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Judicial Self-Limitation in Administrative Law: Examples in Tariff Administration

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JUDICIAL SELF-LIMITATION IN ADMINISTRATIVE LAW: EXAMPLES IN TARIFF ADMINISTRATION†

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A RECENT CASE in the Supreme Court of the United States, *United States v. Bush & Co.*,[1] brings to the foreground again the problem of judicial review of administrative action in certain types of tariff matters.[2]

In the *Bush Case* the court was concerned with action taken by the president and the Tariff Commission pursuant to the provisions of sec. 336 of the Tariff Act of 1930.[3] That section, the so-called "flexible tariff provision," authorizes the president upon the recommendation of the United States Tariff Commission to raise or lower the rate of duties and to change the basis of valuation of imported merchandise in order thereby to equalize the differences in the costs of production of foreign and domestic merchandise of a similar nature.

In pursuance of its duty under that section the Tariff Commission had investigated the cost of production of canned clams produced in Japan for the period from December 1, 1930 to September 30, 1932, which costs were expressed in terms of the Japanese yen. In converting the costs of production into the currency of the United States for comparison with domestic costs, the commission had used the average rate of exchange for 1932.

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[1](1940) 310 U. S. 371, 60 Sup. Ct. 944, 84 L. Ed. 1259, T. D. 50159.

[2]This article is not concerned with the ordinary customs or tariff litigation involving the value, quantity or rate of duty on imported merchandise. There is ample judicial review of such matters by the United States customs court and, on appeal, by the United States court of customs and patent appeals. See, in this connection, secs. 501, 514, and 515 of the Tariff Act of 1930, 46 Stat. at L. 730 et seq., 19 U. S. C. A. secs. 1501, 1514, and 1515); sec. 198 of the Judicial Code (28 U.S.C.A. sec. 310). Provision is also made for review by the Supreme Court "by certiorari or otherwise." Sec. 195 of the Judicial Code, as amended (28 U.S.C.A. sec. 308).

[3]46 Stat. at L. 701, 19 U. S. C. A. sec. 1336.

The change in the basis of valuation recommended by the commission as a result of its study was approved and proclaimed by the president. As the change in the basis of valuation had the effect of increasing the duties on the canned clams imported by him subsequent to the effective date of the proclamation, an importer instituted proceedings to obtain an appraisement on the basis of valuation in effect prior to the president's proclamation.

The United States Customs Court denied relief. On appeal, the United States court of customs and patent appeals held that it was error to convert costs or prices for one period into United States dollars at the average rate of exchange for another period, the statutory section being silent as to the precise method of conversion to be used. The Supreme Court reversed the judgment of the court below, holding that the statute permitted executive discretion in selecting the conversion rate and that the judgment of the president as to the existence of facts warranting a change in the basis of valuation was determinative. Mr. Justice Douglas speaking for the court (Mr. Justice McReynolds dissenting) said:[4]

"The determination of foreign exchange value was prescribed, in the procedure outlined by Congress, neither for the action of the commission nor for that of the president. There is no express provision in the Act that the rate of exchange must be taken for the same period as the invoice prices. To imply it would be to add what Congress has omitted and doubtless omitted in view of the very nature of the problem. The matter was left at large. The president's method of solving the problem was open to scrutiny neither by the court of customs and patent appeals nor by us. Whatever may be the scope of appellate jurisdiction conferred by sec. 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the president that the rates of duty recommended by the commission are necessary to equalize the differences in the domestic and foreign costs of production.

. . .

". . . And the judgment of the president that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary *is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment.* It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer *as to*

[4]At page 378, et seq. Italics supplied and footnotes omitted.

the existence of the facts calling for that action is not subject to review."

Those imbued with the idea of judicial omnipotence may be inclined to treat the *Bush Case* as in the nature of a sport or variant peculiar to the flexible tariff. However, it is the principal purpose of this article to call attention to a little-known line of cases in another field of administrative law in which the courts have exercised similar self-restraint. The leading case is *Cramer v. Arthur,* decided by the Supreme Court in the October 1880, term.[5] In that case the statute directed the director of the Mint annually to estimate the value of the pure metal of foreign coins of standard value in circulation in terms of the money of account of the United States. The secretary of the treasury was directed to proclaim the estimated values on the first day of January of each year. The statute further provided that the values so proclaimed should be used by collectors of customs in appropriate cases in converting the prices and values of goods imported from foreign countries into United States dollars. Acting pursuant to those provisions, the director of the Mint had estimated and the secretary of the treasury had proclaimed the value of the Austrian silver florin for the year 1874, the year in which the plaintiff's goods were imported, to be 47.60 cents.

The United States consul stationed in Austria-Hungary, according to the provisions of another statute and the president's regulations thereunder, furnished the importer, who had actually purchased his goods in Vienna, Austria, with paper florin instead of silver florin, with a certificate stating the value of the paper currency in terms of United States money. The value stated in the certificate, 45.77 cents, apparently was derived by applying the percentage of depreciation to the proclaimed value of the silver florin.

In translating the value of the imported merchandise as expressed in the invoice, the collector of customs adopted the value of the paper florin which had been certified by the United States consul. The importer protested against the collector's action, and on the trial produced evidence for the purpose of showing that the silver florin was not in circulation in Austria in 1874, that it had ceased to be a standard or measure of value early in 1873, and "that by the official paper or gazette of the stock exchange of Vienna the silver florin was worth 45.46 cents in American gold

[5](1880) 102 U. S. 612, 26 L. Ed. 259.

coin in September, 1874, and the paper florin, 43.71 cents." On that evidence, the importer founded his claim "that the amount of duty should have been assessed at $1,780.67," and that an excess of $150 had been exacted. The lower court directed a verdict for the defendant and the Supreme Court affirmed the judgment of the lower court. After stating that the Austrian florin was the standard money of account of Austria whether or not represented by a corresponding coin and that the secretary's proclamation was as binding "as if it had been in a permanent statute,"[6] Mr. Justice Bradley[7] speaking for the court said:[8]

"The proclamation of the secretary and the certificate of the consul must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty. If existing regulations are found to be insufficient, if they lead to inaccurate results, the only remedy is to apply to the president, through the Treasury Department, to change the regulations. From the letter of the secretary exhibited in this case, we infer that this was afterwards done, and that he made the desired change. But this change in the regulations does not affect prior transactions which took place before they went into effect."

The letter of the secretary of the treasury to which the Court referred was written a few weeks after the importation of the goods involved in the case under discussion. It stated, among other things, as quoted in the Court's opinion, that "the department had authentic information that the silver florin had generally been thrown out of use, both as a standard and as currency. . . ." Accordingly, the collector of customs addressed was directed, in effect, to disregard the proclaimed value of the silver florin in determining the value of the paper florin of Austria.

It is hard to reconcile the quoted statement of the secretary

[6]Compare this language with the italicized portion of the quotation from the Bush Case, supra pp. 731-732.

[7]At page 404 of his Bulwark of the Republic (1937) Hendrick refers to Mr. Justice Bradley as "probably the greatest intellect, considered purely as intellect, who ever ornamented the Supreme Bench."

[8]Cramer v. Arthur, (1880) 102 U. S. 612, 619, 26 L. Ed. 259.

of the treasury and the Court's statement[9] that "the florin is the standard money of account of Austria," whether or not "represented by a corresponding coin." Nor is it entirely clear from the Court's statement whether it considered the florin a standard coin "in circulation" within the meaning of the statute as a matter of law. Presumably, the Court meant no more than that the secretary's finding that the florin was a coin "in circulation" was conclusive on the courts irrespective of the actual fact.[10]

The rationale of the court's position was stated more fully in *Hadden v. Merritt.*[11] In that case an importer of goods from China claimed that in acting pursuant to the same statute the secretary of the treasury had proclaimed the value of the foreign currency, the Mexican dollar,[12] in terms of the silver dollar of the United States instead of the gold dollar of the United States, claimed to be the true "money of account of the United States" in 1879, the year of importation. It was also claimed that if the secretary of the treasury had expressed the value of the foreign currency in terms of the gold dollar, the collector's assessment of duty would have been on a lower valuation in the money of account of the United States. The Supreme Court dismissed the importer's arguments in the following language:[13]

[9]Cramer v. Arthur, (1880) 102 U. S. 612, 616, 26 L. Ed. 259.

[10]The Supreme Court's position has been so interpreted by a lower court. In Amalgamated Textiles, Ltd. v. United States, (1936) 24 Ct. Cust. & Pat. Appls. (Customs) 74, 84 F. (2d) 210, 69 Treas. Dec. 1053, T. D. 48378, which arose under the tariff act now in effect, the court said (at page 81): "The parallel between the above-cited case and the case at bar is evident. There it was established as a fact that the silver florin, named in the proclamation of the secretary of the treasury as the standard in Austria, was not in circulation at the time of the importation of the merchandise there involved. A like claim is here made, that the equivalent of the pound sterling in gold was not in circulation in Great Britain at the time of the importation of the merchandise here involved. The Supreme Court in the Cramer Case declined to go behind the proclamation of the secretary of the treasury and inquire into the facts upon which his proclamation was based, and for the same reasons as given by the Supreme Court for so declining, we must decline to inquire into the facts upon which the secretary of the treasury based his proclamation involved in the case at bar."

[11](1885) 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333.

[12]"Various other foreign dollars entered China during the nineteenth century, chief of which was the Mexican dollar, which was introduced into China about 1850-1860. . . . Various attempts were made from time to time to suppress the circulation of foreign coins in China. The Mexican dollar, however, as well as the Hongkong and Straits dollars, has continued to circulate in China up to the present time, so that in Shanghai today the term 'Mex' is practically synonymous with the term 'silver dollar'." Currency, Banking and Finance in China, Trade Promotion Series No. 27 of the United States Department of Commerce (1926), at pages 18 and 19.

[13]Hadden v. Merritt, (1885) 115 U. S. 25, 27, 5 Sup. Ct. 1169, 29 L. Ed. 333.

"The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the secretary of the treasury, is conclusive upon custom-house officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding, to affect the rights of the government or individuals. There is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function, requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision. If any error, in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction. That is to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute, as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation. The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty; and their action cannot be otherwise questioned."

Those pioneer cases have been followed consistently, under varying circumstances, by the Supreme Court[14] itself and have been similarly applied by the lower courts having jurisdiction,[15] including cases decided under the Tariff Act of 1930, which is now in operation.

The situation confronting the court of customs and patent appeals in *J. S. Staedtler, Inc. v. United States*[16] bears an interesting relation to that involved in *Hadden v. Merritt.* The importer again claimed that the secretary had incorrectly construed the expression "the money of account of the United States." This time, it was asserted, the secretary had stated the value of the foreign coin, the German Reichsmark, in terms of gold. It

[14]Klingenberg v. United States, (1894) 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647, and United States v. Whitridge, (1905) 197 U. S. 135, 25 Sup. Ct. 406, 49 L. Ed. 696.

[15]Klumpp v. Thomas, (C.C.A. 3d Cir. 1908) 162 Fed. 853, certiorari denied, (1908) 212 U. S. 579, 29 Sup. Ct. 688, 53 L. Ed. 659; J. K. Clarke v. United States, (1930) 17 Ct. Cust. & Pat. Appls. (Customs) 420, 57 Treas. Dec. 289, T. D. 43866; Amalgamated Textiles, Ltd. v. United States, supra, n. 10; J. S. Staedtler, Inc. v. United States, (1937) 25 Ct. Cust. & Pat. Appls. (Customs) 136, 72 Treas. Dec. 604, T. D. 49255.

[16](1937) 25 Ct. Cust. & Pat. Appls. (Customs) 136, 72 Treas. Dec 604, T. D. 49255.

was further asserted that gold was not the money of account of the United States, in view of the Joint Resolution of June 5, 1933, invalidating clauses purporting to give the obligees of contracts for the payment of money the right to require payment in gold.[17]

The court was not beguiled by the intricacies of the argument. It upheld the proclamation, resting its decision squarely on the ground that the opinion in *Hadden v. Merritt* was authority for the proposition that the proclamation of the secretary of the treasury, being regular on its face, is determinative that the values in question are expressed in terms of the money of account of the United States.

The cases last discussed have all involved the finality or conclusiveness of an administrative or executive finding of the mint-par value of foreign coins.[18] The same degree of finality has been held to pertain to a similar finding of foreign exchange value.

The Supreme Court's opinion in *United States v. Whitridge*,[19] although perhaps not directly in point, is of interest in this connection. In that case the foreign currency, the Indian silver rupee, bore a legal ratio to the English gold pound of fifteen to one. Its value as one-fifteenth of a gold pound exceeded the value of its silver content but corresponded to its exchange value.

The Court apparently thought that the secretary of the treasury had authority to consider foreign exchange value (which point had been disputed by the importer) under a proviso which was added to the law involved in the *Cramer Case* and *Hadden v. Merritt* in 1894 and which was in effect repealed in 1921.[20] As the accuracy of the finding of foreign exchange value was not disputed there was no occasion for sustaining its conclusiveness in this respect. The Court did point out, however, that the secretary's finding may have related to the mint-par value of the rupee as one-fifteenth of a gold pound and if so was conclusive.

In brief, as Mr. Justice Holmes expressed it:[21]

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[17]48 Stat. at L. 112; 31 U. S. C. A. sec. 463.

[18]The Cramer Case, of course, also sustained the finality of the consular officer's finding of the relative values of two currencies of the same foreign country, the Austrian paper florin and the Austrian silver florin. The determination of the market ratio of two domestic currencies would seem to require essentially the same type of skill and judgment as the determination of the relationship between a foreign and a domestic currency.

[19](1905) 197 U. S. 135, 25 Sup. Ct. 406, 49 L. Ed. 696.

[20]Section 403 of the Act of May 27, 1921, 42 Stat. at L. 17.

[21](1905) 197 U. S. 135, 144, 25 Sup. Ct. 406, 49 L. Ed. 696.

"But, as in this case the exchange value and the value as a fraction of a pound were the same, it does not matter to our decision whether we say that in such circumstances the action of the secretary was conclusive or say that it was right."

The lower courts, however, have held clearly that the secretary of the treasury's findings of foreign exchange value are conclusive upon them.[22] In so doing they have cited and relied upon the decisions in the *Cramer Case* and *Hadden v. Merritt.* In the words of the court in *J. K. Clarke v. United States,*[23] the judicial review of such findings "is limited to determining simply whether the order made is by its terms in conformity with the statute. . . ." As the order involved in that case purported to show the foreign exchange value of the rupee "in United States money," the court refused to consider the claim that the value really represented the value in India rather than the value in the United States.

The similarities between the *Bush Case* and the earlier cases just discussed, the *Cramer Case* for example, are evident.[24] In both cases mentioned, the administrative agency involved was performing a function previously performed by Congress.[25] In both cases the Court observed that the action taken pursuant to the congressional delegation was no more subject to judicial review than if performed by Congress itself.

There are important differences in the cases, however. The value of a foreign currency is only incidentally involved in the *Bush Case*; it is primarily involved in the other cases. In *Hadden*

[22]Klumpp v. Thomas, (C.C.A. 3d Cir. 1908) 162 Fed. 853; J. K. Clarke v. United States, (1930) 17 Ct. Cust. & Pat. Appls. (Customs) 420, 57 Treas. Dec. 289, T. D. 43866.

[23](1930) 17 Ct. Cust. & Pat. Appls. (Customs) 420, 57 Treas. Dec. 289, T. D. 43866.

[24]Compare Franklin Sugar Refining Co. v. United States, (1911) 1 Ct. Cust. Appls. 242, 20 Treas. Dec. 236, T. D. 31276, holding that the finding of the secretary of the treasury of the *amount* of a foreign bounty upon production or exportation to be offset by countervailing duties is conclusive upon the courts. To be contrasted is the recent decision of the court of customs and patent appeals in F. W. Woolworth Co. v. United States, (Ct. Cust. & Pat. Appls. 1940) 115 F. (2d) 348, Cust. Appls. Decisions 151, which involved the *existence* of a grant or bounty in the German currency and trade practices, rather than the amount of the declared grant or bounty; the court, without discussion of the point, assumed its competence to review.

[25]The history of congressional action in respect of the value of foreign currencies for the purpose of converting invoice and market values expressed therein into money of account of the United States, and for other purposes as well, is set forth in the statement of the case in Collector v. Richards, (1874) 23 Wall. (U.S.) 246, 23 L. Ed. 95. The relevant portion of the statement is the opinion of the lower court in the case, which the Reporter considered "so curious and interesting" a document as to be "worthy of preservation in this place." P. 249.

v. Merritt, the Court refers to the determination of such value as an "executive function." In view of the nature of the function, the Court believed that Congress wished the agency employed by it, the Congress, to have, so far as the courts are concerned, considerable latitude not only in finding facts as such but in reaching conclusions involving mixed fact and law. Thus, in *Hadden v. Merritt* the Court thought the secretary of the treasury had been authorized to determine, for the purposes involved in that case, whether or not the United States silver dollar could be considered the money of account of the United States.

In neither type of cases is there any apparent constitutional limitation on the finality which may be ascribed to the administrative finding. In the *Bush Case* the Court quoted its statement in *Norwegian Nitrogen Products Co. v. United States*:[26] "No one has a legal right to the maintenance of an existing rate of duty." By a parity of reasoning, there would seem to be no legal right to a particular value of a foreign coin for customs purposes of the kind in question. Or, as the Court said in *Hadden v. Merritt,* in a passage previously quoted, "There is no value, and can be none, in such coins, except as thus ascertained. . . ."

Although it is not within the scope of this article to attempt to fit the cases discussed into the general picture of judicial review of administrative action, one observation may be made. Dean Landis[27] has pointed out that many of the cases on judicial review do not correspond very well with practical judgments as to the desirability of court intervention and has indicated that practical considerations, when present, are sometimes only implicit in the judicial opinions. In that connection the intensely practical reasoning explicit in *Cramer v. Arthur* and the cases following it is rather refreshing.

[26](1933) 288 U. S. 294, 318, 53 Sup. Ct. 350, 77 L. Ed. 796.
[27]Landis, The Administrative Process (1938) 132-133.