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SPECULATIVE EVIDENCE AND THE ADMINISTRATIVE PROCESS

The successful experience of administrative agencies in applying liberal rules for the admission of evidence[1] is clearly reflected in the Administrative Procedure Act, which provides that any evidence may be received, so long as it is not irrelevent, immaterial, or unduly repetitious.[2] However, the administrative agencies' progressive approach to evidence problems has not been directed solely to the question of admissibility. Even more significant, because of its greater influence on the final decision, is the agency's freedom to determine what kind of evidence may support its findings.[3] Illustrative is the recent decision of the Circuit Court of Appeals for the District of Columbia in *American Airlines v. Civil Aeronautics Board,*[4] allowing the CAB to rely heavily on speculative evidence in exercising its broad regulatory powers.

The CAB, following lengthy hearings, granted temporary certificates of public convenience and necessity to four non-scheduled airliners authorizing them to engage in air transportation of cargo only.[5] From the evidence before it, the Board concluded that there was an air freight traffic "potential" of not less than one billion ton-miles annually.[6] Having little previous experience in this undeveloped field,[7] the CAB, in

1. See DAVIS, ADMINISTRATIVE LAW 447 (1951). The author points to three fundamental tendencies: "(1) to replace rules with discretion, (2) to admit all evidence that seems relevant and useful, and (3) to rely in making findings upon 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs.'" *Id.* at 448.

2. 60 STAT. 242, 5 U.S.C. § 1006 (1946).

3. DAVIS, *op. cit. supra* note 1, at 448.

4. 192 F.2d 417 (D.C. Cir. 1951).

5. In 1946, 14 applications were made to engage directly in air freight transportation. There were also 78 applications for permission to participate indirectly as air freight forwarders. In the hearings on the direct cargo carriers, with which this case is particularly concerned, several established airlines intervened in opposition to the applications.

6. There was a wide margin of variance in testimony on this particular point, ranging from the CAB's finding to an estimate of more than 5½ billion ton-miles offered by one expert witness. The CAB recognized that this tremendous potential is subject to many uncertainties, and would therefore necessitate intensive development if it is to be realized.

7. The air freight industry owes its inception primarily to the exigencies of World War II. In the interim between the hearings and the issuance of a report thereon, the CAB promulgated an exemption order, pursuant to statutory authority, which permitted immediate engagement in cargo-only transportation pending its final decision on certification. Thus, while there was some previous experience to draw from, it was severely limited. For an extensive discussion of the problems in developing the air freight industry and suggestions as to how to best resolve them, See Durham and Feldstein, *Regulation as a Tool in the Development of the Air Freight Industry,* 34 VA. L. REV. 769 (1948). The authors are especially critical of the established airlines who have taken advantage of the administrative processes of the CAB

reaching this finding, drew largely on expert opinion as to market potential, data pertaining to property movement by express and rail, and testimony concerning the effect various rates would bear on future growth of this new enterprise. In justifying its action, the agency stressed that the promotional character of the issue in question defied solution in the same manner as the trial of factual issues by a judicial tribunal.[8] The circuit court upheld the Board's determination, grounding its sweeping opinion on the legislative mandate,[9] the prospective nature of the problem which necessitated the utilization of forecasts, and the expertness of the regulatory body, which possesses its maximum utility in this kind of situation.[10]

The Civil Aeronautics Act requires the CAB to consider as being in the public interest the "encouragement and development of an air transportation system properly adapted to the present and future needs"[11] of the country. This explicit mandate is peculiar to the Aeronautics Act insofar as transportation statutes are concerned.[12] However, while this provision is an important consideration in ascertaining whether the Board has remained within the framework of statutory guidance, it does not limit the applicability of the *American Airlines* opinion to CAB decisions. The court's language militates against such a narrow interpretation.[13]

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in an attempt to stifle progress in this infant industry. They, suggest that permanent certificates be issued qualified freight carriers without further delay. Otherwise, they fear, interest groups such as the Air Transport Association of America, a trade group of certificated airlines, will obstruct the achievement of the progressive transportation policy enunciated in the Civil Aeronautics Act.

8. In answer to the invervenors' protest that the factual evidence was too insubstantial to justify issuance of the certificates, the Board said in its opinion: ". . . it is essential in disposing of the present case that we keep in mind the nature of the basic issue involved. That issue is primarily promotional in character and relates to developmental rather than purely regulatory purposes. This characteristic of the statutory scheme serves to distinguish the Civil Aeronautics Board from judicial tribunals and even from many regulatory bodies." American Airlines v. Civil Aeronautics Board, 192 F.2d 417, 420, 421 (D.C. Cir. 1951).

9. 52 Stat. 977 (1938), 49 U.S.C. § 401 *et seq.* (1946) (Civil Aeronautics Act).

10. *See* American Airlines v. Civil Aeronautics Board, 192 F.2d 417, 420 (D.C. Cir. 1951).

11. 52 Stat. 980 (1938), 49 U.S.C. § 402(a) (1946).

12. The National Transportation Policy enunciated by Congress in 1940 admittedly includes the fostering and development of an adequate transportation system. 54 Stat. 899 (1940). This pronouncement, however, does not specifically attach the promotional aspects to the granting of a certificate of public convenience and necessity as is done in the Civil Aeronautics Act. But the sections dealing directly with the issuance of permissive certificates do not confine the agency to past or present conditions. For example, part II of the Interstate Commerce Act provides: ". . . a certificate shall be issued . . . if it is found that . . . the proposed service, to the extent to be authorized by the certificate, is *or will be* required by the present *or future* public convenience and necessity . . . ." 49 Stat. 551 (1935), 49 U.S.C. § 307 (1946) (emphasis added).

13. "Every new bus route, new airplane service, new radio station, new stock issue, new pipe line, new power project, and so on, seeks its permissive certificate

Further, the absence of similar directives in other statutes concerning the issuance of permissive certificates has not precluded other agencies from relying upon prognostication.[14] Thus, while the policy section in question furnishes a useful guide to the agency operating under its authority, to attribute to it the entire rationale of the *American Airlines* case would seem to be unwarranted over-emphasis.

If the policy enunciated by the Act is not the sole basis for approval of the CAB's order, under what circumstances does an administrative determination founded partially upon speculation meet the substantial evidence requirement which permeates the regulatory process when agency action must be based on a record built at hearings?[15] The Attorney General's Committee on Administrative Procedure posed a similar question in discussing the desirability of detailed judicial review of administrative rules.[16] The Administrative Procedure Act, as finally passed, divided the administrative process into two broad categories—rule-making and adjudication.[17] It has been common to characterize the former as that segment of the process which is akin to legislation, and the latter as similar to judicial determination of a controversy.[18] The Attorney General's Committee recognized that certain agency regulations might of necessity be based upon speculative considerations.[19] However, it does not necessarily follow that speculation, if permitted at all, is limited to

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upon the basis of future possibilities." American Airlines v. Civil Aeronautics Board, 192 F.2d 417, 420 (D.C. Cir. 1951).

14. See notes 25 and 28 *infra*, and accompanying text.

15. When either rule-making under Section 4 of the Administrative Procedure Act or adjudication under Section 5 is required by statute to be based on a record built at hearings, Section 7(c) provides: ". . . no sanction shall be imposed or order be issued except . . . as supported by and in accordance with the reliable, probative, and substantial evidence." 60 STAT. 241, 5 U.S.C. § 1006(c) (1946).

16. "One crucial point is whether the courts would be willing to regard as substantial the opinion evidence and the possibly somewhat speculative and partial data upon which some of the findings would necessarily rest—especially the economic findings and findings relating, for example, to consumer preferences or reactions to food products and their labels." REP. ATT'Y GEN. COMM. AD. PROC. 119 (1941) (hereafter referred to as FINAL REPORT). The Committee concluded that little could be gained by a detailed judicial review of such findings by judges inexpert in the solution of such problems. *Ibid.*

17. Section 4 of the Administrative Procedure Act is concerned with the rule-making function, while Section 5 addresses itself to administrative adjudication. That these categories are not mutually exclusive is lucidly pointed out in DAVIS, *op. cit. supra* note 1, at 190, 193.

18. See DAVIS, *op. cit. supra* note 1, at 184. After drawing the analogies, Professor Davis immediately mitigates their utility and suggests that it is often best to omit the nomenclature and deal with the problem in question on a practical basis. *Id.* at 185. See Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259 (1938), for an illustration of the point that mere prospective operation does not necessarily distinguish rule-making from adjudication.

19. FINAL REPORT, *supra* note 16, at 119.

the rule-making function. Illustrative of the attendant inconsistencies in such a conceptualistic approach is the Administrative Procedure Act's express designation of licensing as an adjudicatory proceeding.[20] The issuance of certificates of necessity is a part of the licensing function.[21] That the considerations which enter into such a determination are not solely within the narrow confines of the factual issues generally before a judicial tribunal is readily apparent from the *American Airlines* decision.

Several years prior to the *American Airlines* case, *United Airlines, Inc., v. CAB*[22] upheld the decision of the CAB to grant a certificate of necessity to one of two competing applicants for a new passenger route. The Board had found that Western Airlines must be awarded the certificate if it were to remain a competitive element in the section of the country where the new route was located. From past and present traffic loads, the agency made estimates of probable future traffic, projecting the available data to include the long-term secular growth trend of air travel. It further speculated that Western's operations would be profitable; that if the route were given to the other applicant it would result in serious economic injury to Western. The court alluded to the subject matter in dispute which required the use of "intelligent conjecture," since the "core of facts" was not sufficient to preclude the necessity for such prophecy.[23] Again, as in the *American Airlines* case, the nature of the problem defied adequate resolution in any other manner.

The instances in which agency action has been held to be supported by substantial evidence although such evidence included speculative forecasts have not been restricted to aeronautics problems. The Interstate Commerce Commission during World War II granted a permissive certificate to a steamship company to engage in water transportation of autos upon resumption of their manufacture following the cessation of hostilities. The ICC order was reversed by a federal district court, which characterized as conjectural the Commission's conclusion that to refuse the certificate might cause unnecessary delay in shipping the vehicles once civilian production were resumed, adversely affecting the public interest.[24] The Supreme Court,[25] however, restored the agency's decision,

20. 60 STAT. 237, 5 U.S.C. § 1001(d) (1946).

21. *Id.* § 1001(e).

22. 155 F.2d 169 (D.C. Cir. 1946).

23. "Any forecast of the result of a new venture contains a core of certainty and a margin of conjecture. If the venture is closely similar to established operations, the core is large and the margin small. If there is no experience data on major elements, the margin of conjecture is considerable." *Id.* at 174.

24. Detroit and Cleveland Navigation Co. v. United States, 57 F. Supp. 81, 86 (E.D. Mich. 1944).

25. United States v. Detroit and Cleveland Navigation Co., 326 U.S. 236 (1945).

pointing to the governing statute[26] which makes necessary forecasts as to the future. The lower court's approach, it was felt, would "paralyze the Commission into inaction."[27]

Similarly, in issuing a certificate of necessity to a carrier of petroleum products to operate in a territory already being served, the ICC specifically found that the consequent competition would stimulate improved service to the public, and that the established carrier's economic status would not be seriously impaired. The Commission relied upon the growth and anticipated increase in the territory's population, the expected rise in the volume of business of those concerns which would utilize the proffered service, and the belief that traffic in petroleum products would expand along with the increase of tourist trade once wartime rationing of gasoline ended. The reviewing tribunal, in upholding the administrative grant of the requested certificate, referred to this evidence as typical of offerings made in such cases. The ICC was "exercising an expert judgment or discretion with respect to a transportation question," and the courts will interfere only if agency action is arbitrary or capricious.[28]

The usefulness of administrative forecasting has also been recognized in areas other than those involving the certification of new ventures. In rate-fixing, there is likely to be more factual data available to the governing agency than when the issue is one of determining whether the public interest requires the initiation of a particular service. Nevertheless, it would be unrealistic to assume that rates can be intelligently determined without serious thought being given to their future consequences. The Supreme Court has held that it is not a denial of due process for the regulatory body to draw inferences as to the probable effect a rate increase will have on future traffic.[29] The Commission had concluded that the carrier in question would not be benefited in the long run from a rate above a certain level because a higher tariff would discourage patronage. To the claim that the order was invalid because based on speculation and conjecture, the Court replied that the setting of future rates necessarily includes making predictions. ". . . [I]t is

26. 54 STAT. 941 (1940), 49 U.S.C. § 909(c) (1946) provides: ". . . upon application . . . the Commission shall issue a certificate to any qualified applicant . . . if the Commission finds that . . . the proposed service . . . is or will be required by the present or future public convenience and necessity. . . ."

27. United States v. Detroit and Cleveland Navigation Co., 326 U.S. 236, 241 (1945). "Forecasts as to the future are necessary to the decision." *Ibid.*

28. Lang Transp. Corp. v. United States, 75 F. Supp. 915, 921 (S.D. Cal. 1948). See also Inter-City Transp. Co. v. United States, 89 F. Supp. 441 (D. N.J. 1948).

29. Market Street Ry. Co. v. Railroad Commission of State of Calif., 324 U.S. 548 (1945). See also Board of Trade v. United States, 314 U.S. 534, 546-547 (1942).

not forbidden by the Constitution that there be a pragmatic test of matters which even the most expert could not know in advance."[30] Though rate-making was the particular function to which the court addressed itself, there is no compelling reason to suppose that a different Constitutional result would be reached in connection with the issuance of a certificate of public convenience and necessity. Both are predictive functions, embracing many of the same considerations.

Predictions of future events by administrative agencies have not been confined to situations dealing primarily with regulation of a particular business, but have been relied on also when the chief concern is with the formulation of policies which will directly affect the general public. The Federal Food, Drug, and Cosmetic Act[31] provides that the Federal Security Administrator may promulgate regulations establishing "standards of identity" for various food products in the promotion of honesty and fair dealing in the interest of consumers.[32] The Administrator must base such rules "only on substantial evidence of record."[33] *Federal Security Administrator v. Quaker Oats*[34] furnishes an interesting example of the problems involved in effectuating the avowed statutory purpose. After hearings, the Administrator promulgated regulations designed to prevent possible future consumer confusion as to certain

30. Market Street Ry. Co. v. Railroad Comm. *supra* note 29, at 569. An objection was also raised that the Commission's predictions were made without the aid of expert testimony. The Court pointed out that even if such opinions were offered, they would not bind the agency, since it must evaluate such offerings. The absence, then, of expert opinion other than that of the regulatory body was not violative of due process. The Court carefully distinguished the issue here involved, in which the basis for the judgment was contained in the record, from that where agency action is based on evidential facts gathered by the agency but not cited in the record, thus foreclosing opportunity to challenge them. The latter has been held a violation of due process. Ohio Bell Tel. Co. v. Public Utilities Commission, 301 U.S. 292 (1937). Professor Davis describes the *Market Street* case as "a typical example of a merger of specialized knowledge with an exercise of judgment", but he feels that even then the parties should be made aware that this is being done. DAVIS, *op. cit. supra* note 1, at 514.

31. 52 STAT. 1040 (1938), 21 U.S.C. § 301, *et seq.* (1946).

32. *Id.* § 341.

33. *Id.* § 371(e). The Administrator also must set forth detailed findings of fact upon which orders are based. *Ibid.* For a criticism of the imposition of strict procedural requirements embodied in the Act, see Fuchs, *The Formulation and Review of Regulations Under the Food, Drug, and Cosmetic Act,* 6 LAW AND CONTEMP. PROB. 43 (1939). He predicted that due to the subjective nature of the considerations in this area, the usual basis for reversal of the Administrator's findings would be their arbitrariness rather than the lack of substantial evidence to support them. Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir. 1949), is an excellent illustration of this proposition. The Attorney General's Committee on Administrative Procedure saw little benefit in a detailed court review, and therefore did not favor additional legislation which would require close judicial scrutiny of the administrative process in this area. FINAL REPORT, *supra* note 16, at 119.

34. 318 U.S. 218 (1943).

food ingredients.[35] The circuit court of appeals, in setting aside the regulations, described the evidence relied upon as "speculative and conjectural."[36] The court acknowledged that it was not within its province to substitute judgment, but did so anyway, prophesying that the regulation would not achieve the desired end.[37] The Supreme Court, taking into account the prospective function here involved, deferred to the administrative judgment, which it found to be based on substantial evidence.[38] It is thus apparent that the Administrator's efforts to further the statutory purpose are not to be invalidated merely because it cannot be proven at the outset that regulations so adopted will in fact produce the desired result.[39]

The courts have exhibited considerable deference in their review of administrative action based largely on speculative evidence. As previously mentioned, the substantial evidence rule is the governing criterion for judicial review of administrative action based on a record built at hearings.[40] The rule, however, is of little value in the abstract, taking on significance only when applied to particular situations. Its utility even then seems minimal when, as here, the primary considerations are not factual.

The problem of ascertaining what role the judiciary must assume when reviewing administrative determinations based in part on con-

35. Expert nutritionists and representatives of consumer organizations had testified that consumers, due to their lack of knowledge about ingredients, were being exploited by the sale of foods described as "enriched."

36. Quaker Oats Co. v. Federal Security Administrator, 129 F.2d 76, 82 (7th Cir. 1942). In support of the regulations, the Administrator found that if a standard were not devised, the existing situation might become worse and tend to confuse the public, thus impeding the promotion of honesty and fair dealing in its behalf.

37. ". . . [T]he regulations, while purporting to be in the interest of consumers, do not promote honesty and fair dealing in their behalf." *Id.* at 83. It is difficult to see how this conclusion could be reached without benefit of actual experience, which could only be gained by allowing the regulation to stand.

38. "The exercise of the administrative rule-making power necessarily looks to the future. . . . [T]here was sufficient evidence of 'rational probative force' to support the Administrator's judgment that in the absence of appropriate standards of identity, consumer confusion would ensue." Federal Security Administrator v. Quaker Oats, 318 U.S. 218, 228 (1943).

39. One commentator on this subject has struck out at what he calls the occasional "apparent acceptance of sheer speculation as substantial evidence." Austern, *The Formulation of Mandatory Food Standards*, 2 FOOD DRUG COSMETIC QUARTERLY 532, 587 (1947). He did not, however, point to any specific instances where such practices have occurred. Assuming that an agency would promulgate a regulation devoid of any factual basis, it is inconceivable that a reviewing court would permit such action to be given effect.

40. See note 15 *supra*. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950), held that appellate courts, in reviewing administrative determination, must scrutinize the entire record to ascertain whether the findings are substantially supported. For a discussion of the effect of this requirement on the scope of review, see Note, 26 IND. L.J. 406 (1951).

jecture is not susceptible of articulate delineation. There seem, however, to be three interrelated, interdependent factors which have influenced judicial acceptance of such determinations: (1) the prospective function with which the agencies are dealing; (2) the practical necessity to speculate so that problems of this nature may be realistically and adequately solved; (3) the competence of the agency to make wise use of this type of evidence because of its experience in dealing with problems which require its utilization.

The Prospective Function. As opposed to the trial-like determination of rights based upon the course of past events, the administrative process is often called upon to further future developments in the public interest, such as the certification of new ventures; the improvement of established services; and the promulgation of regulations not solely for the purpose of correcting past errors, but to facilitate the achievement of a generally desired end such as that enunciated in the Federal Food, Drug, and Cosmetic Act. While there need not always be an express statutory command that the agency consider the future effects of its orders, Congressional recognition of the prospective nature of the agency's function is frequently persuasive. As was said in the *American Airlines* case, ". . . when a prospective rule is required to be upon evidence, that evidence must be construed to include estimates, or forecasts, or opinions, on future events."[41]

Practical Considerations. Often, problems confront a regulatory agency which make it necessary to indulge in conjecture, speculation, and experimentation if intelligent action is to be taken at all. The need to predict exists either because the situation requiring solution is novel, or for the reason that no amount of previous experience can furnish an adequate solution without inquiring into the future. Where past data are available, to dogmatically insist upon a precise mathematical projection of such experience would be to ignore the growth of a dynamic society. For example, can it be proven with mathematical exactness the number of ton-miles of air freight which will be transported in 1953? Can the effects of a rate change upon a carrier's revenue be predicted in dollar amounts? Can it be absolutely shown now that a new bus route will aid in developing an industrial area, which will increase demand for residences, thereby providing a bus company with enough patronage to make the route an economically sound venture? Can it be factually demonstrated that the admission of a new carrier into a specific territory will or will not lead to the economic ruin of the established

41. American Airlines v. Civil Aeronautics Board, 192 F.2d 417, 421 (D.C. Cir. 1951).

carrier? Can it be unequivocally stated that a particular requirement pertaining to the identification of food products will prevent consumer confusion which might otherwise ensue? All of these questions must be answered in the negative. Were it otherwise, the resort to prophecy would be wholly unwarranted. In any event, the reliance upon such imperfect means of solution must persist in order that complex problems of a progressive society be solved quickly and as well as possible. It is therefore essential that allowances be made for experimentation in those areas in which even the experts must deal with imponderables.

Administrative Competence to Wisely Use Speculative Evidence. Administrative "expertise" is in reality the touchstone of deference to the administrative process.[42] It is the expertness of the agency which is the true foundation for its exercise of discretion.[43] Professor Freund, an early administrative law writer, defined administrative discretion to include "a determination . . . reached in part at least upon the basis of considerations not entirely susceptible of proof or disproof."[44] Even though he advocated strict limitations on the use of such discretionary powers,[45] Freund admitted that "discretion enlarges as the element of future probability preponderates over that of present conditions."[46] It follows that when the primary task is one of predicting future happenings in order to properly accomplish the statutory objective, the breadth of discretionary power will be even greater than when the agency is confronted with the task of exercising judgment upon the basis of known facts.[47]

Obviously, the ability of agencies to speculate does not give them a license to disregard the factual evidence presented. No matter how novel the problem confronting the agency, it will include a basis of fact. The

42. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,* 58 HARV. L. REV. 70 (1944), points out that matters are reposed in the administrative process largely to "secure the advantage of expertness and specialization." *Id.* at 81, 82.

43. *Id.* at 100. See FINAL REPORT, *supra* note 16, at 117; Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory,* 47 YALE L.J. 538 (1938).

44. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 71 (1928).

45. *Id.* at 80.

46. *Id.* at 71. Freund describes the consideration of future advantages and disadvantages of a particular course of action as the exercise of "prudential discretion." Here the primary considerations are usually speculative, hence, the scope of discretion is necessarily broad. *Id.* at 72, 73.

47. In an attempt to articulate the considerations which influence reviewing courts in ascertaining the desirability of substitution of administrative judgment, Professor Davis opined that one important factor, seldom embodied in the opinion, is the tribunal's respect for the particular agency's competence. Thus when it appears that the regulatory body has given careful attention to the problems before it, judicial interference is less likely than when the agency seems to have done a hasty or inadequate job. DAVIS, *op. cit. supra* note 1, at 927.

necessity for entering the realm of conjecture will vary, depending in large part upon the breadth of the factual core. The size of the core will of course differ within a given field, depending upon the particular circumstances. For example, in the air-cargo problem experience was practically non-existent, and as a result opinions on future contingencies were a major source of the CAB's evidence in granting the temporary certificates. Over a period of years, however, as the industry develops, valuable information and experience will doubtless be obtained so that future applications can be judged upon a somewhat sounder basis. In short, the nucleus of facts will be enlarged, thereby reducing, though not eliminating, the need to speculate.

The factual basis will also differ widely depending upon the type of forecasting function involved. It is likely to be broader when the task is one of fixing rates for an established carrier than where the problem is to determine whether a new endeavor should be initiated. Again the reason is that in the former situation there will generally be a background of accumulated experience data, narrowing the margin for conjecture.

It is manifest that the governing agency cannot be permitted to ignore the factual evidence before it. Fanciful crystal-gazing must not be mistaken for intelligent speculation. If, for example, past facts indicate a trend toward a decreasing need for bus transportation along a route already being serviced, the regulatory body would not be justified in permitting a new carrier to enter and compete with the existing one on the ground that the situation might improve. As the *American Airlines* opinion cautioned, "governmental permissions for the future cannot be fashioned from pure fantasy, speculation devoid of factual premise."[48]

The most difficult problem lies in the region between the situation which necessitates the resort to a future forecast and that which by nature precludes its use. This uncertain area can best be described as that in which there are not enough factual data to pursue a course of action without speculation, but by postponing the decision facts can be obtained which will appreciably narrow the margin of conjecture. The question here is whether an agency should be permitted to speculate when the necessity to do so may be considerably lessened by delaying action until more facts can be gathered.

The Supreme Court apparently feels that agency action may be based in part on speculation, even though postponement may elicit factual

48. American Airlines v. Civil Aeronautics Board, 192 F.2d 417, 421 (D.C. Cir. 1951).

knowledge sufficient to reduce greatly the need to prognosticate, so long as the decision is not arbitrary nor capricious.[49] For several years the Federal Communications Commission had been considering the promulgation of a single set of standards for color television. RCA and CBS were conducting experiments in an effort to perfect their respective systems. RCA's plan, if it could be achieved, admittedly was more desirable both from an economic and scientific standpoint. The CBS system, however, was nearer perfection when the FCC promulgated regulations which in effect adopted its scheme and precluded the RCA plan. In reaching this decision, the FCC admitted relying heavily "on speculation and hope rather than demonstration."[50] It nevertheless refused to stay the effective date of the order so that RCA could present a professed improvement. The Supreme Court held that although the Commission's action may have been unwise, the matter was one of discretion which the FCC did not abuse.[51] Justice Frankfurter, not prone to meddle with the administrative processes, vigorously disagreed with the Commission mainly because of the technological nature of the problem evidently feeling that in this swiftly advancing domain it is foolish to shut out experimentation, particularly where the public interest is greatly affected by so doing.[52]

In support of the agency's determination, it can be argued that its action was not hasty, but came after years of testing; that after all, at some point positive action must be taken. The argument can also be made, though it is somewhat less persuasive, that the public interest demanded immediate production of color television though it may prove to be more expensive and less efficient than the system presumably in the process of being perfected.

On the other hand, it is a reasonable contention that the FCC, by preferring to speculate, in effect cut off further testing in a field where the public interest could be better served by additional experimentation. In the situations discussed previously, sensible solutions to the particular problems could not be attained without experimentation made possible only by positive agency action. Demands for air freight transportation could not be accurately measured until the CAB inaugurated the service by licensing cargo carriers. Whether an additional truck-line over a certain route will seriously impair the established company's economic

49. Radio Corp. of America v. United States, 341 U.S. 412 (1951).

50. Radio Corp. of America v. United States, 95 F. Supp. 660, 672, (N.D. Ill. 1950). The dissenting judge pointed to the "fluid state of the art" and declared that the speculation and hope had not been exercised in the public interest. *Id.* at 672.

51. Radio Corp. of America v. United States, 341 U.S. 412 (1951).

52. Justice Frankfurter predicted that the FCC's prognostications "will be falsified in the very near future." *Id.* at 427.

return can ultimately be determined only by permitting the new carrier to operate. The effect of a given rate upon traffic and income cannot be finally discovered until the rate is put into operation. Postponing agency action in these situations may facilitate accumulation of some additional facts, but will not obviate the necessity to speculate when a decision is eventually made.

The distinguishing feature of the *RCA* case, then, is that agency action based on speculation foreclosed rather than fostered further experimentation. There is thus no ready-made formula which can be applied with equal propriety in passing upon all eventualities. When this predicament presents itself the final judgment must be adapted to the circumstances of the particular case. The Supreme Court's approach to this perplexing problem is perhaps defensible because of its reluctance to interfere with administrative judgment. However, administrative agencies should be extremely cautious in their reliance upon predictions when functioning in this problematic area.

The *American Airlines* case cannot fairly be said to represent a departure from principles governing this realm of the regulatory process. The significance of the opinion lies in its flexible and practical approach to the operation of the administrative system. There is no reason to believe that the decision is an invitation to regulatory agencies to discard traditional methods of supporting conclusions. The resort to intelligent speculation remains a necessity to sound prospective action, rather than an expedient for the avoidance of the factual core present in all situations confronting the administrative process.