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Cover Page Footnote

The writer wishes to express his grateful appreciation of the helpful criticisms and suggestions of Ray I. Hardin, Esq., of the New York Bar, in the preparation of this article.

THE RISING TIDE OF EXPERTISE*

WILLIAM J. BUTLER†

“The detection and appraisal of such imponderables are indeed one of the essential functions of an expert administrative agency.”

Douglas, J., in *International Association of Machinists, etc., Lodge No. 35 v. N. L. R. B.*¹

“appraise— . . . ; to weigh; . . .”

“imponderable—Not ponderable; incapable of being weighed.”

Webster's *New International Dictionary*, Second Edition.

JURISPRUDENCE may occasionally learn a salty home truth from a layman. Simeon Strunsky recently observed, “It is amazing, but also a bit disconcerting, how easily we can be made to take over a new formula in words if smoothly and confidently presented.”² This reflection is not without application to the science which, above all, deprecates anything in the semblance of a formula.³ Consider a recent decision of the Circuit Court of Appeals for the Second Circuit.⁴

The National Labor Relations Act⁵ makes it an unfair labor practice for an employer who is subject to the Act to “interfere with, restrain, or coerce employees in the exercise of”⁶ their right of organization for collective bargaining, or to “dominate or interfere with . . . or . . . support”⁷ a labor organization. The National Labor Relations Board is authorized “to prevent any person from engaging in any unfair labor practice” and to require “such affirmative action . . . as will effectuate the policies of this Act.”⁸ The Act is remedial, not punitive.⁹

At the Bayonne, New Jersey, refineries of the Standard Oil Company, a Joint Conference Plan of labor and management had existed from 1918 to 1937. The Plan was supported by the Company and this became illegal upon the passage of the National Labor Relations Act on July 5, 1935. In April, 1937, the Company disassociated itself from the Plan,

* The writer wishes to express his grateful appreciation of the helpful criticisms and suggestions of Ray I. Hardin, Esq., of the New York Bar, in the preparation of this article.

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1. 311 U. S. 72, 79 (1940).
2. Topics of the Times, N. Y. Times, March 23, 1946.
3. E.g., Federal Power Comm. v. Natural Gas Pipeline Co., 315 U. S. 575, 586 (1942); N. L. R. B. v. Hearst Publications, 322 U. S. 111, 120-121 (1944).
4. N. L. R. B. v. Standard Oil Co., 138 F. (2d) 885 (C. C. A. 2d, 1943).
5. July 5, 1935, c. 372; 49 STAT. 449; 29 U. S. C. A. §§ 151-166 (1942).
6. *Id.* at § 8(1), 49 STAT. 452; 29 U. S. C. A. 158 (1) (1942).
7. *Id.* at § 8(2), 49 STAT. 452, 29 U. S. C. A. 158 (2) (1942).
8. *Id.* at § 10(c), 49 STAT. 453, 29 U. S. C. A. 160 (c) (1942).
9. Republic Steel Corp. v. N. L. R. B., 311 U. S. 7 (1940).

disclaimed any intention to influence the employees' choice of representatives, and declared that it would recognize and deal with whom-ever the employees might select to represent them. About a month later, a new organization, the Bayonne Refinery Employees' Association, was formed. The Company recognized, and thereafter bargained with, the Association.

In November, 1941, the Board found that the Company was interfering with the organizational rights of its employees and was dominating the Association. The Board's theory was that the Association was a continuation of the Plan and that since it was not certain that the employees, in forming the new Association, were uninfluenced by the hope of retaining the Company's favor, which had theretofore been extended to the Plan, and had not been motivated, in avoiding affiliation with any national union, by fear of the Company's hostility, the Association would have to be disestablished.¹⁰

The Board petitioned the Circuit Court of Appeals for the Second Circuit for enforcement of its order. The petition was granted. Circuit Judge Learned Hand, who wrote for the Court, after suggesting the possibility that the Court might disagree with "the Board's conclusion that in November, 1941, four and a half years after the 'Association' was formed, and at a time when there can be no doubt that a very great majority of the employees still adhered to it, their adherence was a consequence of some carry-over of the respondents' earlier favor of the 'Plan' and its well known preference for it over an alliance with any national union,"¹¹ expressed the gist of the Court's view of the case by stating:

"We understand the law to be that the decision of the Board upon that issue is for all practical purposes not open to us at all; certainly not after we have once decided that there was 'substantial' evidence that the 'disestablished' union was immediately preceded by a period during which there was a 'dominated' union."¹²

Judge Hand recognized that he was pronouncing a doctrine which would occasion some surprise, for he proceeded to point out:

"Since we recognize how momentous may be such an abdication of any power of review, especially as it may result in the loss of those very rights of employees which it is the purpose of the act to protect, we feel justified in stating our reasons a little at length, even though we have in effect already decided the issue."¹³

10. *Matter of Standard Oil Co.*, 43 N. L. R. B. 12 (1942).

11. *N. L. R. B. v. Standard Oil Co.*, 138 F. (2d) 885, 887 (C. C. A. 2d, 1943).

12. *Id.* at 885.

13. *Ibid.*

His statement of the reasons for declining to entertain the question whether the Board was justified in making its finding is too long for full quotation. After first pointing out that the question whether the employer's influence upon the will of his employees (a) determined their choice when they formed the new union in 1937 and (b) continued to influence them in adhering to the new union, might seem to concern only human motives of a kind with which courts are not unaccustomed to deal, and to be no different in principle from the questions involved in determining an employer's motive in discharging an employee, he transferred the problem to a somewhat different plane by asserting:

"... but the question of how deeply an employer's relations with his employees will overbear their will, and how long that influence will last, is, or at least it may be thought to be, of another sort, to decide which a board, or tribunal chosen from those who have had long acquaintance with labor relations, may acquire a competence beyond that of any court."¹⁴

Judge Hand proceeded to amplify the reasoning suggested in the foregoing excerpt by pointing out that there can be issues of fact which courts would be altogether incompetent to decide, citing as an instance the decision of a board of qualified chemists as to the chemical reaction between a number of elements.

Judge Hand then went on to say:

"Conceivably labor disputes might have been considered as demanding no such specialized knowledge for their solution. On the other hand they have been made the occasion of wide study, and a very large literature has arisen, with which those only are familiar who have become adepts. Like any other group of phenomena, when isolated and intensively examined, these relations appear to fall into more or less uniform models or patterns, which put those well skilled in the subject at an advantage which no bench of judges can hope to rival. This the Supreme Court has recognized in a number of decisions, particularly when the Board's decision upon the question now before us has come up."¹⁵

This is probably as profound a salaam as can be found in the books. It comes as no surprise to those who have had some contact with the body of principles developed to govern the actions of the administrative agencies of the Government, particularly during the past decade. It represents, however, probably the most detailed and authoritative attempt to analyze and rationalize a theory which has been propounded over a considerable period of years by academicians and courts alike, namely, that administrative agencies are expert bodies which deal with

14. *Ibid.*

15. *Id.* at 887-888.

specialized subject matters and whose findings of fact, views as to statutory policy and, to some extent, conclusions of law, should foreclose any inquiry by the courts as to whether or not they are correct, or at least evoke the special deference which is due to esoteric learning and skill. The question whether this theory is valid may well warrant some attention.

Why Administrative Agencies?

It is not essential for the present purpose to discuss the basic philosophy of administrative law and of the operations of administrative agencies. There is a vast and steadily growing literature on this subject.¹⁶ In order to put in focus the subject of this article, it is sufficient to say that beginning with the enactment of the Interstate Commerce Act in 1887 there began in the United States the significant development of administrative agencies exercising regulatory functions. These functions manifest themselves in the decision of controversies between private parties or between private parties and the Government, or in the issuance of general rules regulating conduct in the field entrusted to the particular administrative agency. Their characteristics, in other words, are partly quasi-legislative, and partly quasi-judicial.¹⁷

The Attorney General's Committee on Administrative Procedure¹⁸ found over 200 of these agencies, 27 of them exercising functions of sufficient importance to warrant detailed monographs which were prepared and filed with Congress as a basis for the Committee's study of the need of procedural reform.¹⁹ The monographs, submitted in 1940, did not, of course, include any of the wartime agencies, such as the Office of Price Administration, the War Labor Board, the Wage Stabilization Board, the War Production Board, etc. But even in 1940 the agencies ranged from the Interstate Commerce Commission, regulating railroads, motor carriers, and, to some extent, coastal steamship lines, through the Veterans' Administration, the Federal Communications Commission,

16. For a working bibliography, see VANDERBILT, ONE HUNDRED YEARS OF ADMINISTRATIVE LAW, in LAW, A CENTURY OF PROGRESS 117, 141-144; See also Smith, *Improving the Administration of Justice in Administrative Processes* (1944) 30 A. B. A. J. 127; Oppenheimer, *Supreme Court and Administrative Law* (1937) 37 COL. L. REV. 1; Frankfurter, *Foreword* (1938) 47 YALE L. J. 515.

17. See, e.g., *Humphrey's Exec. v. United States*, 295 U. S. 602, 628-629 (1935); *St. Joseph's Stock Yards v. United States*, 298 U. S. 38, 50-51 (1936); see also, *Final Report of Att'y Gen's. Committee on Administrative Procedure*, SEN. DOC. No. 8, 77th Cong., 1st Sess. 11-14.

18. *Final Report of Att'y Gen's Comm., op. cit. supra* note 17, p. 8n.

19. SEN. DOC. No. 186, 76th Cong., 3d Sess. (13 parts); SEN. DOC. No. 10, 77th Cong., 1st Sess. (14 parts).

the Securities and Exchange Commission, the Federal Trade Commission, the Federal Power Commission, and many others, to the National Labor Relations Board, which regulates labor-management relationships so far as they have to do with the right of employees to organize for collective bargaining through representatives of their own choosing.

The "Expertise" Formula

The establishment of these administrative agencies is said to be the answer of modern law to the challenge that "Science and technology cannot reshape society while law maintains its Blackstonian essences."²⁰ And it is apparently thought to be a corollary that the agencies themselves are bodies possessed of superior skill and knowledge, whose determinations on disputed facts, of views on policies and even of conclusions of law are entitled to special weight.

This theory, which has lately come to be known as the "expertise" theory,²¹ has been expressed in various ways. Thus, Chief Justice Hughes has stated that the administrative process had its origin in

"a deepening conviction of the impotency of Legislature with respect to some of the most important departments of law making. Complaints must be heard, expert investigation conducted, complex situations deliberately and impartially analyzed, and legislative rules intelligently adapted to a myriad of instances falling within a general class."²²

Addressing the Federal Bar Association in February of 1931, Chief Justice Hughes said:

"Experience, expertness and continuity of supervision, which could only be had by administrative agencies in a particular field, have come to be imperatively needed."²³

Robert M. Cooper, a protagonist of the administrative process, expresses one of the reasons for it as follows:

20. Frankfurter, *Foreword* (1938) 47 YALE L. J. 515. Cf., Dickinson, *Judicial Control of Official Discretion* (1928) 22 AM. POL. SCI. REV. 275.

21. The spelling is not yet standardized. Mr. Justice Frankfurter uses "expertise" (*Federal Power Commission v. Hope Natural Gas Pipeline Co.*, 320 U. S. 591, 627 (1944)); Mr. Justice Rutledge prefers "expertize" (*Elgin, Joliet & Eastern Ry. Co. v. Burley*, 14 U. S. L. WEEK 4249 (U. S. 1946)); in the more advanced writings it is called "the expertise" (e.g., Davison, *Administrative Technique—The Report on Administrative Procedure* (1941) 41 COL. L. REV. 628, 638), the definite article apparently being intended to convey the same overtones as in "He has the Gaelic."

22. Hughes, *Some Aspects of Development of American Law* (1916) 39 REP. N. Y. ST. BAR ASSOC. 266, 269.

23. Address to Federal Bar Assoc., N. Y. Times, Feb. 13, 1931, p. 18.

"In the second place, Congress possesses neither the scientific knowledge nor the technical competence to define completely the national policy in many of its more complicated aspects."²⁴

Cooper goes on to assert:

"It is hardly reasonable to assume that a judiciary, completely untrained in the problems of public administration, is more capable or more likely to reach proper results than experienced administrators selected primarily for their specialized knowledge, technical competence, and thorough familiarity with the intricacies of modern governmental policies."²⁵

Dickinson, another supporter of the administrative process, thus states the reason for the "expertise" rule:

"The administration of general legislation by technical experts, skilled and trained in specialized fields, is the contemporary answer to the challenge to bridge the gap between popular government and scientific government."²⁶

Mr. Justice Holmes has expressed the qualifications of expert administrative agencies as follows:

"They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."²⁷

The Supreme Court of the United States has spoken of the general theory underlying the necessity of administrative agencies in the following words:

". . . The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Un-

24. Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577, 581n. *I.e.*, it is only with respect to those matters as to which Congress has sufficient scientific knowledge and technical competence that it is vested with the legislative power of the United States under Article I, § 1 of the Constitution. We are not to suppose, however, that the incompetence of Congress is all that makes the administrative process necessary. It was also necessary to get "the enforcement of laws of social and economic impact out of the hands of the courts." (Feller, *Administrative Law Investigation Comes of Age* (1941) 41 COL. L. REV. 589, 599).

25. Cooper, *op. cit. supra* note 24 at 595.

26. Dickinson, *Judicial Control of Official Discretion* (1928) 22 AM. POL. SCI. REV. 275; see also, Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944) 58 HARV. L. REV. 70, 81-88, 100; *Report of Att'y Gen's Committee, op. cit. supra* note 17 at 12-16; Davis, *An Approach to Problems of Evidence in the Administrative Process* (1942) 55 HARV. L. REV. 364, 416-423.

27. *Chicago, Burlington & Quincy Ry. Co. v. Babcock*, 204 U. S. 585, 598 (1907). The story that this quotation was once printed on the masthead of the New York Morning Telegraph is probably apocryphal.

doubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."²⁸

Of course, the foregoing excerpts do not reflect an opinion which is held unanimously regarding either the desirability of administrative agencies or the reasons why they have been established. Laird Bell, writing in the *American Bar Association Journal*, expresses this view:

"When a situation is too hot for Congress to handle, statesmen create a board, tell it to do the right thing and hurry on to the really serious business of getting re-elected."²⁹

The specific postulate that the administrative agencies are possessed of specialized and expert knowledge has been expressed by the Supreme Court with respect to many of the most important of these agencies. Thus, the Court has said of the Interstate Commerce Commission,

"It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. . . ." ³⁰

The Court further said in the same case:

"As exemplified by this record, the Commission is 'informed by experience' of years in its consideration of the relationship of forwarders to our national transportation system."³¹

Likewise, the Federal Trade Commission has been thus described by the Supreme Court:

". . . It was created with the avowed purpose of lodging the administrative

28. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421 (1935).

29. Bell, *Let Me Find The Facts* (1940) 26 A. B. A. J. 552, 553; see also, Pound, *For the "Minority Report"* (1941) 27 A. B. A. J. 664.

30. *United States v. Louisville & Nashville Ry. Co.*, 235 U. S. 314 (1914) quoted in, *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 352 (1940).

31. *Id.* at 353; see also, *Interstate Commerce Comm. v. Union Pacific RR. Co.*, 222 U. S. 541 (1912).

functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'³²

Of the Federal Communications Commission, the Supreme Court has said:

"While this criterion [the public convenience, interest or necessity] is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."³³

Mr. Justice Black objected to the decision of the majority of the Court in *Securities and Exchange Commission v. Chenery Corporation*,³⁴ because he thought it did not defer sufficiently to the expertise of the Commission. He said:

"The Commission did not 'explicitly disavow' any reliance on what its members had learned in their years of experience and of course, they, as trade experts, made their findings that respondent's practice was 'detrimental to the interests of investors' in the light of their knowledge."³⁵

Mr. Justice Frankfurter, writing for the majority, did not deny that the Commission actually had the expertise claimed by Mr. Justice Black. He merely thought that in the case before the Court the Commission had not employed "new standards reflecting the experience gained by it in effectuating the legislative policy,"³⁶ but had acted on the basis of traditional equitable principles.

Of the National Labor Relations Board, the Supreme Court has recently said:

"One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by

32. *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 314 (1934); quoting from Rep. of Sen. Comm. on Interstate Commerce, No. 597, 63rd Cong., 2d Sess. (1914) 9, 11.

33. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940).

34. 318 U. S. 80 (1943).

35. *Id.* at 98-99.

36. *Id.* at 89.

experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration."³⁷

Substantially the same pronouncements have been made with respect, among others, to the superior qualifications of public boards administering workmen's compensation,³⁸ the Shipping Act³⁹ and the Bituminous Coal Act.⁴⁰

Some Constitutional Implications

Expertise then, as a theory, is well established in the pronouncements of the Supreme Court. It is probably too late in the game to inquire whether the Constitution permits the adjustment of the rights of citizens to be based upon policies declared or legal principles formulated or facts found by administrative agencies without control by the courts at least to the same extent as in the case of juries. Yet,

"When the lawyers and learned men of Massachusetts made a new declaration of rights and frame of government for the inhabitants of this Commonwealth in 1780, they did not call themselves experts and say that we common people ought to trust them to frame the government because we couldn't be expected to understand the affairs of state. They sent the new constitution to the town clerks in time for the March meetings so the home folks could talk it over and decide whether it should go into effect. I read in a book by a historian fellow up at Harvard that the home folks talked that constitution over pretty thoroughly and voted on it one article at a time; and it pretty near failed of passage. Maybe the lawyers and learned men took pains to make it correct and serviceable, as it has been proved in practice, because they knew that the people would look into it and wouldn't take it if they weren't pleased."⁴¹

It is worth noting, too, that the Constitution itself exhibits no naive trust in experts, as witness not only the provision securing the right of jury trial in all actions at common law,⁴² but also the due process clauses in the Fifth and Fourteenth Amendments.

According to the advocates of administrative government, the administrative process is not judicial process.⁴³ Indeed, the strongest argument advanced for the administrative process is that it is made neces-

37. *Republic Aviation Corporation v. N. L. R. B.*, 324 U. S. 793, 800 (1945); *see also*, *N. L. R. B. v. Waterman Steamship Co.*, 309 U. S. 206, 208-209 (1940).

38. *Crowell v. Benson*, 285 U. S. 22, 46-47 (1932).

39. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 303-304 (1937).

40. *Gray v. Powell*, 314 U. S. 402, 412-413 (1941).

41. Gardner, *Review of Landis' "The Administrative Process"* (1938) 52 HARV. L. REV. 336.

42. U. S. CONST. AMEND. VII.

43. *See, e.g., Crowell v. Benson*, 285 U. S. 22, 50-51 (1932).

sary by the inadequacy of the judicial process, as well as the inadequacy of the legislative process.⁴⁴

The notion that due process, as defined in the Constitution, does not require judicial process, found expression in the concurring opinion of Brandeis, J., in *St. Joseph Stock Yards Co. v. United States*. He there stated:

" . . . The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."⁴⁵

He further stated:

"The Fifth Amendment, like the Fourteenth, declares that property may not be taken without due process of law. But there is nothing in the text of the Constitution (including the Amendments) which tells the reader whether to constitute due process it is necessary that there be opportunity for a judicial review of the correctness of the findings of fact made by the Secretary of Agriculture concerning the value of this property or its net income. To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. [citing cases] They tell us that due process is not necessarily judicial process. . . ."⁴⁶

This demonstrates that the process of deciding facts upon which life, liberty or property may depend can, of course, be called something other than judicial process. But only by main strength. Judicial it is and judicial it remains, by whatever name it is called. It is the process of judging between contending assertions of fact and law and imposing, with the state's authority, obligations on the litigants as a result of the determination.⁴⁷ And if it is judicial process, it is certainly the judicial

44. Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538; Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519; Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577.

45. 298 U. S. 38, 73 (1936). We shall consider presently (*infra* page 59) whether the requirements of notice and hearing are anything more than an apple of Sodom in the absence of some control over the result.

46. *Id.* at 76-77; see also, Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519.

47. Nevertheless, in deference to current terminology, the administrative process and the judicial process will hereafter be spoken of as if they were distinct things.

process of the United States if it is employed by an agency of the United States. But the Constitution provides that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁴⁸

Indeed, it was only upon the hypothesis that the actions of an administrative agency did not affect life, liberty or property in the particular case that the Supreme Court found it possible to sustain the constitutionality of the Tea Inspection Act of March 2, 1897.⁴⁹ The Act provided for the appointment by the Secretary of the Treasury of a board of experts in teas, authorized by the Secretary, upon the recommendation of the board, to fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States, and provided for the exclusion of imports of teas found to be below the prescribed quality. Plaintiff's tea was excluded and he sued the Collector of the Port of New York for damages for wrongful seizure. The trial court directed a verdict for the defendant upon the ground that the only question was as to the constitutionality of the statute and that the statute was constitutional. The Supreme Court, in affirming,⁵⁰ rejected the argument that the statute denied due process of law by failing to accord a hearing before the Board of Tea Inspectors and the Secretary of the Treasury in establishing the standards in question, and before the general appraisers upon the reexamination of the tea. The Court held it a sufficient answer to this argument that

"The provisions in respect to the fixing of standards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred."⁵¹

But where the action of an administrative agency does affect life, liberty or property, due process may well require that its determination of facts be controlled by the courts at least to the degree that jury verdicts are so controlled.

This question recently came before the Supreme Court in *Estep v. United States*, decided February 4, 1946.⁵² *Estep* was convicted of a violation of Section 11 of the Selective Service Act for refusing to obey

48. U. S. CONST. ART. III, § 1.

49. 29 STAT. 604, 21 U. S. C. A. § 41 (1926).

50. *Buttfield v. Stranahan*, 192 U. S. 470 (1904).

51. *Id.* at 497.

52. — U. S. —, 66 Sup. Ct. 423 (1946).

an induction order of his local draft board. He had attempted, on his trial, to defend on the ground, among others, that as a Jehovah's witness he was a minister of religion and had been improperly denied exemption from service because the classifying agencies acted arbitrarily and capriciously in refusing to classify him as IV-D. The District Court refused to allow Estep to introduce any evidence to sustain this contention. The Circuit Court of Appeals affirmed the conviction with a divided vote,⁵³ but the Supreme Court reversed (5 to 3) and held that Estep was entitled to an opportunity to show that the local board had gone "beyond its jurisdiction."⁵⁴ Mr. Justice Douglas, writing for the majority, after pointing out that the Selective Service Act made no provision for judicial review of the acts of the Selective Service agencies, and after observing that there are situations in which "judicial review may indeed be required by the Constitution"⁵⁵ proceeded to determine the case upon the theory that Congress presumably did not intend to preclude a judicial inquiry in a criminal case into the question whether the order of the administrative agency which the defendant was charged with having disobeyed was lawful or unlawful.⁵⁶

But since Congress has specifically provided that the decisions of the local boards are final, it is difficult to avoid the inference that what Mr. Justice Douglas' opinion really means is that a conviction of violating an invalid order of an administrative agency without affording the defendant an opportunity to prove its invalidity would be in violation of the due process clause.⁵⁷ This, indeed, was the express ground upon which Mr. Justice Rutledge and Mr. Justice Murphy concurred in the *Estep* decision. Further, since the order of the local board, if unlawful, was unlawful because the board erroneously decided that Estep was not a minister of religion, it is also difficult to avoid the conclusion that the decision stands, implicitly, for the proposition that life, liberty or property cannot be affected by the factual determination of an administrative agency unless an opportunity is afforded for a tribunal exercising the judicial power of the United States to pass upon

53. 150 F. (2d) 768 (C. C. A. 3d, 1945).

54. — U. S. —, 66 Sup. Ct. at 427.

55. *Id.* at —, 66 Sup. Ct. at 426, citing *Ng Fung Ho v. White*, 259 U. S. 276 (1922), and see also, Dickinson, *Judicial Review of Administrative Determinations, a Summary and Evaluation* (1941) 25 MINN. L. REV. 588, 594.

56. *Id.* at —, 66 Sup. Ct. at 427.

57. The Court has had little difficulty in other cases in finding that Congress intended no judicial review other than that expressly provided for (e.g., *Switchmen's Union v. Mediation Board*, 320 U. S. 297, 301-302 (1941)) nor does the opinion in the *Estep* case point to any actual evidence of congressional intent to allow the review which Estep sought. What the reasoning of the Court amounts to is that Congress *must have* meant to allow it.

the question whether the agency's finding is supported by evidence.⁵⁸

But the question under consideration is not so much whether there are any constitutional limitations upon the expertise theory. It is rather to what extent the theory itself will stand examination. In other words, if we go behind the generalized pronouncements what basis do we find for the idea that administrative agencies are in any true sense experts having specialized knowledge which entitles their determinations, either upon the facts of a given case, or upon general formulation of policy, to the kind of respectful consideration which the Circuit Court of Appeals for the Second Circuit accorded to the finding of the Labor Board in the *Standard Oil* case?⁵⁹

The Statutes Governing Judicial Review

If the courts are required to treat with special deference the findings of administrative agencies, one would expect to find in the review sections of the applicable statutes some provision directing them to do so. Turning to these sections what do we find? Take first the *Standard Oil* case itself. The Circuit Court of Appeals was authorized to review the Board's order by Section 10(e) of the National Labor Relations Act. That section provides that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." It is well established that the phrase "supported by evidence" as used in this section, is synonymous with the phrase "supported by substantial evidence."⁶⁰ That is to say, a mere scintilla of evidence is not sufficient to support a finding by the Board. The court will look into the evidence to the extent of determining whether it is such "as a reasonable mind might accept as adequate to support a conclusion."⁶¹

But this is precisely the rule of review which has existed for many years in the case of judgments on verdicts of juries when they are ap-

58. The Court speaks of Estep's complaint against the local board's action in refusing to classify him as a minister of religion as a charge that the board acted "arbitrarily and capriciously." But this can mean hardly anything other than that Estep ought to be allowed to convince the jury on his trial that there was substantial evidence before the local board that he was a minister of religion and no substantial evidence to the contrary. Estep's right to go into this question on the criminal trial would, of course, not be inconsistent with the Court's injunction (— U. S. —, 66 Sup. Ct. at 427) that the weight of the evidence as to classification is not to be reviewed in the criminal case. The question of jurisdiction is admittedly reached "if there is no basis in fact for the classification which it [the local board] gave the registrant." (*Id.* at —, 66 Sup. Ct. at 427.)

59. *Supra*, pages 20-21.

60. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229 (1938); *N. L. R. B. v. Columbian etc. Co.*, 306 U. S. 292, 300 (1939).

61. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229.

pealed to Circuit Courts of Appeals.⁶² In other words, what the Circuit Court of Appeals had before it for review in the *Standard Oil* case was an order which, so far as the express declaration of Congress was concerned, was entitled to exactly the degree of consideration that would be extended to the verdict of a jury—nothing less and nothing more. No one supposes that Judge Hand would have declared that a question of fact decided by a jury was “not open to us at all.” It was only because the Labor Board was conceived to be a body possessing special competence which a jury would not have that Judge Hand took occasion to refuse to consider the question of fact and to explain the reasons for his judicial “abdication.” Yet, to the extent that he treated the finding of the Board as something entitled to more respectful consideration than the verdict of a jury, he was indulging in an abdication to which he had not been constrained by Congress.

That is to say, there is nothing in the National Labor Relations Act which puts a finding by the Labor Board on any higher plane than the verdict of a jury. The same may be said of the statutes governing judicial review of the orders of the other principal administrative agencies, all of which either expressly contain, or have by interpretation been held to provide, the “substantial evidence” rule.⁶³

If we were to judge the degree of expertness of the fact-finding body according to limitations placed upon the power of review, we should have to conclude that the jury is more expert than the trial judge sitting in an equity case, for in cases tried by the District Court without a jury, the Circuit Court of Appeals can review and reverse if the findings are “clearly erroneous.”⁶⁴ This involves a weighing of the evidence to a degree not permitted where the appeal is from the verdict of the jury.

Apparently, then, the statement of the Attorney General’s Committee⁶⁵ that enlargement of judicial review of the findings of administrative agencies “would destroy the values of adjudication of fact by experts or specialists in the field involved” may be taken *cum grano*.

Another theory which has been urged in opposition to judicial review of the findings of administrative agencies is that finality in the findings of administrative agencies is required for reasons of expedition in the adminis-

62. *Gunning v. Cooley*, 281 U. S. 90 (1930); *Galloway v. United States*, 319 U. S. 372 (1943).

63. *Final Report of Att’y Gen’s Committee*, *op. cit. supra* note 17 at 90, 210n; Stason, “Substantial Evidence” in *Administrative Law* (1941) 89 U. OF PA. L. REV. 1026, 1027, 1029-1030.

64. *District of Columbia v. Pace*, 320 U. S. 698, 701-702 (1944); Stern, *op. cit. supra* note 26 at 79-89.

65. Stern, *op. cit. supra* note 26 at 91-92.

trative process, *i.e.*, because "an ounce of action is worth a pound of argument"⁶⁶ or because there must be "administrative efficiency and flexibility."⁶⁷ But these reasons are almost comically irrelevant. It is of little use to compare an ounce of action with a pound of argument unless we know that we are talking about good action and bad argument. And the whole question is whether it is possible to know in a given case whether the action is good or the argument bad without invoking the judicial process. Also, it is difficult to perceive what administrative efficiency and flexibility have to do with determining whether or not rights have been adjudicated by administrative agencies on the basis of purported facts which are not actually facts at all.⁶⁸

All these reflections have been by way of inquiring whether there is anything in the statutory material or in the nature of the process itself which requires that the determinations of administrative bodies be given some special standing and respect. No account has so far been taken of the question whether and to what extent analysis of the statutory delegations to the various administrative agencies of the Government reveal that these agencies, whether because of personal qualifications, or because of the nature of the fields in which they work, can in any real sense be considered qualified to make determinations upon which special reliance should be placed.

What is Expertise?

To begin with, it is no stranger to the law. From early times the views of experts have been used in lawsuits to guide the finders of fact upon subjects requiring special knowledge. Physicians, chemists, engineers and the like have been permitted to express their opinions on ques-

66. Veto message on Logan-Walter Bill, Dec. 18, 1940 (1941) 27 A. B. A. J. 52, 53.

67. Dickinson, *Judicial Review of Administrative Determinations, A Summary and Evaluation* (1941) 25 MINN. L. REV. 588, 603.

68. BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN NEW YORK* (1942) 22-23 warns that policy cannot properly have anything to do with fact finding. Otherwise, there would seem to be something more than playfulness in the old quatrain:

"The proper skill of expertise
Is to arrange the premises
So that the most foregone conclusion
Will fit therein without confusion."

In point of fact, one of the significant differences between the administrative process and the judicial process is, as the Attorney General's Committee has pointed out (*op. cit. supra* note 17 at 1-3, 4) that the judicial process works, in the main, after the event, whereas the administrative process represents an effort to work before the event and for preventive purposes. This suggests that the expertise idea may be a working disguise for the truth that it is impossible in the nature of things to arrive, before the event, at any certainty about what the facts are going to be.

tions peculiar to their specialty and about which they are presumed to know more than the court or jury.⁶⁹

But before we can treat an expert as an expert we must be sure of two things: *First*, the subject matter as to which he expresses his opinion must be one with respect to which there is conceded to be a specialized body of knowledge which can be acquired only by study and training, and which is not possessed by the ordinary run of men; *Second*, the knowledge must be knowledge in a substantial sense. That is to say, there must be some reasonably objective standard of certainty. Absent this, there is, of course, no way in the world of knowing whether the expert has any idea what he is talking about.⁷⁰ A physician is taken on faith because it is known from experience that his judgments are susceptible of being tested and it is assumed in the given case that they have been tested and their validity indicated. An engineer is taken on faith because he deals with matters of physics, which is among the exact sciences. But no one takes on faith, except upon a frankly gambling basis, an asserted "marked expert" who professes to be able to predict security prices. The contrast between the market expert and the engineer is plain. The market expert has no reasonably objective standard of certainty.⁷¹

This distinction between fields which may properly be said to be the subject of expertness and fields not so subject can be perceived not only in respect of the problem of prognostication, but also in respect of the problem of judging the causes of things which have happened in the past, *i.e.*, of finding out what the facts are. The radio repair man can, if he is competent, usually tell what made the receiver squeal. But no one has yet told what caused the depression of the 1930's.

So that the expert, if he expects to have any special consideration accorded to his judgments, must be one who deals in a field which involves genuine knowledge and some approximation of certainty. Another qualification which the judgment of the expert must have is that it be addressed to a problem which is solvable within his own field.

69. 7 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1917-1918; Hand, *Historical and Practical Considerations Regarding Expert Testimony* (1901) 15 HARV. L. REV. 40.

70. Otherwise the importunities of the astrologers would be embarrassing.

71. Thus, Hand, *op. cit. supra* note 66 at 55 points out that "the expert is necessary and logical only to supply to the jury certain propositions of general applicability, or laws of nature, which are not the heritage of the ordinary man whom the jury, like the Greek chorus, heroically shadow forth." Since the only proposition of general applicability or law of nature about market movements or business conditions generally, is that they are utterly unpredictable and that the best that can be done about them is to make a fortunate guess, the only answer the Greek chorus could be expected to make to the proffered judgments of experts on these subjects would be "ὦμοι, ὦμοι!"

Thus, the physician is no expert when he advocates euthanasia. Nor is the engineer an expert on the question whether a tunnel between Staten Island and Long Island is desirable. No one doubts that the question involves some problems of engineering, but it cannot be answered without the solution of a host of problems about which the engineer knows no more than the ordinary citizen.

One result of the circumstance that few problems involving the adjustment of juridical rights can be solved within the field of any expert or group of experts is that the expert's opinion has always been considered one item of evidence to be taken into consideration by those whose duty it is to decide the facts upon the basis of all the problems involved. Phrased in another way, it has always been the right of the patient to discharge the doctor, either because his charge is too high or because the patient would prefer the illness to the particular remedy which the doctor proposes.⁷²

How Expert Are the Agencies?

To what extent can these basic considerations be said to apply to the administrative agencies of the Government? The question has not altogether gone without attention. Thus, Dickinson says:

"The second consideration which must be kept in mind in considering the view that rules of law should be developed by the administrative agencies themselves rather than by the courts is that there is a possibility of overvaluing, or at least overemphasizing, the element of expertness which administrative agencies are supposed to possess. It is not necessary to say too much concerning the fact that the responsible heads of these agencies are frequently political characters brought into the agency from some other occupation far from the field of its specialty, and so having no expertness whatever of their own to start with. This deficiency is no doubt to some extent remedied by the fact that at least up to a certain point the action of the agencies is guided by their permanent technical staffs. It is the expertness of these staff officials which may in a certain sense be misconceived because it is a different kind of expertness from what we mean by the expertness of the practicing physician in curing patients or the expertness of the machinist in building and repairing machines. When we say that a physician or a machinist is an expert, we mean that he is habitually engaged in doing himself the things in which his expertness consists. The expertness of the technicians employed by regulatory bodies is usually something very different. Very few staff employees of a public utility commission have ever been engaged in the operation of a railroad or a power company. They are not experts in doing the things which they are regulating.

72. That the development of expertise in the administrative process involves a basic transformation of the expert from a consultant to a master is implicit in Professor Frankfurter's explanation of the necessity for the administrative process (*supra* page 7).

They are experts as students or analysts, observing, but always from the outside and with a touch of unfamiliarity, the subject matter in which their expertness is supposed to consist, and this must inevitably be taken into account in evaluating the importance of that expertness and the degree of confidence to be reposed in it."⁷³

In a recent symposium on administrative law,⁷⁴ Professor Brown questioned the validity of the expertise formula as applied to the administrative agencies.⁷⁵ Dean Landis, a protagonist of the administrative process, replied to Professor Brown, citing the effort to establish public utility rate bases upon something other than spot reproduction cost as evidence of the necessity which called into play the expertness of administrative rate-making bodies.⁷⁶ This was indeed a curious illustration, since the other types of data which have grown in popularity in public utility rate-making involve sheer guesswork to a degree that would never be tolerated in an engineering estimate of reproduction cost.⁷⁷

However this may be, it is of even greater importance that some critical analysis be devoted to the workings of the principal administrative agencies of the United States so that we may get an idea of the extent to which they really may be said to be operating in specialized or technical fields which lend special weight to their judgments. Although this question is the main concern, it is not without interest that there are other genuine questions involved relating to the personal qualifications of the heads of the administrative agencies.

Qualifications of the Administrators

That they are, in the main, political appointees and that they operate in fields which are subject to intense political pressure is well known and has received critical attention.⁷⁸ But apart from political pressure, there is a real question whether the statutes furnish any real guaranty of expert treatment of the subjects entrusted to the various agencies. Thus,

73. Dickinson, *op. cit. supra* note 67, at 602; see also, Pound, *The Place of the Judiciary in Democratic Polity* (1941) 27 A. B. A. J. 133, 134.

74. (1939) 9 AM. LAW SCHOOL REV. 139-184.

75. *Id.* at 178-180. The reference is to Professor R. A. Brown of Washington University.

76. *Id.* at 181.

77. *Cf.*, 1 BONBRIGHT, VALUATION OF PROPERTY 151. Original cost may or may not be available as actual figures, and may or may not require some apportionment. But "prudent investment" and "capitalized earnings" bring into play all the fanciful lucubrations springing from the subjective preferences of the various schools.

78. See, e.g., *Report of Special Committee on Administrative Law* (1938) 63 REP. AM. BAR ASSOC., 331, 334-335; Hughes, C. J., in *St. Joseph's Stock Yards v. United States*, 298 U. S. 38, 52 (1936).

the Interstate Commerce Act⁷⁹ provides, in section 11, for a Commission of eleven members with terms of seven years. There are no qualifications specified for any Commissioner except that not more than six of them may be from the same political party. The Federal Trade Commission is composed of five members with terms of seven years, no more than three of whom may be from the same political party.⁸⁰ No other qualifications are specified. The Federal Communications Commission is composed of seven Commissioners, not more than four of whom may be from the same political party. The only qualification specified by the Act is a negative one, namely, that no commissioner may have anything to do with the communications business.⁸¹ The Securities and Exchange Commission is composed of five commissioners, with terms of five years, not more than three of whom can be from the same political party, and no other qualification is specified in the statute.⁸² The National Labor Relations Board is composed of three members, with terms of five years. The Act specifies no qualifications.⁸³

It is not contended even by the most ardent apologists for the administrative process that these commissioners or board members are, or ever become, really expert in the field in which the agency operates. The theory advanced is that the expertness is really to be found in the staff. Thus, Davidson,⁸⁴ states:

"The possibilities in the passage quoted in the margin from the second *Morgan* case⁸⁵ undoubtedly form the basis for the new procedure of the Federal Communications Commission, which has also been used in part by the National Labor Relations Board and by the Department of Agriculture. It is an attempt to devise an indigenous administrative procedure to take care of the need for consultation with the technical and expert staffs by the agency heads in formulating their proposed findings and proposed order. It is the essence of the expertise that technique and experience in a field can be used by the non-specialist agency heads to assist them in their final decision. Otherwise any points not covered by the record must be left out even though they

79. Act of Feb. 4, 1887, c. 104, 24 STAT. 379, 49 U. S. C. A. § 1 *et seq.* (1929).

80. Act of Sept. 26, 1914, c. 311, 38 STAT. 717, 15 U. S. C. A. § 41 (1941).

81. Act of June 19, 1934, c. 652, 48 STAT. 1066, 47 U. S. C. A. § 154(b) (Supp. 1945).

82. Act of June 6, 1934, c. 404, 48 STAT. 885, 15 U. S. C. A. § 78(d) (1941).

83. Act of July 5, 1935, c. 372, 49 STAT. 451, 29 U. S. C. A. § 153(a) (1942).

84. Davison, *Administrative Technique—The Report on Administrative Procedure* (1941) 41 COL. L. REV. 628, 638-639.

85. The passage referred to is from *Morgan v. United States*, 304 U. S. 1, 21-22 (1938). In substance, it points out that although the absence of an Examiner's report and recommendations might not be fatal to a proceeding in the Department of Agriculture if it appeared that the Secretary had made his own appraisal of the evidence and findings of fact, that rule could not save a proceeding in which the Secretary accepted and made his own the findings of his subordinates.

are generally understood by the specialist practitioners and members of the Commission's staff of specialists. The solution of a rehearing to admit some technical testimony known to everyone except the agency heads seems a needless waste of time and unnecessary delay. Yet the judicial analogy would require that every item not in the record should be put in by a rehearing before it can be considered. In the work of the Federal Communications Commission is found the technique of utilizing the expertise by having proposed findings and order prepared with *ex parte* technical help, but leaving the parties free to except and argue before a final order is made. In discussing judicial review of that Commission's orders, in the *Pottsville* case, the court had an opportunity to discuss the nature of the administrative process. It concluded that to the essentially different and unique nature of the administrative process, the judicial technique is not applicable."

How the technique here outlined is to be reconciled with the requirement that the head of the agency must appraise the evidence and make the determination,⁸⁶ Mr. Davidson does not explain.⁸⁷

How Specialized is the Subject Matter?

But all this is by way of introduction to the principal question, which is whether the subject matters entrusted to the various administrative

86. In the first Morgan case (298 U. S. 468, 481-482 (1936)) the Court cautioned that the weight attached by law to the findings of administrative agencies "rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusion which he deems it to justify." Also, despite the fact that assistants may be used, "the officer who makes the determinations must consider and appraise the evidence which justifies them."

87. Taking his analysis at full value, it would seem that what we are dealing with is an expert body without an expert head. The aberrations to be expected of such an oddity may account for some of the curious "expert" judgments which the courts have had to correct. See, e.g., *Gegiow v. Uhl*, 239 U. S. 3 (1915) where the Immigration Department felt that an immigrant should be excluded as "likely to become a public charge" because the labor market in the city of immediate destination was overstocked; *International Ry. Co. v. Davidson*, 257 U. S. 506 (1922), where the Secretary of the Treasury tried unsuccessfully to convince the Court that in the exercise of his informed discretion he was authorized to forbid, on Sundays and holidays, the entrance into the United States over international toll bridges spanning the Niagara River of any vehicle except a trolley car, and any personal baggage; *Campbell v. Galeno Chemical Co.*, 281 U. S. 599 (1930) where the Commissioner of Prohibition unsuccessfully maintained that he had determined that the use of whiskey in medicinal preparations "was susceptible to grave abuse" and that in the exercise of his expert judgment he had discretion to deny permits for such use unless the indispensability of the whiskey to the product could be demonstrated (a requirement not specified in the Act); *Wyman Gordon Co. v. N. L. R. B.*, 153 F. (2d) 480 (C. C. A. 7th, 1946) where the judgment of the agency was that persistent careless handling of airplane propeller blades during heat treatment was not a sufficient reason for discharging the careless employee because the interruption of war production caused by the carelessness was not "serious."

agencies of the Government are susceptible of the exercise of expert knowledge and judgment to the extent that the courts must consider this expertness a factor in determining how far they can go in examining the merits of administrative determinations. A review of all of the administrative agencies of the Government with this question in mind would enlarge this discussion beyond reasonable dimensions. But it can scarcely be doubted that a survey of five of the principal agencies, namely, the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission and the National Labor Relations Board, will yield a result fairly representative of all. These five are, with the exception of the temporary wartime agencies, probably the most in the public eye and not the least the objects of deference by the Supreme Court of the United States on the theory that they are expert bodies working in specialized fields.

The Interstate Commerce Commission

This agency administers not only the Interstate Commerce Act itself,⁸⁸ but also at least 35 other statutes in whole or in part.⁸⁹ A summary of the functions of the Interstate Commerce Commission covers almost six closely written pages in the United States Government Manual for 1945. These functions embrace the regulating not only of railroads, but also of motor carriers, water carriers and freight forwarders in such matters as the supervision of rates, prevention of undue preferences, establishment of through rates and joint rates, regulation of car service and pooling of services, supervision of accounts, records, issuance of securities and reorganizations, investigation of provisions relative to safety appliances, locomotive inspection and many others. It is not difficult to find among these activities a number with respect to which there can be no serious doubt that the Commission is genuinely engaged in a complicated and technical field which calls for specialized knowledge—in other words, in which it may properly be said to be acting as an expert. One example will suffice: The Safety Appliance Act⁹⁰ requires the Commission to investigate and report on the use and necessity of block-signal systems and appliances for the automatic control of railway trains.⁹¹ No one would be disposed to deny that when acting pursuant to that section the Commission is dealing with a highly technical subject

88. Act of Feb. 4, 1887, c. 104, 24 STAT. 379, 49 U. S. C. A. §§ 1-22 (1929).

89. *Monograph of Attorney General's Committee*, SEN. DOC. NO. 10, 77th Cong., 1st Sess., Part 11.

90. Act of March 2, 1893, c. 196, 27 STAT. 531, 45 U. S. C. A. §§ 1-46 (1943).

91. 34 STAT. 838, 45 U. S. C. A. § 35 (1943); 35 STAT. 325, 45 U. S. C. A. § 36 (1943).

and that its findings would have all the value that should be given to the findings of engineers upon an engineering question.

But the thing which strikes the eye upon reviewing the various activities of the Interstate Commerce Commission is that the matters with respect to which the Commission may properly be said to be expert are rarely the matters which give rise to controversies and call into operation the judicial process, thereby furnishing the occasion for the application by the courts of formulae based upon the supposed expertness of the administrative body.⁹²

This point is illustrated in the field of valuation. Here the areas of controversy are mostly not those in which anything approaching scientific accuracy is possible. For example, it is probably fair to say that in the experience of attorneys dealing with such matters, experts do not tend to vary greatly in their estimates of reproduction costs, if it is agreed what is to be reproduced.⁹³ The disputes have to do rather with such questions as what is to be reproduced—questions which are outside the field of the reproduction cost expert. Controversies also arise because of different political and economic views as to what bases of valuation are relevant or as to the weight to be accorded to various types of data. In rate making, the rate of return is likewise fixed, not upon any scientifically exact basis, but upon an estimate of what is "fair and reasonable."

It would seem to be the merest pretense to say that where the crux of the decision as to what a rate shall be is the Commission's view as to what evidence of valuation is important or what rate of return is fair and reasonable, the Commission is drawing upon any specialized or technical knowledge which puts it in a better position than the judiciary to reach a result in conformity with the statutory mandate. The same objection to the expertise formula applies in the case of the prevention of "undue" preferences and to the other criteria which Congress has established to guide the Commission in the administration of the various statutes committed to it. These criteria are set forth in the preamble to the Transportation Act of 1940.⁹⁴ Congress there declares that it is the national transportation policy to provide for "fair and impartial regulation" of transportation subject to the Act, "to promote safe, adequate,

92. We have seen (*supra* page 21) that in the *Standard Oil* case, Circuit Judge Hand mentioned the example of a finding by chemists as to a chemical reaction as an instance of the impotence of courts to judge the expert. But the purported analogy is unrealistic. The example of chemists determining that all life consists of chemical reactions would have been more to the point under discussion.

93. Cf. 1 BONBRIGHT, VALUATION OF PROPERTY 165-166.

94. Act of Sept. 18, 1940, c. 722, Title I, § 1; 54 STAT. 899; 49 U. S. C. A. § 1 (Supp. 1945).

economical and efficient service . . . sound economic conditions . . . reasonable charges . . . without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices. . . ." Here we leave science and technology far behind and approach an area in which things are whatever they are said to be. The standards are so close to being completely subjective that it is hard to see what special competence is required beyond what it takes to enable the agency to say what it likes or dislikes.

The futility of attempting to give weight to supposed expertness in determining whether the Commission has conformed to these argumentative standards in any given case is well illustrated by *Interstate Commerce Commission v. City of Jersey City*.⁹⁵ In 1938, the Commission had denied an application by the Hudson and Manhattan Railroad Company to raise the fare on its downtown line from New York to Jersey City to 10 cents. The denial was upon the ground that although the Company might be entitled to the increased revenue, it was the prognostication of the Commission, in the exercise of its specialized knowledge, that patronage would decrease. The Supreme Court held that the action of the Commission was justified.⁹⁶ In 1942, the Company filed a petition for a further hearing, alleging changed conditions and increased costs in support of the 10-cent fare on the downtown line. The Price Administrator opposed the increase, as he had authority to do under the Inflation Control Act of 1942.⁹⁷ The Commission, however, increased the downtown fare to 9 cents and thereafter to 10 cents or eleven trips for \$1. It dismissed the argument of the Price Administrator that the increase would be inflationary. Jersey City and the Price Administrator sought to have the Commission's order enjoined by the District Court. A three judge statutory court granted the injunction upon the grounds that the Commission had not granted a full hearing and had brushed aside too lightly the economic stabilization arguments of the Price Administrator. The Supreme Court reversed the District Court and upheld the Commission, calling its order "the product of expert judgment which carries a presumption of validity."⁹⁸

But was not the Price Administrator also an expert? And what are we to say when we are faced with the dilemma of choosing between two experts, each of whom has made a judgment into which, because of his expertness, the court ought not to inquire?

If the expertise formula is to be based, as it apparently is, upon the

95. 322 U. S. 503 (1944)

96. 313 U. S. 98 (1941).

97. Act of Jan. 30, 1942, c. 26, 56 STAT. 23, 50 U. S. C. A. App. § 901 *et seq.* (1944).

98. 322 U. S. 503 at 512 (1944).

hypothesis that the administrative agency is a specialized body having abilities in the field superior to those of the court, the formula is obviously of no use where two administrative agencies have made opposing judgments about the same question. The question to be decided by the court covers two fields—the field within the competence of the Interstate Commerce Commission and the field within the competence of the Price Administrator. To attempt to give to the views of either of them any special weight in the solution of such a question when they are in disagreement reduces the formula to absurdity.

And this is true not only in situations where the expertness of one governmental agency clashes with the expertness of another. It is true in any case in which there is any conflict of expert views whatever. The Commission must then be not only more expert than the court but also more expert than any of the contending experts if its expertise is to be of any value in resolving the conflict of expert opinion.⁹⁹

The Federal Trade Commission

This agency administers the Federal Trade Commission Act¹⁰⁰ and Sections 2, 3, 7 and 8 of the Clayton Act.¹⁰¹

Section 5 of the Federal Trade Commission Act makes unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." The Clayton Act provisions administered by the Federal Trade Commission prohibit price discriminations which affect competition, contracts having the effect of substantially lessening competition or tending to create a monopoly, and acquisitions of stock tending to lessen competition, restrain commerce or create a monopoly.

It is immediately obvious upon even a cursory inspection of these statutory provisions that if the Federal Trade Commission is to be considered an expert in many of the fields in which it operates, we must be using the term in a radically different sense from any in which it has ever been understood before. In order to develop a specialized body of knowledge which would be helpful in determining, with respect to any conceivable method of competition in interstate commerce, whether that method is or is not "unfair," or in determining, with respect to any con-

99. "One thing is certain, they will do no better with the so-called testimony of experts than without, except where it is unanimous. If the jury must decide between such they are as badly off as if they had none to help." Hand, *Historical and Practical Considerations Regarding Expert Testimony* (1901) 15 HARV. L. REV. 40, 56.

100. Act of Sept. 26, 1914, c. 311, 38 STAT. 717, as amended by 52 STAT. 111 (1938), 15 U. S. C. A. § 41 *et seq.* (1938).

101. Act of Oct. 15, 1914, c. 323, 38 STAT. 730, as amended by 49 STAT. 1526 (1936), 15 U. S. C. A. §§ 13, 14, 18, 19 (1941).

ceivable act or practice in interstate commerce, whether that act or practice is or is not "unfair or deceptive," the Commission would indeed have to have capacities and qualifications which have not so far been found in any human individual or institution. What we approach here is the concept that there is such a thing as a specialist in all things knowable.

This is not to suggest that the Commission is never confronted with a problem of a technical nature and properly the subject of expert opinion. This may well be so, as in the case of a claimed false advertisement about a medical product. On such a question, the Commission might conceivably have a special competence if it were not for the fact that its field of activity is so broad as to make extravagant the suggestion that it could ever devote enough attention to that specific type of problem to become an expert in the field.

But the point is that when Congress used the phrase "unfair methods of competition" and "unfair or deceptive acts or practices" it was obviously talking laymen's language.¹⁰² And this, in fact, is reasonably clear from the cases which have come before the Supreme Court involving the Federal Trade Commission. Thus, in *Federal Trade Comm. v. Keppel & Bro.*,¹⁰³ the Court decided, upon the ostensible basis that the Federal Trade Commission was particularly competent to say so, that a practice of concealing coins in certain packages of candy was an unfair method of competition since it encouraged the young to gamble. And in *Federal Trade Commission v. Standard Education Society*,¹⁰⁴ the Supreme Court

102. Also, so far as the Clayton Act is concerned, the statutory criteria with which the Commission works are also those with which the courts and juries work in actions involving anti-trust law violations.

103. 291 U. S. 304 (1934).

104. 302 U. S. 112 (1937); and note also the recent decision in *Jacob Siegel v. Federal Trade Commission*, 14 U. S. LAW WEEK 4268 (U. S. 1946). There the Supreme Court sent back to the Commission a case in which it had ordered a manufacturer to cease and desist from using the name of "Alpacuna" to designate coats containing alpaca but no vicuna. The reason for the remand was that although the Commission "is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed" (*Id.* at 4269) and hence is peculiarly qualified to solve the problem whether any remedy short of prohibition of the use of the name "Alpacuna" would suffice "to eliminate the deception which they [the Commission] found lurking in the word" (*Id.* at 4269), the Commission, unfortunately, had not, in the particular case, been sufficiently expert to realize that the problem existed and had to be solved: So the case went back with the gentle admonition that the Commission was "entitled" to appraise the problem in the light, among other things, of "its generalized experience" (*Id.* at 4269). The case suggests a caveat to the rule that administrative agencies have special competence to say what remedies will best effectuate the policy of the particular Act being administered. (See in addition to the *Siegel* case, *Franks Bros. Co. v. N. L. R. B.*, 321 U. S. 702, 703-704 (1944). It is probably true that in passing on such a question admin-

expressed the view that the Federal Trade Commission was in a position, by reason of its special competence in the field, to say that the practice of selling encyclopedias by misrepresenting that the purchaser was getting a discount was unfair and deceptive.

The Federal Communications Commission

The functions of the Federal Communications Commission with respect to radio and wire communication under the Communications Act of 1934¹⁰⁵ are analogous to those of the Interstate Commerce Commission in the field of transportation. In addition, however, the Communications Commission has licensing authority over all radio transmitting apparatus and operators, and control over non-commercial transmission.¹⁰⁶

The standard which the statute requires the Communications Commission to follow is the "public interest, convenience or necessity."¹⁰⁷ One would have supposed that the best judge of the "public interest, convenience, or necessity" is the public, or at least the public's representatives in Congress. But this, we are told, is not so. The public has to be informed by an expert body what its interest, convenience and necessity are and there is, to all practical effect, no appeal from the expert's decision on the question. For the Supreme Court has said in *Federal Communications Commission v. Pottsville Broadcasting Co.*,¹⁰⁸ that

"In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. . . ."

The same admonition was repeated in *National Broadcasting Co. v.*

istrative agencies may develop genuine expertise. But as the *Siegel* case shows, the agencies have a way of ignoring the necessity of applying their own special knowledge (and *see also* *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177 (1941)). Also, the subjectivity of the criteria of judgment and the element of prophecy involved are such that it becomes particularly difficult to distinguish expertise from likes and dislikes in these situations. The second *Chenery* case (*see note 122 infra*) presents an analogous problem.

105. Act of June 19, 1934, c. 652, 48 STAT. 1064, 47 U. S. C. A. § 151 *et seq.* (Supp. 1945).

106. *Monograph of Attorney General's Committee on Federal Communications Commission*, SEN. DOC. 186, 76th Cong., 3d Sess., part 3, 1-5; UNITED STATES GOVERNMENT MANUAL 1945, 453-458.

107. *National Broadcasting Co., Inc. v. United States*, 319 U. S. 190, 194 (1943).

108. 309 U. S. 134, 137-138 (1940).

United States,¹⁰⁹ where the question was whether the Federal Communications Commission might validly provide by regulation that no license should be granted to a standard broadcast station having any agreement with a network organization under which the station was prevented from broadcasting the programs of another network organization, and that other previous practices of the networks be modified. The case is revealing for the manner in which it sanctions the concept of expertise as applied to the field of controversial political and economic questions. Clearly, there are highly technical matters connected with wire and radio communication as to which the Commission may well be considered as having special competence. Indeed, it is difficult to imagine a subject which, in its technical aspects, is more difficult and complicated. Thus, when the Commission determines which frequencies are most feasible for the operation of frequency modulated broadcast transmission, we may well concede it a special technical competence, despite the fact that the inventor of frequency modulation, and the greatest expert in the field, claims that the Commission manifests no competence whatever in handling this technical problem.¹¹⁰ But the question of network organization is not a problem to be determined upon scientific principles peculiar to radio communication. It is an economic, and to a degree, a political matter in which the criterion of the public interest, convenience or necessity can be made to mean whatever the agency or the court wishes it to mean. What the Federal Communications Commission understands it to mean is indicated by the recent news dispatch¹¹¹ announcing that the Commission proposes to regulate the content of radio programs, despite the fact that the Communications Act itself specifically prohibits the Commission from exercising any censorship function.¹¹²

This is an apt instance of the extension of a discretion incautiously sanctioned. The discretion itself is not properly predicated of any special competence in the field of radio communication, since it proceeds upon views as to the interrelation of radio communication and other fields as to which the Communications Commission cannot claim to be in any degree expert.

109. 319 U. S. 190, 224 (1943).

110. For details of this debate see the *N. Y. Times*, Nov. 9, 1945, p. 20; Nov. 10, 1945, p. 8; Nov. 13, 1945, p. 23; Nov. 18, 1945, Part II, p. 5; Nov. 23, 1945, p. 22; particularly the letter of Major Armstrong, Nov. 23, 1945, p. 22; see also *JOURNAL OF FREQUENCY MODULATION*, March, 1946, p. 48 and *F. M. AND TELEVISION*, Feb., 1946, pp. 4, 78.

111. *N. Y. Times*, March 8, 1946, p. 23.

112. Act of June 19, 1934, c. 652, 48 STAT. 1091, 47 U. S. C. A. § 326 (Supp. 1945).

The Securities and Exchange Commission

This agency administers the Securities Act of 1933,¹¹³ the Securities Exchange Act of 1934¹¹⁴ and the Public Utility Holding Company Act of 1935,¹¹⁵ in addition to having certain functions in connection with corporate reorganizations and corporate trust indentures.¹¹⁶

With respect to the issuance of securities, the functions of the Securities and Exchange Commission are not unlike those exercised by the Federal Trade Commission in the field of business practices generally. As to this, the Securities and Exchange Commission is probably more expert than the Federal Trade Commission, since its field is limited. It may be that the Securities and Exchange Commission is more competent than a jury or a trial judge to determine whether in a given case sufficient and accurate information has been furnished about a security or whether an Exchange practice involves manipulation, misrepresentation or some other fraudulent or deceptive device.¹¹⁷

As in the case of other agencies, however, one is struck by the circumstance that the actions of the Commission which give rise to controversies calling for judicial decisions are in fields in which it is difficult to find that the Commission can make any claim to special competence justifying the action which it took. *Securities and Exchange Commission v. Chenery Corporation*,¹¹⁸ is of interest in this connection.¹¹⁹ Acting under the Public Utility Holding Company Act of 1935,¹²⁰ the Commission approved a plan of reorganization of a registered holding company whereby

113. Act of May 27, 1933, c. 38, 48 STAT. 74, 15 U. S. C. A. § 77(a) *et seq.* (1941).

114. Act of June 6, 1934, c. 404, 48 STAT. 881, 15 U. S. C. A. § 78(a) *et seq.* (1941).

115. Act of Aug. 26, 1935, c. 687, 49 STAT. 838, 15 U. S. C. A. § 79 *et seq.* (1941).

116. *Monograph of Attorney General's Committee*, SEN. DOC. No. 10, 77th Cong., 1st Sess., part 13; UNITED STATES GOVERNMENT MANUAL 1945, pp. 522-527.

117. But if the agency members gain special competence in this field, what happens to it when they go on the bench? Do Justice Douglas and Circuit Judge Frank endow their respective courts with any expertise *vis-a-vis* the Commission?

118. 318 U. S. 80 (1943).

119. So is *Jones v. Securities and Exchange Commission*, 298 U. S. 1 (1936), where it was held that the Commission could not rationalize a claimed discretion to refuse to permit the withdrawal of registration statements which were about to be subject to stop order proceedings. The Commission's theory was that "an unlimited privilege of withdrawal would have the effect of allowing registrants whose statements are defective to withdraw before a stop order was issued and then to submit another statement with slight changes" (*Id.* at 22). Dean Landis criticizes the decision (*Administrative Policies and the Courts* (1938) 47 YALE L. J. 519, 526-529) on the ground that the Commission was specially competent to say that the withdrawal would be "inadequate" despite the fact that after the withdrawal the statement could not be the basis of any sale of securities, the only concern of the Commission under the Act.

120. Act of Aug. 26, 1935, c. 687, 49 STAT. 838, 15 U. S. C. A. § 79 *et seq.* (1941).

preferred stock which had been acquired by officers and directors of the company while plans for its reorganization were before the Commission would not be converted into stock of the reorganized company, as would all the other preferred stock, but would be surrendered at cost plus interest. The Commission explicitly based its order on principles of equity judicially established. The Supreme Court, 5 to 3, held the Commission's order invalid. Both Mr. Justice Frankfurter, writing for the majority, and Mr. Justice Black, writing for the minority, held that the Commission might, in passing upon matters before it, employ "the experience gained by it in effectuating the legislative policy."¹²¹ The point upon which the majority and the minority broke was whether the Commission had in fact utilized that experience.

In other words, all the Justices who participated in the case felt that the determination whether the terms of the issuance of the stock of the new company were "fair and equitable" or "detrimental to the interests of investors" within Section 7 of the Public Utility Holding Company Act was a matter within the field of the special competence of the Securities and Exchange Commission. Concededly, however, the facts of the case were not enough to warrant the action of the Commission upon principles established by courts of equity. This for the reason that the purchase of the stock had been at a fair price in the open market and after a full disclosure. Nevertheless, the Securities and Exchange Commission might, because of its experience gained in effectuating the legislative policy, hold that such a purchase was unfair and inequitable and detrimental to the interests of investors. Of this, it is utterly impossible to say anything except that the Commission, in making any such pronouncement, would be inventing principles, not finding facts. It would be operating far from any field in which technical knowledge is brought to bear for the purpose of discovering what exists or may be expected to happen. It would be in the area of subjective judgment in which, when we say that a thing is unfair, what we really mean is that the Commission does not like it.¹²²

121. 318 U. S. 80 at 89, 96 (1943).

122. The Commission was not slow to take the Court's hint. On reconsideration, it adhered to its original determination. The Court of Appeals of the District of Columbia has disapproved the Commission's decision (*Chenery Corp. et al. v. Securities and Exchange Commission*, — F. (2d) — (App. D. C. 1946) C. C. H. Fed. Sec. Serv. p. 90,839. The Court pointed out: "The Commission's present view in no substantial respect differs from its original view except that then the Commission grounded its decision 'on principles of equity derived from judicial decisions,' whereas now it attempts to sustain its position on what it calls its special experience in administering the legislative policy of the Act." (*Id.* at 90,841). After explaining how the Commission rationalized its adherence to its earlier view the Court concluded: "In practical effect, therefore, the Commission now insists

The National Labor Relations Board

This Board is charged by the National Labor Relations Act with the two functions of investigating questions of representation for collective bargaining of employees within the Act, and the preventing of "any unfair labor practice" within the terms of the Act.¹²³

In considering the trustworthiness of the expertise formula as applied to the Labor Board, it would probably be sufficient to refer to *Republic Aviation Corp. v. N. L. R. B.*¹²⁴ The Labor Board had outlawed company rules against solicitation of union memberships on company property outside of working hours and against distribution of union literature on company parking lots outside of working hours. The Court, declaring that the Board had weighed conflicting evidence and made a finding that the rules constituted unfair labor practices in that they were an unreasonable restriction upon the collective bargaining rights of employees, solemnly bowed to the Board's expertise on the ground that Congress intended, in such cases, "to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration."¹²⁵ Yet it seems clear that all that actually happened was that the Board expressed a purely subjective preference for abolishing the company rules as an undesirable restriction on the group whose right "to organize for mutual aid without employer interference . . . is the principle of labor relations which the Board is to foster."¹²⁶

Since, however, this discussion began with the decision of the Circuit Court of Appeals for the Second Circuit in *N. L. R. B. v. Standard Oil Co.*,¹²⁷ it is not inappropriate to revert to that decision for some detailed consideration of the validity of the claimed expertise of the Labor Board. The Court said in the *Standard Oil* case that what the Board had decided was "that in November, 1941, four and a half years after the 'Association' was formed, and at a time when there can be no doubt that a very great majority of the employees still adhered to it, their adherence was

upon doing precisely what the Supreme Court said it could not do; that is to say, in applying to this specific case a standard which has never been promulgated, either by the Commission in its regulations or by legislative Act, and which the Commission says cannot fairly be generally applied." (*Id.* at 90,842).

123. Act of July 5, 1935, c. 372, 49 STAT. 449, 29 U. S. C. A. §§ 151 *et seq.*, 159, 160 (1942); *Monograph of Attorney General's Committee*, SEN. DOC. No. 10, 77th Cong., 1st Sess., part 5; UNITED STATES GOVERNMENT MANUAL 1945, 510, 513.

124. 324 U. S. 793 (1945).

125. *Id.* at 800.

126. *Id.* at 798.

127. 138 F. (2d) 885 (C. C. A. 2d, 1943), see *supra* pages 19-20.

a consequence of some carry-over of the respondents' earlier favor of the 'Plan,' and its well known preference for it over an alliance with any national union."¹²⁸ The determination of this question was, according to the Court, a matter calling for the peculiar competence of the Labor Board since it dealt with "the question of how deeply an employer's relations with its employees will overbear their will, and how long that influence will last."¹²⁹ The determination of this question, the Court tells us, is analogous to determination by chemists as to the chemical reaction between a number of elements. "Labor disputes," the Court declares, "might have been considered as demanding no such specialized knowledge for their solution."¹³⁰ Yet relations between employer and employee "appear to fall into more or less uniform models or patterns, which put those well skilled in the subject at an advantage which no bench of judges can hope to rival."¹³¹

What we learn here is that the Labor Board has some special competence to determine what was in the minds of a body of employees in November 1941, when the only evidence of such a state of mind is evidence that the employer favored a certain labor organization in 1937, and that this favor presumably influenced the employees who were in the plant in 1937.

If this is anything other than sheer clairvoyance, it must be because the Labor Board had some opportunity peculiar to itself to secure some data on which the question could be answered. To determine whether it did or not, we turn to the Board's decision.¹³² The opinion contains a section called "Concluding Findings"¹³³ in which it appears that in the Board's view the employees,

"conditioned by 19 years of denial of their right to self-organization, could reasonably have assumed [in 1937] that the respondents favored the Associations as they had favored the Plan. 'Timorous habit' firmly moulded by 19 years of domination consequently may well have dictated the employees' choice of the Associations. It is the circumstance of clear connection between the Plan and the Associations in the absence of restored neutrality that is most per-

128. *Id.* at 887.

129. *Ibid.*

130. *Ibid.* The overtones in the phrase "might have been considered as demanding" like those of the phrase "at least it may be thought to be," used on the same page of the opinion with reference to the question whether an employer's motives can be competently judged by laymen, are difficult to catch. Considered by whom? The suggestion of sheer subjectivity seems to permeate this whole theory.

131. *Id.* at 888.

132. *Matter of Standard Oil Company*, 43 N. L. R. B. 12 (1942).

133. *Id.* at 56-60.

suasive in the case. The coincidence of these factors infects the ostensibly new organization with the 'virus of control.'"¹³⁴

One who searches for some indication as to how the Board knew what the employees might have assumed in 1937, and what factors "may well have dictated" their choice of a labor organization at that time, and how it is to be inferred that the state of mind of the employees in 1937 was also the state of mind of employees in 1941, learns from the Board's opinion of no data other than earlier decisions by the Board itself establishing the same principles *a priori* as rules of presumption or permissible conclusions. There is no indication that the Board or its technical staff ever investigated the mental operations of these or any other employees or had any data whatever except its own rules of decision as the basis for the conclusion which the Circuit Court of Appeals so reverently treats as the product of special competence in the field.

Indeed, we learn from a later decision, *Donnelly Garment Co. v. N. L. R. B.*,¹³⁵ that the Board has resisted the idea of taking any evidence as to what the state of mind of the employees is in such a situation, despite an earlier direction by the Circuit Court of Appeals that such evidence should be taken.¹³⁶ The Board in the *Donnelly* case took the position that it preferred to base its conclusion upon what it called "our experience in administration of the Act"¹³⁷ without furnishing any guide (other than its earlier decisions to the same effect) as to what that experience was or how it furnished a basis for the conclusion reached. In other words, the theory seems to be that the special competence of expert administrative agencies can be vindicated only by accepting their findings and declarations of policy, not only without independent investigation, but also without requiring that they even be rationalized.

Expertise in the Index

It is this aspect of rationality which is really the crux of the matter. An expert is treated specifically as such only to the extent that his findings and recommendations are taken on faith, *i.e.*, upon the ground that he possesses superior knowledge, and that it is not competent for the layman, having once satisfied himself that the expert sounds like an expert, to make any independent determination on the subject. The decision of the Circuit Court of Appeals in the *Standard Oil* case certainly purports to accept this theory wholeheartedly to the extent of

134. *Id.* at 57-58. .

135. 151 F. (2d) 854 (C. C. A. 8th, 1945).

136. *Donnelly Garment Co. v. N. L. R. B.*, 123 F. (2d) 215 (C. C. A. 8th, 1941).

137. 5 N. L. R. B. 241, 242 (1943). And note *Chenery Corp. v. Securities and Exchange Commission*, — F. (2d) (App. D. C. 1946); cited note 122 *supra*.

declining to go into the question of the validity of the Board's conclusion in that case. The curious thing is that upon close analysis of what the Court actually did in the *Standard Oil* case, as distinguished from what it said (and this is true of many other cases, as will be seen presently), it may be perceived that the stultifying character of the expertise formula has actually prevented most courts from withholding their own appraisal of the propriety of the actions of the administrative agencies, however firmly they may announce that they propose to abdicate the judicial function in such cases. Observe that Judge Hand in the *Standard Oil* case stated that the question which "for all practical purposes [is] not open to us at all" was whether the Board was correct in concluding that the adherence of the employees to the Association in November, 1941, was a consequence of some carry-over of the Company's favor of the Plan in 1937. Actually, this is not what the Board concluded. What the Board said was that "timorous habit" after nineteen years of domination "*may well have dictated*"¹³⁸ the employees' vote for the Association in 1937. All this amounts to is a determination that such subservience on the part of the employee possibly existed, not that it actually did exist. When the Court said that there was "substantial evidence" to support the Board's conclusion, the Court was, in point of actual fact, saying precisely what the Board had said, namely, that the existence of such subservience was a possible conclusion on the facts presented. So that, in reality, the case was not decided without an independent determination by the Court of the very question upon which the Board had passed. In other words, the purported distinction made by the Court between an examination of the record for the purpose of determining whether there was "substantial evidence" to support the Board's conclusion, and an examination of the record for the purpose of determining whether the Board was right or wrong, is a mere verbalism.¹³⁹

Nor is this actual identity between the two mental operations on the part of the court confined to the kind of situation presented in the *Standard Oil* case. The same thing happens in decisions as to the actions

138. Emphasis not in original.

139. There may, of course, be cases in which the distinction is real. Cases, for example, of conflicting witnesses, which do not bring the expertise formula into play at all. Or cases in which the Court actually finds what the Court in the *Standard Oil* case said it found, *viz.*, that the agency could be either right or wrong in result, but had substantial evidence to support the result it reached (see cases cited in *Dobson v. Commissioner*, 320 U. S. 489, 501 (1943)). But even in that kind of a case, it is the Court, not the agency, which finally says that the agency could be right. And the process of deciding whether the agency could be right requires the Court to make as much of an independent appraisal of the evidence as if it were called on to decide whether the agency actually was right.

of administrative agencies in the field of rate making. The Supreme Court has declared¹⁴⁰ that the actual accuracy of the decision of a rate-making body is not subject to review, the only justiciable question being whether the rate established is confiscatory. The suggestion here is that there may be an area of agency action within which the agency will be permitted to act whether its determination is right or wrong, the only function of the court being to determine whether the agency has gone outside of the area—*i.e.*, into the field where the rate which it has established becomes confiscatory. (We need not here stop to analyze the possibility adverted to by Chief Justice Stone in his dissenting opinion in *Colorado Interstate Co. v. Federal Power Commission*,¹⁴¹ that utility regulation may result in a permissible diminution of property values and income “provided the regulation does not so exceed constitutional limitations as to be ‘confiscatory’ ”—as if it were necessary to get some distance beyond the constitutional boundaries before there could be constitutional objections.) But there is actually no middle ground in the field of rate making between a rate which is right and a rate which is confiscatory. In *Ohio Valley Water Company v. Ben Avon Borough*,¹⁴² the line was drawn between a “reasonable” rate which is, by hypothesis, synonymous with a correct rate, and an “unreasonable” rate which is synonymous with a confiscatory rate.

The doctrine established by the *Ben Avon* case that, in view of the due process question involved, the Court will review the facts where the question of a confiscatory rate is presented, is really not as peculiar to that field as one might suppose on first impression. Even in a case where there is some middle ground between the right conclusion (*i.e.*, the conclusion which the court would reach) and an inadmissible conclusion, and the court protests that it will go no further than to say that the agency has not wandered out of the middle ground,¹⁴³ the facts have certainly been reviewed whether the court admits it or not. Unless they are reviewed there is no way of telling whether the agency has kept to the middle ground or not. And a strong case could probably be made out for the proposition that the mental operation involved in determining whether the agency is in the middle ground involves a measurement of the distance between the right conclusion and the inadmissible conclusion—hence a determination by the court where the right conclusion lies. But the important point is that the decision whether the expert has kept to the reservation is not made by the expert but by the court.

140. *E.g.*, *Federal Power Commission v. Pipe Line Co.*, 315 U. S. 575 (1942).

141. 324 U. S. 581, 625 (1945).

142. 253 U. S. 287 (1920).

143. *Cf.* *Dobson v. Commissioner*, 320 U. S. 489, 501 (1943); see note 119 *supra*.

The difficulty of rationalizing any real difference between a right conclusion and a permissible conclusion is illustrated by *Federal Power Commission v. Hope Natural Gas Co.*¹⁴⁴ There the decision was that if the Power Commission reached a result which was reasonable, it was not within the competence of the Court to discover or pass upon the grounds upon which the Commission reached its result. Thus the Court said:

"If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end."¹⁴⁵

This is deceptively simple as a matter of words. When it comes, however, to an investigation of mental processes it is at once obvious that there is no way of finding out whether the result in a rate case is just and reasonable unless we appraise the data on which it was arrived at. This was well brought out in the dissenting opinion of Mr. Justice Jackson:

"The Court sustains this order as reasonable, but what makes it so or what could possibly make it otherwise, I cannot learn."¹⁴⁶

Mr. Justice Frankfurter had a similar difficulty, saying:

"It will not do to say that it must all be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment."¹⁴⁷

In saying that "a rational process implies expressed reasons for judgment," Mr. Justice Frankfurter was propounding a gospel truth. He might have added that a rational result is, by definition, a result arrived at by a rational process. Yet the majority opinion manifests a sounder instinct as to the effect of calling expertise a rational process in this sense. Rational it may be, but the whole point of it is that it is according to an order of reason beyond the competence of ordinary men like judges. If the expert must submit his reasons to the appraisal of the non-expert, there is little advantage in having him at all, since the non-expert controls. There is obviously a dilemma here. The majority embraces expertise and, in effect, abandons reason. The minority embraces reason and, in effect, abandons expertise.

Other doctrines which have actually been applied by the Supreme Court are at variance with the assumption of the expertness of adminis-

144. 320 U. S. 591 (1944).

145. *Id.* at 602.

146. *Id.* at 645-646.

147. *Id.* at 627.

trative agencies. It was long ago established that the Interstate Commerce Commission must submit, not only its conclusions, but also its findings, and that in the absence of sufficient findings its order will not be permitted to stand.¹⁴⁸ The same rule has been applied to the Securities and Exchange Commission,¹⁴⁹ as already indicated, and to the National Labor Relations Board.¹⁵⁰ But there is, of course, no conceivable purpose to be served by requiring an expert to submit his findings and to insist that the findings must support his conclusion unless it is for the purpose of reserving the right to question his judgment—*i.e.*, to decline to treat him as an expert.

That the Supreme Court does not actually hesitate to disagree with administrative agencies where their determinations do not meet the Court's approval is evident from a review of the decisions of the last few years. Thus, determinations by the Wage and Hour Administrator have been overturned by the Supreme Court without receiving any of the respect which would ordinarily be accorded to the findings of an expert.¹⁵¹

In the 1943 term of the Supreme Court the Government lost 14 cases involving dissenting opinions. Four of these cases involved federal regulation and three of them¹⁵² involved the Interstate Commerce Commission.¹⁵³ In the 1944 term actions of federal regulating agencies were at issue in 22 of the non-unanimous decisions studied by Professor Pritchett.¹⁵⁴ Six of these cases involved the Interstate Commerce Commission, and the Commission was overruled in three of these. According to Professor Pritchett:

“The Interstate Commerce Commission cases constitute an exception to the rule in administrative regulation cases. That agency has encountered more opposition from the Court than the other federal regulatory agencies have experienced, and the attitudes of the individual justices toward the I.C.C. are almost the exact opposite of their reactions toward the other agencies.

148. *Florida v. United States*, 282 U. S. 194 (1931); *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454 (1935); *United States v. Carolina Carriers Corp.*, 315 U. S. 475 (1942); *Yonkers v. United States*, 320 U. S. 685 (1944); *Eastern Central Association v. United States*, 321 U. S. 194 (1944).

149. *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80 (1943).

150. As in *Phelps-Dodge Corp. v. N. L. R. B.*, 313 U. S. 177 (1941) and *N. L. R. B. v. Virginia Electric Light & Power Co.*, 314 U. S. 469 (1941).

151. *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944); *Jewell Ridge Corp. v. Local No. 6167*, 325 U. S. 161, 169 (1945).

152. *Yonkers v. United States*, 320 U. S. 685 (1944); *Thomson v. United States*, 321 U. S. 19 (1944) and *Eastern Central Association v. United States*, 321 U. S. 194 (1944).

153. Pritchett, *Dissent on the Supreme Court* (1945) 39 AM. POL. SCI. REV. 47, 50.

154. Pritchett, *The Divided Supreme Court* (1945) 44 MICH. L. REV. 427.

Three of the four left wing justices voted against the I.C.C. oftener than they voted for it, whereas the other five justices were predominantly favorable to the I.C.C., Frankfurter and Stone supporting it in every one of the six cases. The explanation of this special situation is that the I.C.C. has become suspect by the liberals on the Court as tending to protect the entrenched interests of the railroads as challenged by their truck competitors and the public generally."¹⁵⁵

The National Labor Relations Board, on the other hand, receives more favorable treatment from the Supreme Court than the other administrative agencies, particularly the Interstate Commerce Commission.¹⁵⁶

It is a curious commentary upon the genuineness of the expertise formula that the one field which can most properly be called an expert and scientific field—the field of patents—is the field in which the courts do not hesitate to embark upon the most esoteric and complicated scientific investigations despite the fact that the expert judgment of the officials of the Patent Office is concededly entitled to weight as a determination in favor of the validity of the patent.¹⁵⁷

Some of the Implications

So much for a critical examination of the question how far the agencies may claim the respect which is due to expert technicians, and of the question of the extent to which the courts actually do extend to them such deference. Another, and equally important, question remains. If the theory be accepted at face value—and there is unquestionably an articulate and energetic school in favor of such acceptance¹⁵⁸—what are the implications? How may we expect the present doctrines of judicial review to be affected? Are there any observable indications of broader effects on theories of jurisprudence?

For example, to what extent is it likely that the concept of expertise will be applied so as to permit the administrative agency not only to be accorded finality within its field but also to determine what its own field is and to enlarge it where that appears to it desirable? We have come some distance along this road already.¹⁵⁹ In *N. L. R. B. v. Hearst Pub-*

155. *Id.* at 436; cf. Brown. *Fact and Law in Judicial Review* (1943) 56 HARV. L. REV. 899, 924-925.

156. Dodd, *Supreme Court and Labor* (1945) 58 HARV. L. REV. 1018, 1067-1068.

157. *Crosley Corp. v. Westinghouse E. & M. Co.*, 152 F. (2d) 895, 904 (C. C. A. 3d, 1945); *J. A. Mohr & Son v. Alliance Securities Co.*, 14 F. (2d) 799 (C. C. A. 9th, 1926).

158. See *supra* pages 23-24.

159. "When a tribunal is created to perform certain governmental functions in accordance with established policies and is authorized to act under stipulated conditions, the absolute existence of facts indicating the presence of such conditions is immaterial so far

lications,¹⁶⁰ the Court left it to the Labor Board to determine whether certain persons were "employees" within the meaning of the Act and thus subject to the Board's jurisdiction. Of course, the Board is, by hypothesis, to be treated as an expert only if it is assumed to be acting within its field. There is therefore some difficulty in seeing how it can be allowed to establish itself as an expert through a definition of the term "employee" in such a way as to bring the case within its jurisdiction, at the same time assuming that it has jurisdiction in order to attribute to itself the special competence which is necessary to give weight to its definition of the term. Yet that is precisely what it was permitted to do. The Court said that the task of defining the term "has been assigned primarily to the agency created by Congress to administer the Act. . . . Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board."¹⁶¹ The determination, moreover, was treated by the Court as a determination of fact.¹⁶²

It is not to the present purpose to become embroiled in the heated academic controversy over the question whether a determination that a given situation comes within a statutory definition is a question of fact, or a question of law, or a mixed question of law and fact.¹⁶³ It would seem to be obvious, that it is really not one but two questions, each of which may be of varying degrees of difficulty. To the extent that the determination has to do with the existence or non-existence of something in the physical world (*e.g.*, in the *Hearst* case, under what conditions the newsboys worked and what they did) it is a question of fact. The evidence about it may or may not be in dispute and there may or may not be differences of opinion about inferences of fact to be drawn from the evidentiary facts. The question, nevertheless, is still one of fact. But when that question has been determined, there is still a question left, namely, whether, in using a certain term in the statute (*e.g.*, in the *Hearst* case the term "employee") Congress expressed an intention

as the authority of that agency is concerned. The validity of administrative action depends upon the facts as found by the adjudicating agency in a legally conducted proceeding for that purpose." Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577, 594.

160. 322 U. S. 111 (1944), and see Note (1944) 57 HARV. L. REV. 1112.

161. 322 U. S. 111, 130 (1944).

162. *Id.* at 130-131; *Cf.* *Shields v. Utah, Idaho R. Co.*, 305 U. S. 177, 180-181 (1938) and *N. L. R. B. v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1943).

163. Some excellent analytical writing has recently been devoted to this subject. See, for example, Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944) 58 HARV. L. REV. 70; Brown, *Fact and Law in Judicial Review* (1943) 56 HARV. L. REV. 899; and Isaacs, *The Law and the Facts* (1922) 22 COL. L. REV. 1.

to have the Act apply to those facts. The question whether Congress did or did not express a certain intention in using a particular word would seem clearly to be a question of law.¹⁶⁴ This question likewise may be simple or difficult of solution, but decided it must be.

For practical purposes, the question whether the matter is to be treated as a dispute about facts or as a dispute about law may well turn on the question of which phase—*i.e.*, the factual phase or the legal phase—is the thing which demands attention because of its difficulty.¹⁶⁵

In the *Hearst* case there was little dispute about what the actual facts were. The real question was whether Congress had them in mind when it used the term "employee." So that in deciding that the Board had special competence to pass upon the matter, the Court was not only giving the Board a leg up in expanding its own jurisdiction, but also treating its views of the law with the same deference given to the opinions of experts on the facts. This deference to the legal conclusions of administrative agencies was foreshadowed in *Medo Photo Supply Corporation v. N. L. R. B.*¹⁶⁶

Along with the growing judicial emphasis on the asserted special competence of administrative agencies, there have developed other curious doctrines. One is that administrative agencies are established for the purpose of vindicating public rights and thus occupy a preferred position entitling them to special consideration from the courts.¹⁶⁷ It is in-

164. It has been suggested that the question should be treated as one of law if it is generalized in nature, *e.g.*, such a question as whether the Rule against Perpetuities may operate to render void a grantor's power of termination for breach of condition subsequent, and as one of fact if it relates only to the application of a statute to the facts of a particular case, as in the *Hearst* case (see Brown, *op. cit. supra* note 163 at 900). But this will scarcely do. Whatever generalized premises a Court may use in its chain of reasoning, all it ever *concludes* is that the facts of the particular case before it are governed by some statutory or other principle. That is to say, the rule of law is never decisive of the case until it has become particular.

165. This seems to be the present status of the rule of reviewability of Tax Court decisions. *Dobson v. Commissioner*, 320 U. S. 489 (1943) laid it down that such decisions would not be reviewed except where they turned on unmistakable questions of law. In *Bingham's Trust v. Commissioner*, — U. S. —, 65 Sup. Ct. 1232 (1945) the question of the applicability of the statute was held reviewable as one of law where there was no dispute about the facts, because the answer turned "on the meaning of the words" of the section, (*id.* at 1235).

166. 321 U. S. 678, 681-682n (1944); see also *Securities and Exchange Commission v. Associated Gas & Electric Co.*, 99 F. (2d) 795, 798 (C. C. A. 2d, 1938); Note (1943) 56 HARV. L. REV. 1002; Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519, 531-536.

167. *E.g.*, *Virginia Electric Light & Power Co. v. N. L. R. B.*, 319 U. S. 533, 543 (1943); *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 362-363 (1940); *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261 (1940).

teresting in this connection to observe that scholars who have considered the matter closely are unable to find any genuine distinction between public law and private law or any evidence of a principle according to which public agencies are entitled as litigants to any special standing because they are public.¹⁶⁸

It is probably true that what the agencies are really suggesting in such cases is that they are specially privileged litigants in that they represent certain classes which have a higher standing before the law than other classes. The existence of partisanship of this kind has been admitted by Dean Landis. He says: "Partisanship on the part of the administrative tribunals is thus to be expected. It is there to carry out the provisions of the legislation."¹⁶⁹ Pound makes a similar suggestion and points out that the decision of the administrative agency can more realistically be said to be made at the beginning of the case than at the end, because it then decided to take action. From that point on it is engaged in vindicating its own judgment.¹⁷⁰ But this is scarcely a reason for enlarging the immunity of the administrative agencies from judicial review. As was pointed out by the Lord Chancellor's Committee on Ministers Powers:

"Indeed we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest. . . . But the bias to which a public spirited man is subjected if he adjudicates in any case in which he is interested on public grounds is more subtle and less easy for him to detect and resist."¹⁷¹

Another sign-post along the road to administrative finality is the recent decision by the Supreme Court of the United States in *United States v. Pierce Auto Freight Lines, Inc.*¹⁷² that where the Interstate Commerce Commission has two cases before it, it may use the evidence in one as a basis for its findings in the other.¹⁷³ It had, of course, long

168. Chroust, *Law And The Administrative Process: An Epistemological Approach To Jurisprudence* (1945) 58 HARV. L. REV. 573, 581-582; Pound, *Place of the Judiciary in Democratic Polity* (1941) 27 A. B. A. J. 133, 137-138.

169. *Symposium on Administrative Law* (1939) 9 AM. LAW SCH. REV. 139, 181.

170. Pound, *Public Law and Private Law* (1939) 24 CORN. L. Q. 469.

171. C. M. D. 4060 (1932) London.

172. — U. S. —, 66 Sup. Ct. 687 (1946).

173. In *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 154-155 (1941) the Court had held that official statistics were properly used because they went into evidence without objection, since even in a court of law a record could be made in this way. Later, in *Market St. Ry. Co. v. R. R. Comm.*, 324 U. S. 548, 561-562 (1945), it was held that the company's figures were properly used though they were not in evidence at all, since "no prejudice" was shown. Now we learn from the *Pierce* case that the *Opp* and *Market St.* cases, taken together, stand for the rule that in the case of an administrative agency, as in

been the rule that an administrator is bound "to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action."¹⁷⁴ This was considered part of the requirement of "a fair and open hearing" which is essential to the integrity of the quasi-judicial administrative process.¹⁷⁵

But it was inevitable that this should be watered down. If "science and technology," administered by experts, are to "reshape society"¹⁷⁶ (*i.e.*, if we are to have technocracy, as apparently we are), is not the whole concept of a "fair and open hearing" something of an anachronism? How is the expert body really to bring its expertise into play unless it can draw upon its store of esoteric lore without having to ask whether it is in evidence?

So perhaps we shall have to do without the "fair and open hearing." There may, indeed, be those who will agree that the loss will scarcely be felt since the value of the opportunity to put in evidence is questionable if the agency is at liberty to disregard all of it without being subject to reversal under the "substantial evidence" rule¹⁷⁷ provided it has adduced some evidence of its own.¹⁷⁸ Indeed, one may well ask how the "substantial evidence" rule itself will fare under the attrition of the formula that determinative knowledge may come to the agency from sources outside the record.

Another bizarre development has been the repudiation, with respect to the administrative agencies, of the well established rule that where evidence is as consistent with one of two opposite hypotheses as it is with the other, it does not tend to prove either.¹⁷⁹ That this is true was always as obvious as any other principle of reasoning. If it were not true, there could be no such thing as deduction at all, for if any circumstance could ever be said to point equally in the direction of two opposite inferences, there would never be any way of knowing which of

the case of a court, "the mere fact that the determining body has looked beyond the record does not invalidate its action unless substantial prejudice is shown to result" (66 Sup. Ct. 687 at 695 (1946)). But what could the "substantial prejudice" be other than the use by the agency of the wrong kind of evidence? And does not the question of whether the evidence was the right kind or the wrong kind present a point to be decided by the agency in the exercise of its expert judgment?

174. *Morgan v. United States*, 298 U. S. 468, 480 (1936).

175. *Morgan v. United States*, 304 U. S. 1, 14-15 (1938).

176. Frankfurter, *supra* page 23.

177. *Supra*, pages 31-32.

178. The jury is scarcely an analogue. It puts in no evidence of its own, nor is it dedicated to any partisan policy.

179. *Gunning v. Cooley*, 281 U. S. 90, 94 (1930), holding that in such a case there is no question of fact to submit to a jury.

the inferences to draw. It would be possible to guess, but no more.

This evident principle has been discarded in the case of the Labor Board. The Circuit Courts of Appeals used to think that it had as much validity in Labor Board cases as in any other.¹⁸⁰ At least until the Circuit Court of Appeals for the Tenth Circuit applied it in *Nevada Consolidated Copper Corp. v. N. L. R. B.*¹⁸¹ But the Supreme Court reversed¹⁸² and it is now the established rule, at least in Labor Board cases, that if opposite inferences may equally well be drawn from the same circumstances, the selection of one of such inferences is the proper function of the Board, which will not be disturbed by the courts.

So we find ourselves back where we started. Circumstances which do not tend to prove one thing any more than they tend to prove the opposite weigh nothing, which is to say, they are unweighable. In other words, they appear to be the "imponderables" which, we are told, expert administrative agencies are particularly skilled in weighing.¹⁸³

Conclusion

What may be deduced from the foregoing discussion is really that a doctrine is developing according to which it is less and less important, in determining rights and obligations, public and private, to be concerned about the actual facts.¹⁸⁴ Some eminent scholars feel that this is but a step in the development of the Marxist concept of the gradual disappearance of law.¹⁸⁵ This may or may not be true. The important point is that a decision of fact upon which the adjustment of the rights

180. *E.g.*, *Bussman Mfg. Co. v. N. L. R. B.*, 111 F. (2d) 783, 787 (C. C. A. 8th, 1940); *Sun Shipbuilding & Drydock Co. v. N. L. R. B.*, 135 F. (2d) 15 (C. C. A. 3d, 1943).

181. 122 F. (2d) 587 (C. C. A. 10th, 1941). The decision went on the authority of *Gunning v. Cooley*, 281 U. S. 90 (1930).

182. *N. L. R. B. v. Nevada Consolidated Copper Co.*, 316 U. S. 105, 106 (1942).

183. This may account for the plaintive note in the following lines penned by a harassed manufacturer on his way home from Washington:

"When agencies weigh the unweighable,
Then tell me to 'cease and desist,'
The impulse to say the unsayable
Is awfully hard to resist."

184. *See*, for example, *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 581-582 (1940) where the Court laid it down that "in a domain of knowledge still shifting and growing and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of inflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment."

185. *Report of Special Committee on Administrative Law* (1938) 63 A. B. A. REP 331, 340.

and obligations of citizens depends is essentially judicial,¹ no matter in what other terms it may be described. Little that has been so far revealed in the workings of the administrative agencies gives any reasonable ground for the belief that such decisions can be reliably made without the detachment which is essential to critical judgment in all matters, juridical and otherwise. Or that they can be made better than by those who stand completely apart from the controversy and have no interest in it, as by the jury, chosen by lot from the community, sworn to hear the evidence and a true verdict render without fear or favor, or as by the judge, whose immemorial characteristic has been utter impartiality in addition to his learning.

It is to the interest of an enlightened jurisprudence that the impartiality of these traditional fact-finding agencies and the sound community instinct which they contribute should not be carelessly discarded in the febrile pursuit of the fancied aid to be derived in such matters from an expertise which reveals, upon close examination, that it is little more than "a new formula in words . . . smoothly and confidently presented."