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Recommended Citation

Louis L. Jaffe, *Administrative Findings or the Ameer in America*, 34 Cornell L. Rev. 473 (1949)

Available at: <http://scholarship.law.cornell.edu/clr/vol34/iss4/1>

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ADMINISTRATIVE FINDINGS *or* THE AMEER IN AMERICA

LOUIS L. JAFFE

To Max Radin: urbane philosopher of the Law.

WE who for some time have watched the jousting between courts and administrators in the arena of judicial review have noticed how the banners and the slogans change. Nor should this surprise the modern lawyer, trained to look upon legal theory as the pallid reflection of time's urgencies. For a long intense spell the battle was fought as to who should make the findings of fact; and it is only in recent years that the courts have accepted as an almost universal formula the proposition that the findings are beyond revision if supported by "substantial evidence." It had been assumed, however, that the "law" was exclusively for the courts. But this comfortable simplicity is passing. There is, to borrow a term once beloved of the law of negligence, the "mixed question of law and fact." This is a case where the "finder of the fact" applies a compendious standard of judgment to a given situation; *e.g.*, he is asked to decide whether conduct is "reasonable," whether a person is an "employee" or "independent contractor," whether an item is a "deductible loss" or a "taxable gain" etc. In administration, particularly, it is argued, such questions may call upon the acquired technical competence of the agency. They are better handled by one with a sense for the total administrative picture. Increasingly the courts accept the administrative answer to such questions if the answer is "reasonable." The ambit of this administrative power is still uncertain and perhaps by its very nature will remain so. But what is clear is the increasing freedom of administrative agencies. This very freedom has given rise to a new intensity, to a shift, in the relation between court and administrator. A series of fascinating cases have revolved on the basic and perennial demand for an adequate rationalization of judgment; for "findings," for "reasons," for a "theory." The judicial quest is for a total formula which adequately demonstrates to the judge's mind that the agency being reviewed is operating within the delegation of power which is its patent. Thus the attempt is made to satisfy the age-old demand that judgment appear to derive from an authoritative abstraction rather than from the mere goodwill and good sense of the judge. Recent cases show that rationalization

is not without its difficulties and that the problem is in turn tied up with one's theory of justice. I cannot at this point serve my purpose better than to call to mind the charming and characteristic parable upon which Professor Radin bases the third chapter of his *Law as Logic and Experience*.

"There is a story," he says, "about an Ameer of Afghanistan who . . . rendered an extraordinary judgment in a case. . . . According to the story, the Ameer . . . was approached by two of his subjects. . . . There was a field between their properties to which both laid claim. Each produced genealogies, deeds, witnesses, and heatedly asserted his own rights and the injustice of his opponent. The Ameer listened patiently . . . and then asked one, 'Have you a son?' He answered, 'Yes.' And turning to the other he asked, 'Have you a daughter?' And when this was also answered in the affirmative, he said, 'Then marry the young people to each other and give them the field as a portion.'

"The story goes on to say that there was an Englishman present who was with the royal suite on an official mission. He inquired, 'Suppose they had been unwilling, Your Highness, what would you have done?' 'In that case,' replied the Ameer, 'I should have hanged them both and confiscated their lands.'"¹

The law, argues Professor Radin, is too much concerned with a system of syllogisms in which the present relationship of parties is made to turn on what is thought (by the judge) to have transpired in the past. The judge is confronted with a quarrel, a maladjustment between two parties. The past can never be accurately recovered. It exists no longer except as a number of contrasting subjective impressions in the minds of the opposing parties. Whatever the parties may make it appear, it is likely that both are in some measure at fault. Except in those cases where there is a claim of deliberately immoral or criminal conduct the law should seek to compose the difference in terms of what will maintain a human relationship on a fraternal and workable basis. This is what Professor Radin calls arbitration. Its role is already a great one in the practical administration of justice. It should be increased by the introduction of procedural and substantive rules which recognize more frankly the common predicament of the litigants. The law should seek to apportion the loss or the *res*, rather than to prefer one litigant to the other on the basis of "rights" and "duties."

Since Professor Radin is not quite prepared to accept the unfettered

¹ RADIN, *LAW AS LOGIC AND EXPERIENCE* 65 (1940). These wise and witty lectures are a discourse on Holmes's apothegm "The life of the law has not been logic; it has been experience."

personal administration of his carefree Oriental potentate, he is aware that his suggestion is not without its difficulties. We can grant the psychological superiority of preferring the future to the past though this is in some measure a matter of taste. The ordinary man is not as prone as is Professor Radin to regard history as an illusion. A judgment in terms of what is thought to have happened may be more of a solvent of anger and frustration, than the bland, evasive imperative: "forget the past and be friends." Furthermore the distinction between past and present is only a convenient logical abstraction. We may, in one mood, see a deep gulf between them but we just as often sense the past as present; if we admit with Professor Radin that it is irrecoverable, we can with almost as much truth insist that to lose it is impossible. But these psychological fancies apart, there remains the basic difficulty of formulating rules as to what will work in the future. Some rule, some theory there must be if administration is not to be carried about in a bureaucrat's vest pocket. If search for the past is futile, speculation as to future felicity is a gamble. Professor Radin is too honest and too much the master of his whole subject not to see all this. At the end of his chapter he touches our concern rather lightly. "If," says he, a judgment "is reviewed, a reason must be found for it. . . . the process of judgment turned into discourse will . . . take us further away, at each accumulation of summarized rules, from the reality we thought to have firmly seized in our grasp. But it is something to know what is happening to us."² There we are then, as in all honest discussion, finally hoist, though with ever so deprecatory a smile, onto the horns of an old dilemma. A given predicament evokes in a sensitive judge a personal judgment, his prediction as to its best solution. Yet he is asked to compass it within an authoritative generalization. In Professor Radin's opinion, personal prediction has a "reality" somehow denied to generalized predictions, though one might dispute the validity of distinguishing between them in terms of "reality." It is evident, moreover, that his ideal of administration complicates considerably the technical and intellectual difficulty of rationalization. It is hardly fair to ask a judge, under instructions to "do the right thing" by everyone, to give "rules" and "reasons." But Professor Radin would reply that we must not buy rationalization at too great a cost. Let us bind up the wounds and apply the salve and then give the best reasons we can for what we have done.³

To many, an administration of justice so personal to the judge would

² *Id.* at 97-98.

³ Some readers will note the strikingly opposed ethical position of the great Ihering who insisted that litigants had a duty to press their claims to the limit in order to establish the Right.

appear to be a dangerous departure from our legal tradition, grounded we hope in common law and statute. But the theory does point up the inevitable elements of personal judgment in any legal system, particularly in one relying more and more on the broad delegations of modern legislation. The statute points to the situations to be judged (jurisdiction) and gives a few compelling indications of policy, negative and affirmative. The administrator-judge must evaluate not only the facts, but the law as well in the sense of making a choice among the varying logical possibilities. If we demand that he expose his "theory" of the mandate to the test of validity, the test of adequate logical connection with the legislative mandate, we must at the same time recognize that the nature of the delegation governs the degree to which the connection can be articulated. A narrow and explicit mandate to deal with closely defined situations permits, and demands, explicit findings whereas a broad delegation to solve problems in a loosely defined field does not. And in voicing a demand for rationalization by administrative agencies, we must recognize that their jurisdictions cover a spectrum of problems ranging from the narrow to the broad, from the judicial to the legislative, if you will. Three recent cases seem to me to bear upon this thesis and are so interesting in themselves as to warrant study.

Professor Radin's tale of the Ameer prompts me to match it with an occidental parallel, less quaint but surprisingly pat. It concerns the reorganization of that graveyard of New England's faith and hope: the New York, New Haven and Hartford Railroad, debtor. On October 23, 1935, the railroad went into bankruptcy reorganization. The New Haven had been running the Old Colony lines on a 99 year lease. The trustee disaffirmed the lease. Old Colony then was operated by New Haven "involuntarily" in the public interest "for the account of" Old Colony. The Interstate Commerce Commission proposed a plan for reorganizing Old Colony "in connection with" its plan for New Haven. Operating upon the statutory theory of a sale of Old Colony to New Haven, the Commission as required by the statute fixed a "price" whereby as "fair and equitable" treatment, bondholders of Old Colony were to receive securities of a face value of \$16,000,000 plus. The district judge finding this excessive remanded it to the Commission. But at the same time referring to the difficulty of the process of litigation in a controversy so complex, he said: "the best prospect of prompt progress appears to be by reasonable compromise." (Oh, wise Ameer!) Accordingly he himself appointed a "compromise" committee of representatives of New Haven and Old Colony. The committee agreed in a joint report on \$7,500,000 whereupon the Commission found this a "fair and equitable"

price. In the words of the Commission it "afforded the best prospect of prompt progress." *Sed quare* since one year later the Circuit Court of Appeals (per Swan, Augustus Hand and Frank) set it aside.⁴ The statute requires ". . . an independent determination by the Commission. . . . One of the purposes of Section 77 was to do away with an evil prevalent in reorganization through equity receivership proceedings, namely, the customary practice of submitting to the court a plan already consented to by a large proportion of the old security holders and then exerting pressure on the court to approve it against objections of minorities, because failure to do so would mean the upsetting of a *fait accompli* and the undoing of an immense amount of effort and negotiation." How clearly shines forth the virtuous light of the statute! But what is that grim lurking behind page 50; is it the amiable grimace of the Ameer Radin?

"It is possible, of course that the Commission may still adhere to figures which are the same as the Joint Report. Such correspondence would not itself invalidate the Commission's conclusions if it 'shall state fully the reasons for its conclusions' as required by Section 77, subd. d, and such reasons are not the pressure exerted by the compromise."⁵

I think that my readers will not be surprised to learn that the Commission in the exercise of its independent judgment did arrive at precisely the same figure and that (two more years having now gone by) the Court of Appeals affirmed the Commission's ruling!⁶ Learned Hand was in the place of Augustus; Swan and Frank were again sitting. It was Hand and Swan who at last were willing to say, "it is enough," but Frank gagged at the Ameer's dish. To one who knows these judges and their background, are not these varied reactions full of interest and suggestion? Learned Hand, the consummate, subtle, knowing master of the judicial arts, the somewhat resigned but still ardent lover of the law as the way of life; Jerome Frank the erstwhile radical exponent of "realism," who it might be thought would have insisted on the "actualities" of the given situation and have opposed legal abstraction in favor of a "practical" settlement. Might we not have expected that Frank would welcome the Ameer's way and that Learned Hand would have none of it?

Dean Pound has attacked the "realists" particularly in respect to their supposed attitude on administrative law. They teach, he says, that the individual administrative act is a law unto itself; their idea of law is whatever the official chooses to do. And yet here is a judge some-

⁴ *In re* New York, N. H. & H. R.R., 147 F. 2d 40 (C. C. A. 2d 1945).

⁵ *Id.* at 50.

⁶ *Old Colony Bondholders v. New York, N. H. & H. R.R.*, 161 F. 2d 413 (C. C. A. 2d 1947).

times thought one of their leaders, who appears in this instance to be more Roman than the Romans. The wonder arises whether one who has summoned up the nerve and force to revolt can in his later life completely avoid the emotional inclination, once he has been admitted to power, to embrace the standards he previously was thought to have attacked. We may, however, conclude that given the particular brand of Judge Frank's "realism" his present position is not contradictory.

Judge Frank addresses himself to the problem with his usual thoroughness and resourcefulness. By reference to the "laws of probability" he demonstrates that it is unlikely that the similarity of the Commission's findings to the compromise report is a coincidence. The demonstration is not, I think, necessary since surely it must have been obvious that the Commission deliberately adopted the compromise. The question was what the judiciary could or should do in the face of the Commission's obstinate adherence to its course. Frank argues that the previous opinion made clear what was to be done. There was a failure to perform the very minimum duty of finding "the fact" and of exercising judgment. This, surely, is the standard lawyer-like approach; yet it took judicial courage to follow that path. Judge Frank has deep respect for the authority and competence both of the administrative tribunal and of the judges of his circuit. The litigation had lasted 13 years and it would have been easy to abide in the sanctuary of so much respectable authority. He is thoroughly aware of how paradoxical his situation may seem to some. He cites the work of those who have questioned the objective value of administrative rationalizations; or who have sought to relieve the agencies from the "inconvenient" burden of making findings. It might be thought that he was at one time sympathetic to these views. He grants that "because of the 'intuitive' factor, sometimes a complete articulation of the reasons for a decision—breaking it up into 'legal rules' and 'facts'—is all but impossible, since at times the 'rules' and the facts interact." But ". . . while allowing for the difficulties, government officers, judges or members of administrative agencies, when acting judicially, have an obligation to be as articulate as is practically possible. For no aspect of a democratic government should be mysterious. . . . To condone the Commission's conduct here is to give aid and comfort to the enemies of the administrative process, by sanctioning administrative irresponsibility; the friends of that process should be the first to denounce its abuses."⁷

This is a heavy charge. Here is Hand's defense.⁸ ". . . I conceive

⁷ *Id.* at 449-51.

⁸ Hand wrote a concurring opinion; Swan the majority opinion. I quote Hand because his opinion is more directly in response to Frank's dissent and because as appears below Hand and Frank have clashed before on related cases.

that we have no reason for further prolonging a litigation which, as everybody agrees, has already far exceeded expectation, and which makes sadly ironical the hope that a reorganization under § 77 will necessarily be speedier than such reorganizations used to be."

Does it seem then as if the "law" had finally been routed by fatigue, by the desire for peace? Hand will not have it quite so bald as that: "Nor can I think because the Commission in the Sixth Report has come out . . . at exactly the same figure as it did in the Fifth, that we should be justified in imputing to it any evasion of its duty. Indeed, in our last decision we particularly declared that all we wished to be assured of was that the *compromise had not been accepted* without independent valuation. . . ." ⁹ (Italics added). For a moment, one is not aware how subtly the judge has shifted the issue from an independent valuation of the *property* to an independent valuation of whether the *compromise* should be accepted.¹⁰ An independent valuation of the latter there probably was; of the former, there clearly was not.

In an earlier case, *Andrews v. Commissioner of Internal Revenue*,¹¹ Frank and Hand fell out over a comparable issue. The Tax Court for income tax purposes set a market value on a stock dividend. The stock had a market only for a short time during which it was rigged. It might have been sold then, though its very sale might have broken the market. On the basis of this artificially-high market, the Tax Court set the value of the stock. Value, admits Frank, in his honest way of not too much simplifying an issue, is necessarily a guess but the guess here was too high: there was no substantial evidence for the guess. Augustus Hand joined with him in returning the matter to the Tax Court. Dissenting, Learned Hand said:

"The Tax Court has made its guess, and it is the only tribunal vested with authority to do so. We are now saying that there was no substantial evidence to support that guess, in which we are quite right; but we are sending the case back to make another guess, which in the nature of things we must know will have as little to rest upon as the first. That seems to me quite beyond our function; the fact that we should have ourselves fixed a lower price—I should also have done so—does not give us authority to compel the Tax Court to do so. The case lies within that penumbra between light and darkness where the first tribunal should be final."¹²

⁹ *Id.* at 431.

¹⁰ The statute in fact calls for a determination that the *plan* is "fair and equitable." But in the earlier decision, the Court had said (per Swan): "The heart of such a determination is a finding of fact by the Commission as to the value of the debtor's property" 147 F. 2d at 49.

¹¹ 135 F. 2d 314 (C. C. A. 2d 1943).

¹² *Id.* at 319. *Cf.* Learned Hand's interesting discussion in *Sheldon v. Metro-Goldwyn*

These judges are surely not far apart in their views of our problem. It is their occasional difference that gives it sharper definition. They would both agree to the crude generality that the administrator (judge) is obliged to follow an admissible theory of law and to provide an adequate certificate that he has followed such a theory. Both are aware of the intellectual, the logical obstacles to complete articulation; both are aware that facts are in some measure produced rather than merely found. But Frank is I think more sanguine than either Hand or Radin as to the possibilities of reconstructing the past. Historical facts have a greater "reality" for him. It is in that especial sense that he is a realist. Finding "the facts" is for him the heart process of the law; in that enterprise is the place where justice is found. He is prepared to take very great pains to "find" them, and to improve the methods of finding them. In his view, most recently expressed in *In re Fried*,¹³ the greatest responsibility of the judiciary is in clearing and strengthening the approaches to "the truth," by which he means "the facts." Learned Hand, in his opinions in the *Old Colony* and *Andrews* cases, is more quick than Frank to point out the limitations of the "fact finding" process, and to accept wholeheartedly the consequences of those limitations.¹⁴ Where facts cannot beyond a certain point be found, the judges, since they are not themselves the fact finders will not insist on a further performance which may have nothing more to recommend it than a more formal appearance of legality. Value, for example, is a fact only in the sense that it is a measure of the claimant's share in a property. A compromise, Hand seems to say, is as valid a method of determining the share as is any other. The Commission, to be sure, might make its own guess, but Hand refuses to believe that the Commission's duty to exercise independent judgment must take that form rather than the acceptance of a negotiation which it regards as fair.¹⁵

Pictures Corp., 106 F. 2d 45, 50 (C. C. A. 2d 1939). In this case it was found that the motion picture company had plagiarized plaintiff's play. Plaintiff demanded an accounting of profits. Defendant attributed all profits to its choice of actors, direction, etc. Experts made estimates of plaintiff's contribution running from 0% to 12%. In awarding 20% Hand said, "Men often make quantitative judgments and act upon them in matters which logically admit of them as little as this one. If one says that he likes one kind of music twice as much as another, we do not charge him with talking nonsense. . . . A court is justified in basing its decrees upon practices common in other human affairs. . . ."

¹³ 161 F. 2d 453 (C. C. A. 2d 1947). In this case the majority of the court (Learned Hand and Frank; Augustus Hand dissented in part) held that a motion might be made even before indictment to suppress a confession alleged to have been secured in violation of constitutional right. Jerome Frank based his decision on the primary importance of insuring fair fact finding. Learned Hand's decision was on narrower grounds.

¹⁴ Yet Learned Hand, too, in *California Apparel Creators v. Wieder of California*, 162 F. 2d 893, 903 (C. C. A. 2d 1947), protesting the growing use of summary judgment, insists that "thorough, though dilatory, examination of the facts" is more crucial to justice than "a studious examination of the law; for a mistake of law can always be reviewed."

¹⁵ The *Old Colony* decision, as a matter of fact, rests on a line of recent Supreme Court decisions such as *Ecker v. Western Pacific R.R.*, 318 U. S. 448 (1943), holding

The second of our cases is the vast litigation known by the colorless title of *New York v. United States*.¹⁶ It deals with an interim order¹⁷ of the Interstate Commerce Commission (again!) decreasing class rates 10% in the South and increasing them 10% in the North.¹⁸ Attempts by the South to secure from the Commission a general territorial decrease in the so-called class-rates had failed, usually on the ground that greater railroad costs in the South justified higher rates—the factor assumed to be determinative being the lesser density of traffic. Spurred on by the rising clamor in the South, the Commission in 1939 once more undertook to investigate the relation of the Southern to the Eastern (official) and Western class rates. In 1940 Congress gave impetus to the South's demands by the Ramspeck Resolution,¹⁹ a pointed directive to the Commission to investigate class rates. At the same time Congress amended the general act.²⁰ The act as it had stood forbade unreasonable discrimination against "localities," the 1940 amendment added "region, district, territory." If there had been any question that the word "locality" included the more spacious territory, the doubt was eliminated.

The Commission set about its task by undertaking a direct comparison between *all* of the Southern class rates as a *composite group* and all of the Northern rates. The difference in level ran from 30% to 59%. Where the same commodity moved in both areas on the class rate such a comparison formed a *prima facie* measure of discrimination, but the basic difficulty in any such wholesale comparison is that classification of commodities differs in the territories. Where in the North an article moves on a class rate (a rate common to a wide variety of commodities), the same article may in the South move on a single commodity rate which may be the same or lower than the Northern class rate. But the Commission did not take these considerations into account, probably because they would have made it still more impossible to handle this Gargantuan equation.

Once the discrimination in the total lump of class rates was assumed as an effective, actual discrimination, the Commission set about to determine whether it was justified by a difference in costs. But the great cost studies were not studies of the costs of actual comparable shipments. In the words of Mr. Justice Douglas:

that ". . . valuations by the Commission need not be expressed in dollars nor broken down into items; they need be no more than appraisals in equivalent securities of the reorganized debtor."

¹⁶ 331 U. S. 284 (1947).

¹⁷ 262 I. C. C. 447 (1945); 264 I. C. C. 41 (1945).

¹⁸ The whole issue of interterritorial freight rates is splendidly treated in 12 LAW AND CONTEMP. PROB. 391-644 (1947).

¹⁹ 54 STAT. 902 (1940), 49 U. S. C. § 3 (1946), directing the Commission to investigate interterritorial and intraterritorial rates and to remove any unlawful discrimination found to exist between territories.

²⁰ 54 STAT. 902 (1940), 49 U. S. C. § 3(1) (1946).

"... the expenses of the carriers were first broken down and translated into territorial average unit costs of performing each of the kinds of services involved in moving a specific shipment or in furnishing a given amount of transportation service in each territory. The unit costs were then multiplied by the number of units of each of the services found to be employed in moving the specific shipment or furnishing the given amount of service in the territory. . . . The territorial cost comparisons showed, for example, the costs of hauling given weight loads in a certain type of car for given distances in each territory."²¹

Of these studies a dissenting Commissioner said:

"The report does not show, except in nebulous fashion, that the cost figures represent apportionment of totals, based on estimates; that they involve many assumptions and acts of judgment, and are not computations from direct, original cost figures for particular movements. . . ."²²

The implication is not necessarily that the studies and the comparisons were poorly done. One might surmise rather that the question which the Commission believed it must answer was so vast that it was not capable of answer by a more precise intellectual procedure. The Commission recognized that no true comparison could be made until there was a uniform classification. Upon its suggestion the railroads have now undertaken this task, but it is estimated that at least 10 years will be needed to complete it. There was a relentless pressure for immediate action, which the Supreme Court had intensified by accepting jurisdiction of Georgia's suit against the railroads,²³ a suit alleging a conspiracy to maintain rates in violation of the Sherman Act. Faced with all this, the Commission ordered that 20% of the supposed discrimination should be immediately squeezed out. But it ordered a reduction of only 10% in the Southern rates. There was a fear apparently that any greater reduction might render some of the rates non-compensatory. The other 10% was found by increasing Northern rates 10%, though it did not appear that any particular rate was non-compensatory or even unprofitable. We may conclude that an arbitrary (intellectually speaking) question can only beget an arbitrary solution. By way of apology the interim nature of the order was emphasized.

The majority of the Court was prepared to swallow this rather unpalatable pill. In part the Court deferred—justifiably—to the Commission's expert judgment, as in its acceptance of the cost studies. In part it broke up the objections, and gulped them down in small pieces with

²¹ 331 U. S. 284, 317 (1946).

²² 331 U. S. 284, 354 (1946).

²³ *Georgia v. Pennsylvania R.R.*, 324 U. S. 439 (1945).

the appropriate ritualistic remarks, seeking thus to avoid their total logical impact. Mr. Justice Jackson found the decision "extraordinary" and Mr. Justice Frankfurter "Procrustean." Let us examine these charges more closely.

"In a case²⁴ involving issues much narrower than those now here, the Court, only the other day struck down an order of the Interstate Commerce Commission [again!!] for want of adequate findings. . . . Although in that case there were explicit findings the Court deemed them inadequate because they were based on 'unsifted averages.' In a series of cases the Court has set aside orders of the Interstate Commerce Commission because of the failure of the Commission to formulate with clarity and definiteness the transportation and economic circumstances which alone could justify the order, and thereby afford the Court assured basis for concluding that the Commission had duly exercised its allowable judgment on the factors underlying the ultimate issues. . . . Not one of these cases involved an order having a reach comparable to the reach of the order now before us. . . . I am not unmindful of the complicated nature of the problem which confronted the Commission and of the empiric character of the process of rate-making, of the limited scope for judicial review in this process, of the respect to be accorded the Commission's conclusions. . . ." ²⁵

Mr. Justice Frankfurter then points to the absence of any findings that the Northern rates are unreasonable. "Administrative experts no doubt have antennae not possessed by courts charged with reviewing their action," and then referring to 10% increase, 10% decrease, "But courts charged as they are with the review of the action of the Commission, ought not to be asked to sustain such a mathematical coincidence as a matter of unilluminated faith in the conclusion of experts." ²⁶

²⁴ The case referred to is *ICC v. Mechling*, 330 U.S. 567 (1947). The majority reversed an order of the Commission in part on the ground of inadequate findings. Mr. Justices Frankfurter and Jackson dissented; they believed that the findings were adequate! The order permitted railroads to charge for trans-shipment east of Chicago 3¢ per pound per hundred more for grain reaching Chicago ex barge than for grain reaching it ex rail or ex lake. A large part of the majority's ruling rests on a difference between it and the Commission as to the law. Barge rates to Chicago from the West were much less than rail rates. The Commission believed that it might protect the Western roads to some degree from the competitive disadvantage; the majority did not. Cf. Robert Young, *A National Transportation Policy*, 12 *LAW & CONTEMP. PROB.* 621, 635 (1947), complaining that the lower barge rates are due to free government provision of the canals rather than to a true competitive advantage. The findings question which divided the Court arose in this way. The Commission's sought to justify the 3¢ differential on the further ground that ex-barge grain needed more service at Chicago before trans-shipment. But the majority found that there was no documented finding of the difference in service cost. If there were service costs they should have been charged as such whether grain was ex rail, ex lake or ex barge. Frankfurter believed the decision rested on averages for which there was support in evidence.

²⁵ 331 U.S. 284, 351-52 (1946).

²⁶ 331 U.S. 284, 357 (1946).

Readers will, I think be struck by the fact that three judges (Frankfurter, Jackson and Frank), so prominently identified with the championship of administrative bodies both in and out of court,²⁷ have within the same six months period protested the inadequacy of the fact finding process of the oldest and most respected of Commissions. They are among those who have made the largest claims for the integrity and the autonomy of the administrative process. It is as if, appalled by the excessive hospitality given to their ideas, they feel a special responsibility for maintaining the older tradition. Frankfurter and Jackson believe furthermore that, for a number of the judges, deference to the administrative process is a matter of expediency. It has seemed to them that particularly in reviewing the Interstate Commerce Commission, these judges incline to hold the findings adequate when they approve of the Commission's policy and inadequate when they do not. Perhaps in some measure, Frankfurter and Jackson have tended to react to what they believe to be disingenuous decision by taking the contrary view of the sufficiency of the findings. In the *Mechling*²⁸ case, where Black disapproved an order protecting the railroads from barge competition, they believed the findings adequate; in the North-South differential where the majority yielded approvingly to the Southern claim of illegally high rates, they believed the findings inadequate. In any case their criticism is on every score entitled to the highest consideration. And yet there is something to be said for the majority in this case as there was in *Old Colony*, where Learned Hand was much more forthright in his defense than Douglas in the later case.

Mr. Justice Frankfurter states as self-evident that if in narrow matters exactness is demanded, how much more so where the whole fate of the country is to be affected. I suggest that it was this very breadth which made the normally valid criterion less relevant in the inter-territorial rate case. Consider again the political background of the Commission's action. Linguistically Congress in the Ramspeck Resolution added almost nothing new to the text. Congress, Commission and Court were confronted with an insistent demand from the South for more favorable treatment, perhaps, if you will something akin to the tariff advantage regarded sometimes as a special gift to the North—in any case a demand for the benefit of the doubt. Railroad rates express not only technical cost factors but also the conditions under which the entire national economy is carried on: job and entrepreneur opportunity, consumer

²⁷ Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 372-76 (1949); Jackson, *The Administrative Process*, 5 J. SOC. PHIL. 143, 146-49 (1940); FRANK, *IF MEN WERE ANGELS*, c. 9, c. 11 (1942).

²⁸ See note 24 *supra*.

choice, national defense. These in turn are closely related to national unity. "These," as I have recently said elsewhere, "are legitimate objects of legislative concern; they can only be carried into a rational rate system by an administrative body; and yet it is not possible to devise a terminology which indicates the precise weight to be given to factors which the legislature may legitimately decide should be stressed. . . . The problem even at the administrative level is a 'political one,' a problem involving the large scale, national adjustment of competing forces by a judgment the criteria of which can be only partially formulated by 'law.'"²⁹ Does not this have a relevance to the findings problem? The distinction between the work of the legislature and the work of the administrator is one of degree. The Commission had been forced to undertake a task of large-scale legislation. To demand findings such as we should insist upon to uphold or reject a specific discrimination is to overlook this distinction. Indeed, it may be next to impossible to produce that order of findings in such a case.

And finally, the *Chenery* case.³⁰ In this well-known litigation, the Securities and Exchange Commission refused to permit the officers of a public utility holding company to participate in the issue of the securities of a reorganized company on the basis of shares which they had bought during the reorganization. The Commission ordered them to sell their shares to the new company at the price paid plus interest. It concluded that a plan which permitted the officers' participation would not in the words of the Statute be "fair and equitable" but would be "detrimental to the public interest or the interest of investors." In explaining its action the SEC relied heavily on Supreme Court decisions forbidding reorganization managers in equity from retaining advantages acquired by them because of their inside position. The Court reversed. Mr. Justice Frankfurter writing for the majority said that since the Commission had based its decision on the broad equitable principles derived from certain cases, the validity of its action turned on the correctness of its interpretation; and the decisions being those of the Supreme Court, the Court was free to question that interpretation. These cases, said the Court, did not absolutely preclude officers from buying the corporation's stock but only from profiting where there has been a lack of honest dealing or full disclosure. The Commission had sought later in the courts to rest the order on its administrative experience in reorganizations. But, answered Frankfurter, this was not the ground on which its decision was based: "Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a

²⁹ Jaffe, *An Essay on Delegation of Legislative Power*, 47 *Col. L. Rev.* 359, 368 (1947).

³⁰ *SEC v. Chenery Corp.*, 318 U. S. 80 (1943).

particular application, the problem for our consideration would be very different. . . . Before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards. . . .

" . . . For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review."³¹ Accordingly the case was remanded "for such further proceedings, not inconsistent with this opinion as may be appropriate." Mr. Justice Douglas did not take part. Justices Black, Reed and Murphy dissenting thought the Commission had announced a ground at once comprehensible and within its power.

The Commission thereupon "recast its rationale,"³² and reissued the same order. This time Murphy, Reed and Black joined by Rutledge, and by Burton (concurring in the result) upheld the order. Vinson and Douglas took no part. And most significantly it is again Jackson and Frankfurter who dissent. We shall proceed at once to this dissent for in the intensity of its attack both on the agency's order and on the intellectual process of the judges who sustained it, Jackson's opinion has no equal in recent years. Its full import can be immediately appreciated by the statement, ". . . in this decision the Court approves the Commission's assertion of power to govern the matter *without law*, . . . this administrative authoritarianism, this power to decide without law, is what the Court seems to approve in so many words. . . . This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by. . . ." (Italics in original).³³

From a source so august and responsible this is a fearfully grave indictment. It echoes what Dean Pound has so often claimed. It is deeply disturbing to those of us who live by the law; it might upset even those who are partial to the Ameer's way. It appears to charge a deliberate and express sanction of administrative action without law. Yet it is, I think, clear that such is not the *explicit* purport of Murphy's opinion. Jackson notes that in five different places Murphy stresses deference to administrative experience. So he does. But Murphy purports to appeal to the standard of the statute; and he relates the experience of the Commission to its development and application. On the basis of this experience the Commission discovered dangers in the management's conduct of the reorganization, which in its opinion made the approval of the plan "detrimental to the public interest."

³¹ *Id.* at 92, 94.

³² This is the phrase used by Murphy in the second opinion upholding the order, 332 U.S. 194, 196 (1947), and to which Mr. Justice Jackson makes biting reference in his dissent.

³³ 332 U.S. 194, 216-17 (1947).

mental to the public interest or the interest of investors." I should have thought that in such a context reliance upon "administrative experience" is a commonplace. Did not Frankfurter in the first *Chenery* opinion state, "Through its preoccupation with the special problem of utility reorganizations the Commission accumulates an experience and insight denied to others. Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different."³⁴

Ah, but did it promulgate a general rule? The question is twofold: Did it *promulgate* a rule? Was it a *general* rule?

It seems to be Jackson's thought that the remand required the promulgation of a regulation restricted to prospective effect. The Commission's refusal to do so, he says, brings the Court "squarely against the invalidity of retroactive law-making." But the remand is ambiguous. Quoting the *Phelps Dodge* case the opinion says, "All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." And further on: "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its power were those upon which its action can be sustained." In the face of these words can it be maintained that the remand required a regulation, unless indeed the Commission is powerless under the statute to act in any other way?

The statute provides that the Commission shall not approve a plan "detrimental to the public interest or the interest of investors." This would appear to authorize case by case action,³⁵ provided that action is based upon a reasonable theory, in Frankfurter's words "a general rule." The Commission on the remand did admit that a "rule" which so drastically impairs the pre-existing powers of management might be better announced by a regulation putting the affected parties on notice. The SEC's concession might have been more impressive if it had acted upon it. The Chenerys had not, after all, murdered their father: the very novelty of the decision emphasizes the marginal character of their misfeasance. The Commission acted as if the very foundations of the moral order were at stake and it had no choice under the statute but to shore them up. It was no doubt this stiff-necked insistence which irritated the dissenters.³⁶

³⁴ 318 U. S. 80, 92 (1943).

³⁵ The provision in question, 49 STAT. 820 (1935), 15 U. S. C. § 79 K(e) (1946), begins: "In accordance with such rules and regulations or *order* as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company may submit a plan. . . ." (Italics added).

³⁶ A recent note in 62 HARV. L. REV. 473 (1949) criticizes severely the Commission's

Murphy, too, concedes that an agency with rule making power has less reason than a court to rely on *ad hoc* adjudication. Yet an absolute requirement of acting by regulation would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.³⁷ An agency no more than a court can foresee all of these. Never before has it been held that an agency is disabled from applying a general legislative standard until its experience is sufficient to formulate a regulation. It is said by Jackson that the *ad hoc* method is retroactive, that it takes away valuable property. Have not courts of law and equity throughout the long history of the common law imposed ever widening conceptions of trusteeship?³⁸ Promoters advised by no rule that their profits were illegal have been compelled to give them up.³⁹ New or extended conceptions of tort and of nuisance; changes in views of policy leading to the invalidation of contracts previously held valid; new restrictions on the use of real property, all, when brought about by common law decision, destroy value or shift it from one person to another. We have been ever liable to the hazard that "the growth of the law" will defeat established expectations. Retroactivity, says Justice Murphy, ". . . must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."⁴⁰ The judges should confine themselves, we feel, to "molecular" movements. But how much is too much is a question of degree and roughly a question of judgment. However

methods in the *Chenery* case. It notes, *inter alia*, that the Commission was at all times aware of the stock purchases. It made no objection, required no steps (as it might) to protect sellers, and then finally, acting as it did, gave a windfall to the remaining stockholders in the new corporation.

³⁷ 332 U. S. 194, 202 (1947).

³⁸ So distinguished a student of corporation law as Professor E. Merrick Dodd believed that the existing judicial decisions would have justified a court by the usual methods of extension in outlawing these very transactions. He points out that the judicial authorities relied on by the Commission had been used by lower courts to deny compensation to members of reorganization committees who had purchased securities during the pendency of the proceedings. He concludes "It would seem, therefore, that the Supreme Court is requiring standards of law-making from Commissions which it would not require from a court." Note, 56 HARV. L. REV. 1002, 1004 (1943). In the famous case of *Mehring v. Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928), trusteeship was imposed upon the defendant under novel circumstances in a case where Cardozo assumes that he may have acted in good faith and without any realization that the law would require him to share his opportunities with the plaintiff. There was no direct authority for the result and three of the seven judges dissented.

³⁹ As in *Old Dominion Copper Mining and Smelting Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193 (1909). In the companion suit, *Old Dominion Copper Mining and Smelting Co. v. Lewisohn*, 210 U. S. 206 (1908), the Court denied recovery. Holmes writing for the Court regarded the plaintiff's demand as calling for a "strictly legislative determination." But the difference between the two courts was not in their conceptions of the judicial function. It was a difference of opinion as to the breadth of the principle on which related precedents rest and the desirability of extending it or restating it so as to include the present cases. Significantly in the later case of *McCandless v. Furland*, 296 U. S. 140 (1935), the majority led by Cardozo distinguished the *Old Dominion* case, the minority objecting to the imposition of trusteeship as in disregard of "settled principles."

⁴⁰ 332 U. S. 194, 203 (1947).

much we may deplore the Commission's movement as a crude leap better achieved, if at all, by regulation, it can be judicially condemned only if it has no reasonable relation to the statutory standard.

But has the Commission refused to announce a general rule, a comprehensible basis of judgment capable of being tested for its relationship to the statute? Court and Commission agreed that there was no fraud. The managers were compelled to relinquish their advantage for the very reason that they were managers of a voluntary reorganization. All the reasons given for the order are equally applicable to any other case of managers so situated. Is this not a general rule? The Commission did warn that in some cases the *terms of the order* might be different. "Without flexibility the rule might operate unfairly." If the security had been bought too dearly it might be inappropriate to compel the corporation to pay the manager the price. If the purchase was incidental, if it was "not made as part of a program in contemplation of reorganization benefits," the manager might keep his stock. This, argues Jackson, is equivalent to the Commission's assumption of an absolutely arbitrary power to condemn or not as it pleases. Yet what are these but qualifications by way either of fitting the remedy to the situation or of not applying the rule where the reason for it does not exist?

What then are the reasons and are they such as the statute entitles the Commission to consider? The reasons are not far to seek. The management controls and times the reorganization plan. It may, consciously or not, manipulate these controls in order to create favorable opportunities for market purposes. Its inside position gives it superior information as to which securities will be strategic in the plan and what the securities are worth. This knowledge and power it may exercise to the detriment of the other holders whom as managers it is obliged to represent. Jackson seems to state in passing that this line of argument is irrelevant. He implies that in determining whether the plan is "detrimental to the public interest or the interest of investors," the Commission can consider detriment only to those who, according to its terms will now or later participate in it. This is, of course, a possible interpretation but the dissent does not directly argue the comparative merits of this interpretation and the majority's, since the theme of the dissent is that the Commission and the majority have proceeded without reference to the statutory standard. But it is clear that the Commission *did* have a theory of its power under the statute. It reads the word "investors" as covering persons potentially interested in the plan, particularly those who had they not sold would have participated; and it decides that investors as a class will be prejudiced—and above all those who are already holders

—if the managers can trade in the securities during reorganization. If this interpretation is not the preferable one, it is at least reasonable, and at the best it would seem that the difference between majority and dissent is one of statutory interpretation. Indeed if it is not a reasonable interpretation, it would be no better embodied in a regulation.⁴¹ Yet Frankfurter, at least, in the first opinion indicated that a regulation to that effect would be upheld. "Abuse of corporate position influence," he said, "and access to information may raise questions so subtle that the law can deal with them effectively only by prohibitions not concerned with the fairness of the particular transaction."⁴² But, the opinion proceeded, the Commission must on its own responsibility announce such a conclusion. Is not that just what the Commission has done?

We may sense here on the dissenters' part an indignant suspicion that rationalization has been hypocritically superimposed upon the accomplished fact. Some of the judges themselves may be suspected of manipulating the requirement of findings to approve or disapprove of the underlying administrative policy. But can we blind ourselves to the fact that on the remand of an order for insufficient findings it is idle to expect an agency to approach its task in complete disregard of its previously announced resolution? Human stubbornness will stiffen its defenses. The agency will seek a formula to silence its critic. Mr. Justice Frankfurter, himself, in the 4th *Morgan* case wrote an opinion upholding an infinitely more extreme example of administrative self-justification. It will be remembered that the Court in the first two *Morgan* cases⁴³ invalidated on procedural grounds a stockyard rate order made by the Secretary of Agriculture in 1933. During the course of the litigation the difference between the 1933 rate and the earlier rate was impounded. In 1939 the Supreme Court⁴⁴ instructed the District Court to secure the assistance of the Secretary in determining a fair rate for the years 1933-37. The Secretary's original finding had been based on conditions in the years 1929-31. He reopened the record, listened to the evidence of conditions in the later years. He then entered precisely the same rate order based on the same findings as to costs and prospective yield, though he himself acknowledged that conditions in the years 1933-37 were quite dissimilar to the years 1929-31.⁴⁵

⁴¹ This statement should be qualified by the recognition that an action might be regarded as "arbitrary" because a Court would hold it to be of a harshness far in excess of what is needed to make the legislative policy effective. *Cf. Jacob Siegel Co. v. FTC*, 327 U. S. 608 (1946). The aforementioned note in the *Harvard Law Review* believed that the order should for those reasons have been set aside. 62 *HARV. L. REV.* 478, 487 (1949).

⁴² 318 U. S. 80, 92 (1943).

⁴³ 298 U. S. 468 (1936); 304 U. S. 1 (1937).

⁴⁴ 307 U. S. 183 (1939).

⁴⁵ He probably did in a sense "consider" the new evidence and came to the conclusion that he might safely disregard it. It is clear, I think, that the question he put was not

The question is ultimately a question of sincerity, and it is yet one more of the limitations of the process of rationalization that its sincerity cannot be tested in a court of law. By and large we count on the sincerity of our public servants and we hope that for the most part experience has confirmed our faith. In the same *Morgan* case, Mr. Justice Frankfurter comparing administrative officers with judges said “. . . both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”⁴⁶ Where an agency is asked to rationalize an already announced decision, in so far as we insist on complete open mindedness we put our demand for sincerity under a severe strain. In particular instances we may suspect that the announced rationalization does not state the true reason, that it covers a lack of reason, or that it is but part of the reason. Yet we must accept these limitations if not in the court of conscience or opinion, at least in the court of law. In many cases they arise not from dishonesty but from the inability of the mind completely to detect the springs of its own action. We can hope that the insistence on adequate evidence and on findings will promote administrative rectitude.

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It may have seemed that I have explored these remarkable cases in order to throw doubt on the judiciary's concern for the rationalization of administrative action. But that is not my purpose. I have discussed them because of their intrinsic interest and because they illustrate the immense intellectual obstacles which may attend the process of rationalization in complex administrative problems. More often than the Courts, the agencies are cast in the Ameer's role; arbitrament at times, is apt to be “Procrustean,” and in the law's sense, “extraordinary.” Legislative problems are of this nature and there should be no bar to the delegation, within limits, of certain of them to the agencies. If the legislature has simply pointed to the problem and to some of the relevant factors, we can ask little more of the Administrator than that he state a solution without apparent disregard of those factors. We cannot ask for the precision which we would demand as a ground of a judgment, in a matter call it judicial or legislative, where the legislative mandate has a compellingly restrictive logic. In determining the adequacy of findings, the courts will not be wrong if they make allowances for the nature of the

what should the order be? but, can the old order be sustained? It appears from the report below, 32 F. Supp. 546, 551 (W.D. Mo. 1940), that one of the Secretary's chief advisors said of one of the rates: “the Department may be subject to criticism for having acted in an arbitrary manner.” The Secretary, himself, had publicly criticized the Supreme Court for its *Morgan* decisions and intimated that the farmers were entitled to the impounded funds.

⁴⁶ 313 U.S. 409, 421 (1941).

task, nor should they be too unhappy or too concerned lest insincerity or concealed motivation set moral limits to the search for legality. It cannot be otherwise.

But granting these limitations, I would emphasize a growing judicial insistence upon the crucial role of findings. Some proponents of administration have deplored this trend; one of them some time ago said that it failed sufficiently to recognize the extent to which "administrative proof has become speculative and deductive in nature." The intellectual discipline of fact finding, he admits, is good for the administrator, but it consumes ". . . considerable time, particularly when the administrative agency knows . . . that its findings will not be viewed in a broad and understanding light, but will be dissected and scrutinized as occasions for litigation by captiously-minded adversaries."⁴⁷ One can only gather from this that administrative agencies unlike courts or other institutions, should not have their time taken up by persons who cannot be compelled to agree with them.

It is sometimes pointed out by way of argument against a requirement of findings that there are none in jury trials. However, a party can demand a special verdict. Furthermore, a jury is closely controlled by the trial judge. He may set aside a verdict as against the weight of the evidence. Even more to the point, he selects, and instructs the jury as to the controlling theory of the case. The verdict implies a finding in terms of the theory of the instruction. But in administration we begin typically with a statute embracing broad standards. The statute permits more than one theory of judgment since there is ordinarily more than one rational way of achieving a broadly conceived objective. Yet if there is any standard at all, any limitation upon power, some theories of action must be excluded. For example: What is a "reasonable" rate for a public service? Enough to yield 5% to 7% on the investment? Merely enough to yield an income sufficient to attract new capital? Just as much but no more than a competing product sells for? All of these are rational; but in the light of the history of the subject if the first two are permissible, certainly the third is not. In these cases the evidence of value and of likely yield from one or another rate is complex and of uncertain effect. A challenged determination could on the typical record in such cases have as well been deduced from one of the wrong theories as from one of the right theories.⁴⁸ Two minimum demands are made of the administrator: that he exercise judgment and that the judgment shall be guided by a correctly chosen theory—I shall not say determined

⁴⁷ Timberg, *Administrative Findings of Fact*, 27 WASH. U.L.Q. 169, 189, 195 (1942).

⁴⁸ See *Mississippi River Fuel Corp. v. FPC*, 163 F. 2d 433, 449-51 (1947), emphasizing the importance of findings in a rate case.

by it, because from our own experience we know that in most cases there is a gap (which must be bridged by intuition or will) between any theory and any judgment.

These propositions, it is hoped, demonstrate the crucial importance of findings. We assume, of course, that an exterior body is to inquire whether the administrator has done his duty, *i.e.*, judged according to law. If our analysis is correct, it is not possible to make this inquiry, at least with any approach to precision, unless the administrator explains the theory of his action. Nor without such explanation, is it possible for those who are regulated either to plan their action or to defend it. Without findings administration would approximate (to the outside world at least) to a discontinuous series of discrete instances. The finding is a characteristic solution of the conflict between the intuitive and the logical approach to justice, between our need for personal judgment and our fear of unguided and unhampered power. The Courts, then, should recognize that there is an important place in administration for the Ameer's philosophy of justice but they should also insist that during the Ameer's sojourn in America, he be compelled to retain Professor Radin as his lawyer, so that at least, in his words, we "know what is happening to us."