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COMMENT/Review of Administrative Rulings: The Anomaly of District Court Fact-Finding

One of the functions of federal regulatory agencies is the promulgation of rules and regulations for the administration of those matters entrusted to them by Congress. The authority to issue such rules and regulations is ordinarily given in the statute creating the agency.¹ Consistent with the basic philosophy of reliance on administrative expertise, the agencies are given wide discretion in making these determinations and, while they are subject to judicial review,² the courts are slow to disturb their pronouncements.³ The agencies are established to apply their expertise to facts and to make findings and determinations on the basis of these facts;⁴ the results of this process are to be conclusive unless found on review to be arbitrary or beyond statutory limitations.⁵ The procedures to be followed in rule making are prescribed by the Administrative Procedure Act (APA) which, however, does not demand a formal hearing or record of proceedings prior to the determination of issues. Such formalities may, nevertheless, be required by other statutes.⁶

The decisions of the Federal Communications Commission (FCC), Federal Maritime Commission (FMC), Atomic Energy Commission (AEC), and the Secretary of Agriculture are subject to judicial review by provision of

1. *E.g.*, Communications Act of 1934, 47 U.S.C. § 303(r) (1964).

2. Administrative Procedure Act § 10, 5 U.S.C. § 1009 (1964).

3. Speaking of rule making authority the Supreme Court has observed: "The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions." *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956).

4. "[I]t is the exclusive province and function of administrative agencies to draw legitimate inferences of fact and make findings and conclusions of fact, to appraise conflicting testimony or other evidence, to judge the credibility of witnesses and the evidence adduced by the parties . . ." *Noren v. Beck*, 199 F. Supp. 708, 710 (S.D. Cal. 1961).

5. "[T]he determination of questions of fact is by law imposed upon the Commission The findings of fact . . . can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority." *Seaboard Air Line Ry. v. United States*, 254 U.S. 57, 62 (1920). Furthermore, "[e]ven though . . . a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment." *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 304 (1937). *See also Florida Gulfcoast Broadcasters, Inc. v. FCC*, 352 F.2d 726 (D.C. Cir. 1965).

6. *See* 5 U.S.C. § 1003(b) (1964).

the Judicial Review Act of 1950.⁷ That Act provides, *inter alia*, that when a court of appeals is petitioned to review decisions of an agency and the agency has not held a hearing before taking the action appealed from (and the agency was not required by law to hold such a hearing), the court shall "transfer the proceedings to a district court . . . for a hearing and determination as if the proceedings were originally initiated in the district court . . . [if] a genuine issue of material fact is presented."⁸

The foregoing provision is at variance with certain of the basic assumptions delineating the personality of regulatory agencies and administrative law. This article will focus on the effect of the judicial review provision on the FCC,⁹ although the problem is potentially troublesome for the other agencies involved. It is important to keep in mind that the problem is not one of judicial review of rules and regulations, but judicial resolution of questions of fact in agency proceedings. Before concentrating on the specific issues present in the examination of the scope of review of FCC rules and orders an outline of traditional distinctions in administrative proceedings will provide a useful background for criticism of the Judicial Review Act's review procedure.

Administrative Determinations

Rule making is "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations,"¹⁰ whereas orders are the result of adjudicative proceedings which by definition determine the rights of individual parties.¹¹

The APA defines "rule making" and "order" in the following terms:

(c) Rule and Rule Making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of

7. 28 U.S.C. § 2342 (Supp. IV, 1969).

8. 28 U.S.C. § 2347(b)(3) (Supp. IV, 1969).

9. Research and discussion with FMC and AEC personnel revealed no cases on point. The Secretary of Agriculture was presented with the situation in one case, *Ams-hoff v. United States*, 228 F.2d 261 (7th Cir. 1955), *cert. denied*, 351 U.S. 939 (1956), but the parties stipulated to the facts to avoid the remand problem.

10. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 265 (1938).

11. Adjudication is defined as "the application of a statute or other legal standard to a given fact situation involving particular individuals." *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 896 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961).

valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.¹²

(d) Order and Adjudication.

"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.¹³

Questions of fact arising in an administrative context may be categorized as either adjudicative or legislative. Adjudicative facts relate to the parties and their activities, usually answering the questions of who did what, where, when, how and with what motive or intent.¹⁴ Such facts usually arise in the formulation of an order. Legislative facts are those which usually do not concern any immediate parties but are general facts which help the tribunal decide questions of law, policy and discretion in the context of rule making.¹⁵

Fact Questions—Requirement of a Hearing

When adjudicative facts are in issue a hearing is required. The principal reason for requiring a hearing when administrative determinations affect individuals directly is the due process requirement of the fifth amendment.¹⁶

"Due process" is an elusive concept. . . . [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication . . . it is not necessary that the full panoply of judicial procedures be used.¹⁷

The procedures traditionally associated with the judicial process are those of a trial with opportunity to present witnesses and cross-examine opposing parties. Such procedure is not necessary when individual rights are not being determined. This concept was expressed in *Bi-Metallic Investment Co. v. Board of Equalization*¹⁸ which held that: "Where a rule of conduct applies to more than a few people it is impracticable that every one should

12. 5 U.S.C. § 1001(c) (1964).

13. *Id.* § 1001(d).

14. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958) [hereinafter cited as DAVIS].

15. *Id.*

16. U.S. CONST. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

17. *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

18. 239 U.S. 441 (1915).

have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole."¹⁹ That is, where acts of government affect a general populace, it is neither necessary nor practical to give each person a hearing.

An adjudicative question of fact could arise in a rule making which was so narrow as to act upon one or several particular parties. This is rare, but it has happened, and where the rule does have this characteristic of an order, the law has long been that a hearing is required. In *Londoner v. Denver*,²⁰ concerning a tax imposed on several landowners for paving a street, a trial-type hearing was held to be necessary. In the similar *Bi-Metallic* case,²¹ concerning a general increase in valuation of taxable property, no hearing was required. The distinguishing principle between these two cases is "that a party . . . has a right to be heard when official action is based upon 'individual grounds' but not necessarily when official action is based upon general grounds, that is, when the facts are adjudicative but not when they are legislative."²² In a more recent case²³ the FAA ruled that persons over the age of sixty could not be pilots. In denying a hearing on the matter the Second Circuit said: "Congress intended that the section [granting hearings for review of agency actions on licenses] should apply only when an order of the Administrator is directed to an individual airman and is concerned with conduct or other facts peculiar to that airman."²⁴

The circumstances requiring a hearing based on due process should not be confused with those entitling a party to challenge a rule's validity before it is applied to him. For example, in 1941 the FCC promulgated their Chain Broadcasting Rules²⁵ which affected contractual relations between chain broadcasters and their affiliates. The Supreme Court held that those rules could be challenged as orders before being specifically applied to an individual since they "have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack"²⁶ Although noting that the regulations were not directed toward the appellant, the Court found that the appellant had sufficient standing to maintain the

19. *Id.* at 445.

20. 210 U.S. 373 (1908).

21. 239 U.S. 441 (1915).

22. 1 DAVIS § 7.04, at 421.

23. *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961).

24. 276 F.2d at 897.

25. 47 C.F.R. §§ 3.101 to .108 (1969).

26. *CBS v. United States*, 316 U.S. 407, 418-19 (1942).

suit since "[i]t is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations" ²⁷ In such cases the rules are challenged as arbitrary, capricious or beyond statutory authority. To obtain a hearing on the rule as it affects him, a party must file a request for a waiver which states a valid claim or wait until the rule is applied against him directly. ²⁸

In summary, a hearing is required when an adjudicative fact determination is being made; a hearing is not required when a legislative fact determination is being made (*i.e.*, a rule making) except in those rare cases where the operation of the rule is equivalent to an order to specified parties.

Review Under the Judicial Review Act

As was previously noted, the Judicial Review Act provides an occasion for fact-finding in the district court relating to appeals from the FCC and certain other agencies. ²⁹ The FCC has met this problem on two recent occasions; ³⁰ the second time resulted in the district court's making extensive findings of fact. This second case, *Lake Carriers' Ass'n v. United States*, ³¹ poses the problem squarely and a review of it will clearly present the issue.

In 1968 the FCC issued a Report and Order ³² which changed frequency deviations on the Great Lakes to provide for better radio communications for noncommercial pleasure craft. Among other objections, Lake Carriers complained that this change jeopardized the safety of navigation on the Lakes. Upon Lake Carriers' petition to the Sixth Circuit for an interlocutory injunction, that court noted that the Commission had held no hearing on the safety question. Therefore, the court believed that it had no evidence upon which to make a determination on Lake Carriers' averments. The court, then, pursuant to Section 2347(b) of the Judicial Review Act, transferred the case to the United States District Court for the Northern District of Ohio for the purpose of hearing evidence and making findings of fact concerning public safety. The evidence to be taken and determinations to be made on remand were of a highly technical nature concerning a subject to which, given the

27. *Id.* at 422.

28. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). See *Superior Oil Co. v. FPC*, 322 F.2d 601 (9th Cir. 1963).

29. 28 U.S.C. § 2347(b)(3) (Supp. IV, 1969).

30. The first confrontation was in *Radio Relay Corp. v. FCC*, 409 F.2d 322, 330-31 (2d Cir. 1969). The court avoided the issue by finding that Radio Relay had failed to establish a genuine issue of material fact and thereby denied them any further hearing either by a district court or the FCC.

31. 414 F.2d 567 (6th Cir. 1969).

32. See 47 C.F.R. § 83.137 (1969).

opportunity, the FCC might have applied its expertise, judgment and discretion to render a binding decision.³³ Section 2347(b) provided no such opportunity.

Legislative History of Section 2347(b)

In 1913 Congress passed the Urgent Deficiencies Act³⁴ providing for review of determinations of the Interstate Commerce Commission (ICC) by a three-judge district court, with appeal to the Supreme Court upon request.³⁵ When the FCC was established in 1934, it was Congress' wish that where a licensee desired to appeal from orders or rules of the Commission affecting his interest, but which he did not originate, he should file his appeal in a three-judge district court. Therefore, the original review section of the Communications Act specifically provided that review of rules was to be governed by the Urgent Deficiencies Act.³⁶ When it was thought desirable to alter the review procedure for the ICC,³⁷ the Judicial Conference of Senior Circuit Judges in 1942 formed the Committee on Review of Orders of the Interstate Commerce Commission and Certain Other Administrative Orders (Committee), and the FCC was asked to participate³⁸ since it was affected by the provision controlling review of ICC orders. "[T]he committee concluded that review should be had on the record before the administrative agency, [but] it developed from the evidence that occasionally orders are made . . . without a hearing, and . . . [therefore] there would be no record . . ."³⁹ It was decided to limit the proposed bill to determinations made after a hearing and let the remaining ones remain reviewable under the Urgent Deficiencies Act.⁴⁰ The FCC, however, desired all their actions to be subject to one review provision. Since the bulk of their orders went to the courts of appeals anyway,⁴¹ the FCC suggested that orders made without a hearing be included

33. See discussion *supra* notes 4 and 5.

34. 38 Stat. 208.

35. *Id.* at 219-20.

36. Communications Act of 1934, ch. 652, § 402(a), 48 Stat. 1093 reads:

The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act . . . and such suits are hereby authorized to be brought as provided in that Act.

37. See *Hearings on H.R. 1468, H.R. 1470, H.R. 2271 Before Subcomm. No. 3 and Subcomm. No. 4 of the House Comm. on the Judiciary, 80th Cong., 1st Sess. (1947) and on H.R. 2915 and H.R. 2916 Before Subcomm. No. 2 of the House Comm. on the Judiciary, 81st Cong., 1st Sess. 83-86 (1949)* [hereinafter cited as *Hearings*].

38. *Hearings* 72-73.

39. *Id.* 28. An example of such a case would be an emergency service order.

40. *Id.*

41. Section 402(b) of the Communications Act provided for the review by a court of appeals of Commission orders except proceedings under Section 402(a).

in the bill.⁴² The Committee acquiesced and decided to make two bills, one providing for circuit court review of orders made after a hearing before the ICC and leaving other ICC orders reviewable under the Urgent Deficiencies Act; another providing a procedure whereby FCC orders were reviewable only in the circuit courts. The Committee still had to face the problem of providing a record for review of FCC orders made without a hearing and, to cover such occasions, Section 2347(b) was enacted.⁴³ It reads in pertinent part today as it did then, with minor changes:

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

- (1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;
- (2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or
- (3) transfer the proceedings to a district court . . . for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented.⁴⁴

The question arises whether the Committee intended that rule makings be dealt with as “orders” of the Commission. The Committee had the benefit of the previously quoted definitions of the APA.

Nowhere in the legislative history does the Committee use the words rule or rule making, but there is evidence that they intended to include it. In discussing the problem of orders made without a hearing, it found that “[c]ertain orders in emergency matters are made without any hearing. Other orders, *legislative* or purely administrative in character, are made upon informal hearings in no sense adversary in character.”⁴⁵ (Emphasis added). Before the Committee drew and finalized their bills the kinship of rule making to the legislative function had been clearly established. Rule making had been referred to as administrative legislation by at least one eminent professor⁴⁶ and the Supreme Court had discussed administrative schemes in terms of legislating by delegation.⁴⁷ It would be unrealistic to assume that rule making was not meant to be covered by the statute.

42. *Hearings* 28, 71-72.

43. *See Hearings* 72.

44. 28 U.S.C. § 2347(b) (Supp. IV, 1969).

45. *Hearings* 87.

46. Fuchs, *supra* note 10, at 259.

47. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

The Case Against Judicial Fact-Finding

When adjudicative facts are in question on appeal a hearing is required and the Judicial Review Act requires the court of appeals to remand to the agency.⁴⁸ If the fact issue which arises on appeal is legislative, there is no such requirement, but there are pertinent reasons why a remand to the agency rather than a district court is the better procedure. Making findings and determining questions of fact pertaining to agency policy and discretion (especially in a case in which the agency has already acted) is best handled through the filing of briefs and opinions and possibly oral argument, not the trial-type proceeding to which the courtroom is accustomed. The need is for participation by private parties in the governmental decision making process⁴⁹ in the search for a fair and just course of action. Administrative agencies are already familiar with the problems, whereas the district court would need considerably more time to acquaint itself with often complicated technical details. The parties are also familiar with the channels of communication and procedures to follow, since such are standard parts of rule making activity. One well known scholar, in speaking about orders in the adjudicatory sense stated that

where a case has arisen before an agency . . . the agency should complete the job to the greatest extent possible. It should not shift to the courts the responsibility for the determination of issues characteristically involved in its original determination. It is the agency which better than any other organ of government knows what or how much is needed to make a policy work . . .⁵⁰

This view is even more appropriate in a rule making context where agency discretion and policy are brought to bear on a legislative activity delegated to the agency by Congress. In order to preserve the integrity of an administrative agency's legislative processes all facts relevant to a proposed rule should be ascertained by the agency. One of the principal reasons for the existence of regulatory agencies is to enable an administrative body to develop expertise which may then be applied in its special field in order to arrive at rules and regulations for the governance of a specific activity.⁵¹ Congress' decision to involve a district court in evaluating evidence concerning a subject which Congress has otherwise delegated to an agency is inconsistent with

48. 28 U.S.C. § 2347(b)(1) (Supp. IV, 1969).

49. 1 DAVIS § 7.07, at 433.

50. Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865, 899 (1963).

51. Speaking of the Federal Radio Commission, predecessor of the FCC, the Supreme Court said, "Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the *Administrative judgment* essential in applying *legislative* standards to a host of instances." *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 276 (1933) (emphasis added).

the exercise of such expertise.

The very nature of the legislative function, whether exercised directly by Congress or by administrative agencies, demands that the rule maker be the fact-finder. The validity of this statement is illustrated by the language of the Supreme Court in responding to a challenge of certain FCC rules:

If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. . . . "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." [Citation omitted.] Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress.⁵²

Thus the rule making agency is ordinarily permitted the legislative privilege of weighing the evidence as it finds necessary.⁵³ Furthermore, in the nature of the legislature, an agency may act wisely or unwisely on the basis of the facts as it sees them.⁵⁴ The courts do not second guess Congress' conclusions. Administrative bodies are usually accorded the same freedom to predicate rule making on the agency's view of the facts.⁵⁵

The FCC is authorized to make rules and regulations "from time to time, as public convenience, interest, or necessity requires."⁵⁶ In the usual course of events it would not be for the courts to say that the public interest will be furthered or retarded by a particular course of action; Congress has delegated such power to the Commission.⁵⁷ In numerous regulatory agencies comparable to the FCC there is no involvement of the district court in fact-finding.⁵⁸ In such instances wherein Congress has provided for review of agency decisions without setting forth standards to be used or the procedure to be

52. *NBC v. United States*, 319 U.S. 190, 224 (1943).

53. Tollefson, *Administrative Finality*, 29 MICH. L. REV. 839 (1931).

54. *Id.* at 840-41. See also *Commissioner v. Duberstein*, 363 U.S. 278 (1960); *Brown v. United States*, 396 F.2d 989 (Ct. Cl. 1968); *Zabel v. Tabb*, 296 F. Supp. 764 (M.D. Fla. 1969); *Howard v. Allen*, 287 F. Supp. 894 (E.D.N.C. 1968).

55. *Colman v. United States*, 292 F.2d 283, 286 (Ct. Cl. 1961). See generally 4 DAVIS § 29.01.

56. Communications Act of 1934, 47 U.S.C. § 303 (1964).

57. *NBC v. United States*, 319 U.S. 190, 224 (1943).

58. The FCC is a regulatory agency in the same sense as the Securities and Exchange Commission (SEC), Federal Power Commission (FPC), and Civil Aeronautics Board (CAB). The review provisions of these agencies are found in:

a) SEC—Securities Act of 1933, § 9, 15 U.S.C. § 77(i) (1964);

Investment Advisors Act of 1940, § 213, 15 U.S.C. § 80b-13 (1964); Investment Company Act of 1940, § 43, 15 U.S.C. § 80a-42 (1964); Public Utility Holding Company Act of 1934, § 24, 15 U.S.C. § 79x (1964); Securities and Exchange Act of 1934, § 25, 15 U.S.C. § 78y (1964); Trust Indenture Act of 1939, § 322, 15 U.S.C. § 77vvv (1964).

followed (unlike the case of the FCC), the Supreme Court has held that consideration by the reviewing court is to be confined to the *administrative* record and that no de novo proceeding may be conducted.⁵⁹

The Judicial Review Act of 1950 instructs that review is to be had on "the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing, whether or not required to do so by law."⁶⁰ The legislative history suggests that Congress provided for remand to the district court in the absence of a hearing out of fear that there would be nothing for the reviewing court to look at in judging the Commission action. However, the APA requires the Commission to take action through rules and regulations only after careful consideration of the factors bearing on the problem. Section 4 of the APA requires publication of a notice of proposed rule making⁶¹ and thereafter the agency is required to afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner, and after consideration of all relevant matter presented, incorporate in any rules adopted a concise general statement of their basis and purpose.⁶² Oral argument, while not required, *is* one of the major procedural methods in administrative rule making.⁶³ Perhaps in emergency situations such as referred to by the Committee, the Commission may have no written record of the basis for its decision, and some procedure is required to provide evidence for the court to review;⁶⁴ but this is not the case in a rule making of any consequence. The APA recognized that policy and discretionary matters involved in rule makings do not require a formal hearing and thus did not provide for one. However,

b) CAB—49 U.S.C. § 1486 (1964).

c) FPC—Federal Power Act, § 313, 16 U.S.C. § 825(*l*) (1964).

Nowhere in these provisions is there the dichotomy of review present in the FCC statute. All orders are treated in the same manner, that manner being the procedure followed in Section 401(b) of the Communications Act.

59. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). "De novo" in this context means any proceeding involving calling witnesses and taking evidence, as would be necessary for the district court to do if it were to have a hearing and make a determination as required by the statute.

60. 28 U.S.C. § 2347(a) (Supp. IV, 1969).

61. 5 U.S.C. § 1003(b) (1964).

62. *Id.* This section, as well as Section 1003(a), does not apply to interpretive rules, general statements of policy, rules of agency organizations, procedure, or practice, or in any situation in which the agency for good reason finds (and incorporates the finding and a brief statement of the reasons therefore in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

63. REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE 105 (1941).

64. Even then there is no reason why problems should not be remanded to the agency.

there is no reason why an informal proceeding such as that provided for in a rule making would not build an adequate record and satisfy the need for a record on which to base an appellate decision.

In rare instances (*i.e.*, the *Lake Carriers'* situation) when the absence of a specific factual determination in the agency record precludes the court of appeals from deciding the case, there is no reason why a remand to the FCC could not be an effective vehicle for resolving the fact question. Such a procedure would remove the possibility that a court could make a single fact determination binding on an agency even though such determination were made in a vacuum devoid of agency legislative expertise. The agency would also be given an opportunity to rectify its omission of the fact and to conform its processes in the case to the guidelines in Section 4 of the APA.

Putting aside the distinction between legislative and adjudicative facts, there is a general standard of review as to any type question of fact as opposed to review of questions of law. In the context of judicial review of administrative action the term question of fact means an administrative question on which a court should not substitute its judgment, and question of law is a question on which the court may properly substitute judgment.⁶⁵

Questions of law are to be decided judicially, for the judge, both by training and tradition, is best equipped to deal with them. "Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions." [Citation omitted.] These considerations do not apply with equal force to the judicial review of the factual issues arising out of administrative determinations. There, the advantages of *expertise* are with the administrator.⁶⁶

The APA recognizes this when it gives the reviewing court authority to decide all relevant questions of law but allows it to set aside or hold unlawful findings and conclusions of the agency only for limited reasons.⁶⁷ Thus the procedure called for in Section 2347(b)(3) of the Judicial Review Act is a departure from the accepted principles governing review of administrative decisions.

Conclusion

Applying the foregoing discussion to the *Lake Carriers* case, it is clear that a better procedure would have enabled the court of appeals to remand the case to the Commission for any further proceedings. Whether "the public safety was seriously affected by the FCC rule making on frequency devia-

65. 4 DAVIS § 30.02, at 193.

66. Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73 (1950).

67. 5 U.S.C. § 1009(e) (1964).

tions” is clearly a question calling for application of Commission expertise. The additional evidence taken was of a highly technical nature reaching into great detail. Moreover, there had been an extensive proceeding in the Commission before the rule was made effective. The absence of a particular finding material to a question under review should be no reason to deprive the Commission of the opportunity to make the initial determination of fact on remand, since the agency has already been well immersed in related aspects of the same problem.

The Judicial Review Act should be amended to provide for remand to the agency for fact-finding where the record does not reveal a finding of material fact necessary to the reviewing court’s decision. In such manner the FCC review procedure would be reconciled with the practice of other agencies and with the principles of the administrative process.

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