



5-1-1949

Federal Administrative Management and the Administrative Procedure Act

Frederick F. Blachly

Miriam E. Oatman

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Frederick F. Blachly & Miriam E. Oatman, *Federal Administrative Management and the Administrative Procedure Act*, 24 Notre Dame L. Rev. 275 (1949).

Available at: <http://scholarship.law.nd.edu/ndlr/vol24/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XXIV

SPRING, 1949

No. 3

FEDERAL ADMINISTRATIVE MANAGEMENT AND THE ADMINISTRATIVE PROCEDURE ACT

ADMINISTRATIVE economic management, within the meaning of the present study, is the process of guiding and controlling various activities of private business by certain government agencies. The determinations made by the agencies as a part of this process are similar in nature to the policy decisions made by business managers or by the boards and officers of corporations.

It is the purpose of this paper to show that the federal agencies engaged in administrative economic management, as well as the courts, will be impeded in their work by the Administrative Procedure Act.¹

The Act uses general or specific terms which place most of the managerial determinations within the category of formal rules² or licenses;³ it requires a judicialized procedure for

¹ 60 STAT. 237, 5 U.S.C. § 1001 *et seq.* (1946).

² The determinations in respect to economic management are generally placed under the definition of rules by the fact that they are nearly always of "particular applicability and of future effect." They are specifically placed under rules by the fact that rules "include the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing." (§ 2(c)).

³ Several managerial functions come under the definition of licensing, such as granting certificates of public interest, convenience and necessity, certain approvals, registrations, etc. The Act provides that the word license shall include "the whole or any part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." The

the formulation, amendment, or repeal of a formal rule⁴ and for much of the activity connected with licensing;⁵ and it subjects licensing and rule making, as defined by it, to judicial review of a very broad scope.⁶ In so doing the Act reverses the long time trend of both law and jurisprudence toward the maintenance of an effective separation of powers between administration and adjudication by two principal methods: leaving the administrative agencies, especially those which make policy, free to use a non-judicialized procedure; and limiting the scope of judicial review as far as possible while still protecting legal rights. This constitutionally and economically proper trend was reversed by the Administrative Procedure Act, which is quite out of step with the realities of the present day regulatory process and with the relationships which have developed and should continue between the courts and the economic managerial authorities.

term licensing "includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." (§ 2(e)).

⁴ A judicialized procedure in respect to rules governing economic management is provided for by § 4(b), which says: "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of §§ 7 and 8 [which have to do with hearings and decisions] shall apply in place of the provisions of this subsection." Since the statutes providing for economic control usually so provide, this provision of the Act is widely effective. It is true that the doctrine of the Act in respect to the separation of functions, and certain provisions as to the making of decisions, may in certain cases not be applied. In general the proceedings for formal rules, i.e., those concerned with economic determinations, are the same as for adjudication.

⁵ A judicialized procedure in respect to licensing results from the fact that the word "order" includes licensing, and "'Adjudication' means agency process for the formulation of an order" (§ 2(d)). It is true that the separation of function "shall not apply to determining applications for initial licenses . . ." (§ 5(c)). All the other provisions of §§ 5, 7 and 8, however, are applicable to licensing proceedings.

⁶ That the determinations in respect to administrative management are subject to the judicial review provisions of the Act, with their broad scope, is evident from §§ 5, 10(a) and 10(c) of the Act. Section 5 states that such review is to be applied in "every case of adjudication required by statute to be determined on the record after opportunity for agency hearing", which of course includes formal rule making. Section 10(a) provides for judicial review when a person has suffered "legal wrong because of any agency action, or [is] adversely affected or aggrieved by such action within the meaning of any relevant statute. . . ." Section 10(c) contains the sweeping statement: "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

How the Act injuriously affects the function of economic management can best be understood by making an analysis of that function, followed by a rather detailed examination of the Act in relation thereto.

I. An Analysis of the Economic Management Function

The chief factors of federal administrative management are almost identical with those of private management. They include: (a) determining whether or not a business shall be established, expanded, decreased, or discontinued; (b) determining where a business shall be located; (c) providing for the financing of the business by the issue and sale of securities; (d) making determinations as to personnel; (e) making decisions as to accounting and reporting methods; (f) determining upon depreciation and reserves; (g) making decisions as to kinds of service, extent of service, or discontinuance of service; (h) making agreements with others as to joint service or use of facilities; and (i) establishing wages, rates, classifications, or prices.

Several of the independent boards and commissions, as well as various other agencies, in dealing with some or nearly all of these problems, are making determinations regarding them which have a profound effect upon the overhead management of private business. This is particularly true of the Interstate Commerce Commission, the Comptroller of the Currency, the Federal Reserve Board, the Federal Communications Commission, the Civil Aeronautics Authority, the Commodity Exchange Commission, the Securities and Exchange Commission, the Department of Agriculture, and the Wage and Hour Contract Division. These agencies, beside their other functions, are charged with making economic adjustments in a complex society. The chief reasons for investing them with such power are: (a) the attempt to prevent monopoly, cut throat competition, unnecessary duplication of facilities, discrimination, unfair practices and classifications, fraud, gambling in commodities and stocks, and

other economic ills; and (b) the hope of securing efficient and cheap service and economic stability without impairing the legal rights of those affected.

The agencies which are performing these functions are not merely police agencies established to enforce the exact provisions of detailed laws, but are powerful managerial organizations charged with adjusting economic and social relationships in the general interest. They are not, in carrying out these functions, judicial agencies which merely pass upon cases that are brought before them. They are, rather, agencies of the legislature itself, operating in important economic fields to manage the affairs which Congress has committed to them. They are not creators of policy except in a minor and subordinate sense; for the basic policies which they carry out have been laid down by Congress. They are, however, operating within the field of policy.

In connection with their work of economic management, these agencies must make determinations which necessarily involve a high degree of judgment and discretion. This discretion is in part bestowed by Congress; in part it is a necessary element of administrative activity—that is, it is inherent in the subject matter handled. The agencies use it for the purpose of carrying out law. In so doing they are administering. In short, when agencies are engaged in economic management, even though their procedures may be partly modeled after the judicial pattern, their activity is administrative rather than judicial.

In connection with the function of making administrative determinations, a wide variety of special powers and techniques are provided, including many that are not and could not be given to the courts under our constitutional system.⁷ Among them are: (a) the power to initiate action to protect the public interest; (b) the right to make independent in-

⁷ For examples of such powers see Blachly and Oatman, *Actual Legitimate Original Cost as a Basis for Utility Regulation—the Experience of the Federal Power Commission*, 36 GEO. L. J. 487, 497-498 (1948).

vestigations both to assist Congress and to enforce the law; (c) the right to make studies; (d) the right or duty of reporting to Congress and making suggestions as to legislation; (e) the power to formulate rules of procedure and practice; (f) the right to establish and enforce accounting and reporting systems and require reports; (g) the authority to have access to accounts and reports; (h) the power to hold hearings, subpoena witnesses and documents, administer oaths, take depositions and take other similar actions necessary to carry out their functions. It must be noted that all of these special powers and techniques are essential for making managerial determinations in the public interest while protecting private rights. These agencies are generally given by Congress large expert staffs to assist them in carrying out their functions.

Many of the powers and techniques are used in wholly administrative actions, that is, actions where there are no determinations affecting the rights of individuals, such as the making of examinations and investigations by field agents; the requiring, collecting and filing of a multitude of records and accounts; the receiving and answering of communications from those who may be interested; and so on. The agencies are further engaged in the process of making adjustments which are wholly administrative in nature, especially when attempting to settle difficulties without the necessity for a formal proceeding.

Such powers and techniques, and the administrative functions connected therewith, are not given to the boards and commissions so that they may make purely judicial decisions between two opposing parties. These agencies are not courts; their function is to protect the public interest. Nor are these functions given to such agencies so that they may legislate, but so that they may administer the policies laid down by Congress. In other words, such authorities, in so far as they are engaged in the functions of administrative management, are agents of the legislature engaged in administering and

in making determinations for the primary purpose of protecting the general public interest. The special powers bestowed upon them, the techniques which they use, and the administrative activities which they carry on are all a part of one process, administrative management, which cannot be broken up into separate and distinct parts. It is impossible to say where one feature of the process ends and another begins.

It is true that in protecting the public interest the agencies must act in a fair and impartial manner, and must not invade the legal relationships that obtain when a privately owned and managed economic activity is regulated in the public interest. Their determinations must not be arbitrary, capricious, or made without due consideration of all the complex factors involved in the problem of management; for in such case both private rights and the interests of the public would suffer.

The fact that the agencies make their determinations by a procedure which has some of the aspects of judicial procedure does not affect their fundamental activities. Their formal determinations are not judicial but administrative in nature. The fact that such determinations are made after a somewhat judicialized procedure may justify calling this part of their activity administrative adjudication (with particular emphasis upon the administrative aspect), but it is certainly not simple adjudication, as it is classified by the Administrative Procedure Act.⁸

Some examples will be given of the fact that an administrative agency performing managerial functions makes determinations which are largely administrative and discretionary in nature. (a) When deciding whether to grant a certificate for the establishment of a new motor common carrier service, the Interstate Commerce Commission must take into consideration some of the following matters, and perhaps

⁸ §§ 5, 7, 8.

many others: Is the territory already adequately served by other carriers? Will the establishment of the new route make it impossible for all routes to give adequate service? Is a new carrier needed in order to provide for some important special type of service which cannot be furnished by the present carrier? ⁹ Is the applying carrier financially able to give adequate service? (b) In respect to the issuance of certificates of public interest convenience and necessity for natural gas pipe lines by the Federal Power Commission, the significant social and economic considerations may include any or all of the following: Whether there are gas reserves available to the applicant, sufficient to meet the demands to be placed upon them; whether the applicant has been able to make valid contracts for gas supply; whether the terms of the contracts are sufficient to guarantee an adequate and long range gas supply; whether the applicant is financially able to develop satisfactory pipe lines; whether the pipe line is of sufficient size to deliver the gas at the most reasonable price; whether the applicant has an adequate market for his gas; whether other demands on the gas supply region are such as to make uncertain the supply of gas to the applicant; whether the wider extension of natural gas will cause great injury to our fuel economy; whether or not construction materials are available; whether the end purpose for which the gas is to be used will have a deleterious effect upon our fuel economy; what will be the effect upon the coal mining, railroad, tug and barge operators, and upon the workers engaged in these industries, of the wide extension of natural gas pipe lines?

The foregoing are not theoretical questions, but are such as are discussed every day before the Interstate Commerce Commission and the Federal Power Commission.¹⁰

⁹ For example, the carrying of fresh vegetables by motor truck, direct from fields in a part of New Jersey where there is no rail transportation which can deliver the product while still fresh to New York City.

¹⁰ See for example, the Brief of Interveners, In the Matter of Trans-Continental Gas Pipe Line Co., Inc., before the Federal Power Commission of the United States, March 15, 1948.

They are not only problems of business management, but of social management as well. Such questions cannot be solved in any absolute manner. They inherently involve a large amount of discretion. The evidence is merely a basis for the fact finding on which the decision rests, and in general the weight to be given it is a matter for the agency's discretion.

In respect to the fixing of rates, Congress has given various commissions a large amount of implied discretion by statute. Thus, the law regarding the national transportation policy (inaugurated in 1920 and strengthened by the act of 1940) provides:¹¹

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

This policy places the Interstate Commerce Commission in a general managerial position. It may use its appropriate powers, including the rate mechanism, to make the multitude of economic and social adjustments necessary to carry out the broad purposes of the Act. The Commission is continually engaged in the process of approving or making specific adjustments, in respect to rates, joint rates, services, etc., between different types of carriers, between types of

¹¹ 54 STAT. 899 (1940), 49 U.S.C. § 1 (1946).

products carried, and between localities; in order to prevent destructive competition, to prevent prohibitive and restrictive rates, to enable low priced goods to flow in commerce, to preserve the inherent advantages of certain types of transportation, and to provide for the distribution of traffic in such a way as to insure that all transportation facilities can function.

The hearings in such matters can in no sense be regarded as judicial proceedings. The facts adduced and the facts found are not such data as whether or not a specific event which has some relationship to a claimed right took place upon a given day, but contribute information bearing upon complicated relationships. "The process of rate making," said the Supreme Court, in *Board of Trade v. United States*,¹²

is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to¹³ the dynamic character of transportation problems. . . . Any solution (of rate-break combinations for grain) had to rest upon informed judgment. And judgment in a situation like this implies, ultimately, prophesy based on the facts in the record as illumined by the seasoned wisdom of the expert body.¹⁴ . . . Neither rule of thumb nor formula nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure . . .¹⁵

The authority of the Interstate Commerce Commission to make minimum rates for the utilities under its jurisdiction may well be one of the chief methods of implementing the policy of "preserving a national transportation system by water, highway, and rail, as well as by other means." If

¹² 314 U.S. 534, 546, 62 S.Ct. 366, 86 L.Ed. 432 (1942).

¹³ *Ibid.*

¹⁴ *Id.* at 547.

¹⁵ *Id.* at 548.

all modes of transportation are to be maintained by the price mechanism, it must be possible for minimum rates to be established, in order to prevent destructive rate wars which might interfere with the operations of one or more means of transportation and might make it impossible for them to carry out their functions adequately.

The development of competition, which has destroyed the former nearly monopolistic situation of the railways, and the use of the methods given by Congress to the Interstate Commerce Commission to preserve all forms of transportation, have meant that the judicial economic formula of rate making, never adequate, is now obsolete. Instead of holding hearings of a quasi judicial nature, and using judicial methods of fixing rates which will produce a fair rate of return upon the value of the railway property, the Commission is exercising a managerial role. It does this by assenting to, adjusting, or requiring hundreds of thousands of individual rates, in such a way as to meet the criteria laid down in the National Transportation Policy. In respect to the general rate level it must take into consideration such things as the general price level, the wage level, the needs of national defense, and other large social and economic factors.

For the fixing of air mail rates, the Civil Aeronautics Act provides that the Civil Aeronautics Authority shall take into consideration, among other factors:¹⁶

The condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service . . . and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

¹⁶ 54 STAT. 1235 (1940), 49 U.S.C. § 486(b) (1946).

Here, again, the administrative authority is administering policies determined upon by Congress, yet which involve broad discretion. Acting under this provision, the Authority (Civil Aeronautics Board) has fixed mail rates for the carriers, sufficient in general to "enable them to do a little better than break even. The Authority merely follows the method of subtracting non-mail revenues from total approved expenses and fixing a rate which would a little more than make up the difference."¹⁷ Such procedure cannot by any stretch of the imagination be called judicial. Nor is it rule making.

Again, there is neither a judicial procedure nor a legislative action when the Federal Power Commission establishes rates for federal power project utilities, or interstate electric utilities, or natural gas pipe lines, upon the original cost basis.¹⁸ This basis, except for detailed adjustments, is not developed by means of a hearing, but almost automatically results from cost accounts which the Commission sets up and enforces.

The Maritime Commission furnishes another example of rate making which is purely administrative in nature. The Commission has custody of the tariffs filed with it under the Shipping and Intercoastal Acts,¹⁹ analyzes and classifies rate and tariff information, maintains a public file room where tariffs and related information are available, receives voluntary filings of port bills of lading, and receives all agreements entered into within the purview of Section 15 of the Shipping Act. Such agreements are scrutinized, and correspondence is had with proponents regarding the removal of ambiguities or provisions indicating discriminatory practices, by an

¹⁷ Ballard, *Federal Regulation of Aviation*, 60 HARV. L. REV. 1261-1262 (1947).

¹⁸ Blachly and Oatman, *Actual Legitimate Original Cost as a Basis for Utility Regulation—The Experience of the Federal Power Commission*, 36 GEO. L. J. 487 *et seq.* (1948).

¹⁹ Shipping Act of Sept. 7, 1916, 39 STAT. 728 (1916), 46 U.S.C. § 801. Intercoastal Shipping Act, 47 STAT. 1425 (1933), as amended, 49 STAT. 1987 (1936), 46 U.S.C. § 844 (1946).

Agreement Section ²⁰ which prepares them for the Director's signature and for action by the Commission. Conference agreements and compacts may be made in respect to rates, charges, shipping schedules, practices, classifications, transfer charges, joint rates, storage charges, etc. Such agreements and compacts are analyzed by the Agreement and the Rate and Tariff Sections, respectively, and if found unexceptionable, are approved by the Commission as a routine matter. If a protest regarding the agreement is received, a rather critical examination takes place, and the attempt is made to reach a solution satisfactory to all. If such a solution is not achieved, the section may recommend suspension of the agreement or compact. The Commission suspends or refuses to suspend without a formal hearing, although it usually has correspondence with the parties. If, however, a suspension is ordered, a hearing may be scheduled for the purpose of determining the propriety of the proposed rate.²¹

If the Commission, on its own motion, does not order a hearing, a protestant may compel it to do so by filing a formal complaint that the rates in question are improper. It is specifically provided by statute that the Commission may enter into a hearing concerning the lawfulness of a filed rate, without complaint, answer or other formal pleadings. Even when the Commission is determining upon the protest of a private individual, it is not acting in an adversary capacity; but is making an investigation of a legislative type. However, when rates, charges or practices have been held to be improper, the Commission may act judicially by issuing a cease and desist order or an award of reparations.²² After

²⁰ See Federal Register of Sept. 11, 1946, 177A-593.

²¹ The suspension of a tariff does not imply positive disapproval, but means only that the Commission considers further investigation necessary. Hence it appears that an order of suspension is not a final order under the Administrative Procedure Act, § 10(c).

²² See *In Matter of Rates, Charges and Practices of Carriers Engaged in the Trade from Japan to the United States*, U.S.M. No. 561, decided Nov. 15, 1940; *S. H. Kress and Co. v. Baltimore Mail Steamship Co.*, U.S.M. No. 559, decided Dec. 10, 1940; *John G. Neidinger Co. v. American-Hawaiian Steamship Co.*, U.S.M.C. No. 549, decided Jan. 14, 1940, 2 U.S.M.C.

the Commission makes a finding, it generally holds the record open for submission by the respondent of a new agreement or other action, consistent with the finding.²³ Altogether, it appears that the work of the Maritime Commission in respect to rates, services, and so on is largely of a rule-making, investigatory, approving and adjusting type, and is of a judicial nature only when the Commission issues a cease and desist order.

An examination of the managerial functions of these agencies of economic regulation shows: that they are too varied and are governed by too many different types of statutory provisions, to be thrown under any one formula, such as the rule-making and judicial control formula of the Administrative Procedure Act; that in many cases Congress, by laying down factors which they must take into consideration, has forced them to exercise a broad scope of discretion; and that in carrying out their managerial functions they seldom exercise a judicial function.

Recognition by the courts of the fact that making a determination involving administrative management is a discretionary act has been expressed in many decisions, including several recent ones. In the case of *Railroad Commission v. Rowen and Nichols*,²⁴ the Supreme Court said:²⁵

A controversy like this always calls for a fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted . . . whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment.

²³ Pacific Westbound Conference Agreement (Agreement No. 7790) U.S.M.C. No. 645.

²⁴ 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940), *opinion altered and rehearing denied*, 311 U.S. 614, 61 S.Ct. 66, 85 L.Ed. 390 (1940); 311 U.S. 570, 61 S.Ct. 343, 85 L.Ed. 358 (1941).

²⁵ 310 U.S. 573, 580-581, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940).

In the case of *Federal Power Commission v. Natural Gas Pipeline Co. of America*,²⁶ the Court said, in sustaining a rate order of the Federal Power Commission:²⁷

Agencies to whom this legislative power (rate-making) has been delegated are free, within the ambit of their statutory authority, to make pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

The foregoing passages, and many others which might be cited, show that the Supreme Court recognizes the activities in question as administrative in nature. Obviously, when agencies are making "pragmatic adjustments which may be called for by particular circumstances," they are neither legislating nor adjudicating, but are administering.

To summarize: In the field of economic management, the administrative agencies are acting as agents of Congress in making detailed applications of policies already laid down by Congress. They are not creating such policies themselves. Any policy which they formulate is incidental to the implementation of the law. The determinations which they make are almost identical with those which fall into the higher brackets of private management. Here the government is exercising a "super management" function in order to protect the public interest.

The purpose of giving an agency such a function is not primarily to enable it to settle disputes or to prosecute for wrongful action; but rather to provide it with the tools and the methods required for making the economic adjustments required in a highly complex, mechanized economy, and to balance the interests of a privately owned and operated busi-

²⁶ 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942).

²⁷ *Id.* at 586.

ness structure with the interests of the public. The agencies charged with this function are in no sense acting as police authorities, charged with the enforcement of specific statutory clauses which cover the situation. It is true that some of their activities may be quasi-legislative or quasi-judicial in nature; but their basic work is administration. All of their various activities operate as a unity in which each part exists for the sake of the whole.

Moreover, several new factors have entered into the picture which make the process as a whole clearly administrative rather than either legislative or judicial. The adoption by Congress of a national transportation policy is one of these. Another is the new competitive situation due to the development of motor, water and air transportation.²⁸ Yet another is the need of protecting such broad national and international interests as the conservation of natural resources, the national defense, and economic stability, through a process of taking hundreds of separate concrete actions within the general policies laid down by Congress. The need of dealing forcefully and adequately with such matters is of

²⁸ The old type of judicialized procedure in rate making, and of court control, based upon the requirement of a fair rate of return upon the fair value of the property, becomes practically meaningless under the force of such competition. To fix a rate in this way might destroy a business by throwing all trade to a corporation with lower rates. The Supreme Court recognized this new factor in the case of *Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 205, 64 S.Ct. 499, 88 L.Ed. 668 (1944), by a decision which said in part: "But with the evolution of other forms of carriage, particularly motor carriage, and the Commission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transportation, to secure reasonable and nondiscriminatory rates and service. It becomes not merely the regulator, but to some extent the co-ordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the national transportation policy as declared by the later legislation. This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy and inherent advantages of each form of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage." See also, Blachly, *The Role of Smyth v. Ames in Federal Rate Regulation*, 33 VA. LAW REV. at 149, 150 (1947).

equal importance with that of protecting the rights of the individual from inimical agency action.

The Administrative Procedure Act, by placing the determinations as to rates, facilities, appliances, services, valuations, accounting, or any practices bearing upon any of these, under the designation of rules, initially puts them into the legislative category on the ground that they have a future effect. When it comes to procedure, however, they are placed in the category of adjudication, merely because the statutes usually provide that such determinations shall be made on the record after opportunity for an agency hearing, even though the work done is actually administrative. Such a requirement places them automatically under the complete judicial control of Section 10 of the Act.

If what has been said regarding the managerial function is correct (that it is basically not adjudication, but rather the adjusting of complex economic and social relationships; that the criteria laid down by Congress make the function highly discretionary in nature; that the agencies are operating in the public interest, with a full quiver of administrative powers which cannot well be separated from their deciding powers; that the factors of competition have made the concept of a fair return upon the present day value of the property untenable; and that because of various new factors the relationship of the courts to these managing agencies has been fundamentally changed), then to throw the procedure for making highly discretionary economic determinations into a judicial mould and to subject them to the same type of control as though they were judicial acts, is completely inconsistent with the present factual situation.²⁹

²⁹ According to § 2(d) of the Act, " 'Adjudication' means agency process for the formulation of an order." But since actions required by statute to be taken on the record after opportunity for a hearing (as is the case with most managerial determinations), although classified as rules by § 2(c) of the Act, are subjected to the adjudicatory process by § 5, it is a fair conclusion that they are to be considered as orders, even though the definition of order excludes rules (§ 2(d)). In other words, an action which according to one definition is a rule, by being run through the adjudicatory process, becomes by another definition

This is true both from the viewpoint of procedure and from that of judicial review. If the function is managerial and not adjudicatory, a judicialized procedure is in general inapplicable. To try to solve complex economic relationships as though they were judicially provable is nonsense. It is equally meaningless to treat an informative hearing as though it were a case being decided by a court. In establishing rates, for example, an agency is dealing with speculations and prophecies which may or may not work out as has been expected. The results of the rate may be influenced by unforeseeable wage increases, inflation, deflation, new competitive forces, the fears of investors, other types of government control, the swing of the business cycle, and similar factors.

II. *How the Administrative Procedure Act Affects the Administrative Management Function.*

Certain provisions of the Administrative Procedure Act regarding procedure and judicial control are quite incompatible with the function of administrative economic management. A brief analysis of these provisions will demonstrate this fact.

As was said above, many of the subjects of economic management are classified by the Act as rules and treated as legislative in nature.³⁰ Logically, then, the procedure in respect to them should also be legislative in nature, that is, it should be required merely for the purpose of obtaining information upon which to act. Since the actions to be taken are largely discretionary, they, like legislative actions, should be based upon broad considerations and not merely upon the specific factors brought out at the hearing.³¹

an order. An examination of determinations made by several important agencies shows that actions which under § 2(c) would be called rules are issued as orders. There is in any case a fundamental discrepancy among the provisions cited.

³⁰ § 2(c).

³¹ Because of the many factors discussed above.

The Administrative Procedure Act, after classifying managerial actions as of a legislative or policy nature,³² immediately throws them into a judicialized procedure by the simple expedient of saying that: "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of Sections 7 and 8 (those providing for adjudicatory procedure) shall apply . . ." in place of the informal procedures of Section 4 (b). Since in almost all instances the statutes do so provide in either a general or a specific way, most of the managerial functions are automatically thrown into the adjudicatory process. It is true that each and every factor of the adjudicatory process may not apply to these so-called rules. The first and most important exception, provided it is one, is that the requirement of separation of functions between the investigatory or prosecuting staff and the hearing officer is not to be applied to formal rule making as it is to pure adjudication.³³ Others are that agencies engaged in formal rule making may dispense not only with the initial decision

³² The Attorney General's Manual says: "Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations." (14)

³³ This interpretation is based upon the statements in both House and Senate Reports (House Committee Report, pages 264-265; Senate Committee Report, pages 203-204) that section 5 applies to adjudication and not to rule making. Section 5(c) provides: "This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers." The reason given by Representative Walter for these exceptions is, that "these types of cases (i.e., the determination of the reasonableness of rates in the past) are customarily consolidated with rule-making proceedings where the separation of functions is not required so that, unless excepted from this provision, either rule making would be restricted beyond the intent of the bill or consolidated proceedings would be impossible." (House Proceedings, pages 361-362, in *Legislative History*).

One difficulty in interpreting these exceptions arises from the fact that the word "past" was omitted from the clause dealing with the "application of rates, facilities, or practices of public utilities or carriers."

This bill is so badly constructed and ambiguously phrased, however, that Section 5(c) may be construed to apply to rule-making, for the following reasons: This section is made applicable to sections 7 and 8, subject to the exceptions specified. But sections 7 and 8, according to section 4, shall be applied to formal rule-making. Hence section 5(c) does hold for such rule-making, particularly since the formulation and adoption of rules did not appear in the list of exceptions.

of the presiding examiner but also with his recommended decision and that the separation of functions does not apply to an agency or a member or members thereof.³⁴ Also in formal rule making an agency may, "where the interests of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."³⁵

Despite these concessions to the rule making process, there are several difficulties in the procedure prescribed by the Act. The first of these is the difficulty of determining just when it is necessary to adopt the adjudicatory procedure. Many statutes conferring power upon agencies to make rules of general applicability lack any statement as to the procedure that is to be followed. Other statutes, while requiring rules of general applicability to be made "after a hearing" or "after a full hearing",³⁶ have no express requirement that the rules be issued on the basis of the record developed at the hearing. Although in respect to the making of rules of particular applicability the requirement of a record is generally present, in many instances it must be adduced by implication.

A second difficulty arises in respect to the trial examiners, especially their training and experience and their relationship to the deciding authority. When helping to perform the managerial function trial examiners are dealing almost exclusively with economic relationships; hence they should generally be economists rather than lawyers. It is much more important that they should be able to ask questions which will bring out the factors of the economic problems involved and the considerations necessary to protect the public inter-

³⁴ §§ 8(a), 5(c).

³⁵ *Ibid.*

³⁶ See, for example, United States Warehouse Act, in respect to the suspension or revocation of warehouseman's licenses, 39 STAT. 487 (1923), as amended, 46 STAT. 1464 (1931), 7 U.S.C. § 253 (1946); Securities and Exchange Act, 52 STAT. 1070 (1938), 15 U.S.C. § 780-3(g) (1946); and the Communications Act of 1934, 48 STAT. 1085 (1934), 47 U.S.C. § 309 (1946).

est, than that they should merely be judges of the evidence submitted. This is particularly true when, as was shown, they are dealing with complicated economic relationships. Because of the nature of their work, they should be subject to the general control of the agency rather than be quite independent from it.

In disciplinary or other truly judicial activities, certainly, it may be expedient to have the trial examiners act in a rather independent capacity. This does not hold, however, in respect to the function of economic management; for here the trial examiner is helping to administer a basic policy with which the agency is charged, and which has been laid down by Congress to be implemented by the agency through its discretionary determinations. In other words, the trial examiners are not making judicial pronouncements or judgments, but policy determinations that should be in harmony with the legislative and administrative policy. The examiners should act as assistants of the agency, which has the power of final determination, rather than as largely independent judicial authorities.³⁷ The more independence that is exercised by the trial examiners, the more certain it is that each responsible agency will be forced either to consider cases *de novo*, or else to review them upon its own motion. Either one of these solutions places an intolerable burden upon the responsible authority.

The whole theory of the Act in respect to trial examiners is based upon the assumption that they should act as judges

³⁷ In respect to the relationship of the trial examiners to agencies before the passage of the Administrative Procedure Act, Mr. John Foster Dulles has said: "The lack of complete judicial independence on the part of hearing commissioners is, of course, neither accidental nor inevitable. The reason is that the same hearing commissioners may also have to adjudicate, in the first instance, the second category of cases; those in which the Congress has prescribed that the determinative element is to be the expert judgment and discretion, the economic planning of the agency. The hearing commissioner, in this type of case, will serve no useful role unless he is intimately familiar with the opinions, policies and plans of the Commission and can fully interpret them." Dulles, *The Effect in Practice of the Report on Administrative Procedure*, 41 COL. L. REV. 617, 622 (1941).

of the first instance, and should therefore be independent, should perform no duties inconsistent with the judging function, and should be under as little control by the responsible agency as is possible.³⁸ This relationship will inevitably lead to great confusion, expense, and lack of coordinated policy in respect to the managerial functions. Undoubtedly the differences in opinion between trial examiners and the deciding agency will lead to the institution of many suits which would be unnecessary were the examiners in a less independent position.

Another difficulty is connected with the burden of proof provisions in the Act. It has been shown that the managerial activity is highly discretionary in nature and involves adjustments the validity of which is not susceptible to absolute proof, especially since many are based upon prophecies and are affected by changing economic conditions. Hence the requirement that "the proponent of a rule or order shall have the burden of proof," as set forth by Section 7 (c) of the Act, if logically followed leads to the absurd conclusion that that which cannot be proved must be proved.

The question, what is discretion, is another point of difficulty. It seems certain that nearly all the judicial review provisions of the Act are made applicable to practically all managerial activities; for the statute provides that "every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review;"³⁹ except where the statutes preclude judicial review or where the action is by law committed to agency discretion. Since very few managerial actions are expressly precluded from judicial review,⁴⁰ the important question is whether managerial

³⁸ See §§ 7, 8 and 11.

³⁹ § 10(c).

⁴⁰ As an instance in which a statute precludes judicial review of managerial orders, may be mentioned the power of the Secretary of Agriculture to suspend, and after hearing, to revoke certain registrations and authorizations by order which "shall not be subject to review." Packers and Stockyards Act, 42 STAT. 168 (1921), as amended, 56 STAT. 372 (1942), 7 U.S.C. § 217a (1946).

actions escape the provisions of the Act because they are by law committed to agency discretion. This depends upon how the words "agency discretion" are interpreted. If they are to be interpreted as meaning discretion expressly named as such and given by statute, relatively few instances can be found. Hence under this interpretation the managerial functions are generally subject to all the provisions of the Act regarding judicial review. If, however, the words are to be interpreted as meaning implied discretion, then logically most of the managerial functions should be exempted from the provisions regarding judicial review, since it is recognized⁴¹ that they are legislative in nature and are concerned with policy which implies wide discretion.

There are several considerations which militate against the latter interpretation. The first is the fact that most statutes require orders and determinations in the field of administrative management to be made after notice and hearing.⁴² Another is that in nearly all cases the statutes provide for judicial review, either generally or specifically.⁴³ Such an interpretation was also far removed from the thinking of the proponents of the Act. A statement of Senator McCarran makes this clear. He said: "'Committed by law' means of course, that (the) claimed discretion must have been intentionally given the agency by Congress, rather than assumed by it in the absence of express statement of law to the contrary."⁴⁴ Abuse of discretion is expressly made reviewable.⁴⁵

In respect to the scope of review under Section 10 (c), the Act greatly affects the managerial functions. The par-

⁴¹ "We are in the legislative realm of fixing rates." *U. S. v. Morgan*, 313 U.S. 409, 417, 62 S.Ct. 52, 86 L.Ed. 565 (1941).

⁴² See Blachly and Oatman, *Statutory Administrative Orders*, 25 IOWA L. REV. 555, 595-6 (1940).

⁴³ *Id.* at 606 ff.

⁴⁴ Address to American Bar Association, reprinted in 93 CONG. REC. A108, A111 (1947).

⁴⁵ § 10(e) (B) (1).

ticular provisions in point have to do with (a) the judicial decision of "all relevant questions of law"; (b) the determination of the "meaning or applicability of the terms of any agency action"; (c) the setting aside of "agency actions, findings, and conclusions unsupported by substantial evidence"; and (d) the "review of the whole record, or such portions thereof as may be cited by any party." These provisions will be discussed briefly, and some consideration will be given to their effects.

a. The reviewing court "shall decide all relevant questions of law."

The determinations of the reviewing court upon questions of law must be considered from two viewpoints: constitutional law, and the legal questions arising in connection with the enforcement of a given statute. Although the courts have gone a long way toward repudiating the doctrine of *Smyth v. Ames*,⁴⁶ they still cling to the doctrine that "due process of law" applies to the substance of the law or to its economic effects. In other words, they can decide upon the "reasonableness" of an act of economic management, such as rate regulation, the grant of a certificate of public convenience and necessity and the like. This is clearly implied even in cases largely repudiating the doctrine of *Smyth v. Ames*, such as the *Hope* case,⁴⁷ where the court said: "If the total effect of a rate order cannot be said to be unjust and unreasonable, judicial inquiry is at an end." That is, whether or not such an administrative determination is as a matter of fact unjust and unreasonable, is still a question which the courts will decide under the due process clause. Paragraph (e) of Section 10 of the Administrative Procedure Act would appear to impose a clear mandate that such questions must be decided by the reviewing court.

⁴⁶ See Blachly, *The Role of Smyth v. Ames in Federal Rate Regulation*, 33 VA. L. REV. 141 (1947).

⁴⁷ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

From the viewpoint of technical questions of statutory law, the recent tendency of the courts not to substitute their judgment for that of the administrative agency as shown, for example, in the cases of *Dobson v. Commissioner*⁴⁸ and *Gray v. Ponall*,⁴⁹ seems to be checked by the provision in question. In the *Dobson* case the Supreme Court said: "In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. While its decisions (those of the Tax Court) may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible." This sound tendency on the part of the courts would be largely nullified by the clear mandate of the Administrative Procedure Act that all such questions shall be decided by the reviewing court itself, and in the exercise of its own independent judgment.

b. The reviewing court "shall determine the meaning or applicability of the terms of any agency action."

In the managerial functions, as has been pointed out, the administrative agencies are not only making determinations of fact, but are also using the powers bestowed upon them in an administrative way. That is, they are taking action appropriate to definite situations in which the public interest is at stake. Examples of such actions are: placing limitations upon the grant of certificates of public convenience and necessity; determining upon proper rate relationships; determining upon the joint use of facilities, and so on. The provision as to the applicability of the terms of any agency action would appear to make it mandatory upon the courts to consider whether the particular solution of such a problem adopted by an agency were applicable to the given situation. This would practically destroy the use of administra-

⁴⁸ 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248 (1943).

⁴⁹ 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301 (1941).

tive discretion, which is necessary to the performance of any managerial function.

The provision requiring the courts to determine the meaning of the terms of any agency action seems to require the courts themselves to look into all questions of fact as well as law. This interpretation is sustained by a significant omission. In the draft bill of the minority of the Attorney General's Committee (which formed the basis of the Administrative Procedure Act), after an enumeration of specific questions of law and fact that might be raised in review, there was added the following provision: "Provided, however, that upon such review due weight shall be accorded the expertness, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it."⁵⁰ This proviso is entirely absent from the Administrative Procedure Act. The net result might very well be that if the courts should follow the mandate they would go into every detail of the administrative determination, although they have no detailed competence in technical matters and although such an examination would take an impossible amount of time. There would, in effect, be an appeal from Peter expert to Paul inexperienced, with the practical disappearance of administrative discretion. Since the provision is put in mandatory form, either the courts must ignore the mandate or else assume the unending task of going into questions of fact.

It is made the duty of the courts to set aside "agency action, findings, and conclusions found to be . . . unsupported by substantial evidence subject to the requirements of sections 7 and 8, or otherwise reviewed on the record of an agency hearing provided by statute . . ."⁵¹

In order to understand the full implication of this provision, it is necessary to compare it with the scope of review

⁵⁰ FINAL REPORT, ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 247 f. (1941).

⁵¹ § 10(e) (B) (5).

over managerial actions provided by the many specific statutes dealing with the subject. Review over such actions, as a rule, has been established by two separate and distinct methods, the statutory injunction⁵² and the transcript of the record procedure.⁵³ In connection with the older injunc-

⁵² The statutory injunction method is made applicable to orders of the Interstate Commerce Commission, except orders under the Clayton Act, 38 STAT. 220 (1913), 28 U.S.C. §§ 47, 47a (1946); The Federal Communications Commission (certain orders), 48 STAT. 1093 (1934), 47 U.S.C. § 402(a) (1946); the United States Maritime Commission, 39 STAT. 737-8 (1916), 49 STAT. 1987 (1936), 46 U.S.C. § 828 (1946); the Secretary of Agriculture (most orders in respect to stockyards), 42 STAT. 168 (1921), 7 U.S.C. § 217 (1946). It should be noted that in none of these statutes is there any mention of the scope of review.

⁵³ The review upon the transcript of the record before the circuit court of appeals, including the Circuit Court of Appeals for the District of Columbia, is the appellate method (either exclusive, or applicable only to certain determinations) used with respect to the acts of many federal agencies. To give as complete a picture as possible to support the claim that the review provisions of the Administrative Procedure Act are far broader in scope than statutory provisions, each agency will be listed, and the express statutory provision governing the scope of review will be cited:

1. Wage and Hour and Contracts Division, 52 STAT. 1065 (1938), 29 U.S.C. § 210 (1946). "The review of the Court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive."

2. Civil Aeronautics Board, 52 STAT. 1024 (1938), as amended, 54 STAT. 1235 (1940), 49 U.S.C. § 646 (1946). "The findings of fact by the Board, if supported by substantial evidence, shall be conclusive."

3. Secretary of Agriculture under the Commodity Exchange Act, 42 STAT. 1001 (1922), as amended, 49 STAT. 1498, 1499 (1936), 7 U.S.C. § 9 (1946). "And the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive."

4. Federal Power Commission, 49 STAT. 860 (1935), 16 U.S.C. § 825l(b) (1946). "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

5. Foreign Trade Zones Board, 48 STAT. 1002 (1934), 19 U.S.C. § 81 r (1946). "The testimony and evidence taken or submitted before the Board . . . shall be considered by the court as the evidence in the case."

6. Federal Alcohol Administration, 49 STAT. 978 (1935), as amended, 54 STAT. 1232 (1940), 27 U.S.C. § 204(h) (1946). "The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive."

7. Federal Communications Commission, 48 STAT. 926 (1934), as amended, 50 STAT. 197 (1937), 47 U.S.C. § 402 (1946) (in certain matters). "That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious."

8. Interstate Commerce Commission, orders under the Clayton Act, 48 STAT. 901 (1934), as amended, 48 STAT. 926 (1934), 15 U.S.C. § 78y (1946). "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

tive methods, the statutes say nothing as to the conclusiveness of administrative determinations, leaving this question to the courts. The statutes which establish the newer form of judicial review upon the transcript of the record almost

9. Administrator under the Food, Drugs and Cosmetics Acts, 52 STAT. 1055 (1938), as amended, 54 STAT. 1237 (1938), 21 U.S.C. § 371f (1946). "The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive."

10. Secretary of Agriculture, in re withdrawal of privilege of trading in a contract market, 42 STAT. 1001 (1922), as amended, 49 STAT. 1498, 1499 (1936), 7 U.S.C. § 9 (1946). "And the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive."

11. Secretary of Agriculture, under the packer's part of the Packers and Stockyards Act, 42 STAT. 162 (1921), as amended, 48 STAT. 926 (1934), 7 U.S.C. § 194d (1946). "The evidence so taken or admitted, duly certified and filed as aforesaid, shall be considered by the court as the evidence in the case."

12. Securities and Exchange Commission, under various laws, 48 STAT. 80 (1933), as amended, 48 STAT. 926 (1934), 15 U.S.C. § 77i (1946); 48 STAT. 901 (1934), as amended, 48 STAT. 926 (1934), 15 U.S.C. § 78y (1946); 49 STAT. 834 (1935), 15 U.S.C. § 79x (1946); 53 STAT. 1175 (1939), 15 U.S.C. § 77vvv (1946); 54 STAT. 844 (1940), 15 U.S.C. § 80a-42 (1946); 54 STAT. 855 (1940), 15 U.S.C. § 80b-13 (1946). "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

It will thus be seen that in no case do the statutes provide for the wide scope of review over regulatory activities given by the Administrative Procedure Act. Compare these provisions showing the manifest intention of Congress to limit the scope of review in all economic regulatory activities, with the scope of review provided by the Administrative Procedure Act:

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority or limitation or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (§ 10(e)).

It is clear from these citations that neither the statutes providing for the statutory injunction method of review nor those providing for the transcript of the record method, which control practically all the economic managerial determinations of the regulatory agencies, contain any such broad statements regarding the scope of review as are found in section 10(e) of the Administrative Procedure Act. Hence the claims made by some persons to the effect that the Act merely "restates the present law as to the scope of judicial review," or "did not change the existing law of judicial review . . . by widening the scope of judicial review" are completely inaccurate.

universally provide that the findings of the agency as to facts, "if supported by substantial evidence, shall be conclusive."⁵⁴ In several instances they specifically limit the review to questions of law.⁵⁵ Under these statutes the burden of proof is placed upon the person contesting the administrative determination, to show that there was not such evidence. Further, the statutes say nothing as to control over the conclusions reached by the agency as the result of the fact finding. Under the Administrative Procedure Act the courts are mandatorily required to look not only at the adequacy of the fact findings, but also at "actions" and "conclusions" to see if they are unsupported by substantial evidence.

This requirement does several things. In the first place, the words "unsupported by substantial evidence" place upon the agency the burden of proving that not only the fact finding but also the actions and conclusions resulting from such findings are supported by substantial evidence. This provision must also be considered with the rule of evidence of section 7 (c), which reads: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." The two provisions taken together might greatly enlarge the control of the courts over administrative management actions.

In the second place, the provision in question establishes a strict control over conclusions based upon the fact finding. In managerial functions generally, the fact finding is not nearly so important as the conclusions drawn from it. In order to show the difference between the fact findings and the conclusions, one or two examples will be considered. A fact finding shows, let us say, that many of the timbers of a house are rotten or are affected by termites. What shall the owner do about this condition—tear the house down, put in new timbers, or decide to take no action? The decision

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

reached constitutes the conclusions drawn from the facts. To take a more complex example, the facts brought out at a hearing may show that a railroad is unable to meet its expenses from the income which it receives, and is also unable to borrow money to maintain and improve its facilities. What conclusions may be drawn from the facts? First, the decision might be made that rates should be increased. Second, on the contrary, it might be decided that rates should remain the same, in the expectation that the process of deflation would decrease the price of fuel, that the cost of labor might go down or that greater efficiency might bring about the proper adjustment. Third, it might be held that lower rates would so increase the traffic as to remedy the difficulties. Fourth, the conclusion might be reached that no adjustment in rates would bring back the business drawn away from the railroad by motor carriers, water carriers, air carriers, and the use of the automobile by private individuals, and that the business ought to be liquidated. Fifth, the situation might be deemed hopeless from the business viewpoint, but the possibility of a military emergency might cause the agency to consider that it must be kept going somehow, even by increasing rates of competing carriers, i.e., by setting minimum rates for them.

Such conclusions do not resemble the conclusions of guilty or not guilty drawn by a jury from the facts set before it. They do not resemble the conclusions of a judge regarding the penalty to be imposed in view of the jury's findings, or in respect to the facts established in various civil suits. They do not resemble the quasi-judicial conclusions based on facts brought out in a reparation case, or in a case involving a cease and desist order. These conclusions are of the same nature that a business man draws.⁵⁶ They involve policy,

⁵⁶ An excellent example of conclusions, which were mistakenly considered as facts, appears in the case of *Lang Transportation Corporation v. United States*, 75 F. Supp. 915 (S. D. Calif. 1949). Here the court says, at p. 934: "In the instant case the Commission has specifically found that the competition that would result from the grant of authority to operate the proposed service in the

and policy of a high order, since there must be a harmonization of many conflicting lines of interest. Moreover, the results of the policy adopted must be seen before it can be said that the conclusions are wrong. Further, it is not the conclusions which are unreasonable or unjust. It is only the historical results that may accrue from placing the conclusions into effect. The conclusions cannot possibly be justifiable, for they are predicated upon a present uncertainty and a vague non-provable possibility that rights might suffer. An attempt to control conclusions before the results of applying the conclusions are known is like an attempt to control prophesy itself. No court is in a position to say that a different conclusion would yield better results, or that the facts demand the adoption of a certain conclusion.

Finally, all the foregoing considerations show that no party could possibly claim a legal right to have a certain conclusion drawn, or show a legal injury because some other conclusion had been adopted. Despite the fact that there is nothing judicial about making conclusions in respect to policy, the Administrative Procedure Act imposes upon the courts the duty of determining whether such conclusions and the related actions are proper. In other words, the courts are required to take jurisdiction over discretionary actions and decisions as to policy. It would be entirely proper for

territory involved would provide a stimulus for a better service to the public; that the proposed territory would support an additional motor carrier service without impairing the existing service of protestants now serving it; and that the public interest would be best served by granting the authority sought.

"These basic and essential findings, the court finds, are adequate to support the report and order of the Commission of April 8, 1946."

It is clear that the so-called facts here cited are conclusions. A fact is an event or object in the past or the present; these conclusions are estimates regarding the future. They partake of the nature of a prophesy, since they represent the judgment of the Commission (doubtless based on facts not shown here, such as the area and population of the territory, the services and rates of the protestants, etc.) as to the probable results of a future situation. These conclusions are definitely administrative rather than judicial. In requiring the reviewing courts to set aside conclusions found to be unsupported by substantial evidence, the Administrative Procedure Act seeks to compel the court to depart from the judicial function and to exercise judgment of an administrative type.

the Supreme Court to declare the judicial review provisions of the Act unconstitutional, on the ground that they would compel the courts to carry out administrative functions. A more flagrant violation of the doctrine of the separation of powers would be hard to find.

d. The courts "shall review the whole record or such portions thereof as may be cited by any party."⁵⁷

In other words, if any party asks for a review of the whole record the court must comply. This sentence must be considered in connection with the provision just discussed, regarding the review of "agency action, findings and conclusions." These two sentences, taken together, as Mr. Dickinson points out,⁵⁸ practically require a review of substantiality on the whole record. First, not only must the court find whether or not there is substantial evidence to support the findings and conclusions, but it must examine all of the evidence on the other side, and consider the question whether against the background of the conflicting testimony and exhibits it still regards the evidence on which the finding of fact was based as substantial.⁵⁹ This would compel the judges to weigh and balance all the evidence in the record—a thing that they have refused to do in cases involving

⁵⁷ § 10(e) (B) (6).

⁵⁸ Dickinson, *Judicial Review Provisions of the Federal Administrative Procedure Act (Section 10) Background and Effects*, in *FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 546, 586.

⁵⁹ Regarding the rule of substantial evidence on the whole record, in the case of *In Matter of Stork Restaurant, Inc. v. Boland*, 282 N. Y. 256, 26 N.E. (2d) 247, 255 (1940), the New York Court of Appeals said: "The evidence produced by one party must be considered in connection with the evidence produced by other parties. Evidence which, unexplained, might be conclusive may lose all probative force when supplemented and explained by other testimony. The Board must consider and sift all the evidence." Cited by Mr. John Dickinson in *FEDERAL ADMINISTRATIVE PROCEDURE ACT*, etc., p. 559. Mr. Benjamin, in the same publication, quotes a remark made by Judge Lehman to a lawyer who was arguing a case before the New York Court of Appeals, where the judge said: "Mr. Seward, you have recounted to us evidence in support of the Board's finding that appears to be substantial. I suggest that you now permit the respondent to argue, because the question for this court is whether, against the background of the respondent's evidence, your evidence remains substantial." *Id.* at 591.

managerial functions. For example, in the *St. Joseph Stockyard* case⁶⁰ the Supreme Court said:

The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. . . . When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact that are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. . . . In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

As to the overall effects of the provisions just considered, there is much difference of opinion. The claim is often made that the Act enlarges neither the subject matter of review nor the scope of review. The Attorney General takes the position that:⁶¹

The provisions of Section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions. Section 10, it must be emphasized, deals largely with principles. It not only does not supersede special statutory review proceedings, but also generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules.

Professor Scanlan states that the Act "did not change the existing law of judicial review, either by increasing the availability of the judicial remedy, or by widening the scope of judicial review."⁶²

In respect to the Attorney General's position, several objections can be made. How is it possible, when a provision is made mandatory⁶³ by the use of "shall" rather than

⁶⁰ *St. Joseph Stockyards v. United States*, 298 U. S. 38, 51, 56 S.Ct. 720, 80 L.Ed. 1033 (1936).

⁶¹ ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, 93 (1941).

⁶² Scanlan, *Judicial Review Under the Administrative Procedure Act*, 23 NOTRE DAME LAWYER 502, 503 (1948).

"may" to hold that it merely deals with "principles"? How can this mandatory provision avoid superseding earlier statutory law which conflicts with it? How can it be said that the Act, which requires the reviewing court to set aside any decision "unsupported by substantial evidence," and in so doing to review the whole record if cited by any party, goes no further than the provisions of statutes which are applicable to the managerial or regulatory function? Some of these statutes, it is true, require "substantial evidence" to support an administrative fact finding; but some are silent on the matter, and others contain provisions to the general effect that "The findings of fact of the Commission as to facts, if supported by evidence, shall be conclusive."⁶⁴ None of them require the court to balance the evidence on both sides, as it must do when it reviews the whole record. It has been the practice of the courts to examine the record only far enough to see whether it contains evidence sufficient to support the fact finding. The requirement that they shall review the whole record or such portions thereof as may be cited by any party must mean that they can no longer confine themselves to this question, but must also consider the weight or preponderance of the evidence. No statute governing the review of managerial or regulatory action by either the injunction method or the transcript of the record method required the courts to "determine the meaning or applicability of the terms of any agency action," or to hold unlawful and set aside "conclusions" as well as fact findings.⁶⁵ How can it be said that the provisions of the Act on scope of review merely summarize "the principles of judicial review embodied in many statutes and judicial decisions," when the scope of review established is far wider than that which the courts, for very cogent reasons, have declared applicable?⁶⁶

⁶³ It should be noted that the provisions as to scope of review on the Act use the word "shall." 60 STAT. 243, 5 U.S.C. § 1009(c) (1946).

⁶⁴ See notes 52, 53 *supra*.

⁶⁵ *Ibid.*

⁶⁶ See Notes 60, 68-74 *infra*.

How is it that when one of the chief purposes of the Act, loudly declared and widely advertised, was to check so-called "administrative absolutism" by stringent judicial review, it is now claimed that the Act left the situation just as it was?

Professor Scanlan's statement is partially answered by the preceding paragraph. It may be added that a case which he himself cites in various connections holds that section 10 (e) clause 5 of the Act: ⁶⁷

. . . empowers the court to determine whether the findings of fact made by the administrative agency are supported by substantial evidence, and to set them aside if its conclusion is in the negative. . . . Consequently, in those cases in which the scope of judicial review had been restricted within narrower bounds, it was enlarged to that extent.

What may be the results of such a wide extension of the scope of judicial review? In the first place, logically, the review provisions of the Act would supersede the numerous former statutes providing for the review of the managerial or regulatory determinations of the government. This is true both because the scope of review established by the Act is broader than that established by such statutes, and because the new provisions are mandatory in character.

In the second place, if rigorously applied, these review provisions would reduce the independent boards and commissions and other regulatory authorities to little more than fact finding agencies.

In the third place, if the courts follow in detail these new provisions, there will be a fundamental change in the relationship which the Constitution appears to contemplate and which the courts have developed between themselves and the administrative bodies, particularly in respect to managerial action. What this relationship is can best be shown by extracts from relevant cases.

⁶⁷ *United States v. Watkins*, 73 F. Supp. 216, 219 (S. D. N. Y. 1947).

In the *Pottsville Broadcasting Company* case⁶⁸ the Supreme Court said:

The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. . . . Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. . . . But to assimilate the relation of these administrative bodies and the courts to the relationship between the lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

In *Railroad Commission v. Rowen and Nichols*,⁶⁹ the Supreme Court said:

A controversy like this always calls for a fresh reminder that courts must not substitute their notions of expediency

⁶⁸ 309 U. S. 134, 142-144, 60 S.Ct. 437, 84 L.Ed. 656 (1940).

⁶⁹ 310 U. S. 573, 581, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940). See note 25 *supra*.

and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted. . . . whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment.

In *United States v. Morgan*,⁷⁰ the Supreme Court said:

In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by words of the statute, those words should be so construed as to attain that end through co-ordinated action.

The *Waterman Steamship Corporation* case⁷¹ further dwelt upon this relationship. Here the Supreme Court said:

It is of paramount importance that courts not encroach upon this exclusive power of the Board if effect is to be given the intention of Congress to apply an orderly, informed and specialized procedure to the complex, administrative problems arising in the solution of industrial disputes. As it did in setting up other administrative bodies, Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act. . . .

In a recent decision⁷² the Supreme Court said:

And so the Board, in performing its delegated function of defining and applying these terms (employer and employee), must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by the statute. This does not mean that it should

⁷⁰ 307 U. S. 183, 191, 59 S.Ct. 795, 83 L.Ed. 1211 (1939).

⁷¹ 309 U. S. 206, 208, 60 S.Ct. 493, 84 L.Ed. 704 (1940).

⁷² *National Labor Board v. Atkins*, 331 U. S. 398, 403, 67 S.Ct. 1265, 91 L.Ed. 1563 (1947).

disregard the technical and traditional concepts of "employee" and "employer." But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the Board's familiarity with the problems and its experience in the administration of the Act.

In *Unemployment Commission v. Aragon*⁷³ the Court said:

To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The "reviewing court's function is limited." All that is needed to support the Commission's interpretation is that it has "warrant in the record" and a "reasonable basis in law."

In *Securities and Exchange Commission v. Chenery Corporation*⁷⁴ it was said:

The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to an ordinary administrative action. The wisdom of the principle adopted is none of our concern. . . . Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress.

The Court further said:

The Commission avoided placing its sole reliance on inapplicable judicial precedents. Rather it has derived its conclusions from the particular facts of the case, its general experience in reorganization matters and its informed view of statutory requirements. It is these matters which are the guide for our review. . . .

The Commission's conclusion here rests squarely on that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type

⁷³ 329 U. S. 143, 153, 67 S.Ct. 245, 91 L.Ed. 136 (1946).

⁷⁴ 332 U. S. 194, 207, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. Whether we agree or disagree with the results reached, it is an allowable judgment which we cannot disturb.

Summary and Conclusions.

This paper has attempted to show: That in carrying out functions of economic regulation, several of the important boards, commissions and other agencies of the government are exercising powers which are managerial in nature; that these functions are carried out primarily to protect the public interest in its largest aspects; that they are functions which the legislature itself could well perform had it the time, technical experience and equipment; that these agencies are the extended arms of the legislature; and that their work is secondary only to that of the lawmaking body. As in any managerial function, a great deal of policy making and discretion must be involved. Insofar as these agencies are carrying out managerial functions, they are not prosecuting; they are not adjudicating; they are administering.

Economic determinations based on discretion and informed judgment cannot be made by a purely adjudicatory process, since they are legislative in nature and must involve considerations alien to that process. Although the function of making such determinations should be the result of careful study, should often be preceded by the hearing of evidence, and where rights are involved, should be based on a procedure which guarantees fairness, it is of neither a prosecutory nor an adversary nature. Hence there is no reason for throwing the procedure into the adjudicatory framework, as is done by the Administrative Procedure Act.

The scope of judicial review with respect to managerial functions should be severely limited for several reasons. One

is the nature of the determinations which must be made, whether various factors of discretion are or are not specifically provided for by Congress. A second is new economic circumstances, such as the development of competition where there was formerly monopoly, which have made it impossible to claim a legal right to a certain valuation or rate of return. The process, under such circumstances, becomes one of adjusting the interests of all those concerned, together with the public interest. This interest has undergone a wide extension in significance within recent years, due to war, uncertain economic conditions, and the need for security in a rapidly fluctuating economy. Again, such factors as a grant or subsidy have entered into the picture, making judicial review difficult if not impossible. Finally, the courts themselves have been developing more realistic and less juristic theories regarding the basic nature of control, as by assimilating rate making to the police power rather than to the taking of property by expropriation. Under these changed circumstances, also, the courts have found that their relationship to the economic regulatory authorities has had to undergo a profound change. They have tended more and more, not to review the administrative managerial acts in themselves, but only to consider matters of law such as proper delegation of powers, jurisdiction, and similar questions of the most general type.

Despite the manifest policymaking and discretionary nature of the determinations made by economic regulatory agencies, the fact that new economic relationships are growing up, the combination of benefactory action with regulatory action, and the judicial development of a new basis for such functions as rate making, the Administrative Procedure Act has sought to increase greatly the judicial features of procedure and the scope of review over managerial acts. This attempt to intensify the judicialized pat-

tern of procedure for the taking of managerial determinations, and to subject such determinations to a much stricter judicial control than before, is based upon an inadequate and confused view of the nature of administrative management, and goes contrary to present day economic and social realities.

Frederick F. Blachly

Miriam E. Oatman