# ADMINISTRATIVE FINDINGS OF FACT PART ONE*

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Benevolent and hostile critics of the current administrative process alike agree that administrative procedures should be geared to certain definite objectives. The administrative process should afford affected parties full knowledge of the bases of administrative decision, conserve the time of reviewing tribunals and litigants by apprising them of the issues involved and limiting the number of issues, and convey generally the assurance that constitutional limitations of due process and delegation are being observed. Consistently with all this, administration must proceed with expedition; otherwise administrative acts tend to be deprived of operative significance, and become merely reminiscences of the way in which once-exigent situations could have been administratively handled. In the forefront of devices said to insure the attainment of these objectives is the requirement that final administrative action be accompanied by findings of fact.[1] It is the purpose of this article to explore the validity of that assertion.

The first two sections of this article deal with findings of so-called "ultimate" fact—factual determinations called for on the face of the statute itself—contrasting the exhaustively condemnatory attitude of the 1935 Supreme Court with the milder yet still critical approach of the present Court. The third section explores rationales whereby administrative bodies have been deemed justified in dispensing with findings of fact; the exploration is necessarily inconclusive because the rationales are vague

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1. See Feller, Prospectus for the Further Study of Federal Administrative Law (1938) 47 Yale L. J. 647, 666. Findings accompanying final action must be differentiated from the proposed findings that are served upon parties at the inception, or during the course, of an administrative proceeding. Gellhorn, *Administrative Law, Cases and Comments* (1940) c. 9. The latter class of findings will here be discussed only by way of analogy to the former, see Part Two, infra.

and indeterminate.** The fourth and fifth sections set forth two formulations of the doctrine that there must be "supporting" findings of fact as well as findings of ultimate fact—one evolved by the Supreme Court during 1931 to 1935, and the other receiving its most explicit statement at the hands of Judge Stephens in the Court of Appeals of the District of Columbia. After a sixth section discussing some of the similarities between judicial and administrative findings, the concluding portion of this essay develops some of the policy criteria and logical presuppositions which underlie the entire subject, and attempts to suggest a pragmatic and purposive rather than a dogmatic and restrictive approach to the problem.

## I. Findings of Ultimate Fact — 1935

On January 7, 1935, the Supreme Court, in the "Hot Oil" case,[2] invalidated section 9(c) of the National Industrial Recovery Act, authorizing the President to prohibit the transportation in interstate commerce of petroleum or petroleum products produced within a state in amounts in excess of that state's limitation of production, *i. e.*, "hot oil." The authorization, it was held, constituted a forbidden delegation of legislative power to the President, in that he was not governed by adequate statutory standards as to *when* to make the prohibition of transportation effective.[3] Evidence had been presented, both in the record and in the argument of counsel, that the general policy of the act, as set forth in section 1, would be effectuated by prohibiting the transportation of "hot oil" under section 9(c). It had been pointed out that such a prohibition would, in the language of section 1, serve to "eliminate unfair competitive practices," "conserve natural resources," "promote the fullest possible utilization of the present productive capacity" of the oil industry, and "except as may be temporarily required * * * avoid undue restriction of production" of oil. Nevertheless, over Mr. Justice Cardozo's eloquent but unavailing protest, the Court flatly refused to concede that a legislative policy which presumably motivated the entire act had any relevance to the specific mandate of section 9(c). Section

** Only the first three sections of the article appear in this issue. The remaining sections will be published in the February number.

2. Panama Ref. Co. v. Ryan (1935) 293 U. S. 388.

3. The character of the prohibition had been predetermined by Congress; the only element of unexercised discretion in the executive was temporal.

9(c) was declared void for the sole reason that there was no explicit verbal connective between the declaration of policy in the statute and one of its key provisions.

A similar failure, this time on the part of the President, to translate self-evident ratiocination into written form led the Court to decide that, even if section 9(c) itself could be upheld, the executive order which he had issued pursuant to that section was invalid. The President, in issuing the order, had made no findings of fact as to which one of the several standards set forth in section 1 he had relied on in putting into effect the prohibition against transporting "hot oil." According to Chief Justice Hughes' argument, the President, unless pinned down by such a finding of fact, possessed an unfettered discretion, in that he was "free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select." There was no contention that the executive order did not in fact carry out the basic policies of the act, nor any intimation of the possibility that, since his action was to be drastic, Congress might have intended the President to act only when it would effectuate the declared policy of the act in aggregate, rather than a mere segment of that policy such as the elimination of unfair competitive practices. Furthermore, there was no recognition of the fact that the separate verbal segments of the declaration of policy could not, and were not, intended to refer to mutually-exclusive, compartmentalized phenomena—the same regulatory activity that would tend to "eliminate unfair competitive practices," would also tend "to remove obstructions to the free flow of interstate and foreign commerce," "to promote the fullest possible utilization of the present productive capacity of industries," and so forth.[4] The Court's opinion, liter-

4. Cf., as furnishing a possible contrast, Elite Dairy Products, Inc. v. Ten Eyck (1936) 271 N. Y. 488, 3 N. E. (2d) 606, 607-608, 610, where the State Commissioner of Agriculture was instructed to grant no license to purchase, handle, sell or distribute milk, unless he was "satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that issuance of the license is in the public interest." In that case the court pointed out: "The conditions imposed by the Legislature are separable. Failure to show compliance with any one condition may be fatal. Then the applicant is entitled to findings which will show the particular matter determined against him."

ally followed, would have compelled the President, in the process of fact-finding, to make an unreal choice among overlapping and intermeshing criteria of action.

It seems incongruous that the Supreme Court, which has so frequently said that a statute under interpretation must be viewed in its entirety as an expression of total legislative intent, should have rejected this wholesome *Gestalt*-like concept in this case.[5] Why should it have assumed that a legislative policy which purportedly motivated a Congress in large measure ignorant of "hot oil" and which was put into immediate emergency action did not survive, for lack of purely verbal taggings, to guide an informed executive in charge of that action? Is not the notion legalistic and unreal that Congressional addition of an introductory phrase to section 9(c), or administrative repetition of a few statutory phrases in the form of findings of fact as a preface to an executive order, would have converted the statute and the executive order from an unfettered and invalid delegation of legislative power into a proper exercise of administrative power circumscribed by appropriate standards?[6] Apologists for the case have said that the Court was motivated by considerations of judicial statesmanship, and that underlying the syntactical considerations which appear on the surface of the Court's opin-

5. For the most recent expression of the viewpoint that statutory context must prevail over the rules of syntax, see United States v. American Trucking Ass'n, Inc. (1940) 310 U. S. 534, 542-544; United States v. Dickerson (1940) 310 U. S. 554, 562. To the extent that findings of fact are regarded as determinants of administrative action, the central thesis of *Gestalt* Psychology is apropos: " * * * the causal unit is often a configuration which cannot be broken up without losing its distinctive causal properties." Russell, *Outline of Philosophy* (1927).

6. The oddity of the "Hot Oil" case becomes highlighted by the fact that it was decided the same year as Pacific States Box & Basket Co. v. White (1935) 296 U. S. 176. In that case, the Supreme Court upheld an order of a State Department of Agriculture, requiring the use of containers of a certain type, form and dimensions in the marketing of strawberries and raspberries; the lack of accompanying findings was excused on the ground that the regulation authorized by the statute was in the nature of general legislation.

The "Hot Oil" case is the sole authority standing in the way of the rule that, where an administrative body exercises legislative authority, it need not, under the due process clause, make findings of fact. Rohrer v. Milk Control Board (1936) 121 Pa. Super. 281, 184 Atl. 133, follows the "Hot Oil" case both with respect to the adequacy of legislative standards and the impropriety of administrative regulation without findings of fact, but the decision was reversed in (1936) 322 Pa. 257, 186 Atl. 336, on the ground that the issues had not been raised at the proper time. The Pennsylvania milk control statute now *requires* that findings of fact be made.

ion was an acute distrust of the host of new federal administrative agencies, expressive of a novel and somewhat startling policy of business regulation by government, which had suddenly mushroomed forth.[7] So far had the activities of these agencies escaped adequate scrutiny and coordination even at governmental hands, that in the "Hot Oil" case itself both counsel for the government and the lower courts had been unaware of the elimination by the President of an important provision of the executive order on which the litigation was based.[8]

We now have a reconstituted Court, solidly established administrative bodies with patterns of conduct familiar to the courts, and a Federal Register Act that renders it impossible that regulatory provisions will stage unannounced appearances or disappearances. The Lord Chief Justice's condemnation of English administrative law has been answered by the Report of the Committee on Minister's Powers; the advocates of our own Walter-Logan Bill have been replied to by the Attorney General's Committee on Administrative Procedure; and there is general acceptance of current governmental regulation of business. Are we prepared to cease construing the grant of administrative power under a statute as strictly as a deed of property, or a contract under seal? Are we prepared to concede that administrative agencies have had ample time to study the statutes which they administer, and that the republication of portions of the statute in the form of findings of fact, as a prelude to the exercise of their powers, is inutile? Or shall jurisprudence in the field of administrative findings remain, to borrow Bentham's

7. This distrust was epitomized on the English scene by Lord Chief Justice Hewart's *The New Despotism* (1929) and on the American by Beck, *Our Wonderland of Bureaucracy* (rev. ed. 1933). As far as the Supreme Court itself was concerned, it may be noted that Crowell v. Benson (1932) 285 U. S. 22 (imposing as a constitutional requirement judicial review *de novo* for quasi-jurisdictional facts in federal workmen's compensation proceedings) had, like March, come in like a lion, see Dickinson, Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact" (1932) 80 U. Pa. L. Rev. 1055, although it now seems to have gone out like a lamb, see Note (1938) 24 Va. L. Rev. 653. The Interstate Commerce Commission was being castigated for failure to make findings of fact on "basic" and "essential" facts, see Part Two, infra. And the N. R. A., A. A. A., and Bituminous Coal Acts were only a few months short of judicial invalidation.

8. See Gellhorn, *Administrative Law, Cases & Comments* (1940) 412. Prior to this, a similar lapse had occurred in the case of a criminal indictment, see Griswold, Government in Ignorance of Law—A Plea for Better Publication of Executive Legislation (1934) 48 Harv. L. Rev. 198, 204.

phrase, "the art of being methodically ignorant of what everybody knows"?[9]

## II. Findings of Ultimate Fact — 1941

Current indications are that we have made progress, but have not completely passed the stage of artistic ignorance. While the courts no longer invalidate administrative action or impede it unbearably, they still cling to occasional conceptualistic mummery that retards it. The presence of a statutory requirement for administrative findings of fact is still cited as a guarantee that no invalid delegation of legislative power has taken place,[10] and the requirement of such findings is a well-established legislative practice.

Some cases, however, attach a deeper significance to administrative findings. For example, in *N. L. R. B. v. White Swan Company*,[11] the Court dismissed a certificate from a circuit court of appeals which attempted to elicit from the Supreme Court a determination whether a laundry business located on a state line was subject to the jurisdiction of the National Labor Relations Board. One of the alleged grounds of dismissal was that the certificate did not indicate in which one of three possible senses the unfair labor practice found by the Board affected commerce. Unfair labor practices, to come within the statutory jurisdiction of the Board, may be either "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Despite the fact that most of the disputes before the Board could be said to fall within *all* three categories, the Court hewed to the superficial approach,

9. Bentham, *A Treatise on Judicial Evidence* (Dumont tr. 1825) 6.

10. "The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.

"The present statute satisfies those requirements. The basic facts to be ascertained administratively are whether the prescribed wage as applied to an industry will substantially curtail employment, and whether to attain the legislative end there is need for wage differentials applicable to classes in industry. The factors to be considered in arriving at these determinations, both those specified and 'other relevant factors,' are those which are relevant to or have a bearing on the statutory objective." Opp Cotton Mills v. Administrator of Wage and Hour Div. (1941) 312 U. S. 126, 145.

11. (1941) 313 U. S. 23.

as it had in the "Hot Oil" case, that three separable possibilities were involved from among which selection was possible. In *Phelps-Dodge Corporation v. N. L. R. B.*,[12] the Board had decreed the reinstatement of certain individuals affected by unfair labor practices, saying that it would do so even were it shown that those individuals had obtained substantially equivalent employment elsewhere.[13] The Court majority, speaking through Mr. Justice Frankfurter, reversed the Board on the ground that, in ordering the reinstatement of these individuals, the Board merely relied on its legal power under the statute so to do, and did not make an explicit finding that the reinstatement of men who had obtained employment elsewhere would effectuate the policy of the act. We quote from Mr. Justice Frankfurter, and attempt, in a parallel column, a paraphrase which we trust does not do undue violence to the views of the dissenters in this case (Murphy, Douglas, and Black, JJ.) :—

"The *administrative* process will best be vindicated by *clarity in its exercise.* Since Congress had defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§10(e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order *to require the Board to disclose the basis of its order.* * * * All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most em-

"The *judicial* process will best be vindicated by *not transmuting desirable formalities into a positive rule of law.* Since Congress has defined the authority of the Board and the procedure by which it must be asserted, and has charged the federal courts with the duty of reviewing the Board's orders, it will avoid needless litigation, *in this case as well as in future cases,* and make for effective and expeditious enforcement of the Board's order, *for us to draw the obvious inference that the order was intended to effectuate the declared policy of the act.* * * * All we ask of the Board is to give *as* clear indi-

12. (1941) 313 U. S. 177.

13. The Board had originally found that the men had not obtained substantially equivalent employment, but the court below had held that the proof did not support its findings on this point, and remanded the case to the Board for additional evidence on that issue. The Board subsequently took the issue out of the case, by expressly declining to ask for its review in the Supreme Court; it said it considered the fact that the employees had obtained substantially equivalent employment irrelevant to the question of whether it would order their reinstatement.

phatically the authority of the Board."

cation *as* possible that it has exercised the discretion with which Congress has empowered it, *although some of our number believe that it would have been desirable for the Board to make an explicit finding of fact on this point.* This is to affirm most emphatically the authority of the Board, *without stultifying its effectiveness in the current controversy.*"

Surely the minority has the better case; an agency trying to fulfill a mandate like that imposed upon the Board unshakeably ties up the issuance of its orders to the determination of whether these orders will effectuate the declared policy of its act,[14] and the Board had obviously decided in the *Phelps-Dodge* case that the obtaining of substantially equivalent employment was irrelevant to that determination.

The *White Swan* and *Phelps-Dodge* decisions are not vicious ones. Their immediate consequences were negligible. The Circuit Court in the *White Swan* case took the hint implicit in the Supreme Court's opinion and subsequently upheld the Board.[15] As an aftermath of the *Phelps-Dodge* case, at the first possible opportunity, the Board spelled out in detail the reasons why the reinstatement of employees who had obtained substantially equivalent employment elsewhere would effectuate the policy of the act,[16] in language which one may confidently expect will be adopted in all subsequent decisions of the Board dealing with the same issue. The long-run consequence of the *Phelps-Dodge* decision will be the mechanical regurgitation of "canned" findings on a subject as to which nobody can entertain any reasonable

14. A determination aptly described by Justice Frankfurter as "one of the most intractable of legislative problems." Tigner v. Texas (1940) 310 U. S. 141, 148.

15. (C. C. A. 4, 1941) 118 F. (2d) 1002.

16. Matter of Ford Motor Co. and Internat'l Union U. A. W., Local Union No. 249 (1941) 31 N. L. R. B. 170. Furthermore, the Labor Board issued instructions to its staff emphasizing the irrelevancy of the entire issue. Instructions issued to all attorneys by the General Counsel in effect said that the Board would not itself raise the issue, and its trial examiners were to exclude evidence presented by employers on the issue, but were to receive offers of proof. If the issue were raised by the employer, it would be considered and dealt with in the Board's decision, on the offer of proof.

doubts concerning the Board's opinion. The immediate result was that the Board met with a purely ephemeral reversal, in that the Phelps-Dodge Corporation settled, realizing that checkmate was inevitable even if forestalled for one move.[17] Other circuit courts of appeal, similarly appreciating the futility of a remand to the Board for inescapable findings on this issue, have sustained the Board on rehearing without remand.[18]

The real danger is a potential one, that the judiciary, in correcting the rhetoric of administrative decisions,[19] will tend to ignore the all-important time variable. Thus, for example, the eighth circuit, leaning heavily on the *Phelps-Dodge* decision, has recently remanded an order of the Federal Security Administrator fixing definitions and standards for various skim milk products, on the ground that the Administrator merely referred to the statutory provision upon which his order was grounded rather than reciting explicitly that "such action will promote honesty and fair dealing in the interest of consumers."[20] After all, there is no evidence that administrative agencies would turn a deaf ear to sharply-worded *dicta* on the part of reviewing courts, or that they can be brought to book only by a sharper sanction than rebuke.[21] The reversal of administrative action by a court be-

17. In the *Phelps-Dodge* situation, as in N. L. R. B. v. Nat'l Casket Co. (C. C. A. 2, 1939) 107 F. (2d) 992, 995, the employer may also be a sufferer from the Fabian impact of the law, in that back wages which he would have to pay cumulated as settlement was deferred.

18. See the denial of rehearings in N. L. R. B. v. Mall Tool Co. (C. C. A. 7, 1941) 119 F. (2d) 700, 704; Eagle-Picher Mining & S. Co. v. N. L. R. B. (C. C. A. 8, 1941) 119 F. (2d) 903; El Paso Electric Co. v. N. L. R. B. (C. C. A. 5, 1941) 119 F. (2d) 581.

19. In this connection, it may be borne in mind that litigants have on occasion insisted that administrative findings adhere punctiliously to the exact wording of the statute, see United States v. Curtiss-Wright Corp. (1936) 299 U. S. 304, 331; Morgan v. U. S. (D. C. W. D. Mo. 1940) 32 F. Supp. 546, 563. Fortunately, the courts have usually balked at such literal extremes. But cf. Staley Mfg. Co. v. Sec'y of Agriculture (C. C. A. 7, 1941) 120 F. (2d) 258.

20. Twin City Milk Producers Ass'n v. McNutt (C. C. A. 8, 1941) 122 F. (2d) 564; cf. Staley Mfg. Co. v. Sec'y of Agriculture (C. C. A. 7, 1941) 120 F. (2d) 258. Supporting the view that the *Phelps-Dodge* doctrine has been expanded is the fact that the *Twin City* case involved an exercise of "quasi-legislative power," whereas the *Phelps-Dodge* case concerned what would conventionally be described as quasi-judicial action, see Part Two, infra. Also, the court rested its decision directly on the "Hot Oil" case and on two Supreme Court cases requiring jurisdictional findings by the Interstate Commerce Commission.

21. The Supreme Court has on occasion taken an admonitory approach, merely criticizing the administrative tribunal for not explicitly stating findings implicit in the evidence before it. See, e. g., Beaumont, S. L. & W.

cause of rhetorical defects in an order or decree would be subject to criticism even in the case of a proceeding solely between clear-cut adversaries equally equipped to withstand the consequences of delay. For it to take similar action in the case of the National Labor Relations Board is to overlook the fact that the public has an interest in the expeditious settlement of labor controversies that far outweighs any additional effectiveness which the Court's rebuke may gather because accompanied by the enhanced sanction of a remand. Furthermore, labor's right to collective bargaining must reach fruition within a short period of time, if its legislative victory in obtaining the right is not to prove illusory.[22] Pedagogic zeal should not obscure the fact that the mere establishment of an administrative agency is a legislative affirmation of the popular conviction that action is necessary, and the nullification of action is vicious; that delay is a boon to a person benefiting from the *status quo,* and a detriment to the beneficiary of a legislative-administrative effort to alter the *status quo.*

Can this retarding effect be condoned as merely incidental to a more important consideration, *i. e.,* the purpose behind requiring an administrative agency to make an explicit finding of fact? Presumably that purpose, in situations where the finding is a mere repetition of statutory language and is clearly indicated by the evidence already before the agency, is to make certain that the agency has brought a responsive deliberative judgment to bear in determining whether the facts which it has considered fall within the prescribed statutory pattern.[23] If that be the case,

Ry. Co. v. U. S. (1930) 282 U. S. 74; United States v. Louisiana (1933) 290 U. S. 70, discussed on pages 77-82, infra and F. C. C. v. Sanders Bros. Radio Station (1940) 309 U. S. 470, discussed in note 84 (Part Two), infra.

22. A similar obtuseness to the speed with which events in the arena of labor conflict march is to be found in Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc. (1941) 312 U. S. 287, 298, where Mr. Justice Frankfurter, speaking for the Court's majority, says: "If an appropriate injunction were put to abnormal uses in its enforcement, so that encroachments were made on free discussion outside the limits of violence, as for instance discussion through newspapers or on the radio, the doors of this Court are always open." Compare with this: " * * * the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom resumption, even if the injunction is later lifted." Frankfurter and Greene, *The Labor Injunction* (1930) 210. As already indicated, employers likewise may also suffer from delay, see note 17, supra.

23. The court in the *Twin City Milk Producers* case (C. C. A. 8, 1941) 122 F. (2d) 564, said of the requirement for administrative findings of fact:

comparison may be instructive with a device intended to insure an analogous effect in the field of contract law, the doctrine of the seal, which, in the words of Chancellor Kent, gives "ceremony and solemnity to the execution of important instruments."[24] Here it has been noted that "with the routine printing of the letters 'L. S.' on law blanks, the solemn effect of the act of sealing was much impaired. It is highly doubtful today whether the presence of the seal on the paper or even the addition of the seal to a writing actually implies greater deliberateness than the signing of the writing by itself."[25] As a result, at least twenty-five jurisdictions have abolished the distinction between sealed and unsealed instruments, and nine jurisdictions require a showing of additional intention on the part of contracting parties to be bound, over and above the presence of the seal.[26] Why should a routine republication of part of a statute convey any greater assurance of deliberation and solemnity than a printed seal? Inasmuch as we are not dealing with more or less intermittent contractual relationships entered into between private parties, but with public acts undertaken by responsible officials appointed by the President and confirmed by the Senate, sworn to obey the Constitution and the laws of the United States, devoting their

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"This requirement is not intended as an arbitrary symbol. The great liberal minds of the Supreme Court, which have declared the need for the prescription, can hardly be accused of being worshippers of mere form. * * * Doubtless, it has assuaged the legalistic conscience, by the assurance that only responsible action has been taken."

24. See Warren v. Lynch (N. Y. 1810) 5 Johns. 239. Note, however, that the historical function of a seal (and even its present function, see Cochran v. Taylor (1937) 273 N. Y. 172, 7 N. E. (2d) 89), is to *prevent* parties from questioning the binding effect of a promise. The effect of the current dogma relating to findings of fact, on the other hand, is to *permit* litigants to question the propriety and binding effect of administrative action.

25. New York Law Rev'n. Comm., *Acts, Recommendation and Study Relating to the Enforcement of Certain Written Contracts,* Legislative Doc. No. 65(M) (1941), p. 31. See also Llewellyn, On the Complexity of Consideration (1941) 41 Colum. L. Rev. 777, 781; Mason, The Utility of Consideration—A Comparative View (1941) 41 Colum. L. Rev. 825, 837, 845.

26. Comment, The Present Status of the Sealed Obligation (1939) 34 Ill. L. Rev. 457. In New York the mere presence of the seal upon a written instrument is not sufficient to establish it as a specialty, in the absence of a recital of sealing. See Transbel Investment Co. v. Venetos (1938) 279 N. Y. 207, 18 N. E. (2d) 129. This anomalous rule of law, deriving from the diminished import of the seal in practice, is an example of the judicial fallacy, indulged in the findings field, that people can confer by self-serving declarations an assurance of veracity or deliberation that they cannot confer by their positive actions. It clashes oddly with the general common law distrust of this type of testimonial evidence.

full time to consideration of the statutory standards and objectives which they are applying and administering, and assisted by an expert staff sworn to be similarly diligent, what index of added deliberation and correctness of judgment is a formulary device like a finding of fact couched in statutory language?

### III. Dispensability of Fact Findings:— Absence of Judicial Review; "Executive" and "Legislative" Activity

It is obvious that, epistemologically speaking, facts can be *"found"* without being *stated,* and a few courts have been bold and Berkeleyan enough in this field to recognize that *esse est percipi;* these courts infer, from the fact that administrative officials have taken action, that those officials have found the facts prerequisite to such action, and hence forego insistence upon explicit findings of fact.[27] Most courts, however, reject this approach. In deference to this fact and the confused constitutional status of findings of fact, the prevailing legislative mode is to prescribe administrative findings of fact in the authorizing statute;[28] and the courts interpret these provisions to mean written findings.[29] This legislative tendency makes it difficult to deter-

27. " * * * where, as in the present case, an act is to be done, or patent granted upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act or granted the patent, is prima facie evidence that the proofs have been regularly made, and were satisfactory. * * * It is not, then, necessary for the patent to contain any recitals that the prerequisites to the grant of it have been duly complied with, for the law makes the presumption; and if, indeed, it were otherwise, the recitals would not help the case without the auxiliary proof that these prerequisites had been, de facto, complied with." Philadelphia and Trenton R. R. v. Stimpson (U. S. 1840) 14 Pet. 448, 458, 459. Accord, Consolidated Flour Mills Co. v. Kansas Gas & Electric Co. (1925) 119 Kan. 47, 237 Pac. 1037.

28. See Opp Cotton Mills v. Administrator of Wage and Hour Div. (1941) 312 U. S. 126; Missouri Broadcasting Co. v. F. C. C. (App. D. C. 1937) 94 F. (2d) 623, cert. den. (1938) 303 U. S. 655; Saginaw Broadcasting Co. v. F. C. C. (App. D. C. 1938) 96 F. (2d) 554, cert. den. (1938) 305 U. S. 613; Bituminous Coal Act (1937) 50 Stat. 72, c. 127, §2, 15 U. S. C. A. §829; Food, Drug, and Cosmetic Act (1938) 52 Stat. 1055, c. 675, §701(e), 21 U. S. C. A. §371(e) (requiring regulations to be accompanied by *"detailed* findings of fact"), discussed in Fuchs, The Formulation and Review of Regulations under the Food, Drug, and Cosmetic Act (1939) 6 Law and Contem. Prob. 43, and in Staley Mfg. Co. v. Sec'y of Agriculture (C. C. A. 7, 1941) 120 F. (2d) 258.

29. The Bureau of Marine Inspection and Navigation of the Department of Commerce has objected to the requirements of current proposed administrative law bills that decisions of administrative bodies be in writing. This

mine whether findings of fact are currently required under the due process clause, or to avoid an undue delegation of legislative power.[30] *Opp Cotton Mills v. Administrator of Wage Hour Division,* however, would certainly seem to indicate that they still serve a function in establishing that an administrative agency is not engaging in an invalid delegation of legislative power.[31]

In general, dispensability of findings is correlative with the degree of unavailability of judicial review.[32] Thus, for example, where there is no judicially assertible right of review,[33] there is lacking any occasion for demanding written findings of fact. Clear as this single criterion appears on the surface, however, what about its application where an administrative order is sub-

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Bureau apparently makes decisions by telephone every day with respect to the clearance of vessels, etc. The Attorney General's Committe has recommended oral decisions in the case of trials of officers and seamen for drunkenness. Hearings before a Sub-Committee of the Committee on the Judiciary of the United States Senate (1941) 77th Cong., 1st Sess., on S. 674, 675, and 918 (hereafter referred to as "Administrative Procedure Hearings"), p. 591-592.

It is curious to note that the constitutional and statutory requirement that courts hand down written opinions has been restrictively interpreted by appellate courts, on the grounds that it hampers the speedy administration of justice, and that written opinions will be better if fewer in number. See Comment (1939) 16 N. Y. U. L. Q. Rev. 485.

30. The possibilities of misinterpretation on this score are clearly indicated by two cases relied on in the "Hot Oil" case. In Wichita R. R. & Light Co. v. Public Utilities Comm. (1922) 260 U. S. 48, 55, a Kansas *statute* provided that "the Commission shall find that [existing] rates * * * are unjust, unreasonable, unjustly discriminatory, or unduly preferential" before issuing an order for a rate increase. In Mahler v. Eby (1934) 264 U. S. 32, 44, a federal *statute* provided that aliens could be deported by the Secretary of Labor only if he found that they were undesirable residents of the United States. In both cases, Chief Justice Taft had said that an order made after hearing was void for lack of express findings, "*not only* on the language of the statute, *but also* on general principles of constitutional government." (Italics supplied). Chief Justice Hughes felt that this meant that failure by an administrative tribunal to make findings of fact involved a deprivation of due process of law and was evidence of an invalid delegation of legislative power. Mr. Justice Cardozo interpreted the cases to mean only that, "if legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled." Panama Ref. Co. v. Ryan (1935) 293 U. S. 388, 488. The writer's feeling is that nothing more is involved than an innocuous, fortuitous, and personal commendation by Taft of the legislature's wisdom, from the standpoint of general constitutional polity, in providing for explicit findings of fact by the administrative body. The liberal opinion of the Kansas court in the *Consolidated Flour Mills* case, note 27, supra, negatives the assumption that the *Wichita* case enunciated any novel constitutional law doctrine.

31. See note 10, supra.

32. See Twin City Milk Producers Ass'n v. McNutt (C. C. A. 8, 1941) 122 F. (2d) 564.

33. As in Perkins v. Lukens Steel Co. (1940) 310 U. S. 113.

ject to collateral attack, *e. g.*, by injunction, but no specific appellate procedure is provided for by the statute?[34]

It is also said that findings of fact need not be made in situations involving executive action,[35] because activities falling within the executive prerogative tend to be political questions characteristically subjected to a minimum of judicial review, and because a special presumption attaches to the general validity of executive action.[36] One difficulty with this rule is the merger of legislative and executive functions so characteristic of current-day democracies, which, coupled with the quantitative political ascendency of the executive, blurs perhaps beyond hope of differentiation the distinction between the executive and legislative domains.[37] Presumably, however, the President's conduct of international relations, where he exercises a "very delicate, plenary and exclusive power * * * as the sole organ of the

34. For example, Shields v. Utah Idaho Central R. R. (1938) 305 U. S. 177 (determination by I. C. C. that electric railway was not interurban and hence was subject to Railway Labor Act); Utah Fuel Co. v. Nat'l Bituminous Coal Comm. (1939) 306 U. S. 56 (order of Bituminous Coal Commission requiring disclosure of confidential information). See Feller, Prospectus for the Further Study of Federal Administrative Law (1938) 47 Yale L. J. 647, 668.

35. See Philadelphia & Trenton R. R. v. Stimpson (U. S. 1840) 14 Pet. 448; Panama Ref. Co. v. Ryan (1935) 293 U. S. 388, 432; United States v. Baltimore & O. R. R. (1935) 293 U. S. 454, 465.

36. See Martin v. Mott (U. S. 1827) 12 Wheat. 19, 30 (presidential power to call forth militia when the United States is invaded or in imminent danger of invasion); Dakota Central Tel. Co. v. S. Dakota (1919) 250 U. S. 163, 184 (presidential power to take over telegraph and telephone system as war emergency measure). As a matter of fact, in the absence of clear evidence to the contrary the Court has said that it will presume that *all* public officers have properly discharged their official duties. See United States v. Chemical Foundation (1926) 272 U. S. 1, 14, 15 (counselor for state department, acting pursuant to authority delegated to him by President, held authorized to sell chemical patents belonging to alien enemies).

37. See United States v. Bush & Co. (1940) 310 U. S. 371, 379 (Presidential procedure in promulgating tariff rates intended to equalize differences in domestic and foreign costs of production is legislative in nature); Mr. Justice Douglas' concurring opinion in Z. & F. Assets Realization Corp. v. Hull (1941) 311 U. S. 470, 490; Corwin, *The President: Office and Powers* (1940) 122, 123. Although the majority of the "Hot Oil" court felt that the power exercised was not executive in nature, the confusing entry must be made that it was in fact exercised by the Chief Executive. Cf. also Norwegian Nitrogen Products Co. v. U. S. (1933) 288 U. S. 294, 319, discussed p. 77, infra; Report of Special Committee on Administrative Law (1934) 59 Rep'ts Am. Bar Ass'n 539, 542.

Executive and legislative actions are only different states of the same political process and political will. Lowenstein, The Balance Between Legislative and Executive Powers: A Study in Comparative Constitutional Law (1938) 5 U. Chi. L. Rev. 566, 575.

federal government" and where secrecy of information is highly necessary, is executive activity rendering findings of fact otiose.[38] Likewise, since procedural safeguards are generally more easily dispensed with in the field of regulation of foreign commerce,[39] administrative fact findings are probably similarly dispensable. Since the justification for dispensing with findings of fact in these fields lies largely in the aura of secrecy and confidential treatment which must surround such matters as costs of production, similar dispensability is indicated for other administrative regulatory proceedings requiring secrecy, such as the deportation of aliens and the granting of applications for patients.[40] Furthermore, although courts in the past have been loath to regard economic stress as on a par with military exigency in justifying judicially unreviewable executive sanctions,[41] perhaps in time they may concede that administrative action in amelioration of economic crises also need not be preceded by such specific formalities as findings of fact.[42]

It has been a truism that where legislative authority is exercised by an administrative body, the due process clause does not

38. Cf. United States v. Curtiss-Wright Corp. (1936) 299 U. S. 304 (upholding the Presidential power to make punishable as a crime, by proclamation, the sale of arms and munitions to countries engaged in armed conflict in the Chaco dispute); Z. & F. Assets Realization Corp. v. Hull (1941) 311 U. S. 470; Mueller v. U. S. (C. C. P. A. 1940) 115 F. (2d) 354. In both the *Curtiss-Wright* and *Mueller* cases the empowering statute directed that findings of fact be made. The way in which the court dismissed counsel's contention that the fact findings had not been made in the form contemplated by the statute, however, justifies the conclusion that findings of fact may constitutionally be dispensed with in this field.

Riesenfeld, The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions (1937) 25 Calif. L. Rev. 643, 665-669, points out that in the field of foreign relations Congress merely *requests* the state department to furnish information, whereas in other situations it *directs* the executive department to furnish the same.

39. Cf. Buttfield v. Stranahan (1904) 192 U. S. 470; Norwegian Nitrogen Products Co. v. U. S. (1933) 288 U. S. 294.

40. See Administrative Procedure Hearings, 562-564, 610-611.

41. Cf. Sterling v. Constantin (1932) 287 U. S. 378, 399 (governor of state held not authorized to proclaim martial law as incident to administration of state oil conservation law; presumption of such authority present, but not conclusive upon judiciary).

42. Daniel W. Bell, Under Secretary of the Treasury, testified that the regulatory functions of the Department are in connection with such matters as national banks, international currency, and the control of foreign funds, all of which are associated with national defense. Administrative Procedure Hearings, 145.

For judicial recognition of the seriousness of the industrial turmoil that the National Labor Relations Board was established to mitigate, see N. L. R. B. v. Ford Motor Co. (C. C. A. 6, 1940) 114 F. (2d) 905, 910.

require findings of fact to be made. Although the direct authority supporting this belief is both sparse and subject to qualification,[43] this rule derives its major support from the relaxation of other procedural safeguards in connection with "quasi-legislative" activities.[44] The courts proceed on the premise that a legislative function is something which the legislature could do (and perhaps historically had done) itself, but which it had determined to delegate to an administrative body. From this they infer that legislative canons control the sufficiency of the hearing called for by the due process clause, *i. e.*, that an administrative body performing a legislative function need afford only the hearing that the legislature itself would have given, which would have been informal, far from adversary in nature, and would have amounted to little more than an opportunity to appear before a legislative committee to testify.[45] By analogy, it is assumed that findings may be dispensed with.

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43. In support of this proposition can be cited Pacific States Box & Basket Co. v. White (1935) 296 U. S. 176 (the inconsistency of which with the "Hot Oil" case was discussed in note 6, supra); American Tel. & Tel. Co. v. U. S. (D. C. S. D. N. Y. 1936) 14 F. Supp. 121 aff'd, without discussion of this point, in (1936) 299 U. S. 232 (prescription of system of accounts held a legislative rather than a judicial function, which can be exercised "without first reporting the data upon which it decided that the proposed rule should be established.") As has been pointed out, the *Twin City* case looks the other way, see note 20, supra.

The *American Tel. & Tel.* case seems to possess little logical continuity with earlier cases characterizing accounting orders as legislative. The Supreme Court, when it first upheld the power of the I. C. C. to prescribe accounts "in its discretion" as not being a delegation of legislative power, seems to have done so on the basis that the prescription was in large measure a device for procuring information, and hence in effect amounted to an administrative regulation of unimportant nature. See I. C. C. v. Goodrich Transit Co. (1912) 224 U. S. 194, 214. Subsequent cases describing accounting orders as "legislative" in character, use the "legislative" label primarily as a justification for refusing to assume jurisdiction. (See p. 78, infra.) Their real rationale has been that, since accounting classifications were not conclusive, the parties affected thereby were not entitled to injunctive relief against their enforcement. Norfolk and Western R. R. v. U. S. (1932) 287 U. S. 134; State Corp. Comm. of Kansas v. Wichita Gas Co. (1934) 290 U. S. 561; cf. United States v. Los Angeles and Salt Lake R. R. (1927) 273 U. S. 299. For an excellent discussion indicating how the courts, with some exceptions, have failed to realize the prescriptive force of accounting regulations, see Kripke, Accountants' Financial Statements and Fact-Finding in the Law of Corporate Regulation (1941) 50 Yale L. J. 1180, 1200 et. seq.

44. This approach assumes (mistakenly we think, see Part Two, infra) that the compelling consideration behind the courts' insistence on findings of fact is the giving of notice to the parties affected by administrative action as to the grounds of such action.

45. An importer affected by the promulgation of new tariff rates could demand no more. See Norwegian Nitrogen Products Co. v. U. S. (1933)

The purely opportunistic nature of the "legislative" tag in this connection is indicated by the fact that some courts, merely out of a desire to assure full notice to the parties affected by a wage order, have termed the fixing of minimum wages "quasi-judicial."[46] We are ultimately led to Gellhorn's conclusion that "legislative" is a word of art meaning that no preliminary notice need be given a party affected by administrative action, whereas "judicial" connotes that notice must precede the determination.[47] Furthermore, since notice to parties affected can be given in other ways than through findings of fact (and, the writer believes, is not the main reason such findings are called for),[48] there would seem to be no legal or substantive reason why "legislative" should connote dispensability of findings merely because it points to the dispensability of notice. This is not true where the term "legislative" operates as part of the doctrine of exhaustion of administrative remedies to indicate that judicial intervention is premature while administrative action is in a "legislative" state, *i. e.*, has not reached the final stage of impact on the parties covered by the order;[49] courts obviously should not insist on an administrative record containing final findings of fact in advance of such time as the administrative proceeding itself has reached a status of finality appropriate for judicial review.

Attempts to differentiate quasi-legislative and quasi-judicial activities in terms of the coverage of the administrative act similarly fail to indicate whether or why administrative findings may

288 U. S. 294, 318. Accord, Commonwealth v. Sisson (1905) 189 Mass. 247, 75 N. E. 619, 621; State ex rel. State Board of Milk Control v. Newark Milk Co. (1935) 118 N. J. Eq. 504, 179 Atl. 116, 126; Spokane Hotel Co. v. Younger (1920) 113 Wash. 359, 194 Pac. 595, 598 (fixing of milk prices); Town of Lexington v. Bean (1930) 272 Mass. 547, 172 N. E. 867, 869 (zoning regulation). But cf. Southern Ry. v. Virginia (1933) 290 U. S. 190, decided by a split court and probably ripe for overruling.

46. See Western Union Tel. Co. v. Industrial Comm. (D. C. D. Minn. 1938) 24 F. Supp. 370, 377 (minimum wage order), discussed in Note, Notice and Hearing in Minimum Wage Regulation (1939) 24 WASHINGTON U. LAW QUARTERLY 233; O'Grady, Wage-Fixing by Administrative Agencies—Legislative or Judicial? (1939) 27 Geo. L. J. 486 (concluding on the basis of the *Morgan* and *Prentis* cases, that legislative functions like rate-fixing may have attributes necessitating a judicial hearing).

47. Gellhorn, *Administrative Law, Cases and Comments* (1940) 360-361.

48. Compare the decisions cited in notes 109 et seq., Part Two, infra, and decisions in text.

49. See Prentis v. Atlantic Coast Line Co. (1908) 211 U. S. 210; Mr. Justice Brandeis' dissent in Pennsylvania v. West Virginia (1923) 262 U. S. 553, 616; Berger, Exhaustion of Administrative Remedies (1939) 48 Yale L. J. 981, 983. See also note 43, supra.

be dispensed with in the case of legislative or rule-making activity. Professor Fuchs, for example, defines legislative rule-making as "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations" as distinguished from the adjudicative function, "the issuance of orders or findings or the taking of action applying to named or specified persons or situations."[50] Instructive perhaps in some contexts, this definition places an emphasis on the mere mechanics of addressing an administrative order, an emphasis that has no relevance to the basic considerations involved in determining whether to require findings. In short, if the order is couched in a form apparently applicable to general classes and operative *in futuro*, Fuchs calls it legislative, but if addressed to specific parties as the termination of a specific outstanding dispute, it may be denominated quasi-judicial.

But how important is the addressograph? Let us look at the matter functionally. Even legislatures pass private bills remedying private wrongs; need we therefore be surprised that a court can say of administrative activity, "we do not agree, because it is not a general regulation, it is a judicial action"?[51] Furthermore, if generality of application be the criterion of "legislative" rule-making, the Interstate Commission's prescription of power-operated reverse gears in the *Baltimore and Ohio Railroad Co.* case, for example, would appear to be the promulgation of a legislative rule; yet the Court in that case held quasi-jurisdictional findings essential to the constitutional validity of the rule.[52] Confusion is furthered by the fact that many of the newer federal agencies, operating in untrodden fields, have wisely expressed a preference for formulating their "legislative" rules and general policies by the (presumably "judicial") case by case method.[53]

50. See Fuchs, Procedure In Administrative Rule-Making (1938) 52 Harv. L. Rev. 259, 260-265.

51. Commonwealth v. Sisson (1905) 189 Mass. 247, 75 N. E. 619, 621.

52. (1935) 293 U. S. 454, discussed more fully in Part Two, infra.

53. Even interpretive regulations—regulations intended as a guide to individual action under a statute and imposing no legal sanctions in the event of violation (see Lee, Legislative and Interpretive Regulations (1940) 29 Geo. L. J. 1, 3)—have, so far as individual conduct is concerned, the coercive effect of legislation. See Administrative Procedure Hearings, 331, 863. The same is true of so-called "directory" matter contained in a commission's report and not embodied in a formal order. See United States v. Atlanta, B., & C. R. R. (1933) 282 U. S. 522, 528.

The courts have on occasion supported the proposition that legislative activity is prospective and judicial activity retroactive in operation.[54] This notion likewise does not aid us in our special problem. In any situation where the promulgation of a new rule or order arises out of dissatisfaction with the way in which a prior rule, or an unregulated *status quo*, has been working, the rule operates *in fact* not only as a regulation of future conduct,[55] but as an adjudication, and frequently a reorganization, of individual rights based on past conduct. Even if a rule purports as a matter of law to be prospective in operation, the individuals most likely to complain of it are those who conceive that their past rights are impaired by its adoption. Administration characteristically has the contours of reorganization, a Janus-faced process looking both to past and future.[56]

In sum, generality of application and intended futurity of operation are defective criteria of what differentiates "legislative" from "judicial" activity,[57] and of what justifies administrative

54. Prentis v. Atlantic Coast Line Co. (1908) 211 U. S. 210; Arizona Grocery Co. v. Atchison, T. & S. F. Ry. (1932) 284 U. S. 370 (holding that a quasi-judicial reparation order could not repeal a quasi-legislative promulgation of a maximum reasonable rate); Arizona Wholesale Grocery Co. v. So. Pacific Co. (C. C. A. 9, 1934) 68 F. (2d) 601; and Associated Industries v. Industrial Welfare Comm. (Okla. 1939) 90 P. (2d) 899. These cases are examples which strongly endorse the theory that rate-fixing and wage-fixing are legislative because they look to the future.

55. Compare Judge Lindley's language in Lincoln Printing Co. v. Middle West Utilities Co. (D. C. N. D. Ill. 1934) 6 F. Supp. 663, 682-683, discussing the reorganization of the Insull utility empire:

"The conduct of any equity receivership is of necessity largely administrative; it involves more than a decision of 'yes' or 'no' upon a single issue or a multiple of single issues presented by appropriate pleading. It involves decisions on matters of policy with nice gradations of refined reasoning and conservative judgment * * * often * * * questions of policies or courses of conduct concerning which two apparently equally consistent views may be taken. Such questions and situations constantly recur in the conduct of an equity receivership, giving to it a character requiring the exercise of administrative jurisdiction, as distinguished from decision or controverted or litigated questions."

56. See Administrative Procedure Hearings, 219-223 (Federal Communications Commission); id. at 515, 524-525 (Railroad Retirement Board); id. at 903 (Interstate Commerce Commission).

57. This is especially true of such critical border line instances as rate-fixing orders, and other public utility regulations, where "adjudication is the vehicle primarily of future rule rather than consequence for the past." Jaffe, The Report of the Attorney General's Committee on Administrative Procedure (1941) 8 U. Chi. L. Rev. 401, 420. See also Fuchs, Concepts and Policies in Anglo-American Administrative Law Theory (1938) 47 Yale L. J. 538; O'Grady, Wage-Fixing by Administrative Agencies—Legislative or Judicial? (1939) 27 Geo. L. J. 486; Morgan v. U. S. (1936) 298 U. S. 468; Highland Farms Dairy v. Agnew (D. C. E. D. Va. 1936) 16 F. Supp. 575, 586.

abstention from fact-finding. The first consequence of following the admonition of Chief Justice Hughes in the *Morgan* case[58] not to have regard to the mere form of the proceeding and not to ignore realities would be to discount in large measure his subsequent remark that a proceeding which has "all the essential elements of contested litigation" is quasi-judicial. A court should tackle the problem of administrative findings from the same standpoint that should guide the administrative agency itself, the type of hearing intended by Congress,[59] fairness to the parties affected by its order, and reasonable expeditiousness in settling the controversy.

A starting point for such an approach that might still find some utility for the "legislative" concept is Mr. Justice Holmes' classic statement of the impracticability of the New England town meeting approach in carrying out the numerous, complicated, and all-inclusive present-day administrative programs; personal self-representation must take a back-seat as the political community expands in size and regulatory vigor.[60] To this insight based on the fact of population growth may be added an elementary statistical observation. In the *Assigned Car Cases,* the Court sustained an order of the Interstate Commerce Commission establishing a general rule of coal car distribution among bituminous coal mines, which order contained a finding that the existing practice was discriminatory in giving certain mines an

58. Morgan v. U. S. (1938) 304 U. S. 1, 23.

59. Viewed in this light, it is probably correct to say that a statutory requirement for a "full hearing" gives administrative proceedings a quasi-judicial character. Morgan v. U. S. (1938) 304 U. S. 1, 23; Opp Cotton Mills v. Administrator of Wage and Hour Div. (1941) 312 U. S. 126; cf. Highland Farms Dairy v. Agnew (D. C. E. D. Va. 1936) 16 F. Supp. 575, aff'd (1937) 300 U. S. 608. However, had the statute in the *Morgan* and *Opp* cases provided merely for a "hearing" rather than a "full hearing," would the Court have reached the same conclusions as to the quasi-judicial character of the proceedings?

60. "Where a rule of conduct applies to more than a few people it is impracticable that every one should 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. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. * * * There must be a limit to individual argument in such matters if government is to go on." Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colorado (1915) 239 U. S. 441, 445. Accord, People v. Orvis (1922) 301 Ill. 350, 133 N. E. 787; but cf. Northwestern Bell Tel. Co. v. State Bd. of Equalization (1929) 119 Neb. 138, 227 N. W. 452.

unjust and unreasonable share of railroad services and facilities. In defending the order against the charge that the evidence and the findings related to only a few of the carriers covered, Mr. Justice Brandeis pointed out that the evidence sustaining the Commission's induction need not be exhaustive, so long as it was typical.[61] In other words, the relative quantum of proof (*i. e.*, the amount of evidence and perhaps also the *number* of findings) differs as between legislative and adjudicative proceedings; a legislative proceeding may rely on a relatively smaller sampling of the total pertinent evidence and fewer findings than is necessary where the rights of parties are dealt with in separate adjudicative proceedings.[62]

With these two preliminary observations, it may be well to abandon the attempt to give intelligible content to the doctrine that "legislative" rule-making, as contrasted with administrative adjudication, need not be accompanied by findings of fact. The inchoate nature of the relevant case law seems to justify, with respect to the requirement of findings of fact, Landis' suggestion that judicial review of administrative adjudication and administrative legislation be assimilated to each other, since the same type of issues influence both types of administrative judgment.[63] Furthermore, our analysis has thrown us upon a rationale that concerns not the making of findings, but rather the quantity of evidence required to sustain such findings as may be made. When we return to this strand of thought in the last section of this article, it will be in connection with the alleged necessity for *subsidiary* findings of fact.[64]

(To be concluded in the February issue.)

61. " * * * in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general." (1927) 274 U. S. 564, 583. For an even more vigorous statement of the necessity for relying on what the commentators on scientific method call "imperfect induction," see United States v. Louisiana (1933) 290 U. S. 70, 76.

What we here say relates to such propositions of fact as are arrived at strictly by induction; as will be pointed out more fully later, administrative agencies have to be convinced of many propositions that are not thus derived. See Part Two, infra.

62. See Andree and Seedman, Inc. v. Administrator of Wage and Hour Div. (App. D. C.), decided June 30, 1941.

63. See Landis, *The Administrative Process* (1938) 150-151.

64. See Part Two, infra.