Proposed Legislation Pending in the Congress and in the Minnesota Legislature Concerning the Scope of Judicial Review of Administrative Decisions

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PROPOSED LEGISLATION PENDING IN THE CONGRESS AND IN THE MINNESOTA LEGISLATURE CONCERNING THE SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

By Harvey Hoshour*

In his brilliantly done book: "The Administrative Process"¹, Dean Landis writes:

"The most fascinating branch of American constitutional law relates to judicial review over legislative action. Here one is presented with decisions that speak of contest between two agencies of government—one, like St. George, eternally refreshing its vigor from the stream of democratic desires, the other majestically girding itself with the wisdom of the ages. Similarly, in the field of administrative law judicial review over administrative action gives a sense of battle" (p. 123).

One gets this "sense of battle" from other sources too. Sometimes the thrust is largely against those who, for one reason or another, have supported and continue to support legislation along the lines of that now pending. Thus in December, 1940, President Roosevelt, in vetoing² the Logan-Walter Bill, then sponsored by the American Bar Association, said:

"Court procedure is adapted to the intensive investigation of individual controversies. But it is impossible to subject the daily routine of fact-finding in many of our agencies to court procedure. Litigation has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often traps

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²Published in 1938 by Yale University Press. The four chapters of Dean Landis' book constituted the Storrs Lectures on Jurisprudence at the Yale School of Law delivered in January, 1938.

²The full text of the President's veto message is printed in (1941) 27 A. B. A. J. 52, 53.
for the unwary and technical rules of evidence often prevent common sense determinations on information which would be regarded as adequate for any business decision. The increasing cost of competent legal advice and the necessity of relying upon lawyers to conduct proceedings have made all laymen and most lawyers recognize the inappropriateness of entrusting routine processes of government to the outcome of never-ending lawsuits.”

The very heart of modern reform administration is the administrative tribunal. Great interests, therefore, which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterilizing the administrative tribunal which administers them, they will have effectively destroyed the reform itself.

“The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulations. The effort was made in the recent New York constitutional convention by this same combination of influences to deprive state tribunals of their authority. That effort was wisely rejected by the people at the polls. The effort was continued on a national scale to destroy the administrative tribunals which enforce the nation’s important laws. It is from this background that this bill has emerged.”

Just about a month after the President’s message Dean Pound replied, in a speech before the Judicial Section of the New York Bar Association, in language no less positive:

“A recent veto message has read a lecture to the organized lawyers of America and told the judges to confine the judicial process to cases ‘appropriate for its exercise.’ This message is so thoroughly in keeping with the Marxian idea of the disappearance of law, now much in fashion, and so much in the spirit of the absolute ideas which have been making headway all over the world in the past two decades, that it deserves to be made the text for a discussion of the place of the judiciary in our democracy. It is not my purpose to discuss the particular measure which called forth this message. Such a measure is difficult to draw, and in spite of all the care devoted to it by able lawyers it is not unlikely that it was open to specific objections. But the message attacks the whole purpose of the measure and of any measure which may be designed to make effective and available to the ordinary citizen the constitutional guarantees against arbitrary and high-handed official or governmental action. What I wish to consider, therefore, is its attitude toward the law, toward constitutional limitations and guarantees, and toward the judiciary—in short, toward the characteristic American legal-political polity which had been developed in this country under our constitutions.

*(1941) 27 A. B. A. J. 133.
"In this consideration of the attitude of the message toward law and the judiciary it is not necessary to consider the conventional jibes at the profession as being in a conspiracy with sinister interests, preferring shrewd play upon technical rules to the substance of controversies, and juggling cases rather than getting down to the merits. What has been done to eliminate such things from the judicial administration of justice has been chiefly the work of the very association against which these time worn charges are made, and I need say no more about them.

"Whether well or ill carried out, and at any rate carried out with no assistance from and indeed in spite of opposition from administrative agencies and advocates of allowing them absolute powers, the purpose of the measure was to make available to people generally by means of a simple, expeditious, relatively inexpensive procedure, what is guaranteed to them by the constitution."

In certain of the opinions of the Supreme Court one also gets this same "sense of battle" on the vital issue here involved. The case of Jones v. Securities & Exchange Commission was decided on April 6, 1936. There the Court's opinion was delivered by Mr. Justice Sutherland and contains the following:

"The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of law,—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning" (pp. 23, 24).

"Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. Goldsby, 211 U. S. 249, 262. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by en-

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1(1936) 298 U. S. 1, 56 S. Ct. 654, 80 L. Ed. 1015.
croachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guarantees” (pp. 24, 25).

The opinion in the Jones Case also suggests that the Commission's actions were like “those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640,” a comparison which led Mr. Justice Cardozo, dissenting for himself, Mr. Justice Brandeis and Mr. Justice Stone, to say: “Historians may find hyperbole in the sanguinary simile” (p. 33).

If the question were not of such vital and continuing importance in the relation of government to business, as well as of the courts to the administrative commissions, one might dismiss these differences in the words of Gilbert and Sullivan:

“How Nature always does contrive
That every boy and every gal,
That's born into this world alive,
Is either a little Liberal,
Or a little Conservative.”

But the question is of vital importance and that importance continues, for liberals and conservatives alike. The American Bar Association, notwithstanding the rebuff from the President implicit in his veto message above quoted, has continued its work in this field, with the results to be commented on herein, and the Minnesota Bar Association has likewise entered the field and is sponsoring a bill now pending in the State Legislature which was approved by the Association at its Duluth meeting last July, also to be commented on herein. It is not the purpose of this article to analyze or discuss the relevant decided cases in detail. That has been done many times in the Law Reviews and elsewhere, most recently in the November, 1944, number of the Harvard Law Review. Rather it is to set out and briefly to discuss those provisions of the bills now pending in Washington and in St. Paul which have to do with judicial review of administrative decisions, in the thought that thereby lawyers and others who may be in

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5Iolanthe, II.
interested will have current data readily available on the crucially important question involved.

Before discussing these bills in detail, I want to refer at some length to what is the best,—and at once the most interesting,—statement of the background material on this subject, among the many similar statements I have read. It comes from an address: "Administrative Discretion," delivered on October 12, 1932, at the meeting of the Association of Practitioners before the Interstate Commerce Commission, by Henry Wolf Biklé, long a distinguished scholar in the constitutional law field as well as a skilled practitioner of administrative law:

"In his famous opinion in *Marbury v. Madison*, Chief Justice Marshall said:

'The government of the United States has been emphatically termed a government of laws and not of men.'

"In thus reiterating the famous antithesis of James Harrington carried into the Constitution of Massachusetts of 1780, the great Chief Justice gave currency to a terse description of a conception which has come to be regarded as fundamental if free institutions are to be preserved. It summarizes in a simple contrast the revolt against autocratic power. It is an accepted axiom of our governmental system.

"But candor compels the concession that it is impossible for the law to be so clearly and so completely stated as to eliminate all doubtful cases. Particularly is this true because, as Dean Pound says:

'Law must be stable and yet it cannot stand still.'

Now, as soon as the presence of the doubtful case is admitted, it becomes necessary to recognize the possibility that the judicial answer to hardly-contested litigation may depend on considerations which, while not excluding, will be in addition to, those of pure logic. In the conflict of principles which underlies some litigation—in the difficulty of determining the application of admitted standards because of their vagueness or indefiniteness, which underlies so much more—the courts themselves are frequently in doubt. But they must decide one way or the other; and in such case of doubt their decisions may be affected consciously or unconsciously by what Mr. Justice Holmes, with his accustomed felicity, describes as

'a judgment or intuition more subtle than any articulate major premise.'

Decisions in such cases—in spite of lip-service to the fidelity of the courts to the law—represent a choice between two different

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5Mr. Biklé's address is printed in (1933) 2 George Washington Law Review 1.
but possible answers. That there is this real possibility of choice becomes at once—and painfully—apparent if counsel ask themselves how much confidence they have as to the probable fate of cases which they have argued, but which remain undecided.

"In other words, to quote Mr. Justice Holmes again, judges do legislate, but

' they are confined from molar to molecular motions.'

a fact which Mr. Justice Cardozo has interestingly elaborated in his lectures on the Nature of the Judicial Process.

"But to the extent that judges possess this freedom of choice in deciding cases, it is difficult to justify the statement that they are controlled in their decision by established law. The orthodox theory is that they are supposed to discover the law and not to make it, but this theory cannot, in all cases, be made to square with actuality. In the doubtful cases, and within the limits of the doubt, men govern rather than the law.

"It is inevitable that this should be so, since it is impossible to foresee, and, by specific rules of law, to provide for, all the possible situations that may come to require the application of some rule of law. General principles or standards must be established which are bound to carry with them a penumbra of vagueness or uncertainty, and to involve doubt in their application to specific, concrete situations.

"Now, this difficulty becomes increasingly troublesome with the growing complexity of modern life. It proves more and more difficult to lay down rules to govern the activities of everyday life, which will be at once simple and definite. In addition, the customary procedure of the courts frequently proves ill-adapted to the enforcement of the vague standards which it is deemed wise to ordain.

"As one result, regulatory commissions are created, which are intended, on the one hand, to furnish more adequate machinery for the enforcement of new rules, and, on the other, to provide tribunals for the purpose of making definite in concrete cases the indefinite standards which the legislature finds it necessary to establish. In this authority on the part of regulatory commissions to make definite in concrete cases the indefinite standards established by the legislature lies a range of discretion far wider than that customarily possible of exercise by the courts, and involving to a much greater extent a government of men rather than a government of laws."

One might have expected, in view of the background of the regulatory commissions, as pointed out by Mr. Bikié, that there might have been a more general effort to assimilate these commissions into the judicial system than there seems to have been in the past, particularly among lawyers and others trained in and
familiar with the traditions, purposes and development of the law. Thus in 1936 the present Chief Justice of the United States said: 8

"Rarely in the history of the law has such an opportunity come to our profession to carry forward a creative work which would enable the law to satisfy the pressing needs of a changing order without the loss of essential values. The ultimate establishment of equity, after a period of resistance, as a coordinate branch of the law, ameliorating the rigors of the common-law system and translating in some measure moral into juristic obligations, is a comparable transition in the law. The profession of our day, like its predecessors who saw in the pretensions of the chancellor but a new danger to the common law, has given little evidence that it sees in this new method of administrative control any opportunity except for resistance to a strange and therefore unwelcome innovation."

Some lawyers have realistically explained the tendency referred to in the last sentence quoted from Mr. Justice Stone's address in terms not altogether complimentary to the profession. Thus John Foster Dulles, eminent New York lawyer and Chairman of the Committee on Administrative Law of the Bar Association of the City of New York, in an address at the Harvard Law School 9 said:

"Lawyers have heretofore had to deal, primarily, with the static. Laws have been passed which constituted, for the time being, a complete and final exercise of the legislative power. Such laws constituted obstacles to action in certain particular ways, but they were fixed obstacles. Today we encounter, not a mere obstacle, but a weapon which is like a flaming sword. It is not static but is wielded by skilled hands, directed by astute brains. The flexibility and scope is such that avoidance thereof is impossible and adjustment thereto a difficult problem. Vast fields which touch the lives of us all have been turned over to the ministration or policing of such agencies. * * *

"The Bar historically has been conservative, standing against changes which materially modified the rules within which they worked. From time to time important changes have occurred. But they have usually occurred due to pressure from without rather than to reform from within. The introduction of 'equity' came when common law had become so rigid that legal technique was almost an end in itself, largely unrelated to justice. Simplification of pleadings, liberalization of rules of evidence have come primarily from pressure from the outside public which, in the

face of recurrent failures of justice, demanded less technical procedures.

"Administrative bodies represent the most recent and most flagrant intrusion into the lawyer's preserve. Thereby there has occurred an extraordinary change in the rules of the game. The classic separation of legislative, executive and judicial functions has been cast aside. The law has, in effect, become mobile rather than static. Uncertainty replaces certainty, and much which has been learned over the years has become obsolete. No longer is it possible for a lawyer to sit at his desk and by making logical deductions from past decisions advise his client with confidence as to his rights. All of this is naturally disturbing and upsetting to lawyers and tends to create in them a sullen resentfulness which, unless overcome, will largely disqualify them from effectively representing their clients."

However this may be or may have been, it is believed that the pending bills show that in large degree American lawyers are coming to recognize the "opportunity" to which Mr. Justice Stone refers, and that they are truly coming to see in the "new method of administrative control" far more than the chance "for resistance to a strange and therefore unwelcome innovation." There is encouragement here also in the language of certain recent decisions of the Supreme Court. Thus in the third Morgan Case the Court said that

"in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." (P. 191.)

Again in the fourth Morgan Case the Court reiterated the same thought:

"It will bear repeating that although the administrative process has had a different development and pursues somewhat different

ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." (P. 422.)

The difference of opinion between the Justices in *Buford v. Sun Oil Co.*, which led Mr. Justice Frankfurter in dissenting to comment that:

"To talk about courts as 'working partners' with administrative agencies whenever there is judicial review of administrative action is merely another way of saying that legislative policies are enforced partly through administrative agencies and partly through courts." (P. 347.)

does not indicate a retreat from the language quoted from the decisions in the two *Morgan Cases*, but only a difference as to its applicability to the facts in the decided case. Mr. Justice Frankfurter concurred in the opinion quoted from in the third *Morgan Case* and wrote that in the fourth *Morgan Case*. Further, his contribution toward a middle-ground solution of the "battle" between the courts and the commissions, wholly aside from his work as a Justice of the Supreme Court, have been many and very great. In so far as this article has a thesis other than to set forth the information about the pending bills above referred to, that thesis is that the development in the past few years among lawyers and judges alike has been away from the "battle" concept suggested by Dean Landis and others, and toward a realization of the fact—as fact I believe it to be,—that the courts and the administrative agencies are indeed "collaborative instrumentalities of justice" (whether or not one classifies them as "working partners," as did Mr. Justice Black in the *Buford* decision above referred to) and that there can be worked out a fair and reasonably satisfactory basis for their respective jurisdictions. This necessarily leads to a discussion of the pending bills.

**Bills Pending before the Congress of the United States**

On January 6, 1945, Senator McCarran, Chairman of the Senate Judiciary Committee, introduced S. 7:14 "A bill to improve

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12(1943) 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424.
13See Frankfurter, The Task of Administrative Law, (1927) 75 University of Pennsylvania Law Review 614, and also his brilliant summation of the Cincinnati Conference on Functions and Procédure of Administrative Tribunals on March 5, 1938, as reported in 24 A. B. A. J. 282.
14An identical bill, H.R. 1203, was introduced in the House of Representatives on January 8, 1945, by Mr. Sumners, Chairman of the House Judiciary Committee. These bills were referred to the respective Committees on Judiciary of both houses.
the administration of justice by prescribing fair administrative procedure." The part of this bill here relevant is Sec. 10 (e) and reads as follows:

"(e) Scope of Review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) direct or compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action found (1) arbitrary, capricious, or otherwise not in accordance with law, (2) contrary to constitutional right, power, privilege, or immunity, (3) in excess of statutory right, (4) without due observance of procedure required by law, (5) unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8, or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial de novo by the reviewing court. The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing."

Before giving consideration to the provisions of S. 7 that seem to require or justify discussion here, it may be well, since this is the bill sponsored by the American Bar Association, briefly to review the Association's activities which have culminated in the recommendation of this bill. They are thus summarized in the Supplemental Report of the Special Committee on Administrative Law submitted to the House of Delegates on February 28, 1944:

"In recent years the first substantial recommendation of the Special Committee on Administrative Law was the presentation of a measure for the establishment of a federal administrative court (see S. 1835, 73d Cong. 1st Sess.; S. 3676, 75th Cong. 3d Sess.; 58 A.B.A. Rep. 203, 426 (1933); 59 A.B.A. Rep. 539 (1934); 60 A.B.A. Rep. 136 (1935); 61 A.B.A. Rep. 220, 233, 721 (1936)). That was succeeded by the legislature proposal known generally as the Walter-Logan Bill, which was sponsored by the Association, passed by Congress, and vetoed by the President (62 A.B.A. Rep. 262, 790 (1937); 62 A.B.A. Rep. 156, 333 (1937); 63 A.B.A. Rep. 281 (1938); 65 A.B.A. Rep. 215 (1940); H.R. 6324, 76th Cong. 3d Sess.; House Dec. No. 986, 76th Cong. 3d Sess.; 66 A.B.A. Rep. 143-144 (1942)). Shortly thereafter the so-called Attorney General's Committee on Administrative Procedure made its final report, including legislative recommendations by both a majority and a minority of that committee (Sen. Doc. No. 8, 77th Cong. 1st Sess., 1941). The American Bar As-

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The Association did not adopt either of those measures as its choice, nor did it continue its backing of the Walter-Logan bill; instead, it adopted a declaration of principles which it felt should be included in any adequate federal legislation and declared that, of the existing proposals, that of the minority of the Attorney General's Committee more nearly met the principles so declared. Thereafter a subcommittee of the Senate Judiciary Committee held extensive hearings on the proposals growing out of the report of the Attorney General's Committee (Hearings, Administrative Procedure, on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess., three parts plus appendix), but suspended consideration in the summer of 1941 because of the imminence of war and the then declared national emergency. Accordingly, for the last year and a half the Special Committee on Administrative Law of the American Bar Association has devoted its energies to the development of the Conference on Administrative Law and other matters covered in its annual reports (67 A.B.A. Rep. 226 (1942)).

On the date stated, February 28, 1944, the House of Delegates unanimously approved the proposed bill submitted by the Committee, which bill contained provisions, so far as the question of judicial review is concerned, substantially the same as those included in S. 7.16

The content of the McCarran-Sumners bill seems in part to stem from the work of the Special Committee on Administrative Law of the Bar Association,17 and in part from the so-called

16The following resolution, however, was adopted by the House of Delegates:

"RESOLVED, That while the House of Delegates heartily supports the proposed Administrative Procedure Act as submitted by the Committee on Administrative Law and strongly urges its enactment by the Congress at the earliest practicable time in order to accomplish without delay the many substantial improvements which such a law would bring about, the Association at the same time adheres to and reaffirms its historic position in favor of a broad and adequate judicial review for the protection of the rights of persons and property when affected by quasi-judicial determinations made by fact-finding agencies; and the House of Delegates authorizes and directs that the Committee on Administrative Law, along with its support of the bill now submitted, shall continue its studies and efforts to secure the enactment of other and additional measures for remedying administrative abuses, and particularly to formulate and support a suitable provision which, in addition to the grounds of judicial review provided for in the present bill, will assure a broader and more adequate judicial review.

"FURTHER RESOLVED, That the Committee on Administrative Law shall from time to time report to the House of Delegates or the Board of Governors its further recommendations to carry out the above-stated purposes of this resolution." (1944) 30 A. B. A. J., pp. 181, 182.

17Thus in its 1939 report the Committee favored the substantial evidence rule, but, in what was perhaps an attempt to avoid the possibility that a slight amount of evidence might be held sufficient without consideration of the whole record, suggested that the rule ought to be that findings "unsupported by substantial evidence or clearly erroneous" should be reversed. The words "or clearly erroneous" were taken from the Rules of Civil Procedure of the
"minority report" of the Attorney General's Committee on Administrative Procedure referred to above. This latter committee was appointed by Attorney General Murphy in February of 1939 at the request of President Roosevelt and made its final report on January 22, 1941. This report (474 printed pages) has been published as Senate Document No. 8, 77th Congress, First Session. The Committee, as constituted when the report was made, comprised Dean Acheson, now Assistant Secretary of State, Francis Biddle, now Attorney General, Ralph E. Fuchs, Professor of Law, Washington University Law School, Lloyd K. Garrison, Dean of the University of Wisconsin Law School, D. Lawrence Groner, Chief Justice, Court of Appeals for the District of Columbia, Henry M. Hart, Jr., Professor of Law, Harvard Law School, Carl McFarland, Washington lawyer and former Assistant Attorney General, James W. Morris, Judge of the United States District Court for the District of Columbia, Harry Schulman, Professor of Law, Yale University School of Law, E. Blythe Stason, Dean of the University of Michigan Law School, and Arthur T. Vanderbilt, New Jersey lawyer, former President of the American Bar Association.

The majority of the Attorney General's Committee made a number of recommendations and submitted a bill to carry out these recommendations. The majority did not, however, include any recommendation for statutory changes in the scope of judicial review, its conclusion being:

"Dissatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies. The need for review of questions of fact is less if the machinery Federal Courts, Sec. 52(a), where they are used with reference to the scope of review in cases tried without a jury. It seems, however, that the words "clearly erroneous" probably provide a broader scope of review than that permitted under the substantial evidence rule. See District of Columbia v. Pace, (1944) 320 U. S. 698. And it is doubtless for this reason that they were omitted from the "minority" recommendations of the Attorney General's Committee and from the bill now being sponsored by the Bar Association.


Administrative Procedure in Government Agencies, Senate Document No. 8, 77th Congress, First Session, p. 92. The "majority report" was submitted by Messrs. Acheson, Biddle, Fuchs, Garrison, Hart, Morris and Schulman; the "minority report" contained the additional views, recommendations and bill offered by Messrs. McFarland, Stason and Vanderbilt, with Chief Justice Groner concurring but going further as to separation of functions. The "minority report" was not so much a dissent as the submission of additional views. Since the two reports are commonly referred to as the "majority" and "minority" that terminology will be used here.
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for the determination of facts inspires confidence; it is greater if it does not." Quite apart from the objections to the suggested changes stated above, the Committee believes that the machinery which it has recommended in this report for administrative adjudications will inspire confidence and will obviate the reasons for change in the scope of judicial review.

"What has been said about the sufficiency of the existing provisions for judicial review applies only, of course, so long as the courts continue to discharge conscientiously the functions of review stated above. These require that, under whatever formula, the court should review the proceeding sufficiently to be satisfied that the administration is not arbitrary and is within permissive bounds of administrative discretion. Between the limits of maximum and minimum review derived from the Constitution, the Congress has power to regulate the extent of the courts' participation. When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires. Only by addressing itself to particular situations, and not by general legislation for all agencies and all types of determinations alike, can Congress make effective and desirable change."

There is much to be said for the point of view thus expressed in the "majority" report of the Committee. It is believed, however, that there is more to be said for the "minority" viewpoint which in substance has become incorporated into the provisions of the McCarran-Sumners bill above quoted. The position of the "minority" is thus stated in its report:

"(1) Certainly the haphazard, uncertain, and variable results of the present system or lack of system of judicial review constitute a major 'deficiency.' As is well stated in Chapter VI of the Committee report, the general statutory phrases now in use, purporting to express the congressional intent as to the scope of judicial review of administrative determinations of facts, are freely interpreted by the courts. Wide variations in results in specific cases defy explanation. Furthermore, a fundamental change is taking place in the concepts of the scope of judicial review hitherto derived from the implications of due process, separation of powers, and the nature of judicial power under Article III of the Constitution, so that the question is likely to loom even larger in the future than it has in the past. The opinion of the majority of the Supreme Court handed down last June in Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573, and touched upon in chapter VI of the Committee report, forces us to the conclusion that, in the future, fact issues involving due process, equal protection, and doubtless also other constitutional guarantees will in all probability no longer be subject to court review as a matter of
constitutional right. Since cases involving these issues generally
deal with important interests and often raise questions of high
emotional or political content, it follows that the present state of
uncertainty constitutes an even greater defect than heretofore,
and the importance of proper attention to judicial review of fact
determinations is very great.

"(2) The present scope of judicial review is also subject to
question in view of one of the prevalent interpretations of the
'substantial evidence' rule set forth as a measure of judicial review
in many important statutes. Under this interpretation, if what is
called 'substantial evidence' is found anywhere in the record to
support conclusions of fact, the courts are said to be obliged to
sustain the decision without reference to how heavily the counter-
vailing evidence may preponderate—unless indeed the stage of
arbitrary decision is reached. Under this interpretation, the courts
need to read only one side of the case and, if they find any evi-
dence there, the administrative action is to be sustained and the
record to the contrary is to be ignored. The courts, of course,
should not weigh meticulously every bit of evidence. Indeed, such
a requirement would prove a very undesirable burden. But the
courts should set aside decisions clearly contrary to the manifest
weight of the evidence. Otherwise, important litigated issues of
fact are in effect conclusively determined in administrative deci-
sions based upon palpable error.

"(3) The present statutory formulas of judicial review fail to
take account of differences between the various types of fact de-
terminations, not only as between agencies but also within a
single agency. Some fact determinations involve highly technical
matters and require special experience and training; others in-
volve technology in small degree or not at all. Some impinge
heavily upon private rights; others do so lightly, if at all. Some
are intended to be merely preliminary to the exercise of validly
conferred administrative discretion; others involve no discretion-
ary element but are quite objective. Some are rendered by long-
established, well-tried tribunals in whom all persons have confi-
dence; some come from new and hurriedly organized agencies.
Yet, for the most part all these different types of fact determina-
tions are cast into a single mold, with a single general formula for
judicial review. The lack of a reasoned approach to the problem
is obvious. It is small wonder that the courts sometimes feel en-
titled and, indeed, obliged to indulge in free interpretation of the
statutory language of review.

"(4) The present standards of judicial review are unsatis-
factory because of the very manner of their establishment. The
scope of review is, in effect, determined by the usual case-to-case
procedure of the courts. This results in a microscopic view of the
field as each point is determined in the line of demarcation. The
process is unfair to litigants and burdensome to the courts. We
think it would be a major improvement if the several types of issues decided by each administrative agency were enumerated and precise and definite language were adopted to indicate the intended scope of review of each type. This, if it is to be done at all, must be done by Congress itself. The present piece-work process is not likely to produce anything more satisfactory than a patchwork result.

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"In view of existing deficiencies, we think it not sufficient to await and rely solely upon the benefits of a reorganization of subordinate administrative hearing officers and their procedure as recommended by the Committee, although such reorganization, if adequately directed by statute and faithfully carried out, will be productive of much good. It is unsatisfactory to the citizen and unfair to the courts to provide for judicial review without defining its scope. In effect the courts are asked to choose between themselves and other public agencies, they are asked to assume or deny themselves power of review, and they are made a party to the result of conflicting statutory interpretations. Under these circumstances, it is natural that the courts should lean backwards to deny themselves powers which Congress has not clearly conferred upon them."20

The reference to the decision in the *Rowan & Nichols Case* in the language quoted has to do with the much discussed questions of constitutional fact and jurisdictional fact. If, as many lawyers think,21 the decision in the *Rowan & Nichols Case* presages the end of the rule in the *Ohio Valley Case*22 and perhaps that in the equally noted case of *Crowell v. Benson*,23 and the Supreme Court finally so holds, the importance of the scope of judicial review of the facts will indeed be greater.

The comment of the "minority" on the possibility that the courts might hold the "substantial evidence" rule required them "to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record

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to the contrary is to be ignored” is based on certain language of
the Supreme Court in several comparatively recent cases. While
it is believed that the weight of judicial opinion is such that this
fear is hardly justified, certainly there can be no objection to
clarifying whatever doubt there may be on this phase of the
matter.

The bill recommended in the “minority” report contains the
following language on the scope of judicial review:

“311 . . . (e) Scope of review.—As to the findings, conclusions,
and decisions in any case, the reviewing court, regardless
of the form of the review proceeding, shall consider and decide
so far as necessary to its decision and where raised by the parties,
all relevant questions of: (1) constitutional right, power, privi-
lege, or immunity; (2) the statutory authority or jurisdiction of
the agency; (3) the lawfulness and adequacy of procedure; (4)
findings, inferences, or conclusions of fact unsupported, upon the
whole record, by substantial evidence; and (5) administrative
action otherwise arbitrary or capricious. Provided, however, that
upon such review due weight shall be accorded the experience,
technical competence, specialized knowledge, and legislative policy
of the agency involved as well as the discretionary authority con-
ferred upon it.”

The bills proposed in the “majority” and “minority” reports
of the Attorney General’s Committee became, respectively, S. 675
and S. 674 as introduced in the 77th Congress. It was on these two
bills (and one other) that the hearings above referred to (p. 167,
supra.) were held by a subcommittee of the Senate Judiciary
Committee from April 2nd to July 2, 1941. At these hearings
representatives of the American Bar Association, the Federal
Administrative Commissions, and many others appeared and testi-
ified. The Government representatives, speaking broadly, favored
S. 675, and the representatives of the Bar, again speaking broadly,
favored S. 674. As above stated, the Senate Committee suspended
consideration of the matter in the summer of 1941, without action
having been taken. The Bar Association Committee, however, con-
tinued its studies and conferences and finally, on February 28,
1944, as above stated (p. 167, supra.) submitted, and the House

24See the testimony of Dean Stason in the record of the hearings on
Administrative Procedure before the Senate Judiciary Committee, 77th
Congress, 1st Session, pp. 1355, 1356.
25See Stork Restaurant, Inc. v. Boland, (N. Y. Ct. of App.) (1940) 26
N. E. (2) 247, 255; Galloway v. United States, (1943) 319 U. S. 372, 396,
63 S. Ct. 1077, 87 L. Ed. 1458.
26Administrative Procedure in Government Agencies, Senate Document
No. 8, 77th Congress, 1st Session, (1941) pp. 246, 247.
of Delegates approved, a bill which contained provisions for judicial review substantially like those in S. 7.27

To date no hearings have been held by either Judiciary Committee on S. 7 but there is at least a possibility that such hearings may be held shortly. It is apparent that this bill has strong Congressional sponsorship and that it will be supported by the American Bar Association.28

The major controversy as to judicial review provisions like those in S. 7 has been on the measure of review of the Commissions' findings of facts. The increasing importance—or what may be the increasing importance if certain seeming judicial trends continue—of findings of fact by administrative agencies has al-

27The relevant provisions of the Committee's proposed bill were:

"Sec. 9 . . . (f) Scope of Review.—With reference to any action or the application, threatened application or terms of any rule or order and notwithstanding the form of the proceeding or whether brought by private parties for review or by public officers or others for enforcement, the reviewing court shall consider and decide, so far as necessary to its decision and where raised by the parties, all relevant questions of law arising upon the whole record or such parts thereof as may be cited by any of the parties; and, upon such review, such court shall hold unlawful such act or set aside such application, rule, order, or any administrative finding or conclusion made, sanction or requirement imposed, or permission or benefit withheld to the extent that it finds them (1) arbitrary or capricious; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory authority, jurisdiction, or limitations or short of statutory right, grant, privilege, or benefit; (4) made or issued without due observance of all procedures required by law; or (5) either a—unsupported by substantial evidence upon the whole record in any case in which the action, rule, or order is required by statute to be taken, made or issued after administrative hearing or b unwarranted by the facts to the extent that the facts in any case, including all administrative adjudications not required by statute to be made upon administrative hearing, are subject to trial de novo by the reviewing court." (1944) 30 A. B. A. J. 46.

28At the House of Delegates' meeting last September, Chairman Smith of the Association's Committee said, as to the predecessor to S. 7 in the last Congress:

"... the tremendous support which our bill has received is most encouraging. I thank the members of the House of Delegates, and those members of the Association, who have advised the Committee as to what they have done, in order to obtain support for the bill from their representatives in the Congress.

"We have found that other organizations—labor, agricultural organizations, business organizations—are interested in this measure; and we expect to find them supporting our proposal. The time has now come to see whether we have the leadership, and can create the public opinion, not on a partisan but on a non-partisan basis, in favor of this bill to improve the administration of justice by providing a fair administrative procedure. We shall need your continued cooperation.

"We shall need, in addition to that, your aid in explaining to laymen in different walks of life the advantages of this bill to them, the importance of its enactment. We need your cooperation in urging your representatives in Congress to support this bill, in either the Senate or the House." (1944) 30 A. B. A. J. 646.
ready been commented on (p. 171, supra). But, aside from this, any one familiar with the administrative process knows the crucial importance of the fact-finding part of that process. As Chief Justice Hughes once said:

“The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say ‘Let me find the facts for the people of my country, and I care little who lays down the general principles.’”

On this question of the extent of review by the courts of the findings of fact of administrative agencies, S. 7 adopts (in subdivision (5)) the so-called “substantial evidence” rule, a rule that has much both legislative and judicial background. As to the former, Dean Stason’s testimony before the Senate Committee in 1941 will suffice:

“Now, that term ‘substantial evidence’ has had a considerable history in American statute law, and it is of very great importance today in administrative proceedings. It first appeared in the Trade Commission Act in 1914 in a somewhat different form. In the same year it was written into the Clayton Act. Since that time it has been embodied in some 17 other Federal statutes.

“These 19 statutes now provide that the decisions of the administrative agencies shall be conclusive ‘if supported by substantial evidence.’ The statutes are: The Tariff Commission Act, the Federal Communications Act, the Federal Power Commission Act, Securities and Exchange Act, Public Utility Holding Company Act, the Alcohol Administration legislation, the Toll Bridge Act, Social Security Act, National Labor Relations Act, Bituminous Coal Act, Fair Labor Standards Act, the Agricultural Adjustment Act, the Natural Gas Act, the Food and Drug Act, Civil Aeronautics Authority, and finally in 1940, the ‘substantial evidence’ rule was written in the Bridge Alteration Act.

“In all of these exceedingly important statutory structures, then, the decisions of the administrative tribunals charged with enforcement are accorded conclusiveness on the facts if their decisions are supported by substantial evidence.”

Prior to 1941 and since, however, the “substantial evidence” rule has been applied and has evolved in the decisions of the courts as well. Thus as long ago as 1906 in *Jenkins & Reynolds Co.* v.

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29As reported in U. S. Daily November 1, 1930.

30A very comprehensive and well-done article on the development and meaning of the “substantial evidence” rule by Dean Stason is: Substantial Evidence in Administrative Law, (1941) 89 U. of Pa. Law Review 1026.

31Record of Hearings on Administrative Procedure before the Senate Judiciary Committee, 77th Congress, 1st Session, pp. 1354, 1355.
Alpena Portland Cement Co., the Circuit Court of Appeals, Sixth Circuit, in a directed verdict case, said:

"The motion should be sustained unless among such evidence as has been introduced there is evidence favoring such of the ultimate or constitutive facts of plaintiff's case as have been put in issue to a substantial degree. By substantial evidence is not meant that which goes beyond a mere scintilla of evidence. Evidence may go beyond a mere scintilla, and yet not be substantial.

* * *

"What constitutes such evidence may be indicated in another way. If the evidence favoring such facts of the plaintiff's case is such that reasonable men may fairly differ as to whether it establishes them, then it is substantial. If, however, it is such that all reasonable men must conclude that it does not establish them, then it is not substantial."

In his testimony before the Senate Committee in 1941, Dean Stason thus summarizes the decisions of the courts as to what constitutes substantial evidence:

"* * * the term 'substantial evidence' has sometimes been equated to the term 'arbitrary and capricious action' in such a manner as to permit setting aside decisions but only if found to be arbitrary. This view is rather frequently held by the courts, but it seems to me to be unwisely restrictive. Arbitrary action, as we normally think of it, involves some active error, and such interpretation simply spells a scope of review that would fail to reach many gross errors which should not be permitted to stand.

"On the other hand, the term 'substantial evidence' is sometimes construed to require virtually a weighing of the testimony, a balancing of the persuasive effect of the evidence offered on the one side against that offered by the other. That technique has in the past been followed in the review of Federal Trade Commission cases. Whenever this interpretation is adopted, no evidence is deemed substantial unless, upon examination of the whole record, a substantial conviction of the 'rightness' of the decision exists in the mind of the reviewing court.

"Such a construction is quite as objectionable as is the other extreme. It makes the court the final arbiter on the issues of fact in all cases, and if it were generally adopted it would not only overload the courts but would withdraw from the administrative tribunals 'appointed by law and informed by experience' the conclusiveness which common sense and good administration demand.

"There are, however, a goodly number of intermediate positions which have been taken by the courts between the extremes just

1906 Federal 641, 643.

Record of Hearings on Administrative Procedure before the Senate Judiciary Committee, 77th Congress, 1st Session, pp. 1356, 1357.
outlined. One of the intermediate positions, and probably the most generally accepted meaning ascribed to the term 'substantial evidence' is this: The term 'substantial evidence' is construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision. On the other hand, if a reasonable man, acting reasonably, could not have reached the decision upon the evidence and the inferences therefrom, then the decision is not supported by substantial evidence, and it should be set aside.

"In effect, this is the prevailing rule in jury trials relative to the direction of verdicts, and is also the so-called mandatory rule applied by courts in setting aside jury verdicts because contrary to the evidence.

"So we find all of these different interpretations of substantial evidence. The term appears in 19 statutes and is interpreted in a wide variety of ways. It is certainly not unduly pessimistic to conclude that at the present moment, judicial review, both as regards statute law and case law, is in a state of unsatisfactory indefiniteness and uncertainty, and that there are wide divergencies that need the attention of Congress.

"Now, the question is, 'What can and should be done about it?' The minority group of the Attorney General's committee feels that there are two things that can be done: The first can be done in connection with this particular legislation now before the committee. The other is a long-time proposition that will have to be carried out through a period of years by amendment of individual statutes.

"Section 311 (e), that I read at the beginning, endeavors to attain the first of these ends. It endeavors to clarify that 'substantial evidence' rule. It seems perfectly clear that the rule should be clarified and given a definite content and meaning.

"As I have stated, although judicial decisions are spotted all the way up and down the scale, many courts have taken the position that substantial evidence should be equated to the rules concerning directed verdicts. That seems to be an eminently sensible conclusion. If it were generally accepted, if it could be made mandatory by statute, then the courts would be obliged to survey the entire records in cases arising under the rule and would be required to sustain administrative-fact decisions if the evidence, including the inferences therefrom, is found to be such that a reasonable man acting reasonably might have reached the decision. On the other hand, if a reasonable man, acting reasonably, could not have reached the decision, then the result would be otherwise and the decision would be set aside. Thus conceived and interpreted, the substantial evidence rule would be eminently sound as applied to a vast majority of administrative-fact questions. It would permit
wide latitude of administrative action, but it would at the same time check gross and palpable errors.

"Now, section 311 (e) seeks to accomplish those ends."

Thus it seems clear that the interpretation of "substantial evidence" envisioned in S. 7 is that those words shall "be equated to the rules concerning directed verdicts." Interestingly enough, this proposal brings into a very modern setting one of the law's most ancient figures: the reasonable man. Also it applies to the fact-finding functions of the administrative agencies a rule and a technique that the courts have evolved in dealing with the best known fact-finding agency in the common law: the petit jury. Thus it uses a balancing factor which, over the years and over the centuries, has proved its own validity. It does indeed seem, as Dean Stason puts it, "to be an eminently sensible conclusion."

The other provisions concerning judicial review contained in S. 7 have not been much disputed and do not require lengthy comment here.

In his written statement filed with the Senate Committee in the 1941 hearing above referred to, Attorney General Biddle said:

"But if it is thought that some provision on judicial review is necessary, I am inclined to agree with Senator Danaher that a revision of section 311 (e) of S. 674 which would restate the existing

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24 See in this connection Labor Board v. Columbian Co., (1939) 306 U. S. 292, 300, where Chief Justice Stone, speaking for the Court, says: "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

25 See Prosser on Torts, p. 224 ff.

26 The much quoted statement of the scope of judicial review in Interstate Commerce Commission v. Union Pacific R. R., (1912) 222 U. S. 541, 547, shows the extent to which the judicial review provisions of S. 7 stem from the decisions of the United States Supreme Court:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."
provisions for judicial review would be feasible. This could be done as follows:

"Unless otherwise precluded or unless a broader scope of review is prescribed by law, as to the findings, conclusions, and decision in any final order, the reviewing court, regardless of the form of the review proceeding, shall consider and decide so far as necessary to its decision and where raised by the parties all relevant questions of (1) constitutional right, power, privilege, or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness of procedure; and (4) finding or conclusions of fact unsupported by substantial evidence."\(^{37}\)

It should be noted that Mr. Biddle's alternative proposal does not include the words "arbitrary or capricious," nor the words "upon the whole record" or their equivalent, both contained in the provisions of S. 7. Before the Senate Subcommittee it was contended on behalf of the Federal Power Commission that the words "arbitrary or capricious" appeared "to open a scope of review not now available, the extent of which is uncertain and which might be used to hamstring administrative agencies seeking to protect the public."\(^{37}\) Also before that Committee the Civil Aeronautics Board took the position that the words "upon the whole record" "are designed to change substantially the present well established court rule that if there is substantial evidence to support the findings of the agency, such findings will not be set aside."\(^{39}\) These objections hardly seem tenable. A better case could be made for Mr. Biddle's omissions on the ground that the quoted words are redundant and therefore unnecessary, and perhaps his reason for their exclusion in his alternative proposal was that rather than his belief that the position of the two commissions referred to was sound.

So much for S. 7. Its provisions as to judicial review, as above set forth in detail, are the result of many years' study by those most competent to deal with the crucially important subject involved. The weight of the argument, it is submitted, supports their soundness, and it is believed that the public interest will best be served by their enactment.

The other bills pending in the Congress on federal administrative procedure require only brief mention here. H. R. 184, intro-

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\(^{37}\)Record of Hearings on Administrative Procedure before the Senate Judiciary Committee, 77th Congress, 1st Session, p. 1452.

\(^{38}\)Record of Hearings on Administrative Procedure before the Senate Judiciary Committee, 77th Congress, 1st Session, p. 498.

\(^{39}\)Record of Hearings on Administrative Procedure before the Senate Judiciary Committee, 77th Congress, 1st Session, p. 665.
duced in the House on January 3, 1945, by Mr. Celler is substantially in the form of the bill recommended by the "majority" of the Attorney General's Committee. This bill, while excellently drawn, contains no reference to the scope of judicial review of administrative decisions, and for the reasons above set forth it is believed to offer a less desirable approach to the problem here under consideration than that proposed in S. 7. H. R. 1206, introduced by Mr. Walter on January 8, 1945, is substantially like the bill recommended by the "minority" of the Attorney General's Committee, and H. R. 339, introduced on January 3, 1945, by Mr. Smith, while essentially different in other respects from H. R. 1206 and S. 7 does not differ in substance so far as provisions for judicial review are concerned, from either of those bills. Thus all of the bills pending in the Congress which contain provisions for judicial review adopt the "substantial evidence" rule herein discussed, and, as above pointed out, (p. 178, supra) Attorney General Biddle is of the opinion that if any provisions for judicial review are to be enacted they should include that rule.\footnote{It is also of interest in this connection that the proposed Uniform Administrative Procedure Act, as approved by the National Conference of Commissioners on Uniform State Laws contains (Section 23) provisions for judicial review, including the "substantial evidence" rule, substantially in the same form as those contained in S. 7 and the other bills on administrative procedure pending before the Congress and herein commented on. So far as the writer is advised Wisconsin is the only state which to date has adopted the Uniform Act. (See Wisconsin Laws 1943, Chapter 375.)}

**Legislation Pending in the Minnesota Legislature**

H. F. 340, now pending in the Minnesota House of Representatives, contains the following with reference to the scope of judicial review:

"Sec. 11. ***

"The court shall have jurisdiction to review all conclusions of law and such findings of fact as were the subject of a motion to amend as provided in Section 10. The court shall have no jurisdiction to amend or modify any finding of fact which was not the subject of such motion to amend. Any finding of fact which is not supported by a fair preponderance of the evidence shall be modified by the court so as to be in accord with the fair preponderance of the evidence."

On June 21, 1941, the Minnesota Judicial Council appointed a Special Committee on the Unification of Courts. The resolution suggested five subjects for the consideration of the Committee, of which one was as follows:
“(4) The relation of the courts to decisions of administrative commissions and similar bodies.”

Later, however, this Section (4) was referred by the Judicial Council to the State Bar Association for further study, which at its annual meeting in 1942 authorized the appointment of a Special Committee on Administrative Law to study this and allied questions. As a result of this Committee’s consideration H. F. 891 was introduced in the last session of the Minnesota legislature. That bill differed from H. F. 340 in that it omitted all reference to the scope of judicial review—in other words, it did not contain the language above quoted. During the last session H. F. 891 was recommended for passage by the Judiciary Committees of both houses, but was lost in the pressure of the last few days of the session.

A proposed bill identical, at least so far as the matter here under consideration is concerned, with H. F. 340, was submitted by the State Bar Association’s Committee on Administrative Law to the Association at its Duluth meeting last July and was there approved. Very recently the Bar Association’s executives appeared at a hearing before the House Judiciary Committee in support of H. F. 340.

The only provision in H. F. 340 which uses the words “substantial evidence” is that in Section 5, Subdivision 1, which says: “Only substantial evidence shall be received,” a usage which obviously has no bearing on the question under discussion here.41

The critical words in Sec. 11, as above quoted:

“Any finding of fact which is not supported by a fair preponderance of the evidence shall be modified by the court so as to be in accord with the fair preponderance of the evidence.”

are intended, it would seem clear, to prescribe a scope of review broader than the “substantial evidence” rule above discussed in detail.

In this connection it should be pointed out that the Minnesota decisions have laid down the “substantial evidence” rule. Thus in State v. Great Northern Ry. Co.42 the Court said:

“The court does not consider the wisdom or expediency of the order. The court ascribes to the findings of the commission the strength due to the judgments of a tribunal appointed by law and

41To the writer the use in this connection of the words “substantial evidence” is unclear. Perhaps those words were used in the sense of “relevant evidence.” In any event this phase of the pending bill is not here involved.

42(1916) 135 Minn. 19, 159 N. W. 1089.
informed by experience,' and its conclusion, when supported by substantial evidence, is accepted as final." (p. 22)43

In Steenerson v. Great Northern Railway Co.44 the Court had under consideration the following statute:

"'Upon such appeal, and upon the hearing of any application for the enforcement of any such order made by the commission, the district court shall have jurisdiction to, and it shall, examine the whole matter in controversy, including matters of fact as well as questions of law, and to affirm, modify or reserve such order in whole or in part, as justice may require; and in case of any order being modified, as aforesaid, such modified order shall, for all the purposes contemplated by this act, stand in place of the original order so modified and have the same force and effect throughout the state as the orders of said commission.'" (p. 375)

As to this statute the Court said:

"'If by this the legislature intended to provide that the court should put itself in the place of the commission, try the matter de novo, and determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one. * * * And the performance of such duties cannot, under our constitution, be imposed on the judiciary. * * *"

"But it is not necessary to construe this statute so as to render it unconstitutional. It does not by express words, or even by necessary implication, provide that the court shall stand in the shoes of the commission, and try the matter de novo. Under the constitution, the district court may, on appeal to it, review the findings of the commission in the same manner as an appellate court reviews the findings of the jury on a trial in the court below. And for this purpose the court may 'examine the whole matter in controversy, including matters of fact, as well as questions of law.'"

"In other words, the court may examine matters of fact to ascertain whether there is any evidence reasonably tending to support the findings of fact disputed, and may examine questions of law arising on the facts conceded. It seems to us that this is, then, the proper interpretation of this somewhat vague and obscure statute, and the only interpretation which will render it constitutional."" (pp. 375, 376)45

It is not within the purview of this article to express an opinion as to whether the provisions of H. F. 340 requiring the Courts to modify the findings of administrative agencies "so as to be in

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43See also Chicago & Northwestern Ry. Co. v. Verschingel, (1936) 197 Minn. 580, 585, 268 N. W. 2d.
44(1897) 69 Minn. 353, 72 N. W. 713.
45See also State v. Great Northern Ry. Co., (1915) 130 Minn. 57, 59, 153 N. W. 247; also the South Dakota case of (1942) Application of Northwestern Bell Telephone Co., 6 N. W. (2d) 165, 170.
accord with a fair preponderance of the evidence” in those cases in which those findings are found not to be supported by such fair preponderance would be held to be an attempt to impose a legislative duty on the Courts in violation of the Minnesota Constitution. The Steenerson decision would seem, however, to make that question somewhat debatable.

The wisdom of the broader review provisions set forth in the language of H. F. 340 is also of course debatable. Many sincere and public spirited people, lawyers and those not lawyers, have been seriously and greatly disturbed by certain characteristics and tendencies that have shown themselves among modern administrative agencies. Indeed the President’s Committee on Administrative Management in its report transmitted by the President to Congress on January 12, 1937, said:47

“They are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless ‘fourth branch’ of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government, and only three. The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities.”

Inevitably, under the circumstances suggested in the language of the President’s Committee, the tendency of many has been to urge a larger scope of judicial review—a tendency which doubtless explains H. F. 340 and the resolution of the House of Delegates of the American Bar Association referred to above (p. 167, supra). But the House of Delegates approved and the American Bar is supporting, as above pointed out, a bill which adopts the narrower “substantial evidence” rule, and the chairmen of the judicial committee of both Houses, themselves distinguished lawyers, have offered that bill in the Congress.

Perhaps the recent experience of New York may be helpful in this connection. In 1938 the people of New York voted on a

46See in this connection Dean Pound’s address before the American Bar Association on September 29, 1941 (1941, 27 A. B. A. J. 664).
47Language which Dean Landis finds highly objectionable (The Administrative Process: p. 4), but which the President seemed to approve, as the following from his message transmitting the report of the Committee to Congress indicates:

“I have examined this report carefully and thoughtfully and am convinced that it is a great document of permanent importance. The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop into a 'fourth branch' of the Government for which there is no sanction in the Constitution.”
proposed constitutional provision to the effect that if the Court should find a decision of an administrative agency "to be contrary to the evidence, or not supported by the facts" it might "direct a reconsideration or a new hearing of the matter." At the election there was a wide division among New York lawyers, as well as others, on the wisdom of the broader scope of judicial review provided for and the measure was defeated at the polls. During the discussions on this measure Governor Lehman appointed Robert M. Benjamin to make a detailed study of the methods of administrative adjudication. Mr. Benjamin's report, a 370-page document published in March, 1942, concluded as follows:

"No form of judicial review, however broad in scope, could ascertain with certainty whether a quasi-judicial determination has been arrived at—as it should have been—on the administrative tribunal's own considered judgment as to the preponderance of the evidence. Adherence by the administrative tribunal to that standard of responsible adjudication must necessarily be left to the good faith of the tribunal. The substantial evidence rule, providing as it does for a review of the rationality of a quasi-judicial determination on all the evidence that was before the administrative tribunal, is broad enough, and is capable of sufficient flexibility in its application, to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. Judicial review broader in scope than the substantial evidence rule would, on the other hand, permit the reviewing court to substitute its own judgment on the evidence for that of the administrative tribunal, and thus to supersede a quasi-judicial determination even where that determination did represent the considered judgment of the administrative tribunal on the evidence."

Mr. Benjamin's conclusion and summary just quoted states the matter as well as it can be put. Debatable as the point is—and critical as is the issue which it concerns—the "substantial evidence" rule seems the best solution that has been devised and, as I have attempted to point out above, it uses techniques which themselves have been evolved in the law under somewhat analogous circumstances. It would seem, therefore, that the quoted provisions of H. F. 340 are too broad and should not be passed without substantial change."

18 Administrative Adjudication in the State of New York, Report by Robert M. Benjamin as Commissioner under Section 8 of the Executive Law (published by the State of New York, March, 1942), page 336.

19 Also it would seem debatable whether our courts should be required to carry the burden of the additional work the proposed rule would put on them; whether the delay such a rule would cause in final administrative adjudications would not be unfortunate; and whether it would not contribute to an undesirable lessening of the administrative officers' own sense of responsibility.
Conclusion

Perhaps an article of this type requires no conclusion. But the heading offers an excuse for bringing in some brief comment on several matters connected with administrative procedure not strictly relevant here but still of very great importance in one's understanding of the administrative process.

Joseph B. Eastman, probably the ablest of modern administrative commissioners in this country, in what proved to be his last public address, said:50

"the personnel which does the administering is more important than the wording of the statute. Good men can produce better results with a poor law than poor men can produce with a good law."

The same thought is vividly expressed by John Foster Dulles at the Senate hearings in 1941 several times above referred to:

"Nobody has yet written a law which just went out and administered itself. To say that the quality of the people that administer your laws is unimportant is, to my mind, ridiculous. The heart of the administrative problem is to get good judges, if you can do that.

"* * * If a part of the furor that is aroused about these bills could be devoted to efforts to assure good appointments, I think that we all would be better off."

Perhaps the next great task for the Bar in this field, with the cooperation of those in the government service and in the schools of public administration,52 might be the devising of means whereby the personnel of administrative agencies may be improved, their salaries made commensurate with their responsibilities, and their tenure of office made as nearly free from partisanship as possible in our form of government. Here is indeed an opportunity, in the language of Mr. Justice Stone (p. 163, supra) "come to our profession to carry forward a creative work which would enable the law to satisfy the pressing needs of a changing order without the loss of essential values."

Nor are administrative agencies the product of this administration or that, to be condemned in wholesale fashion or lauded extravagantly depending on what one's attitude is toward a particular administration. Rather they are part of an evolution in government as inevitable, under modern conditions, as that which

50The 12 points in Mr. Eastman's "credo" in the address referred to, delivered February 17, 1944, are printed in (1944) 30 A. B. A. J. 266.
51Record of Hearings on Administrative Procedure before the Senate Judiciary Committee, 77th Congress, First Session, p. 1155.
52An outstanding example of which is the Littauer School of Harvard University.
once led to the establishment of courts of equity in addition to those of law. Finally, they are in large part but the American counterpart of what happened in England some years back. In the language of Mr. Justice Frankfurter:

"That happened in England about a generation ahead of our time. It is not accidental. It pertains to the differences in social and economic factors in this country compared with the English situation. England established a Railway and Canal Commission in 1854, and the Interstate Commerce Commission was not established until 1887. You could duplicate almost every branch of social or economic legislation in this country, and you will find England had the counterpart anywhere from 15 to 30 years before we did. The Railway and Canal Act of 1854, the first important taxation of inheritances, the Harcourt Budget of 1894—again just about that difference—The Workmen's Compensation Act, Unemployment Insurance, Old Age Pensions, every one of these activities of political society with which we are still worrying in this country, had its English counterpart anywhere from 15 to 30 years ago. These political and legal mumps that we are passing through, England had passed through some 20 or 30 years ago."

"Political and legal mumps" does seem to describe the situation in more ways than one. But, if the thesis of this article is sound, we are on the mend. It is believed, however, that the enactment of some such bill as S. 7 will speed the mending process, and make more pleasant and profitable the convalescence!

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