THE EXECUTION OF ADMINISTRATIVE ACTS*

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A dog's obeyed in office.—*King Lear*, iv, 6

IN OUR complex modern society the dynamics of the law is a process whereby norms of a more general nature are applied from step to step by the creation of more particularized special norms.¹ The Constitution ordains in a very general fashion that there shall be statutes, a mandate which is left to Congress to carry out. The latter in turn enacts statutes whose further particularization might be left to administrative agencies empowered to promulgate regulations which concretize the law further. This is often referred to as "filling in the details," which the lawmaker left to the agency.² The agency then applies the law to still more concrete situations by making individual determinations which may be arrived at after a so-called quasi-judicial procedure, or one more informal, or even after a procedure that is devoid of any formalities, as the acceptance or refusal of a package for mailing pursuant to general postal regulations that are in turn based on postal statutes enacted under the Constitution.³ Some of these decisions may need no further enforcement; they are ipso facto enforced upon rendition.⁴ If the decision needs no further enforcement, or if it is complied with by the person against whom it is rendered, no further descent on the legal stepladder is required. However, decisions, whether judicial or administrative, that are neither self-executory nor acquiesced in necessitate further concretization. Thus, a court decision which is neither executed by itself nor obeyed by the addressee of the judgment must in some fashion be carried out, or "executed." This, then, is the ultimate sanction which is inherent in the decision; if the affected party fails to obey, the decision can be enforced by deprivation of property, imprisonment, etc. So, too, must administrative decisions be capable of further enforcement if their command is disobeyed. The mandate of an administrative decision must be translated into fact, either through obedience by the addressee or through some physical act, often co-

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¹ For an exposé of the legal hierarchy consult Kelsen, *General Theory of Law and State* 135 (1945), and the remarks of Justice Jackson, note 2 *infra*.

² For a recent, lucid discussion see Justice Jackson's dissenting opinion in *FTC v. Ruberoid Co.*, 343 U.S. 470, 485-86 (1952).

³ U.S. Const. Art. 1, §7.

⁴ For instance, a tax authority's "decision" to grant a tax refund by mailing a check to the claimant.

⁵ Such as a divorce decree or a decision dismissing a plaintiff's action.

ercive, of a governmental organ. This ultimate enforcement of an administrative decision we may call administrative execution. The manner of administrative execution is a field exhibiting a remarkable dearth of any writing or organized legal theory.⁶ This is the field the following discussion will survey.

Typical of the prevailing opinion is the statement that, at least in most instances, "administrative action depends for enforcement upon sanctions imposed by courts."⁷ This standard opinion has found implicit judicial approval in *Myers v. Bethlehem Shipbuilding Corp.*,⁸ where Justice Brandeis, for the Court, reaffirmed the constitutionality of the National Labor Relations Act, because, among other things, "[n]o power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance."⁹ Statements like these could indeed lead one to believe that a statute enabling an agency to enforce its orders by means other than through appeal to the courts is unconstitutional. Nothing could be farther from correct.

It is generally, though vaguely, recognized that "a small portion" of administrative action does not depend on court action for enforcement, such as "the withholding of benefits, a governmental refusal to contract under the Walsh-Healey Act, exclusion or deportation of an alien, refusal of the post office to deliver fraudulent or obscene mail, refusal of clearance to vessels. . . ."¹⁰

This list alone, even if it were complete, would be large enough to render questionable the notion that agency action *typically* depends on the courts. Of course, the enumeration must be properly comprehended, for it includes the correct as well as the wrong decision.¹¹ Moreover, the "withholding of benefits" may include anything the government declares to be a "benefit,"¹² and the gov-

⁶ Consult Davis, *Administrative Law* 750-54 (1951); Hart, *An Introduction to Administrative Law* 751-68 (2d ed., 1950); Gellhorn and Byse, *Administrative Law: Cases and Comments* 621-25 (1954); Parker, *Administrative Law* 283-87 (1952); Parker, *Contempt Procedure in the Enforcement of Administrative Orders*, 40 Ill. L. Rev. 344 (1946); *The Role of Contempt Proceedings in Enforcing Orders of the NLRB*, 54 Col. L. Rev. 603 (1954). None of these writings purport to cover the problem in its entirety.

⁷ Davis, *op. cit. supra* note 6, at 750. Consult also Mayers, *The American Legal System* 407 (1955): "In our system the traditional method by which law enforcement officers may seek to enforce upon the individual compliance with the law has been the judicial proceeding. . . ."

⁸ 303 U.S. 41 (1938).

⁹ *Ibid.*, at 48.

¹⁰ Davis, *op. cit. supra* note 6, at 750; Mayers, *op. cit. supra* note 7, at 403-15.

¹¹ Because "[j]urisdiction . . . carries with it jurisdiction to decide erroneously as well as correctly." Tooze, J., for the court in *Ashford v. Ashford*, 201 Ore. 206, 220, 268 P.2d 382, 387 (1954). And "discretion implies selection, the power to choose, to weigh, and to evaluate, yes, even the power to be wrong." Smith, J., dissenting in *Hazel Park Racing Ass'n v. Racing Comm'r*, 343 Mich. 1, 14, 71 N.W.2d 692, 698 (1955).

¹² See, e.g., the broad language in *Hobby v. Hodges*, 215 F.2d 754, 759 (C.A. 10th, 1954) (social security "benefits"); *Miller v. United States*, 124 F.Supp. 203, 205 (W.D. Mo., 1954), noted in 23 Geo. Wash. L. Rev. 620 (1955) (death "benefits" under Servicemen's Indemnity Act). Consult also the brief comment on "grants" and "benefits" in Attorney General's Manual on the Administrative Procedure Act 27-28 (1947).

ernment's refusal to contract under the Walsh-Healey Act¹³ may in fact include a refusal in violation of the Act.¹⁴ The government's right to exclude aliens includes the faculty to exclude, for the time being at least, anybody thought to be an excludable alien,¹⁵ even as the post office's right to refuse to deliver obscene mail cannot be easily divorced from its de facto power to exclude from delivery any mail which the postal authorities think to be "obscene."¹⁶

The fact that the aggrieved parties may often seek and obtain judicial redress¹⁷ is a recognition far removed from a statement to the effect that agencies cannot put teeth into their actions without the courts' help. Of course one may argue, so far as decisions subject to judicial review are concerned, that eventually no agency action can become law unless either the courts have spoken or their review was not sought. To say, then, that the decisions of the postal authorities or immigration authorities alluded to above are not "final" unless sanctioned by a review court is no doubt sound theory as far as the statement goes. Whether, however, this is a meaningful statement in reality depends upon the readiness and swiftness with which the courts are able to act. M. Gregoire spent four years in the jails of the Immigration and Naturalization Service until a court found that it was unlawful to detain him.¹⁸ It can be said that for him the administrative decision that declared him to be an enemy alien subject to detention was temporarily executed. Thus, in addition to agency execution of unreviewable administrative decisions there are many more instances of agency execution of decisions pending their judicial review.

The "withholding of benefits" has been quoted above as one example of non-judicially enforced action.¹⁹ It is not, however, just "benefits" that the govern-

¹³ Public Contracts Act of 1936, 49 Stat. 2036 (1936), 41 U.S.C.A. §§35-45 (1952).

¹⁴ See *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Covington Mills v. Durkin*, 3 Pike & Fischer Ad. Law (2d series) 221 (D. D.C., 1953) (stay order granted, under Fulbright amendment to Walsh-Healey Act, against wage order); *Miller*, Administrative Discretion in the Award of Federal Contracts, 53 Mich. L. Rev. 781 (1955).

¹⁵ *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (resident alien unlawfully excluded and held at San Francisco and Ellis Island for two years). Consult *Constitutional Restraints on the Expulsion and Exclusion of Aliens*, 37 Minn. L. Rev. 440 (1953).

¹⁶ *Summerfield v. Sunshine Book Co.*, 221 F.2d 42 (App. D.C., 1954), cert. denied 349 U.S. 921 (1955), noted in 68 Harv. L. Rev. 1458 (1955) (enforcement of postmaster's order forbidding mail delivery on account of obscenity enjoined). Cf. *Jeffries v. Olesen*, 121 F.Supp. 463 (S.D. Calif., 1954) (postmaster's fraud order forbidding use of mails to advertise male genital aid for sexual intercourse enjoined); *Stanford v. Lunde Arms Corp.*, 211 F.2d 464 (C.A. 9th, 1954) (postmaster's order to declare air rifle unavailable as "firearm" set aside). But cf. *Stanard v. Olesen*, 74 S.Ct. 768 (1954) (administrative remedies must be exhausted prior to review of postmaster's order impounding party's mail and keeping it apart pendente lite). For a good discussion consult de Grazia, *Obscenity and the Mail: A Study of Administrative Restraint*, 20 Law & Contemp. Prob. 608 (1955).

¹⁷ But see, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), and *Stanard v. Olesen*, 74 S.Ct. 768 (1954). For an exhaustive discussion of what is judicially reviewable consult Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411 (1954).

¹⁸ *United States ex rel. Gregoire v. Watkins*, 164 F.2d 137 (C.A. 2d, 1947). Consult also *Gregoire v. Biddle*, 177 F.2d 579 (C.A. 2d, 1949), cert. denied 339 U.S. 949 (1950).

¹⁹ Quoted in text at note 10 supra.

ment may withhold without first asking the courts, but anything else that lends itself to being withheld. The power, subject to deferred judicial review, not to grant a license, issue a passport or appoint a person to the civil service may still be mentioned as somewhat expanded illustrations of "benefits." And with the post office's authority not to deliver certain mail can be paralleled the infinitely more frequent decisions by which postal authorities refuse to accept mailing matter unless there has been compliance with certain conditions. The question of whether something is a periodical, a book, a package or first-class matter may be of greatest importance to the sender, yet the mailing authorities will of course decide it, usually quite informally, without the need for judicial authorization even though judicial control may be exercised at a later date.²⁰ Actually, as will be observed, it is any negative decision that can be executed by the agency concerned.

In short, it appears that there are many conceivable ways to execute, at least preliminarily, administrative decisions by administrative agencies. On the other hand, there are those decisions and acts which the administrative branch of the government must rely on the judiciary to enforce, in every sense of the word. As this subject is new and its treatment novel, it is advisable to give an outline of what may be expected:

A. Some agency decisions are not judicially reviewable. Most, though not all, of these are executed by the issuing agency.

B. Agencies may at times execute their own decisions, notwithstanding subsequent judicial review. This includes many affirmative decisions and all negative ones, except for those included in the first category above. In other words, negative decisions are never executed through the courts even though they be judicially reviewable.

C. Agencies may at times execute reviewable decisions only after the decisions have become final for the reason that review has become foreclosed because it was not sought at all, or because it was sought unsuccessfully.

D. Some agency decisions are executed through the acceptance of the decision by another party, such as where a mutually exclusive license is granted to one and correspondingly denied to another party. These decisions may or may not be subject to subsequent judicial review.

E. There are some affirmative administrative decisions that can be executed only through the judicial branch of the government.

Execution of Administrative Decisions Not Subject to Judicial Review

This is the category usually alluded to by writers who refer to execution, or "enforcement,"²¹ of agency actions without the intervention of the judicial machinery. Yet it is the least important in our group. Just how large the field of

²⁰ E.g., *Houghton v. Payne*, 194 U.S. 88 (1904).

²¹ The term "enforce" is also used, especially in NLRB cases, to denote a review court's approval and confirmation of an administrative decision. See the language used in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (quoted in text at note 9 supra).

nonreviewable decisions is seems uncertain.²² However, it is not necessary to investigate the penumbra of unreviewable administrative decisions;²³ it will suffice to examine the mode in which a few such decisions are executed.

An example of undisputably unreviewable decisions appears to be claims decided by the so-called International Claims Commission, an independent federal agency set up under the International Claims Settlement Act of 1949 to deal with certain claims of American citizens against Yugoslavia.²⁴ The Commission's decisions are expressly declared final and unreviewable.²⁵ Consequently, the Commission alone was to decide how much, if anything, a given claimant was to receive, and was to pay out claims accordingly.²⁶ The Commission thus executed its decisions by granting or withholding payment without court control.²⁷

There are but few other instances of express statutory preclusion of judicial review. To stay in the international field for one more instance, the decisions of American consuls abroad in granting or denying visas to enter the United States are final and unreviewable.²⁸ More familiar examples of unreviewable agency-executed decisions include orders concerning veterans' claims under the Servicemen's Indemnity Act,²⁹ excess-profits determinations,³⁰ and similar government contract renegotiations.³¹

²² Davis, *op. cit.* supra note 17; Davis, *Administrative Law* 812-67 (1951); Parker, *Administrative Law* 262-64 (1952).

²³ The very existence of this ambiguous dark area appears to be a potent argument against any attempt during our present stage of administrative-legal development to codify general administrative law and procedure, since it is totally unsettled in its most essential point. Consult Parker, *op. cit.* supra note 22, at 63-64; Madden, *Review of Parker, Administrative Law*, 5 *Vand. L. Rev.* 680, 686 (1952).

²⁴ 64 Stat. 13 (1949), 22 U.S.C.A. §§1622-27 (1952).

²⁵ *Ibid.*, at §1623(a)(b)(h).

²⁶ A recent decision so holding, however, indicates by dictum that there might be situations of a constitutional nature that might yet warrant judicial review. *De Vegvar v. Gilliland*, 228 F.2d 640, 642 (App. D.C., 1955), cert. denied 350 U.S. 994 (1956).

²⁷ The functions of the Commission were later transferred to the Foreign Claims Settlement Commission. Reorg. Plan No. 1 of 1954, 19 *Fed. Reg.* 3985 (1954).

²⁸ *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (App. D.C., 1929), cert. denied 279 U.S. 868 (1929); Auerbach, *Immigration Laws of the United States* 24 (1955).

This fact has been termed "administrative absolutism" [Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolution*, 41 *A.B.A.J.* 1109 (1955); for the problem of nonreviewability of the exclusion of aliens compare *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), with *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953)] and has given rise to at least two works of art that tend to show God's country in a light somewhat different from what Emma Lazarus' famous poem on the Statue of Liberty intended to proclaim. Laura Z. Hobson, *Trespassers* (1943); Gian Carlo Menotti, *The Consul* (1950).

²⁹ 54 Stat. 1197 (1940), 38 U.S.C.A. §11(a)(2) (1954); *Cyrus v. United States*, 226 F.2d 416 (C.A. 1st, 1955); *Acker v. United States*, 226 F.2d 575 (C.A. 5th, 1955); *Miller v. United States*, 124 F.Supp. 203 (W.D. Mo., 1954), noted in 23 *Geo. Wash. L. Rev.* 620 (1955).

³⁰ *Macaulay v. Waterman S.S. Corp.*, 327 U.S. 540 (1946).

³¹ *Int. Rev. Code* §1481(a)(1)(D) (1954), 26 U.S.C.A. §1481(a)(1)(D) (1955); *Renegotiation Act*, 56 Stat. 245 (1942), as amended, 50 U.S.C.A. App. 1191(e)(1) (1951); *Spaulding v. Douglas Aircraft Co.*, 154 F.2d 419 (C.A. 9th, 1946).

These types of decisions commonly involve governmental funds or grants. However, the instances of nonreviewability are by no means confined to this category. Some courts, at least, have held that administrative decisions whereby an agency declines to exercise its "jurisdiction"³² are not capable of judicial review.³³ However negative such a ruling may seem, its effect is positive. A decision that the agency will not prosecute a certain conduct complained of, means that the conduct may be continued. For example, a party sought to persuade the SEC "to assume jurisdiction to investigate and regulate the issuance and sale" of travelers' checks by the American Express Company, but the Commission refused, and the refusal was held to be nonreviewable.³⁴ The NLRB has repeatedly refused to exercise its authority and the courts have held this to be an unreviewable exercise of administrative discretion.³⁵

Administrative decisions concerning the promotion, demotion or removal of Civil Service employees are unreviewable if the prescribed procedure was followed, which in the normal case of dismissal of a civil servant amounts to no more than that he be informed of the charges against him and be given an opportunity to answer in writing.³⁶ Thus if the decision rendered after this procedure amounts to a dismissal, it is executed by the agency without judicial aid.³⁷

³² " 'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls." Frankfurter, J., dissenting in *City of Yonkers v. United States*, 320 U.S. 685, 695 (1944). Consult also *Parker*, op. cit. supra note 22, at 109-114 (1952).

³³ Consult notes 34 and 35 infra.

³⁴ *Leighton v. SEC*, 221 F.2d 91 (App. D.C., 1955).

³⁵ *Haleston Drug Stores, Inc. v. NLRB*, 187 F.2d 418 (C.A. 9th, 1951), cert. denied 342 U.S. 815 (1951); *Houlihan v. NLRB*, 201 F.2d 187 (App. D.C., 1952) (court has no power to order Board's general counsel to issue complaint or to require Board to issue an order where no complaint was filed); see *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 684 (1951); *Manhattan Construction Co. v. NLRB*, 198 F.2d 320 (C.A. 10th, 1952), noted in 53 Col. L. Rev. 280 (1953) (dismissal of proceedings under Section 10(k) of the NLRA by Board and general counsel not a final order and hence not reviewable). Consult *New Entrance to the "No Man's Land": State Injunction of Unfair Labor Practices as Torts Following NLRB Declination of Jurisdiction*, 65 Yale L. J. 86 (1955). Board orders dismissing a complaint after issuance are reviewable. E.g., *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951); *Judicial Review of Board Dismissal of a Charge under §10(k) of the Amended NLRA*, 53 Col. L. Rev. 280 (1953). Cf. *Algonquin Gas Transmission Co. v. FPC*, 201 F.2d 334 (C.A. 1st, 1953) (FPC order dismissing petition for temporary permit not merely preliminary nor procedural, hence reviewable).

³⁶ 62 Stat. 354 (1948), 5 U.S.C.A. §652 (1950). "[t]he determination of whether or not an employee's discharge would promote the efficiency of the Government service was vested in the administrative officer. . . ." *Gadsden v. United States*, 100 F.Supp. 455 (Ct. Cl., 1951), cert. denied 342 U.S. 856 (1951). Consult *Keyton v. Anderson*, 229 F.2d 519 (App. D.C., 1956); *Cole v. Young*, 226 F.2d 337 (App. D.C., 1955); *Williams v. Cravens*, 210 F.2d 874 (App. D.C., 1954); *Powell v. Brannan*, 196 F.2d 871 (App. D.C., 1952); *Carter v. Forrestal*, 175 F.2d 364 (App. D.C., 1949), cert. denied 338 U.S. 832 (1949) (citing many precedents).

³⁷ Some courts have seen to it that at least the employee's meager procedural safeguards be observed by the agencies. *Peters v. Hobby*, 349 U.S. 331 (1955) (Loyalty Board must not reopen its case on its own motion); *Roth v. Brownell*, 215 F.2d 500 (App. D.C., 1954), cert. denied 348 U.S. 863 (1954) (review of unlawful removal from classified civil service granted); see *Burns v. McCrary*, 130 F.Supp. 908 (E.D. N.Y., 1955) (injunction granted not to remove

Labor agencies' decisions concerning the certification of unions are reviewable only to a limited extent. Though the leading Supreme Court case is anything but lucid,³⁸ a railway labor union certification is probably unreviewable, in which case the decision falls clearly within the category of agency execution. NLRB certifications, on the other hand, are reviewable but only belatedly, i.e., when the employer refuses to bargain with the certified union and as a result is held to have committed an unfair labor practice under Section 8(5) of the National Labor Relations Act.³⁹ This will be discussed below.⁴⁰

As noted earlier, it is not necessary here to attempt the impossible and ascertain the limits of judicial review. For even in many border cases the agencies are able to execute their decisions, whether judicial review is held to be available or not.⁴¹

Execution of Administrative Decisions Subject to Subsequent Review

Inasmuch as this group forms the main bulk of the material under consideration in this article, it is apposite to clarify a theoretical point, alluded to above.⁴² The argument might be raised that if an agency decision is later set aside by a review court, the agency decision is a nullity and its previous execution by the agency simply amounted to an unlawful act. Thus, the argument might run, the unlawful detention of M. Gregoire was nothing more than an unlawful imprisonment rather than the execution of a decision. However, the fallacy of this argument is obvious. The acts of an agency, later reversed by higher authority, such as a court, are "unlawful" only in that they are not, as the reviewing tribunal rules, in accordance with the law. But they are not "illegal," as crimes, torts or breaches of contracts are, nor are they legal wrongs. The Attorney General did have jurisdiction to detain and his jurisdiction included the power to render a wrong decision that is yet not an "illegal" one. His act entailed no sanction, as the second *Gregoire* case⁴³ most clearly shows, and it was no more a

plaintiff pendente lite); Richardson, Problems in the Removal of Federal Civil Servants, 54 Mich. L. Rev. 219 (1955); Gardner, Bailey v. Richardson and the Constitution of the United States, 33 B.U.L. Rev. 176 (1953); Review of Removal of Federal Civil Service Employees, 52 Col. L. Rev. 787 (1952); "The civil servants are treated as no individual would treat those on whose services he relies." Pollard, The Evolution of Parliament 256 (2d ed., 1926). But this kind of judicial review, if it can be so called, has no suspensive effect and hence falls at best into the category of decisions executed by agencies subject to subsequent review.

³⁸ *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943); *Brotherhood, etc. v. Atlantic Coast Line R. Co.*, 201 F.2d 36, 38-39 (C.A. 4th, 1953).

³⁹ *AFL v. NLRB*, 308 U.S. 401 (1940); *Foreman & Clark, Inc. v. NLRB*, 215 F.2d 396 (C.A. 9th, 1954); *Timken-Detroit Axle Co. v. NLRB*, 197 F.2d 512 (C.A. 6th, 1952).

⁴⁰ Consult discussion at 306-7 *infra*.

⁴¹ This does not mean, however, that every unreviewable agency decision can be agency executed. Consult notes 117, 118 *infra*.

⁴² Consult discussion pertaining to M. Gregoire at 294 *supra*.

⁴³ *Gregoire v. Biddle*, 177 F.2d 579 (C.A. 2d, 1949), cert. denied 339 U.S. 949 (1950).

legal wrong than a trial court decision that is reversed on appeal. An administrative agency that executes its own decision may act contrary to law and hence the decision will be set aside and its further execution terminated, if that is still possible, but in so acting contrary to law the agency did not violate the legal order either by rendering or executing its decision.

It is therefore correct to say that, similar to lower court decisions under Anglo-American civil and criminal court procedures,⁴⁴ many administrative decisions are capable of execution even though they may be subject to review. The effect of court decisions, however, can frequently be suspended through the posting of security. The extent to which agency decisions may be stayed pending review is far less certain.⁴⁵

The largest group in this category is no doubt that of the negative orders. However questionable the theoretical validity of a category of negative orders may be otherwise, they have one thing in common in that they stand until set aside. It is inherent in a decision, reviewable or otherwise,⁴⁶ which simply says "no" that it needs no further execution. Where judicial review is available the decision might subsequently be changed, although in fact the courts often have displayed an understandable reluctance to disturb "negative orders"⁴⁷ even after the abandonment of the negative-order doctrine.⁴⁸ But in any event the decision stands until changed and, as far as the impact on the party is concerned, the decision may be as positive or affirmative as any other. To the union which is told that its grievance against a certain employer will not be entertained, this is pro tanto a decision that the employer may further indulge in the complained of conduct.⁴⁹ An applicant whose license is not issued because he applied to the wrong authority is not prejudiced in that he may apply to the right one; but if his application is turned down for any reason on what in fact amounts to the merits, whether under the guise of a "jurisdictional" ruling or otherwise, the decision needs no judicial enforcement to make it a ruling that the applicant may not and therefore does not get the license he sought. That this decision may have an additional, and likewise self-executing, effect on other parties, such as members of the public or competitors, will be discussed below.

⁴⁴ 62 Stat. 837 (1948), 18 U.S.C.A. §3565 (1951); Fed. Rules Crim. Proc. 38(a)(2)(3); Fed. Rules Civ. Proc. 62.

⁴⁵ Consult Section 1009(d) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C.A. §§1001-11 (1950), where stay may be granted if "justice so requires" but only when judicial review is already pending. See *Dolcin Corp. v. FTC*, 219 F.2d 742 (App. D.C., 1954), cert. denied 348 U.S. 981 (1955), noted in 68 Harv. L. Rev. 1452 (1955).

⁴⁶ Consult note 35 *supra*.

⁴⁷ See *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684 (1951) (dictum approving Board's "de minimis" doctrine).

⁴⁸ *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939), overruling *Procter & Gamble Co. v. United States*, 225 U.S. 282 (1912).

⁴⁹ This was pointed out in the dissent in *Oregon Teamsters' Security Plan Office & William C. Earhart*, 113 N.L.R.B. 111 (1955), *aff'd sub nom. Office Employees Int. Union v. NLRB*, 235 F.2d 831 (App. D.C., 1956), cert. granted 352 U.S. 906 (1956).

An agency may deny claims such as those for social security,⁵⁰ workmen's compensation or unemployment compensation.⁵¹ It may deny a passport to a prospective traveler.⁵² A student may be denied admission to the state school, and he may be vindicated in court if the decision was wrong and if he has the time, money and stamina for a long-drawn litigation. But until he wins his cause in court he loses so many state school terms.⁵³ Rulings like these may be based on findings that the applicant has not been employed sufficiently long to warrant social security benefits, that he became unemployed through his own fault, that he is unfit to have this or that business license, that he belongs to a race not admissible to "white" schools or that his travel abroad is "not in the best interest of the government." In any case, these denials of applications are executed upon rendition notwithstanding the possibility of judicial review.

At times the power at the government's disposal is so situated that an agency can physically execute an affirmative decision, *de facto* as it were, because the respondent party is unable to ward off an execution of perhaps dubious legal basis. Thus a passport may not only be denied, but it may be taken away and canceled if the government possesses the physical power to obtain the traveler's passport.⁵⁴ Similarly, a policeman may "lift" an automobile driver's license.⁵⁵

⁵⁰ *Hobby v. Hodges*, 215 F.2d 754 (C.A. 10th, 1954).

⁵¹ Consult Parker, *Administrative Law Problems in the Unemployment Insurance Program*, 8 Vand. L. Rev. 436 (1955).

⁵² Consult Boudin, *The Constitutional Right to Travel*, 56 Col. L. Rev. 47 (1956); Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Va. L. Rev. 853, 857-61, 864-65 (1954); *The Passport Puzzle*, 23 U. of Chi. L. Rev. 260 (1956). Recently, the State Department's alleged right to curtail a citizen's right to travel abroad has been restricted, but only to the extent of leaving the matter to the Department's "reasonable" discretion. *Shachtman v. Dulles*, 225 F.2d 938 (App. D.C., 1955). See *Clark v. Dulles*, 129 F.Supp. 950 (D. D.C., 1955); *Nathan v. Dulles*, 129 F.Supp. 951 (D. D.C., 1955). Consult N.Y. Times §1, p. 14, Col. 3 (Aug. 17, 1955) (passport refused to Paul Robeson). The refusal to grant a passport to a foreign resident alleging to be an American citizen is reviewable. *Yung Jin Teun v. Dulles*, 229 F.2d 244 (C.A. 2d, 1956); *Tom Mung Ngow v. Dulles*, 122 F.Supp. 709 (D. D.C., 1954), noted in 55 Col. L. Rev. 226 (1955).

⁵³ In *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), the petitioner applied for admission to the state university in the fall of 1935; the Supreme Court decided that he had a right to be admitted in December, 1938; rehearing was denied January 3, 1939, 305 U.S. 676 (1939). In *Sweatt v. Painter*, 339 U.S. 629 (1950), rehearing denied 340 U.S. 846 (1950), it took nearly five years.

⁵⁴ E.g., *Bauer v. Acheson*, 106 F.Supp. 445 (D. D.C., 1952) (Secretary of State "through his agents in Paris" revoked the plaintiff's passport). Federal Judge William Clark's passport was taken away from him with the aid of dictator Franco's police. Parker, *op. cit. supra* note 22, at 859; *Clark v. Dulles*, 129 F.Supp. 950 (D. D.C., 1955). The passport of a client of this writer was taken from him, at the behest of American consular authorities, by the then fascist police of Vienna. For but a small fraction of the many recent instances of the "lifting" of American citizens' passports consult Parker, *op. cit. supra* note 22, at 857-61.

⁵⁵ *Silver v. McCamey*, 221 F.2d 873 (App. D.C., 1955); *Knoll v. Kelley*, 142 Conn. 592, 115 A.2d 678 (1955); *Marshall v. Registrar of Motor Vehicles*, 324 Mass. 468, 87 N.E.2d 7 (1949); *Wall v. Registrar of Motor Vehicles*, 329 Mass. 70, 106 N.E.2d 425 (1952), *aff'd sub nom. Wall v. King*, 206 F.2d 878 (C.A. 1st, 1953); *Matter of Moore v. MacDuff*, 309 N.Y. 35, 127 N.E.2d 741 (1955).

The licensee or passport holder may be able to obtain judicial relief and perhaps ultimately have the satisfaction of hearing that the agency had no right to act as it did, but until this is accomplished, if ever, he can neither drive nor travel.⁵⁶ In the procedure leading to denying (or granting) of a passport application, the agency has all the means for executing its decision within its power; but in canceling or otherwise restricting a passport already issued and in the bearer's possession, the agency must use either persuasion to cause the owner to surrender the document or else the executive arms of those foreign governments which willingly (though no doubt not without amazement) cooperate with American consular officials in their strange demands of stripping a citizen of a free country of the right to be abroad. Should these means fail, the government would have to seek judicial help to accomplish its purposes, though this writer knows of no case where that actually happened.

Ordinarily the government must seek judicial assistance to expropriate private property.⁵⁷ But it can happen that it has the physical power to take by force and is willing to exercise it, as demonstrated by the case of an American citizen whose Austrian castle was "used" by the Army.⁵⁸ As we shall presently see, however, the instances of agency execution of affirmative decisions are not at all confined to such extraordinarily situated cases where the agency may act because it possesses the physical powers to do so.

Emergency measures have long been recognized as a field in which the executive must act swiftly and may be called to judicial account either never or, at any rate, only *ex post facto*.⁵⁹ Time-honored examples include the shooting of a mad dog⁶⁰ or the seizure of gambling devices,⁶¹ unhealthy or falsely labeled food⁶² or goods brought into the country in apparent violation of customs laws.⁶³ The expansion of this field can no longer be overlooked. Physical seizure of possession of a home loan bank which, according to the seizing agency's findings had been

⁵⁶ In *Matter of Moore v. MacDuff*, 309 N.Y. 35, 127 N.E.2d 741 (1955), the driver's license was revoked in August, 1953, and the court of appeals decided in the driver's favor in June, 1955. In *Dulles v. Nathan* 225 F.2d 29 (App. D.C., 1955), the issuance of a passport was accomplished through judicial pressure after two and one-half years.

⁵⁷ 62 Stat. 935 (1948), 28 U.S.C.A. §1358 (1950).

⁵⁸ *Seery v. United States*, 127 F.Supp. 601 (Ct. Cl., 1955). Plaintiff is better known all over the world under her maiden name, Maria Jeritza.

⁵⁹ *Davis*, op. cit. supra note 6, at 260-64 (1951); *Parker*, op. cit. supra note 22, at 34-36 (1952); *Stays of Federal Administrative Action*, 67 Harv. L. Rev. 876 (1954).

⁶⁰ *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891). The present-day tenability of the decision, which granted a damage suit to the owner of a dog erroneously killed as mad by a police officer, is doubtful. 63 Stat. 444 (1949), 28 U.S.C.A. §2680(a), (h) (1950) (no damage suit under Federal Tort Claims Act for abuse of discretion or for intentional torts).

⁶¹ E.g., *Bedenbaugh v. National Surety Corp.*, 130 F.Supp. 108 (N.D. Ga., 1955) (seizure of gambling machines by F.B.I. agents).

⁶² *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950).

⁶³ *United States v. 532.33 Carats, More or Less, of Cut and Polished Diamonds*, 137 F.Supp. 527 (D. Mass., 1955).

mismanaged,⁶⁴ is not quite on the mad dog or roulette level, nor is the seizure and sale of private property by Internal Revenue agents under certain circumstances prior to court review.⁶⁵

The impounding of a person's mail can be perpetrated pursuant to an administrative decision called mail fraud order⁶⁶ or because the article is administratively held to be nonmailable.⁶⁷ Judicial review will be, of course, available,⁶⁸ but even if the court works very fast it will take many months during which the aggrieved party must do without mail.⁶⁹

Post office decisions like these are often arrived at after quasi-judicial proceedings,⁷⁰ an observation that could lead to the more general question of the extent to which courts are better equipped to render decisions that are peculiarly within the province of a given agency—a problem not attempted to be solved here.⁷¹ The decision, on the other hand, that the American nation may not get certain mail which postal officials regard as "subversive" is not based on any quasi-judicial trial and yet this kind of decision has been rendered without inhibition or court control for years.⁷² The recent decision of the Post Office Department that (only) people with "a serious interest" who have "a genuine use" may "now" receive periodicals from Russia more easily,⁷³ by its de facto execution through postal clerks, deprives people who are not, by postal standards, worthy of the right to receive any kind of printed mail from the Soviet Union. Apparently the freedom of the press does not include the freedom to read. However, it is not the purpose of this study to examine the legal validity of such acts, but merely to register the fact that they are being perpetrated by administrative agencies without, or at any rate prior to, court review.

There are, however, even more important liberties that may be encroached

⁶⁴ *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Home Loan Bank Board v. Mallonee*, 196 F.2d 336 (C.A. 9th, 1952), cert. denied sub nom. *Wilmington Fed. Sav. & Loan Ass'n v. Home Loan Bank Board*, 345 U.S. 952 (1953).

⁶⁵ Consult discussion at 306 *infra*.

⁶⁶ E.g., *Stanard v. Olesen*, 74 S.Ct. 768 (1954); *Door v. Donaldson*, 195 F.2d 764 (App. D.C., 1952) (Administrative Procedure Act applicable); *Jeffries v. Olesen*, 121 F.Supp. 463 (S.D. Calif., 1954).

⁶⁷ E.g., *Stanford v. Lunde Arms Corp.*, 211 F.2d 464 (C.A. 9th, 1954).

⁶⁸ *Door v. Donaldson*, 195 F.2d 764 (App. D.C., 1952).

⁶⁹ In *Jeffries v. Olesen*, 121 F.Supp. 463 (S.D. Calif., 1954) the fraud order was issued on July 27, 1953; thus the plaintiff was "[e]ffectively and completely put out of business by a single awesome stroke of the pen." *Ibid.*, at 470. The court set it aside on May 13, 1954, nine and one-half months later.

⁷⁰ *Door v. Donaldson*, 195 F.2d 764 (App. D.C., 1952). But see *Stanard v. Olesen*, 74 S.Ct. 768 (1954).

⁷¹ For classics on this problem see *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

⁷² As early as 1940 the writer's wife worked in an office of the Post Office Department where incoming foreign printed matter was censored.

⁷³ *N.Y. Times* p. 17, col. 1 (Aug. 20, 1955).

upon without or prior to judicial intervention. The country's chief prosecutor, upon a presidential ukase proclaiming a national emergency, may detain any person "as to whom there is reasonable ground to believe" that he "probably" will commit espionage or sabotage. A warrant for arrest and detention is to be made out not by a court but by the Attorney General or his subordinates. Subsequent judicial review is preserved, of course, but he who resists or even "knowingly disregards" his apprehension subjects himself to imprisonment up to ten years.⁷⁴ There are as yet no decisions dealing with our future concentration camps,⁷⁵ but from our past experience⁷⁶ it is quite possible that this kind of law will be upheld.⁷⁷

The Attorney General has other powers for which he needs no courts. He can exclude certain aliens,⁷⁸ an authority which as an inevitable incident includes de facto the power to exclude by mistake, at least for a time, one who is in fact a citizen or an alien who ought not to have been excluded.⁷⁹ He may detain certain aliens if they are enemies,⁸⁰ and it can happen that a man so held turns out after several years to be an allied alien, as in the notorious *Gregoire* cases.⁸¹ And he can without judicial warrant or permission of any kind arrest and detain aliens for deportation,⁸² an authority which again implicitly includes power to determine jurisdiction, as well as the power to make a wrong decision. The long and the short of this is that the Attorney General may, and indeed does, arrest, hold and detain "deportees" who, as it often later turns out, are not deportable

⁷⁴ Emergency Detention Act of 1950, 64 Stat. 1021-22 (1950), 50 U.S.C.A. §§812-14 (1951).

⁷⁵ Worried citizens may derive comfort from a description of several of these camps in N.Y. Times, p. 6, col. 3 (Dec. 27, 1955).

⁷⁶ Consult Rostow, Our Worst Wartime Mistake, 191 Harper's, No. 1144, at 193 (Sept., 1945), showing the fearful precedent we established in detaining American and alien citizens of Japanese extraction.

⁷⁷ See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (both cases upholding detention of Japanese Americans). But see *Ex Parte Endo*, 323 U.S. 284 (1944).

⁷⁸ Immigration and Nationality Act of 1952, 66 Stat. 195 (1952), 8 U.S.C.A. §§1221-30 (1953). *Gonzales v. Williams*, 192 U.S. 1 (1904) (Puerto Rican, upon arrival at New York, unlawfully detained and denied entry as "foreign immigrant").

⁷⁹ *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (alien resident unlawfully excluded and detained by immigration authorities); *United States ex rel. Baglivo v. Day*, 28 F.2d 44 (S.D. N.Y., 1928) (native of Pennsylvania unlawfully excluded as alien); *Haymes v. Brownell*, 131 F.Supp. 784 (D. D.C., 1955) (alien unlawfully refused "entry" from Hawaii). Consult Constitutional Restraints on the Expulsion and Exclusion of Aliens, 37 Minn. L. Rev. 440 (1953); *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643 (1953).

⁸⁰ Alien Enemy Act of 1798, 1 Stat. 577 (1798), as amended, 50 U.S.C.A. §21 (1951); *Ludecke v. Watkins*, 335 U.S. 160 (1948).

⁸¹ *United States ex rel. Gregoire v. Watkins*, 164 F.2d 137 (C.A. 2d, 1947) (plaintiff kept in custody as alien for almost five years despite Enemy Alien Hearing Board's ruling that he was a Frenchman); *Gregoire v. Biddle*, 177 F.2d 579 (C.A. 2d, 1949), cert. denied 339 U.S. 949 (1950) (no cause of action for damages for this unlawful detention).

⁸² 66 Stat. 208 (1952), 8 U.S.C.A. §1252 (1953).

and hence should never have been detained.⁸³

Another example of what the Attorney General may do is furnished by the well-known "Attorney General's List." Certain allegedly subversive organizations were put on it without the benefit of a hearing. This was declared unconstitutional.⁸⁴ Yet, these organizations had, in fact unlawfully, been on the List for some years, that is, until the Supreme Court spoke. Moreover, and more important, the Court's decision had no visible practical effect whatsoever,⁸⁵ for, as is known to every reader of newspapers and governmental forms, the List has been in use ever after despite the unconstitutional manner in which it was established.⁸⁶ Every applicant for any civil or military service position is still being asked whether he belongs or ever belonged to an "organization on the Attorney General's List,"⁸⁷ even though that List is legally a nullity. As the law stands at the time of this writing only two organizations have been ordered to register.⁸⁸ Yet the recently published Internal Security Manual again reprints the List of more than 200 organizations,⁸⁹ as if the Court had never spoken. This proves again that even our government, although it "must operate within the law,"⁹⁰ will at times do what it physically can do.⁹¹

That it can happen here on a very large, even national scale has been convincingly demonstrated by what may be considered the Hawaiian experiment of World War II. Martial law of at least dubious validity was enforced so effectively in that territory that its judicial test was rendered difficult, indeed prohibited!⁹² Court review was eventually accomplished, to be sure. In Febru-

⁸³ E.g., *Barber v. Gonzales*, 347 U.S. 637 (1954), *aff'd* 207 F.2d 398 (C.A. 9th, 1953) (alien put in custody July 25, 1951; released as not deportable more than two years later); *United States ex rel. Alcantra v. Boyd*, 222 F.2d 445 (C.A. 9th, 1955) (similar; twenty months); *United States v. Heikkinen*, 221 F.2d 890 (C.A. 7th, 1955) (similar). See *Ocon v. Landon*, 218 F.2d 320 (C.A. 9th, 1954) (no legal right to be released on bail pending determination of deportability for communist activities).

⁸⁴ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

⁸⁵ Except that the Joint Anti-Fascist Refugee Committee itself was eventually removed from the list of organizations required to be registered with the Subversive Activities Control Board. Letter dated June 2, 1955 from Chairman Thomas J. Herbert to Senator Wiley, Sen. Doc. No. 40, 84th Cong. 1st Sess. 353-54 (1955). See also *Joint Anti-Fascist Refugee Committee v. Brownell*, 215 F.2d 870 (App. D.C., 1954).

⁸⁶ The Attorney General's list was published in 18 Fed. Reg. 2741 (1953).

⁸⁷ Consult e.g., Civil Service Commission form no. 385 (May, 1954).

⁸⁸ Letter cited note 85 *supra*. See *National Lawyers Guild v. Brownell*, 225 F.2d 552 (App. D.C., 1955); *Communist Party of America v. Subversive Activities Control Board*, 223 F.2d 531 (App. D.C., 1954), *rev'd* 351 U.S. 115 (1956).

⁸⁹ Sen. Doc. No. 40, 84th Cong. 1st Sess. 329-36 (1955). Consult *The Legal Status of the Attorney General's "List,"* 44 Calif. L. Rev. 748, 751 (1956).

⁹⁰ *Yanish v. Barber*, 73 S.Ct. 1105, 1108 (1953).

⁹¹ A fact which brings to mind the statement, true or legendary, ascribed to President Jackson: "Well, John Marshall has made his decision, now let him enforce it!" Corwin, *The President, Office and Powers* 77 (1948).

⁹² For a detailed description and analysis consult Anthony, *Hawaii Under Army Rule* (1955).

ary, 1946 the Supreme Court ruled that military trials of civilians were not authorized under the Hawaiian Organic Act.⁹³ This decision clearly shows that the administrative, especially the military, arm can act contrary to law for several years until the judiciary catches up with it. Next time it might take longer.

In sum, judicial review is available against many of the discussed administrative actions. Until a favorable court decision is procured, however, the administrative decision not only "stands" but is "enforced" in the true sense of the word.

Execution of Administrative Decisions After Judicial Review Becomes Unavailable

Some affirmative agency decisions are executed by the agencies concerned only after judicial review was either unsuccessfully sought or not sought during the statutorily prescribed time. Thus, reviewable deportation orders are executed by administrative authorities, and, though the Attorney General can deport aliens with the help of the judiciary, the deportee cannot be deported until either upon the alien's timely application the court has sanctioned the deportation or until the time for judicial review has elapsed.⁹⁴ Also, the distraint of property for delinquent federal taxes is accomplished by Internal Revenue officials.⁹⁵ Regularly, however, the tax claim will not become delinquent without judicial review or an opportunity for it.⁹⁶

Agency Decisions That Are Executed Through the Cooperation of a Party Primarily Affected

It would easily double the size of this article if an attempt were made to determine just who under our administrative law is sufficiently aggrieved by an administrative decision to have the right to seek judicial review.⁹⁷ In an ideal society probably everybody who is affected in his economic or other status by a decision could seek review. But, then, an ideal society would need no judicial review of agency actions.

This problem arises even in court procedure, that is, in situations where a

⁹³ *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

⁹⁴ 66 Stat. 208(c) (1952), 8 U.S.C.A. §1252(c) (1953). See also *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), noted in 28 So. Calif. L. Rev. 407 (deportee may seek judicial review under Section 10 of the Administrative Procedure Act).

⁹⁵ Int. Rev. Code §§6331-44, 26 U.S.C.A. §§6331-44 (1955).

⁹⁶ *Ibid.*, at §§6213(a), (c), 6861. In some emergency cases, however, the tax authorities may both seize and sell property for the satisfaction of a tax claim and thus execute, subject to belated court review, the tax deficiency decisions. See *Denton v. United States*, 132 F.Supp. 741 (D. N.J., 1955) (Commissioner may recover excessive refund by administrative assessment and collection). Consult discussion at 301-2 *supra*.

⁹⁷ Consult Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955), for a most scholarly discussion, which covers seventy-eight pages without solving the problem.

third party is affected by a court decree. Thus, a child's rights and happiness may be quite obviously affected by a divorce or nullity decree, yet he has no standing to attack the validity of the decree for want of jurisdiction,⁹⁸ nor will he be given party status so as to intervene in the divorce or annulment proceedings. A paternity suit may, through the parties' connivance or even collusion, end in a decision that might be of considerable importance to the parties' other legitimate children, yet our state laws do not afford him standing in the paternity suit.⁹⁹

However, these exceptions are infrequent, for court law is typically two-party law and our refined rules of *res judicata* in this sense of the word see to it that the old rule *res iudicata facit ius inter partes*¹⁰⁰ is the prevailing principle as far as the effect of court decisions goes. Where many parties are concerned, the modern rules of procedure provide for class actions and for broad rights of intervention.¹⁰¹

Administrative law exists chiefly in the interest of the community as such, and its decisions are quite frequently of importance to many. If A's license application, for example for air carrier, is denied while B's application is granted, the decisions may affect the well-being of many separate communities. They may have been represented in the administrative process leading to the granting of the license, but that does not necessarily mean that the communities, much less their individual members, are entitled to judicial review.¹⁰²

To remain within the same example, if B obtains the license, A, and perhaps some members of the public, may seek review. But until they succeed the decision is executed and B uses his license.¹⁰³ And if a state insurance commissioner refuses to approve an insurance company's purchase of certain real property,¹⁰⁴ his decision can be executed there and then without court intervention if the insurer acquiesces in the decree (or must so acquiesce for want of judicial review facilities). The decision is executed as to the seller; he does not sell. Whether he may have a cause of action, and against whom, is only important to the question of judicial control *ex post facto*.

An employer may be told to disestablish what was found to be a company

⁹⁸ *Johnson v. Muelberger*, 340 U.S. 581 (1951).

⁹⁹ Consult 4 *Vernier*, *American Family Laws* 148-49, 206-19 (1936).

¹⁰⁰ Digest 50, 17, 217: *Res judicata* makes law between the parties (only).

¹⁰¹ E.g., *Fed. Rules Civ. Proc.* 23, 24.

¹⁰² The right to intervene in the administrative procedure does not necessarily confer standing to seek judicial review. *Pittsburgh & W.Va. Ry. Co. v. United States*, 281 U.S. 479, 486 (1930); *Davis*, op. cit. supra note 6, at 687-91 (1951). See *Dallas v. CAB*, 221 F.2d 501 (App. D.C., 1954).

¹⁰³ E.g., *Northwest Airlines, Inc. v. CAB*, 194 F.2d 339 (App. D.C., 1952) (license to airline A granted May 25, 1950; airline B seeks judicial review and succeeds twenty months later); *San Miguel Power Ass'n v. Public Service Comm'n of Utah*, 292 P.2d 511 (Utah, 1956) (non-profit co-op not entitled to protest against power license grant to corporation).

¹⁰⁴ *Guardian Life Ins. Co. v. Bohlinger*, 308 N.Y. 174, 124 N.E.2d 110 (1954), noted in 24 *Fordham L. Rev.* 266 (1955) (no judicial review available).

union in violation of Section 5(a)(2) of the National Labor Relations Act. The employer may seek court review, but the decisions are conflicting as to whether the company union may seek review.¹⁰⁵ In any event, it may be said that it is only against the employer that the NLRB decisions cannot be executed or translated into the desired fact against a party's will unless by act of court;¹⁰⁶ but the agency decision through its third-party effect remains executed, as far as the alleged company union is concerned, if the employer complies.¹⁰⁷ Moreover, where there are competing unions, one of which is certified by the NLRB, and the employer does not refuse to bargain with it, the administrative decision is pro tanto executed simply through the third-party effect of the decision.

What applies to licenses and their revocation is quite generally true whenever administrative decisions are complied with by the party who is in what may be said to be the primary power center. For instance, if the ICC promulgates a rule providing for the discontinuance of a certain bus or railway line, the order can be executed, or "carried out," by the discontinuance of the line as far as users of the utility are concerned. If in the recent lottery broadcasting case¹⁰⁸ the networks had complied with the FCC regulation forbidding "give-away" programs,¹⁰⁹ it would have been the end of this kind of radio entertainment, subject only to such vague and uncertain possibilities as might have been had by individual radio stations, sponsors with contractual rights, or even the general public.¹¹⁰

Execution of Administrative Decisions Through the Judiciary

The foregoing has been intended to show that a great many administrative acts are executed by agencies, either with finality or at least for the time being. Yet there are decisions that can be executed only by the judicial arm. Unfortunately, there is no common denominator that would furnish us with a categorical criterion as to when this or that type of execution lies. It is not the relative importance of an administrative matter that would subject it to judicial scrutiny prior to execution. Thus a subpoena is ordinarily a matter of mere ephemeral importance, incidental to some other proceedings. Yet it can only

¹⁰⁵ See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938) (AFL union held indispensable party in proceeding against employer charged with having contracted with AFL to defeat competing union). But see *NLRB v. Pennsylvania Greyhound Lines Inc.*, 303 U.S. 261 (1938) (company union not indispensable party in proceedings against employer charged with having supported a company-dominated union).

¹⁰⁶ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (quoted in text at note 9 supra).

¹⁰⁷ Either forever, under *NLRB v. Pennsylvania Greyhound Lines Inc.*, 303 U.S. 261 (1938); or at least until the aggrieved union succeeds in court, under *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

¹⁰⁸ *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954).

¹⁰⁹ 47 Code Fed. Regs. §§3.192, 3.292, 3.656 (Supp., 1956).

¹¹⁰ *Reade v. Ewing*, 205 F.2d 630 (C.A. 2d, 1953) (food consumer has standing to seek review of Food and Drug Administrator's decision against producer of fish oils).

be "enforced" through the judicial proceeding.¹¹¹ In recent years, it is true, the courts have refused to examine the validity of the claim or right for the sake of whose prosecution or investigation the subpoena is issued.¹¹² Still, the mere fact that a court procedure is needed for the execution of a subpoena may and often does mean a considerable loss of time.¹¹³ And so we encounter the strange picture that a person may be administratively arrested there and then as a prospective deportee even though he may later turn out not to be deportable,¹¹⁴ but if his status is merely to be inquired into, the efficacy of the subpoena to that effect may be successfully postponed for some time by not obeying the summons until the courts have spoken.¹¹⁵

Preliminarily it may be noted that, surprisingly enough, non-reviewability and agency execution are not necessarily one and the same. A decision may by command of the enabling statute be unreviewable, and yet in some cases might be capable of effective execution only with the aid of a court. This is the situation under the draft laws. If a person is determined to be fit for military service by the draft board but refuses to be inducted the board's decision cannot be carried out by the military arm.¹¹⁶ As long as he is still a civilian his defection is a crime to be tried in the ordinary civil courts. The decision of the military authorities is unreviewable, other than administratively, according to the wording and intention of the law,¹¹⁷ but the enforcement of the decision is left to the courts.¹¹⁸

¹¹¹ Section 5(c) of the Administrative Procedure Act states that "[u]pon contest the court shall sustain any subpoena"; Attorney General's Manual on the Administrative Procedure Act 68 (1947). Some state administrative agencies have authority to punish for contempt of their subpoenas. Gellhorn and Byse, *Administrative Law* 624-25 (1954).

¹¹² *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); *Lansky v. Savoretti*, 220 F.2d 906 (C.A. 5th, 1955); *Barnes v. Oddo*, 219 F.2d 137 (C.A. 2d, 1955); *Carroll Vocational Institute v. United States*, 211 F.2d 539 (C.A. 5th, 1954); *Tobin v. Banks & Rumbaugh*, 201 F.2d 223 (C.A. 5th, 1953) (no change effected by Administrative Procedure Act §5[c]). For an excellent discussion consult *United States v. Zuskar*, 237 F.2d 528 (C.A. 7th, 1956).

¹¹³ Gellhorn and Byse, *Administrative Law* 622-23 (1954).

¹¹⁴ Cases cited note 83 *supra*.

¹¹⁵ E.g., *Barnes v. Oddo*, 219 F.2d 137 (C.A. 2d, 1955); *Lansky v. Savoretti*, 220 F.2d 906 (C.A. 5th, 1955).

¹¹⁶ *Toth v. Quarles*, 350 U.S. 11 (1955).

¹¹⁷ 62 Stat. 622 (1948), 50 U.S.C.A. App. §462(a) (1951).

¹¹⁸ In actual fact, however, this legal situation has led to what might be called judicial review through the back door of "jurisdiction." The courts do not always enforce draft board decisions by mechanically finding that a crime is committed whenever an inductee fails to report for duty, regardless of whether the board's decision was correct or not. Rather, in what one might think a clear statutorily established non-review situation, they have obtained effective review powers. This has been accomplished by holding that the draft board may act only if it has "jurisdiction," and that, "if there is no basis in fact for the classification" the draft board gave the registrant, the board's decision is rendered without jurisdiction and is void. *Gonzales v. United States*, 348 U.S. 407 (1955); *Sicurella v. United States*, 348 U.S. 385 (1955); *Estep v. United States*, 327 U.S. 114, 122 (1946); *Bejels v. United States*, 206 F.2d 354 (C.A. 6th, 1953).

In some instances the judicial branch of government is merely authorized to support and put additional teeth into the enforcement of administrative decisions. Thus even though the distraint of property for delinquent taxes is carried out by the tax agency,¹¹⁹ willful tax evasion is a judicially punishable crime.¹²⁰ A Loyalty Board decision denying employment is ordinarily self-executory (perhaps subject to subsequent court review), inasmuch as it is addressed to the government itself and the thus proscribed employee alone has practically no physical power to defy the order.¹²¹ In a more uncommon case, however, where three seamen who were denied *private* employment by the Board because of alleged subversive affiliations, but accepted employment anyway, the Board in aid of its decision invoked judicial proceedings by having the recalcitrant sailors indicted for violation of the Magnuson Act.¹²² In this particular instance, the indictment was dismissed for want of due administrative process as the basis of the Loyalty Board's order.¹²³ Deportation orders¹²⁴ can ordinarily be executed by the Immigration and Naturalization Service, albeit pursuant to a judicial review only recently enlarged so as to afford a deportee nearly the same procedural rights as if, say, the taking by the government of an acre of arid land belonging to the same alien were involved.¹²⁵ But deportation orders can also be fortified through criminal proceedings. If the alien wilfully fails to apply for traveling papers he can be imprisoned up to ten years at hard labor.¹²⁶

In other instances, however, the law is so organized that the agency is completely powerless to execute its decisions without the aid from the judiciary,

¹¹⁹ Int. Rev. Code §§6331-43, 26 U.S.C.A. §§6331-43 (1955).

¹²⁰ *Ibid.*, at §§7201-4; *United States v. Smith*, 206 F.2d 905 (C.A. 3d, 1953).

¹²¹ An attempt to remain at his desk would no doubt be unceremoniously ended by the maintenance crew. This actually happened to the United States Chief Judge in Germany, William Clark, who was dismissed from office but at least attempted to continue to hold court until his successor took physical possession of the court's offices. *N.Y. Times*, p. 18, col. 2 (Dec. 15, 1953).

¹²² *United States v. Gray*, 207 F.2d 237 (C.A. 9th, 1953), noted in 67 *Harv. L. Rev.* 1077 (1954).

¹²³ *Ibid.*; *Parker v. Lester*, 227 F.2d 708 (C.A. 9th, 1955).

¹²⁴ Distinguish this from the preliminary decision to detain an alien pending deportation proceedings, which falls into our second category, as being carried out by the agency itself, subject to subsequent court review.

¹²⁵ *Shaughnessy v. Pedreiro*, 348 U.S. 882 (1955) (deportee may seek declaratory judgment under Section 10 of Administrative Procedure Act). It was recently proposed to change the deportation proceedings themselves to approximate Sections 5, 7 and 8 of that Act. 20 *Fed. Reg.* 5,729 (Aug. 9, 1955). In view of the harsh provisions of the Immigration and Nationality Act of 1952, 66 Stat. 185 (1952), 8 U.S.C.A. §§101(b)(4), 236, 242 (1953), these new regulations must be considered as *praeter legem*. Report of the President's Commission on Immigration and Naturalization: Whom We Shall Welcome 159-60 (1953); Sen. Rep. No. 1137, 82d Cong. 2d Sess. 28 (1952). See *United States ex rel. Belfrage v. Kenton*, 224 F.2d 803, 805 (C.A. 2d, 1955) (Administrative Procedure Act not applicable to deportation proceedings).

¹²⁶ *United States v. Spector*, 343 U.S. 169 (1952) (alien had not, or not properly, applied to Soviet Embassy for passport but had emigrated to this country from Russia in 1913).

whose decision, then, is not a mere implementation of the administrative action but rather amounts to the final decision. It is these with which this section is primarily concerned. In some of these cases the technique of the law renders a violation of the agency decision a criminal offense, as in the case of violations of cease and desist orders of the FTC,¹²⁷ of regulations or orders of the Wage and Hour Administration¹²⁸ or of induction orders of the draft boards.¹²⁹ The judiciary, however, in these instances does not merely pronounce the existence of the administrative order and its violation. Rather, the court examines the validity of the order to a varying degree, even where, as in the draft board cases, the law proclaims the administrative order to be "final." As we have seen, in such a situation it has been found expedient to say that the agency had no "jurisdiction" to arrive at a decision that appeared to be patently wrong to a majority of the members of the Supreme Court.¹³⁰

A second, and rather weak, means of judicial execution of agency decisions is a civil suit, such as to enforce a statutory penalty,¹³¹ or to restore excessive rent to overcharged tenants¹³² or for an injunction to comply with an order.¹³³ Such suits are time consuming.¹³⁴

Finally, the least efficient method of administrative law execution is the one by which the NLRB's cease and desist orders are "enforced" by the courts of

¹²⁷ 38 Stat. 719 (1925), 15 U.S.C.A. §45(1) (1951).

¹²⁸ Fair Labor Standards Act §§15(a)(2), 16, 52 Stat. 1068, 1069 (1949), 29 U.S.C.A. §§215(a)(2), 216 (1956).

¹²⁹ Consult discussion at 308 *supra*.

¹³⁰ *Ibid*.

¹³¹ The inherent weakness of this kind of law execution is aptly demonstrated by some recent cases: *United States v. Chicago, B. & Q. R. Co.*, 199 F.2d 223 (C.A. 7th, 1952), cert. denied 345 U.S. 908 (1953) (suit for enforcement of penalty under Federal Safety Appliance Acts dismissed); *United States v. Lynn*, 132 F.Supp. 605 (E.D. Ky., 1955) (suit for statutory penalty dismissed because court disagreed with agency's findings and construction of Agricultural Adjustment Act); *United States v. Harvey*, 131 F.Supp. 493 (N.D. Tex., 1954) (judgment for defendant in penalty suit under Agricultural Adjustment Act where administrative proceedings were faulty, despite defendant's failure to exhaust his administrative remedies).

¹³² E.g., *United States v. Jacovetty*, 204 F.2d 376 (C.A. 4th, 1952). *Contra*: *Smith v. United States*, 199 F.2d 377 (C.A. 1st, 1952), noted in 66 Harv. L. Rev. 918 (1953) (treble damage suit not maintainable because of court's different conclusion from that of rent administrator, despite landlord's failure to exhaust administrative remedies); *United States v. McCrillis*, 200 F.2d 884 (C.A. 1st, 1952) (similar).

¹³³ E.g., *Seipel v. SEC*, 229 F.2d 758 (App. D.C., 1955) (injunction suit to enjoin investment adviser's practices). See *United States v. McCrillis*, 200 F.2d 884 (C.A. 1st, 1952) (injunction against rent overcharge denied); *United States v. Sanders*, 196 F.2d 894 (C.A. 10th, 1952) (contempt for failure to comply with injunction to refrain from circulating misbranded drugs in interstate commerce); *United States v. 3 Cartons, etc.*, 132 F.Supp. 569 (S.D. Calif., 1952) (libel against misbranded goods); *United States v. Shafer*, 132 F.Supp. 659 (D. Md., 1955) (injunction granted to restrain farmers from preventing Government agents to enter upon their farms).

¹³⁴ Thus, to pick two examples at random from the preceding footnote, in *3 Cartons*, the quack medicines were shipped "during 1949" and the trial court's decision was rendered in November, 1952. In *Sanders*, a case of unusual judicial speed, the complained-of sale took place in January and the injunction was not issued before October, 1951; in May, 1952, the appellate court reversed and remanded to the district court upholding the Government's petition for criminal contempt.

appeals and then executed through the tedious method of contempt procedure.¹³⁵ If a respondent, employer or union, so chooses he may with some skill delay the translation into fact of the Board's order by many years.¹³⁶ And it is not only the length of time and considerable expenditure of money¹³⁷ that has often rendered labor law enforcement a pastime for lawyers accomplishing little of practical value,¹³⁸ but also the very nature of a contempt procedure itself. For, at least under the older doctrine, not only is the "heavy" burden of proving the contempt upon the agency,¹³⁹ but also the evidence must be "clear, convincing, and satisfactory";¹⁴⁰ and worse yet, the evidence is often received by a special master. In the agency's decree for which execution is sought, the facts found by the agency are conclusive if supported by substantial evidence considering the record as a whole;¹⁴¹ moreover, the agency's solution of legal questions whose adjudication falls peculiarly within the expert province of the agency will generally be accorded great weight by the courts.¹⁴² And thus the Board issues, and the court approves, an order directing the employer to cease and desist from certain practices. If, however, the respondent is not obliging enough to cease and desist, no expert body is called upon to decide the issue. Rather, this is done by a "master"—a local lawyer in good standing but not necessarily endowed with any expert knowledge in the agency's field. This has often produced unfortunate results.¹⁴³ The NLRB and some of the courts have

¹³⁵ Consult Parker, *Contempt Procedure in the Enforcement of Administrative Orders*, 40 Ill. L. Rev. 344 (1946); *The Role of Contempt Proceedings in Enforcing Orders of the NLRB*, 54 Col. L. Rev. 603 (1954). Consult also Parker, *Administrative Law* 283-84 (1952); Gellhorn and Byse, *op. cit. supra* note 6, at 624. Subpenas likewise are "enforced" through contempt proceedings under Section 6(c) of the Administrative Procedure Act.

¹³⁶ Consult the cases in Parker, *Contempt Procedure in the Enforcement of Administrative Orders*, 40 Ill. L. Rev. 344, 347 (1946), and 60 Harv. L. Rev. 973 (1947); *NLRB v. Retail Clerks' Int'l Ass'n*, 211 F.2d 759 (C.A. 9th, 1954) (unfair labor practice charge filed December, 1948; Board's settlement decree entered September, 1949; "enforced" by consent decree in Court of Appeals January, 1950; final decision holding respondent in contempt for failure to obey April, 1954); *West Texas Utilities Co. v. NLRB*, 206 F.2d 442 (App. D.C., 1953) (three years from appellate court's approval of Board's order to contempt decree). See *United States v. Sanders*, 196 F.2d 894 (C.A. 10th, 1952).

¹³⁷ In the contempt procedure following *NLRB v. Sunshine Mining Co.*, 110 F.2d 780 (C.A. 9th, 1940), *enforcing* 7 N.L.R.B. 1252 (1938), cert. denied 312 U.S. 678 (1941), the master's fee amounted to \$25,000.00. The contempt petition was filed on April 3, 1942, the master's final report was filed on December 12, 1944, and the approval date was January 6, 1945. Parker, *Contempt Procedure in the Enforcement of Administrative Orders*, 40 Ill. L. Rev. 344 (1946).

¹³⁸ Consult the critical remarks in Cox, *Cases on Labor Law* 388 (3d ed., 1954).

¹³⁹ *Kansas City Power & Light Co. v. NLRB*, 137 F.2d 77, 79 (C.A. 8th, 1943).

¹⁴⁰ *NLRB v. Giannasca*, 119 F.2d 756 (C.A. 2d, 1941).

¹⁴¹ *Administrative Procedure Act* §§7(c), 10(e)(5); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

¹⁴² *O'Leary v. Brown-Pacific-Maxon Inc.*, 340 U.S. 504 (1951); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

¹⁴³ See *Kansas City Power & Light Co. v. NLRB*, 137 F.2d 77 (C.A. 8th, 1943), where the lack of understanding of labor law is equalled only in the contempt procedure of *NLRB v. Budd Mfg. Co.*, 142 F.2d 922 (C.A. 3d, 1944). See also *NLRB v. Warren Co.*, 214 F.2d 449 (C.A. 5th, 1955).

worked out some measure of relief in this situation. Many courts, some of them still grudgingly, now let the contempt facts be found by the Board itself by remanding the case to it, subject to the continued jurisdiction of the court, "for investigation and report to this court."¹⁴⁴ Though this is still far from ideal, or even good, law enforcement it is at least better than the mockery of "committing the last perhaps most delicate step of labor enforcement—proceedings in contempt—to somewhat alien professional interest as in effect a court of first instance," a procedure by which "we lose the very quality of expertness and wise discretion" which has led to the creation of administrative agencies.¹⁴⁵

There are other instances of execution of administrative decisions through contempt,¹⁴⁶ but nowhere has this mode of procedure been quite so pernicious as in the law of labor relations.

In presenting this picture we have not been able to set forth a *ratio legis*, that is, an explanation of the principle by which the legal system is guided in letting administrative decisions be executed this way or that. Why can important decisions involving liberty and property be carried out by administrative agencies, whereas a mere subpoena must be judicially enforced? And while the courts to a large extent bow to the agencies' expertise and experience in making their decisions, the picture changes when this decision is to be executed by a non-expert court "master."

It might be said that the question is one of "power distribution." But "power" is either physical power or it means legal authority. It is true that agencies can and hence do execute their orders because they are physically capable to do so. Negative decisions such as decisions not to grant a passport or license could be so classified. The agency there exercises its physical power not to act. As to affirmative decisions, however, executions based on physical power regardless of legal justification, fortunately for our legal civilization, are rare. Aside from negative decisions where the agency's power not to act is inherent, decisions are generally executed by agencies only if the agency is so authorized. This realization has, of course, led us into a circle; agencies have authority to execute their decisions if they are so authorized. And no common

¹⁴⁴ *NLRB v. Western Cartridge Co.*, 138 F.2d 551 (C.A. 2d, 1943), cert. denied 321 U.S. 786 (1944). With this case the practice started in the Second Circuit. It has spread to other circuits. Consult *Parker, Contempt Procedure in the Enforcement of Administrative Orders*, 40 Ill. L. Rev. 344 (1946); *The Role of Contempt Proceedings in Enforcing Orders of the NLRB*, 54 Col. L. Rev. 603 (1954). See *NLRB v. Venetian Blind Workers' Union Local 2565*, 207 F.2d 124 (C.A. 9th, 1953); *NLRB v. Retail Clerks' Int'l Ass'n*, 203 F.2d 165 (C.A. 9th, 1953) (good survey of the scope and limitations of the new doctrine); *NLRB v. Dixon*, 189 F.2d 38 (C.A. 8th, 1951) (extent to which respondent is able to comply may be left to Board's determination). But see *NLRB v. Warren Co.*, 214 F.2d 481 (C.A. 5th, 1954) (court refused to hold respondent in contempt, ruling that it, not the Board, must determine "what will best serve the public and at the same time vindicate its own decree"), rev'd 350 U.S. 107 (1955).

¹⁴⁵ *NLRB v. Giannasca*, 119 F.2d 756, 759 (C.A. 2d, 1941) (concurring opinion).

¹⁴⁶ Authorities cited notes 89-94 *supra*.

rationale of importance or expediency can be determined to explain why the distribution of authority, or "power," is just this way and not otherwise. It is a part, but only a part, of the bigger question why the task of making certain kinds of decisions has been assigned to administrative agencies and others to the courts.

The Administrative Procedure Act is silent on the whole subject, as is a recent proposal of an Administrative Code.¹⁴⁷ The most intelligently written administrative procedure law, the Massachusetts act,¹⁴⁸ likewise has no provision on the execution of administrative decisions.

Legislation might seem apposite, but it must come *sine ira et studio*. A general outcry "more power to the courts" would be as unsatisfactory a basis for reform as the demand to leave everything to the agencies. The latter bears the danger of an increase of rash political decisions such as have occurred in the past. To curb agencies, on the other hand, by letting any execution that needs further action¹⁴⁹ be physically enforced only by the courts would be equally unsatisfactory in view of the time and money that would be thereby consumed. Moreover, cases such as *Sacco-Vanzetti* and a recent one¹⁵⁰ where a man had been kept in jail for twenty-four years, the only evidence being a forced confession to a crime neither he nor anyone else had committed, severely test our belief in the natural-law inspired creed of the infallibility of judges.

In any event it should be realized that administrative agencies *do* execute their decisions to a large extent, at times in an irrational manner. Such a realization suggests the need for a rational, coordinated and, perhaps someday, codified¹⁵¹ system of administrative execution, a system which might well include an office of administrative enforcement.

¹⁴⁷ Administrative Code Bill in Report on Legal Services and Procedure, prepared for the Commission on Organization of the Executive Board of the Government by the Task Force on Legal Services and Procedure 359 (March, 1955); 7 Ad. L. Bull. 132-72 (1955).

¹⁴⁸ Act of June 10, 1954, c.681, Gen. Laws c.30(A).

¹⁴⁹ Strictly self-executory decisions, such as many "negative" ones, of course would not be capable of execution through the judiciary.

¹⁵⁰ *United States ex rel. Montgomery v. Ragen*, 86 F.Supp. 382 (N.D. Ill., 1949).

¹⁵¹ The writer knows of only one foreign country that has what may truly be called a comprehensive code of administrative law. Austria has four statutes on administrative procedure, one of which, the *Verwaltungsvollstreckungsgesetz*, deals in thirteen sections with execution problems concededly simpler than those of a common-law country. *Das Verwaltungsverfahren* 387-417 (Mannlicher, 5th ed., 1951); 1 Adamovich, *Handbuch des österreichischen Verwaltungsrechts* 280-84 (5th ed., 1954); Parker, Review of 1 Adamovich, *Handbuch des österreichischen Verwaltungsrechts*, 5 Am.J. Comp. L. 146, 149 (1956).