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# MIXED QUESTIONS OF LAW AND FACT AND THE ADMINISTRATIVE PROCEDURE ACT

BERNARD SCHWARTZ†

JUDICIAL review of administrative action is based upon the distinction between "law" and "fact". Questions of law are to be decided judicially, for the judge, both by training and tradition, is best equipped to deal with them. "Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions."<sup>1</sup> These considerations do not apply with equal force to the judicial review of the factual issues arising out of administrative determinations. There, the advantages of *expertise* are with the administrator. The fact "findings of an expert commission have a validity to which no judicial examination can pretend; the decision, for instance, of the New York Public Service Commission that a gas company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the Courts in a similar case."<sup>2</sup>

A theory of review based upon the "law-fact" distinction assumes that there is a more or less clear-cut division between "law" and "fact", with the former for the judge and the latter for the administrator. "This separation of law and fact sounds attractively simple. . . . The administrative tribunal would find the facts and the courts would not interfere unless the absence of evidence or the perversity of the finding required them to intervene."<sup>3</sup> In fact, however, the distinction between "law" and "fact" is not nearly so well-defined as is often supposed. "The judges, who have the last word, can confidently draw the line between law and fact; for the rest of us it is not so easy."<sup>4</sup> There is a certain ambiguity about the terms in practice which makes it difficult in many cases confidently to ascertain which is which prior to court decision.

"Whether or not a man was walking along the sidewalk on a certain street of a certain afternoon is a question of fact. Whether a coal hole on the sidewalk was or was not covered is a question of fact. Whether or not the man fell into the coal hole is question of fact. In each case, the fact is ascertainable by observation; there can be no question of judgment or opinion. As a matter of law, however, the liability of the person or corporation chargeable with the condition of the coal hole may depend upon whether or not it was reasonably guarded. This will depend upon

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1. LANDIS, *THE ADMINISTRATIVE PROCESS* 152 (1938) (italics omitted).
2. LASKI, *A GRAMMAR OF POLITICS* 393 (4th ed. 1938).
3. CARR, *CONCERNING ENGLISH ADMINISTRATIVE LAW* 103 (1941).
4. *Ibid.*

two questions. It will depend upon the physical character, location, and surroundings of the hole, and it will depend upon whether those physical factors conform to the standard of reasonableness which the law demands. The former is a question of fact, but what is the latter?"<sup>5</sup>

In such cases, "law" and "fact" are not two mutually exclusive kinds of questions, so that the scope of review becomes a mere mechanical matter, depending upon the category in which the finding at issue falls. The reviewing court itself has the final word upon whether the particular finding is one of "law" or "fact", and in deciding that question it, in effect, determines whether the review of that finding is to be a broad or narrow one. "The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right."<sup>6</sup> As one observer has pointed out, "since all rules of law are something more than abstract propositions of logic, and depend for their meaning on their relevance to certain states of fact, it is inevitable that Courts should often lay down as matters of law what are really in essence matters of fact."<sup>7</sup>

The difficulty in applying the distinction between law and fact in concrete cases has led to the terming of a large number of questions as "mixed questions of law and fact." As Justice Jackson has put it: "Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing 'questions of law' from 'questions of fact.' This is the test Congress has directed, but its difficulties in practice are well known and have been the subject of frequent comment. Its difficulty is reflected in our labelling some questions as 'mixed questions of law and fact' and in a great number of opinions distinguishing 'ultimate facts' from evidentiary facts."<sup>8</sup>

In many ways, the judicial treatment of the so-called "mixed questions of law and fact" goes to the very heart of the problem of the scope of review. If they are termed "questions of law," the courts are enabled to exercise a broad reviewing power; if they are treated as "questions of fact," judicial review is narrowed by the substantial evidence rule. The extent of review thus depends upon which side of the "law-fact" dividing line the particular finding is seen to fall. This problem, one should note, is not confined to American administrative law. "What I have many times in this House protested against," said Lord Atkinson in *Great Western Ry. Co. v. Bater*,<sup>9</sup> "is the attempt to secure for a finding on a mixed

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5. HENDERSON, *THE FEDERAL TRADE COMMISSION* 93 (1924).

6. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 55 (1927).

7. ALLEN, *LAW AND ORDERS* 160 (1945).

8. *Dobson v. Commissioner*, 320 U.S. 489, 500 (1943).

9. [1922] 2 A. C. 1.

question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact, a finding of fact."<sup>10</sup>

"Most frequently, particularly in recent years in the administrative law field, the problem has arisen in connection with the application of statutory language to particular states of fact."<sup>11</sup> Though the administrative findings in these cases are basically findings of fact—*e.g.*, whether the subjects of particular administrative determinations fall within a statutory category may largely depend upon their factual characteristics—they also involve questions of statutory interpretation, in the defining of the category itself. Ultimately, the scope of review in these cases depends upon whether the application of the statutory category to the particular factual situation—*i.e.*, the application of law to fact—is thought of as being a judicial or administrative function.

Under the Federal Trade Commission Act of 1914,<sup>12</sup> the Federal Trade Commission was "empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce. . . ." <sup>13</sup> *Federal Trade Commission v. Gratz*<sup>14</sup> was the first important case dealing with the application by the Commission of the statutory standard of "unfair methods of competition" to specific business practices. The Supreme Court reversed the conclusion of the Commission that the trade practices in that case constituted such unfair methods. In so doing, the Court did not confine itself to the question of whether there was an evidentiary basis for the administrative conclusion. "The Court instead conceived its function to embrace the right to determine independently what the appropriate rule of law should be. Its approach was identical with that which it would possess were it reviewing a legal ruling by a lower court."<sup>15</sup> The application of the statutory concept to the particular situation is thus treated by the Court as a pure question of law. "The words 'unfair methods of competition,' " said Justice McReynolds, "are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include."<sup>16</sup>

The holding of the *Gratz* case and others in accord was of great practical consequence for the work of the Federal Trade Commission, "for if

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10. *Id.* at 12.

11. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 94 (1944).

12. 38 STAT. 717 (1914), 15 U. S. C. § 41 (1946).

13. 38 STAT. 719 (1914), 15 U. S. C. § 45 (1946).

14. 253 U. S. 421 (1920).

15. LANDIS, *THE ADMINISTRATIVE PROCESS* 150 (1938).

16. 253 U. S. 421, 427 (1920).

the Commission is, by these decisions, shorn of all power to exercise administrative discretion in matters of unfair competition or of restraint of trade and monopoly, it has become little more than a subordinate adjunct of the judicial system."<sup>17</sup> The later cases have, therefore, tended to depart from the doctrine of the *Gratz* case by assigning great weight to the conclusion of the Commission that particular business practices fall within the statutory concept of "unfair methods of competition."

*Federal Trade Commission v. Cement Institute*<sup>18</sup> indicates the extent to which the Supreme Court has receded from the view expressed in the *Gratz* case. There the Commission had issued a cease and desist order against the multiple basing point system of pricing used in the cement industry. The effect of such an order is, to say the least, very widespread in view of the prevalence of the method of pricing involved. "Clearly if such an order by the Commission were to be sustained, it would not only write an entire chapter of new law but would bring about a major revolution not merely in marketing methods but in the distribution and location of American industry."<sup>19</sup> Under the *Gratz* case, the holding of the Commission that the basing point system of pricing constituted an unfair method of competition would be reviewed by the Court upon its own independent judgment as a question of law. In the *Cement Institute* case, the Court implies that the scope of review is narrower. "We sustain the Commission's holding that concerted maintenance of the basing point delivered price system is an unfair method of competition prohibited by the Federal Trade Commission Act. In so doing we give great weight to the Commission's conclusion, as this court has done in other cases. [Emphasis is laid upon the expertness of the agency as a reason for narrowing review.] We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty."<sup>20</sup>

In a series of recent cases, as well as some not so recent, the Court has gone even further in limiting the scope of review on so-called "mixed questions of law and fact."<sup>21</sup> Among the important cases of this type is *Gray v. Powell*,<sup>22</sup> which was decided in 1941. That case involved the Bituminous Coal Act of 1937,<sup>23</sup> which sought to fix minimum prices for the bituminous coal industry, though exempting from its provisions

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17. HENDERSON, *THE FEDERAL TRADE COMMISSION* 102 (1924).

18. 333 U.S. 683 (1948).

19. Dickinson, *Judicial Characteristics of Administrative Regulation*, 23 N.Y.U.L.Q. REV. 239, 258 (1948).

20. 333 U.S. 683, 720 (1948).

21. See Stern, *supra* note 10, at 99.

22. 314 U.S. 402 (1941).

23. 50 STAT. 72 (1937), 15 U.S.C. § 828 (1946).

“coal consumed by the producer or . . . transported by the producer to himself for consumption by him.”<sup>24</sup> The respondent company in the instant case asserted that it was a producer-consumer within this section and hence entitled to exemption from the Act. The administrative agency, the Bituminous Coal Division, held that the respondent was not a “producer” consuming its own product and issued an order denying the claimed exemption.

This administrative determination was sustained by the Supreme Court in language which implied that the question at issue was wholly within the administrative competence and not subject to wider review than administrative findings of pure fact. “Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other. . . . Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly, a finding on Congressional reference that an admittedly constitutional act is applicable to a particular situation does not require such further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.”<sup>25</sup>

*Gray v. Powell* seems to mark a definite break with earlier doctrine as to the scope of review in connection with the administrative application of statutory language to particular states of fact. This is shown by the analysis in Justice Roberts’ dissenting opinion. “Upon a record in which there is not a single disputed fact, the bare question is presented whether the words the Congress used bring the respondents within the Bituminous Coal Code or exclude them from its operation. In answering that question, the Director made no controverted finding of fact, exercised no judgment as to what the relevant circumstances were, but merely decided that the meaning of the statute was that the respondents’ transactions required that they become members of the Code or suffer the penalty. . . . If the Director was in error, his error was a misconstruction of the Act

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24. 50 STAT. 77 (1937), 15 U.S.C. § 833 (1946).

25. 314 U.S. 402, 411 (1941).

which created his office; and that error, under all relevant authorities, is subject to court review."<sup>26</sup>

Under *Gray v. Powell*, the scope of review on these "mixed questions of law and fact" is assimilated to that on findings of pure fact. In both cases, review is limited by the substantial evidence rule—the court looks only to see that there is an evidentiary basis for the administrative finding. *Gray v. Powell* thus "accords to an administrative tribunal's rationally supportable interpretation of the statute under which it operates the same binding force that the substantial evidence rule accords to the tribunal's rationally supportable determinations of fact."<sup>27</sup> This doctrine of review has been applied in a number of recent cases, and seems by now to be established in federal administrative law. Thus, it has been followed in determining whether a particular carrier is an "interurban railway" within the meaning of an exemption from the Railway Labor Act of 1934;<sup>28</sup> whether one company has "control" of another within the meaning of the Communications Act of 1934;<sup>29</sup> whether a worker is a "member of a crew" within the meaning of an exemption from the Longshoremen's and Harbor Workers' Compensation Act of 1927;<sup>30</sup> whether an injury arose "out of and in the course of employment" so as to give rise to a workmen's compensation award under the same Act;<sup>31</sup> and whether a worker is an "employee" so as to come within the provisions of the National Labor Relations Act of 1935<sup>32</sup> or the Fair Labor Standards Act of 1938.<sup>33</sup> In these cases "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."<sup>34</sup>

26. *Id.* at 418.

27. Benjamin, *Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals*, 48 *COL. L. REV.* 1, 12 (1948).

28. *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177 (1938).

29. *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939).

30. *Norton v. Warner Co.*, 321 U.S. 565 (1944); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940).

31. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947); *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941).

32. *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111 (1944).

33. *Fleming v. Demeritt Co.*, 56 F. Supp. 376 (D.C. Vt. 1944).

34. *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 131 (1944). See, similarly, *Unemployment Comm'n v. Aragon*, 329 U.S. 143 (1946). *Cf. Fishgold v. Sullivan Corp.*, 328 U.S. 275, 290 (1946), where the court implied that the doctrine of *Gray v. Powell* applies only to interpretations made in adversary proceedings by administrative agencies entrusted with the responsibility of making *inter partes* decisions.

The present rule with regard to the review of "mixed questions of law and fact" can be gathered from the opinion of Justice Jackson in *Dobson v. Commissioner*:<sup>35</sup> "Congress has vested the Tax Court with primary authority for redetermining deficiencies, which constitutes the greater part of tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."<sup>36</sup> Or, in other words, unless the question at issue is seen to be wholly one of law, the scope of review is no wider than that over administrative findings of fact. "Where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."<sup>37</sup>

The division of functions here between the reviewing court and the administrative agency approaches that between court and jury. A jury in a negligence case, for example, normally returns a general verdict compounded of both law and fact. In these cases, the jury does more than merely find the facts, for "it is, in fact, ordinarily, the jury that has the application of the law to the facts."<sup>38</sup> The jury's verdict "is more nearly akin to a declaration of law than to a finding of fact, since it does create obligatory standards, which, if created by the jury, are, it is true, binding in only the particular case then before it, but which none the less are the standards by which the conduct of the parties to that litigation is to be judged to determine their respective legal rights and liabilities."<sup>39</sup> The reasons which have led the courts to respect the conclusions of juries with regard to the application of statutory standards to particular factual situations apply with even greater force to the similar conclusions of administrative agencies. "Is there anything in the Constitution," asks a lower federal court, "which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclu-

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35. 320 U. S. 489 (1943).

36. *Id.* at 502. In so far as the Tax Court is concerned, Section 1141 (a) of the Internal Revenue Code was amended in 1948 so that review of the decisions of the Tax Court now proceeds in the same manner and to the same extent as decisions of federal district courts in civil actions tried without a jury. This changes the rule of the *Dobson* case with regard to review of Tax Court decisions.

37. *Bates & Guild Co. v. Payne*, 194 U. S. 106, 109 (1904); citing Justice Miller in *Marquez v. Frisbie*, 101 U. S. 473, 476 (1879).

38. THAYER, *PRELIMINARY TREATISES ON EVIDENCE* 252 (1898).

39. BOHLEN, *STUDIES IN LAW OF TORTS* 605 (1926).



sive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?"<sup>40</sup> In this field of review of "mixed questions of law and fact," at any rate, the federal courts are now "attempting to give to the findings of administrative bodies the respect paid to those of a jury when it returns a general verdict."<sup>41</sup>

There is, however, one very important difference between the type of administrative finding we have been considering and the conclusion of a jury embodied in a general verdict. The finding at issue in *Gray v. Powell*, for example, is not only a mixed finding of "law" and "fact", but is also a finding of "jurisdictional fact" in the sense that its existence is a condition precedent to the lawful exercise of the administrative authority. The administrative power to act in that case was dependent upon the finding that the respondent was not a "producer-consumer," for the enabling Act was not operative in the absence of such a finding. To apply the doctrine of limited review to such cases would seem to run counter to the general policy of Anglo-American law against allowing inferior tribunals finally to determine the limits of their own jurisdiction. "An [administrative] agency may not finally decide the limits of its statutory power," the Supreme Court has asserted. "That is a judicial function."<sup>42</sup> Where the administrative jurisdiction depends upon a finding of fact, the reviewing court should be able to determine upon its own independent judgment whether or not that finding is correct. "The law is settled that where a jurisdiction is given to a tribunal in certain events, the jurisdiction only arises on the actual happening of those events. If they have not happened in fact, they cannot obtain jurisdiction by wrongly deciding that they have happened."<sup>43</sup>

Under *Gray v. Powell* and other similar decisions, discussed above, review of "jurisdictional fact" findings of the type at issue in those decisions, is no broader than that of ordinary findings of fact. That there are strong practical considerations to support this further judicial withdrawal in favor of administrative *expertise* can be seen from a reading of Justice Brandeis' dissenting opinion in *Crowell v. Benson*.<sup>44</sup> At the same time, however, there is great danger from the point of view of effective judicial control of administrative action in over-deference by the courts

40. *St. Joseph Stock Yards Co. v. United States*, 11 F. Supp. 322, 327 (W.D. Mo. 1935).

41. Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court*, 35 HARV. L. REV. 127, 151 (1921).

42. *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946).

43. *Rex v. Local Government Board*, [1922] 2 Ir.R. 76, 93. Compare the language of Farwell, L. J., in *Rex v. Shoreditch Assessment Committee*, [1910] 2 K.B. 859, at 880.

44. 285 U.S. 22, 65 (1932).

to administrative fact findings upon which the existence of jurisdiction depends.

This can be illustrated by *Packard Motor Co. v. National Labor Relations Board*,<sup>45</sup> where the Board had decided that the foremen employed by appellant company constituted an appropriate bargaining unit and had certified their union as the exclusive bargaining representative. The company asserted that foremen were not "employees" entitled to the advantages of the Labor Act, and refused to bargain with the union.

The finding of the Board here is of the type involved in *Gray v. Powell*—*i.e.*, one involving the application of a statutory definition to a particular factual situation—and is likewise "jurisdictional," in that the Act under which the Board operates is not applicable in the absence of the "employer-employee" relationship. Under *Gray v. Powell*, the scope of review of such a finding should be limited by the substantial evidence rule, just as though the finding were wholly one of fact, and this, in effect, is the theory of review applied by the majority of the Court. "There is clearly substantial evidence in support of the determination that foremen are an appropriate unit by themselves," says Justice Jackson, "and there is equal evidence that, while the foremen included in this unit have different degrees of responsibility and work at different levels of authority, they have such a common relationship to the enterprise and to other levels of workmen that inclusion of all such grades of foremen in a single unit is appropriate. Hence the order insofar as it depends on facts is beyond our power of review. . . . Whatever special questions there are in determining the appropriate bargaining units for foremen are for the Board, and the history of the issue in the Board show the difficulty of the problem committed to its discretion. We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute."<sup>46</sup>

Yet, wholly apart from the question of whether such foremen should be encouraged to organize for collective bargaining, it would seem that this is the type of case where review limited by the substantial evidence rule is too narrow. The Board, by its finding on the "jurisdictional fact" of the existence of the "employer-employee" relationship, has extended the benefits of a labor statute to a group of supervisory employees who are not expressly covered by the Act, and who have in the past normally been

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45. 330 U.S. 485 (1947).

46. *Id.* at 491. Under the Labor Management Relations Act of 1947, supervisory employees of the type involved in the *Packard* case no longer come within the term "employee" in the Labor Act. See *L. A. Young Corp. v. National Labor Relations Board*, 163 F.2d 905 (D. C. Cir. 1947).

identified with the interest of management. "Trade union history shows that foremen were the arms and legs of management in executing labor policies. In industrial conflicts they were allied with management. Management indeed commonly acted through them in the unfair labor practices which the Act condemns."<sup>47</sup> It is perhaps not too much to say that the Board has, in effect, re-written the governing statute through its interpretation of the statutory definition. "For if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application."<sup>48</sup>

This is not to say, of course, that supervisory employees such as those involved in the *Packard* case should not be permitted to bargain collectively. "What I have said does not mean that foremen have no right to organize for collective bargaining."<sup>49</sup> But apart from the merits, one wonders whether the administrative determination that the protection of the Act should extend to such foremen should be vested with the same degree of finality as administrative findings of pure fact. Surely this is the type of case where the "jurisdictional fact" doctrine should compel a broad review of the administrative finding. This case indicates the dangers inherent in the recent tendency of the Court to abandon the "jurisdictional fact" doctrine, for here the extension of the enabling legislation by the administrative body acting in pursuance of its general policy is placed in a position of finality, although the Board has been "vested merely with the authority of general words of power."<sup>50</sup>

#### THE ADMINISTRATIVE PROCEDURE ACT

In the first portion of this paper, we have seen how the scope of review over "mixed questions of law and fact"—especially those involving the application of statutory language to particular states of fact—has been narrowed by the federal courts so that review of such questions has tended to be similar to that available over administrative findings of fact. We will now seek to determine whether this tendency has been affected by the Administrative Procedure Act of 1946.<sup>51</sup>

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47. Justice Douglas, dissenting, in *Packard Motor Co. v. National Labor Relations Board*, 330 U.S. 485, 496 (1947).

48. *Id.* at 494.

49. *Id.* at 500.

50. Lord Shaw, dissenting, in *Rex v. Halliday*, [1917] A. C. 260, 300.

51. 60 STAT. 237, 5 U.S.C. § 1001 (1946).

For our purposes, the key language in the Act is to be found in the first sentence of Section 10 (e), dealing with the scope of review, which reads: "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 or applicability of the terms of any agency action."<sup>52</sup>

Under the test of *Dobson v. Commissioner*, which has already been discussed, "when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the [administrative agency] must stand."<sup>53</sup> It has been asserted by Professor Dickinson that "such a position on the part of the courts will henceforth be hard to square with the specific language of the first sentence of paragraph (e) of Section 10 of the Administrative Procedure Act, if that sentence is given the effect which an objective reading of its words seems to require. The reviewing court is there not merely given the power, but [by] the word 'shall' is placed under an obligation, not only to 'interpret constitutional and statutory provisions' but to 'decide all relevant questions of law'; and then follow the additional words which impose on the reviewing court itself the further duty of determining 'the meaning or applicability of the terms of any agency action.'"<sup>54</sup>

One may sympathize with the desire expressed in the above statement that the Act be interpreted as broadening the scope of review over questions of the type we have been considering. Whether the first sentence of Section 10 (e) does, in fact, lead to that result is, however, quite another matter. In the first place, there is the obligation imposed on the reviewing court by that section to "decide all relevant questions of law." But this brings us back to the basic question: What is fact and what is law? If we assume, as Professor Dickinson seems to do, that the question in a case like *Gray v. Powell*—*i.e.*, one involving the application of a statutory term to a particular state of fact, there whether respondent was a "producer" consuming its own product—is a question of law, then we are, of course, impelled to his conclusion, for Section 10 (e) of the Act requires the reviewing court to decide questions of law. Yet, is such a question so clearly a question of law as to compel the federal courts to abandon the theory of review which they have followed consistently since *Gray v. Powell*?

It is undoubtedly true, as Justice Murphy pointed out in *Cardillo v. Liberty Mutual Co.*,<sup>55</sup> that questions of the type we have been concerned

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52. 60 STAT. 243, 5 U. S. C. § 1009 (1946).

53. 320 U. S. 489, 502 (1943).

54. THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 584 (Warren ed. 1947).

55. 330 U. S. 469 (1947).

with can be considered "more legal than factual in nature."<sup>56</sup> That does not, however, necessarily make them questions of law which must be decided by the reviewing court within the meaning of the Act. In the *Cardillo* case, the Court dealt with the finding by the Deputy Commissioner in a compensation proceeding under the Longshoremen's and Harbor Worker's Compensation Act<sup>57</sup> that the particular injury was one "arising out of and in the course of employment." Such a finding was essential before a compensation order could be made under the Act, and such an order could be set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law."<sup>58</sup>

The scope of review of the administrative finding in the *Cardillo* case appears to be similar to that in *Gray v. Powell*. "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited. . . . If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive."<sup>59</sup> And, dealing directly with the type of question with which we have been concerned, Justice Murphy goes on to say that "the fact that the inference of the type here made . . . involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. . . . and the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only 'if not in accordance with law.'"<sup>60</sup>

The *Cardillo* case indicates that the duty imposed on reviewing courts by Section 10 (e) of the Act to decide relevant questions of law will not broaden the scope of review of *Gray v. Powell* type questions. Review under the Longshoremen's Act would seem to give the courts the same review power as the portion of Section 10 (e) that we have been discussing, as the courts must decide questions of law in determining whether an order is "not in accordance with law." The "questions of law" phrase in the first sentence of Section 10 (e) of the Act would seem, indeed, to

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56. *Id.* at 478.

57. 44 STAT. 1424 (1927), 33 U.S.C. § 901 (1946).

58. 44 STAT. 1436 (1927), 33 U.S.C. § 921 (B) (1946).

59. 330 U.S. 469, 477 (1947).

60. *Id.* at 478.

be merely a legislative restatement of the familiar review principle that questions of law are for the reviewing court, at the same time leaving to the courts the task of determining in each case what are questions of law. It is most unlikely that the federal courts will hold that the type of question we have been concerned with is now a question of law within the meaning of the Act.

In addition to directing the reviewing court to decide relevant questions of law, the first sentence of Section 10 (e) of the Act directs it to "interpret constitutional and statutory provisions". Does not the application of a statutory term to a particular state of facts involve statutory interpretation within the meaning of this provision? If it does, then the first sentence of Section 10 (e) would seem to broaden the scope of review in the *Gray v. Powell* type of case, for it requires the reviewing court itself to perform the function of statutory interpretation.

A leading authority on statutory interpretation has divided the steps in the judicial process of interpreting statutes into three parts: (1) finding or choosing the proper statute or statutes applicable; (2) interpreting the statute law in its technical sense; and (3) applying the meaning, so found, to the case at hand.<sup>61</sup> If Section 10 (e) of the Act uses statutory interpretation in this broad sense, then, clearly, the determination of a *Gray v. Powell* type of question involves statutory interpretation.<sup>62</sup> On the other hand, it has been urged that the interpretation and application of statutes are two different things. In this view, interpretation properly so called includes only the determination of the proper sensible meaning of the statute. Application is the process of determining whether the facts of the particular case are within or without that meaning.<sup>63</sup> "The application of law is preceded by . . . (6) interpretation . . . or the discovery of the legislative intent from the law, in which rules of construction . . . are employed"<sup>64</sup>

The Supreme Court has indicated that it is in accord with the second of the above views on the meaning of statutory interpretation, at least insofar as the problem we are dealing with is concerned. In *National Labor Relations Board v. Hearst Publications*,<sup>65</sup> where the question at issue was similar to that in *Gray v. Powell*—i.e., that as to the scope of review available over a Labor Board finding that certain newsboys were "employees" within the meaning of The National Labor Relations Act—

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61. de Sloovère, *Steps in the Process of Interpreting Statutes*, 10 N. Y. U. L. Q. REV. 1 (1932).

62. Compare Benjamin, *supra* note 24, at 13.

63. de Sloovère, *supra* note 56, at 17.

64. GAREIS, *SCIENCE OF LAW* 89 (3d ed. 1911), quoted in de Sloovère, *supra* note 56, at 10.

65. 322 U. S. 111 (1944).

the Court implied that the administrative finding on that question involved only application, which was primarily for the agency, and not interpretation, which was for the courts. "Undoubtedly questions of statutory interpretation, . . ." says Justice Rutledge, "are for the courts to resolve. . . . But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."<sup>66</sup> It does not appear probable that the Court will change this view in connection with the mandate given to reviewing courts in Section 10'(e) of the Act to "interpret constitutional and statutory provisions." It is more likely that the Court will hold that an administrative finding such as that in *Gray v. Powell* and the *Hearst* case does not involve statutory interpretation within the meaning of the Act. Hence, the scope of review will be the same as that in *Gray v. Powell*.<sup>67</sup>

A stronger argument for the view that the Act broadens the scope of review over "mixed questions of law and fact" of the type we have been considering can perhaps be based upon Section 10'(e) (B) (3), which requires the reviewing court to hold unlawful and set aside agency action, findings and conclusions found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right".

As we have seen, administrative findings of the type at issue in *Gray v. Powell* and the *Hearst* case are findings upon which the administrative jurisdiction depends, in the sense that their existence is a condition precedent to the lawful exercise of administrative authority. Thus, in the *Hearst* case, the National Labor Relations Act was not applicable in the absence of an employer-employee relationship and the Labor Board was without power to act if the newsboys involved in that case were not found to be "employees". Can it not be argued that where administrative jurisdiction is dependent upon a particular finding, Section 10'(e) (B) (3) of the Act requires the reviewing court to determine for itself the correctness of that finding? In such a case, if the finding is incorrect, is not the administrative action "in excess of statutory authority"—a matter which the reviewing court itself must decide under Section 10 (e) (B) (3)?

If the above argument is valid, the Act, in effect, re-imposes the "jurisdictional fact" theory of review—i.e., that where administrative

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66. *Id.* at 130.

67. The same result would appear to follow with regard to the provision at the end of the first sentence of Section 10 (e) that the reviewing court determine the meaning or applicability of the terms of any agency action. It is difficult to see how this could broaden the scope of review over questions of the type we have been considering, for it would seem to deal with the interpretation of the meaning of validly exercised agency power and not with the validity of the exercise of power.

jurisdiction depends upon a finding of fact, the correctness of that finding must be determined by the reviewing court upon its own independent judgment. But this, as we have seen, is precisely the doctrine that the federal courts have abandoned in recent years. That a sound argument can be made for the thesis that Section 10 (e) (B) (3) does revive the "jurisdictional fact" doctrine has been shown above. But is that argument so conclusive as to compel the federal courts to accept it? It is more probable that the present Court will paraphrase Justice Frankfurter, concurring in *Estep v. United States*,<sup>68</sup> if the argument is addressed to it. "This argument revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of 'jurisdictional fact'. In view of the criticisms which that doctrine . . . brought forth and of [its attrition] through later decisions, one had supposed that the doctrine had earned a deserved repose."

We are thus brought to the conclusion that the trend discussed in the first part of this paper in the direction of narrowing the scope of judicial review of "mixed questions of law and fact" is not affected by Section 10(e) of the Act. Though arguments can be made to support the contrary view, the wording of the statute is probably not strong enough to compel the federal courts to change the theory of review that has been firmly established since *Gray v. Powell*. This is not, of course, to say that the result we have reached is necessarily the most desirable one. One can, indeed, assert that the *Gray v. Powell* line of cases makes effective judicial control of administration impossible. This is especially true insofar as the administrator is made the final arbiter of facts upon which his power to act depends. However valid many of the criticisms of the "jurisdictional fact" doctrine may be, the total abandonment of that doctrine presents the danger of going to the other extreme of over-deference to the administrative judge.<sup>69</sup> Under the *Gray v. Powell* line of cases, that danger has become a real one.

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68. 327 U.S. 114, 142 (1946).

69. See Benjamin, *supra* note 24, at 12.



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