' point is clear: the real work of the agencies is done outside the framework of traditional administrative law. Unlike Lowi, who wishes to move as much discretionary action as possible away from the agencies and back to the courts, the Congress, and the President,¹³³ Davis seeks to reduce unnecessary discretionary power and control that which is necessary. His goal is to confine, structure, and check the necessary powers. "Confining" means to reduce undue breadth of discretion by fixing boundaries through administrative rule making. Courts can require these rules through the non-delegation doctrine; Davis suggests allowing the agencies to describe the standards if the legislators fail to do so. "Structuring" is devising plans, policies, and rules in open (non-secret) processes to control the exercise of discretionary power within the confined boundaries, while "checking" is the judicial and administrative review and supervision of discretionary power.¹³⁴

That inclusion of discretionary action as part of administrative law has been partially accepted in academic circles can be seen in a review of relatively recent literature, for example, Peter Woll's 1963 book, Administrative Law: The Informal Process, and in chapters

on informal administrative law in texts such as Phillip Cooper's Public Law and Public Administration (1983).¹³⁵ Other authors such as Jaffe and Nathanson (1976) deliberately exclude the discretionary aspects of administrative law from their discussions; although they do not reject the existence of the informal and discretionary aspects of administrative law, they make a pedagogical decision to exclude it from their text. Jaffe and Nathanson do, however, deal with the problem of discretionary behavior in an oblique way. They acknowledge Appleby's observation that the legal profession "generally has ignored the vastly greater dimension of non-regulatory administration"¹³⁶ but excuse themselves for ignoring it because

we as teachers and lawyers...have had to choose....The choice is no doubt in part merely traditional, but considerable experiment has convinced most of us that this type of material best illustrates certain organic relationships and certain perennial problems...which most of us identify as administrative law.¹³⁷

In the introduction to the section on judicial review, Jaffe and Nathanson deal somewhat tartly with Davis' contention that the ten to twenty percent of cases subject to judicial review are less important than the discretionary cases by virtue of the sheer weight of numbers.¹³⁸ They write:

[i]t is sometimes said that judicial review is a relatively minor aspect of administrative law because only a very small proportion of

administrative actions are reviewed by the courts....Judicial review, however seldom invoked, casts a long shadow, both before and after it. Its significance cannot, therefore, be measured by statistical analysis alone. Furthermore, it provides a vantage point from which...the administrative process can be examined.¹³⁹

Although their text has a section entitled "Administrative Discretion," it simply examines cases that have actually been reviewed by court.

UTILIZATION OF ADMINISTRATIVE LAW

Despite attempts to ignore the impact of discretionary actions on the definition of administrative law, it seems clear that ignoring the informal process does not remove it from the purview of administrative law. Once the concept of discretionary action was accepted in the field, it became necessary to explain its use. It clearly was outside the realm of the traditional legal system and thus became considered as extra-legal. Thus administrative law came to mean in part the actual rules and regulations promulgated by agencies and the informal adjudicative processes by which agency decisions are made and hence was a concern of public administration.

Although the use of administrative law in this sense by contemporary authors in public administration¹⁴⁰ seems to rest on a rather recent foundation, the idea of utilizing

administrative law as both the traditional tripartite definition and the discretionary process has roots that extend at least as far back as the seventeenth century. In that century the concept of "judicial review with limited scope" helped to solve the problem of providing law for both individuals and government while retaining room for discretionary action. This doctrine has three components. First, government agencies and officials must be guided by general rules or standards of conduct. In modern times, these standards are determined by the legislature. Second, private citizens must be empowered by the law to hold the government to the standards set for it. Finally, room must be left in the legal process for some decisions to be made based upon administrative discretion. This is clearly a variation of the traditional tripartite view of administrative law as delegation of power (legislatively set standards), exercise of power (administrative discretion), and judicial review. The problem of jurisdiction for this review in the limited scope was not as severe as it might seem since "when a case of obvious injustice and illegality came before the courts, some formula of words could usually (though not always) be found to call the issue jurisdictional...."¹⁴¹ The same is true today: "[t]he courts can always find sufficient reason to review any

aspect of an administrative case, even where review is limited or precluded by Congress in the statutes governing the agency.¹⁴² Thus, in this context, it is the courts which are viewed as shaping policy in the administrative arena.

However, the agencies themselves are also often viewed as shaping policy, especially since the demise of the academic distinction between politics and administration. That agencies use rules and regulations, administrative adjudication and informal decision processes to shape policy is hardly original; Comer in 1927 was distinguishing agency rules as operational or interpretive sublegislation (i.e., rules that supplement the work of the legislature).¹⁴³ What is new is to label such actions as administrative law rather than administrative processes. Although

[a]dministrative law is usually defined in terms of its procedural characteristics, and is equated to administrative adjudication, [the term when defined in the substantive manner as the] 'law' formulated by administrative agencies through their rule-making power...is equivalent to legislation. This aspect of administrative law concerns the policy-making powers of bureaucracy and, although it is not generally the primary subject of texts in the field, it is inextricably related to the procedural features of agency practice. One of the most difficult problems facing those in the field of administrative law is that of developing, both theoretically and practically, a proper relationship between policy-making and adjudication, i.e., between the substantive and procedural aspects of regulation. To say that these aspects of administrative law can be completely separated may be a profound, albeit common, error (emphasis added).¹⁴⁴

One way in which these two aspects can be united is by considering administrative law not as a field characterized by uniform and generalizable principles but rather as a grouping of substantive policy areas which utilize administrative procedures to achieve policy implementation. This view is made possible in the American system by the "broad exemptions and general escape clauses" of the APA which resulted in "standards of agency action but [left] what is in fact if not in theory a fairly complete freedom to adapt procedure to particular need."¹⁴⁵

Despite the appeal of formulating generalizable principles of administrative law, the bulk of the literature seems to agree that such generalizations are impossible. Merrill in 1933 called for these general principles to bring "multitudes of particular cases...into harmony,"¹⁴⁶ and it was this call that the Attorney General's Committee set out to answer. "The problem which our committee had," said Dean Acheson, "...is the problem of making generalizations or a series of generalizations, as a law, which are really general. That means that they must properly apply all over the field which they purport to cover." However, Acheson noted that the Committee soon felt that "any sort of generalization was going to be impossible." The Committee majority finally abandoned the idea of a general code

because they found themselves writing either a "collection of isolated positions" or that whenever they "made the [general] provision very firm, it would not work in two-thirds of the cases where it was supposed to work so we abandoned the whole idea of a code." The minority stayed with the concept of a general code but the majority "returned to the idea of legislation limited to particular areas where, throughout the field, we thought that there were common problems."¹⁴⁷

Gardner, an attorney who was Justice Harlan Stone's clerk in 1934 and who worked in the Solicitor General's office under Jackson, agrees that generalizations cannot be made about administrative agencies. Having similar characteristics such as being quasi-judicial, quasi-executive, and quasi-legislative does not mean the agencies are the same: "[i]n considerable measure each administrative agency is an ad hoc improvisation, designed to operate within a specific practical context."¹⁴⁸ Stewart, a more recent author, also asserts the impossibility of generalizing agency functions; he writes that it is risky to view administrative law as a "unified body of doctrine with general applicability" because of different agency functions, forms, and the "sources and operative foci of various administrative law doctrines."

Agencies function within their own environment of politics, interest groups, and internal and external bureaucratic organizations.¹⁴⁹

It is, however, Gellhorn and Robinson who state the case most clearly: "[a]dministrative law, so-called, was born of a desire to impose some orderly conceptual framework on the otherwise divergent actions of different bureaucratic institutions," but there is still no unity to the field. To make sense of administrative law it is necessary to view the administrative procedures and processes in light of the agency's substantive mandate.¹⁵⁰

Administrative Law as Substantive Law

Definitions of administrative law given earlier in this paper often included a concern with substantive issues. Davison in 1939 spoke of "the rules of procedure and formulations of substantive law;" in 1958 Prettyman included in administrative law the "rules and orders entered by those agencies pursuant to [rulemaking and adjudicatory powers]," including the "quasi-legislative rules and the quasi-judicial orders."¹⁵¹ Woll writes that

[o]ne of the most important distinctions that must be made between adjudication by administrative agencies on the one hand, and by the courts on the other, is that substantive policy considerations are more consciously involved in administrative adjudication....[O]ne of the principle purposes of the administrative process is to implement public

policyThe extent to which substantive issues should be injected into administrative adjudication is a major point of contention at the present time [1962].¹⁵²

However, Shapiro has summed up the position best:

In short, when questions of substantive policy are defined out of administrative law, the underlying and unifying factors in court-agency relations are lost, and what remains is a clutter of procedural rules which seem to lack coherence precisely because the factors underlying them have disappeared.¹⁵³

If Shapiro is correct in his assessment--and I believe he is--then almost all the past efforts to codify administrative procedures are unrealistic, and attempts to judicialize the administrative process are not only doomed to failure but philosophically in error as well.¹⁵⁴ Bayless Manning coined the term "hyperlexis" to describe the current problem in the United States of too much law.¹⁵⁵ He attributes this to five causes: (1) the complex layered government structure (from cities and counties to the federal government), all involved with an "endless proliferation" of lawmaking; (2) the change in basic attitude of American political thought from limited public intervention in the private sector to extended intervention;¹⁵⁶ (3) a major governmental effort to reallocate resources more equitably; (4) the regulatory attempt to minimize the "risks of life;" e.g., health protection through regulation of advertising; and (5)

"proceduralism and participationism"--ideas which "multiply exponentially the burdens imposed upon the legal process by multiplying the numbers of potential litigants and clearance procedures...."¹⁵⁷ Such hyperlexis cannot, of course, be cured by simply considering substantive issues, even assuming the nation would wish to change such values as equality of opportunity, but at least the issues of proceduralism might be somewhat quelled by a concern for substantive agency policy. Robinson notes that "[f]uture efforts in the direction of administrative procedure reform should steer away from prescription of uniform procedures for the entire administrative system and focus instead on specific procedures tailored to the distinctive functions of each individual agency."¹⁵⁸ To ignore this advice may lead to increased use of adjudication rather than rulemaking as the primary method by which agencies establish policy; Antonin Scalia has already identified this trend as bureaucrats, eager to avoid both the increased procedural requirements in rulemaking imposed by courts and Congress and the Executive requirement for OMB clearance of all rules, have returned to the simpler method of adjudication.¹⁵⁹

FUTURE TRENDS IN THE CONCEPTION OF ADMINISTRATIVE LAW

One useful result of considering substantive areas of administrative law is the realization that the administrative process is moving into areas formerly under judicial control. One example of this is found in administrative criminal law, where traffic offenses are often handled by an administrative agency rather than by a court, and no-fault insurance by-passes the traditional adversarial process. Four states currently have "administrative revocation" of driving licenses of drunk drivers.¹⁶⁰ There are, of course, constitutional restraints in this process such as trial by jury for felonies and the inability of administrative agencies to imprison; care must be taken that the "crisis in the criminal courts" does not lead to removing the safeguards of criminal law.¹⁶¹ However, the expansion of substantive areas included in the administrative process will lead to a change in the definitions of administrative law which can no longer be defined in terms of powers delegated to agencies by the legislature and must now, as Davis suggested, include criminal as well as civil law.

A second conceptual change brought about by the inclusion of substantive law may be the further expansion of administrative law to include the political behavior of

agencies. If the agencies function as legislatures, they must be expected to behave as legislatures, i.e., as political bodies.¹⁶² This expanded definition would bring administrative law as a field perilously close to encompassing all of public administration, and it seems unlikely that the definition will expand to such an extent.

A more long-range change suggested by Schwartz is one that parallels the changes in English law occasioned by the Star Chamber and Chancery of the sixteenth and seventeenth centuries. In the Tudor and Stuart periods of English history, the tendency was to administer justice in what were, "for all intents and purposes, administrative tribunals" rather than law courts. When the Stuarts lost the English throne, the common law lawyers did not attempt to restore the legal order to pre-Star Chamber days; instead they attempted to "retain what was desirable in the administrative justice of their day and to fit it into its proper place in the legal order." This was accomplished by abolishing the Star Chamber but as the "law courts themselves realized that a large part of its work was of permanent value...much of its law passed into the common law." Chancery was totally judicialized but remained a separate tribunal. Thus the

arbitrary discretion exercised by the agencies was canalized within legal limits, and where discretion was, as in the case of Star Chamber,

too intimate a part of the tribunal, the tribunal itself was done away with. The common lawyers, who had earlier complained that the justice dispensed by Chancery was so uncontrolled by legal principles that it might just as well have depended on the size of the particular Chancellor's foot, were able to ensure that Chancery became a true court for the application of principles that, though somewhat different from those of common law, were no less fixed.

Schwartz feels that the rise of the federal administrative judiciary¹⁶³ may lead to a true judicialization of the agencies which would lead, in turn, to the absorption of administrative law by "ordinary" law that would "follow the pattern of the executive tribunals of three centuries ago." Under those circumstances, judicial review would become simply "appellate review" from administrative review.¹⁶⁴

Of course, the converse might as easily be true, and administrative law, which is already poaching on traditional legal territory, may absorb most, if not all, of ordinary law. While such an idea is anathema to Americans steeped in the Anglo-American common-law tradition, it is possible to create an argument in which such an outcome is neither illogical nor shocking. Iredell Jenkins argues that "we have transformed the supremacy of law into judicial supremacy" and allowed the courts to define "functions and powers of legislative and administrative bodies." He continues: "we have acquired the habit of thinking that our traditional law represents the natural and necessary order

of society, and that this law contains implicitly the solution of any social difficulty that can conceivably arise." This view, he writes, is naive; law is rather "an instrument to guarantee order in human life....[a]nother means of social control of individualized behavior;.... Since legal systems come into being, they are obviously not eternal verities. And since they vary with the conditions that produce them, they cannot be inviolate or sacred."¹⁶⁵ Thus, for administrative law to become that predominant form of law might be viewed as a natural evolutionary change.¹⁶⁶

CONCLUSION

Two excellent attempts have been made by other authors to provide a conceptual framework through which to view administrative law.¹⁶⁷ The first of these articles is by Jerre Williams, former chairman of the ABA Section of Administrative Law and presently Circuit Judge for the Fifth Circuit, United States Court of Appeals.¹⁶⁸ He defines "four basic cornerstones which have dominated the development of administrative law up until the contemporary period:" (1) the development of the independent agency, leading to issues of delegation of legislative authority, mixing of policymaking and enforcement; (2) the Administrative Procedure Act of 1946 which provided the

"structural foundation necessary to an administrative process grounded effectively on legal principles" and which provides the basis for the third and fourth traditional cornerstones; (3) the "substantial evidence scope of judicial review of adjudicatory proceedings based upon a record;" (4) and the notice and comment rulemaking procedure in Section 4 of the APA, an innovation that Kenneth Davis told Williams was "one of the most significant jurisprudential inventions of this century."¹⁶⁹ Williams then adds three more "cornerstones" for the "present and for a near and pragmatic future:" (1) public participation in the administrative process which Williams feels reduces the danger of "captured" agencies; (2) "awareness of and attention to administrative process in the areas of informal and discretionary government administration;" and (3) "structure and oversight of the administrative process," which includes not only increased judicial review but also the proposals for ombudsmen and for legislative vetoes.¹⁷⁰ To these seven cornerstones I would add an eighth: the development of substantive administrative law which is, as has been shown, certainly relevant for the present and for the near and pragmatic future.

The second article, "Administrative Law in Transition: A Discipline in Search of an Organizing Principle," written

by Robert Rabin in 1977 and cited earlier in this chapter, begins by discussing the "three major themes that...shape the traditional approach to administrative law:" delegation of power, judicial review, and analysis of the formal aspects of agency procedure. Rabin sets 1940 as the year by which this tripartite definition was firmly established as the critical model--right in the "twilight" of the New Deal. These three themes emerged, Rabin maintains, because the New Deal's "dramatic change in the scale of the regulatory system...stirred deep concern over the propriety of a massive government response to economic and social ills." The intellectual debates over the delegation doctrine and the concern with fair procedure were largely settled by 1946; "a strong tradition of constitutionalism, embodied in a commitment to the separation of powers, due process and judicial review, and buttressed by a lingering attachment to a laissez-faire ideology, provided the underpinnings for" these themes. The strength of these traditions was reinforced by the case-method approach to legal education which has the appellate court decision as its focal point. "Each of the three major themes...involves judge-made law developed largely through appellate court opinions," and thus the case method is "entirely congenial to the traditional approach to administrative law."¹⁷¹

This judicial perspective led to concern not only over substantive policy areas which "constantly threaten [the claim of administrative law] to subject matter coherence" but also over a "wide range of administrative behavior" [e.g., negotiating with regulated parties, personnel policies] that are "simply beyond the ambit of judicial consideration." These concerns cannot be excluded from the field of administrative law by political scientists or public administrators because "it is in these various low-visibility byways of the administrative system that the administrative lawyer does most of his work." To fully understand administrative law, the political perspective of the agency as well as the legal perspective must be included in the area of study.¹⁷²

Rabin agrees with Gellhorn and Robinson that the key to this difficulty is in consideration of the substantive setting of the agency, although he feels "it can be effectively implemented only if the substantive focus is combined with a greater emphasis" than Gellhorn and Robinson suggest on "informal agency processes and cross-agency comparative analyses."¹⁷³ Rabin believes that it is possible to generalize about administrative law; he suggests dividing agency missions into (1) regulatory, (2) public management, and (3) benefit distribution as a heuristic

device to introduce the substantive element.¹⁷⁴ He concludes that a "deeper understanding of the administrative process itself" is essential to fully understand administrative law.¹⁷⁵

This conceptual history of administrative law has, as promised, found some "inconsistent currents, at variance with, and even at cross purposes to, the underlying drift of the [basic] stream [of development]" but the general path and direction of the stream can be discerned. Through the period of the New Deal, the concept of administrative law developed as the traditional tri-partite view of law (delegation of power, exercise of power, and judicial review of administrative action). Then from the New Deal to 1946 came the simultaneous judicialization of the administrative process culminating in the APA, and the expansion of the administrative state which contained the genesis of the next stage in administrative law: discretionary justice. Substantive administrative law, although it began as a concept early in the century and continued to have a steady impact, suddenly came to the fore in the wake of concern with agency discretion, and now, in our contemporary welfare state, the concern with substantive fields and their expansion seems to be revolutionizing administrative law.

NOTES

¹Frank J. Goodnow, Comparative Administrative Law (New York: G.P. Putnam's Sons, 1893).

²Although most writers assert that Goodnow first introduced the term "administrative law" to the United States, Oscar Kraines attributes the first American use of the term to United States Attorney General Hugh Legare who spoke of "the administrative law" in Claim of Administrator to Land Scrip on 25 May 1842. United States Attorney General Caleb Cushing subsequently used "the administrative law of the United States" in the Case of Spratt's Hemp Contract on 5 September 1853. Opinions of the United States Attorneys General 4 (1842):37; Opinions of the United States Attorneys General 6 (1953):99. Cited in Oscar Kraines, The World and Ideas of Ernst Freund [University, AL: University of Alabama Press, 1974], p. 64).

³Goodnow, 1893, pp. 8-9.

⁴Phillip J. Cooper, Public Law and Public Administration (Palo Alto, CA: Mayfield, 1983), p. 5.

⁵Cooper, p. 8.

⁶Bernard Schwartz, The Law in America: A History (New York: McGraw-Hill, 1974), p. 19.

⁷Robert L. Rabin, "Administrative Law in Transition: A Discipline in Search of an Organizing Principle," Northwestern University Law Review 72(1977):122.

⁸Roscoe Pound, "The Growth of Administrative Justice," Wisconsin Law Review 2 (January 1924):321-339. Pound is also discussed in the section on the New Deal and World War II eras.

⁹Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers (St. Paul, Minn.: Keefe-Davidson, 1903).

¹⁰Goodnow, 1893, p. 8.

¹¹Goodnow, 1893, pp. 8-9.

¹²Milton M. Carrow, The Background of Administrative Law (Newark, N. J.: Associated Lawyers Publishing Co., 1948), p. 17. Agreeing with this perspective on Goodnow is Arthur Vanderbilt, who wrote that Goodnow recognized the "inseverability in both the study and practice of the science of administration, of politics and law...." (Arthur Vanderbilt, "One Hundred Years of Administrative Law," in New York University School of Law, Law: A Century of Progress 1825-1935 (New York: New York University Press, 1937), p. 121.) This is an intriguing interpretation of the early works of the man credited with establishing the politics-administration dichotomy.

¹³For example, Carrow cites Hart ("Some Aspects of Delegated Rule-Making," Virginia Law Review 25 (1939):810) as defining administrative law as "the law that is made by, as well as that law that controls the administrative authorities." Carrow, p. 17, n.5. Carrow writes: "The formal procedural determinations made by administrative agencies, whether by rule or order, govern the administrative process of the particular agency affected until changed by legislation or judicial decision. The procedures so established are as much the concern of administrative law as are the ones formulated by statute or as a result of judicial law making" (p. 17). Carrow distinguishes the "law of public administration" from administrative law as being "internal"--which is his interpretation of Goodnow--rather than "external." While he does not exclude internal concerns, he notes that the "problems which are the primary concern of administrative law today [1948] are those dealing with procedures and controls under which administrative discretion and judgment are exercised" (p. 19).

¹⁴Ernst Freund, "The Law of Administration in American," Political Science Quarterly 9 (1894):403-425.

¹⁵Freund, 1894, pp. 403-404 (notes omitted).

¹⁶Freund, 1894, p. 404.

¹⁷Ernst Freund, Cases on Administrative Law Selected from Decisions of English and American Courts (St. Paul, Minn.: West, 1911), n.p. quoted in Edward Harriman, "Development of Administrative Law in the United States," Yale Law Journal 25 (1916):658-659. Also quoted in part by Oscar Kraines, The World and Ideas of Ernst Freund (University, AL: University of Alabama Press, 1974), p. 69, who cites p. 3 in Freund's "Introduction" for this quotation.

- ¹⁸Ernst Freund, "Administrative Law," Encyclopedia of the Social Sciences (New York: Macmillan, 1930. Vol. One.) pp. 454-455. Quoted in Oscar Kraines, The World and Ideas of Ernst Freund (University, AL: University of Alabama Press, 1974), p. 71.
- ¹⁹Felix Frankfurter and J. Forrester Davison, Cases and Other Materials on Administrative Law, (Chicago: Commerce Clearing House, 1932.)
- ²⁰"There is one field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law." Elihu Root, "Presidential Address," American Bar Association Reports 41(1916):368. Quoted in Bernard Schwartz, The Law in America, pp. 176-177.
- ²¹Felix Frankfurter, "The Task of Administrative Law," University of Pennsylvania Law Review 75 (May 1927):616.
- ²²Frankfurter, 1927, p. 618.
- ²³Frankfurter, 1927, p. 617.
- ²⁴"Standards" is used in this context as judgments by intuition and experience (Roscoe Pound, "The Growth of Administrative Justice," Wisconsin Law Review 2 (January 1924):328) and not in the more ordinary sense of "fulfilling specific requirements as established by an authority, law, rule, custom, etc." (Random House College Dictionary, 1st ed.).
- ²⁵Frankfurter, p. 619.
- ²⁶Frankfurter, p. 619.
- ²⁷Maurice Merrill, "Three Possible Approaches to the Study of Administrative Law," Iowa Law Review 18 (January 1933):229.
- ²⁸Merrill, p. 229.
- ²⁹Merrill, p. 219.
- ³⁰Merrill, p. 220.
- ³¹Merrill, p. 220.

- ³²Ernest Gellhorn and Glen O. Robinson, "Perspectives on Administrative Law," Columbia Law Review 75 (May 1975): 771.
- ³³Woodrow Wilson, "The Study of Administration," Political Science Quarterly 2 (June 1887): n.p. Reprinted in Jay Shafritz and Albert Hyde, eds., Classics of Public Administration (Oak Park, Illinois: Moore Publishing Co., 1978), pp. 3-17.
- ³⁴James Landis, The Administrative Process (New Haven: Yale University Press, 1938), p. 2.
- ³⁵Gellhorn and Robinson, 1975, p. 772.
- ³⁶Landis, p. 3.
- ³⁷Roscoe Pound, "The Rise of Administrative Justice" in Roscoe Pound, Administrative Law: Its Growth, Procedure, and Significance (Pittsburgh: University of Pittsburgh Press, 1942), pp. 42-43. This citation is from a collection of four lectures which were presented in 1942. However, virtually identical ideas appear in Roscoe Pound, "The Growth of Administrative Justice," Wisconsin Law Review 2 (January 1924): 321-339, and I am therefore unsure if Pound truly intends the phrase "the present generation" to refer to 1940.
- ³⁸Arthur T. Vanderbilt, "One Hundred Years of Administrative Law," in New York University School of Law, Law: A Century of Progress 1835-1935 (New York: New York University Press, 1937), p. 121.
- ³⁹Oscar Kraines, The World and Ideas of Ernst Freund (University, AL: University of Alabama Press, 1974), p. 80.
- ⁴⁰Ernst Freund, Harvard Law Review 46 (November 1932), p. 170, quoted in Kraines, p. 80.
- ⁴¹Martin Shapiro, The Supreme Court and Administrative Agencies (New York: The Free Press, 1968), p. 105.
- ⁴²Shapiro, p. 105.

- ⁴³Shapiro, p. 105. This compromise was deliberate and not without precedent. For example, when the University of Chicago Law School was being planned at the turn of the century, Freund suggested including in the curriculum such subjects as criminology, railroad transportation, banking, government and industry, accounting, and psychology. This would have required admitting professors of political science and sociology to the law faculty. He also opposed using the case method. Freund negotiated with the other founders of the school; ultimately, he "compromised and agreed to forgo all the non-legal courses but won out on the teaching of international law by members of the political science faculty and on retaining his own courses in administrative law. At the time, only Columbia and Chicago taught courses in administrative law....Harvard did not introduce such a course until 1911." (The above information is from Kraines, Note 276, pp. 191-192.)
- ⁴⁴The preceding paragraph is from Shapiro, pp. 105-106.
- ⁴⁵FDR, quoted in James Burns, Roosevelt: The Lion and the Fox (New York: Harcourt, Brace, and World, 1956), p. 223.
- ⁴⁶Edward S. Corwin, Constitutional Revolution, Ltd. (Claremont, CA: Pomona College, Scripps College, Claremont Colleges, 1941), p. 80, quoted in Schwartz, Law in America, p. 180.
- ⁴⁷Schwartz, 1974, p. 181.
- ⁴⁸Schwartz, 1974, pp. 221-222.
- ⁴⁹Oliver W. Holmes, "The Path of the Law," in Collected Legal Papers -n.p.: 1921), p. 169; Jerome Frank, Law and the Modern Mind (n.p.: 1930), p. 46. Quoted in Schwartz, Law in America, pp. 221-222.
- ⁵⁰Richard Stewart, "The Reformation of American Administrative Law," Harvard Law Review 88 (June 1975), p. 1675.
- ⁵¹Stewart, 1975, pp. 1669-1670.
- ⁵²Rabin, p. 121.

- ⁵³"(T)here is no single commonly accepted definition of 'administrative law.'" Phillip Cooper, Public Law and Public Administration (Palo Alto, CA: Mayfield, 1983), p. 5.
- ⁵⁴James Roland Pennock, Administration and the Rule of Law (New York: Rinehart & Co., 1941), pp. 4-5.
- ⁵⁵The preceding paragraph is from J. Forrester Davison, "What is Administrative Law," George Washington Law Review 7 (April 1939), pp. 681-682.
- ⁵⁶U. S. Congress, Senate, Final Report of the Attorney General's Committee on Administrative Procedure. S. Doc. No. 8, 77th Congress, 1st session, 1941. This has been reprinted in a facsimile edition under the title of Administrative Procedure in Government Agencies (Charlottesville, VA: University Press of Virginia, preface and index copyright 1968) which is the source in this paper for citations from pages 1-121, and which excludes the appendices, draft legislation, and the minority report. These sections, when cited, are from the original government document. The report is commonly referred to as the Report, the Final Report, or the Acheson Report, so called because Dean Acheson was the chairman of the Committee.
- ⁵⁷Jerra S. Williams implies this connection in "Fifty Years of the Law of the Federal Administrative Agencies - And Beyond." Federal Bar Journal 29 (1970):282.
- ⁵⁸James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (Cambridge: Cambridge University Press, 1978), p. 4.
- ⁵⁹Carrow, p. 14.
- ⁶⁰See, for example, R. John Tresolini, "The Development of Administrative Law," University of Pittsburgh Law Review 12 (1951):362-380, esp. pp. 369-374, and H. W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business," Osgoode Hall Law Journal 17 (April 1979):1-45.
- ⁶¹Dimock, 1980, p. 103.

- ⁶²Glenn Robinson, Ernest Gellhorn, and Harold Bruff, The Administrative Process, 2nd ed. (St. Paul: West Publishing, 1980), p. 34. See also James Freedman, Crisis and Legitimacy: The Administrative Process and American Government (Cambridge, Cambridge University Press, 1978).
- ⁶³Vanderbilt, 1937, p. 126.
- ⁶⁴Vanderbilt, 1937, p. 133.
- ⁶⁵Shapiro, p. 91.
- ⁶⁶Shapiro, p. 91.
- ⁶⁷President's Committee on Administrative Management, Report of the Committee with Studies of Administrative Management in the Federal Government (1937), p. 40, quoted in Robinson, Gellhorn, and Bruff, p. 34. It is interesting to note that the pro-court faction for once was in agreement with the pro-President elements in government.
- ⁶⁸According to Schwartz, 1974, p. 213, the New Deal brought many young lawyers into government service and changed them from pure business advocates to thinking of public service. It is, however, just as likely that these same lawyers were partially imbued with the spirit of political expediency in addition to public spirit.
- ⁶⁹Shapiro, p. 92.
- ⁷⁰Vanderbilt, 1937, p. 132.
- ⁷¹W.F. Dodd, "Administrative Agencies as Legislators and Judges," American Bar Association Journal 25 (November 1939):925;976.
- ⁷²Dodd, pp. 925-927.
- ⁷³J. Forrester Davison, "Administrative Technique - The Report on Administrative Procedure," Columbia Law Review 41:632.
- ⁷⁴Peter Woll, "Administrative Law Reform: Proposals and Prospects," Nebraska Law Review 41 (1962):700.
- ⁷⁵James M. Landis, "The Challenge to Traditional Law in the Rise of Administrative Law," Mississippi Law Journal 13 (September 1941):727.

- ⁷⁶Phillip Bradley, Editor's Foreword in J. Roland Pennock, p. vii.
- ⁷⁷H.R. Doc. No. 986, 76th Congress, 3rd Session (1940): Roosevelt's veto and Jackson's official Attorney General's message of 11 December 1940. U.S. Serial Set No. 10502, fiche 13.
- ⁷⁸H.R. No. 6324, Section 3. (Walter-Logan Bill)
- ⁷⁹H.R. Doc. No. 986, p. 7.
- ⁸⁰H.R. Doc. No. 986, p. 7.
- ⁸¹H.R. Doc. No. 986, p. 7.
- ⁸²H.R. Doc. No. 986, p. 8.
- ⁸³H.R. Doc. No. 986, p. 8. Jackson continues: "It is as if we should average the sizes of all men's feet and then buy shoes of only that one size for the Army."
- ⁸⁴Of course, the Final Report did include a uniform code in the minority report, and that code formed the basis of the Administrative Procedure Act.
- ⁸⁵H.R. Doc. No. 986, p. 11.
- ⁸⁶H.R. Doc. No. 986, p. 1.
- ⁸⁷The following three quotations are from H.R. Doc. No. 986, pp. 2-3.
- ⁸⁸Attorney General's Report, p. 1x.
- ⁸⁹Dean Acheson, Morning and Noon (Boston: Houghton Mifflin, 1965), p. 214.
- ⁹⁰Acheson, 1965, p. 108.
- ⁹¹Acheson, 1965, p. 214.
- ⁹²Woltz, p. vii (notes omitted).
- ⁹³Earl W. Kintner, "The Administrative Process Comes of Age," Federal Bar Journal 16 (October-December 1956):548. Also see Landis Report, pp. 11-18.

- ⁹⁴Woll, 1962, p. 702; Walter Gellhorn, telephone interview, 29 December 1982; James Hart, "The Acheson Report: A Critique," Iowa Law Review 26 (1941), p. 804.
- ⁹⁵See especially Dean Acheson's testimony before the Subcommittee of the Committee on the Judiciary on 15 May 1941. U.S. Congress, Senate, Committee on the Judiciary. Administrative Procedure, Hearings before a subcommittee of the Committee on the Judiciary on S. 674, S. 675, and S. 918. 77th Congress, 1st Session, 1941, pp. 801-837, esp. p. 827.
- ⁹⁶John Foster Dulles, "The Effect in Practice of the Report and on Administrative Procedures," Columbia Law Review 41:617.
- ⁹⁷This salary was suggested to be \$7500 per annum, a sum which J. Forrester Davison felt was too high to make such jobs safe from patronage. Davison, "Administrative Techniques," p. 635.
- ⁹⁸Dulles notes that such a requirement could lead to the presumption that Congress had approved any rules or regulations not expressly undone (p. 620); this provides an interesting counterpoint to the controversy over the legislative veto.
- ⁹⁹Dulles, p. 620.
- ¹⁰⁰Attorney General's Report, pp. 210-212. Quoted in Universal Camera v. NLRB, 340 U.S. 474 (1951), p. .
- ¹⁰¹Dulles, pp. 625-626.
- ¹⁰²Marshall Dimock finds this to be a salutary delay as the war would not have been waged as successfully had APA been in effect. Dimock, 1980, p. 104.
- ¹⁰³Schwartz, 1974, p. 170.
- ¹⁰⁴Dimock, 1980, p. 104. Dimock does not explain why the agitation would have begun in 1944 while the war was still in progress, when supposedly the delay in legislative action was caused by the war.
- ¹⁰⁵60 Stat. 237 (1946), 5 U.S.C.A. Sec. 1001.

- ¹⁰⁶Kintner, pp. 550-551. Kintner also notes that "with the passage and implementation of the APA, the administrative process has come of age" (p. 551), which, for those of us who read Margaret Mead, marks one of the few occasions where such an event has occurred following a literal rite of passage.
- ¹⁰⁷Nathaniel L. Nathanson, "Some Comments on the Administrative Procedure Act," Illinois Law Review 41 (1946): 369; Williams, 1970, p. 269.
- ¹⁰⁸Woll, 1962, p. 702.
- ¹⁰⁹Nathanson, 1946, p. 370.
- ¹¹⁰Williams, 1970, p. 268.
- ¹¹¹This particular phrase is borrowed--and apparently paraphrased--from Attorney General Clark by Nathanson, 1946, p. 420. However, similar comments are found in Nathaniel Nathanson, "Law and the Future: Administrative Law," Northwestern University Law Review 51 (May-June 1956): 174 where he states that APA is "statutory codification," and in Warner Gardner, "The Administrative Process," Monrad G. Paulsen, ed. Legal Institutions Today and Tomorrow (Westport, CT: Greenwood Press, 1959; rpt 1980; original copyright Columbia University Press), p. 129 where he writes that APA "set largely hortatory standards and has overlaid its prescriptions with broad exemptions and general escape clauses." Also, in a telephone interview on 29 December 1982, Walter Gellhorn, Director of the Attorney General's Committee, said that although the APA was innovative in some regards (e.g. hearing examiners), it was "largely declaratory."
- ¹¹²Gellhorn and Robinson, 1975, p. 773.
- ¹¹³Williams, 1970, p. 268.

- ¹¹⁴"The chaos of issued regulations, which no one could obtain or know about as a practical matter, led to the establishment of the Federal Register [1937:49 Stat. 500; 44 U.S.C. Sec. 1501] as the official means of notification. The Federal Register may still leave something to be desired as far as adequate notification is concerned, since it is hardly popular reading by the American citizen." Williams, 1970, pp. 273-274 (notes omitted). Robert Jackson, dissenting in 1947 in *PCIC v. Merrill* (332 U.S. 380), wrote: "To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If [Merrill] were to peruse this voluminous and dull publication as it is issued from time to time..., he would never need crop insurance, for he would never get time to plant any crops" (p. 387).
- ¹¹⁵These three aspects are discussed in virtually identical form by Williams, 1970, pp. 269-271 and by Woll, 1962, pp. 702-704. The quotation is from Williams, p. 269. Robinson, Gellhorn, and Bruff analyze the Act in somewhat different terms which are discussed in the text accompanying this note.
- ¹¹⁶Robinson, Gellhorn, and Bruff, p. 35.
- ¹¹⁷Robinson, Gellhorn, and Bruff, p. 35; Schwartz, 1974, p. 179; Kenneth Culp Davis, Administrative Law and Government (St. Paul, Minn.: West, 1960), p. 29.
- ¹¹⁸Kintner, p. 551. This is true, of course, only for the agencies covered by APA.
- ¹¹⁹Robinson, Gellhorn, and Bruff, p. 36.
- ¹²⁰66 Stat. 166, 8 USC Sec. 1101 et seq.
- ¹²¹Henry Friendly, "Some Kind of Hearing," University of Pennsylvania Law Review 123 (1975):1265.
- ¹²²397 U.S. 254 (1970).
- ¹²³For example, Mathews v. Eldridge, 424 U.S. 319 (1976).
- ¹²⁴See William Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," Harvard Law Review 81 (1968):1439-??? and Charles Reich, "The New Property," Yale Law Journal 73 (1964):733-787.

- 12⁵Kenneth Culp Davis. Discretionary Justice (Baton Rouge, LA: Louisiana State University Press, 1969).
- 12⁶Freund, 1894, p. 419.
- 12⁷Pennock, 1941, p. 5.
- 12⁸Attorney General's Report, pp. 35-42.
- 12⁹Gellhorn and Robinson, 1975, p. 771, discussing the 1954 edition of Gellhorn and Byse.
- 13⁰Kenneth Culp Davis, Administrative Law and Government (St. Paul, Minn.: West, 1960), p. 11.
- 13¹Davis, 1960, p. 12.
- 13²Kenneth Culp Davis, Administrative Law: Cases-Text-Problems 6th Ed. (St. Paul, Minn.: West, 1977), p. xiii.
- 13³Theodore Lowi, The End of Liberalism (2nd Ed.) (New York: Norton, 1979), esp. Chapter 11: Toward Juridical Democracy. Lowi proposes to revive the Schechter rule requiring clear standards, to encourage Presidential vetoes of legislation on constitutional grounds, to require "administrative formality," i.e., formulation of rules rather than case-by-case adjudication, and to suggest frequent codification and review of existing rules by Congress (legislative oversight). Lowi acknowledges that his views are supported by Davis' work.
- 13⁴Davis, Discretionary Justice, 1969.
- 13⁵Peter Woll, Administrative Law: The Informal Process (Los Angeles: University of California Press, 1963); Cooper, 1983.
- 13⁶Paul Appleby, Morality and Administration in Democratic Government (Baton Rouge: Louisiana State University Press, 1952), p. 86, quoted in Louis Jaffe and Nathaniel Nathanson, Administrative Law: Cases and Materials (Boston: Little, Brown, and Co., 1976), p. 3.
- 13⁷Jaffe and Nathanson, 1976, p. 3.
- 13⁸Kenneth Culp Davis, Administrative Law: Cases-Text-Problems, 6th ed. (St. Paul, Minn.: West, 1977), p. 440.
- 13⁹Jaffe and Nathanson, 1976, p. 27.

- ¹⁴⁰For example, in the curriculum of the Center for Public Administration and Policy (Blacksburg, VA), administrative law is grouped with "budgeting, personnel, audit and control, planning, and finance" as one of the management processes which are utilized by public managers to implement policy decisions, a singular addition to the more common PODSCORB processes - planning, organizing, directing, staffing, co-ordinating, reporting, and budgeting.
- ¹⁴¹Edith Henderson, Foundations of English Administrative Law (Cambridge, MA: Harvard University Press, 1963), p. 3, p. 6. Henderson, pp. 3-4, is the source for the discussion of the doctrine of "judicial review with limit of scope" which precedes this quotation.
- ¹⁴²Woll, 1962, p. 689.
- ¹⁴³John P. Comer, Legislative Functions of National Administrative Officers (New York: Columbia University Press, 1927) n.p., cited in Dimock, 1980, pp. 97-98.
- ¹⁴⁴Woll, 1962, pp. 688-689. In the same vein, David Gould writes that administrative law has been limited to the "narrow study of administrative procedures as seen through judicial opinions." The field needs to include "not just how certain government agencies do things, but also why they do it, who benefits and who suffers as a result, and how law and administration complement each other in the policymaking process thus described." Law and the Administrative Process: Analytical Frameworks for Understanding Public Policymaking (Washington, D.C.: University Press, 1979), p. xi. Similarly, "[a]dministrative law is not merely the procedural law of government agencies engaged in the regulation of private business...but becomes the study of interface and interplay between law and bureaucracy within the framework of government's major functions in capitalist society." Edward Greenberg, The American Political System: A Radical Perspective (Cambridge: Winthrop, 1977), p. 122, quoted in Gould, p. 20.
- ¹⁴⁵Gardner, 1959, p. 129.
- ¹⁴⁶Merrill, 1933, p. 231.
- ¹⁴⁷Except where otherwise cited, the above paragraph is from Dean Acheson's testimony before the Subcommittee of the Committee on the Judiciary on 15 May 1941. See note 88 above.

¹⁴⁸Gardner, 1959, p. 114.

¹⁴⁹Stewart, 1975, pp. 1670-1671.

¹⁵⁰Gellhorn and Robinson, 1981, pp. 783-787.

¹⁵¹Davison, 1939, p. 682; Prettyman, 1958, pp. 687-688.

¹⁵²Woll, 1962, pp. 694-695.

¹⁵³Shapiro, 1968, p. 108.

¹⁵⁴"Since many of the rules governing the admission of proof in judicial trials are designed to protect the jury from unreliable and possibly confusing evidence, these rules need not be applied with the same vigor in proceedings before an [administrative law] judge." Robinson, Gellhorn, and Bruff, p. 29. Of course, the opposing view is that since any decision is to be made by only one person, protecting him from improper evidence is even more critical.

¹⁵⁵Bayless Manning, "Too Much Law: Our National Disease," Business Lawyer 33 (1977):435-440.

¹⁵⁶Stewart finds a parallel change in the concept of judicial review, which has changed from "prevention of unauthorized intrusions on private autonomy" to "assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies," thus seeing a change from the "transmission belt" theory of the administrative process to the "interest representation concept." Stewart, p. 1712.

¹⁵⁷Bayless Manning, pp. 436-437.

¹⁵⁸Robinson, p. 534-535. "This would, of course, undermine to some degree the attempt of the APA to prescribe at least minimal uniformity of procedure among the federal agencies, but this is not a very disturbing thought. It is not at all self-evident that the CAB's blocked space proceeding required the kind of procedures which would be used by the FCC to modify a broadcast license....

This is not to suggest that there would not be certain uniform procedures appropriate to all, or most, of these varied functions. But such uniformity would not be imposed on the proceedings because they are 'adjudicative' or 'legislative' in character, but would emerge only out of basic similarities in agency functions and in the private interests affected, where they were shown in fact to exist." Robinson, p. 535.

¹⁵⁹Antonin Scalia, "Back to Basics--Making Law Without Making Rules," Regulation 3 (July/August 1981), pp. 25-28. For an alternative view of the impact and importance of flexible due process in this area, see Henry Friendly, "Some Kind of Hearing," University of Pennsylvania Law Review 123 (1967):1267-1317, or Victor Rosenblum, "School children: Yes, Policemen: No--Some Thoughts About the Supreme Court's Priorities Concerning the Right to a Hearing in Suspension and Removal Cases," Northwestern University Law Review 72(1977):146-170.

¹⁶⁰"Learning from Iowa," Christian Science Monitor, 27 January 1983, Eastan Ed, p. 24.

¹⁶¹Schwartz, 1977, pp. 296-299. Quotation from p. 299.

¹⁶²Gellhorn and Robinson, p. 778. They offer as an example of political activity the FCC compromise on cable regulation in which the cable, broadcasting, and copyright owners found a political compromise, with the implied neglect of the "public interest."

¹⁶³As evidenced by a three hundred percent increase in Administrative Law Judges -- from 197 examiners in 1946 to 804 ALJs in 1974 -- from which Schwartz projects thousands of members in the federal judiciary in the decades to come. Schwartz, 1977, pp. 305-307.

¹⁶⁴The above paragraph is from Schwartz, 1977, pp. 307-309.

¹⁶⁵Iredell Jenkins, "Conflict of Philosophies in Contemporary Law," Tulane Law Review 20 (March 1946):353-359. Notes omitted.

- ¹⁶⁶That the common law is inappropriate for the United States is hardly a novel idea. Even as late as 1856 (or perhaps 1876 when his thesis was reprinted), Sir Henry Maine thought that French or Roman-French law would overtake the common law in the United States. Schwartz says this danger was actually over by the 1830's and resulted from Francophile notions following the French Revolution. Schwartz, 1974, pp. 12-13. Notes omitted.
- ¹⁶⁷A third article by John Willis, a Canadian scholar, appeared in 1935 and is titled "Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional," (University of Toronto Law Journal 1 (Lent Term, 1935):53-81.) It is a remarkable article, recognizing the inevitable growth of the administrative process and discussing "what shall be the approach of the legislatures to government by department and commission?" p. 59. It is in the context of legislative response that the article is written, and hence, while it is a worthwhile and penetrating discussion, the article is not of substantial use in the present discussion.
- ¹⁶⁸Jerre S. Williams, "Securing Fairness and Regularity in Administrative Proceedings," Administrative Law Review 29 (1977): 3;8;9. Williams' use of seven cornerstones may lead to an edifice of rather confusing design--a possibility which only serves to reinforce Mathanson's quotation which began this chapter.
- ¹⁶⁹Kenneth Culp Davis, no date, quoted in Williams, 1970, p. 270.
- ¹⁷⁰Williams, 1977, p. 15; p. 18; p. 23; p. 26.
- ¹⁷¹Rabin, p. 121; p. 123; p. 125; p. 126.
- ¹⁷²Rabin, p. 127; p. 128. Notes omitted.
- ¹⁷³Rabin, p. 135, Note 57.
- ¹⁷⁴This corresponds to Stewart's nominalist thesis for the study of the administrative law; i.e., classify agencies by "functions, structure, powers, environment, and the nature and quantities of discretion exercised" and then cross-hatch with techniques for directing and controlling such as "judicial review, procedural requirements, political controls, and partial abolition of agency functions," (Stewart, p. 1810). This is a much more elaborate and probably less workable suggestion.

175Rabin, p. 145.

CHAPTER III

GOVERNMENT ATTORNEY

"A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

Sir Walter Scott, 1815

INTRODUCTION

In February of 1934, Secretary of Treasury Morgenthau persuaded Robert Jackson to leave his thriving practice in Jamestown, New York, to become General Counsel for the Bureau of Internal Revenue. His duties for Internal Revenue were primarily to prosecute tax evasion cases: his most spectacular achievement was the successful prosecution of Andrew Mellon. Two years later, in March of 1936, Jackson became the Assistant Attorney General in charge of the Tax Division, and in May of the same year was named Assistant Attorney General for the Antitrust Division. Jackson remained with the Antitrust Division for two years; on 5 March 1938 he was named Solicitor General of the United States. In January 1940 Jackson became Attorney General of

the United States, a position he held until 11 July 1941 when he was sworn in as Associate Justice of the Supreme Court.¹

Jackson's impact as Solicitor General was considerable. Justice Brandeis said Jackson should remain Solicitor General for life,² and certainly "the 1938-1941 revolution in the constitutional doctrine of the Supreme Court was made a great deal simpler, and much less noticeable, by Robert Jackson's skillful advocacy."³ As Solicitor General, he argued two of the four Morgan cases which are so well known to students of administrative law. He lost Morgan II (1938) and won Morgan III (1939).⁴ These cases and their sequel, Morgan IV⁵ which Attorney General Jackson argued and won, are discussed in detail in this chapter. During his tenure as Attorney General, Jackson wrote several opinions which are of importance in understanding his view of the administrative process. In addition, he presented to Roosevelt the final report of the Attorney General's Committee on Administrative Procedure which was released shortly after his official suggestion to Roosevelt that the Walter-Logan Bill be returned unsigned to the Congress.⁶

EXTRA-LEGAL WRITINGS

One of Jackson's earliest statements in the administrative process came before he joined Roosevelt's administration in an address given before the Alabama State Bar in 1932.⁷ He called for the Bar to reform the adversary process by "sweating out its excess cost and formality, and speeding it up so as to have a fair chance to compete for its life" against the administrative process.⁸ He noted that the lawyers' monopoly on legal processes was being lost: accountants had been admitted to the Treasury Bar and administrative tribunals were arbitrating insurance claims. The courts and the legal profession were declining in prestige as the traditional litigation method was replaced by the administrative method. Lawyers, he noted, value the adversary process and "yield [this process] an almost oriental devotion."⁹ Jackson warned that the administrative agencies were multiplying in number and in power. The dangers he foresaw reflected the values he espoused in his judicial career. Although administrative tribunals are speedy, final, and less expensive, they demand the sacrifice of some traditional rights and values.

What can be deduced from this early statement of Jackson's view of the administrative process? It is not clear what actually motivated his theme: is he truly

warning of the dangers of the administrative method, or does he perceive a need for reform in the legal profession and is therefore using the administrative process as a common threat against which the lawyers should unite? Jackson thought of himself throughout his career as a "country lawyer," and although at the time of this address he was not in government service, he had already been approached about leaving his Jamestown practice for Washington. He was an ardent supporter of Roosevelt. Under such circumstances it seems unlikely that he was calling for a fight to the death between the adversary process and the administrative method. Rather Jackson is alerting the legal profession to the latent dangers of ignoring their own failings.

By 1939 Jackson was vocally supporting the administrative process. The Court had performed the famous "switch in time," and in "Back to the Constitution," Jackson wrote approvingly of the return of the Court to what he regarded as the original intentions of the framers of the Constitution.¹⁰ He wrote that the Court had, by 1890, begun to draw away from its constitutional underpinnings, and constitutional law had become law about the Constitution rather than law of the Constitution. For example, wage-fixing and price-fixing is not forbidden by the Constitution. Both were known to the Framers; as early as

1648, the "Laws and Liberties of Massachusetts" set prices for baked goods and fixed wages. The Revolution was not, even in part, an attempt to remedy what the Court in Lochner (1905) and Adkins v. Children's Hospital (1923) perceived as evils;¹¹ during the Revolution and at the instigation of the Continental Congress, "at least 8 of the 13 states passed laws fixing the price of almost every commodity on the market...."¹² Jackson approved the Court's return to the positions advocated by Justice Holmes in his dissents in Adkins and Lochner: "The criterion of constitutionality is not whether we believe the law to be for the public good," wrote Holmes in Adkins |¹³ in Lochner he reminded the majority that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."¹⁴ Jackson saw in these Holmesian sentiments a return to the spirit of the Framers. He was pleased to see this sentiment transformed into law in a case such as Graves v. O'Keefe, which overruled Collector v. Day, an earlier case which had held that the states could not tax federal employees and the national government could not tax state employees.¹⁵

Of the cases directly touching the administrative process, Jackson's favorite was Morgan III, a case he had argued before the Supreme Court. In the 1939 article "Back to the Constitution," he cited Stone's opinion for its

acknowledgement of the coordinating activities of courts and agencies:

...[I]n construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action....[N]either [the court nor the agency] can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.¹⁶

Thus in this 1939 article, Jackson is supporting the view that the agencies and the courts--and thus the administrative process and the adversary process--are complementary.

Jackson returned to the interrelationships between courts and agencies in another 1939 article, "The Problem of the Administrative Process."¹⁷ At the time Jackson was Solicitor General; the article is both a defense of the proliferation of agencies in the New Deal and a rebuttal to the opponents of the New Deal who sought to destroy government policies by destroying the agencies which designed and implemented the policies. This latter position

is essentially the one taken by many proponents of the Walter-Logan Bill which Roosevelt vetoed in 1940.

Jackson had served on a commission investigating the administration of justice in New York and had found extraordinary delays in court proceedings: one court was six years behind. He felt such poor administration of justice could not fail to lower the prestige of the courts and hence of the bar, and, as he argued in 1932, he proposed that it was the duty of the bar to improve judicial administration, as much to protect their own position as to protect the citizens. He wrote:

Certainly, if we leave to laymen the remedying of defects in the courts, we undertake great risks that their remedies will be rough and will not respect our own professional interest.¹⁸

Not only are such remedies likely to interfere with the adversary process but also

[t]he layman's answer to all the delay, to the high cost, and to the technicality of litigation in the courts, has been a resort to the administrative tribunal....¹⁹

Jackson was, however, merely baiting the hook with concerns likely to catch the attention of his legal audience, for he continued by again quoting Stone's opinion in Morgan III. Stone's opinion, he wrote, "seems a timely admonition to contestants in the current struggle for supremacy between the formal, traditional judicial method of adjudging

controversies...and the so-called 'administrative method.'²⁰

In this article Jackson carefully described the differences between the judicial method and the administrative method.²¹ One of the most important of these differences lies in the responsibilities of judges and administrative officers. The judicial responsibility "begins and ends in hearing and decision" while the official responsibility of the administrative official is the

development of a consistent policy of law enforcement in the filing of complaints and in the preparation and presentation of the evidence as well as in the making of final decisions. The administrative tribunal, unlike a court, can not escape responsibility for an uneven administration of justice by saying that it has faithfully decided each separate case which happened to be brought before it on the evidence which some litigant found it to his own advantage to produce.

...The administrative officers have a responsibility not merely for the decision of separate cases but also for the carrying out of a consistent policy with reference to all of their cases.²²

A second difference rests in the mechanics of the hearing process. Courts are formal and have very technical rules, and lawyers play vital roles to the exclusion of almost every other profession. In contrast,

[t]he administrative tribunal is non-technical about the receipt of evidence, and its procedure is flexible, and even mistakes are easily amended. A layman may actually understand what one of these administrative tribunals is doing and may even appear before them with his own grievance. Such a tribunal may have a better knowledge of the

problems at issue than the lawyer who presents the case. It may have its own corps of experts to advise and assist it. Such a tribunal is not as dependent as the ordinary court upon the arguments of partisan counsel to get at the truth. Skilled advocacy is neither so necessary to [lead] such a body nor is stupid or cute advocacy so apt to blur the merits of a controversy.²³

A final difference noted by Jackson is in methods by which change or new policy is announced. The court must act through the "somewhat awkward 'leading case' method" in which an individual must bear the expense and uncertainty of bringing a case before the court. While some courts can indicate that they are prepared to hear arguments for overruling a precedent, a real controversy must arise before the court may establish a new precedent. Administrative tribunals are able to announce rules or regulations on matters of policy and procedure "without waiting for specific cases to arise and without subjecting interested parties to the costs and delays of litigation."²⁴

These three differences--responsibility, mechanical process, and method of announcing change--are all presented by Jackson in a pro-agency perspective although they are not anti-court in any sense. Jackson was developing the basis for a defense of the administrative tribunal. He established the essential differences without attacking the judicial process. He then defended New Deal agencies:

Some of the newer administrative agencies have come into existence to deal with the most

bitter type of controversy....They had to enforce basic laws which a large part of the bar and their powerful clients refused to recognize or accept. They must close hundreds of cases where the courts finish but one. History will probably find that the sharp critics in this generation have underestimated the fairness and skill with which these new agencies have performed their tasks....²⁵

These agencies have had to cope with new responsibilities. Unlike the courts, "the administrative tribunal may be said to be the heart of nearly every social or economic reform of the twentieth century, and if the heart fails, the whole body perishes."²⁶ While Jackson recognized that some agencies had been lax or in error or subject to "misguided zeal," the administrative decisions of the preceding ten years showed evidence of high quality with few reversals by the Supreme Court.²⁷ Jackson closed his argument with a plea for cooperation between agencies and courts:

Society needs both the judicial process and the administrative process....Each has regrettable deficiencies at times in personnel, and rather than arraying them one against another our bar association would be better occupied in cleaning out incompetence and promoting men of ability and understanding and good-will in both administrative positions and in the judiciary.²⁸

This quotation provides an insight into Jackson's perspective on the role of lawyers as well as on the necessity for coordinated government. While he opposes incompetence in any branch of government, he sees lawyers as

the appropriate persons to be staffing the agencies. Earlier in the article he had noted the judicial control of administrative tribunals through judicial review of every concern except questions of pure fact, enforcement of subpoenas, and enforcement of orders, but he followed this observation with the acknowledgement that federal judges are no better than other men in public service. Thus he is not offering judges as such as models for administrative officials. What he does suggest, however, is that lawyers should occupy places of prominence in administrative as well as judicial positions.

I do not mean to carry this analysis too far. Jackson always considered himself first as a lawyer, and a country lawyer at that. Throughout his entire career in government he was surrounded by lawyers, and his respect for the law itself permeates his work. He is not suggesting a legal fifth column in the agencies, and it is certainly possible to interpret "men of ability and understanding and goodwill" to include non-lawyers as well, although I doubt his audience so interpreted it. It seems most likely, however, that Jackson felt that only lawyers were adequately trained to understand the traditional, adversarial, judicial process, and if the agencies and the courts were to provide an integrated response to the issues of the day, the agencies needed lawyers as administrative officials.

JACKSON AS SOLICITOR GENERAL

While serving as Solicitor General, Jackson wrote:

[lawyers] know that office as one of the few in government where one's energies may be devoted to the philosophy of the law, and to court room advocacy, without having his mind constantly littered with administrative detail.²⁹

He saw the position of Solicitor General as one "which affords the greatest professional opportunity and intellectual satisfaction of any in government,"³⁰ Jackson felt the office was the one to be of the most benefit when he returned to private practice as he expected to do by 1940.³¹

While in office, he devoted his time to preparing his own briefs for argument before the Supreme Court. He did not interfere with his staff unless they requested his assistance, and he prepared his briefs alone without help from the staff. Most Solicitors General utilize staff services for digests of the record, for supplementary research, or for consultation or advice in presentations, but Jackson did not.³² Thus, although no positive proof exists that every case which Jackson briefed is entirely his own work, it is safe to assume that those cases which he did brief are primarily his own effort.

Of central importance during this period are the four Morgan cases.³³ The cases began in April 1930 when the

Secretary of Agriculture, acting under the Packers and Stockyards Act of 1921,³⁴ began an inquiry into the reasonableness of rates charged by market agencies for buying and selling livestock at the Kansas City Stockyards. After several hearings, in June 1933 the Secretary issued an order establishing maximum rates. Morgan and other agencies brought suit attacking the order as "illegal and arbitrary and as depriving plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution."³⁵ The District Court issued a temporary restraining order, under which payments to the agencies above the rates ordered by the Secretary were impounded, and then upheld the Secretary's order. Morgan appealed.

In the appeal, Morgan contended that the Secretary had not given a proper hearing. The "outstanding allegation" in the complaint against the hearing was that "the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted."³⁶ The District Court had struck out this and other allegations about the inadequacy of the hearing on motion of the Government, thus refusing to consider if Morgan's hearing were adequate. Morgan asserted to the Supreme Court that the "granting of that hearing [which the

statute requires] is a prerequisite to the making of a valid order."³⁷ The Court agreed. Despite the assertion of Solicitor General Reed that "a construction of the Act consistent with that theory [that the Secretary must read the record and briefs and consider the oral arguments] would destroy it altogether as a measure capable of practical administration"³⁸ and his warning that to require members of administrative tribunals to testify as to their decision processes would "lead to the paralysis of administrative tribunals,"³⁹ the Court remanded the case to the District Court for consideration of whether Morgan had a proper hearing.

By 1938, Jackson was Solicitor General, and he briefed and argued Morgan II. The District Court on remand had considered only the issue that the Secretary had not personally considered the evidence. The District Court decided that the requirement of the statute for a full hearing had been satisfied and again upheld the Secretary's order.⁴⁰ Morgan appealed.

Morgan argued that even if the Secretary read the oral and written argument, he did not "judicially weigh and appraise" the arguments because he admittedly

adopted the vitally important inferences drawn by his subordinates from the evidence, and rejected the widely differing inferences asserted by [Morgan]... , without weighing or appraising the evidence upon which either set was based.⁴¹

Jackson, arguing for the Government, countered that the "question at most must be whether the external conduct of the Secretary is clearly inconsistent with a correct understanding of what his duties were and a minimal attempt to discharge them."⁴² He objected to efforts to determine the "supposed state of mind and mental processes" of the Secretary, not on grounds of propriety but because the question "is not to be determined on such subjective and illusory grounds as these."⁴³ Jackson noted that Morgan had the "additional burden of overcoming that presumption of regularity and propriety which attaches to all official acts,"⁴⁴ a clear statement of deference to administrative expertise which he expected of the Court.

In Morgan I, the Court had written that

The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.⁴⁵

This, Jackson asserted in his brief, "does not mean that if the Secretary does give personal consideration to the case, the litigant nevertheless may require him to establish in a court that the consideration was adequate."⁴⁶ Litigants may not inquire into judicial processes in this fashion, and Jackson did not believe a similar inquiry into administrative actions which are judicial in nature was justified.

Morgan also raised again a concern that no opportunity was given to object to the examiner's report. The Court in Morgan I had stated that

while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented, ...we cannot say that that particular type of procedure was essential to the validity of the hearing.⁴⁷

Based upon the decision in Morgan I, Jackson was dismayed when Chief Justice Hughes, who had delivered the opinion in Morgan I, changed what seemed to have been a counsel of perfection into a firm mandate. The entire case turned on the failure of the government to provide Morgan with a copy of the hearing examiner's report during the ascending levels of appeals from the examiner to the Secretary of Agriculture. As Hughes put it:

...what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors of the Government, after an ex parte discussion, with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect.⁴⁸

It was small consolation that the Court agreed with Jackson's contention that "it was not the function of the

[District] court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required."⁴⁹ The Court declared the order of the Secretary invalid "as the hearing was fatally defective," and reversed the District Court ruling which had upheld the Secretary's order.⁵⁰

Jackson promptly filed a petition for rehearing which bluntly accused the Court of inconsistent opinions. The Court, in a "sharp"⁵¹ per curiam opinion, rejected his petition. In Morgan I, the Court contended, the case was remanded because the District Court had failed to afford Morgan an opportunity to prove that the hearing was defective. Given such an opportunity, the Court held in Morgan II that the hearing was "fatally defective."⁵² The Court also rejected Jackson's request for rehearing because of questions of substance and procedure as to the disposition of the funds impounded under the original District Court order. These questions, the Court ruled, "are not properly before us upon the present record,"⁵³ and the petition for rehearing was denied.

Before the Secretary could issue a new rates order based on a proper hearing, the District Court ordered the money impounded under the original order to be released to Morgan and the other market agencies,⁵⁴ as it "considered

that the Supreme Court's decision left it no discretion."⁵⁵ The Government appealed, and thus Morgan III came before the Court.⁵⁶

The case was first argued in October 1938 and then reargued in April 1939. Jackson wrote in 1941 that "[by] this time it was apparent that the Court was on the spot even more than the Secretary had been."⁵⁷ Twice the District Court had found that the weight of the evidence supported the order of the Secretary of Agriculture. Twice the Supreme Court had reversed on a question of procedure without considering the merits of the case. This, Jackson felt, "had taken the money away from the farmers with no hearing on the rates at all in the Supreme Court."⁵⁸ The Government appeal

contended that no right to the moneys could accrue to the brokers as a result of a procedural error of the Secretary and that the impounded fund should be distributed according to equity and good conscience and after a decision upon the evidence as to fairness of the rates.⁵⁹

The Supreme Court was now in the position of either granting a hearing on the merits or asserting that payment should be made to the "parties who were found by the only court that passed on the merits not to be entitled to it."⁶⁰

The Court, whose opinion was delivered by Justice Stone, "extricated itself...by holding that the procedural

error could be corrected by the Secretary."⁶¹ The Court reversed the District Court once again and ordered the District Court to retain the funds until the Secretary "proceeding with due expedition, shall have entered a final order in the proceedings before him."⁶²

Justice Butler, joined by McReynolds and Roberts, dissented because the Secretary was prohibited from ordering reparation and could only "prescribe charges to be applied after the effective date of" the order.⁶³ The market agencies, they wrote, were "entitled to the money...that was deposited in court by them to secure their compliance with the Secretary's order if found valid."⁶⁴ The order was not valid and therefore the money belonged to the market agencies. Jackson objected to their views on practical grounds:

Had such a view prevailed, interests litigating before administrative tribunals might gain or lose substantive rights because the tribunal made errors in its procedure. This would have defeated the very purpose for which such tribunals have been introduced--elimination of technicalities of procedure, cheapening the cost of litigation, and speeding up of decision.⁶⁵

When the decision in Morgan III came down, the Morgan cases seemed finished. The Secretary issued a new schedule of rates that were decided under the earlier Morgan guidelines and that established the impounded money should be returned to the farmers. However, Morgan filed suit in

District Court, and that court held the order invalid and directed again that the money be given to the market agencies.⁶⁶ The Government appealed, and the hapless District Court was once again reversed. Jackson, now Attorney General, briefed and argued the case.

The market agencies contended that the Secretary's new order was invalid because his decision was based in part on economic conditions in 1933 (the year of the original order), was not supported by substantial evidence, and because the Secretary was personally biased, as evidenced by a letter from him to the New York Times following the decision in Morgan II. Jackson's brief refuted these contentions. He noted tartly that "[both] the argument of appellees and the decision of the majority [of the District Court] may fairly be characterized as proceeding under the hypothesis that the Secretary...is an 'alien intruder' into the field of government administration, deserving of unrestrained discipline if pretext can be found."⁶⁷ Jackson also rejected the claim that the Secretary was biased. Following a frank explanation of the letter, both Jackson and the Court agreed that the Secretary had not prejudged the case:

Read in the context of the times, the Secretary's letter shows an adherence to his original views on the merits that the order established reasonable rates, measured by the existing record and arguments, but did not suggest

in any manner that his mind would be closed to the force of new evidence and new arguments.⁶⁸

However, even if the Secretary had prejudged the issue, he would not be disqualified. Trial judges are disqualified only for a "personal bias or prejudice."⁶⁹ The bias--had it existed--of the Secretary was not personal, although

[it] is doubtless true that a judge who had prejudged the issues would adopt a wiser course if he were to disqualify himself. We suppose this to be the general rule, and we also are prepared to assume that the administrative tribunal should follow the same careful standards as the courts. But the judicial analogies demonstrate that, if the Secretary had prejudged the issues and still did not care to disqualify himself, the parties would have no recourse.⁷⁰

As Congress had not established a higher standard of impartiality for administrative tribunals than for judicial ones, and there was no constitutional requirement for a double standard, Morgan's contention that the Secretary's order was invalid because of prejudgment could not stand. Here Jackson is foreshadowing his own judicial position of deference to both administrative agencies and to the Congress.

Justice Frankfurter, in delivering the opinion of the Court, agreed:

That [the Secretary] not merely held, but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued

that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.⁷¹

A final issue raised in the case which was not directly involved in the validity of the Secretary's order was the personal appearance of the Secretary at the District Court trial and his examination there. This was an issue raised in previous briefs, and Jackson was clearly incensed at the lower court action which he felt raised "a question of fundamental and far-reaching importance in the field of administrative law."⁷² Judge Otis, one of the three District Court judges and the lone dissenter in this final Morgan case, drew a parallel between a trial judge and the Secretary exercising his judicial function. He wrote: "Has anyone ever heard of a court of appeals, reviewing such a case, entertaining arguments that the trial judge did not read and consider the evidence? Certainly not. The presumption is conclusive that the trial judges have done their duty."⁷³ Jackson agreed. He wrote:

It would...be a shocking departure from accepted standards of propriety if a trial judge were forced to take the witness stand and defend himself against imputations of misconduct and demerit, testify as to the quantity and quality of his consideration of the evidence, and produce for reexamination the memoranda of his law clerk.⁷⁴

The District Court action he felt was just such a proceeding. Jackson objected on practical as well as theoretical grounds:

The integrity and value of the administrative system as an instrumentality of orderly government depends upon the freedom of administrative officers from inquisitions such as was permitted by the court below.⁷⁵

Justice Frankfurter was again in agreement with the Attorney General. Citing Morgan I, which held that the proceedings had a "quality resembling that of a judicial proceeding,"⁷⁶ and Morgan II, in which the Court held that "it was not the function of the court to probe the mental processes of the Secretary,"⁷⁷ he wrote that "[just] as a judge cannot be subjected to such a scrutiny,...so the integrity of the administrative process must be equally respected."⁷⁸

Shortly after the decision in Morgan IV, Jackson became an Associate Justice of the Supreme Court. However, before examining his work during his early years on the Court, Jackson's impact through his opinions as Attorney General should be discussed. His influence through the Attorney

General's Committee on Administrative Procedure and his recommendation to veto the Walter-Logan Bill have been discussed in Chapter Two.

JACKSON AS ATTORNEY GENERAL

Homer Cummings, the Attorney General who had devised Roosevelt's court-packing plan,⁷⁹ was replaced by Frank Murphy in 1939. Jackson succeeded Murphy to the position. He was appointed Attorney General on 18 January 1940, and his first opinion appeared on 25 January 1940; his final opinion as Attorney General was written on 12 June 1941, although Francis Biddle did not officially succeed him until 5 September 1941.⁸⁰ Five opinions are of particular interest in view of Jackson's later court opinions.

Three of the early opinions deal with the issue of administrative discretion.⁸¹ The first of these, dated 22 July 1940, is concerned with the enforcement of the Hatch Act. Three employees of the Department of the Interior were involved in a primary campaign when the statute was enacted. The Secretary of the Interior asked for Jackson's opinion on the following questions:

(1) Is the power to determine whether officers or employees of the Division have violated the Hatch Act, and to remove violators from office, vested in the head of the Department?...

(2) Do the activities of these employees...fall within the scope of the prohibition in section 9 (a) of the Hatch Act?...

(3) Does the removal of an officer or employee for violation of section 9 (a) of the Hatch Act require notice and hearing?...

(4) May the short interval between approval of the Hatch Act and the occurrence of the conduct here in question be taken into consideration in determining whether section 9 (b) of the act should here be applied?⁶²

Jackson responded to these questions with his typical blend of precision in defining the law and practicality in its application. He found that the power to determine violation was indeed vested in the Secretary but he declined to give an opinion on the particular case because of the Secretary's third and fourth questions. The issue of notice and hearing was delicate because special agents of the Department had already interviewed and taken depositions from the three employees. Jackson agreed with Interior's Solicitor that notice and hearing was required but declined to affirm that the interviews were sufficient to satisfy the requirement: "[a]pparently this was not intended as, and possibly did not meet the requirement of, notice and opportunity to be heard. Assuming, however, that the requirement had already been met, there would be no objection to any such further notice and hearing as you should find proper in the interest of the Government or in fairness to the employees."⁶³ In other words, the employees are entitled to notice and hearing, and even if you have satisfied that requirement already--which

is by no means sure--you may do more. This is a thinly veiled hint to the Secretary that his notice and hearing requirements might not withstand searching scrutiny. As described, the procedures surely do not meet the basic requirements later outlined in APA and supported by Justice Jackson in Wong Yang Sung v. McGrath (1950).

It is in his response to the fourth question that Jackson throws the decision to the Secretary's discretion.

I cannot hold otherwise than that the Hatch Act became effective immediately upon its approval by the President and that ignorance or misapprehension afford no legal justification. As a practical matter, however, there was no initiation of dismissal proceedings against all whom its approval caught in a state of possible technical violation.⁸⁴ (Emphasis added).

He continues by quoting the Secretary's letter which offers in defense of the employees the short time period between the approval of the Hatch Act and the suspected violations. Final resolution is "for administrative determination in your Department."⁸⁵

Jackson has thus utilized the concept of administrative discretion to relieve both himself and the Secretary of what was clearly a reluctant obligation to fire the three employees. The statute is clear that violators must be removed from office, but by declining to decide the case because some "disputed questions of fact" are determinable

only by the Secretary,⁸⁶ Jackson has allowed the Secretary to decide the facts in favor of the employees. He has protected himself from claims of lawlessness by affirming that the Act was in full force when the President signed, but he then gives the Secretary an escape route by citing the practical example of his predecessor who allowed district attorneys who were running for office when the Act was passed either to resign their offices or to withdraw their candidacies. This resolution of practical necessity with the dictates of law will be found again in Jackson's dissent in Shaughnessy v. United State ex rel. Mezei (1953).

The second opinion concerned with administrative discretion, dated 20 August 1940, involves a housing project in Caddo Parish, Louisiana, which was to be funded through Federal relief funds. The President asked for Jackson's opinion on two matters: (1) whether the housing project was a public project within the meaning of the Emergency Relief Appropriations, and (2) if the fact that the parish funds to be spent on the project came from the owner of the abutting property (even though funneled through the Police Jury of the parish) nullified the public sponsorship of the project. Jackson's opinion, based in part upon a letter from the Administrator of the Works Project Administration, was that

the project was indeed a "bona fide low-cost housing project" and that it was unimportant and immaterial that the owner of the abutting property was paying the parish, that he would be reimbursed by subsequent home owners, or that he donated the land for the project to the parish.⁸⁷ He relied upon the Administrator's statement that housing would be built only as needed:

I am inclined to think those who object may have visioned the laying out of streets, etc., throughout the whole of an unoccupied tract of land without regard to probable immediate public need--which might perhaps be assailed as an abuse of discretion. The statement of the Administrator supplies the desirable clarification regarding this.⁸⁸

It might be reasonable in this context to suspect that Jackson--ever the New Dealer--was looking for ways to support a Works Project Administration project. Certainly on the face of the facts presented in his opinion, the unnamed benefactor of Caddo Parish, having donated the land and voluntarily paid the parish enough money to cover its share of the cost, stood to gain substantial financial benefit. His abutting land would increase in value due to the housing project,⁸⁹ and his cash outlay to the parish would be reimbursed by the subsequent home owners, presumably with some profit. His only ultimate cost is the value of the donated land. However, the reasons for Jackson's support in this case are less important for our

purposes than the tool he chose to justify his view: administrative discretion. He does not, as in the opinion discussed previously, draw a distinction between the law and the application of the law. Rather he rests his opinion on the statements found in the Administrator's letter and on the opinion and oral statements of the General Counsel of the Federal Works Agency.⁹⁰ Thus the concept of deference to the administrator's exercise of discretion, i.e., to administrative expertise, is used to achieve the implementation of a politically desirable project.

In the third opinion, dated 25 March 1941, Jackson used the concept of administrative discretion to offer the Secretary of Agriculture a weapon to get his own way despite apparently forbidding statutes. The case involved a government employee who, while on an official trip in a government car, became intoxicated and hit a privately owned vehicle. The employee accepted responsibility, paid for repairs to the government car, and was disciplined by being required to take leave without pay for one month and by being placed on probation for one year. The Agriculture Department paid for the damage to the private car. The Secretary of Agriculture requested an opinion on whether he could "properly require the employee to reimburse the Government for a payment made by the Government to a private

person for property damage resulting from the employee's negligence."⁹¹

Jackson's reply seems unequivocal. The statute under which payment was made "does not provide for reimbursement by the employee, and no statute charges you with collecting the amount from him. If it were to be attempted the employee would, I think, be entitled to his day in court...."⁹² Jackson noted that Congress had "progressively assumed liability" for the negligence of governmental employees and in the necessary legislation had "not made provision for the assertion of claims by the United State against the officers and employees causing the damage."⁹³ This all seems straightforward, and the Secretary cannot require the employee to reimburse the government for the funds appropriated by Congress to pay the claim. However: "[o]f course, the employee may be subjected to suitable discipline, including dismissal, if warranted."⁹⁴

The final outcome of this case is not known, and since the employee had already been disciplined, the imposition or the threat of imposition of an additional penalty might well lead to the employee's "day in court." It does seem clear, however, that Jackson is offering an alternative to the Secretary that through his discretionary power to discipline, he might induce the negligent employee to reimburse the government.

The three opinions discussed above demonstrate Jackson's views of administrative discretion, its usage and the deference accorded to it by government. In the first case, he bowed to administrative discretion in order to allow the Secretary to deal in a practical manner with a technical violation of the law. In the second opinion, the judgment of the Administrator was the basis for allowing a public project to continue despite an apparent possibility of profiteering. And the third opinion again uses administrative discretion as a tool, this time to permit the Secretary to rectify what he considered to be a financial injustice.

The fourth opinion to be discussed deals with the delicate issue of delegation of authority. The question at issue was the "power of the Federal Security Administrator to delegate to the Assistant Administrator the authority conferred...[by] the Federal Food, Drug, and Cosmetic Act...and transferred to the Federal Security Agency by Reorganization Plan No. IV..." to conduct hearings.⁹⁵ The Administrator was especially concerned because, although the statute specifically empowered him to delegate the actual conducting of the hearing, the statute required him to base his order "only on substantial evidence of record at the hearing" and to "set forth as part of the order detailed

findings of fact on which the order is based."⁹⁶ Citing Morgan I,⁹⁷ the Administrator maintained that "I cannot delegate the reading of the record and the making of the findings to anyone else, unless I am also able to delegate to him the power of issuing the order."⁹⁸ In addition to the Administrator's concerns, the General Counsel of the Federal Security Agency noted an opinion of Attorney General Cummings in 1933 which seemed to place even greater restrictions on the power to delegate than did Supreme Court decisions then current.⁹⁹ Jackson, however, distinguished Cummings' 1933 opinion as having a different situational basis.¹⁰⁰ He found the present delegation to the Assistant Administrator to be lawful because the wording of the Reorganization Plan vested responsibilities for the duties in the Federal Security Agency "to be administered under the direction and supervision of the Federal Security Administrator," and he regarded "this as sufficient negation of any idea that particular functions not amounting to 'direction and supervision' must be exercised by the administrator personally."¹⁰¹ The question in Morgan I which so concerned the Administrator was "Must he who decides hear?" This question was "May he who hears decide?" The answer was yes, and Jackson thus affirmed the authority of the Administrator to delegate authority vested in him by statute.

The fifth and final Attorney General's opinion is the Lend-Lease opinion of 27 August 1940.¹⁰² The destroyers were given to Great Britain in exchange for leases on military bases on British territory. The military bases provided the necessary justification for sending the destroyers to Britain. Navy officials had recently certified to Congress that the ships were necessary to the country's defense and therefore the ships could not be sent to Britain as surplus. The bases, however, enhanced American defenses even more than the possession of the destroyers, and the trade became legally justified.¹⁰³ Jackson's opinion as Attorney General is interesting not so much for its content as for his forthright statement that part of the deal Roosevelt wished to make was impermissible under the statutes of the United States.

In deciding if the "mosquito boats" or subchasers, which were then under construction, could be sent to Great Britain, Jackson relied on the "traditional rules of international law" to illuminate his interpretation of the statutes.¹⁰⁴ His interest in international law was a long-standing one and led directly to his subsequent appointment as chief Prosecutor for the United States at Nuremberg. In this particular case, the rules of international law forbade a neutral nation from building armed ships that were

predestined for a belligerent, and since the ships were still under construction, to consign them to Great Britain would violate the law. Had the ships been finished, presumably the Navy could have declared them surplus or allowed under the trade agreement. Jackson's opinion, while supporting the other terms of the Lend-Lease agreement, declared the transfer of the subchasers to be a violation of statute law,¹⁰⁵ despite Roosevelt's clear desire that the entire arrangement be consummated.

An interesting sidelight to the Lend-Lease transaction appeared in 1953 when Jackson released a memorandum written to him by Roosevelt in 1940.¹⁰⁶ This was a legal opinion on the Lend-Lease Act tendered by Roosevelt to his Attorney General.

The issue revolved around a provision in the Act that permitted some of the powers granted to the President to be repealed by concurrent resolution of both houses of Congress. This meant that the veto, unlike a joint resolution which requires approval of both houses and the signature of the executive, would not be presented to the President. Roosevelt found the provision "constitutionally objectionable but politically necessary." Roosevelt viewed the clause as authorizing a Congressional repeal of legislation. Normally any Congressional enactment--except

Constitutional amendments--must be presented to the President for his signature; should he return the bill and his objections to it to the originating House unsigned, the Congress must provide a two-thirds majority in each house to override the veto. However, to repeal portions of the Lend-Lease Act required only a simple majority in each house, and the President had no opportunity to accept or to reject.

On this occasion, Roosevelt found himself in partial agreement with the opponents of Lend-Lease. He found the provision unconstitutional; so did they. Their concern, however, was that the Act gave to the President unprecedented and dangerous executive power that could not be revoked if the only repeal procedure were unconstitutional. Proponents of Lend-Lease, among whom was Jackson, viewed the provision as a legitimate reservation or limitation on the granted power. Jackson was unexcited about the issue: "I really regarded the question as interesting but rather academic." He felt that "any course of events which might arouse enough opposition in Congress to put concurrent resolutions through would be likely to require a change of administration policy in any event."

Roosevelt could not publicly denounce the clause as unconstitutional because to do so would be grist for his political opponents' mill. But he did feel that some sort

of official declaration was necessary in case Congress invoked the repeal clause. He "wanted a record that his constitutional scruples did not arise only after the shoe began to pinch, and so far as possible, to excuse his approval and counteract its effect."

Roosevelt's memorandum to Jackson described the Lend-Lease bill as "an outstanding measure which sought to meet a momentous emergency of great magnitude in world affairs;" Roosevelt "felt constrained to sign the measure, in spite of the fact that it contained a provision which, [in his] opinion, is clearly unconstitutional."¹⁰⁷ He did not, however, want the memorandum to become public, and he gave it to Jackson to release at Jackson's discretion. Jackson was reluctant to keep the opinion in the open files at the Department of Justice for fear of a leak, but he was equally reluctant to place it in a confidential file where it might be permanently lost. Roosevelt declined to assist Jackson in solving the problem, and Jackson finally kept the memorandum in his personal possession, releasing it in 1953 in response to a Harvard Law Review article which discussed Roosevelt's views and actions regarding legislative control of executive action.¹⁰⁸

CONCLUSION

What then, are we to make of Jackson's role during the New Deal years? How did he view administrative law, and what role did he play in the development of administrative law? Two themes emerge from his early work: that the traditional judicial adversary model of justice and the administrative process are partners in the administration of government; and that on occasion, practical considerations must temper the rigors of the letter of the law.

In 1932, Jackson was defining the administrative process as a threat to the bar; by 1939 he was supporting the administrative process and citing approvingly Justice Stone's opinion in Morgan III that the agencies and the courts must be coordinated. His briefs on the Morgan cases and his opinions as Attorney General support the idea of deference to the administrator. It is clear, then, that Jackson was a supporter of the administrative process--hardly surprising in an ardent New Dealer. It is also apparent that he recognized the policy component of administrative tribunals and hence of the administrative process; it is this policy component, which he felt was inappropriate in the courts, that justified the procedural differences in the administrative tribunals.

That Jackson, the "country lawyer," was willing to temper law with expediency is evident even in his early years. His opinion on the Hatch Act violations demonstrates this as he acknowledges that both the discretion of the administrator and precedent may excuse the government from strict enforcement in the early days of the Act. The opinion on reimbursement for employee negligence is another case: the Secretary could not legally require repayment, but "[o]f course, the employee may be subjected to suitable discipline, including dismissal, if warranted." This concept appears later in Jackson's work in, for example, the Mezei dissent and to a slight extent in Korematsu.

During his tenure as government attorney, Jackson did not directly impose changes in administrative law or in the conception of administrative law. His skillful advocacy before the Supreme Court certainly helped the Government in such important cases as the Morgan cases, and Jackson's views on the coordinating nature of the work of the agencies and the courts doubtless shaped the attitude of the Department of Justice. Possibly the greatest direct impact Jackson had was in advising Roosevelt to veto the Walter-Logan Bill (discussed in Chapter Two), a measure which would have substantially interfered with the differences between the administrative tribunals and the courts which Jackson cited so approvingly in 1939.

NOTES

¹The above paragraph is from Warner W. Gardner, "Government Attorney," Columbia Law Review 55:440-444.

²Felix Frankfurter, "Mr. Justice Jackson," Harvard Law Review 68:939.

³Gardner, "Government Attorney," p. 442.

⁴Morgan v. United States (Morgan II), 304 U.S. 1 (1938); United States v. Morgan (Morgan III), 307 U.S. 183 (1939). Jackson was not involved in the first Morgan case, 298 U.S. 468 (1936).

⁵United States v. Morgan (Morgan IV), 313 U.S. 409 (1941).

⁶Jackson's role in the Attorney General's Report was minimal. Although he was instrumental in persuading Roosevelt that such a report was desirable, he had no control or input into the daily activity and no input in shaping the Report's conclusions. This information on Jackson's involvement--or non-involvement--with the Committee is from a telephone interview with Walter Gellhorn, director of the Committee, on 29 December 1982. Gellhorn said "Nothing was cleared with Jackson unless Dean Acheson discussed the project with him without my knowledge, and I find that unlikely."

⁷Robert Jackson, "An Organized American Bar," American Bar Association Journal 18 (1932):383-386.

⁸Jackson, 1932, p. 385.

⁹Jackson, 1932, p. 384.

¹⁰Robert Jackson, "Back to the Constitution," American Bar Association Journal 25 (1939):745-759.

¹¹Lochner v. New York, 198 U.S. 45 (1905); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

¹²Jackson, "Back to the Constitution," p. 746.

¹³261 U.S. 570 (Holmes dissenting) (Adkins v. Children's Hospital).

¹⁴198 U.S. 75 (Holmes dissenting) (Lochner v. New York).

- ¹⁵ Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); Collector v. Day, 11 Wall 113.
- ¹⁶ United States v. Morgan, 307 U.S. 183, 191 (1939), (Morgan III), Stone writing for the Court. Jackson simply discusses Stone's position in "Back to the Constitution;" however, the quoted passage is given in full in Robert Jackson, The Struggle for Judicial Supremacy (New York: Vintage, 1941), pp. 267-268. It is also cited in part in Robert Jackson, "The Problem of the Administrative Process," Wisconsin State Bar Association Reporter 29 (1939):157.
- ¹⁷ Jackson, "The Problem of the Administrative Process," Wisconsin State Bar Association Reporter 29 (1939): 155- 165.
- ¹⁸ Jackson, "The Problem of the Administrative Process," pp. 156-157.
- ¹⁹ Jackson, "The Problem of the Administrative Process," p. 157.
- ²⁰ Jackson, "The Problem of the Administrative Process," p. 157.
- ²¹ Jackson makes his own preference explicit: "[i]he lawyer is inclined by habit and training to prefer the court over the administrative tribunal....I frankly share that preference for a court as a forum in which to practice." I think this is again a situation in which Jackson is demonstrating to his audience that he too is a lawyer in an attempt to make them more receptive to his later defense of administration. He must be particularly careful to remain "one of the boys" as the Walter-Logan Bill which was vetoed the following year partly at his suggestion was sponsored, and heartily lobbied for, by the American Bar Association. And while many proponents of that bill were indeed anti-New Deal, a solid core of attorneys were genuinely concerned over the inroads on personal rights being made in the name of administrative efficiency.
- ²² Jackson, "The Problem of the Administrative Process," p. 158.
- ²³ Jackson, "The Problem of the Administrative Process," p. 159.

- 24 Jackson, "The Problem of the Administrative Process," p. 159.
- 25 Jackson, "The Problem of the Administrative Process," p. 161.
- 26 Jackson, "The Problem of the Administrative Process," p. 161.
- 27 Of course, another interpretation of few reversals of administrative decisions by the court is the shift in judicial deference to administrative expertise.
- 28 Jackson, "The Problem of the Administrative Process," p. 164.
- 29 Robert Jackson, "Government Counsel and Their Opportunity." American Bar Association Journal 26 (1940), p. 411.
- 30 Jackson, "Government Counsel," p. 411.
- 31 Robert Jackson, Autobiographical Notes (unpublished), cited in Eugene Gerhart, America's Advocate: Robert H. Jackson (Indianapolis: Bobbs-Merrill, 1958), p. 168.
- 32 Warner W. Gardner, "Government Attorney," Columbia Law Review 55 (4), p. 441. Gardner was first assistant to Jackson when Jackson was Solicitor General and served in the Department of Justice from 1935 to 1941.
- 33 Although these four cases span a period from before Jackson's appointment as Solicitor General to his serving as Attorney General, for the sake of continuity they are all discussed in this section.
- 34 Packers and Stockyards Act of 1921, 42 Stat. 159, 7 U.S.C. 181-229.
- 35 Morgan I, 298 U.S. 472.
- 36 Morgan I, 298 U.S. 478.
- 37 Morgan I, 298 U.S. 473.
- 38 Morgan v. United States, 8 F. Supp. 766, cited in Government Brief, Morgan v. United States (Morgan I), 298 U.S. 468, p. 181.
- 39 Government Brief, Morgan I, p. 182.

- ⁴⁰ Morgan v. United States, 23 F. Supp. 380.
- ⁴¹ Government Brief, summarized in Morgan v. United States (Morgan II), 304 U.S. 9.
- ⁴² Government Brief, Morgan v. United States (Morgan II), 304 U.S. 1. It should be noted that Morgan II was argued on March 10 and 11, and Jackson was sworn in as Solicitor General on March 5. However, he was nominated as Solicitor General on 27 January so he had ample time to prepare the case.
- ⁴³ Government Brief, Morgan II, p. 32.
- ⁴⁴ Government Brief, Morgan II, p. 34.
- ⁴⁵ Morgan I, 298 U.S. 480-481.
- ⁴⁶ Government Brief, Morgan II, p. 40. Emphasis in original.
- ⁴⁷ Morgan I, 298 U.S. 478.
- ⁴⁸ Morgan II, 304 U.S. 22.
- ⁴⁹ Morgan II, 304 U.S. 18.
- ⁵⁰ Morgan II, 304 U.S. 22.
- ⁵¹ Robert Jackson, The Struggle for Judicial Supremacy (New York: Vintage Books, 1941), p. 265.
- ⁵² Morgan II, 304 U.S. 22.
- ⁵³ Petition for Rehearing, 20 May 1938, denied 31 May 1938, 304 U.S. 26.
- ⁵⁴ 24 F. Supp. 214.
- ⁵⁵ Jackson, The Struggle for Judicial Supremacy, p. 266.
- ⁵⁶ Because the briefs of the Solicitor General for Morgan III are unavailable at the time of this writing, this section draws from the Court's opinion in the case and from Jackson's 1941 book, The Struggle for Judicial Supremacy. This book was apparently written before Morgan IV as it contains no mention of the case.
- ⁵⁷ Jackson, The Struggle for Judicial Supremacy, p. 266.
- ⁵⁸ Jackson, The Struggle for Judicial Supremacy, p. 267.

- ⁵⁹Jackson, The Struggle for Judicial Supremacy, p. 267.
- ⁶⁰Jackson, The Struggle for Judicial Supremacy, p. 267.
- ⁶¹Jackson, The Struggle for Judicial Supremacy, p. 267.
- ⁶² United States v. Morgan (Morgan III), 307 U.S. 198.
- ⁶³ Morgan III, 307 U.S. 199.
- ⁶⁴ Morgan III, 307 U.S. 199.
- ⁶⁵Jackson, The Struggle for Judicial Supremacy, pp. 268-269.
- ⁶⁶ Morgan v. United States, 32 F. Supp. 546.
- ⁶⁷Government Brief, United States v. Morgan (Morgan IV), 313 U.S. 409, p. 39. (Notes omitted). The "alien intruder" phrase is from Justice Stone's opinion in Morgan III (304 U.S. 17) quoted above.
- ⁶⁸Government Brief, Morgan IV, p. 44.
- ⁶⁹Section 21 of the Judicial Code, 28 U.S.C. Sec. 25, quoted in Government Brief, Morgan IV, p. 46.
- ⁷⁰Government Brief, Morgan IV, pp. 48-49. This is an interesting statement in view of Jackson's later feud with Justice Black over Black's refusal to disqualify himself in Jewell Ridge Coal Corp. v. United Mine Workers of America, 325 U.S. 161 (1945), which was argued before the Court by Black's former law partner and counsel. (For a full discussio--albeit one-sided--of this feud, see Chapter 15: The Black Controversy in Gerhart, 1958).
- ⁷¹ Morgan IV, 313 U.S. 421. Jackson echoed part of these sentiments in 1944 when he wrote that the country lawyer "never quit....He moved for new trials, he appealed; and if he lost out in the end, he joined the client at the tavern in damning the judge--which is the last rite in closing an unsuccessful case, and I have officiated at many." (From Robert Jackson, "A Tribute to Country Lawyers: A Review [of I Can Go Home Again, by Arthur Gray Powell], American Bar Association Journal 30 (1944), pp. 136-139.
- ⁷²Government Brief, Morgan IV, p. 25.
- ⁷³ Morgan v. United States, 32 F. Supp. 546, quoted in Government Brief, Morgan IV, p. 28.

- 74 Government Brief, Morgan IV, p. 29.
- 75 Government Brief, Morgan IV, p. 36.
- 76 Morgan I, 298 U.S. 480.
- 77 Morgan II, 304 U.S. 18. It should, however, be noted that the full sentence says the mental processes are not to be probed if the Secretary "gave the hearing which the law required." The lower court, despite precedents to the contrary, might well have thought that in this case, if the adequacy of the hearing were in question, it would be permissible to do some probing.
- 78 Morgan IV, 313 U.S. 422. Although the prohibition in Morgan IV against probing the mind of the administrator would seem absolute, a subsequent decision in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, held that

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision makers is usually to be avoided. [Here Justice Marshall cites Morgan IV.] And where there were administrative findings that were made at the same time as the decision, as was the case in Morgan, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

How this case is to be interpreted is still open for discussion. Robinson, Gellhorn, and Bruff write:

Overton Park began speculation that perhaps a new way to examine agency decision making had been found. However, this has not yet come about. (Glenn Robinson, Ernest Gellhorn, and Harold Bruff, The Administrative Process (St. Paul: West, 1980), pp. 129-130.)

It is clear, however, that the Morgan IV prohibition against probing administrator's mental processes is not absolute, and the parallel between administrators and trial judges is not adhered to by the Court.

⁷⁹For a full discussion of the court-packing plan and Cummings' involvement, see Joseph Alsop and Turner Catledge, The 168 Days (Garden City, NY: Doubleday, 1938). Jackson wrote of the fight in its "historical and constitutional perspective" in The Struggle for Judicial Supremacy (New York: Vantage Books, 1941). He wrote: "The fight of 1937 was not a fight to destroy the Court or to impose legal limitations on its powers. The Roosevelt administration never refused obedience to any mandate of the Court. It made no attack on the tenure or integrity of any individual Justice. Its attack was on what it regarded as an abuse of power, not on the institution itself " (Preface, p. xiii).

This book is not discussed fully in the text of this chapter because it is an amalgam of other articles and speeches presented during his time as government attorney.

⁸⁰Jackson's opinions as Attorney General are found in Official Opinions of the Attorneys General edited by John T. Fowler (Washington: United States Government Printing office): Vol. 39 (1941) and Vol. 40 (1949).

⁸¹"Political Activity by Federal Employees," Opinions of the Attorneys General 39:462-465; "Public Housing Project," Opinions of the Attorneys General 40:1-3; "Negligence Claims - Liability of Employees," Opinions of the Attorneys General 40:38-41.

⁸²While the above questions quoted are from Jackson's opinion cited above, they are actually quoted from the Secretary's letter of 8 July 1940 to the Attorney General.

⁸³ Opinions of the Attorneys General 39, p. 464.

⁸⁴ Opinions of the Attorneys General 39, pp. 464-465.

⁸⁵ Opinions of the Attorneys General 39, p. 465.

⁸⁶ Opinions of the Attorneys General 39, p. 464.

⁸⁷ Opinions of the Attorneys General 40, pp. 2-3.

⁸⁸ Opinions of the Attorneys General 40, p. 3.

- ⁸⁹The project included "placing mains, laterals, and service connections; constructing sidewalks, curbs, gutters, and drainage lines and structures; paving; creating and landscaping parks and playgrounds; grading, straightening, and sodding creek; and performing incidental and appurtenant work." Opinions of the Attorneys General 40, p. 1, Apparently quoted from the description of the Meadowbrook Park Living Terrace project approved by Roosevelt on 8 June 1940.
- ⁹⁰ Opinions of the Attorneys General 40, p. 2.
- ⁹¹Quoted from a letter from the Acting Secretary of Agriculture on 5 February 1941 to the Attorney General. In Opinions of the Attorneys General 40, p. 39.
- ⁹² Opinions of the Attorneys General 40, pp. 39-40.
- ⁹³ Opinions of the Attorneys General 40, p. 40.
- ⁹⁴ Opinions of the Attorneys General 40, p. 41.
- ⁹⁵ Opinions of the Attorneys General 40, p. 34. The Federal Food, Drug, and Cosmetic Act is cited as 52 stat. 1040, 1055 (for section 701(e), the section of particular concern); Reorganization Plan No. IV is cited as 5 Federal Register 2421; 54 stat. 1284.
- ⁹⁶Section 701 (e) of the Federal Food, Drug, and Cosmetic Act, quoted in Opinions of the Attorneys General 40, p. 35.
- ⁹⁷298 U.S. 468 (1936).
- ⁹⁸Statement of the Federal Security Administrator, quoted in Opinions of the Attorneys General 40, p. 36.

⁹⁹"Delegation of Certain Powers and Duties to the Assistant Secretaries of Commerce," Opinions of the Attorneys General 39: 541-547. The passage of particular concern is:

The courts...will presume much in favor of the validity of an act performed by a responsible subordinate, particularly when he purports to act for, by direction of, or in the name of his superior; but there exists, nevertheless, the possibility that a particular act may be examined and rejected, and this is especially true in the case of regulations which have the force of law and bear upon the rights or conduct of private citizens.

Such regulations must, in some manner, emanate from you [i.e., the Secretary of Commerce]. If a subordinate should draft a regulation which truly reflected your view and wish, I should regard all requirements as fully met, but the difficulty and uncertainty that might attend the establishment of the essential facts strongly suggest the advisability of your personal signing or other unequivocal act of approval. [pp. 546-547]

¹⁰⁰ "The motivating purpose in that opinion was not merely to uphold proposed delegations of authority but, at the same time, to guard against anticipated challenges and resulting litigation, which might be ill-founded and might result satisfactorily but would be no less disturbing. It is sometimes better from this viewpoint to adopt a conservative course."

"The regulations dealt with in the statutory provision now under consideration are to be issued, amended, and repealed in conformity with a prescribed procedure, after public hearing, and with the right of review by the Circuit Courts of Appeals and by the Supreme Court upon petition by any person adversely affected; [and this authority is vested] in the Federal Security Agency for administration under the direction and supervision of the Federal Security Administrator. The situation is not the same as in connection with the regulations involved in the opinion of October 14, 1933." Opinions of the Attorneys General 40, pp. 37-38.

- ¹⁰¹ Opinions of the Attorneys General 40, p. 37. This opinion is dated 12 March 1941; Morgan IV (313 U.S. 409) was argued on 10 April 1941. Jackson, having won Morgan III, 307 U.S. 183 (1939), and lost Morgan II, 304 U.S. 1 (1938), was unlikely to rely on Morgan I, 298 U.S. 468 (1936), as the General Counsel of the Federal Security Agency urged. For Jackson's discussion of the first three Morgan cases, see Jackson, The Struggle for Judicial Supremacy, pp. 262-268.
- ¹⁰² "Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers," Opinions of the Attorneys General 39:484-496.
- ¹⁰³ James MacGregor Burns, Roosevelt: The Lion and the Fox (New York: Harcourt, Brace & World, 1956), pp. 437-440. This point is also made by Gerhart, p. 217, citing Langer and Gleason, The Challenge to Isolation (no publication data given), pp. 763-764.
- ¹⁰⁴ Opinions of the Attorneys General 39, p. 494. Jackson also offers an amusing sidelight to his opinion when he notes that "during the war between Russia and Japan in 1904 and 1905, the German Government permitted the sale to Russia of torpedo boats and also of ocean liners belonging to its auxiliary navy" (p. 496). Clearly a case of "what's sauce for the goose is sauce for the gander."
- ¹⁰⁵ Title V., Sec. 2 and Sec. 3 of the act of June 15, 1917, c. 30, 40 Stat. 217, 222. Jackson relies on this act and in the "rules of international law which the Congress states that it was its intention to implement. (H. Dept. No. 30, 65th Cong., 1st sess, p. 9)." from Opinions of the Attorneys General 39, p. 494.
- ¹⁰⁶ Robert Jackson, "A Presidential Legal Opinion," Harvard Law Review 66 (1953):1353-1361. Unless otherwise cited, the discussion which follows is from this article. For a slightly fuller treatment of the legislative veto, see Note 44 in Chapter Seven.
- ¹⁰⁷ Franklin D. Roosevelt, "Memorandum for the Attorney General," 7 April 1941, quoted in Jackson, "A Presidential Legal Opinion," p. 1357.
- ¹⁰⁸ Robert W. Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees," Harvard Law Review 66 (1953):569. Cited in Jackson, "A Presidential Legal Opinion," pp. 1353, 1360-1361.

CHAPTER IV

ROBERT JACKSON AS ASSOCIATE JUSTICE, 1941-1946

"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

Oliver Wendell Holmes, Jr., 1897

Jackson served on the Supreme Court for thirteen years, with a full year's interruption in 1946 when he was chief Prosecutor for the United States at Nuremberg. The year of the trials provides a convenient point at which to break his judicial career, especially in light of the frequently repeated assertion that Jackson's legal views were significantly changed as a result of that experience.¹

During his first five years on the Court, Jackson wrote opinions in several cases of interest to students of administrative law. Such cases as United States v. Carolina Freight Carriers (in which Jackson's dissent stressed the discretionary power of the Interstate Commerce Commission), Endicott Johnson v. Perkins (which sustained the subpoena power and expanded the investigatory power of the Secretary of Labor), and Wickard v. Filburn and United States v. Southeastern Underwriters (which enlarged the reach of the

Commerce Clause) are all directly relevant to the development of the administrative state of today.² This chapter discusses not only those cases but also cases which, while not bearing directly on administrative law, are essential to understanding Jackson's position on administrative law issues. For example, in United States v. Spector (1952), an alien deportation case, Jackson is particularly troubled by the possibility that the government's power to imprison an alien by administrative decision may set a precedent that will allow similar imprisonments of citizens. This concern with the power of precedent is more easily understood if we are aware of Jackson's position in Korematsu v. United States. Therefore, in this chapter are discussed Williams v. North Carolina and Estin v. Estin (two divorce cases resting on the full faith and credit clause), and Korematsu v. United States.³

Jackson's extra-judicial writings during this period are primarily concerned with the legal issues of the war, e.g., international law and the changing conception of the unjust war. These writings are discussed in the chapter on Nuremberg which follows. Two major pieces not concerned with the war are Jackson's book Full Faith and Credit: The Lawyer's Clause of the Constitution and an article published

in 1944, "Decisional Law and Stare Decisis." While these are both excellent works, neither is of sufficient concern to understanding Jackson's views of administrative law to justify a full in-text treatment. Rather the idea and insights about Jackson that are gained from these will be incorporated into the discussion which follows. Thus, Jackson's extra-judicial writings will not be considered in this chapter as a separate category.

ADMINISTRATION AND COMMERCE

This first grouping of cases provides insights into Jackson's views on national control of interstate commerce, his tendency to defer to administrative expertise, and his concern--sometimes excessive--for the practical consequences of the Court's decisions.

United States v. Carolina Freight Carriers

In 1935, the Motor Carrier Act had given the Interstate Commerce Commission (ICC) the task of regulating the motor carrier industry; the Act granted, among other things, authority to allocate certificates to motor carriers based on public convenience and necessity. Common carriers which were in business prior to 1 June 1935 could apply for an exemption to the "public convenience and necessity" clause of the Act; the purpose of this "grandfather clause" was to

reduce the injury to carriers then in operation which might, were the Act suddenly enforced against them, sustain considerable economic injury. However, the intent of Congress was clearly that the ICC was to "bring greater order and stability to the transportation system than had earlier obtained" without the Motor Carrier Act.⁴

Carolina Freight applied for a common carrier certificate under the grandfather clause. The carrier had eight trucks prior to the 1 June 1935 cut-off point but only four by 1936. The firm changed ownership and at the time of the ICC hearing on the certificate (1940) had seventeen trucks. In applying for the certificate, the firm was asking for virtually the entire Atlantic seaboard, carrying primarily cotton and some filler north and carrying virtually anything--to avoid empty trucks--on the return southbound trip. The ICC approved the certificate but restricted the carrier to certain commodities and designated given points which the carrier might serve. Carolina Freight appealed the ICC order. The District Court set aside the order. The District Court said:

It is, of course, reasonable to limit the certificate to the type of service rendered by the carrier during the grandfather period, and to limit the territory to that within which substantial service of that type has been rendered; but it is unreasonable to limit the certificate of one who has functioned as a general carrier to the specific commodities carried and the specific points served. The law cannot

reasonably be construed as authorizing such limitation.⁵

In addition, the District Court noted that Congress had not authorized a distinction between regular route carriers and irregular route carriers such as Carolina Freight, and similar restrictions were not placed on regular carriers.

The ICC appealed the District Court opinion, but the Supreme Court upheld the lower court. Justice Douglas wrote the opinion for the court, and Jackson, joined by Frankfurter, dissented.

Douglas deferred in part to administrative expertise. He found the ICC justified in basing restrictions on the geographical territory that Carolina Freight might serve. "The judgment is highly expert," wrote Douglas. "Only where the error is patent may we say that the Commission has transgressed. This is not the case."⁶ However, the Court had doubts about the restrictions on what articles might be carried.

The Court's first concern was the criteria under which the ICC had determined that only certain commodities--specifically those commodities carried both before and after 1 June 1935--could now be carried by Carolina Freight. A "common carrier" could not be restricted as to commodities although it could be restricted on the territory served; at issue was the proper application by the ICC of the statutory

standards required by Congress to determine the "common carrier" status of Carolina Freight. Douglas wrote: the "commission may not atomize [a carrier's] prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in 'bona fide operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property."⁷ That substantial evidence existed was not clear from the ICC ruling. "The difference between those types of carriers may well justify a sharp delimitation of the far flung territory which an irregular route carrier may profess to serve," but once the territorial limitations are established, there is "no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers."⁸ Such a distinction is unlawful.

The Court could not determine if the ICC had applied the standards to the facts in the Carolina Freight record. If, as Douglas suspected, the ICC had improperly construed the statute, the statutory rights of the carrier were impaired. "An insistence upon the findings which Congress made basic and essential to the Commission's action is no intrusion into the administrative domain," wrote Douglas.⁹

Because the Court cannot be certain that the proper construction of the Motor Carriers Act was used in issuing the restrictive certificate, the Court cannot affirm that the scope of the certificate is justified. The Court affirmed the District Court's decision to set aside the ICC order; this lower court decision apparently remanded the order to the commission and therefore the ultimate result of the case was to return it to the ICC for a new decision.

Jackson's dissent stressed that the ICC was exercising the discretion delegated to it by Congress. He complained that the case was being returned to the Commission for the Commission to reinterpret the law even though the Court had all the facts. He wrote:

Furthermore, if after this case is returned to the Commission, the Commission should leave no room for doubt that in making the challenged order it acted upon correct notions of law, it may yet be upset because the Court says its findings are not sustained by the evidence, it had better be said now. We have here a small record and simple facts, which are all before us, giving adequate basis for concluding whether these facts as found by the Commission warranted the order. On this record it is plain what the Commission has done. The only question is--Can it do what it has done? To send the case back to the Commission to be reconsidered or to say that it has already been considered in the light of the legal views which the Court expresses, and then, perhaps, to say that in any event the order is not warranted on the record before us, is really to invite the Commission to express abstract views on law. What this amounts to is that the Court refuses to tell the Commission what it thinks about the evidence until the Commission tells what it thinks about the law. We cannot regard this as the most helpful use of the power of judicial review.¹⁰

One of Jackson's major concerns as a justice was the regulation of the national economy.¹¹ He most frequently displayed this concern when the states tried to exercise rights over commerce, but in this case his concern was with the clash of public interest and private business rights as well as with deference to administrative expertise. The grandfather clause, which allowed carrier firms engaged in business before the 1935 cut-off to apply for exemptions, was included in the Motor Carrier Act to allow the ICC to regulate previously purely private businesses with minimal injury to the businesses. It was not intended to hamstring the Commission: some business would necessarily suffer from the regulation. Jackson wrote:

By the enactment [of the Motor Carrier Act], Congress asserted that the public interest in the motor carrier enterprise had become paramount to private interests....It was not to be expected that a sprawling, chaotic and cutthroat industry that had developed entirely in the private interest would be reduced to an orderly and regularized system of transportation in the public interest without stepping on a good many individual toes.¹²

Of course the carriers petitioned the ICC for any and every exemption, and as Jackson noted, "the scramble for grandfather rights represents the effort to pre-empt territory and service privileges without submitting to the test of public interest."¹³ In this case the Commission was right; it reduced the "nebulous and extravagant claims" of the carrier to more reasonable scope.¹⁴

Jackson did not agree that the ICC distinction as to commodities which could be carried by regular and irregular carriers was possibly an improper statutory construction:

The Court is 'not confident' that the Commission applied to this irregular route carrier the same test as to commodities that is applied to regular route carriers. We cannot be so confidently unconfident. The Commission seems to have made only the distinction between irregular and the regular route carriers that result from the differences inherent in the two types of enterprise....[To] reach different results on such different facts does not imply either the use of different legal standards or discriminatory administration.¹⁵

Jackson concluded: "We should not substitute our own wisdom or unwisdom for that of administrative officers who have kept within the bounds of their administrative powers."¹⁶

Endicott Johnson v. Perkins

At issue in Endicott Johnson v. Perkins was the enforcement by the federal District Court of a subpoena issued by Secretary of Labor Perkins against Endicott Johnson Corporation, a shoe company. The company had a government contract to manufacture shoes which clearly specified which plants under corporation control were involved in the contract. After completion of the contract, the Secretary issued a ruling on "integrated establishments" which meant that the Walsh-Healy Public Contracts Act applied not only to the primary assembly areas, as

previously, but also to the supply parts of the corporation. This meant, for example, that the government shoes might all be assembled in one location, and a second location engaged in producing shoe soles, even though some of the soles were not for the government shoes and went instead to Endicott Johnson's regular commercial line of shoes. The sole making plant now fell entirely under federal contract law. Endicott Johnson cheerfully supplied the payroll records of the plants mentioned in the contract when Perkins requested the records to verify adherence to federal policies. However, the shoe company refused to furnish records for the supply parts of the corporation. Perkins issued a subpoena to obtain the records, and Endicott Johnson refused to comply. Perkins then appealed to the District Court for enforcement, but the court refused to enforce on grounds that the Act was improperly invoked because the supply parts of Endicott Johnson were not covered under the Walsh-Healy Act.

Jackson wrote the Court's opinion over a dissent by Murphy in which Roberts joined. The Court found that the District Court had no power to review the Secretary's subpoena and should therefore enforce it. The issue of the constitutionality of the delegation of the subpoena power was summarily dismissed by Jackson. He found it so

obviously constitutional that he declined to discuss the question.

In his opinion, Jackson turned again to an affirmation of the integrity of the national economy: the Act's "purpose is to use the leverage of the Government's immense purchasing power to raise labor standards," and contractors who bid under the Act "voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract."¹⁷ Neither Jackson for the Court nor Murphy ever raise the issue of retroactivity except in a brief note by Jackson. The issue in the case was the behavior of the District Court rather than the propriety of Perkin's action. Jackson deferred, as usual, to both Congress and the administrator: "Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts"¹⁸ and one of the principal duties of the Secretary in administering the Act is the "conclusive determination of questions of fact" to guide Government procurement officers as they award or withhold Government contracts.¹⁹

The Secretary could not determine if any violations had occurred without examining the shoe company's payroll records. Jackson noted that the Secretary "is given no power to investigate mere coverage, as such, or to make

findings" on coverage except as an issue of violation is concerned.²⁰ It was therefore "advisable to begin by examining the payroll, for if there were no underpayments to be found, the issue of coverage would be academic."²¹

Jackson wrote:

This ruling [of the District Court] would require the Secretary, in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision. The former would be of dubious propriety, and the latter of doubtful practicality.²²

Jackson concluded his opinion by administering a rather sharp reprimand to the District Court. He wrote that the duty of the District Court is to enforce the subpoena: it is the duty of the Secretary to examine the evidence.

It seems clear from the facts of the case presented above, that Endicott Johnson might have a valid defense against any charges of violation, and Jackson acknowledged this. He noted that the shoe company had many matters to raise against the administrative complaint, such as the administrative rulings in place at the time of the complaint and the retroactive nature of the ruling, but "they are not of a kind that can be accepted as a defense against the subpoena."²³ Thus the agency no longer had to demonstrate that it had jurisdiction over the records of a company under investigation. "The requirement of probable cause was now

gone--and it was not even replaced by a requirement of probable jurisdiction, as long as the administration asserted some reason to believe that she had jurisdiction."²⁴

United States v. South-Eastern Underwriters

In 1869, the Court had decided in Paul v. Virginia²⁵ that insurance was not commerce within the meaning of the Commerce clause because agreements to insure were simply "contracts of indemnity." Therefore regulation of insurance belonged to the states. The courts had adhered to that concept from 1869 through the 1890 passage of the Sherman Anti-Trust Act to this 1944 case which involved an anti-trust suit brought against a group of fire-insurance companies that were fixing rates of insurance. The question before the court was whether or not the insurance industry was interstate commerce. Justice Black, writing for the Court, found that despite the history of allowing each state to regulate the insurance industry within its own borders, no previous case had "involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines."²⁶ However, now that the Sherman Anti-Trust Act had been applied in a administrative attempt to regulate the

insurance industries, the question was before the Court. The Court found that the insurance industry came within the definition of interstate commerce and therefore the Sherman Anti-Trust Act applied.

Stone, joined by Frankfurter, dissented, but on narrow grounds. He wrote that Congress had not intended the Sherman Anti-Trust Act to apply to insurance. At the time the Act was passed, insurance was quite clearly state business, and therefore Congress could not have meant for it to be included. In addition, Stone asserted that using interstate facilities such as roads and the postal service did not make insurance interstate commerce.

Jackson dissented in part. If the Court were "writing upon a clean slate," he would find insurance is commerce--and he expected that eventually it would be so considered. But as the matter stood, legally, the court should be bound by the principle of stare decisis, which in this instance would apply not only in the strictly judicial mode of following precedent wherever possible but also in a more legislative mode. In view of the large and complex nature of existing state regulation of insurance, Jackson felt the legislature should initiate national control of the industry. The main question is "What role ought the judiciary to play in reversing the trend of history and

setting the nation's feet in a new path of policy?"²⁷ Jackson acknowledged that insurance was, by 1944 standards, interstate commerce. However, he had "broad views on the reach of Congressional authority" and felt that the legislature should take the first step "to revise obviously outmoded constitutional concepts."²⁸ He was reluctant to change the law without a Congressional initiative:

[I]n contemplation of law, however, insurance has acquired an established doctrinal status not based on present-day facts. For constitutional purposes a fiction has been established, and long acted upon by the Court, the states, and the Congress, that insurance is not commerce....[This idea] continues only at the sufferance of Congress....²⁹

Jackson believed that as long as Congress does continue the fiction, it must be maintained. Jackson was concerned not only that Congress did not have legislation in place to replace the state regulatory process but that Congress also had indicated a lack of interest in passing such legislation. He felt it was not the place of the Court to force Congress to act:

A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and in part upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the Government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress....

Moreover, this is the method of responsible democratic government. To force the hand of

Congress is no more the proper function of the judiciary than to tie the hands of Congress.³⁰

Congress did not allow its hands to be either forced or tied. Congressional response was to pass the McCarran Act which allowed states to continue to regulate the insurance industry while acknowledging that insurance was interstate commerce. In 1946, the Court in Prudential Insurance Co. v. Benjamin "abandoned its traditional view that federal and state control over commerce are mutually exclusive and sustained the [McCarran] Act."³¹

A Diversion: Reconciling Wickard v. Filburn to South-Eastern Underwriters

In 1942 Jackson had written for a unanimous Court the decision in Wickard v. Filburn.³² This was the case of the Ohio chicken-farmer who raised wheat in excess of his quota set under the Agricultural Adjustment Act of 1938. Filburn contended that because the surplus wheat was raised for chicken feed, his product never became a market commodity and could not be regulated by the federal government under its commerce clause powers. The case was argued twice; Jackson, Murphy, Roberts, Byrnes, and Frankfurter requested the second argument.³³ They thought Filburn's attorney had skirted the constitutional issues, and they felt that "most of the Government men feel too sure of the Court to bother

with enlightening it."³⁴ The problem concerning the five justices was "the Court's power to inquire into the factual justification for congressional control over acts not interstate and not in themselves commerce, but which affect commerce."³⁵

Jackson found himself unable to agree with Black and Douglas that the "supremacy clause swept before it any objection that Congress had invaded the preserve of the states when the matter regulated touched the national interest in commerce."³⁶ Jackson, like Stone, thought such a view eliminated the role of the Court in passing upon the validity of commerce-related legislation. He wished instead to differentiate between legislation that regulated commerce and legislation controlling "activities that are neither interstate nor commerce [which] are regulated because of their effect on interstate commerce."³⁷ The Court, Jackson felt, must be able to inquire into the facts or else "the federal compact was pretty meaningless if Congress is to be the sole judge of the extent of its own commerce power."³⁸ Jackson's view carried the day, and Stone assigned the opinion to him.

Jackson's opinion found that Filburn's wheat did indeed affect interstate commerce:

...such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that

it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.³⁹

Filburn's contention that his wheat was not interstate commerce, while not rejected, was not deemed an adequate defense:

even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effects at some earlier time have been defined as 'direct' or 'indirect'.⁴⁰

An apparent contradiction exists in Jackson's opinions in Wickard v. Filburn and in South-Eastern Underwriters. In Filburn, he used the "substantial economic effect" to justify "federal intrusion into Filburn's chicken yard,"⁴¹ claiming that while Filburn's

own contribution to the demand for wheat may be trivial by itself [it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial....It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions...It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process.⁴²

This is the same argument that Jackson used in Carolina Freight Carriers: regulation is not for the benefit of the regulated. How then could Jackson dissent in South-Eastern Underwriters, when a clearly substantial economic effect resulted from the insurance industry's business, and the mechanical interaction of insurance with interstate commerce, the roads, and postal system was at least as great if not greater than Filburn's wheat farming?

The difference lies in what Jackson perceived as Congressional intent and in his views on judicial restraint. Although he was supportive of any legislative attempt to regulate the national economy, Jackson did not feel the Court should be setting economic policy. In the Agricultural Adjustment Act at issue in Filburn, Congress was reaching for federal control of agriculture regardless of state interest. Jackson was willing to defer to Congress. But in South-Eastern Underwriters, there was no clear indication of a Congressional intent to regulate insurance and more than a hint that it did not wish to do so. When the Sherman Anti-Trust Act was passed in 1890, insurance had been considered by the courts as outside the purview of interstate commerce for twenty years. For the next fifty years, Congress had made no attempt to establish federal control. Jackson, reluctant to hamper the "flexible

and responsible legislative process mentioned in his Filburn opinion," backed away. His opinion introduced a "new factor in the equation of judicial restraint--the notion that in certain instances, at least, the Court ought to await legislative action before undertaking to revise obviously outmoded constitutional concepts."⁴³

JACKSON AND STARE DECISIS

Korematsu v. United States

The final case to be considered at length in this chapter is Korematsu v. United States in which Jackson wrote a disturbing and somewhat unsatisfactory dissent. Fred Korematsu, an American citizen of Japanese descent, refused to obey a military order requiring him to leave his home in San Leandro, California, which had been designated part of Military Area No. 1, to go to a military assembly center, and from there to go to a relocation center; he was, however, also prohibited by military order from leaving the zone in which he lived. Thus he did not have the option to leave home for a location of his own choosing. Black, writing for the Court, found the government order under which Korematsu was convicted to be constitutional. Relying on Hirabayashi v. United States,⁴⁴ a case which had sustained the military curfew applied only to citizens of

Japanese ancestry, he found that exclusion of the Japanese-Americans from areas designated as military district was not "beyond the war power of Congress and the Executive."⁴⁵ Black narrowed Korematsu to the exclusion order and set aside an examination of where Korematsu would go should he leave Military Area No. 1. As Black put it: "[r]egardless of the true nature of the assembly and relocation centers--and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies--we are dealing specifically with nothing but an exclusion order."⁴⁶ He concluded:

[Korematsu] was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders--as inevitably it must--determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot--by availing ourselves of the calm perspective of hindsight--now say that at that time these actions were unjustified.⁴⁷

Justices Roberts, Murphy, and Jackson dissented separately. Roberts objected that Korematsu had been confronted with two contradictory orders that left him no option but "to submit to illegal imprisonment on the

assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus...."⁴⁸ He found that Korematsu had been subjected to a "clear violation of Constitutional rights,"⁴⁹ and that to pretend that Korematsu was not being ordered into a concentration camp was to ignore reality.

Murphy's dissent was even stronger: the exclusion of Japanese-Americans "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."⁵⁰ Murphy agreed that some deference must be paid to the "judgments of the military authorities who are on the scene and who have full knowledge of the military facts....[But individuals] must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."⁵¹ Murphy asserted that deciding the permissible boundaries of military discretion is a decision for the courts. In this case, the military excluded all persons of Japanese descent based on the grounds that some might be disloyal and on an "accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices...."⁵² He continued:

A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strict military considerations.⁵³

Jackson's dissent does not fall with Murphy's clear-cut Constitutional outrage or with Roberts' dislike of Justice Black's sophistry. He found that were Korematsu ordered to obey a similar command in time of peace, he supposes the "Court would refuse to enforce it."⁵⁴ This is, however, a time of war. Jackson rejected the concept that military expediency-- "reasonable military grounds for promulgating the order"⁵⁵--provides constitutionality to any military order. Jackson was, as always, intensely practical and he recognized that the military may at times be required to impose unconstitutional demands.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution....Defense measures will not, and often should not, be held within the limits that bind civil authority in peace.⁵⁶

Despite the occasional necessity for extra-constitutional military expedients, Jackson denied that the Court must agree to enforce them because of military necessity:

But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.⁵⁷

Jackson seems in these two excerpts from his dissent to be asserting that in time of war, American society may become separated from its Constitution, and a choice must be made to uphold one or the other. The danger in taking the opposite view--that without the Constitution we have no society--is that the desire to protect the Constitution may require such ineffective military measures that both society and Constitution fall. Jackson cannot bring himself to go as far as the majority opinion but he refuses to absolve the military for its behavior. Black's opinion asserts, in effect, that DeWitt was justified in excluding American citizens of Japanese descent from the West Coast simply by virtue of being the military commander; Jackson, forced to decide, would declare DeWitt's order invalid. This may be suggesting a no-man's-land of military behavior in which the military personnel must be willing to accept the consequences of behavior which is later declared illegal. However, in view of Jackson's often demonstrated prediliction for practicality, such a no-man's-land permits the military to do as it pleases while releasing the Court from complicity in the military's actions: this is the heart of Jackson's dissent.

As much as Jackson disliked the Court's acceptance of military expediency, he found "a judicial construction of

the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself."⁵⁸ What is the danger Jackson foresaw?

THE DIVORCE CASES AND STARE DECISIS

Jackson frequently mentioned the value--and dangers--of stare decisis. In 1942 he dissented in Williams v. North Carolina.⁵⁹ The case rested on a controversy in which a man and a woman in North Carolina abandoned their respective spouses, moved to Nevada and obtained divorces, married each other, and returned to North Carolina. North Carolina, with very strict divorce laws, charged them with bigamy. The Supreme Court reversed an earlier ruling in Haddock v. Haddock⁶⁰ and held that the Nevada decrees were valid. Jackson dissented for four reasons. His first objection was that the Court had misconstrued the issue of jurisdiction. He wrote that "[t]he effect of the Court's decision today...is to deprive this Court of control over the operation of the full faith and credit and the due process clause of the Federal Constitution in cases of contested jurisdiction and to vest it in the first state to pass on the facts necessary to jurisdiction."⁶¹ He also disagreed with the Court because neither spouse remaining in North Carolina had been served with process: "I cannot but

think," he wrote, "that in its preoccupation with the full faith and credit clause the Court has slighted the due process clause."⁶² The third objection was based on Jackson's doubt that true domicile had been established in Nevada: "a stay of about six weeks at the Alamo Auto Court [is] an address hardly suggestive of permanence."⁶³ His fourth objection involved a concern with stare decisis:

The Court says that its judgment is 'part of the price of our federal system.' It is a price that we did not have to pay yesterday and that we will have to pay tomorrow, only because this Court has willed it to be so today. This Court may follow precedents, irrespective of their merits, as a matter of obedience to the rule of stare decisis. Consistency and stability may be so served. They are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it and to lower courts which must apply it. But we can break with established law, overrule precedents, and start a new cluster of leading cases to define what we mean, only as a matter of deliberate policy.⁶⁴

And Jackson can find no "countervailing public good" to justify the change in law.⁶⁵ In Williams, Jackson did not extend his view to suggest, as he does in South-Eastern Underwriters, that Congress is the repository of the power to change government policy, but he did present the same argument that precedent should not be overturned unless the resulting good outweighs the inevitable chaos of a change in law. He viewed stare decisis as a useful tool that can

"deny to the courts the power to determine social policy while leaving Congress...free to determine within wide limits [e.g., constitutional constraints on Congressional power] the major lines of governmental policy without fear that the weight of outmoded precedent will unduly hamper that power."⁶⁶ It is, in other words, a two-edged sword. Jackson used it to cut in another direction in Estin v. Estin.⁶⁷

At issue in Estin was the validity of a support agreement entered into in New York. Mrs. Estin had obtained a separation agreement in New York which obligated her estranged husband to pay her alimony. Several years later, the husband moved to Nevada, established domicile, and sued for divorce. Mrs. Estin was served with notice of the divorce proceedings through "constructive service" which means the defendant spouse is not served personally but instead through some indirect method such as publication in a local newspaper. She did not contest the divorce. The Nevada divorce, when granted, did not award alimony to Mrs. Estin, and Mr. Estin stopped the monthly payments. She sued in New York to recover the overdue payments; Mr. Estin asserted that his Nevada divorce voided the separation agreement entered into in New York. The New York appellate courts affirmed the initial decision in Mrs. Estin's favor, and the Supreme Court affirmed.

Both Frankfurter and Jackson dissented, Jackson basing his dissent in part on Williams. He asserted that "[f]or reasons which I stated in dissenting in Williams v. North Carolina ...I would not give standing under the [full faith and credit] clause to constructive service divorces obtained on short residence."⁶⁸ However, since the Court did not agree with him in Williams, he felt obligated to follow the concept of stare decisis and to rely on Williams. One concern of the New York appellate court had been that Mrs. Estin, deprived of her alimony, might become a welfare charge on the state. The appellate court opinion stated that in New York, divorces do not automatically terminate prior separation agreements. Jackson in his dissent disagreed with that interpretation of New York law. He wrote that as a divorce in New York does terminate any support agreement--here Jackson relied on his experience as a New York lawyer--and Williams requires New York to recognize the divorce as though it were a New York decree, then Mrs. Estin's support agreement should be terminated.

Louis Jaffe writes of this dissent that

We may suspect that in his role of dissenter he was allowing himself considerable license to express his rather scornful disapproval of Williams. By its fruits shall ye know it! Adopt a doctrine, he seems to say, that makes divorce easy because you set little value on a state's interest in the sanctity of the marriage relation; but squirm and crawl to avoid your premise when it becomes a matter of property, in which you do believe.⁶⁹

Jackson's concern over precedent is not limited to his views on judicial policy-making or to twitting fellow members of the Court for inconsistent decisions. He is also concerned about the dangers inherent in thoughtlessly stating the Court's opinion.

The Importance of Stare Decisis

In 1944, the same year as the Korematsu decision was announced, Jackson spoke at the annual meeting of the American Law Institute on the subject of "Decisional Law and Stare Decisis,"⁷⁰ a topic that was apparently much on his mind. He noted that the multiplication of courts and of decisions had led to such a plethora of decisions that an astute lawyer could find a precedent for almost anything. Precedents, he said, gained value or authority from two sources. The first was a fiat value due to the high authority of the courts. The second was an intrinsic value based on the individual quality of the opinion. A lasting precedent must have the full commitment of its court or of a majority of the justices,⁷¹ and to obtain this commitment the precedent must be both based on a careful study of the background and legal antecedents of the case and well drafted.

Williams and Estin had not suited Jackson's requirements; they represented to him shoddy scholarship and

a disregard for consequences. Korematsu, on the other hand, outraged both his concern for individual liberty and his sense of fair play. His concern for individual liberty is accentuated by the realization that Korematsu, in itself an injury to Fred Korematsu's constitutional rights, provided a highly dangerous precedent:

A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time, has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition inbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own....⁷²

It is quite clear that Jackson viewed Korematsu as an outrageous decision on its own merits, but he "felt that he had been led down the garden path in accepting Stone's Hirabayashi decision."⁷³ Jackson notes that "although Hirabayashi raised the issue of the constitutionality of the

exclusionary order reached in Korematsu," we were urged to consider only the curfew feature....We yielded, and the Chief Justice guarded the opinion as carefully as language will do."⁷⁴ Stone's guarded language was insufficient. "However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones."⁷⁵ And the weapon which was used against Korematsu was the precedent--agreed to by the full court only with great reluctance and after persuasion by Chief Justice Stone⁷⁶--set in Hirabayashi.

Jackson had prophetically written in 1941 that by establishing new precedents the court "binds itself and its successors and all inferior courts and future judges to decide similar cases by like logic. It not only limits the judgments of other judges, but, so long as the rule stands, it destroys the discretion even of the men who made it."⁷⁷

CONCLUSION

Although about one-third of Jackson's opinions were written before he left for Nuremberg, very few of them were of great import in administrative law. It was not until later that the major cases such as Wong Yang Sung, Chenery II, and FTC v. Ruberoid were decided. What can be gleaned from these early cases is the beginning of a judicial philosophy. Jackson deferred whenever possible to administrative expertise; his extra-legal writings both in this period and as a government attorney show a strong respect for the value of the administrative process.

In line with his approval of administration, he consistently supported the right of the government to regulate the national economy: "Jackson is outstanding for the vigor of his federalism," wrote Louis Jaffe. "No other modern judge has defended so bold and comprehensive a program of judicial action. The great end of the Constitution, the road to manifest destiny, is the national economic market."⁷⁸ Arthur Sutherland wrote that "[t]o the day of his death, Jackson never participated as a judge in any decision declaring invalid any act of Congress on the ground that it exceeded the federal power to control any part of the national economy."⁷⁹ Such a position is not to be wondered at: Jackson was a preeminent New Dealer and had

been active--and approving of the need for action--in Roosevelt's fight with the Supreme Court. His book, The Struggle for Judicial Supremacy, is a strong statement of his views. This book was "very much the product of his Washington experience between 1934 and 1941,"⁸⁰ and Jackson himself affirmed his position when he said "The only agency with the power to condition capitalism and industrialism to survive is the government. To this end I have supported, in general, the program of reform called the 'New Deal' with more doubts about its adequacy than about its moderation."⁸¹ Even his dissent in South-Eastern Underwriters is a support of the Congressional power to regulate--but only when Congress chooses to exercise the power.

The final point raised in this chapter was Jackson's view on the merits and dangers of stare decisis. He felt strongly about the establishment of precedent, and this concern will appear again in his writings on the Nuremberg trials and in later court cases. Ever the practical advocate, he used precedent as a tool to achieve his own purpose whether benign or mischievous, and he could take umbrage at being "led down the garden path" by the misuse of precedent. But his more serious concern was deeper than mere utility, as his dissent in Korematsu shows.

These early cases do not shed much light on Jackson's view of administration beyond an affirmation of New Deal orthodoxy in deferring to administrative expertise and discretion. This deference is the administrative corollary of the broader jurisprudential position of judicial restraint in economic affairs that characterized the "Roosevelt Court."⁸² But the cases do provide a forum for some of Jackson's beliefs that developed during this period and that would be of importance when he returned to the Court.

NOTES

- ¹See, for example, Eugene Gerhart, America's Advocate: Robert H. Jackson (Indianapolis: Bobbs-Merrill, 1958), p. 455; Henry Abraham, Justices and Presidents (New York: Oxford University Press), pp. 219-220. It should be noted, however, that Abraham cites Gerhart in his section on Jackson and may not be independently asserting Jackson's change of view.
- ² United States v. Carolina Freight Carriers, 315 U.S. 475 (1942), (dissent); Endicott Johnson v. Perkins, 317 U.S. 501 (1943); Wickard v. Filburn, 317 U.S. 111 (1942); and United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944), (dissent).
- ³ Williams v. North Carolina, 317 U.S. 287 (1942) (dissent); Estin v. Estin, 334 U.S. 287 (1948) (dissent); White v. Winchester Country Club, 315 U.S. 32 (1942); and Korematsu v. United States, 323 U.S. 214 (1944) (dissent). Although Estin properly belongs in the discussion of post-Nurmeberg cases, it is so closely connected to Williams that I chose to discuss it in this chapter.
- ⁴315 U.S. 481. Justice Douglas here cites Senate Doc. No. 152, 73d Cong., 2d Sess.
- ⁵315 U.S. 479. This is from the District Court opinion (38 F. Supp. 549) but is cited by Justice Douglas without full reference.
- ⁶315 U.S. 482.
- ⁷315 U.S. 483-484.
- ⁸315 U.S. 485; 315 U.S. 484-485.
- ⁹315 U.S. 489.
- ¹⁰315 U.S. 491-492.
- ¹¹"To Jackson, concepts such as interstate commerce, due process, privileges and immunities, and full faith and credit are to be chosen as tools with appreciation of their several qualities....[H]is aim is the integrity of the national economy." Louis Jaffe, "Mr. Justice Jackson," Harvard Law Review 68 (1955):949.

12315 U.S. 492.

13315 U.S. 493.

14315 U.S. 494.

15315 U.S. 494-495.

16315 U.S. 495.

17317 U.S. 507.

18317 U.S. 507.

19317 U.S. 507-508.

20317 U.S. 508.

21317 U.S. 509.

22317 U.S. 508.

23317 U.S. 509.

24 Glen Robinson, Ernest Gelhorn, and Harold Bruff, The Administrative Process (St. Paul, Minn.: West, 1980, p. 488).

25 Paul v. Virginia, 8 Wall. 168, 19 S. Ct. 361 had declared insurance not commerce because insurance was simply a "contract of indemnity" 8 Wall. 183, cited at 322 U.S. 543, note 17. I am indebted to Alpheus Mason's biography Harlan Fiske Stone: Pillar of the Law for the discussion of Southeastern Underwriters which follows.

26322 U.S. 534.

27322 U.S. 586.

28 Mason, p. 620, un-numbered note.

29322 U.S. 588.

30322 U.S. 594-595.

31 Mason, p. 621, second un-numbered note.

32317 U.S. 111.

- ³³Mason, p. 594. Mason adds in a note on the same page that Justice Reed did not participate in the case, and Stone, Black, and Douglas were for deciding the case on the first hearing. Stone was, however, willing to allow the rehearing. (Memorandum re Wickard v. Filburn, 27 May 1942, in Mason, p. 594.)
- ³⁴Memorandum from Jackson to Stone, 25 May 1942, in Mason, p. 594.
- ³⁵Mason, p. 595.
- ³⁶Mason, p. 594.
- ³⁷Memorandum from Jackson to Stone, 25 May 1942, in Mason, p. 594.
- ³⁸Memorandum from Jackson to Stone, 25 May 1942, in Mason, p. 595.
- ³⁹317 U.S. 128.
- ⁴⁰317 U.S. 125.
- ⁴¹Mason, p. 595.
- ⁴²317 U.S. 127-129. Notes omitted.
- ⁴³Mason, un-numbered note, p. 620.
- ⁴⁴320 U.S. 81. Hirabayashi was an American college student who had refused to obey both a curfew order and an order to report to a military assembly center. Indicted and convicted on both counts, his sentences were to run concurrently. The Court therefore considered only the curfew issue first, since if the conviction were sustained, the Court would not need to consider the thornier issue of the detention order.
- ⁴⁵323 U.S. 217.
- ⁴⁶323 U.S. 223.

*7323 U.S. 223-224. To sustain his opinion, Black had to discount the value of hindsight, which would seem an integral part of the judicial process. General DeWitt, the Commanding General who issued the orders, testified before the House Naval Affairs Subcommittee to Investigate Congested Areas (Part 3, pp. 739-40, 78th Congress, 1st Session) that "The danger of the Japanese was, and is now--if they are permitted to come back--espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese....But we must worry about the Japanese all the time until he is wiped off the map." Cited in 323 U.S. 236, note 2 (Murphy dissenting). With such an outlook, General DeWitt's decisions on the behavior of American citizens can scarcely be absolved from the taint of racism.

Similarly, special interest groups had a financial interest in having the Japanese-Americans evacuated. The managing secretary of the Salinas Vegetable Grower-Shipper Association admitted his association's racist perspective:

We're charged with wanting to get rid of the Japs for selfish reasons....We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over....They undersell the white man in the markets....They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either (323 U.S. 239, note 12. Citing Taylor quoting Austin E. Anson, "The People Nobody Wants," Saturday Evening Post 214 (9 May 1942), p. 66).

Somehow the Protestant work ethics was an offense if not practiced by white men; one view of the "white farmer" may be found in John Steinbeck's Grapes of Wrath.

There was an additional financial incentive to remove these citizens. After evacuation, the majority of their property was auctioned. While of course the proceeds went to the original owners, the money received was but a fraction of the value of the property.

For Justice Black, military expediency covered a wide range of motives and results which can only be ignored by refusing to invoke "hindsight."

48323 U.S. 233.

49323 U.S. 225.

50323 U.S. 233.

51323 U.S. 234.

52323 U.S. 239.

53323 U.S. 240.

54323 U.S. 244.

55323 U.S. 244.

56323 U.S. 244.

57323 U.S. 245.

58323 U.S. 246.

59317 U.S. 287.

60201 U.S. 562 (1905). This case decided that "a state court, even of the plaintiff's domicile, could not render a judgment of divorce that would be entitled to federal enforcement in other states against a nonresident who did not appear, and was not personally served with process." Discussed in Williams, 317 U.S. 316. Jackson's dissent continues: "The opinion was much criticized, particularly in academic circles. Until today, however, it has been regarded as law, to be accepted and applied, for good or ill, depending on one's view of the matter." Williams, 317 U.S. 316. (Notes omitted).

61317 U.S. 315.

62317 U.S. 319-320.

63317 U.S. 321.

64317 U.S. 323.

65317 U.S. 324.

66J.A. Nielson, "Robert H. Jackson: The Middle Ground," Louisiana Law Review 6 (December 1945), p. 388.

67 Estin v. Estin, 334 U.S. 541 (1948).

⁶⁸334 U.S. 554.

⁶⁹Louis Jaffe, "Mr. Justice Jackson," Harvard Law Review 68 (1955), p. 963. ⁷⁰Robert Jackson, "Decisional Law and Stare Decisis," American Bar Association Journal 30 (1944): 334-335.

⁷¹The strength of Jackson's belief in a unanimous court when establishing a landmark precedent is demonstrated in his actions when the Court announced its decision in Brown v. Board of Education. Jackson was in the hospital recuperating from a heart attack and left the hospital to sit on the bench when the decision was read. Gerhart, p. 468.

⁷²323 U.S. 245-246.

⁷³Mason, p. 677. Hirabayashi v. United States is found at 320 U.S. 81 (1943).

⁷⁴323 U.S. 246-247.

⁷⁵323 U.S. 247.

⁷⁶Mason, pp. 672-676.

⁷⁷Jackson, The Struggle for Judicial Supremacy, pp. 295-296. In context, this quote discusses Court decisions which declare acts of Congress unconstitutional.

⁷⁸Jaffe, "Mr. Justice Jackson," p. 996.

⁷⁹Arthur Sutherland, "The Nation's Economy and State Frontiers: Mr. Justice Jackson on the Supreme Court's Role in National Economic Policy." Stanford Law Review 8 (1955), pp. 34-35.

⁸⁰William Rehnquist, "Robert H. Jackson: A Perspective Twenty-Five Years Later." Albany Law Review 44 (April 1980), p. 537.

⁸¹Robert Jackson, "The Philosophy of Big Business," Vital Speeches 4 (1938), p. 208.

⁸²For a full treatment of this issue, see C. Herman Pritchett, The Roosevelt Court (New York: Macmillan, 1948), especially Chapter Ten.

CHAPTER V

THE NURENBERG TRIALS

"If an idea is right in itself, and if thus armed it embarks on the struggle in this world, it is invincible and every persecution will lead to its inner strengthening."

Adolf Hitler, 1933

On 26 April 1945, Jackson accepted President Truman's appointment as Chief Prosecutor for the United States at the Nuremberg Trials. Jackson had long had an interest in problems of international law; Truman's appointment of Jackson was prompted by an address given earlier that year in which Jackson stressed the need for an impartial court if a court were to be used to try the Nazis. Jackson's temporary departure from the Court led to some criticism from his fellow justices. His absence probably stopped him from becoming Chief Justice, especially because of the eruption of his feud with Black and the adverse publicity from his cross-examination of Goering. Jackson, however, felt that the trial was one of the most significant legal events of his lifetime, and he prosecuted his case with great vigor. After his return to the Court, he wrote often of the trials themselves, and his subsequent opinions

reflect the impact of the trials and the lessons he learned from the fall of the Weimar Republic.

EXTRA-LEGAL WRITINGS

One of Jackson's earliest pronouncements on international law came at an address given at an American Bar Foundation dinner in October of 1941.¹ Jackson was newly on the Court, and he stressed that nations must choose either to abide by law or to wage war.

At the end of this war we must either throw the full weight of American influence to the support of an international order based on law, or we must outstrip the world in naval and air, and perhaps in military, force. No reservation to a treaty can let us have our cake and eat it too.²

Always practical when applying the law, Jackson acknowledged that the perfect legal order would not be found:

The triumph of the law is not in always ending conflicts rightly, but in ending them peaceably. And we may be certain that we do less injustice by the worst processes of the law than would be done by the best use of violence. We cannot await a perfect international tribunal [such as the League of Nations] before proscribing resort to violence even in case of legitimate grievance.³

The following year Jackson returned to the idea of an international law in a speech which contrasted civil law and common law.⁴ One of the most significant contrasts between the two systems is the "dissimilarity of method by which [they] submit their particular doctrines to change....The

civil law depends for progress on legislation....Its method is to promulgate and from time to time to amend comprehensive codes of rules....The emphasis in study and in application is on principles, not cases."⁵ Common law differs; the American contribution to international law has been helped by sharing common law principles with Great Britain, especially as arbitrations such as the Jay Treaty, the Alaska Boundary arbitration, and the North Atlantic Fisheries arbitration were decided.⁶ In the common law, "emphasis is on the customary law as declared in judicial decisions, particularly by courts of last resort."⁷

Jackson was to have this difference brought home sharply when determining what procedures should be used in the war criminal trials: the Russians objected to the American system of indictment, which provides the accused with only the charges against him and not the evidence as well, as not fair to the defendant. They also contended that to withhold knowledge of the evidence would "tend to promote contests, and permit trials to drag out into endurance tests, like sporting events."⁸ Providing a full indictment of both charges and evidence to the defendant gives him a fair opportunity to prepare his defense, and for the guilty to see the weight of evidence against them so they can plead guilty.⁹ Jackson thought "[t]here is much to be said in favor of this view."¹⁰

On 13 April 1945, Jackson spoke to the American Society of International Law. This address,¹¹ brought to the attention of President Truman, was a major factor in Truman's decision to name Jackson as Chief Prosecutor.¹² In this speech he stressed the need both for international law to protect society and for any tribunal examining war criminals to be independent and impartial.

One of the ominous signs of our times is that the progressive mobilization of the resources, manpower, and business of the country has necessarily been accomplished at the cost of surrendering or impairing one after another of our traditional individual liberties....Awareness of the effect of war on our fundamental law should bring home to our people the imperative and practical nature of our striving for a rule of law among the nations.¹³

American legal philosophy, he had written in 1942, sees international law as part of our national law, especially related to the Constitution and to treaties.¹⁴ But now he felt it was important to step out of a narrow national perspective.

It is important that we do not allow the assumptions that lie at the foundation of any worthwhile international judiciary to become obscured in issues or pressures about details such as the number, method of selection, nationality, or tenure of judges.¹⁵

What are the assumptions which Jackson felt lay at the foundation of an international court? First was the

requirement that such a court must be independent of any nation or interest. He observed with dismay the view that courts should set policy, or that they should, like the Russian courts, act as "an instrument of policy designed to carry out the policy of the executive:"¹⁶

Anglo-Americans and many others generally have adhered to the concept of a court as an independent body which neither serves nor controls policy and whose members owe a duty to truth in fact-finding and to the science of law in decision that transcends any duty to nation, to class, to governments, or to party....[T]his is quite contrary to the concept prevailing among nearly all our enemies, among some of our allies and some neutrals, and beginning to have a considerable and influential school of thought in the United States. They think of courts as [dependent] and controlled arms of the policy-making part of government, as legitimate instruments to promote policy, and as bodies whose fact-findings and decisions may properly reflect the national interest, the class or party interest which is responsible for their creation.¹⁷

An international court cannot follow the latter view: it must be independent of any nation or interest. Courts should not be a policy weapon. They have a "foundation in nature" and a "necessary harmony with higher principles of right and wrong."¹⁸ Jackson believed that the power of law is not merely the power of social control:

I confess even to mid-Victorian romanticism which believed that 'Thrice armed is he whose cause is just.' Of course, these are difficult concepts for the most wise to delimit and apply and easy for the most shallow to ridicule. But unless there is something of substance in these techniques, there is nothing to law except the will of those who have the power.¹⁹

The second requirement for a war tribunal was that the court proceedings must not be used to justify military or political decisions to execute war criminals. Jackson wrote that "undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride."²⁰ Instead, the "ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty."²¹

ACCEPTING THE APPOINTMENT

When Judge Roseman, Roosevelt's personal representative who had been in London negotiating with the British on war criminal treatment, conveyed Truman's appointment to Jackson, Jackson accepted without consulting either Chief Justice Stone or his friend Felix Frankfurter, even though Jackson generally felt that Supreme Court justices should not accept non-judicial official assignments.²²

Knowing that his acceptance was likely to cause a furor, why did Jackson agree? General Telford Taylor, who served with Jackson at Nuremberg, suggests three principal reasons for Jackson's acceptance.²³ First was his desire to

participate more directly in the war effort. Since the war did not reach the Bench, Jackson was restless and missed the excitement of executive responsibility. A second reason was the strained atmosphere on the Court. Personal relations among the brethren were not easy, and Jackson was not sure he intended to return. Third, and perhaps the most powerful reason of all, was the unique opportunity afforded by Nuremberg to implement his ideal of an "international order under law."

It is difficult to overestimate the importance of international law to Jackson. While his contributions in other fields were important, "it is in the field of international law that he did his most striking and important work."²⁴ Jackson was willing to leave the Court if necessary: "I was entirely willing to quit the Court if this was the price. In those days this wasn't a pleasant place to be."²⁵ For Truman to appoint a member of the Supreme Court to Nuremberg meant the other three participating nations--Great Britain, France, and Russia--would also send high quality representatives.²⁶ This would insure not only a trial of high calibre but also that the principles established at the trial would be well-received by the international legal community. This must have weighed heavily with Jackson:

There can be no doubt that [at Nuremberg] he ardently believed that great moral issues were at stake....He also felt that here was an opportunity to establish, once and for all, the truth that aggressive war is the greatest of all crimes.²⁷

Chief Justice Stone disapproved not only of Jackson's appointment to Nuremberg but also of the trial itself. He refused to comply with Biddle's personal request to swear him in as one of the judges. "I do not wish to appear, even in that remote way, to give my blessing or that of the Court on the proposed Nuremberg trials," he explained.²⁸ Earlier he had written to a friend, "Jackson is away conducting his high-grade lynching party in Nuremberg. I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law."²⁹ Justice Black also found Jackson's behavior inappropriate for a member of the Court. Black's son writes that Black "felt strongly that Jackson had no business taking a leave of absence from his job on the Supreme Court to undertake an executive function. It not only subverted the separation of powers, but it also crippled the ability of the Court to function at full capacity."³⁰ Douglas was the third justice to speak out in opposition. He wrote: "[Jackson] was gone a whole year, and in his absence we sat as an eight-man Court. I thought at the time he accepted the job that it was a gross violation of separation of

powers to put a Justice in charge of an executive function. I thought, and I think Stone and Black agreed, that if Bob did that, he should resign. Moreover, some of us--particularly Stone, Black, Murphy and I--thought that the Nuremberg trials were unconstitutional by American standards."³¹

Douglas here is missing the point. No one expected the trials to be run by American constitutional standards; indeed, the whole purpose of an international tribunal is that it is not controlled by the procedures and legal philosophy of any one nation. In addition, while representing the United States as Chief Prosecutor is undoubtedly an Executive action, Jackson's actions do not necessarily violate the concept of separation of powers as it is historically understood. Madison, in the Federalist Papers (No. 47)³², discussed the intent of the Framers when they established separation of powers as a principle of the new American government. Tyranny, wrote Madison, results from the accumulation of legislative, executive, and judicial power in the same hands. The authority on separation of powers is Montesquieu, and his source is the British parliamentary system; however, Montesquieu "did not mean that these departments [legislative, executive, and judicial] ought to have no partial agency in or no control

over, the acts of each other. His meaning...[is] that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."³³ Thus, in the historical sense of the principle, Jackson was not violating separation of powers.

PROBLEMS AT NUREMBERG

One of Jackson's first problems--in addition to hammering out the details and procedures of the trial with his colleagues from France, Great Britain, and Russia--was an issue of administration. He had to collect his staff, to secure a site for the trial, to prepare a building for the influx of lawyers, spectators, reporters, and military, and to provide secure facilities for the prisoners.

Many of these matters [site, linguistics, etc.] were no more congenial to Jackson than the conflicts encountered in framing the charter. He was not a born administrator. He did not relish controversy with or among his subordinates, and tended to withdraw from administrative and executive duties. He delegated his authority extensively and sometimes mistakenly. The staff at Nuremberg was plagued with irritations and misunderstandings that a firmer administration might at least have mitigated, and some of Jackson's ablest assistants [such as General Donovan] soon departed because of policy disagreements or because their tasks and responsibilities were not sufficiently defined.³⁴

A different view of Jackson's administrative abilities comes from two Englishmen. Viscount Kilmur, Lord High Chancellor of Great Britain, wrote "[a] great lawyer is not necessarily a good organiser, but here the extent of the organizational problems that were solved must give Jackson the palm."³⁵ Lord Shawcross, who was with Jackson at Nuremberg, said that Jackson "never lost sight of [the domestic details]."³⁶ Whichever view is the more accurate, it is quite clear that much of Jackson's time and energy was occupied with organizing the trial.

More interesting to Jackson were the complexities of compromising on a legal procedure to satisfy all four powers. The Russians were the most difficult to work with, but as the United States and Great Britain had captured the worst prisoners and the best evidence, they were prepared to do without Soviet help if necessary.³⁷ The four powers were well-represented. Great Britain sent the Lord Chancellor and the Attorney General; France sent the Judge of the Cour de Cassation and a prominent international law scholar, and the U.S.S.R. sent the Vice-President of the Federal Supreme Court and a leading Soviet law professor.³⁸ Most of the problems were procedural rather than substantive. As discussed above, the Soviets wanted to supply a full copy of the indictment to the defendants, which was done; the

indictments had much more detail than is usual in a British or American trial. Common law rules of evidence were not followed: "Continental lawyers generally regard them with varying degrees of abhorrence. Since they were devised mainly to control jury trials, we saw no reason to urge their use in an international trial before professional judges."³⁹ Admissability of evidence was decided by the tribunal based upon "probative value."⁴⁰ For example, the French and Russians were shocked at the idea of surprising the defendants with previously undisclosed evidence, which was very likely to occur as Occupation Forces delved more deeply into government records. The issue ended up with allowing evidence to be admitted as discovered but also making it available to the defendants as soon as possible.⁴¹ Anglo-American law permits a defendant to testify under oath; Continental law does not permit such testimony but does allow the accused at the end of the trial to make an unsworn statement. At Nuremberg the Nazis were permitted to do both.⁴² And throughout the negotiations Jackson insisted that the tribunal be impartial and not be a kangaroo court. The idea of establishing guilt by trial was difficult for the Soviets to grasp. Jackson wrote, "I have never doubted their good faith in accepting and in trying to apply this theory at the trial, but their failure to grasp

its full import brought up the same issue in many guises."⁴³ For example, the Russians proposed putting the accused at penal labor until the trial; Jackson refused because to do so presumed their guilt. Jackson also refused to allow any of the accused to testify against their fellow Nazis in return for clemency of any kind. He felt "such a method was altogether out of place in a great international trial involving profound legal and moral issues."⁴⁴ In addition, such bargains--or even lesser ones such as the offer from one defendant to cooperate if he could be shot rather than hanged--were unnecessary to procure the convictions: the "testimony thus obtained is not discredited by the suspicion that it was influenced by promises or expectations of leniency."⁴⁵

THE OUTCOMES OF NUREMBERG

One of the outcomes of Nuremberg which affected Jackson most personally was that Fred Vinson, rather than he, became Chief Justice when Harlan Stone died on 22 April 1946. There had always been rumors that Roosevelt intended to appoint Jackson as Chief Justice, and one rumor even said that Stone accepted his advancement with the proviso that he would retire at seventy and let Jackson have his turn.⁴⁶ At Stone's death Jackson was urged to leave Nuremberg for

Washington to assert his claims to the position. It is, however, unlikely that he was seriously in contention. The Jackson-Black feud was by then public knowledge; the appointment of Fred Vinson to the post unleashed a final vituperative attack by Jackson that was apparently prompted by the report that Black would resign if Jackson were appointed.⁴⁷ In addition, in March had come Jackson's disastrous and much publicized cross-examination of Goering. Even Lord Shawcross was forced to admit "[i]t was not a success."⁴⁸ Jackson was led by Goering "into a difficult cross-examination field where opinions were challenged instead of facts, always an unrewarding exercise."⁴⁹ Whatever the reason, it could not enhance the chances of an absent Justice serving in a controversial trial.

Jackson was disappointed at losing a chance to become Chief Justice; Douglas thinks this thwarted ambition "truly poisoned his judicial career."⁵⁰ In retrospect, however, Jackson did not find the loss so onerous. He reflected later that although he certainly wanted to be Chief Justice, "I know that my work, if it lives at all, will live in what I write. It won't live in the administration work of the Chief Justice."⁵¹ In his final Nuremberg report to President Truman on 7 October 1946, Jackson wrote that to be

Chief Prosecutor at Nuremberg "was, perhaps, the greatest opportunity ever presented to an American lawyer."⁵² Jackson does not seem to have regretted accepting the post.

Personal ambitions aside, what accomplishments did Jackson feel came from the Nuremberg trial? In his final report he lists six major accomplishments.⁵³

1. Aggressive war was declared a "crime against international society" for which individuals are held responsible. A total of twenty-three nations adhere to the Agreement of London (8 August 1945).
2. The principles underlying the agreement were incorporated into a judicial precedent. "A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law--and law with a sanction."
3. The four participating nations were able to reconcile the basic differences in their legal systems to assure "all the elements of fair and full hearing...."
4. The Allies set the "example of leaving punishment of individuals to the determination of independent

judges, guided by principles of law, after hearing all of the evidence for the defense as well as the prosecution." This example may help strengthen processes of justice throughout the world.

5. The full and undeniable documentation of the Nazi atrocities was such that "there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can rise among informed people."
6. The method by which totalitarian regime gains control was fully documented in a "merciless expose."

Jackson developed the lessons to be learned from the "post-mortem on a totalitarian state" the following year.

He wrote

You can trace in Goering's admission after admission the steps they took to overthrow a free government and set up a totalitarian state. It would be well worth the American's time to learn how it was done because the Weimar Constitution had almost as good protection on paper for civil liberty as our constitution has. Yet, they managed to set up the concentration camps and the Gestapo and a dictatorship because the German people did not recognize the symptoms of a coming totalitarianism.⁵⁴

Jackson's own legal philosophy was touched by Nuremberg. He had seen the moral value of a "fair and full hearing" before

the force of the state is brought to bear on [the accused]. The Court's responsibility in this area of human freedom was for the Justice paramount,

for the arbitrary administration of justice is both an indignity to the claims of humanity and a damaging reproach to the legal order itself. Some of the most biting animadversions to be found in the writing of one whose bite was uncommonly deep are contained in his opinions on the denial of a fair hearing."⁵⁵

Jackson discovered the idea of conspiracy in the common law and used it when he returned to the bench:

Acknowledging, as he had earlier insisted, that on the procedural side prosecutions for conspiracy could be a 'dragnet device,' he laid hold of the concept of conspiracy as an escape from the problems of the first amendment, in particular the test of clear and present danger. The Nuremberg experience had borne in upon him the distinctive character of the idea of criminal conspiracy in Anglo-American law and he pressed it into service.⁵⁶

First amendment guarantees seemed to him to be particularly susceptible to abuse, and he was more prepared than other Justices to sustain the demands of public order when confronted with inflammatory speech, public meetings, and door-to-door visitations.⁵⁷

A series of these issues reached the Court after his return from Nuremberg, and his acquaintance with European experience colored his opinions, if it was not actually decisive in his judgments. Even a system of licensing, within different standards, seemed to him justifiable in the regulation of street speakers....With a kind of deliberate perversity, the Justice argued that to require permission in advance is more consonant with the protection of liberty of speech than to put the speakers to the hazard of surveillance and arrest.⁵⁸

Jackson returned from Nuremberg a changed man. In a sense he felt that he had reached the peak of his career as a lawyer; the trial, he said in 1947, "was the supremely interesting and [most] important work of my life...."⁵⁹ He had probably lost any chance to become Chief Justice. Whatever private regrets he may have had disappeared in his work as Associate Justice.⁶⁰ He had seen Continental law mingled with the Anglo-American tradition of the common law, and the resulting hybrid satisfied his sense of justice. He would never, after Nuremberg, be able to side with his brethren Douglas and Black to take an absolutist stand. He returned to Washington to face a new President, a new Chief Justice, and the Administrative Procedure Act.

NOTES

- ¹Robert Jackson, "The Challenge of International Lawlessness," American Bar Foundation Journal 24 (November 1941):690-693.
- ²Jackson, "Challenge to International Lawlessness," p. 693.
- ³Jackson, "Challenge to International Lawlessness," p. 692.
- ⁴Robert Jackson, "The Law above Nations," American Journal of International Law 37 (1943):297-304. This is a speech given on 20 November 1942 to the Inter-American Bar Association.
- ⁵Jackson, "Law above Nations," p. 299.
- ⁶Robert Jackson, "Our American Legal Philosophy," Vital Speeches 8 (1942):356-358.
- ⁷Jackson, "Law above Nations," p. 299.
- ⁸Robert Jackson, "Nuremberg in Retrospect: Legal Answer to International Lawlessness," American Bar Association Journal 35 (1949), p. 816. Even so, the trial did drag on. Rebecca West wrote: "For however much a man loved the law, he could not love so much of it as lies about at Nuremberg." Reporters assigned to the trials joked that they were the last victims of Nazi persecution. Reported in William Bosch, Judgment on Nuremberg (Chapel Hill: University of North Carolina Press, 1970), pp. 94-95. (notes omitted)
- ⁹Jackson, "Nuremberg in Retrospect," p. 816.
- ¹⁰Robert Jackson, "Some Problems in Developing an International Legal System," Temple Law Quarterly 22 (1948), p. 150. For a discussion of the conflicting legal philosophies at the trials, see Robert Jackson, Nurnberg Case (New York: Knopf, 1947), pp. vi-vii.
- ¹¹Robert Jackson, "The Rule of Law Among Nations," American Bar Association Journal 31 (June 1945):290-294.
- ¹²Telford Taylor, "Robert H. Jackson: 1892-1954--The Nuremberg Trials," Columbia Law Review 55 (April 1955), p. 495 note 37.

- 13 Jackson, "The Rule of Law Among Nations," p. 290.
- 14 Jackson, "Our American Legal Philosophy," p. 356.
- 15 Jackson, "The Rule of Law Among Nations," p. 291.
- 16 Robert Jackson, "A Country Lawyer Looks at an International Court," Virginia State Bar Association Proceedings 58 (1947), p. 193.
- 17 Jackson, "The Rule of Law Among Nations," pp. 291-292.
- 18 Jackson, "The Rule of Law Among Nations," p. 293.
- 19 Jackson, "The Rule of Law Among Nations," p. 293. Jackson follows this statement with a story he told several times about Lord Alverstone, who was one of the British judges assigned to the Commission that arbitrated the Alaska Boundary dispute between the United States and Great Britain. The commission was composed equally of Americans and British, and Lord Alverstone finally broke the inevitable deadlock by voting for the American viewpoint. In response to criticism for his action, Lord Alverstone said, "If when any kind of arbitration is set up they don't want a decision based on the law and the evidence, they must not put a British judge on the commission." (p. 294).
- 20 Jackson, The Nurnberg Case, p. 8.
- 21 Jackson, "The Rule of Law Among Nations," p. 293. In fact, three of the defendants were acquitted.
- 22 Taylor, p. 495. Stone had complained when James Byrnes continued to advise the President after his appointment to the Court, and he objected when Roberts was appointed to head the commission investigating Pearl Harbor. Stone himself was asked by FDR to head a commission to investigate the rubber supply of the nation. An exchange of letters between Stone and FDR resulted in which Stone was explicit that judges should not act for the Executive or Legislature. Interestingly, Stone voluntarily gave copies of these letters to a friend to make them public three years after the fact--in June 1945, two months after Jackson accepted the appointment to Nuremberg. Mason, pp. 707-713, esp. note at p. 712.

²³Taylor, p. 495. William Douglas adds a fourth reason for Jackson's acceptance: "He was planning to run for Governor of New York and perhaps for President, so from a political viewpoint it was desirable for him to be our Nuremberg prosecutor, since the Jewish vote is important in many parts of our country" (William Douglas, The Court Years 1939-1975, New York: Random House, (Vintage Books), 1980, p. 28). Commentators on Jackson disagree about Jackson's political ambitions. He did begin a luke-warm campaign for governor of New York in 1938 but his lack of popular appeal and the machinations of Jim Farley soon halted him (Gerhart, America's Advocate, Ch. 9: The New York Governorship Bubble, pp. 122-141). Jackson seemed not to care: "And I never was much interested in executive office. I would rather be Chief Judge of the Court of Appeals than Governor of New York" (Gerhart, America's Advocate, p. 137, from an interview by Gerhart with Jackson, 16 June 1951). That Jackson was not seriously interested in elective office is borne out by William Ransom, who wrote that Jackson "has never been a candidate for elective public office, and those who know him best believe that he never planned or expected a political or public career" (Ransom, p. 480). What may be responsible for the idea that Jackson was thinking of politics is his meteoric career prior to his judicial appointment: from upstate New York attorney to Attorney General of the United States in six years. His acceptance of the Supreme Court position surprised many people; he "seemed to be surrendering a brilliant political future which might lead eventually to the Presidency" (A.L.G., p. 37). What appears most likely is that Jackson did not have strong political ambitions but--as a very ambitious man--wanted whole-heartedly to be Chief Justice.

²⁴A. L. G., "Mr. Justice Robert H. Jackson: 1892-1954." Law Quarterly Review 71 (January 1955), p. 37.

²⁵Mason, note p. 716. This quote is from an interview by Mason with Jackson on 8 April 1953.

²⁶Mason, note p. 716. Also Bosch, p. 27.

²⁷A. L. G., p. 37.

²⁸Mason, p. 715. Stone to Luther Ely Smith, 2 January 1946.

- ²⁹Mason, p. 716. Stone to Sterling Carr, 4 December 1945. Stone is being a little harsh on Jackson whose writings make quite clear that the Nuremberg proceedings were forged from a compromise between the common law and the continental system.
- ³⁰Hugo Black, Jr. My Father: A Remembrance (New York: Random House, 1975), p. 190. Black's son also suggests that Jackson's attack on Black from Nuremberg was partially motivated by Black's outspoken opposition to the appointment (p. 190).
- ³¹Douglas, p. 28. (Emphasis in original.) Murphy's concern for the constitutionality of Jackson's behavior had not stopped him from donning an Army uniform in a effort to participate more directly in the war effort. Turned down for active duty by General George Marshall, Murphy accepted Marshall's offer of military training during the summer recess as a lieutenant colonel in the infantry reserve. "Because an act of Congress prohibited federal employees except inactive reservists from holding dual offices, it was necessary for the Justice to be on inactive status, which precluded his exercising command." Chief Justice Stone was not pleased with Murphy's decision. Both Congressman Celler, chairman of the House Judiciary Committee, and Attorney General Biddle had raised with Stone the issue of Murphy's dual appointment, and Stone "brought the statute prohibiting dual positions to Murphy's attention. Apparently both Biddle and Celler were unaware of the inactive character of Murphy's appointment and of the exemption for inactive reservists. Once informed of the detailed arrangements, Stone...let the matter drop....The policy as distinct from the legal right was another issue, however. Murphy's failure to inform Stone of his plans embarrassed the Chief Justice, and his summer tour was criticized as patriotism misguided and misplaced." In any event, Murphy's tour of duty involved "driving tanks and shooting machine guns on maneuvers, sweating in bivouac, reading certiorari petitions in his barracks, and issuing rousing declarations" to bolster the morale of the Army. (J. Woodford Howard, Mr. Justice Murphy: A Political Biography (Princeton, N.J.: Princeton University Press, 1968), pp. 272-277 notes omitted). The level and importance of Jackson's contribution to international law makes Murphy's war games pale by comparison.
- ³²Alexander Hamilton, James Madison, and John Jay, The Federalist Papers (New York: New American Library, 1961).

- ³³Hamilton, pp. 302-303. Emphasis in original.
- ³⁴Taylor, p. 502.
- ³⁵Right Hon. Viscount Kilmuir, G.C.V.O. (Sir David Maxwell Fyfe), "Justice Jackson and Nuremberg--A British Tribute," Stanford Law Review 8 (December 1955), p. 56. Of course, both this article and Lord Shawcross's article cited below are memorial articles and may be suspected of improving upon history.
- ³⁶Lord Shawcross, "Robert H. Jackson's Contributions During the Nuremberg Trial," in Association of the Bar of the City of New York and the William Nelson Cromwell Foundation, Mr. Justice Jackson: Four Lectures in His Honor (New York and London: Columbia University Press, 1969), p. 120.
- ³⁷Robert Jackson, "Some Problems in Developing an International Legal System," Temple Law Quarterly 22 (1948), p. 157.
- ³⁸Jackson, "Some Problems in Developing an International Legal Systems," p. 148.
- ³⁹Jackson, "Some Problems in Developing an International Legal System," p. 151.
- ⁴⁰Robert Jackson, "Nuremberg in Retrospect," American Bar Association Journal 35 (1949), p. 881.
- ⁴¹Taylor, p. 501.
- ⁴²Jackson, The Nurnberg Case, p. vii.
- ⁴³Jackson, "Some Problems in Developing an International Legal System," p. 149.
- ⁴⁴Taylor, p. 503.
- ⁴⁵Jackson, The Nurnberg Case, p. ix.
- ⁴⁶Gerhart, America's Advocate, p. 231.
- ⁴⁷I do not intend to discuss the acrimonies between Black and Jackson. This is covered in detail in Gerhart, Black Jr., and Mason, and while interesting, the debate is not germane to this paper.

- ⁴⁸Shawcross, p. 126. Gerhart (pp. 394-399) describes the cross-examination in a slightly more favorable light. However, the facts seem to be that the Court permitted Goering to respond to Jackson's questions with long and evasive speeches: "Mr. Justice Jackson, the Tribunal feels that the witness should be allowed to make whatever explanation he cares to make in answer to this question." (Jackson, Nurnberg Case, p. 187). Goering interpreted this to allow explanations in all his answers. On the second day of Jackson's cross-examination, Jackson lost his temper at Goering's propoganda speeches and rounded on the Tribunal: "Well, I respectfully submit to the tribunal that this witness is not being responsive...It is perfectly futile to spend our time if we cannot have responsive answers to our questions." (Trial of the Major War Criminals, Vol. 9, p. 507, quoted in Gerhart, p. 397.) On the third day of cross-examination, Goering was admonished to respond more directly, but the cross-examination was only salvaged by Sir David Maxwell Fyfe. The press was very critical of Jackson's performance.
- ⁴⁹Sir Elwyn Jones, Q.C., to Lord Shawcross, in Shawcross, p. 127.
- ⁵⁰Douglas, pp. 31-32.
- ⁵¹Gerhart, p. 288. Interview with Jackson, 16 June 1951. Considering the conflicting opinions on the quality of his administrative efforts, perhaps remaining Associate Justice was not such a bad thing.
- ⁵²Jackson, The Nurnberg Case, pp. xvii-xviii.
- ⁵³The following discussion, unless otherwise noted, is from Jackson, The Nurnberg Case, pp. xiv-xvii.
- ⁵⁴Jackson, "A Country Lawyer Looks at an International Court," p. 200.
- ⁵⁵Paul Freund, "Individual and Commonwealth in the Thought of Mr. Justice Jackson," Stanford Law Review 8 (1955), p. 20. Hong Yang Sung, discussed in Chapter Six, provides one example of Jackson's views on fair hearings.
- ⁵⁶Freund, "Individual and Commonwealth in the Thought of Mr. Justice Jackson," p. 18.
- ⁵⁷Freund, "Individual and Commonwealth in the Thought of Mr. Justice Jackson," pp. 16-17.

⁵⁸Freund, "Individual and Commonwealth in the Thought of Mr. Justice Jackson," p. 17.

⁵⁹Gerhart, p. 441. Quoting Jackson in Reports of the New York State Bar Association 70 (1947), p. 147.

⁶⁰A. L. G., pp. 37-38.

CHAPTER VI

RETURN TO THE BENCH 1946-1954

"...in the discovery of hidden causes, stronger reasons are obtained from sure experiments and demonstrated arguments than from probable conjectures and the opinions of philosophical speculators of the common sort."

William Gilbert, 1600

INTRODUCTION

The cases from Jackson's final years on the court contain some of his most well-known opinions and dissents. Two cases for which Jackson wrote the opinion of the Court have been especially important in subsequent cases: United States v. Morton Salt (1950) and Wong Yang Sung v. McGrath (1950).¹ Both cases are covered in this chapter at some length; Morton Salt is important for its affirmation of the investigatory powers of the agencies, and Wong Yang Sung for its exposition of the Administrative Procedure Act, the subsequent reaction of Congress, and its impact on later cases.

One point which is immediately clear upon reading Jackson's opinions is the extraordinary diversity of positions he espouses. In Chapter Two a conceptual history

of administrative law was presented which suggests that administrative law can best be understood in the context of substantive policy. In this chapter, Jackson's opinions are examined in terms of both traditional analysis and substantive policy. It is relatively simple to draw procedural parallels between cases, but to discover substantive similarities is more difficult and uncertain, perhaps in part because Jackson believed in judicial restraint and was unwilling to attempt to set policy by judicial means. Jackson's opinions in six selected alien cases are discussed in an effort to find the substantive similarities; how effective this is and how useful is in part the subject of Chapter Seven.

MORTON SALT

The Morton Salt case was decided at the same time as Wong Yang Sung. It arose when the Morton Salt company refused to obey a Federal Trade Commission (FTC) order to furnish certain reports indicating compliance with a Court of Appeals decree. The decree itself was originally issued to force compliance with an FTC cease and desist order. The decree had specified that Morton Salt was to file compliance reports within ninety days, and decree of the Court of Appeals reserved jurisdiction to issue further orders to

insure compliance. Morton Salt filed the required reports. Four years later the FTC ordered additional reports to be filed. Morton Salt (and International Salt) refused, charging the Commission lacked jurisdiction. Both the District Court and the Court of Appeals upheld the salt companies. The Supreme Court did not.

Jackson wrote the opinion of the Court; Douglas and Minton did not participate in the case. Morton had asserted that the Court of Appeals through its enforcement order had exclusive jurisdiction over the original case and the Commission was therefore invading the Court of Appeals jurisdiction. However, as the court had left to the Commission the right to initiate contempt proceedings if the companies violated the order, and the decree also directed the original reports to be filed with the Commission, it appeared clear that the appeals court had not intended to exclude the Commission from any further activity in the case. In addition, the Commission's responsibility to regulate trade was not "suspended or exhausted as to any violator whose guilt is once established."²

The salt company protested that the Commission had no evidence of any misdoing; "it had at most a suspicion, or let us say a curiosity as to whether [the salt company's] reported reformation in business methods was an abiding

one."³ However, a corporation is not entitled to the same protections of privacy as are individuals. The Endicott Johnson case discussed in Chapter Four had eliminated the "probable cause" requirement for agency investigations established by FTC v. American Tobacco Company (1924); in 1946, while Jackson was at Nuremberg, the Court in Oklahoma Press Publishing Co. v. Walling had established that the criterion for a sufficient reason for an investigation was satisfied if the "disclosure sought shall not be unreasonable."⁴ The Fourth Amendment could not furnish much protection to Morton. Historically the courts have been unable to "go fishing" for evidence: the "judicial subpoena power not only is subject to specific constitutional limitations, which also apply to administrative orders, such as those against self-incrimination, unreasonable search and seizure, and due process of law, but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution."⁵ However, administrative agencies are not subject to the same constitutional prohibitions; "it must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of

judicature." ⁶ Jackson then proceeded to establish the "power of inquisition" of the administrative agency:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because the judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.⁷

This is a rather breathtaking assertion of investigatory power; Justice Douglas, who dissented in subsequent cases on the same issue, must have regretted that he did not participate in Morton Salt.

SUBSEQUENT CITATIONS

The section of the Morton Salt opinion quoted above has been cited twice by the Supreme Court in recent years.⁸ The earlier case is United States v. Powell (1964), in which Justice Harlan for the Court cited Morton Salt to support the Court's contention that the Internal Revenue Service has

powers of inquisition just as does the Federal Trade Commission.⁹ Douglas, joined by Stewart and Goldberg, dissented. Douglas tried to use Morton Salt to justify his case, claiming that the Court had reserved the right to "prevent the 'arbitrary' exercise" of the power to force businesses to release reports,¹⁰ but the Court did not accept his view either in Powell or in a subsequent case.

Eleven years later, in 1975, the Court again turned to Morton Salt in United States v. Bisceglia.¹¹ This case affirmed the prerogative of the Internal Revenue Service to issue a "John Doe" summons to a bank to discover the identify of any taxpayer. The statutory language states that the Internal Revenue Service can investigate "all persons...who may be liable" for any kind of taxes and therefore the Internal Revenue Service does not have to name any one individual.¹² Burger, writing for the Court, cited Harlan's position in the Powell case and once again quoted the excerpt from Morton given above. Stewart, joined by Douglas, dissented, claiming that such investigatory power is too broad, allows the Internal Revenue Service to investigate anyone in the country with no prior justification, and could result in wholesale abuses. However, Jackson's 1950 opinion has remained the accepted position of the Court.

WONG YANG SUNG

A second opinion written by Jackson which had a great impact was Wong Yang Sung v. McGrath (1950).¹³ This case is notable for its discussion of the Administrative Procedure Act, its implied threat to the Immigration Service, the subsequent reaction by Congress, and its later citations, especially in alien cases.

JACKSON ON THE MEANING OF STATUTES

In 1948, Jackson wrote an article on the "Meaning of Statutes: What Congress Says or What the Court Says"¹⁴ which foreshadowed his opinion in Wong Yang Sung. He was concerned first with an impartial judicial interpretation of the statutes:

But when a ruling majority has put its commands in statutory form, we have considered that the interpretation of their fair meaning and their application to individual cases should be made by judges as independent of politics as humanly possible and not serving the interests of the class for whom, or a majority by whom, legislation is enacted.¹⁵

How are such judges to maintain their impartiality? Jackson wrote that to keep politics out of interpretation of statutes "requires training, constant intellectual effort, deliberation and detachment....guided and aided by the experience of generations of common law judges found in the precedents."¹⁶

Jackson next adressed the problem of unclear statutes, which he does not attribute to Congressional incompetence or cowardice. Neither poor draftsmanship nor the inexactness of the English language can be blamed for laws which are confusing as to intent. Rather the problem is "that neither Congress in the choice of language it will use, nor the Courts in the meanings they will ascribe to Congress, have really effective guidance from consistently accepted principles of interpretation."¹⁷ Lack of such guidance leads the justices to interpret the statutes by their personal prejudices and thus, in a sense, by politics: "[f]or the individual justice to be left so much at large presents opportunity and temptation to adopt interpretations that fit his predilections as to what he would like the statute to mean if he were a legislator. Indeed, sometimes there is not much else to guide him."¹⁸

In this quandary, justices often resort to the legislative history of a statute to guide their interpretations. Although Jackson at times resorted to legislative history--and did so in Wong Yang Sung--he found that using legislative history as a guide to the meaning of statutes was overdone, of dubious value for "true interpretation," and posed practical problems for lawyers.¹⁹ Statutes, Jackson noted, are formalized expressions of

Congressional will. They have passed three readings in each house and have either executive approval or have overridden an executive veto. In contrast, the legislative history includes tentative as well as final views of the legislators. In addition to these tentative and final views is presented the political evolution of the statute; many sides of the argument are offered for consideration, and expressed opinions which appear contradictory may in fact be true expressions of the legislator's intent that subsequently have been modified by the political process. A misinterpretation of one legislator's position may be left "unanswered lest more definite statements imperil the chance of [the statute's] passage."²⁰ Thus an astute advocate can find support for almost any cause expressed in a legislative history. By interpreting statutes through their legislative history, the Supreme Court makes the formal acts of Congress no longer a safe basis for a lawyer to advise his client or for a lower court to decide a case.

Jackson closed his article with a plea for basic principles of statutory construction. Just as the British courts will not consider Parliamentary proceedings in deciding cases, the American Supreme Court should follow the advice of Holmes: "We do not inquire what the legislature meant, we ask only what the statute means."²¹ If Holmes'

dictum were followed, the Court might avoid what Jackson believes is "[p]erhaps the most unfortunate consequence of resort to legislative history [which] is that it introduces the policy controversies that generated the Act into the deliberations of the Court itself."²²

A lawyer conversant with this article by Jackson might have predicted how Jackson would frame his opinion in Wong Yang Sung. For although Jackson resorts to legislative history, he does not do so from the stance of an outsider, a political judge, but rather from the insider's viewpoint of the Attorney General's Committee which he oversaw. In his use of legislative history he does not try to delve into the political ramifications of Congress but he uses his knowledge to support statutory construction which would seem to need little support. And his response to the Immigration Service appeal that Congress intends to exempt them from the Administrative Procedure Act receives the short shrift this article--and South-Eastern Underwriters--should have led them to expect.

THE ADMINISTRATIVE PROCEDURE ACT

Jackson began his opinion in Wong Yang Sung with a long discussion of the background of the Administrative Procedure Act. He wrote that "concern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929, when Senator Norris introduced a bill to create a separate administrative court."²³ Jackson had written in Morton Salt:

The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachments on private rights.²⁴

Of course Senator Norris's 1929 bill did not produce an administrative court; Jackson may have regretted the omission for he later wrote approvingly of the French Cour de Cassation:²⁵

But for three quarters of a century Congress has continued to launch these [administrative] agencies without facing and resolving the administrative law problems which their functions precipitated.

The painfully logical French went about the controlling of official action where it affected the rights of the citizen in exactly the opposite manner. They recognized from the beginning that controversies between the citizen and an official, in the performance of his duty as he saw it, involved some different elements and considerations than the contest between two private citizens over private matters. They invested the Conseil d'Etat with jurisdiction over

regulatory bodies and recognized that droit administratif was a different matter than private law, as to which the Cour de Cassation was the high court.

But the United States and England have backed into the whole problem rather than face it....²⁶

Jackson brushed by the 1937 Brownlow Report rather quickly; in Wong Yang Sung he emphasized only the point he wished to make to support his opinion--that the Commission "recommended complete separation of adjudicating functions and personnel from those having to do with investigation or prosecution."²⁷ Despite Roosevelt's direction to his Attorney General in 1939 to appoint a committee to review the administrative process, Congress in 1940 passed the Walter-Logan bill, a "comprehensive and rigid prescription of standardized procedures for administrative agencies,"²⁸ which Roosevelt vetoed on 18 December 1940, in part because he was waiting for the Attorney General's Committee Report.²⁹ When issued, the Report contained both majority and minority proposals for legislation. No legislative action was taken until 1945, primarily because of the war. In 1945 the McCarran-Sumners bill evolved into the Administrative Procedure Act of 1946; Jackson stressed that the bill painstakingly considered the views of the agencies and noted that the Department of Justice canvassed the agencies prior to the passage of the bill and "submitted a favorable report on the bill as finally revised."³⁰ Jackson summed up his history:

The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.³¹

Jackson was explicit about the evils the Act is supposed to remedy. One he foreshadowed in his mention of the Brownlow Report: that one person should not serve as both prosecutor and judge. In support of this he cited not only the Brownlow Report of 1937 but also a 1940 report by the Secretary of Labor, "whose jurisdiction at the time included the Immigration and Naturalization Service,"³² and of course his own Attorney General's Report. The second evil he noted briefly: the general lack of "uniformity of procedure and standardization of administrative practice among the diverse agencies...."³³ He concluded:

Such were the evils found by disinterested and competent students. Such were the facts before Congress which gave impetus to the demand for the reform which the [Administrative Procedure] Act was intended to accomplish. It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns.³⁴ (Emphasis added.)

He is echoing his earlier article's view on judicial responsibility and statutory interpretation. He believed the statute was clear; he offered historical support both from his own experience and from the legislative history to support his construction. He even drew a supporting document (the report from the Secretary of Labor) from what was, if not the enemy's camp, at least the home base of the enemy's ally. He then threw down the gauntlet to his fellow judges: no matter what their personal views on the Administrative Procedure Act or on immigration, their "plain duty" was to construe the statute's meaning to eliminate both non-uniform procedures and the mingling of the office of prosecutor and judge in one government official.

THE ARGUMENTS AND THE WARNING

The facts of Wong Yang Sung were straight forward and not in dispute. Wong Yang Sung, a Chinese national, overstayed his shore leave in the United States. Immigration officials arrested him; after a hearing before an immigrant inspector, Wong Yang Sung was ordered deported. Both the Acting Commissioner and the Board of Immigration Appeals confirmed the deportation order. Wong Yang Sung filed a habeas corpus petition for release from custody "upon the sole ground that the administrative hearing was

not conducted in conformity with Sections 5 and 11 of the Administrative Procedure Act."³⁵ The two sections of APA invoked by Wong Yang Sung require the examiner who conducts the hearing to make the decision and to be independent of any investigating or prosecuting function (Sec. 5) and requires each agency to appoint independent examiners (Sec. 11). Section 7, on which Immigration relied in part, provides an exemption for hearings conducted "in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute...."³⁶ The Immigration Service admitted that the hearing given to Wong Yang Sung did not comply with the requirements of the Administrative Procedure Act, but Immigration also contended that the Act did not apply to deportation hearings. Both the District of Columbia District Court and the Court of Appeals upheld the Immigration Service.

Jackson quickly dismissed the arguments advanced by the Immigration Service. Hearing examiners often served as investigators or prosecutors in cases which they did not hear, thus giving rise to the danger of developing an "agency perspective" in deportation hearings. Clearly the hearing inspector was an official with prosecutive and investigatory functions, even though he did not personally investigate or prosecute Wong Yang Sung's case. Jackson

found such a commingling especially offensive in deportation cases "where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused."³⁷ Neither was Jackson moved by the contention that to apply the Administrative Procedure Act to the Immigration Service would be both costly and an inconvenience; "of course it will," he wrote, "...but the power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high."³⁸

A final point was Immigration's suggestion that Congress intended to acknowledge by statute the agency's position that deportation hearings were not subject to the Administrative Procedure Act. Bills were pending in Congress to make the exemption explicit; Immigration had requested an explicit exemption after a 1948 decision had found in favor of the alien.³⁹ Although committees in both houses had reported favorably on the bills, Congress adjourned without taking action. Immigration argued that since Congress was aware of the agency interpretation and had "taken no action indicating disagreement with that interpretation, it was "at least arguable that Congress was

prepared to specifically confirm the administrative construction by clarifying action."⁴⁰ Jackson was firm: "We do not think we can draw that inference from incompleting steps in the legislative process."⁴¹ In reply, Wong Yang Sung submitted that the "agency admits that it is acting upon a wrong construction by seeking ratification from Congress."⁴² Jackson refused to accept either view: "We draw, therefore, no inference in favor of either construction of the Act--from the Department's request for legislative clarification, from the congressional committee's willingness to consider it, or from Congress' failure to enact it."⁴³ This latter point is certainly in line with Jackson's views on the Court's role vis-a-vis Congress that he enunciated in South-Eastern Underwriters, i.e., that the Court has no business either tying or forcing the hands of Congress.

The Immigration Service, however, did not rest with assertions of cost or inconvenience or Congressional intent. The Government claimed "first, that the general scope of [Section] 5 of the Act does not cover deportation proceedings; and, second, that even if it does, the proceedings are excluded from the requirements of the Act by virtue of [Section] 7."⁴⁴ Section 5 in the original bill established formal requirements in every case of

adjudication required "by law;" the Attorney General suggested a change to "by statute or Constitution."⁴⁵ The final version, which read "required by statute," was interpreted by Immigration to mean that an adjudicatory hearing was necessary only when the statute explicitly provided for one. Wong Yang Sung asserted a right to a hearing under previous Court decisions; his interpretation of the legislative history construed "by statute" to indicate a legislative intent to avoid "creating by inference a new right to a hearing, where no right existed otherwise."⁴⁶ Jackson, as might have been expected, was unsympathetic to an argument based on legislative history: "The legislative history is more conflicting than the text is ambiguous."⁴⁷

The government, however, had advanced some arguments in its discussion of the legislative history which Jackson felt obligated to answer. Jackson disagreed strongly with Immigration's contention that the statute which authorized deportation had no express requirement for any hearing or adjudication; deportation hearings were not covered by Section 5 of APA. The requirement for hearings was the constitutional requirement of procedural due process; to contend that the Immigration Act was outside such constitutional requirements was to jeopardize the Act's validity. He wrote:

But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such a hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body. It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally....

We think that the limitation to hearings 'required by statute' in [Section] 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity.... We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.

Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one.... A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.⁴⁸

In other words, should the Immigration Service persist in its claim that it is exempted from the Act, the Court might

find the Immigration Act upon which the Service was built to be unconstitutional. This is a strong threat coming from the Court and indicates the seriousness with which Jackson at least regarded the safeguards provided by the Administrative Procedure Act. He was not impressed with Immigration's argument that grounded its case for exemption from the APA in the consideration that its obligation to grant a hearing was rooted in the constitution and not in a statute.

He was not so vehement about the contention that Section 7 of APA provided an exemption for the immigration inspectors at deportation hearings because they were specially designated by statute. He agreed that such inspectors had the powers necessary to conduct investigations of, for example, aliens at the borders of the United States, "but that Congress by grant of these powers has specially constituted them or provided for their designation as hearing officers in deportation proceedings does not appear [in the Act]."⁴⁹

Justice Reed could not agree with Jackson's interpretation of Section 7. Under the portion of the Immigration Act which described the duties of immigrant inspectors,

inspection...of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States,

and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors....Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence....⁵⁰

Reed found it obvious that the statute specially provided for an officer to conduct the hearings and that therefore deportation hearings were not covered by the Administrative Procedure Act.

CONGRESSIONAL RESPONSE

Congress agreed. The same year that Wong Yang Sung was decided, Congress attached a rider to an appropriations bill that specifically exempted deportation hearings from the Administrative Procedure Act. This rider was later repealed by the 1952 Immigration and Nationality Act which achieved the same purpose but in a manner more formal than an appropriations rider.⁵¹ This Act established an "exclusive procedural system for deportation hearings."⁵² The Act provided in part for a "special inquiry officer" to conduct the hearing and at times to present evidence and to interrogate witnesses; the hearing officer was, however, prohibited from hearing a case in which he participated in the investigation.⁵³ Under Section 242(b) of the Act, the

Attorney General issued regulations and established the Board of Immigration Appeals which was to figure so largely in Jackson's dissent in United States ex rel. Accardi v. Shaughnessy.⁵⁴ Although Wong Yang Sung has not been explicitly overruled,⁵⁵ Congress itself overruled the decision and the Court deferred.

SUBSEQUENT CITATIONS

Despite the Congress' objections to the holding in Wong Yang Sung, the case was frequently cited, especially in the years immediately following the decision.⁵⁶ One of the earliest cases was United States v. Spector (1952).⁵⁷ Spector had been indicted for failing to "make timely application in good faith for travel or other documents necessary to his departure" after a deportation order.⁵⁸ He moved to have the indictment dismissed on the grounds that the relevant portion of the Immigration Act was unconstitutionally vague. The District Court upheld his petition but the Supreme Court reversed. Black and Jackson, joined by Frankfurter, dissented.

Black simply found the statute too vague to stand. Jackson pushed further, relying on Wong Wing v. United States, (1896)⁵⁹ which had held that the "Constitution prohibited for criminal purposes a judicial determination

without a jury that the alien was illegally present in the United States."⁶⁰ He noted that in Li Sing v. United States,⁶¹ the Court had quoted a previous case: "[An] order of deportation is not a punishment for crime....It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions [upon which] his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law...."⁶² In this case the "Court thereby made it clear that there is a great distinction between deportation itself and a deportation order that may be made the basis of subsequent criminal punishment."⁶³ This distinction, Jackson felt, should have governed Spector. Harisiades v. Shaughnessy,⁶⁴ an earlier 1952 case in which Jackson wrote for the Court, Frankfurter concurring, had established that the alien is on "an equal constitutional footing with the citizen when he is charged with crime," and that "administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations."⁶⁵ In Spector, the Government was judging the deportation charge on administrative, civil grounds and then relying on the result as the basis of a criminal charge.

Jackson found this insupportable: "[We] cannot sanction sending aliens to prison except upon compliance with constitutional procedures. We can afford no liberties with liberty itself."⁶⁶ Jackson delved into the administrative procedure and its possible consequences in some depth; he pushed the issues beyond Black's "void for vagueness" position.

A second case in which Hong Yang Sung was critical was United States v. Tucker Truck Lines (1952).⁶⁷ The Interstate Commerce Commission had granted a certificate to a motor carrier that rivaled Tucker Truck. Tucker Truck opposed the certificate, and the hearing by the Interstate Commerce Commission, which had granted the certificate, was conducted by an examiner whose appointment conflicted with the procedures established by the Administrative Procedure Act. Tucker Truck petitioned a district court to invalidate the Commission's certificate on the basis of an improperly appointed hearing examiner. Tucker Truck had not previously questioned the examiner's appointment, and Tucker Truck did not claim that the examiner conducted the hearing improperly. The District Court set the Commission's order aside, but the Supreme Court reversed. Jackson wrote the opinion of the Court.

Jackson based his opinion in Tucker Truck on a distinction between Riss Co. v. United States⁶⁸ and Wong Yang Sung. Riss had established that the improper appointment of an examiner was cause to invalidate an order of the Interstate Commerce Commission, but in Riss the objection had been raised at the hearing. The Riss decision was distinguished by Jackson because it "established only that a litigant in such a case as [Tucker Truck] who does make such demand at the time of hearing is entitled to an examiner chosen as the [Administrative Procedure] Act prescribes."⁶⁹ Jackson noted that thousands of orders would be vulnerable to attack if the issue of appointment procedures could be raised at any time following the hearing. Such an impractical consequence would not be allowed:

simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.⁷⁰

Tucker Truck was not, however, relying solely on the Riss decision. Following Wong Yang Sung, it was suggested, would establish that the use of an irregularly appointed hearing examiner removed the entire issue from the jurisdiction of the Interstate Commerce Commission. Jackson

dismissed the argument, first because Government had not raised the issue of timeliness in Wong Yang Sung and therefore any discussion of the probable result of such an objection was irrelevant. Secondly, following Justice Marshall, court tradition holds that when the court exercises jurisdiction and that exercise is neither questioned nor commented upon, the court is not bound by the prior exercise of jurisdiction. Thus Jackson, who was so strongly opposed to mingling of investigative and adjudicate powers, found in this case that the practicalities of administration outweighed the evil the Administrative Procedure Act had been carefully crafted to eliminate.

Frankfurter, who had sided with Jackson in Wong Yang Sung, was unable to distinguish Riss and Wong Yang Sung as Jackson did. Frankfurter found that the limitations of the Administrative Procedure Act on the functions of hearing examiners "bind and confine the (Interstate Commerce) Commission itself" and cannot be waived by an litigant.⁷¹ Frankfurter relied on "the significance we attached to the requirement of independent hearing examiners as inherent in the process of administrative adjudication."⁷² He found this case even stronger than Wong Yang Sung because Congress acceded to Immigration's request that deportation hearings be exempted from the Administrative Procedure Act yet

rejected a similar request from the Interstate Commerce Commission following Riss.

Douglas's dissent in this Tucker Truck relied even more heavily on Wong Yang Sung. No objection to the examiner was made at Wong Yang Sung's hearing; "it would seem, therefore, that reversal of this administrative order would follow a fortiori from Wong Yang Sung's case."⁷³ That the examiner appeared unbiased is immaterial:

No one knows how the commingling of police, prosecutor and judicial functions in one person may affect a particular decision. In some situations it might make no difference; in others it might subtly corrupt the administrative process. The only important consideration for us is that Congress has condemned the practice; and we as supervisors of the federal system should see to it that the law is enforced, not selectively but in all cases coming before us.⁷⁴

Douglas concluded that "the action of the Commission in the present case created an error that permeates the entire proceeding. It is an error that goes to the very vitals of the case. I would therefore set aside the order and send the case back for a hearing that meets the statutory standards of fairness. I would make the rule of Wong Yang Sung's case good for more than the day and the occasion."⁷⁵

The dissenting opinions of both Frankfurter and Douglas sound as though they should have come from Jackson's desk. Wong Yang Sung is one of Jackson's most well-known opinions;

he appears to be a fervent supporter of the Administrative Procedure Act, especially in its provisions to separate the judicial function from the investigatory. How then to explain Tucker Truck in which he distinguished Wong Yang Sung virtually to extinction? Part of the explanation rests with the concept of viewing administrative law as substantive law.

DEFINING SUBSTANTIVE AREAS

Quite clearly the first problem to be faced is into what substantive areas shall administrative law be divided? Several approaches were discussed in Chapter Two: for example, Robinson, Gellhorn, and Bruff in their Administrative Process tried to fit the various steps of the administrative process into the context of substantive policy areas such as environmental policy or licensing. Rabin suggested dividing the substantive federal areas into regulation, public management, and benefit distribution. While these provide interesting and valuable devices to organize material, they do not provide much insight into interpretation of judicial opinions that appear to be inconsistent. The critical factor in analyzing these cases is to identify the similarities which are relevant to the judge, especially if one major concern of the analysis is

predictability. It is all very well to write that "when questions of substantive policy are defined out of administrative law, the underlying and unifying factors in court-agency relations are lost, and what remains is a clutter of procedural rules which seem to lack coherence precisely because the factors underlying them have disappeared."⁷⁶ The trick is to know what substantive policy is being dealt with.

TRANSPORTING EXPLOSIVES--

Boyce Motor Lines v. United States (1952) and Dalehite v. United States (1953)⁷⁷ are both cases in which Jackson dissented and which deal directly with transporting of explosive material. Such substantive similarity--explosives --is deceptive, as Jackson's dissents, and the issues of concern to the Court, do not really deal at all with transporting explosives. Boyce rests on the vagueness of an Interstate Commerce Commission regulation; the Court found to be valid the regulation which Boyce violated by transporting carbon bisulphide through the Holland Tunnel in Brooklyn. Jackson, joined by Black and Frankfurter, thought the regulation lacked any definite standard by which Boyce could choose a legal route for the trucks; he asked

Would it not be in the public interest as well as in the interest of justice to this petitioner to pronounce this vague regulation invalid, so that

those who are responsible for the supervision of this dangerous traffic can go about the business of framing a regulation that will specify intelligible standards of conduct?"⁷⁸

Jackson has either lost his inhibitions against forcing the political branches to act, or else his inhibitions applied only to Congress; at any rate, his concern here is vagueness. In contrast, the issue in Dalehite is the definition of discretion and the tort liability of the Government. The Court found that the Government was not liable under the Tort Claims Act for damages resulting from a massive explosion of two ships loaded with fertilizer because all the government sponsored actions were discretionary and involved the exercise of judgment at a "planning rather than an operational level."⁷⁹ Jackson, once again joined by Black and Frankfurter, dissented. He thought the Court had moved the protection of discretion too far down into the "housekeeping side of federal activities" which "involved actions akin to those of a private manufacturer, contractor, or shipper."⁸⁰ Thus, even though Jackson cites the Boyce case in his dissent in Dalehite as imposing "criminal liability without regard to knowledge of danger or intent where potentially dangerous articles are introduced into interstate commerce,"⁸¹ it is clear that the relationship between the two cases does not rest on interstate commerce or transporting explosives. The best

that might be said to tie these two cases together is that Jackson's dissent in Dalehite is influenced by the breadth of the definition of discretion and that this inexactness offends him as does the regulatory vagueness in Boyce, but such an analysis is specious. Dalehite and Boyce, despite superficial similarities, are not significantly related to each other.

--OR STATUTORY EXPLICITNESS?

There are, however, two cases which are related to Boyce in their concern for statutory explicitness: Federal Trade Commission v. Ruberoid (1952), in which Jackson dissented, and United States v. Five Gambling Devices (1953), in which Jackson announced the judgment of the Court.⁸² In Ruberoid, the company had been ordered by the Federal Trade Commission to stop discriminatory pricing of roofing materials. Ruberoid petitioned the Court of Appeals for review; the order was affirmed but on rehearing, the Court of Appeals refused to issue an order of enforcement. On appeal, the Supreme Court affirmed the Court of Appeals, Jackson dissenting.

In his dissent, Jackson noted that Ruberoid's objection to the Federal Trade Commission order was that the order to cease and desist from discriminatory pricing also contained

orders "to cease types of violations it never had begun and [Ruberoid] asked that any order include a clause to the effect that it did not forbid the price differentials between customers which are expressly allowed by statute."⁸³ The Court of Appeals had agreed the order was vague but had laid the blame for vagueness on the Clayton Act. Because the Act was vague, the Commission was excused by the Court of Appeals for a vague cease and desist order. Jackson did not accept this conclusion:

This appraisal...exposes a grave deficiency either in the Act itself or in the administrative process by which it has been applied. Admitting that that statute is 'vague and general in its wording,' it does not follow that a cease and desist order implementing it should be. I think such an outcome of administrative proceedings is not acceptable. We would rectify and advance the administrative process, which has become an indispensable adjunct to modern government, by returning this case to the Commission to perform its most useful function in administering an admittedly complicated Act.⁸²

Thus in Ruberoid as in Boyce, Jackson would return an unclear regulation to the agency which promulgated it.

In Five Gambling Devices, Jackson announced the judgment of the Court in an opinion which Frankfurter and Minton joined. Black and Douglas wrote a concurring opinion. Clark, Warren, Reed, and Burton joined in dissent. Jackson refused to reach the constitutional questions: "All we would decide at present is a question of statutory

construction. We think the Act [of January 2, 1951, which prohibits shipment of gambling machines in interstate commerce but includes incidental registration and reporting provisions,] does not have the explicitness necessary to sustain the pleadings which the Government has drafted in these cases. On this ground alone, we would affirm the judgments below" which dismissed the charges.⁸⁵ Despite Jackson's avowed support for the administrative agencies and the administrative process, he was unwilling to allow a vague act to support the indictments. For these examples, at least, the unifying factor is procedural rather than substantive. Ruberoid's substantive issue is discriminatory pricing under the Clayton Act; Boyce is transportation of explosive materials under an Interstate Commerce Commission regulation; Five Gambling Devices involves regulating the gambling industry. However, common to all three is the concern with clarity and explicitness of acts or regulations.

To find similarities among procedural issues in cases does not advance the need to delineate what level of substantive areas should be considered, or if the substantive concerns are viewed as general substantive policy areas for which issues in administrative law are simply tools. An examination of Jackson's opinions in

selected alien cases may help to clarify how these questions might be answered.

THE ALIEN CASES:

Knauff, Wong Yang Sung, Harisiades, Spector, Mezei, and Accardi⁸⁶

Rather than present a long discussion of each case, the six cases have been arranged chronologically, a brief statement of the facts of the case is given, and Jackson's opinion, whether for the Court or in dissent, is presented.

United States ex rel. Knauff v. Shaughnessy (1950). Ellen Knauff was a German war bride with an exemplary record as member of the Royal Air Force in Britain during the war and in Germany as a civilian employee for the Occupation forces. She was denied admittance to the United States as a security risk. The Attorney General did not allow her a hearing. The Court upheld the Attorney General. Jackson joined by Black and Frankfurter, dissented primarily because of the secrecy of the proceedings:

Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men,

because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.⁸⁷

Wong Yang Sung v. McGrath (1950). As noted above, Wong Yang Sung, a Chinese sailor, was ordered deported by the Immigration Service without a hearing that met the requirements of the Administrative Procedure Act. Jackson, writing for the court, held that the Immigration Service was controlled by the Administrative Procedure Act and ordered Wong Yang Sung released.

Harisiades v. Shaughnessy (1952). Harisiades, a legal alien, had been a member of the Communist Party but had ceased Party membership. Congress declared that membership in the Communist Party at any time, past or present, was grounds for deportation, and Harisiades protested, partly because the Constitution forbids ex post facto laws. Jackson, with Frankfurter concurring, wrote for the Court that the expulsion order was valid:

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state.⁸⁸

Jackson then cites Oppenheim's International Law that states do not even need to give reasons for deportation of aliens. In this case, the ex post facto nature of the law is

immaterial. The law forbids aliens to belong to organizations that advocate the violent overthrow of the government. Since deportation is a civil, not a criminal, matter, it is not affected by the constitutional prohibition against ex post facto laws because this prohibition applies only to crimes.⁸⁹

United States v. Spector (1952). Spector was an alien who had been ordered deported for advocating the overthrow of the government by force. He was imprisoned after a jury trial for failing to obtain documents to leave, and the imprisonment was based on an administrative decision that his presence in the United States was unlawful. The jury could not decide whether Spector was in the country illegally but only whether or not he had applied for the documents. The Supreme Court upheld his conviction but Jackson, joined by Frankfurter and Black, dissented. Jackson was particularly troubled by the logical extensions of the decision:

We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom....

While we would not join in a strained construction of the Constitution to create captious or trivial obstacles or delays to solutions of this problem [of where to send dangerous aliens since Communist countries wish them to remain in the United States and non-Communist countries do not want them], we cannot sanction sending aliens to prison except upon compliance with constitutional procedures. We can afford no liberties with liberty itself.⁹⁰

Shaughnessy v. United States ex rel. Mezei (1953).

Mezei was an alien resident who remained abroad for nineteen months and, upon attempting to return to the United States, was excluded. Because no other country would receive him, he was confined to Ellis Island for twenty-one months. A District Court in habeas corpus proceedings ordered him paroled into the United States on bond. On appeal by the Attorney General, the Supreme Court held the District Court order invalid in part because as an "entrant" alien, Mezei was not protected by the due process clause. Black, joined by Douglas, and Jackson, joined by Frankfurter, dissented.

Jackson was offended in part because the Attorney General refused to give reasons for denying Mezei admittance to the nation where he had resided for twenty-five years: "This man, who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him."⁹¹ Jackson again noted the problem faced by the alien

who must find a country to receive him: "Since we proclaimed him a Samson who might pull down the pillars of our temple, we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands."⁹² Jackson reiterated his concern with practicality: "It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound.... We must regard this alien as deprived of liberty, and the question is whether the deprivation is a denial of due process of law."⁹³ The Fifth Amendment, he notes, prohibits depriving persons--not simply citizens--of life, liberty, or property without due process of law.⁹⁴ Jackson found that "detention of an alien would not be inconsistent with substantive due process, provided--and this is where my dissent begins--he is accorded procedural due process of law."⁹⁵

Jackson concluded his dissent with a discussion of procedural due process; he found analogies between the Government's position in this case and the Nazi system of "protective custody" which, "once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere."⁹⁶ To avoid this pitfall, procedural due process must be observed scrupulously.

Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.

If it be conceded that in some way this alien could be confined, does it matter what the procedure is? Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied....[Due] process of law is not for the sole benefit of the accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice....

Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused. If the procedures used to judge this alien are fair and just, no good reason can be given why they should not be extended to simplify the condemnation of citizens. If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien....⁹⁷

Jackson acknowledged that Communism is a danger:

The Communist conspiratorical technique of infiltration poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil.⁹⁸

However, he refused to see Communism as the only threat to American government:

But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.⁹⁹

United States ex rel. Accardi v. Shaughnessy (1954).

Accardi was ordered deported, and he applied to the Board of Immigration Appeals to have the deportation order suspended. The Board denied his application. Accardi claimed his case was prejudged because the Attorney General in 1952 had circulated a list of "unsavory characters" whom he wished to deport, and Accardi's name was included. Although Accardi admitted he was deportable, the Supreme Court held that he must have a rehearing; his application might be unsuccessful "but at least he will have been afforded that due process required by the regulations in such proceedings."¹⁰⁰ Jackson, joined by Reed, Burton, and Minton, dissented.

Jackson viewed the decision to suspend the order as executive discretion and hence not subject to judicial review:

Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus....Habeas corpus is to enforce legal rights, not to transfer to the courts control of executive discretion.¹⁰¹

In addition, the Board of Immigration Appeals was

neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office....[and] operates under his supervision and direction, and its every decision is subject to his unlimited review and revision....We do not think [the validity of the decision] can be impeached by showing that he overinfluenced members of his own staff whose opinion in any event would be only advisory."¹⁰²

The six cases presented have all dealt with problems regarding aliens. All but Knauff were deportation cases. All involved the office of Attorney General which Jackson himself had held at one time. In Knauff, Wong Yang Sung, Spector, and Mezei, Jackson supported the alien's position but in Harisiades and Accardi he did not. This division is not unexpected in view of Jackson's overall support rating in alien cases: in the 1946 through 1952 terms, he voted for alien claims in fifty percent of the alien cases, well below Murphy, Rutledge, and Black who were always in support of the alien, but well above Reed (nine percent support), Clark (fourteen percent support), and Minton (nineteen percent support).¹⁰³ Viewed at this level of analysis, Jackson's opinions seem unpredictable, a conclusion which Pritchett suggests "leads one to question whether [Jackson] has developed any systematic theories about civil liberties or the judicial function."¹⁰⁴ Other authors find in Jackson's work "a consistency of thought which is a vital part of his judicial philosophy. For him liberty is

possible only in a well-ordered society...."¹⁰⁵ However, consistency is not an essential attribute in an analysis of judicial work:

If this portrait [of Jackson] leaves some features blurred, it is not disturbing. What is disturbing is the risk of the opposite distortion, an excessive tidiness in the portrayal of a complex and altogether unmechanical individual.¹⁰⁶

To make sense of these six cases--admittedly a small and inconclusive sample--it is necessary to look at them through the filter of Nuremberg. Jackson left Germany with a deep concern for potential destruction of democratic government which lurked in an overpermissiveness to minority groups. This is seen most clearly in such opinions as Terminiello (1949), Kunz v. New York (1957), and Sain v. New York (1948).¹⁰⁷ He was, as we have seen, a staunch defender of liberty but of liberty with restraint. We might have expected that Nuremberg would have given Jackson a horror of suppression of any kind, given the excesses of the Nazis and, in this Cold War period, of the Russians to suppress disagreement with government policy. What Jackson learned was in fact the opposite: had the Weimar Republic suppressed the Hitler minority which endangered democracy, the Republic might have survived.

Philip Kurland in a 1977 article on Jackson refers to Jackson as a liberal rather than a libertarian.¹⁰⁸ He

distinguishes between the two points of view by defining first the legal libertarian who

tends to think in terms of the absolute and unconditioned protection of asserted civil liberties, almost without acknowledgement of the possibility of any legitimate competing values.¹⁰⁹

Examples of legal libertarians are Justices Black, Douglas, Rutledge, Murphy, Warren, and Brennan; Kurland notes that most libertarians are also judicial activists. "In gross, then," writes Kurland, "the libertarian...is dedicated to a creed that societal salvation lies in the maintained primacy of all claimed civil rights and that the savior is the judicial branch of government."¹¹⁰

The liberal tradition, represented by Holmes, Brandeis, Cardozo, Frankfurter, Stone, Learned Hand, Friendly, and Jackson, and whose "foremost academic apologist"¹¹¹ is Bickel, follows the creed that

[the] individual is free and supreme, subject to majority rule in those areas where the majority is authorized to rule, and the realm of majority rule has been greatly extended, but not with regard to matters of faith, or speech or ideas unless that speech or ideas or faith does specific harm to others. Above all, for the liberal jurist, responsibility was an attribute of liberty.¹¹²

Jackson's "liberalism"--in Kurland's sense of the term--tempered by his experiences at Nuremberg is the key to the six alien cases. Knauff offers no threat to the Government. There is no evidence to brand her a subversive,

and the manner in which she is excluded is secret and thus reminiscent of Nazi Germany. In addition she was a war bride and Congress had made quite clear its desire to help war brides enter the country. Jackson supported Congressional intent and dissented against Star Chamber procedures. The basis of Jackson's reasoning in Mezei follows Knauff. Similarly, Wong Yang Sung was, as far as the Court record shows, simply a Chinese sailor who had overstayed his shore leave. Congress had not explicitly exempted the Immigration Service from the Administrative Procedure Act which, however remotely, Jackson had helped to fashion. Wong Yang Sung's treatment was not fair in that the hearing examiner's status was not, in Jackson's view, congruent with the requirements set out by Congress. Absent any national danger, the demands of justice and procedural regularity, and Jackson's previously iterated reluctance to second-guess Congress, structured his opinion for the Court.

Spector is, however, a case involving a Communist but in the context not of civil liberties but of safeguards in administrative procedures. The Nuremberg experience showed Jackson how once an undemocratic government is established, administration can be used to circumvent the courts; he returned to this theme in the excerpts from Mezei quoted above. Weighing Spector's Communist affiliations against

the dangerous example furnished by his imprisonment, Jackson preferred the Communist. It is important to note, however, that the issue was not trying Spector as much as it was how he was tried. There is no indication that Jackson would have objected to the outcome had Spector been convicted in a jury trial which passed on the illegality of his presence as well as on his refusal to apply for travel documents after the deportation order.

Harisiades was a former Communist ordered deported. There were no procedural irregularities in his deportation order and the law which allowed his deportation was clear in intent. Congress did not want any former or current Communists to remain in the country. Citizens could not be deported but aliens could. And while the Constitution clearly prohibits ex post facto laws, judicial precedent forbids them only in criminal cases. None of the demands of Jackson's philosophy--danger of precedent, secrecy, violation of Congressional intent, procedural irregularity--came to Harisiades' defense, and his Party membership was against him. Hence the dissent.

Accardi too was a Communist but we might suspect that Jackson's predilection for procedural safeguards would come to Accardi's defense. However, Jackson had been Attorney General and, although the Board of Immigration Appeals had

been instituted since his time, he was sensitive to both the duties and the perogatives of the office. He was as zealous in guarding executive discretion as he was legislative intentions. Accardi, both a Communist and an "unsavory character," was admittedly deportable and the exercise of executive discretion was not subject to judicial review.

It therefore seems that the substantive policy addressed here is not that of aliens or even of alien deportation but rather one of control of Communists. Jackson's belief is that they may be expelled but only if the expulsion does not violate safeguards necessary to prevent the United States from following the very procedures we condemn in the totalitarian beginning of the Weimar Republic. Viewed in this context, we can see that the various tools of administrative law as they are commonly conceived, e.g., procedural due process, deference to legislative intent, executive discretion, or administrative expertise, are applied as the circumstances warrant to achieve a desired policy direction. How this discovery may be generalized, if at all, and what the impact on public administration might be, is the concern of the final chapter.

NOTES

- ¹ Morton Salt, 338 U.S. 632 (1950); Wong Yang Sung, 339 U.S. 33 (1950).
- ²338 U.S. 639.
- ³338 U.S. 640.
- ⁴ ETC v. American Tobacco Co., 264 U.S. 298 (1924); Oklahoma Press Publishing Company v. Walling 327 U.S. 186 (1946). The quotation is from Walling at 208.
- ⁵338 U.S. 642.
- ⁶338 U.S. 642.
- ⁷338 U.S. 642-643.
- ⁸A third case, California Bankers Association v. Shultz, 416 U.S. 21 (1974), relies on Morton Salt as justification that corporations do not have the same right to privacy as do individuals. The case in Morton Salt on which this rests is United States v. White, 322 U.S. 694 (1944), in which Murphy wrote for the court and Roberts, Frankfurter, and Jackson all concurred.
- ⁹379 U.S. 48 (1964), at 49.
- ¹⁰379 U.S. 59-60, note 3. Citing Morton Salt, 338 U.S. 632 at 640.
- ¹¹420 U.S. 141 (1975).
- ¹²Harlan at 420 U.S. 149 quoting Sec. 7601 of the Internal Revenue Code of 1954. It is not specified whether emphasis within the quotation is added or is in the original.
- ¹³ Wong Yang Sung: 339 U.S. 33 (1950).
- ¹⁴Robert Jackson, "The Meaning of Statutes: What Congress Says or What the Court Says," American Bar Association Journal 34 (1948):535-538.
- ¹⁵Jackson, "Meaning of Statutes," p. 536.
- ¹⁶Jackson, "Meaning of Statutes," p. 536.

- 17 Jackson, "Meaning of Statutes," p. 537.
- 18 Jackson, "Meaning of Statutes," p. 537.
- 19 Jackson, "Meaning of Statutes," p. 537.
- 20 Jackson, "Meaning of Statutes," p. 538.
- 21 Jackson, "Meaning of Statutes," p. 538. Jackson does not identify the source of the Holmes' quote except to note that he said it before joining the Supreme Court.
- 22 Jackson, "Meaning of Statutes," p. 538.
- 23 339 U.S. 37-38.
- 24 338 U.S. 644.
- 25 One possible explanation for Jackson's approval of the French system beyond the obvious is that he served at Nuremberg with a member of the Cour de Cassation.
- 26 Robert Jackson, The Supreme Court in the American System of Government (Cambridge, MA: Harvard University Press, 1955), p. 46 (notes omitted). Part of Jackson's wording is ambiguous: the Cour de Cassation is the high court over the regulatory agencies.
- 27 339 U.S. 38 (notes omitted).
- 28 339 U.S. 39 (notes omitted).
- 29 This historical period is discussed in some detail in Chapter Two, above.
- 30 339 U.S. 40 (notes omitted).
- 31 339 U.S. 40-41.
- 32 339 U.S. 42.
- 33 339 U.S. 41.
- 34 339 U.S. 45.
- 35 339 U.S. 35.
- 36 60 Stat. 237, 241, 5 U.S.C. Sec. 1006. Cited at 339 U.S. 51.

37339 U.S. 46. While of course Jackson is correct about aliens in general, Wong Yang Sung himself seems to have found a voice to which American law was willing to listen. Jackson's concern for aliens as a class is not as sincere as this opinion might indicate; this point is discussed more fully later.

38339 U.S. 46-47.

39The case is Eisler v. Clark (D.D.C. 1948), 77 F. Supp. 610.

40339 U.S. 47. Apparently Jackson is quoting from the Government's brief.

41339 U.S. 47.

42339 U.S. 47.

43339 U.S. 47-48.

44339 U.S. 48.

45339 U.S. 49.

46339 U.S. 49.

47339 U.S. 49.

48339 U.S. 49-51.

49339 U.S. 52. Wong Yang Sung's writ of habeas corpus was sustained and he was ordered released. However, an immediately subsequent Supreme Court order turned him over to the authorities different charges. I have not been able to discover the ultimate disposition of the hapless Wong Yang Sung.

50Immigration Act, 39 Stat. 874 at 885.

5166 Stat. 166, 8 USC Sec 1101 et seq., cited in Marcello v. Bonds, 349 U.S. 302 (1955) at 316.

52 Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) at 288.

- ⁵³In Marcello v. Bonds, 349 U.S. 302 (1955), these proceedings were challenged because the hearing officer was supervised by officials with investigatory and prosecutory powers. The Court upheld Immigration although both Black and Frankfurter dissented on substantially the same grounds raised by Jackson in Wong Yang Sung: judges should be independent of the "power and control of prosecutors" (349 U.S. 319).
- ⁵⁴347 u.S. 260. Jackson's dissent in this case rests on the Attorney General's control of the Immigration Board of Appeals. Accardi had been denied his application for suspension of deportation. The Attorney General, prior to the Board of Appeal's decision, had circulated a confidential list of people he wanted to deport. Accardi claimed this prejudiced his hearing. Jackson quite clearly could not deny the prejudice, but Jackson felt that since the Board was not only advisory but also appointed by the Attorney General who had unlimited and final review of all its decisions, any bias they might have was acceptable in view of their subordinate and dependent role. Jackson was joined in this dissent by Reed, Burton, and Minton.

⁵⁵ Wong Yang Sung is not the only case in which Congress overturned a Court decision in which Jackson was involved. Gerhart ("A Decade of Mr. Justice Jackson," New York University Law Review 28 (May 1953:927-971) lists five cases where Jackson's dissents were eventually upheld by Congressional action (pp. 970-971). (1) Jackson's dissent in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) led to amendment of the relevant statute (57 Stat. 608 (1943), 31 U.S.C. Sec. 232 (1946). (2) In response to Jackson's dissent in Farmers Reservoir and Irrigation Co. v. McComb, 337 U.S. 755 (1949), Congress amended the Fair Labor Standards Act to agree. 63 Stat. 917, 918 (1949), 29 U.S.C. Sec. 213 (Supp 1952). (3) The Portal-to-Portal Act, 61 Stat. 84 (1947), 29 U.S.C. Sec 251 (Supp. 1952) repudiates the Jewell Ridge case in which Jackson dissented and which led to the public flare-up of the Black-Jackson feud. (4) Also in response to the Jewell Ridge controversy over Black sitting on the case, Congress revised the Judicial Code (28 U.S.C. Sec 455, Supp. 1952) so that "relation between a judge and an attorney in a case [is] a reason for the judge's disqualification" (pp. 270-271). (5) Jackson's dissent in Virginia Hotel Co. v. Helvering, 319 U.S. 523 (1943), led to a change in the Internal Revenue Code (Publication No. 539, 83d Cong., 2d Sess., 14 July 1952). I must add that I have not verified these impacts and that Gerhart is unabashedly biased in favor of Jackson. While I am sure Jackson's dissents carried some weight, without verification I am reluctant to assert the direct causality that Gerhart does.

⁵⁶ A survey of the Shepherd's Citator for this case revealed nineteen Supreme Court cases in which Wong Yang Sung received a more than superficial mention; the case was cited and distinguished in numerous lower court decisions. I have here been concerned only with the Supreme Court references to Wong Yang Sung which seemed especially important or illuminating.

⁵⁷ 343 U.S. 169 (1952).

⁵⁸ 343 U.S. 1701. Justice Douglas is quoting from the Immigration Act of 1917.

⁵⁹ 163 U.S. 228. (1896).

⁶⁰ 343 U.S. 176. Emphasis in original.

⁶¹ 180 U.S. 486.

- 62 Li Sing v. United States, 180 U.S. 486, at 494-495; quoting Fong Yue Ting v. United States, 149 U.S. 698 at 730. Cited in 343 U.S. 176, note 3.
- 63343 U.S. 176, note 3.
- 64342 U.S. 580 (1952).
- 65343 U.S. 177-178.
- 66343 U.S. 180.
- 67344 U.S. 33 (1952).
- 68341 U.S. 907.
- 69344 U.S. 36.
- 70344 U.S. 37.
- 71344 U.S. 39.
- 72344 U.S. 40.
- 73344 U.S. 41.
- 74344 U.S. 41.
- 75344 U.S. 42.
- 76 Martin Shapiro, The Supreme Court and Administrative Agencies (New York: Free Press, 1968), p. 108.
- 77 Boyce: 342 U.S. 337 (1952); Dalehite: 346 U.S. 15 (1953).
- 78342 U.S. 346.
- 79346 U.S. 42.
- 80346 U.S. 60.
- 81346 U.S. 50.
- 82 Ruberoid: 343 U.S. 470 (1952); Five Gambling Devices: 346 U.S. 441 (1953). The case in which Jackson actually dissented was a companion case, Ruberoid v. Federal Trade Commission.
- 83343 U.S. 480.

- 84343 U.S. 481-482. The quotation within this block quote is from Ruberoid Co. v. FTC, 189 F. 2d 893, 894.
- 85346 U.S. 452. The explanation of the Act is a paraphrase from 346 U.S. 442.
- 86 United States ex rel. Kraunff v. Shaughnessy: 338 U.S. 537 (1950) (dissent); Wong Yang Sung v. McGrath: 339 U.S. 33 (1950); Harisiades v. Shaughnessy: 342 U.S. 580 (1952); United States v. Spector: 343 U.S. 169 (1952) (dissent); Shaughnessy v. United States ex rel. Mezei: 345 U.S. 206 (1953) (dissent); United States ex rel. Accardi v. Shaughnessy: 347 U.S. 260 (1954) (dissent).
- 87338 U.S. 551. The influence of Nuremberg on Jackson is quite clear.
- 88342 U.S. 587-588.
- 89 Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), determined that the constitutional prohibition against ex post factor laws applied only to criminal statutes.
- 90343 U.S. 177-180.
- 91345 U.S. 219.
- 92345 U.S. 220.
- 93345 U.S. 221.

⁹⁴This is essentially the argument advanced by Douglas in his dissent in Harisiades:

Moreover, it was Douglas' contention that the [1893] Fong Yue Ting case [Douglas approved of Justice Brewer's dissent in this case] was inconsistent with the philosophy of constitutional law developed since 1893 for the protection of resident aliens, which has come to regard them as 'persons' within the meaning of the Fifth and Fourteenth Amendments and so entitled to due process and equal protection. Specifically, resident aliens have been protected against discrimination in business or employment [Yick Wo v. Hopkins, 1886; Truax v. Raich, 1915]; their property may not be taken without just compensation [Russian Volunteer Fleet v. United States, 1931]; they are entitled to habeas corpus to test the legality of arrest [Nishimura Ekiu v. United States, 1892], to the protection of the Fifth and Sixth Amendments in criminal trials [Wong Wing v. United States, 1896], and to the right of free speech as guaranteed by the First Amendment [Bridges v. California, 1941]. 'Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one--the right to remain here--has a like dignity.'

[C. Herman Pritchett, Civil Liberties and the Vinson Court (Chicago: University of Chicago Press, 1954), p. 105. Cases cited within brackets are the footnote information in the original text.]

⁹⁵345 U.S. 224.

⁹⁶345 U.S. 226. Jackson's note on p. 225 quotes from Goering's testimony at Nuremberg to emphasize the parallels between this case and Nazi Germany.

⁹⁷345 U.S. 224-225.

⁹⁸345 U.S. 227.

⁹⁹345 U.S. 227.

¹⁰⁰347 U.S. 268.

- 101347 U.S. 269.
- 102347 U.S. 269-270.
- 103Pritchett, The Vinson Court and Civil Liberties, Table 9, p. 190.
- 104Pritchett, The Vinson Court and Civil Liberties, pp. 228-229.
- 105Robert Steamer, "Mr. Justice Jackson and the First Amendment," University of Pittsburgh Law Review 15 (Winter 1954), p. 203. Paul Weidner also takes exception to Pritchett's views: Paul Weidner, "Justice Jackson and the Judicial Function," Michigan Law Review 53 (1955): 567-594.
- 106Paul Freund, "Individual and Commonwealth in the Thought of Mr. Justice Jackson," Stanford Law Review 8 (1955), p. 24.
- 107 Terminiello: 337 U.S. 1 (1949); Kunz: 340 U.S. 290 (1951); Saia: 334 U.S. 558 (1948).
- 108Philip Kurland, "Justice Robert H. Jackson--Impact on Civil Rights and Civil Liberties," University of Illinois Law Forum 1977 (1977): 551-576.
- 109Kurland, p. 552.
- 110Kurland, p. 552.
- 111Kurland, p. 552.
- 112Kurland, p. 559.

CHAPTER VII

CONCLUSION

"I have come across men of letters who have written history without taking part in public affairs, and politicians who have concerned themselves with producing events without thinking about them. I have observed that the first are always inclined to find general causes, whereas the second, living in the midst of disconnected daily facts, are prone to imagine that everything is attributable to particular incidents, and that the wires they pull are the same as those that move the world. It is to be presumed that both are equally deceived."

Alexis de Tocqueville.

In this chapter, several lines of thought developed throughout the study are brought together. The chapter has three major subdivisions. The first concludes the direct discussion of Jackson's work. His ultimate view of administrative law and the administrative process is presented, as is his personal impact on present views of administrative law. The second section discusses the ramifications of using substantive law and policy to frame our conceptualization of administrative law. Four possible levels of analysis and the usefulness of each are discussed. The third section discusses the importance of the study to public administration.

ROBERT JACKSON AND ADMINISTRATIVE LAW: CONCLUSIONPERSONAL BASIS FOR JACKSON'S VIEWS

In order to judge Jackson's ultimate impact on administrative law, some understanding of Jackson as an individual is necessary. Some writers "described his political philosophy as a little bit right of center. He often said he believed in liberal legislation conservatively construed."¹ "The net impression," wrote one observer, "is, to some extent, that of a man being forced more and more to the right by the sweeping views of his more 'liberal' colleagues--and not liking it."² His opinions were at times too clever; he sacrificed clarity or succinctness for the judicial bon mot. Frankfurter viewed this failing generously:

To an unusual degree in the history of the Court, Justice Jackson wrote as he felt. In his case, the style was the man....Unlike what he praised in Brandeis, his style sometimes stole attention from the substance...[but] no man who ever sat on the Supreme Court, it seems to me, mirrored the man in him in his judicial work more completely than did Justice Jackson.³

Frankfurter summed up his impressions of the man in the foreword to a symposium on Jackson in 1955:

Self-reliance, good-humored tolerance, recognition of the other fellow's right to be and to thrive even though you may not think he is as good as you are, suspicion of authority as well as awareness of its need, disdain of arrogance and self-righteousness, a preference for truculent

independence over prudent deference and conformity--these were the feelings that shaped his outlook of life.⁴

Frankfurter suggested that Jackson's book review of Arthur Gray Powell's I Can Go Home Again is a valuable aid to understanding Jackson's character.⁵ Jackson's review⁶ emphasized his pride in rural values, exemplified by the judges who might consult with their neighbors before making decisions: "But usually without asking they knew how the community felt, and the decision represented its collective idea of the decent thing. And generally it was not far off."⁷ He lamented the urban emphasis in a law founded on agrarian principles: "There isn't a whiff of the stable in a carload of college freshmen. More and more those who in court and classroom and legislative body restate our legal principles are men who have not experienced the country life of which our law was so largely the expression."⁸ He admired Georgia's governor John Slaton, who commuted to life imprisonment the death sentence of a Jewish factory manager unfairly convicted of murder and thereby committed political suicide. Perhaps Slaton's example influenced Jackson's decision to go to Nuremberg in the face of opposition and to remain there despite the urgings of friends to return to fight for the Chief Justiceship. At least in his early years in Washington, Jackson thought of himself as a country

lawyer, and he was shaped by his years in rural New York and in Jamestown: "Understanding of his outlook in public questions would be aided by an appreciation of the atmosphere of rugged independence, free discussion, and keen solicitude for the rights and welfare of the individual, which pervaded his city and county, so profoundly influenced by the presence of Chautauqua Assembly...."⁹

However, this "keen solicitude for the rights and welfare of the individual" of Jackson's early years was modified somewhat by Jackson's Nuremberg experience and his years on the Court. His expressions of his views changed after joining the Court; Barnett in 1948 wrote that "it cannot be too strongly urged that Jackson is primarily a brilliant and powerful advocate, and that in his earlier utterances he was working in that role....One might assume that the judge is more nearly the real Jackson than was the young and politically ambitious New Deal prosecutor and presidential hopeful."¹⁰ Rehnquist, writing in 1980, echoed this sentiment: The Struggle for Judicial Supremacy, published in 1941, "neither could nor would have been regarded as gospel by the man who, as an Associate Justice of the Supreme Court in 1952, wrote one of the concurring opinions in the famous Steel Seizure Cases."¹¹

MINORITY RIGHTS AND MAJORITY RIGHTS

Jackson's support of the rights of the individual came into conflict with the need for proper authority to govern by majority rule. Jackson wrote in his Godkin Lectures, published posthumously in 1955, that the balance between liberty and authority is the "most delicate, difficult and shifting" balance the court is asked to maintain.¹² He felt that the rough outlines of a free society were provided by the Bill of Rights. Liberty, "achieved only by a rule of law," is not the "mere absence of restraint." This rule of law often entails impinging upon the rights of the majority in order to protect individual or minority rights:

In case after case in which so-called civil rights are involved, the question simmers down to one of the extent to which majority rule will be set aside. This issue has been debated, but it has by no means been settled, and views shift as the occasion for judicial intervention shifts from case to case. About all we need to note, unless we were to go into a lengthy discussion of the particular cases of application of the power, is that the power of the Court to protect individual or minority rights has on the other side of the coin the power to restrain the majority. Some profound political philosophers, among them Mr. Jefferson, doubted the advisability of such intervention. Mr. Jefferson asked where else we may "find the origin of just powers, if not in the majority of the society? Will it be in the minority? Or in an individual of that minority?" Perhaps we should say that it is only to be found in the law, in rationally and dispassionately devised rules which limit the majority's control over the individual and the minority. But even with the best draftsmanship possible such rules cannot but leave many questions for interpretation.¹³

This position repeats a view espoused by Jackson in 1953 when he confronted the problem of maintaining minority rights: "Presumably we enforce the rights of a minority which restrict the majority only because a one-time majority will established them. May later majorities rescind the grant?"¹⁴ The problem is to determine what is owed to the past. Jefferson wrote that "the earth belongs to the living generation...."and Jackson agreed.¹⁵ Jackson concluded that proper rules of conduct require that the will of the current majority should be supported unless it clearly violates the Constitution.¹⁶ It seems that Jackson has contradicted himself; in Korematsu he suggested that the preservation of American society is not "merely" protecting the Constitution, but here, nine years later, he is writing that obedience to the Constitution takes precedence over even the "will of the living generation." This position is not so confusing when explained in light of Nuremberg.

JACKSON AND THE ROLE OF THE CONSTITUTION

Frankfurter in 1941 had written:

How to fit ancient liberties, which have gained a new preciousness, into solution of those exigent and intricate economic problems that have been too long avoided rather than faced, is the special task of Administrative Law.¹⁷

Jackson recognized that the administrative agencies were an essential ingredient in modern government and that they had to be accepted and controlled. One answer to Frankfurter's "special task" was the Administrative Procedure Act; in the 1953 article Jackson wrote that the Act was an example of a measure "that may help to prevent government from becoming arbitrary and oppressive as it grows big."¹⁸ The Act could protect individuals from two movements that threaten liberties: authoritarianism and the state philosophy that the state's interests are supreme. Authoritarianism Jackson defined as "official authority, unconfined by law, [which] rides roughshod over individual rights."¹⁹ The individual here is protected by due process. The second movement taken to its extreme becomes totalitarianism and from this movement the individual is protected by limiting the power of the Federal government. People, Jackson wrote, are willing to exchange liberty for security, subsidies, and collective advantage, but they forget that an intimate connection exists between property rights and human rights; Jackson felt that the two could not be separated. His foreign experience led him to believe that removal of individual rights, at least in foreign nations, always followed from removal of property rights. The establishment of the police state is argued on the same basis as

regulating property rights, e.g., compulsory service, heavy penalties for absenteeism, production quotas. It is therefore necessary for individuals to guard jealously all their rights within the context of majority rule and constitutionalism. The Weimar Republic, faced with a confrontation between majority rule and minority rights, found its Constitution and government incapable of the correct decision. In the 1944 Korematsu dissent, Jackson suggested that American society might survive without the Constitution, that on occasion the Constitution might have to give way to military expediency. After Nuremberg he found that the only hope of preserving society in the face of "exigent and intricate economic problems" and in the Cold War conflict was the Constitution, construed, when possible, in a way that supports the prevailing view of the majority.

Jackson constantly affirmed that the court must lean in favor of the constitutionality of action by the political branches, and he felt strongly that "overstepping or irresponsible use of judicial power is as much an evil as lawlessness in either of the other branches of government."²⁰ He was opposed to judicial activism; he felt the Court should not be viewed as the only branch of government to protect liberties:

The question that the present times put into the minds of thoughtful people is to what extent Supreme Court interpretations of the Constitution

will or can preserve the free government of which the Court is a part. A cult of libertarian judicial activists now assails the Court almost as bitterly for renouncing power as the earlier "liberals" once did for assuming too much power. This cult appears to believe that the Court can find in a 4,000-word eighteenth-century document or its nineteenth-century Amendments, or can plausibly supply, some clear bulwark against all dangers and evils that today beset us internally. This assumes that the Court will be the dominant factor in shaping the constitutional practice of the future and can and will maintain, not only equality with the elective branches, but a large measure of supremacy and control over them. I may be biased against this attitude because it is so contrary to the doctrines of the critics of the Court, of whom I was one, at the time of the Roosevelt proposal to reorganize the judiciary. But it seems to me a doctrine wholly incompatible with faith in democracy, and in so far as it encourages a belief that the judges may be left to correct the result of public indifference to issues of liberty in choosing Presidents, Senators, and Representatives, it is a vicious teaching.²¹

However, Paul Freund cautions against a too literal interpretation of Jackson's words; the question above

was only a caution, not a dogma, and a caution which did not keep him from breaking the sound barrier explosively and repeatedly. Liberty of conscience and the right to procedural decencies were the causes that most emphatically drew from Mr. Justice Jackson his full powers of indignation and rebuke on behalf of man against the State.²²

Walter Murphy, discussing Jackson's views on free speech and the judicial function, agreed:

But agreement or disagreement [with legislative or executive judgment] did not change his belief that the Court could best maintain its prestige by standing aloof from those situations where elected officials were forced to balance competing rights,

insuring only that there had been no efforts at censorship or discrimination.²³

Thus over his years on the Court Jackson evolved from a shrewd country lawyer to a judge whose philosophy which, while not always clear or predictable, is much the product of his judicial experience and his year at Nuremberg.

JACKSON AND THE ADMINISTRATIVE PROCESS

The major impact of Jackson's work as mirrored in his own writings was the work at Nuremberg. He did, however, express his views on the administrative process in his dissents in Ruberoid and in Chenery II.²⁴ Jackson used these dissents as a forum for essays on administration much as he used the Steel Seizure Cases to comment upon Presidential power.

Chenery II

The Public Utility Holding Company Act of 1935²⁵ required utility holding companies to register with the Securities and Exchange Commission (SEC). Once registered, the holding companies were required to integrate geographically and to simplify corporate structure under standards prescribed by the SEC. During integration and reorganization, the SEC controlled the companies' financing and operation. The Public Utility Holding Act permits companies to submit voluntary reorganization plans.

The first Chenery case (1943)²⁶ arose when Chenery and other stockholders of a holding company for Federal Water Service Corporation purchased preferred shares of Federal stock while approval of a reorganization plan was pending before the SEC. Under the proposed plan, preferred Federal stock would be converted to common stock in the new corporation formed from the reorganization. The result of the purchase, were the plan approved, would be that Chenery and the other holding company managers would retain their interest in the company. The SEC refused to allow the management to convert their new preferred shares to common stock and restricted them to receiving the cost of the shares plus four percent interest. The SEC justified its holding on the grounds that because management had prior knowledge of the reorganization, management's purchase of the shares was unfair and a violation of its fiduciary relationship to the shareholders; the SEC claimed that this notion of fiduciary relationships came from Supreme Court and other court decisions. Chenery appealed, and ultimately the Supreme Court returned the case to the Court of Appeals to be remanded in turn to the SEC.

The SEC reconsidered the issue, proclaimed a new line of reasoning for its decision against Chenery, but reached the same decision. Chenery again appealed to the SEC

decision to block the reorganization plan which would convert management's preferred stock to common stock.

Justice Murphy wrote the opinion in Chenery II. He emphasized two "simple but fundamental" rules of administrative law which Justice Frankfurter had stated in Chenery I. The first was that "a reviewing court, in dealing with a determination or judgement which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency," and the second was that "[if] the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable."²⁷ In Chenery I, the SEC had invoked judicial authority as the grounds for its order, and the Court had decided that the interpretation of the law by the SEC was in error: management has no fiduciary duty to the shareholders which prohibits it from buying and selling stock, and the only rule of equity upon which the SEC might have relied would apply only in cases of fraud or mismanagement. In Chenery II, the SEC concluded that Chenery was in violation of the Public Utilities Holding Act. This time the SEC based its decision on administrative expertise and not on judicial authority.

On this second attempt to have the reorganization plan approved, Chenery contended that since no fraud or mismanagement was involved, the SEC could not issue an order forbidding the management to receive their profit, and that any rule which forbade such activity must be prospective only. Writing for the Court, Justice Murphy disagreed:

To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.²⁸

Murphy clearly felt that the Commission was justified in deciding Chenery's case by a retroactive individual order. The SEC, he wrote, was charged with implementing the Holding Company Act, and this implementation might be by general rule or by individual order. The method chosen was at the discretion of the SEC:

The function of filling in the interstices of the Act should be performed, as much as possible, through the quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible....Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule....In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.²⁹

Jackson, joined by Frankfurter, dissented. Chenery II is considered by some scholars as the best expression of Jackson's views on the administrative process.³⁰ Jackson was usually supportive of deference to the administrative process but he was still "less inclined to treat administrative findings as conclusive or determinative than were most of his colleagues."³¹ He held in Chenery II that the opinion of the Court was unjustified deference to administrative expertise, especially since the problem was new to the Securities and Exchange Commission:

What are we to make of this reiterated deference to 'administrative experience' when in another context the Court says, 'Hence, we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct.'?... (Emphasis supplied.)

The Court's reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted!³²

Jackson quite clearly thought the Court was allowing the agency to judge matters of law properly reserved for judicial review and not just matters of fact; he found the possible precedent to be dangerous. The opinion

makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress. It reduces the judicial process in such cases to a mere feint. While the opinion does not have the adherence of a majority of the full Court, if its pronouncements should become governing principles they would, in

practice, put most administrative orders over and above the law.³³

The difference between the first Chenery case and this is "simply the difference between holding that administrative orders must have a basis in law and a holding that absence of a legal basis is no ground on which the courts may annul them."³⁴ He felt that the courts must not overweight the importance of administrative experience which may be exercised only within the agencies' discretionary powers as provided by law. What action is, or is not, within the law is a decision for the Court:

The truth is that in this decision the Court approves the Commission's assertion of power to govern the matter without law, power to force surrender of stock so purchased whenever it will, and power also to overlook such acquisitions if it so chooses. The reasons which will lead it to take one course as against the other remain locked in its own breast, and it has not and apparently does not intend to commit them to any rule or regulation. This administrative authoritarianism, this power to decide without law, is what the Court seems to approve in so many words: "The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties...."....This seems to me to undervalue and to belittle the place of law, even in the system of administrative justice....

I have long urged, and still believe, that the administrative process deserves fostering in our system as an expeditious and nontechnical method of applying law in specialized fields. I can not agree that it be used, and I think its continued effectiveness is endangered when it is used, as a method of dispensing with law in those fields.³⁵

Part of Jackson's outrage derives from his opinion that the courts in general, and the Supreme Court in particular, have the obligation and right to check administrative agencies. In 1947, Jackson wrote

In the United States, once Congress delegates authority to an administrative agency, the Congress loses effective control of the use to which that authority will be put, because it places the power in the hands of an independent and sometimes antagonistic Executive department of government. Hence, Congress legislates with wearisome and confusing details, designed to foreclose abuse, on the theory that every administrator will push his authority to the uttermost limits and as far beyond as the courts will permit--an expectation seldom disappointed.³⁶ [Emphasis added.]

He returned to this theme, that the courts control the administrative process, in the Godkin Lectures. He noted first that the courts supervise the administrative process by enforcement of administrative subpoenas, through judicial review of administrative decisions, and through judicial review of administrative subpoenas. Of these three, judicial review of administrative decisions has been the most troublesome:

But the courts recognized that mingled with a judicial function were executive and legislative ones. On the one hand [the courts] tried to avoid supervising intermingled nonjudicial functions, on the other to prevent arbitrary invasion of private rights. The limit of review wavered from case to case, the courts being on the whole more restrictive of their own jurisdiction than Congress desired. Finally an Administrative Procedure Act was passed to effect some separation

of prosecutive and adjudicative functions, to provide better and more independent hearing officers, and to enlarge the scope of judicial review. So far as administrative decisions are concerned, it would seem that if this headless fourth branch has a head, it must be the Supreme Court.³⁷ [Emphasis added.]

Ruberoid

By the end of his time on the Court, Jackson seemed to have developed a suspicion of the administrative process. He did not doubt the necessity for the administrative agency, but he felt strongly that the agencies must be controlled. Although he advocated the New Deal measures in the Thirties and Forties, it must not be forgotten that in those years he viewed himself as a government advocate, and the positions he supported were not necessarily his own. He always thought of himself as a country lawyer, and in 1944 wrote "Much controversy has shifted to the administrative tribunal, and the country lawyer hates it and all its works."³⁸ This was, perhaps, an overstatement for effect, but Jackson had noted--and feared--a deterioration in government administration. His clearest, and most eloquent, expression of his views of administrative law is in his dissent in FTC v. Ruberoid (1952) which is important in the context of this study not for the issue decided in the case but for Jackson's development of the "fundamental principles

which determine the position of the administrative process" in the American system of government.³⁹

THREE FUNDAMENTAL PRINCIPLES OF THE ADMINISTRATIVE PROCESS

1: Statutes are Incomplete. Jackson's first "fundamental principle" is that statutory enactments often are deliberately left incomplete for "clarification by the administrative process before court review or enforcement."⁴⁰

The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediences or conflicting guides, and so leaves the rounding out of its command to another, smaller and specialized agency....

Such legislation represents inchoate law....The intervention of another authority must mature and perfect an effective rule of conduct before one is subject to coercion...The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of the legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts.⁴¹

2: Administrative Process Completes Law. The second fundamental principle is that the "constitutional independence of the administrative tribunal presupposes that it will perform the function of completing unfinished

law."⁴² Jackson first addressed the place of the administrative process in the traditional American system:

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decision apart. They also have begun to have important consequences on personal rights....They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.⁴³

The place of administrative agencies in the American constitutional scheme was also addressed in the Godkin Lectures. Jackson noted the resistance of lawyers to the increase of the administrative process. This resistance, he wrote, is based on the lawyer's natural preference for a system in which he has been trained for the leading role and on the aversion many lawyers' clients have for whatever regulatory scheme is being enforced. Despite these objections, Jackson continued,

[it] is too late in the day to continue the argument as to whether these statutory bodies which defy the constitutional principle of separation of powers are unconstitutional. They have been accepted as a valid part of our legal system. But for three quarters of a century Congress has continued to launch these agencies without facing and resolving the administrative law problems which their functions precipitated.⁴⁴

Jackson had reverted to the practical side of his nature: he was unclear on just how the agencies fit into our constitutional theory, but since they are the heart of social and economic legislation and are already in place, he accepted them.

Jackson distinguished between statutes that have a policy component left to the agencies and those that are complete. Statutes that are complete, such as revenue, patent, and customs law, are enforced through executive action by executive agencies even though questions of fact are still required.

Only where the law is not yet clear of policy elements and therefore not ready for mere executive enforcement is it withdrawn from the executive department and confided to independent tribunals. If the tribunal to which such discretion is delegated does nothing but promulgate as its own decision the generalities of its statutory charter, the rationale for placing it beyond executive control is gone.⁴⁵

This, for Jackson, is administrative law: that law which is both left incomplete by Congress and completed by an

independent administrative agency--an agency which is placed beyond executive control. Administrative law, in Jackson's view, must include a policy component and therefore includes administrative discretion. Independent administrative agencies, rather than purely executive agencies, are thus the repositories of completed administrative law.

3: Restraints on Judicial Review. That the legislative component of agency activity "must neither be passed on to the courts or assumed by them" is Jackson's third fundamental principle.⁴⁶

That the work of a Commission in translating an abstract statute into a concrete cease and desist order in large measure escapes judicial review because of its legislative character is an axiom of administrative law....⁴⁷

The courts may review to ensure that the "secondary legislation properly derives from the primary legislation" or that due process considerations have been satisfied.⁴⁸

However, a determination by an independent agency, with "quasi-legislative" discretion in its armory, has a much larger immunity from judicial review than does a determination by a purely executive agency....

On review, the Court does not decide whether the correct determination has been reached. So far as the Court is concerned, a wide range of results may be equally correct. In review of such a decision, the Court does not at all follow the same mental processes as the Commission did in making it, for the judicial function excludes (in theory, at least) the policy-making or legislative element, which rightfully influences the Commission's judgment but over which judicial power does not extend. Since it is difficult for

a court to determine from the record where quasi-legislative policy making has stopped and quasi-judicial application of policy has begun, the entire process escapes very penetrating scrutiny....⁴⁹

Summary: Jackson's Definition of Administrative Law

Jackson's views on the administrative process can be summed thus: the administrative process, which has a debatable role in the American constitutional system, serves a necessary role in American government and we must seek to control, rather than to eliminate, it. Independent regulatory agencies produce secondary legislation which includes, by definition, policy considerations. This secondary legislation, expressed in the form of rules and regulations, comprises administrative law and is reviewable only so far as is necessary to verify both its congruence with the original Congressional intent and its consistency with constitutional requirements.

Such a view is hardly an earth-shattering denial of the established view of administrative law. If Jackson's mature opinions on administrative law were pedestrian, what, if anything, has been his impact on the field?⁵⁰ His impact in the definitional sense has been minimal; unlike Goodnow, or Freund, or Frankfurter, the strength of his views was neither strong enough nor radical enough to make much

impact. However, his impact in the evolutionary sense--in his involvement with the events which led the field to concerns with discretion and with substantive law--was considerable.⁵¹ That involvement has been described in some detail in earlier chapters; similar incremental contributions might have been made by any attorney who filled the offices of Solicitor General or Attorney General, but such a sustained effort and involvement spanning the very early years of the New Deal and continuing through the coldest of the Cold War was only possible because Jackson filled so many roles so well.

ADMINISTRATIVE LAW AS SUBSTANTIVE LAW: LEVELS OF ANALYSIS

The concluding portions of Chapter Two: Conceptual History of Administrative Law indicated clearly that to understand administrative law, we must set it in the context of its substantive policy area. This section will discuss the usefulness of each of the following four approaches to thinking of administrative law in a substantive law perspective:⁵² (1) Rabin suggested dividing agency missions into (a) regulation, (b) public management, and (c) benefit distribution as a heuristic device to introduce the substantive element. (2) Robinson, Gellhorn, and Bruff in their Administrative Process tried to fit the various steps

of the administrative process into the context of substantive policy areas such as environmental policy or regulatory licensing. (3) C. Herman Pritchett chose a different level by viewing the behavior of the Supreme Court as a unit and as individual justices as it rules on policy areas; an example of this approach is Civil Liberties and the Vinson Court (1954). (4) And finally, the focus may be narrowed even further to the work of one justice, as has been done in this paper, to try to ferret out the principles and philosophies by which he worked by analyzing his cases in one substantive area.

It is a truism that the level of analysis that should be used depends in great part on the results one wishes to achieve. Rabin's work is most useful in determining a definition for the field of administrative law. His divisions include the areas that are ignored by the narrower definitions such as Jackson's; should administrative law be restricted to the work of the independent agencies such as the Securities and Exchange Commission, then important issues such as off-shore oil development--largely under the purview of the Department of Interior--are excluded from the analysis. Rabin is seeking an organizing principle for the field that is narrower than simply "substantive law." Within his three categories of regulation, public

management, and benefit distribution can be placed virtually all administrative activities of the executive branch. Such a conceptualization of the field does not restrict research to case law; one might, for example, examine agency relationships with Congress in terms of the three categories. The ever-increasing demands of the welfare state may well call for special concerns in administrative law; Charles Reich's article on "The New Property" indicates how administrative law is changing with regard to welfare "benefits."⁵³ Rabin's conceptualization provides a definitional focus through which to study administrative law; it provides access to the entire range of administrative activity from organizational concerns with internal and external environments to policy implementation to specific court cases. Within such a definition might be found almost any aspect of what is traditionally included in the study of public administration.

Robinson, Gellhorn, and Bruff are perhaps the most ambitious in their attempt to reconceptualize the field, because they try to retain the case-law approach while incorporating substantive issues. Their attempt is only partially successful because they encounter the same difficulties in grouping cases as was found in the attempt in Chapter Six to identify the unifying principles behind

Jackson's alien cases. They utilize policy areas that bisect several of Rabin's categories. For example, environmental policy consists in part of regulation (e.g., clean air standards) and in part of management (e.g., restricting access to wilderness areas). The flaw in the approach is that, unlike Rabin's broader perspective which includes political behavior, policy-setting, and agency discretion, only those issues which come before the courts receive much attention. And, as we have seen, what may appear to be substantively similar cases are not necessarily so.

There is an assumption underlying the approach of Robinson et al. to administrative law that should be scrutinized. The presumption of law school texts, or of any academic text, is that the material can be compressed into a course or series of courses. If Rabin's perspective provides a truly useful definition of the field, then perhaps administrative law is not a course or series of courses but is instead an academic curriculum in its own right. Or perhaps what is usually called administrative law is in reality only a small subset: "Case Law in Public Administration," and what is needed are courses in "Rules and Regulations" which investigate such areas as public involvement and its impact on agency pronouncements, or how

regulated industries cope with regulating agencies which refuse to issue prospective rules. If administrative law is to break out of the case method pattern--a pattern which should be suspect for anyone who has read Davis on informal procedure--it will have to change the assumption that it can be taught from one book.

There are, however, positive aspects of such an approach. First, that a law school text, such as Robinson, Gellhorn, and Bruff's Administrative Process, would attempt to develop substantive concerns is encouraging. In Chapter Two we saw Jaffe and Nathanson acknowledge that one reason administrative law is taught by the case method is that the case method is easy. It may not be totally accurate or complete, but it provides a logical, functional framework, providing the anomalous cases are omitted. Robinson, Gellhorn, and Bruff force the student to include policy considerations. In addition, it should by now be clear that no division of issues into substantive areas can be entirely satisfactory. There are always overlaps and contradictions, places where anomalies can only be resolved by resorting to concerns that are properly in another area. Nathanson wrote in 1956 that "the future of administrative law lacks the clarity calculated to appeal to orderly minds."⁵⁴ The Eighties are part of the future he envisioned, and

administrative law is no clearer. To begin to understand administrative law, we must be prepared for disorderliness.

The third approach through which substantive issues may be included in administrative law is by viewing the courts through an historical perspective. Examination of, for example, the Roosevelt Court, or the Vinson Court, provides the historical evolution of legal concepts or of substantive policy as it is defined by the courts. Despite the dreams of legal purists, the work of the Supreme Court does not take place in a political vacuum. Speaking of the aftermath of Roosevelt's court-packing fight, Jackson said "...in the next six months the Supreme Court rewrote the whole law of labor in the United States. If you wish to believe this to be mere coincidence it is all right with me."⁵⁵ Historical events do not need to be so spectacular as Roosevelt's attempt to control the Court; death and retirement gave him sufficient control of the Court through his appointment power that the Court is known not as the Stone Court but as the Roosevelt Court. The Court must eventually respond to public opinion. Judges bring the assumptions of their training to the Court; "judicial power has often delayed but never permanently defeated" persistent public opinion, wrote Jackson in 1953.⁵⁶

By viewing Court opinions over a considerable length of time which is structured by some common factor--such as the Roosevelt presidency--general trends of political force, public opinion, and judicial interpretation are observed. Single cases cannot be afforded the opportunity to dominate the analysis because too many cases are decided. Thus in the 1970's the Court's decisive role in environmental matters is seen against the broader sociological concerns of the anti-Vietnam War movement and the counter-culture movement.

What is often lacking in these historical investigations of courts is the agency behavior which comprises most of the interaction between citizen and bureaucrat and which by the very nature of the interaction is legal and hence administrative law. The defense of the historical method against that charge is that it is only supposed to identify the broader trends, and that to consider agency behavior is to change and to narrow the focus. Such omissions are not, however, necessary; for example, agency considerations are not excised from Pritchett's work, and while they are not his primary concern, they are included where appropriate.

The final level and method of analysis is to focus upon the work of one Justice as this study has focused upon

Justice Jackson. This is a potentially fruitful method with very narrow applications. First, one is restricted to a very small period of time, unless the Justice chosen is one such as Douglas or unless, like Holmes and Brandeis, his influence is such that it extends well beyond his lifetime. Second, only those cases in which he wrote an opinion or dissent are of much value for defining his interests. Aggregate studies like The Roosevelt Court can, through tabulation of judicial votes, find the broad indicators of a Justice's philosophy, but only a detailed examination of his work can verify the indicators. Of necessity, then, many factors which might provide depth must be ignored or unused. I do not think that in general, the individual Justice mode of examination can provide much insight into substantive issues. Rather it is the other way round: thinking in terms of substantive issues provides insight into the philosophies of individual Justices.

There are, however, some exceptions to the view that the work of single Justices is not very useful in analyzing substantive issues. These exceptions arise when that Justice is so placed as an individual that his personal behavior is historically significant. Jackson is one such Justice, as he had direct personal influence with Roosevelt and was so intimately involved with what eventually became

the Administrative Procedure Act. His life and work provides a focus to organize an otherwise overwhelming array of material. His work at Nuremberg is a bonus; by stepping outside the American legal confines of the Constitution, he brought a unique perspective to bear on the relationships between law and society. As a general technique, the use of individual Justices provides the least useful methodology. But to return to the truism which began this section: to achieve what I wanted, this was the appropriate level of analysis and technique.

LESSONS FOR PUBLIC ADMINISTRATION

The importance of this study to public administration was addressed in part in Chapter One: Introduction. There are, however, some issues beyond the small concern of the justification for the study. This includes the role of administrative law in the discipline of public administration both in conceptual terms and in light of educational processes.

To think of administrative law in terms of substantive law or policy is to continue to ignore how administrative law is defined. Is it simply case law on a particular topic, neatly indexed by Shepard and West? Does it include the hearings held before the agencies and decided by

administrative law judges? Probably both views may be included without much controversy since they both have what we consider the trappings of the law, and because the courts may ultimately review the hearing results. Does administrative law include the rules and regulations published, as required by law, in the Federal Register? Probably so, especially as these may be viewed as secondary legislation, and legislation is clearly law. Does administrative law include the decision process by which those rules and regulations are made? Maybe. This is political activity, and some academics and lawyers cling to the illusion that politics is antithetical to law. From here on, the answers to "Does it include...?" become increasingly unclear. In one sense, any legitimate government activity is law, and any differentiation between kinds of law is partly artificial and designed to induce clarity and order where none exists in fact. But to include any bureaucratic activity as administrative law is to define the field out of existence.

There are no answers. If we accept 1887 as the date at which public administration became a self-conscious activity, then almost one hundred years later we have not arrived at a satisfactory consensual definition of public administration. How then can we expect to define

administrative law? We can subdivide it to increase the ease of understanding. We can analyze it at macro-levels (the Constitution) and micro-levels (case law and discretionary action). We can view it as a tool of social control as Iredell Jenkins suggested, or as a tool of managerial implementation of policy, as David Gould suggested. We can analyze agencies or courts or Justices or cases. But within certain bounds, how we define administrative law depends largely upon what we plan to do with the results of our definition, and therefore a consensus on the definition is unimportant. The bounds within which we define administrative law, however, are important, and it is these bounds that have implications for the teaching of public administration:

1. Administrative law includes case law but is not restricted to case law.
2. Administrative law includes a vital discretionary component that operates at every level of the administrative process, including agency and court behavior.
3. Administrative law, because of its intimate relationship with the legislature, the executive, the courts, and the bureaucracy, is intensely political both in its origins and its implementation. Any

study of administrative law must include these political relationships.

It is these three factors which must be included in any definition of administrative law.

The implication of these factors for teaching public administration seem clear. Administrative law permeates virtually every segment of the public administration curriculum. To teach simply case law and to label such a course "Administrative Law" is to do a disservice to students of public administration. Fortunately, new texts are appearing that grapple with the need to include the discretionary and political components of administrative law.⁵⁷ However, just as policy components should not be ignored in administrative law, neither should administrative law be ignored in presenting courses on policy analysis, on bureaucratic theory, or on other public administration subfields.

NOTES

- ¹"American Lawyers Mourn the Passing of Mr. Justice Jackson," American Bar Association Journal 40 (November 1954), p. 971.
- ²Barnett, p. 241.
- ³Felix Frankfurter, "Mr. Justice Jackson," Harvard Law Review 68 (April 1955), pp. 938-939. A short collection of some of Jackson's more telling phrases is found in Eugene Gerhart, Supreme Court Justice Jackson: Lawyer's Judge (Albany, NY: Q Corporation, 1961).
- ⁴Felix Frankfurter, Foreword to a Symposium on Robert Jackson, Columbia Law Review 55 (1955), p. 436.
- ⁵Frankfurter, Foreword to a Symposium on Robert Jackson, p. 436.
- ⁶Robert Jackson, "A Tribute to Country Lawyers: A Review [Of I Can Go Home Again by Arthur Gray Powell], American Bar Association Journal 30 (1944):136-139. The book was published in 1943 by the University of North Carolina Press in Chapel Hill.
- ⁷Jackson, "A Tribute to Country Lawyers: A Review," p. 137.
- ⁸Jackson, "A Tribute to Country Lawyers: A Review," p. 139.
- ⁹W.L. Ransom, "Associate Justice Robert H. Jackson," American Bar Association Journal 27 (April 1941), p. 481.
- ¹⁰Vincent M. Barnett, Jr., "Mr. Justice Jackson and the Supreme Court," Western Political Quarterly 1 (3) (September 1948), p. 241.

¹¹William H. Rehnquist, "Robert H. Jackson: a Perspective Twenty-Five Years Later," Albany Law Review 44 (April 1980), p. 537. Rehnquist clerked for Jackson in 1952. His mention of the Steel Seizure Cases is significant as several authors have commented on Jackson's concurrence in that opinion. Simpson (1956) wrote that Jackson's opinion "is a remarkably sophisticated distillation of existing constitutional wisdom with regard to the complex and, regrettably, often obscure question of Presidential powers" (p. 348). Kurland (1977) called the opinion "probably the most important that Jackson ever composed..." (p. 567). And Rehnquist continued his discussion by declaring that Jackson's opinion was the "closest [of all Jackson's opinions] to being a 'state paper' of the same order as the best of the Federalist Papers, or of John Marshall's opinions for the Court in the early part of the nineteenth century. His grouping of Presidential powers into three classes...has yet to be surpassed in its statesmanlike and lawyerlike analysis of the executive branch of the federal government" (p. 537).

The Steel Seizure Cases (Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 [1952]) was a six to three decision invalidating Truman's attempt to seize the steel mills in order to protect steel production during the Korean War. Jackson's concurring opinion discussed three levels of presidential power (at 635-637). The first level, that of maximum presidential power, occurs when the President acts "pursuant to an express or implied authorization of Congress" and is maximal because he is exercising all of his own power plus delegated power. The second level exists where he has no Congressional grant but also no denial of authority. The third level is the weakest and exists when the President acts against the "expressed or implied will of Congress."

¹²The following paragraph is from Robert Jackson, The Supreme Court in the American System of Government (Cambridge, MA: Harvard University Press, 1955), pp. 75-76 (notes omitted).

¹³Jackson, The Supreme Court in the American System of Government, p. 77 (notes omitted).

¹⁴Robert Jackson, "The Task of Maintaining our Liberties: The Role of the Judiciary," American Bar Association Journal 39 (November 1953), p. 965.

¹⁵Jackson, "The Task of Maintaining our Liberties," p. 969. He does not give the source for the Jefferson quotation.

¹⁶Jackson, "The Task of Maintaining our Liberties," p. 969.

¹⁷Felix Frankfurter, "Foreword," Columbia Law Review 41 (1941), p. 586, quoted in Bernard Schwartz, "Administrative World of Mr. Justice Frankfurter," Yale Law Journal 59 (June 1950), p. 1265.

¹⁸Jackson, "The Task of Maintaining our Liberties," p. 963.

¹⁹Jackson, "The Task of Maintaining our Liberties," p. 962.

²⁰Jackson, "The Task of Maintaining our Liberties," p. 961.

²¹Jackson, The Supreme Court in the American System of Government, pp. 57-58. James Shellow elaborated on Jackson's view of judicial power:

[Jackson's] image of the judiciary is that of an independent, non-political body whose function is solely to decide cases on the basis of reasonably clear mandates as to the desires of the legislative and executive branches. The Court in a republican form of government does not evaluate the desirability of legislation and the road to totalitarianism is paved with courts eager to impose their scheme of social values.

(James Shellow, "An Analysis of Judicial Methodology: Selected Opinions of Justice Robert H. Jackson," Marquette Law Review 45 (1961), p. 107.

²²Paul Freund, "Individual and Commonwealth in the Thought of Mr. Justice Jackson," Stanford Law Review 8 (1955), pp. 12-13.

²³Walter Murphy, "Mr. Justice Jackson, Free Speech, and the Judicial Function," Vanderbilt Law Review 12 (October 1959), p. 1043 (notes omitted).

²⁴SEC v. Chenery, 332 U.S. 194 (1947); FTC v. Ruberoid 323 U.S. 470 (1952).

²⁵Public Utility Holding Act of 1935, 15 U.S.C. Sections 79-79z. I am indebted to Louis Jaffe and Nathaniel Nathanson, Administrative Law (Boston: Little, Brown, 1976), pp. 207-226, for the organization and substance of this discussion on the background of the case.

²⁶SEC v. Chenery Corp., 318 U.S. 80 (1943).

27332 U.S. 196.

28332 U.S. 202.

29332 U.S. 202.

30Barnett, p. 238.

31Barnett, p. 283.

32332 U.S. 213.

33332 U.S. 210.

34332 U.S. 212.

35332 U.S. 216-218 (notes omitted).

36Robert Jackson, "Lawyers Today: The Legal Profession in a World of Paradox," American Bar Association Journal 33 (January 1947), p. 25.

37Jackson, The Supreme Court in the American System of Government, pp. 47-48.

38Jackson, "A Tribute to County Lawyers: A Review," p. 139.

39343 U.S. 483.

40343 U.S. 483. Original in italics.

41343 U.S. 486-487.

42343 U.S. 487. Original in italics.

43343 U.S. 487-488.

44Jackson, The Supreme Court in the American System of Government, p. 46. One of the methods frequently relied upon by Congress to resolve the problems posed by administrative agencies has been the legislative veto. However, in a recent decision INS v. Chadha (No. 80-1832, decided 23 June 1983), the Court struck down the use of the legislative veto as unconstitutional. Jackson's opinion in the Steel Seizure Cases (see Note 11 in this chapter) was cited several times as was his article in the Harvard Law Review explaining Roosevelt's view of the legislative veto in the Land-Lease Act (see Chapter Three for a full discussion).

*5343 U.S. 489. (Notes omitted.)

*6343 U.S. 490. Original in italics.

*7343 U.S. 490.

*8343 U.S. 490.

*9343 U.S. 490-491.

⁵⁰Philip Kurland does not find Jackson's impact to have been substantial:

I would say that neither Jackson's attitudes nor his craftsmanship, whether in the realm of civil liberties or elsewhere, has left a deep mark on the jurisprudence of the Supreme Court. But he has left an intellectual inheritance that may, like a phoenix, rise again.

(Kurland, "Justice Robert H. Jackson--Impact on Civil Rights and Civil Liberties," University of Illinois Law Forum 1977(1977), p. 576.) Just what that "intellectual inheritance" might be is unclear, unless Kurland is referring to the concepts developed in some of Jackson's dissenting essays, such as governmental discretion in tort liability (Dalehite), extra-Constitutional society (Korematsu), or levels of Presidential power (Steel Seizure Cases).

⁵¹The connection between the late Thirties and the early Forties and Jackson's last years on the Court is not as remote as might be expected. For example, the lower court judge who invalidated the FTC rule in Ruberoid--and with whose decision Jackson, dissenting, agreed (although we are not told if Jackson also agreed with the reasoning behind the decision)--was Judge Groner who filed a separate minority report with the Report of the Attorney General's Committee. Groner was in favor of very strict judicial controls of the administrative process.

⁵²I do not mean to imply that these four approaches--or variants of them--are the only ones possible. One might, for example, examine the work of one agency or bureau or department, although the danger of producing a case study is always present under such conditions. (I do not intend to denigrate case studies, but a case study is not the goal of this analysis). I am limiting this discussion to the four methods outlined in the accompanying text because they have been introduced earlier in the study, and because I feel they adequately bracket the concerns I wish to address.

⁵³Charles Reich, "The New Property," Yale Law Journal 73 (1964): 733-787.

⁵⁴Nathaniel Nathanson, "Law and the Future: Administrative Law," Northwestern University Law Review 51 (May-June, 1956), p. 184.

⁵⁵Robert Jackson, "Labor and the Law," Vital Speeches 3 (1937), p. 719.

⁵⁶Jackson, "The Task of Maintaining our Liberties," p. 965.

⁵⁷Phillip Cooper's 1983 text, Public Law and Public Administration, is an admirable text that utilizes a multi-faceted approach.

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*Discussion in the text of these Morgan cases also draws upon the government briefs for these cases. Citations to these briefs simply refer to the cases, e.g., "Government Brief, Morgan v. United States, _____ U.S. _____." The briefs are available in the Library of the Supreme Court and are filed in bound volumes by case number. Documents within each volume are numbered separately; the method of citation used here seems most convenient. The brief for Morgan III is not available at the time of this writing. I am indebted to Robert Matthews for providing copies of the texts of these government briefs.

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JUSTICE ROBERT JACKSON AND THE EVOLUTION OF ADMINISTRATIVE
LAW

by

Susan Jane Buck Cox

(ABSTRACT)

Neither practitioners nor academics in the field of public administration have agreed upon a satisfactory definition of administrative law. To help explain this present-day confusion, a conceptual history of administrative law is presented. This history, which stresses how administrative law has been perceived, is divided into three major periods: 1893-1933, 1933-1946, and 1946 to the present. The definition is found to have begun as the tripartite view of delegation of legislative authority, exercise of legislative authority, and judicial review, which later changed to a concern for the discretionary component of administrative law; the present-day definition includes substantive law.

Because the New Deal era was critical in codifying administrative law and in setting the stage for the changes which followed, the New Deal and post New Deal years are examined closely. The work of Robert Jackson, who served as Solicitor General and then Attorney General under President Franklin Roosevelt, and then as Associate Justice of the Supreme Court from 1941 to his death in 1954, is used as the

focal point for the examination. Jackson's work as government attorney had considerable impact on the field of administrative law, especially in his influence on the veto of the Walter Logan bill and the Attorney General's Committee on Administrative Procedure. His work as a Justice had less impact; most of his notable opinions are in dissent and have yet to be affirmed by the Court.

The dissertation concludes with a discussion of Jackson's views of administrative law, the necessary components to a definition of administrative law, and the importance of accepting such components for methods of teaching public administration.