ADMINISTRATIVE DECISIONS IN CONNECTION WITH IMMIGRATION[1]

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Administrative decisions in connection with immigration are in a different class from those of the interior department and those of the interstate commerce commission as explained in the preceding papers. The interior department deals with distributions of public property and the interstate commerce commission acts judicially with reference to private rights; whereas administrative decisions in connection with immigration determine some of the most sacred of private rights as a mere incident in the execution of a public policy.

The immigration service is within the general but minutely regulated administrative jurisdiction of the department of labor.[2]

This is the tenth and youngest of those executive branches of the federal government that are administered by members of the president's cabinet. For its administration the present secretary of labor,[3] who is also the original incumbent, is William B. Wilson, of Pennsylvania. Long-continued industrial and civic experience of varied and highly responsible kinds, and a mind naturally judicial and instinctively humane, have made Secretary Wilson exceptionally competent for the work of this department.

[1] A paper read at the annual meeting of the American Political Science Association, December 29, 1915.

[2] Organic Act of the Department of Labor, entitled "An Act to Create a Department of Labor," approved March 4, 1913; Immigration and Chinese Exclusion Laws collected in Regulations of Department of Labor (1915), pp. 131 to 227.

[3] Organic Act, Sec. 1; "That there is hereby created an Executive Department of the Government to be called the Department of Labor, with a Secretary of Labor, who shall be the head thereof, to be appointed by the President by and with the advice and consent of the Senate."

The department is of very recent creation. Although advocated by labor organizations for nearly half a century,[4] it was not created by congress until March 4, 1913. You will therefore notice that the secretary has had less than three years for organization. And this period is shortened by several months, during which his thoughts and energies were monopolized by problems of financing his work with scant appropriations.[5] In so short a time and under that embarrassment, few administrative policies could be firmly enough established, or even clearly enough outlined, to warrant a subordinate official in discussing them with the slightest air of authority without instructions, and as to the subject assigned me here I am officially uninstructed. Let me advise you then that in no sense nor in the slightest degree is anything I may say on this occasion to be regarded as significant of more than my own understanding and my personal opinion.

Four bureaus were embodied in the department of labor at its creation. For a longer or shorter time three had existed and out of one of these the fourth was carved. The oldest, then known as the bureau of labor but now called the bureau of labor statistics,[6] had operated since 1884. The youngest, the children's bureau, had been created in 1912.[7] The other, then named the bureau of immigration and naturalization, dated back historically to 1882.[8] Having transformed the division of naturalization of the last-named bureau into the present bureau of naturalization, the organic act of the department of labor has left all immigration functions—subject, however, to the jurisdiction and supervision of the department—with the present bureau of immigration.[9] It is to administrative decisions in connection with the work of this bureau that my subject is limited.

[4] First Annual Report of the Secretary of Labor (1913), p. 7; and Second Annual Report of the Secretary of Labor (1914), p. 6.

[5] Id. (1913), p. 47, and id. (1914), pp. 9 to 12.

[6] Id. (1913), p. 22; id. (1914), p. 56; id. (1915), p. 54 et seq; Organic Act, Sec. 3 and 4.

[7] First Annual Report of the Secretary of Labor (1913), p. 44; id. (1914), p. 80; id. (1915), p. 72; Organic Act, Sec. 3.

[8] First Annual Reports of the Secretary of Labor (1913), pp. 27–43; id. (1914), pp. 62–79; id. (1915), pp. 59–71; 80–84; Organic Act, Sec. 3.

[9] First Annual Report of the Secretary of Labor (1913), p. 27; id. (1914), p. 62; id. (1915), p. 59; Organic Act, Sec. 3.

The federal laws for regulating immigration, out of which this class of administrative decisions has developed, were administered at the beginning by state officials. That method continued nine years after congress had made permanent appropriations for defraying the expense, exclusive federal jurisdiction not having been established until 1891. Under the secretary of the treasury from that year until 1903 and under the department of commerce and labor from 1903 until 1913, the immigration laws have been administered under the department of labor since March 4, 1913.[10]

Of those laws there are two classes. One class, immigration laws distinctively, relates to all aliens;[11] the other, the Chinese exclusion laws, relates to Chinese alone.[12] To facilitate administration, ports of entry are established at convenient places. Aliens entering elsewhere are subject to deportation, and at the ports of entry immigrant inspectors are stationed to investigate questions of admissibility.[13]

By amendment and interpretation the immigration laws have become alien laws, alienage rather than migration being the major fact in administrative decisions under them. An alien who lives in the United States, no matter how long his residence here may have continued, must have a care if he goes near the Canadian or the Mexican boundary line lest he stub his toe against it and fall over to the other side. His stepping back at the place where he fell, this not being an authorized port, would constitute an unlawful entry and subject him if captured to deportation to the country whence he had originally come. So would his proving to be inadmissible if he applied at an authorized port. A plea that he was not an immigrant because already domiciled here, would be unavailing. His alienage would be the decisive fact. He might have lived in this country almost a lifetime; the country

[10] First Annual Report of the Secretary of Labor (1913), p. 27.

[11] "An Act to regulate the immigration of aliens into the United States," approved February 20, 1907 (34 Stat. 899), with its amendments as collected in Regulations of the Department of Labor (1915), pp. 131–147.

[12] Treaty of 1880 and Statutes relating thereto as collected in Regulations of the Department of Labor (1915), pp. 185–205.

[13] Regulation of the Department of Labor (1915),p. p 147–170.

of his original migration might be half way around the world; he might have no friends or relatives there; all his personal associates, property interests and family ties might be here. Yet by administrative decision he could be, in many cases he must be, kept away or sent away; and if sent away, sent not to Mexico or Canada, whose boundary line had tripped him up (for they might refuse to receive him), but possibly to a distant country to which he had become from long absence a total stranger. To put the example in another way, an alien who lives in the United States, regardless of how long, must have a care if in order to get a particular view of Niagara Falls he is tempted to cross temporarily over to the Canadian side. Should he yield to this temptation his return to the country of his domicile, though it were made within the day or even the very hour, and whether regularly at a port of entry or clandestinely, would be subject to the exclusion provisions of our immigration laws. The supreme court of the United States has so decided.[14]

When an alien appears at an immigration port of entry, he is primarily inspected by public health surgeons and immigrant inspectors as to his admissibility. If they approve him they thereby make an administrative decision in his favor and he is allowed at once to enter the United States. So far as "exclusion" proceedings in contradistinction to possible "expulsion" proceedings in the future are concerned, their decision is final. If the inspectors do not approve the applicant at their primary inspection of him, he is taken before a board of three inspectors where an administrative trial of his case is had. The trial is privately conducted, but the proceedings are recorded. Should this board admit him by unanimous vote, they thereby make an administrative decision which is also final. The alien is in that event forthwith released. Should the decision not be unanimous, the minority member of the board may appeal to the secretary of labor. So may the alien if the decision is against him, whether it be by majority or unanimously.

Appeals go up to the secretary of labor upon the record made by the inspectors. His decisions either way are final, for the

[14] Lewis v. Frick, 233 U. S. 291; Ueberall v. Williams, 187 Fed. 470.

courts interfere only in cases in which he appears to them to have no jurisdiction. They may reverse or affirm his decisions on questions of law, but into questions of fact they do not inquire[15] if there is any evidence at all in support of the secretary's conclusion.

Not to all kinds of cases, however, do rights of appeal from immigrant inspectors to the secretary of labor attach. When official surgeons certify to mental defects or to dangerous or loathsome contagious diseases, and a board of inspectors excludes upon the basis of that certificate, there can be no appeal to anybody. Such cases are beyond the reach even of the secretary of labor.[16]

And in cases in which an appeal does lie to the secretary of labor, or which otherwise come within his authority, the range for discretion is narrow indeed. There is in the whole system no chancery principle enabling him or anyone else to modify any intolerable harshness which the immigration law, by reason of its necessary universality, compels its administrators to inflict. It is true that the secretary of labor is invested with some discretion as to some classes of aliens ordered excluded as likely to become a public charge, and with reference also to admission to hospital treatment for some kinds of physical affliction; but there his discretion is about exhausted. In cases in which the law commands him to dismiss an appeal upon the evidence in the inspectors record, and in those in which there is no appeal, the law makes him powerless to relieve any consequent suffering however extreme.

Were a wider range of discretion lodged in the secretary, administrative decisions with reference to immigration could not be objected to consistently with the recognized right of governments to fix their own terms for admitting aliens to territory under their respective jurisdictions. Only through governmental decisions can this right be enforced by any government. But in order that those decisions may be wisely administrative,

[15] Lewis v. Frick, 233 U. S. 291; Lee Lung v. Patterson, 186 U. S. 168; Pearson v. Williams, 202 U. S. 281.

[16] Act of February 20, 1907, 34 Stat. 899, Sec. 10.

executives should not be straightjacketed with minute statutory regulations. Their discretion should be broad enough to enable them to bring good judgment and humane considerations to the interpretation and support of broad formulations of legislative policy. Administrative decisions moulded by inelastic legal machinery are incompatible with the best administration of alien immigration laws. Rectified in that respect, however, our immigration statutes might go as much farther in cataloguing the defects for which aliens may be excluded as public policy requires. Invest executive officials with the degree of freedom they must have in the interests of a wise administration of public policies involving individual suffering—a freedom which, law or no law, will almost inevitably be resorted to in cases of hardship in order to avoid outraging the common humanities and scandalizing the law itself and its administration,—do this, and (the general policy of alien exclusion being conceded) exclusion of aliens by administrative decision might be unobjectionable.

But what of the possibilities of excluding citizens by administrative decision?

Ought questions of American citizenship to be determined as incidents of executive administration? Whether they ought to be or not, they are in fact so determined. By administrative decisions, wholly nonjudicial in character, made as an incident to executive routine and with no right reserved for judicial trial or review, citizenship is awarded or denied much as a new public building may be contracted for or an old one ordered to be torn down. It is an executive act performed in the course of executive routine and under the influence of administrative precedents and habits of thought.

Such decisions usually occur in Chinese cases. Immigrants from China are subject to all the disabilities of the ordinary immigration laws and in addition to those also of the Chinese exclusion laws. Originally only Chinese laborers were excluded for being Chinese. This was in accordance with a treaty which authorizes the exclusion of laborers from China under certain circumstances. By accumulated legislation, however, and departmental interpretations over a long period, the treaty has

been thrust so far into the background that outside of a few specific classes all Chinese aliens are now inadmissible.[17] But Chinese born in the United States and under its jurisdiction constitute a class apart.

Pursuant to the Fourteenth Amendment they are constitutional citizens.[18] Consequently every person of Chinese lineage who comes from abroad and claims American birth raises the highest question of privilege known to the laws of our land. Yet his constitutional rights in this respect are determined by administrative decisions—in the first instance by a board of immigrant inspectors and then by the secretary of labor or one of his subordinates upon appeal. The courts will not give judicial consideration to this claim to citizenship farther than it will to the questions of an alien's admissibility. Beyond ascertaining whether there is in the record any evidence at all upon which to base an administrative judgment against citizenship, they refuse to review the secretary's decision.[19]

It may be said that only Chinese are concerned with this, and that they, though born in this country, retain Chinese customs and language exclusively and yield allegiance to China. A serious consideration that, with reference to Chinese-Americanism; but it is quite apart from the question of subordinating constitutional citizenship to administrative decisions. The function of administrative decisions is to execute details of public policy. Private rights, certainly fundamental private rights, belong in another category.

Nor is it true that administrative decisions determining citizenship concern Chinese alone. In principle they apply to every person of American birth whatever his race. As our immigration laws now stand, a direct American descendant of a Pilgrim Father, were he returning from a visit abroad and suffering from tuberculosis or trachoma, from insanity or imbecility, with ringworm of the nail or valvular disease of the heart that might

[17] Regulations of the Department of Labor (1915), pp. 185–227; Chae Chan Ping v. U. S., 130 U. S. 581; 23 Opp. Att. Gen. 485.

[18] U. S. v. Wong Kim Ark. 169 U. S. 649.

[19] U. S. v. Ju Toy, 189 U. S. 253.

affect his ability to earn a living, would have his citizenship determined by administrative decision. Had he been abroad long enough to have acquired an alien accent or a foreign air, the decision might be against his citizenship; and in that case it would be final, no matter how weighty the preponderance of proof in his favor. Upon any old-fashioned judge coming to the relief of this citizen who had found himself unable to satisfy the secretary of labor of his American birth, the precedents furnished by Chinese cases would fall like an avalanche.

Other than rights of citizenship, few personal rights are determined by administrative decisions incidental to the administration of the immigration laws. Inasmuch as immigrants never yet landed have no personal rights under our laws, their exclusion does not raise questions of personal rights. The questions in such cases are of national policy alone. If therefore aliens indiscriminately were not subject to our immigration laws, irrespective of their domicile and of the brevity of their temporary absence abroad, exclusion by administrative decision could be reasonably defended. As it is, however, the principle of administrative decisions in immigration cases operates repugnantly to American conceptions of the rights of domicile. The relegation of domiciliary rights in individual cases to executive power, should be almost as offensive to American thought as relegating constitutional rights of citizenship to that power should be.

If, however, personal rights determinable by administrative decisions in "exclusion" cases under the immigration laws be few, they are numerous enough in cases of "expulsion." For not only can aliens be kept out of this country by administrative decisions in certain circumstances when they apply for admission, but they can be put out by administrative decision in certain circumstances although they are actually domiciled. And not only do administrative decisions in "expulsion" cases determine questions of citizenship. They determine also questions of the property, of the personal character,[20] and of the marital relationships,[21] of persons who may have lived for many years under

[20] Zakonaite v. Wolf, 226 U. S. 272.
[21] Lewis v. Frick, 233 U. S. 291.

the shelter of our laws. Under the shelter of our judicial processes, however, such persons do not live—not when administrative process for alien expulsion is invoked. And it may be invoked by anyone, from the highest official conscientiously executing the law down to the meanest individual maliciously trying to "get even" with a personal enemy.

The processes in expulsion cases are extremely administrative. They begin with a recommendation by the bureau of immigration to the secretary of labor for a warrant of arrest. When a warrant issues it runs as freely to immigration officers throughout the United States as the warrant of a justice of the peace does to the constables of a county.

This extensive power has seldom if ever been seriously abused. But think of the power itself! Does it not seem like the old "administrative process" come again? Replete with all the evil possibilities of that historic process, nothing more is needed for realization of those possibilities than the touch of an executive hand capable of grossly abusing lawful authority.

After his arrest the alien alleged to be unlawfully here is put upon trial. His trial is conducted without publicity. It is conducted even without counsel for the prisoner, until the immigrant inspector who sits in primary judgment upon the case permits the appearance of counsel. The prisoner may call witnesses in his own behalf, but his counsel cannot examine those who have testified and gone before counsel has been allowed to enter, nor any who are there but refuse to answer. Yet the prisoner's citizenship may be at issue, his property may be at stake, his good name may be involved, and in the case of women their chastity may be circumstantially upon trial.[22]

For certain offences an alien may be excluded however long his residence here, though he has never left the country for a moment, and without other adjudication than administrative decisions. In other cases the power of arresting lapses if it be not exercised within three years after the alien has come into the country. But the three-year limit is not determined by duration

[22] Zakonaite v. Wolf, 226 U. S. 272.

of domicile; it is determined by the date of the alien's very latest arrival, and this though his absence from the country may have been but momentary. Aliens going abroad to visit after living here no matter how long, and who happen not to be excluded upon returning, may be expelled within three years after their return. They may be so expelled for any one of many causes, including mental defects of almost any kind, certain physical diseases, crimes involving moral turpitude committed even at remote periods, or as polygamists or anarchists or prostitutes. For any of those causes, though it were to have originated in this country, they must be expelled—not merely may be but must be, provided the cause originated prior to their latest return from abroad.

As to the propriety of these "exclusions" and "expulsions" I make no contention here. What I contend for raises a very different question. Lest I be misapprehended or misunderstood, let me emphasize the contention I do make here. It is that personal rights, when involved in "exclusion" or "expulsion" proceedings under the immigration laws, should not be determined finally by administrative decision. Although the immigrant inspector's record in an "expulsion" case goes as a matter of course to the secretary of labor, without whose warrant for it there can be no expulsion, yet the secretary's decision, like the inspector's, is not judicial but administrative. Therein lies the fault and the danger of it all. In most instances administrative decisions must in the very nature of administration be made by subordinates; in all instances they must be made along hard and fast lines according to unelastic legislation designed to promote a governmental policy. Determinations regarding private rights by such decisions are mere incidents of administration. Only in minor degree, therefore, can rights of property, rights as to character, rights of domicile, or even the birthright of citizenship be duly determined by administrative decisions.

Culprits of whatever race or nationality have judicial trials and appeals, and in special cases of hardship there is for them at the last a fountain of mercy in the Chief Executive. But for the hapless person, whether citizen or alien, who is arrested as an alien,

tried as an alien and found to be an alien—all by administrative decision—there is neither judicial trial nor fountain of mercy, though his case call for it never so loudly, if the secretary of labor becomes satisfied that he is in this country contrary to law. Between that alien, or that citizen administratively found to be an alien—between him and what may be the cruelest exile, there is no barrier but a secretary of labor too humane and wise to be so "satisfied" unless he thinks he ought to be.

Nothing in my official experience in the Department of Labor has impressed me more deeply than the conviction that fundamental personal rights should be more scrupulously guarded in immigration cases than is possible through administrative decisions made in the course of executive routine. As to the form this protection should take, the kind of tribunal that might be desirable and possible, even whether anything at all adequate for the purpose would be consistent with the immigration policy of Congress, I offer no suggestions at this time. All I offer now in that respect is an admonition. Whenever fundamental individual rights are at issue, their protection by some method inherently more judicial than it is possible for administrative decisions to be, is demanded no less in the interest of public policy than in the interest of personal security.

"GOVERNMENT CONTESTS" BEFORE THE ADMINISTRATIVE TRIBUNALS OF THE LAND DEPARTMENT[1]

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By administrative adjudication is usually meant the exercise of quasi-judicial functions upon and in the control of vested property rights, or personal rights secured by constitutional guaranties. It often accompanies and effectuates regulative power of a quasi-legislative nature. A large measure of this quasi-legislative power has been given to the departments and bureaus dealing with the lands of the United States, but the enforcement of such regulations, insofar as they affect rights of person or vested rights of property, is chiefly by process of the regular courts. Thus the regulation of the occupancy and use of lands reserved for national forests is entrusted to the secretary of agriculture. His regulations usually prohibit acts that were theretofore innocent and customary though not vested rights. Sometimes they restrict the use of land in which there exists a vested private right of use for a particular purpose only, but the restriction does not affect the right itself. For example: A mining claim in a national forest duly located and recorded after the discovery of mineral therein is true property, but only for the purpose of mining; other use of it may be and is prohibited by regulation. Occasionally this regulative power does limit true vested rights: As when a mining claimant, having a vested right to use the standing timber on his claim for mining operations thereon, must submit to have that timber sold by the Forest Service under regulations made to prevent destructive insect infestation of adjacent public timber. Analogous powers are given

[1] A paper read at the annual meeting of the American Political Science Association in Washington, D. C., December 29, 1915.