The American Bar Association's Administrative Law Bill

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The House of Delegates and the Board of Governors of the American Bar Association in their recent meeting (January 7-10, 1939, Chicago, Ill.) approved, with an amendment, the draft of an administrative law bill submitted by their Committee on Administrative Law after some six years of study. They directed the Committee to take such action as might be necessary to have the draft bill enacted into law. Mr. Harold J. Laski, noted English author, lecturer, and professor at the London School of Economics, advised the writer that the approval by the American Bar Association of such a bill was at least fifty years in advance of what he would expect of that organization. In taking such action the Association disproved, in effect, a suggestion of Mr. Thurman Arnold (now Assistant Attorney General of the United States) made at a symposium on administrative law held some two years ago by the Georgetown University Law Alumni, that the American Bar Association was incapable of drafting and agreeing upon any bill which, if enacted into law, would codify and simplify the administrative determination of controversies with the United States with adequate, but not ham-stringing, judicial reviews of such administrative decisions.

As the present chairman of the Committee and its chairman in 1935-1936 and 1936-1937—and the only member whose service has been continuous since its organization in 1933—I know that I speak for the members of the Committee when I state that we are pleased that the Board of Governors and the House of Delegates have been able to approve the result of our more than six years of study. Also, it is encouraging that the draft of the bill has been subjected to close scrutiny by teachers of administrative law in

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the various law schools, by members of the United States Circuit Courts of Appeals, by government administrators, and by experienced practitioners before various governmental agencies—with comparatively few suggestions to the Committee as to changes and amendments thereof.

No doubt the reasons for this are at least two-fold: (1) the procedure followed in evolving the draft; and (2) the character and experience of the members of the Committee.

As to the procedure in evolving the draft, it should be stated that, commencing in the autumn of 1936, successive drafts based on intensive studies from 1933 to 1936 were prepared and sent to every teacher of administrative law in the approved law schools and to every lawyer throughout the United States who was believed to be informed and interested in the subject. Their studies and criticisms of the bill were requested. Moreover, appeals for studies, criticisms, and suggestions of the bar generally were published in the Journal of the American Bar Association, the Journal of the American Judicature Society, and the Journal of the Federal Bar Association. Specific requests were addressed to all the judges of the United States Circuit Courts of Appeals. The responses were carefully studied and such of the suggestions as were believed to have merit were worked into the final draft of the bill submitted at Chicago.

In addition, the Committee had the invaluable aid of Roscoe Pound, former Dean of the Harvard Law School, as chairman in 1937-1938, and he has continued his interest in the program subsequent to the Cleveland meeting (1938) of the Association, though other pressing duties required him to surrender the active direction of the work of the Committee. Also, the Committee had the benefit of the advice and services of James R. Garfield of Cleveland, who had been Commissioner of the Bureau of Corporations (predecessor of the present Federal Trade Commission) and Secretary of the Interior. In the absence of Dean Pound on a lecture tour in South America, Mr. Garfield presented the report of the Committee at the Cleveland Convention and his remarks there will repay reading by all serious students of government in action.

Professor Felix Frankfurter, now Mr. Justice Frankfurter of the Supreme Court of the United States, was a member of the Committee for approximately one year and a half. During a part of this time he was absent in England as a visiting professor at Oxford and his substitute was Mr. John Dickinson, then assistant
Secretary of Commerce and later assistant Attorney General of the United States. Mr. Dickinson is a professor of law at the University of Pennsylvania and is now general solicitor of the Pennsylvania Railroad. Also, Mr. Charles B. Rugg of Boston, formerly assistant Attorney General of the United States in charge of defense of suits against the Federal government in the Court of Claims and the United District Courts, served as a member of the Committee. Professor Milton Handler of the Columbia University Law School; Walter F. Dodd, formerly professor of law at Yale University and now engaged in the private practice of law in Chicago; Julius C. Smith of Greensboro, North Carolina, who is general counsel of a large life insurance company; Louis G. Caldwell, formerly general counsel of the Federal Radio Commission, and now a member of a large Chicago law firm; Robert F. Maguire, formerly an employee of the Coast and Geodetic Survey as well as of the Department of the Interior, and a former president of the Oregon State Bar; and many others, have rendered yeoman service in the study of this problem and in the formulation of the successive drafts of the bill which resulted in the final draft submitted in Chicago.

Thus Democrats and Republicans, conservatives and liberals, have participated in the work of the Committee. Except on the part of two of the several members of the Committee, there has been no substantial disagreement among the various members of the Committee since it was organized in 1933. The draft finally formulated and approved is in no sense New Deal or anti-New Deal and any attempt to make it so appear comes from the efforts of special pleaders to draw a red herring across the trail of any reform. The draft represents an earnest attempt to meet the pressing problems of governmental administration so as not to hamper the execution of the laws while, at the same time, providing those guarantees necessary to insure that the administrative agencies shall themselves be regulated; that is, that they remain within the standards or canals fixed by the Constitution and the statutes in conformity therewith. This was no easy task. As James Madison, the Father of the Constitution, said:

"You must first enable the government to control the governed, and in the next place oblige it to control itself."

As might be expected from the background of private and public service rendered by the men I have mentioned as having been members of the Committee on Administrative Law, none was a starry-eyed theorist. Each one realized, to paraphrase a
famous English statesman, that the United States is not governed by logic but is governed by laws enacted by Congress. Each of these men was, and is, a thorough student of Anglo-American legal history and none was willing to sacrifice upon the altars of theory or alleged efficiency, the liberties of the citizen.

Some modern disciples of Karl Marx, exponents, as Dean Pound has stated, of “administrative absolutism” and doctrines of “psychological determinism” may sneer that the Constitution of the United States is outmoded and unequal to present-day problems of government—while they greedily accept the advantages of that Constitution. This doctrine of administrative absolutism is nothing more or less than the proposition that either there should be no judicial review or, at the most, a minimum of judicial review of administrative action, whether that action be legislative or judicial in character. Their theory seems to be that the processes of the courts are too slow to meet the ever changing and shifting economic and social problems; that the judges, appointed for political reasons, are unfamiliar with these problems and are not qualified to determine them; and, finally, that the administrative officers, being experts, know best what should be done and should not be subject to judicial control or restraint. It ignores the fact that too frequently such officers are ex-officio experts only. This theory of psychological determinism posits that the judicial process is shaped wholly and inexorably by the psychological determinants of the individual judge, which determinants are largely undiscoverable and that judicial action is only in pretense and appearance uniform and predictable. The Marxian theories were held by Pushakanis, law writer of Soviet Russia, and when they failed under the test of practice he had to face a firing squad.

At no time has any member of the Committee on Administrative Law suggested that the Committee should accept any such views. The conservative members of the Committee would have nothing whatever to do with any such theories and the liberal members were too wise in the ways of government, as practiced since recorded history, to trust their liberality to administrative absolutism or psychological determinism. These men knew that trust placed in men to administer law in their uncontrolled discretion was similar to placing trust in a broken reed, as Pushakanis learned too late. Further, not one of the several members of the Committee was willing to turn his back on the Constitution of the United States and Anglo-American legal history from the days of the Stuart kings to the present.
On the other hand, the Committee could not accept the view of a small minority that, as soon as a controversy arises with some administrative officer or tribunal of the federal government, the private individual should be required to file a bill of complaint or other appropriate pleading in a federal district court where the claim or other controversy would have to be tried de novo on the law and the facts. Among the reasons for the inability of the Committee to sponsor any such program may be mentioned the following: (1) The vast volume of controversies with the United States would swamp any judicial system unless there is a preliminary weeding-out process. For instance, the official records show that one of the larger departments of the federal government heard and determined more than four times as many cases as all of the federal courts combined during a corresponding period, and another department had approximately three times as many intra-departmental appeals as were filed in all of the United States Circuit Courts of Appeals during a corresponding period. (2) The pleadings and other processes of the trial courts are not geared to the necessary expedition in the handling of administrative controversies with the United States. The administration of the law can not be halted for a year or two while a test case is dragging its weary way through the traditional courts in accordance with the traditional procedure. (3) The local United States District Attorneys and their assistants—appointed and holding office for short periods of time—generally are not familiar enough with the varied and sundry problems of governmental administration to defend successfully the United States in the many district courts throughout the country. This would necessitate a large increase in trial attorneys attached to the various agencies of government and a large increase in appropriations for their salaries and expenses in traveling from the seat of government to the various districts either to try the cases or to assist the United States Attorneys in doing so. (4) Also, it is doubtful for constitutional reasons whether the constitutional courts could be vested with the necessary jurisdiction to determine de novo all classes of controversies with the United States.

The 1936 Committee, under chairmanship of the writer, did consider the advisability of establishing a large court at the seat of government, with trial and appellate divisions, to hear and determine on the law and the facts many classes of administrative controversies. It was thought that daily consideration of these problems of government would make the court more familiar
with them than any of the traditional courts could become, and that since the court would be legislative in character there could be avoided the constitutional questions as to its jurisdiction in certain classes of cases. This plan involved the consolidation of the three existing legislative courts and the Board of Tax Appeals with the addition of sufficient judges to constitute a court of forty. It was, however, severally criticized by various elements of the bar and the government—as the writer had warned the Committee would be the result.

No concrete recommendations were made by the Committee prior to 1936 regarding the establishment of an administrative court or the reform of existing procedures so as to utilize more fully the administrative agencies of the federal government, with resort in the final instance to the traditional courts for review of the administrative action in either or both legislative and judicial exercise of governmental power. With the reorganization of the Committee after the Boston Convention of the American Bar Association, we agreed early in the autumn of 1936 to abandon the administrative court idea and strike at the root of the trouble—the administrative process. The 1937 report of the Committee to the Kansas City Convention of the Association carried out this agreement and the draft of an administrative law bill was printed as an appendix to the report. It was believed that this measure would carry out the thought expressed by Elihu Root in his 1916 presidential address to the American Bar Association; that is, a bill which would permit the administrative agencies to function freely and fully so long as they functioned fairly and in good faith, and in accordance with the terms of the Constitution and statutes. The 1938 report of the Committee, under the chairmanship of Dean Pound, to the Cleveland Convention of the Association elaborated upon the reasons for this proposed solution of the problem and there was printed as an appendix to that report a revision of the 1937 draft which had been approved by the Board of Governors. The House of Delegates recommitted the bill to the Committee with the requirement that the draft be resubmitted to both the Board of Governors and the House of Delegates and that they approve the same both as to form and substance.

The draft was revised to some extent and submitted with a report to the Chicago meeting of the House and Board, where the draft was amended to a slight extent and approved by both bodies as the American Bar Association Administrative Law Bill. The report and bill have been reprinted in the February 1939 number
of the Journal of the American Bar Association but, for lack of space, there was not reprinted after each section of the bill the annotations showing in detail some of the reasons therefor. In other words, the proposed bill and report are now available for the study of all interested lawyers and business men as well as organized labor. The bill has been introduced in the United States Senate where it is known as S-915 and the matter is before the Judiciary Committee of the House of Representatives. In addition, copies of the annotated draft of the bill have been sent to every State and City Bar Association having representation in the House of Delegates with the request that the necessary action be taken fully to inform all members of their associations with respect thereto. Our draft of the bill, S-915, should not be confused with S-916 introduced the same day by Senator M. M. Logan of Kentucky to which the lawyers of the American Bar Association are opposed for various reasons. It would take me too far aside from my subject to attempt to state these reasons at this time but the gist thereof will be found in the testimony of Dean Pound, Mr. Robert F. Maguire, Mr. Appel and the writer before the Senate Committee on the Judiciary of the 75th Congress in the hearings on S-3676.

In substance, our bill makes no attempt to reshuffle the practical distribution of legislative, executive and judicial power, as that distribution has been made from time to time across the century and a half of our national existence so as to meet the ever-present but constantly changing problems of government.

While the Constitution divided the general powers of government among the legislative, executive and judicial branches, it did not purport to make any absolute division of all such powers and it was recognized by the authors of the federalist papers that it did not do so. The First Congress recognized that the administrative officers could best issue rules and regulations, or subordinate legislation, to fill in minor details for the administration of the departments of government created by that Congress, and the practice has been a more or less continuous one to this day. Neither that Congress nor any succeeding Congress has attempted to prescribe the detailed procedure of pleading and practice in the courts or all the rules of decision which should be applied by the judicial branch in the determination of concrete cases. The Constitution had seen fit to confer on the judicial branch jurisdiction of all cases in law, admiralty and equity but it left to the Congresses from time to time to work out the details. In the statutes,
the Congresses have worked out the jurisdiction which the inferior federal courts should exercise but, with minor exceptions, the legislative branch has very wisely and properly left details to the judiciary. There appears no reason why a similar procedure should not be followed as to the executive branch in the administration of the statutes.

It is even more important today that the statutes mark out the channel and prescribe the standards in legislation dealing with social and economic problems. These problems are constantly changing and necessitating changes in details of administration in order to cope with them. Congress is not constantly in session; its members can not foresee all the changes which may take place when they draft legislation; and these members of Congress, drawn for short periods of time from civil life, can not possibly study all of the vast and sundry details which must be observed and changed from time to time in our complex economy. Therefore, it is in the interest of both wisdom and flexibility to leave to the administrative officers immediately concerned in the execution of the statutes the necessary authority and jurisdiction to issue sub-legislation, or rules and regulations within well-defined channels and subject to standards stated in the statutes. The exercise of such power by administrative officers is in no sense of the word a surrender to them of the functions and duties of the legislative branch of the government, though it is necessarily true that today the scope and extent of the exercise of such power by administrative officers is far greater than it was at any time prior to the World War.

But this is far from suggesting that the administrative officers may be permitted to issue such rules and regulations when they see fit; that they may or may not give public notice and hold public hearings, when demanded, before such rules and regulations are issued; and that the individual must be harassed by any rule or regulation unless and until such individual is, perchance, able to raise the question of its validity in a suit brought against him or which he may bring against the United States. The President's Committee on Administrative Management is on record as recommending that public notice and public hearing should be required before administrative officers exercise legislative power and that there should be some expeditious and inexpensive method of testing the validity of the regulations thereafter issued.

Contrary to this recommendation by the President's Committee, some of his subordinates have claimed that any such require-
ment would "ham-string" administration of the laws and would place "business in a strait-jacket" through hasty and ill-considered rules and regulations. The position of these subordinates emphasizes the correctness of both the President's Committee and of our Committee that due to the vast proportions of the administrative establishment—consisting of some 130-odd different agencies and about 850,000 civil officers and employees as well as a third more in the uniform services—the Chief Executive is unable to retain control over all of his subordinates and has no means of knowing whether, through them, he is taking care that the laws be faithfully executed. Moreover, there is nothing whatever in the argument that by such a device business would be placed in a strait-jacket, as the rules and regulations could be changed and amended at any time—but only after public notice and a public hearing if such should be requested, and subject to judicial review as to whether the statute and rule are in accordance with the Constitution and whether the rule is in accordance with the statute.

Further, subordinate officers and employees of administrative agencies must have directives as to how their duties are to be discharged in the administration of particular statutes. The subordinates must function at once and more or less continuously in applying the terms of the statutes to particular sets of facts as they arise in the administration of the law. Yet it has been admitted that years have elapsed before some administrative agencies have issued any rules and it is seriously claimed that sometimes years are required before a rule can be formulated. This is equivalent to the statement that during this long period of time the subordinate administrative officer is either proceeding as his own knowledge may dictate in the enforcement of the statute (regardless of what his fellow employees may be doing), or is appealing to his superior officer—in person, by telegram or by letter—for instructions in each instance. The former state of affairs leads to contradictions and uncertainty with resulting dissatisfaction, while the latter results in a state of affairs in which the rules of the game are known to the government officer but not to the individual citizen, and where rules may be applied, or even changed, as the game progresses without any regard whatever for past action in similar cases. This is certainly an unhealthy and inefficient manner to administer the statutes of the United States. It is exactly the situation which obtained in the absolute governments of
the ancient world and which today obtains in the countries ruled by dictators.

Furthermore, to attempt by judicial action to establish rules from the cases as they arise and are contested, results in a delay of years for the interpretation of a complex statute. Also, in litigation between the United States and a private party, the law-making function is distracted by factors which are important in that particular case but irrelevant to the formulation of future policy.

Having all of these matters in mind, the Committee on Administrative Law recommended in sections 1 and 2 of the bill—and the Board of Governors and House of Delegates approved—a requirement that, except in an emergency, rules must be issued under all statutes enacted after the bill becomes law so as to implement the terms of such statutes, but only after public notice and a public hearing if a hearing should be requested. As to prior statutes, the existing rules must be reconsidered after public notice and public hearing, if requested. While all rules must be issued in the first instance within ninety days from the date that a statute becomes law, they may be amended, rescinded or supplemented at any time thereafter following public notice and public hearing, when requested.

The United States Court of Appeals for the District of Columbia (a court having certain common law and statutory jurisdiction as a District of Columbia Court and all the jurisdiction of a United States Circuit Court of Appeals) is given jurisdiction to determine, upon the petition of any interested party, whether the rule is constitutional, and if so, whether the rule is in accordance with the terms of the statute or statutes under which it was issued. Any such determination by this court may not foreclose the raising of the issue in the merits of any controversy in some other court.¹

Both the rule and the notice of any judicial determination of its validity must be published in the Federal Register and the rule has no effect until it is published. An individual acting in good faith in accordance with the rule is protected for a period of thirty days after notice of its rescission or its invalidity is published in the Federal Register.

As a matter of practical procedure, some of the agencies of

¹. This procedure is a common one in a number of states. See Andrews, Administrative Labor Legislation (1936).
government now hold public hearings preliminary to the issuance of rules while a few others are required by recent statutes to do so. These statutes were enacted subsequent to the publication of the 1937 report of the Committee on Administrative Law. The procedure to date has belied all suggestions that section 2 of the bill for judicial review of the rules would swamp the United States Court of Appeals for the District of Columbia. As a matter of fact, it is fairly expensive to employ a lawyer and pay the costs of testing out such a rule. It is not expected that any such tests will be made except by business and labor organizations vitally interested in some social or economic legislation and the rules thereunder. All of these principal organizations have representation in Washington and as the public necessities require prompt action in this respect, it was not thought desirable, at this stage of development of administrative law, that the jurisdiction be shared by other Circuit Courts of Appeals outside of the District of Columbia.

The draft bill authorizes and requests the Supreme Court of the United States to issue "uniform rules of practice and procedure for the hearing of all claims and controversies between the United States or its governmental agencies and any person, of which such agencies are vested with power and jurisdiction to hear and determine." This requirement will result in uniform rules for the administrative hearing of concrete cases and controversies and uniform rules for judicial reviews thereof.

Sections 3 and 4 of the draft concern the semi-judicial work connected with the administration of the law and with judicial reviews thereof in the traditional courts of appeal, these sections being complementary to the same extent as sections 1 and 2 complement each other as to the exercise of quasi-legislative power in the administration of the statutes.

Neither section 3 nor section 4 contemplates any great change in the existing administrative procedure. The multiple-headed so-called independent boards, commissions and authorities, as such, seldom hear the evidence in controversies which they must determine. The procedure is by no means uniform. In some instances a commissioner or board member may hear the evidence and in other instances employees may be assigned as trial examiners to such tasks. In the latter event, the examiner is supposed, in most instances, to present to the tribunal the record accompa-
ied by his report which is in the nature of tentative findings of facts and a decision or order. These papers may or may not be furnished to the private party. If a hearing is demanded, the case is briefed and there may be oral arguments. Such procedure is a necessity in a number of instances, such as the Federal Trade Commission, Securities and Exchange Commission, and others where there is a large volume of work. Section 3 of the draft would establish a uniform procedure for these multiple-headed agencies to insure a full and fair hearing of the claim or controversy.

The situation is more complicated in the single-headed agencies of the administrative service. In a comparatively few instances, statutes have created boards within such agencies to hear and determine certain classes of claims and controversies. In others, such boards have been created by administrative rule, and in the balance of the agencies, employees make determinations for the approval of the head of the agency, or such representative as may be designated to make the approvals or disapprovals. It is physically impossible for the heads of larger agencies of government, such as the Department of Agriculture or the Treasury Department or the Veterans' Administration, for instance, to personally consider more than a small fraction of the claims and controversies which arise in the administration of various and sundry statutes required to be administered by their respective agencies.

However, the boards created by rule in these agencies have no jurisdiction to subpoena witnesses or to build a fair and impartial record which might be used as the basis of a judicial review, and the same situation obtains where some officer or employee prepares the tentative decision. In some, but not in all cases, the aggrieved individual or his attorney may be permitted to informally discuss the claim or controversy with the board created by rule or with the individual employee and a written statement may be submitted. However, the individual has little or no means of showing errors in any ex parte report of the facts made by the officer or employee actually administering the statute, and in most instances the individual or his attorney is not permitted to see such report. This is not only seriously disadvantageous to the private party but it is equally so to the conscientious public official whose sole concern is that the claims and controversies arising in his agency shall be settled and adjusted in accordance with the law and the facts.

In recognition of this entire condition of affairs, the proposed bill provides for the creation within the agency from time to time
as the needs thereof may require, of such number of three member intra-agency boards as may be necessary, with the requirement that at least the chairman of each board shall be a lawyer. The draft, of course, would recognize the boards which may already exist in some of the agencies, whether by virtue of statutes or by virtue of rules, but provides that all such boards shall be reorganized with three members each, at least the chairman in each instance to be a lawyer. As there may be from one to a dozen or more such boards functioning at the same time in some of the larger agencies, the draft requires that the findings of facts and decision or order of all boards must be reduced to writing and approved, disapproved, or modified in writing by the head of the agency or his designated representative. Such authority in the head of the agency is necessary in order that conflicts among the several boards may be avoided, since it is not intended that the United States shall be permitted to appeal from the final conclusions of these agencies.

No one but a theorist—whose knowledge of administrative law is limited to its pathological aspects as gleaned from court decisions—would for a moment think that the head of any agency of the federal government could find either the time or the energy to be familiar with every controversy which may arise through the administration of statutes by his subordinates located at many places throughout the country. The head of an agency can not be familiar with more than a mere fraction of the controversies arising under his agency and then only when they reach such an acute stage that his personal attention must be claimed with respect thereto. The vast amount of law administration must be performed by subordinates, many stages removed from the chief officer or officers of the particular administrative agency. The United States does not pay sufficient salaries to obtain in all cases broad-gauged men and women for these subordinate places and we have no Civil Service or career service worthy of the name for employees in these more responsible positions. England is far ahead of our country in providing a real career service with sufficient rewards in both honors and salaries to secure the honor men from her leading universities and to retain them in the service until death or retirement. In the United States all principal offices are filled by virtue of political services to the party in power and it is a naive person, indeed, who would expect a politician appointed to office to cease to be a politician when retention in
the service depends to a considerable extent upon his remaining a politician.

The result of all this is at least two-fold, and it may be three-fold in the administration of the law. There is incompetency and favoritism on the part of some subordinate administrative officers holding the more important positions as the result of political patronage. There is, or there may be, political or class pressure exerted on, or bias shown by, some of these employees. Few men big enough to head a governmental agency want any such practices on the part of their subordinates; very naturally the presumption is that the subordinate is a faithful, competent and just employee. The burden of proof to establish the contrary is—and rightly should be—on the private individual but no procedure has been established whereby that burden may be carried, except in a limited class of cases where wrong, fraud or injustice may be shown in the courts. Quite naturally, business men and their lawyers hesitate to attack a government employee and this too is as it should be, but our administrative procedure should be such that these defects in a subordinate may be made of record and necessarily appear upon the face of that record.

The intra-agency board is a device which will accomplish that purpose. Under the terms of the proposed bill, the aggrieved party would have the right to require his witnesses to be summoned and all necessary documents or objects subpoenaed and he not only would have the right to publicly place the testimony of his witnesses and the documents in the record, but he would have the right to publicly cross-examine the witnesses of the government, including the officer or employee whose acts caused the claim or controversy to be brought before the board. Further, the head of the agency or his principal subordinates would have a check on the board, through their power to approve or disapprove or modify the findings of facts and the decision or order of that board. As the findings of facts and the decision or order of both the board and the head of the agency or his principal subordinates are required to constitute a part of the record, the courts would have this before them in the event of appeal. Arbitrary and incompetent administrative action simply could not thrive in such an atmosphere. It is only when men and women are given responsibility and made publicly answerable for the exercise of it that we may expect any substantial improvement in the administration of the law. Where matters are determined by unknown and
unnamed individuals, with some superior officer being required to assume responsibility therefor, at least in name, there thrives the old game of "passing the buck."

However, aside from this phase of the matter, appeals now are generally prosecuted to some superior officer and in many cases he is able to adjust the controversy. If he is unable to make an adjustment, there should be no need to assemble all of the evidence again and go to the expense of placing it in a court record. The short and simple procedure is to take the record, properly made before the administrative agency, to a court so that the court may review it. This would not only save expenses but would also save a great deal of time. By the terms of the proposed bill, such a review is contemplated in the United States Court of Appeals for the District of Columbia or in the United States Circuit Court of Appeals for the circuit in which the aggrieved person resides or has his principal place of business or in which the controversy arose. Where the claim or controversy is otherwise within the jurisdiction of the United States Court of Claims, provision is made in the bill that the review may be secured in that court if the individual so elects.

One uniform procedure of review is contemplated for all administrative decisions in the exercise of quasi-judicial power, whether such decisions or orders be made by an intra-agency board or by a so-called independent board. This will save much time in the writing of opinions—since the judges will not be required to consult the statutes in every cited case arising under the laws administered by other agencies to see whether the case is actually in point on procedural matters. Only those who have been required to undergo such drudgery are able to appreciate the vast amount of work thereby involved.

Obviously, the scope of review in the courts is very important. The Committee proceeded on the theory that this scope of review should be broader than on an appeal from a jury verdict and broader than exists where the matter is tried before a court without a jury. The jury and the trial judge hearing the evidence are supposed to be, and generally are, unbiased while it is not always true that a board of government officers or employees hearing a case or controversy is unbiased. On the other hand, the Committee concluded that there was no necessity—and that it was impracticable—to impose on the reviewing courts the mandatory duty of reviewing the evidence in all cases to see whether the findings of
facts were clearly erroneous or unsupported by substantial evidence and whether there had been a full and fair hearing as contemplated by the bill. On the contrary, if the reviewing court was given discretionary jurisdiction to review the evidence—when counsel for the individual could show that the findings of facts were clearly erroneous or not supported by substantial evidence—and if the trial board knew in advance that such jurisdiction did exist, there would be relatively few occasions when it would be necessary for the courts to actually exercise such jurisdiction to review the evidence. In brief, the judicial review formula stated in section 4 of the draft was worked out upon the basis of the decided cases and with a view to accomplish the purpose of requiring a full and fair hearing by the administrative agency—with sufficient jurisdiction in the reviewing court to see that substantial justice was done in each case in accordance with the law and the record evidence.

The Committee has had some difficulty in getting both government employees and lawyers in private practice to understand that section 3 of the draft applied to the actual administration of the statutes; that is, that this section intended to provide the machinery by which a public record could be publicly built before trained employees and for the consideration of the head of the agency or his designated representative so that the great bulk of administrative controversies could be satisfactorily adjusted. Having built such a record for the administrative adjudication of the controversy, there is no need to rebuild another record before a trial court with all the delay and expense to both the private party and the taxpayers which such a procedure would entail. Accordingly, as above stated, section 4 of the draft provides that the review of the case on the record built before the administrative agency shall be in the appropriate Circuit Court of Appeals or in the Court of Claims, if the matter is otherwise within the jurisdiction of the latter court.

Opponents of the plan have argued that reviews of the rules (as contemplated by section 2 of the draft) in the United States Court of Appeals for the District of Columbia and reviews of the decisions or orders of the boards (as contemplated by section 4) in the United States Circuit Courts of Appeals, including the one in the District of Columbia, would swamp the courts—but they present no statistics or reasons to support such an argument. The Committee confidently believes that even with the increased number of controversies which could be reviewed by the courts, the
actual number which will be taken to the courts will be decreased. In other words, there are a great many classes of cases arising under various statutes which may now be taken to the courts, but in most instances the scope of review in the courts varies from statute to statute and in relatively few instances do the statutes provide any requirements as to the form of the administrative hearings. There is not only room for differences of opinion as between the courts and the administrative agencies as to the procedure which should be followed but in actual fact there are many such differences. All this is unnecessary and is a waste of money and effort on the part of both the individual and the federal government. Further it is most difficult for administrative agencies to function and for the individual to know what to do under particular statutes where there exists such uncertainty in procedural matters.

Some administrative agencies object to that feature of the bill which concentrates in the Department of Justice the supervision of all judicial reviews of administrative rules and administrative decisions. The officials of some of such administrative agencies have publicly stated that there may not always be an agreement between them and the Department of Justice as to the proper interpretation of a statute. Of course, this is very true, but after all the Attorney General of the United States is the chief legal officer of the federal government and, if it is believed that his opinion of a statute is in error, the place to have the error corrected is in the Congress through a change in the statute. The individual should not be saddled with the expense and effort of taking the controversy through the courts to see whether the Department of Justice or the particular agency may be correct as to their respective and conflicting interpretations of the statute. Then, again, the Department of Justice is not an administrative agency in the same sense as the Department of Agriculture, the Federal Trade Commission, or the Securities and Exchange Commission which are agencies engaged in the administration of various statutes. Not infrequently these law administering agencies take an extreme position. They would not be good administrators unless they attempted to carry out the statutes to their fullest extent. On the other hand, the Department of Justice takes a more detached view of the statutes and, with sufficient jurisdiction to do so, could avoid judicial reviews which might otherwise be necessary if the administrative agency concerned
had the authority and responsibility to defend the statutes in the courts.

It has been urged by some administrative officers and by some lawyers that instead of intra-agency boards to hear and determine administrative appeals, there should be created a series of so-called independent boards sufficient in number to do this work. These men assert that such intra-agency boards will be dominated by politics and by the head of the agency who must be something of a politician before he may secure that position. Men who should know better point to the failure of a few intra-agency boards of the past—but these boards had no authority to summon witnesses and there was no jurisdiction in the courts to review their decisions.

An answer to these arguments is that the single-headed administrative agencies are today, and every day except Sundays and holidays, actually administering the law and are actually deciding claims and controversies as they arise from day to day and hour to hour. They are, for the most part, doing their best to arrive at correct results with little or no adequate authority to determine the actual facts. They must rely upon ex parte statements of subordinates whose actions in many instances gave rise to the controversy and most of whom report such facts as will serve to justify them with their superior officers. I do not mean to suggest that there are many instances where the subordinate deliberately colors the facts to suit his own ends, but I do mean to say that it requires a very capable and detached individual to see and report facts adverse to the position which he may have taken. Without authority to summon witnesses and to hear their examination and cross-examination, the responsible administrative official must rely upon these ex parte statements, except in the more important controversies where an independent investigation may be made. Also, the attorney for the individual generally does not know the contents of the adverse reports and is therefore unable to show the errors therein.

The situation is not so bad with the independent boards and commissions. They are generally equipped with authority to summon witnesses and hear their examination and cross-examination—though, as in the case of the Packers and Stockyards Act administered by the Secretary of Agriculture, there has been no attempt in the statute to prescribe the procedure for a full and fair hearing, and the Supreme Court of the United States does not have the authority to issue uniform rules of procedure for the
actual hearing of the controversy which it would have under the proposed draft.

It would seem that no informed person could deny to the administrative agencies the necessary machinery and jurisdiction to dispose of any particular controversy arising in the administration of statutes which can not be settled by negotiation. It would seem to be self-evident that such machinery and jurisdiction should exist for the proper administration of the law. If this be conceded, then the question is whether the judicial review should be of the record administratively made—with sufficient jurisdiction in the reviewing court to examine the record, when that is shown to be necessary to correct injustice—or whether the judicial determination should be de novo on a record built before the court. The Committee firmly believes that the review should be on the administrative record on the basis of the formula stated in section 4 of the draft and that it is impracticable to obtain a trial de novo of the vast number of administrative controversies which are not settled as the result of negotiation; that such a trial is unnecessary in the great bulk of cases where the facts may be fully and fairly established for the consideration of superior administrative officers or employees; and that without a direct judicial review of the administrative record there can not be obtained the necessary improvements in both administration and personnel.

Some of those who could have, but did not make any suggestions for improvement of the draft as it was brought to the form in which approved at Chicago, have loudly insisted that there should be a different type of procedure for each separate administrative agency or at least that the procedure could not be made uniform. They suggest that the reformation take place piecemeal—and if any such suggestions were adopted, no substantial reforms of a general character could be accomplished for many years. As a matter of fact, they make no concrete suggestions as to such reforms as they think should be effected, though practically all admit that some reforms are necessary and desirable. As to their insistence that a different procedure be maintained for each separate administrative agency, they are in the same position as the practitioners at early common law who insisted that there should be a separate writ and procedure for each action. It required but a phrase in the Constitution to confer on the federal courts jurisdiction in law, equity and admiralty and within the past year the Supreme Court of the United States has adopted uniform rules for both law and equity cases. Suppose it had been
attempted to formulate and approve a separate set of rules for each class of actions which may be brought in the federal courts?

And yet the various and sundry administrative agencies of government are charged with the responsibility of administering statutes dealing with a particular problem or a particular class of problems. Procedure is basic and fundamental. As Mr. Justice Frankfurter has said, some of the most precious values of civilization are procedural in their nature and there is no more necessity for a separate type of procedure for each administrative agency than there is need for a separate type of procedure for each class of actions coming before the courts today. One is tempted to believe that the men who make these suggestions are opposed to any change in the chaotic status quo no matter in what form that change might be suggested.

Section 5 of the draft provides for the taxation of costs against the losing party, whether the agency or the individual, and authorizes the reviewing court to impose damages when the review is sought for purposes of delay. Also, section 6 retains existing remedies for judicial reviews or trials de novo, where they exist. This has been done out of an abundance of caution on the part of some members of the Bar who think the existing remedies for judicial action should be retained until the procedure contemplated by the bill has demonstrated its worth and soundness. This section makes certain exemptions from the terms of the bill. The reasons for each exemption have been explained in the annotated copy which was submitted to the Board of Governors and to the House of Delegates in Chicago; limitations of space do not permit such a detailed explanation here. It is quite possible that some of the exemptions may be omitted by the Congress before the bill is enacted into law or that subsequent amendments to the statute may eliminate some of the exemptions.

By way of summary, it may be stated that the draft is quite simple in its basic principles which are three in number: (1) improvement of methods of formulating rules in the exercise of the quasi-legislative function (including provisions for judicial review of the rules so formulated); (2) establishment of a system of administrative review of controversies arising in the administration of the statutes and rules issued thereunder; and (3) provisions for judicial review of the decisions or orders of the intra-agency boards—such reviews to be uniform for all administrative agencies, including both the intra-agency and independent boards. These three basic principles cover, generally, three consecutive
stages in the administrative process—that is, the formulation of rules, the administrative review of the application by subordinates of the statutes and rules to the facts in particular controversies, and, finally, judicial review of the administrative action by a uniform procedure.

In this manner, we think that the government will be required to control itself, and the administrative officials of that government will themselves be regulated.

APPENDIX

PROPOSED ADMINISTRATIVE LAW BILL—S. 915, H.R. 4236

To provide for the more expeditious settlement of disputes with the United States and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that:

Section 1. Implementing administrative rules. (a) Hereafter all administrative rules and amendments or modifications thereof, or supplements thereto, except those relating to hearing procedure, and all amendments or modifications or supplements of existing rules (which shall include regulations), implementing or filling in the details of any statute affecting the rights of persons or property shall be issued by the head of the agency (which as used in this act shall mean departments and independent establishments) and by each independent agency (which as used in this act shall include boards, commissions, authorities and other organizations) charged with the administration of the statute after publication of notice and public hearings; and all such rules and amendments shall be published in the Federal Register within ten days (Sundays and national holidays excluded) after the date of their approval by the head of the agency or the independent agency concerned, and shall not become effective until such publication, except in a public emergency stated in the rule approved by the President. Rules under all statutes hereafter enacted, shall be issued as herein provided within ninety days after the date same become law subject to the adoption thereafter of further rules or amendment of rules, or rescission of rules from time to time as provided in this Act.

(b) Any person affected by an administrative rule in force on the date of the approval of this act may petition the head of the agency or the independent agency which administers any statute under which the rule was issued for a reconsideration of any such rule; and the head of such agency or the independent agency shall, after publication of notice and public hearing, determine whether such rule shall be continued in force, modified, or rescinded. All amendments of such rules shall be in accordance with the procedure provided in subsection (a) of this Section and all action of the head of such agency or the independent agency on such petitions and all new or amended rules shall be published in the Federal Register as prescribed in said subsection (a) for the publication of rules and amendments.

(c) No person shall be penalized or subjected to any forfeiture or prosecuted for any act done or omitted to be done in good faith in conformity with a rule or amendment which has been rescinded or declared invalid by any final judgment entered as hereinafter provided, unless the act was done or omitted to be done more than thirty days (Sundays and national holidays excluded) after the publication in the Federal Register of the rescission or final judicial determination of the invalidity of such rule.
(d) The Supreme Court of the United States is authorized and requested to prescribe uniform rules of practice and procedure for the hearing of all claims and controversies between the United States or its governmental agencies and any person, of which said agencies are vested with power and jurisdiction to hear and determine.

SECTION 2. Judicial Review of Rules. In addition to the jurisdiction heretofore conferred upon the United States Court of Appeals for the District of Columbia, that court shall have jurisdiction, upon petition filed in accordance with its rules, within thirty days (Sundays and national holidays excluded) from the date any administrative rule is published in the Federal Register, to hear and determine whether any such rule issued or continued in force in accordance with Section 1 of this Act is in conflict with the Constitution of the United States or the statute under which issued. No rule shall be held invalid except for violation of the Constitution or for conflict with a statute or for lack of authority conferred upon the agency issuing it by the statute or statutes pursuant to which it was issued or for failure to comply with Section 1 of this Act. A copy of the petition, and copies of all subsequent pleadings shall be served upon the Attorney General of the United States who shall conduct the defense of the rule. The court may refer such petition and any reply thereto for the taking of such evidence as shall be material and relevant thereto. The court shall give preference to such petitions and shall have no power in the proceedings except to render a declaratory judgment holding such rule legal and valid or holding it contrary to law and invalid. If the rule is held contrary to law and invalid, the rule thereafter shall not have any force or effect except to confer immunity as provided in Section 1 of this Act. Nothing contained in this Section shall prevent the determination of the validity or invalidity of any rule which may be involved in any suit or review of an administrative decision or order in any court of the United States as now or hereafter authorized by law.

SECTION 3. Statutory Approval and Authority for Administrative Boards and Prescribing their Procedure. (a) Every head of an agency (as defined in Section 1 of this Act) shall from time to time designate three employees of his agency for such intra-agency boards (including the field service of such agency) as may be necessary and desirable. Where there are intra-agency boards existing on the date of approval of this Act, they shall be re-established and function in accordance with this Act. Wherever practicable, such boards shall be designated in various sections of the United States. At least one employee designated for each such board shall be a lawyer who shall act as chairman of the board. When the members of any board are not engaged in the hearing of administrative appeals as hereby here provided, such employees shall be assigned to other duties in the service of the agency concerned. No member of a board who has participated in a particular case or in the preparation, draft or approval of any rule shall sit in review or appeal of the case or application of the rule. Each board shall be impartial, free and independent in the hearing and determination of administrative appeals.

(b) When any person (which term wherever used in this Act shall include individuals, corporations, partnerships, or other organizations) is aggrieved by a decision, act or failure to act (which shall include any regulatory order) by any officer or employee of any agency, such person may notify the head of the agency in writing of objections thereto, specifically requesting that the claim or controversy be referred to a board constituted as hereinbefore provided for hearing and determination. Such notice shall be given not more than twenty days after the date of receipt of a registered letter notifying him of the decision, act, or failure to act. Such written objections shall be referred promptly to an intra-agency board for the agency concerned. At a time and place to be designated and communicated to the aggrieved person, he shall have an opportunity at an early day for a full and fair hearing before said board, at which time there shall be introduced into the record the testimony and any documents or objects relating to the administrative appeal before said board. Any person having a substantial interest in the controversy shall
have the right to intervene therein. A stenographer shall be assigned to the hearings before the board to take and transcribe the testimony. All testimony, other evidence and all proceedings before the board shall be reduced to a written record and filed in the agency concerned and a copy thereof shall be furnished to the aggrieved person upon his written request therefor at a charge not exceeding fifteen cents a folio. Within thirty days (Sundays and national holidays excluded) after the day the evidence and arguments are closed, the board shall make written findings of facts and separate decision or order thereon, which shall be subject to the written approval, disapproval, or modification of the head of the agency concerned or of such person as he shall designate in writing to act for him. A copy of the findings of fact and decision or order, showing the action if any, of the head of the agency concerned or his representative, shall be filed in the agency as a part of the written record in the case and a copy shall be sent by registered mail to the aggrieved person and to the intervenors if any. The United States shall take such action as may now or hereafter be provided by law to enforce the decision or order of the agency unless there be pending judicial review thereof as hereinafter provided.

(c) The chairman of any board, upon request of any party to the proceedings, shall require by subpoena the attendance and testimony of witnesses and the production of documents and all other objects before said board without other showing than required by the rules in United States District Courts for the issuance of subpoenas by such courts. Any witness subpoenaed or whose deposition is taken shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party at whose instance the witness appears or deposition is taken. In the event of disobedience of a subpoena issued as herein provided, the chairman, or any party to the proceedings may apply to any district court of the United States of the jurisdiction in which the witness may be found for an order requiring his attendance and testimony and the production of all documents and objects described in the subpoena. The chairman of the board shall be authorized to administer oaths to witnesses and there shall be a right of examination and cross-examination of witnesses.

(d) When the matter in controversy is such that the delay incident to the hearing and decision of the case would create an emergency contrary to the public interest and there is administrative action or inaction, prior to or without such hearing and determination, resulting in the destruction of the property or damage to the aggrieved person involved in such controversy, the findings of fact and decision when made by the board shall state the amount of pecuniary damage suffered by the aggrieved person and upon approval thereof by the head of the agency concerned, the amount of damages so approved, if acceptable to the aggrieved person, shall be certified to the Congress for an appropriation with which to pay the same.

(e) Where any matter arises out of the activities of any independent agency (as defined in Section 1 of this Act), it may be provided by rule that such matter may be heard in the first instance by one of its trial examiners, who shall file with the independent agency his written findings of fact and separate decision or order thereon, which shall be made in all instances, whether by the examiner or the independent agency, after reasonable public notice and a full and fair hearing as hereinbefore in this Section provided. A copy or copies thereof shall be sent by registered mail to the aggrieved party. The independent agency may enter at the expiration of thirty days (Sundays and national holidays excluded) such appropriate decision or order as may be proper unless within said thirty days (Sundays and national holidays excluded) the aggrieved party shall file by registered mail with the independent agency his written objections to the findings of fact and decision or order of the examiner in which event the independent agency shall not enter its decision or order without first according a public hearing upon reasonable notice to such party. Such hearing shall be before the members of the independent agency, if it has not less than three members, or before any three of such members. If the independent agency has less than three members, an
intra-agency board shall be constituted in the manner provided in subsection (a) of this Section, upon which the member or members of such agency may serve at his or their election.

SECTION 4. Judicial Review of Decisions or Orders of Administrative Agencies. (a) The term “Circuit Court of Appeals” as hereinafter used shall include the United States Court of Appeals for the District of Columbia.

(b) Any party to a proceeding before any agency or independent agency as provided in Section 3 of this Act who may be aggrieved by the final decision or order of any agency, or independent agency, as the case may be, within thirty days (Sundays and national holidays excluded) after the date of receipt by registered mail of a copy thereof, may at his election file a written petition (1) with the clerk of the United States Court of Appeals for the District of Columbia; or (2) with the clerk of the Circuit Court of Appeals within whose jurisdiction such aggrieved party resides or maintains his principal place of business or in which the controversy arose, for review of the decision or order. Before filing a petition such party may within ten days make a motion to the agency or independent agency concerned for a rehearing tendering a statement of any further showing to be made thereon which shall constitute a part of the record, and the time for appeal shall run from the order on such motion if denied or the order made on such rehearing if a rehearing shall be had. The petition shall state the alleged errors in the decision or order of the agency or independent agency concerned. The Attorney General of the United States and the agency or independent agency shall each be served by registered mail with a copy of the petition and it shall be the duty of the Attorney General of the United States to cause appearance to be entered on behalf of the United States within thirty days (Sundays and national holidays excluded) after the date of receipt by him of a copy of the petition and it shall be the duty of the agency or independent agency, as the case may be, within thirty days (Sundays and national holidays excluded) or such longer time as the court may by order direct, after receipt of a copy of the petition to cause to be prepared and filed with the clerk of such court the original or a full and accurate transcript of the entire record in such proceeding before such agency or independent agency. The court may affirm or set aside the decision or order or may direct the agency or independent agency concerned to modify its decision or order. Any case may be remanded to the agency or independent agency to take such further evidence as in the discretion of the court may be required but no objection not urged before the agency or independent agency, as the case may be, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused by the court for good cause shown. To facilitate the hearing of such appeals and avoid delay in the hearing other matters before the court, such court may constitute special sessions thereof to consist of any three judges competent in law to sit as judges of a Circuit Court of Appeals, which special sessions may be held concurrently with the regular sessions of said court. Any decision or order of any agency or independent agency shall be set aside if it is made to appear (1) that the findings of fact are clearly erroneous, or (2) that the findings of fact are not supported by substantial evidence, or (3) that the decision or order is not supported by the findings of fact, or (4) that the decision or order was issued without due notice and a reasonable opportunity having been afforded the aggrieved party for a full and fair hearing, or (5) that the decision or order is beyond the jurisdiction of the agency or independent agency, as the case may be, or (6) that the decision or order infringes the Constitution or statutes of the United States, or (7) that the decisions or order is otherwise contrary to law.

(c) The judgments of the Circuit Courts of Appeal shall be final, except that they shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C. Tit. 28, Secs. 346 and 347).

(d) Where the cause of action or controversy is otherwise within the jurisdiction of the United States Court of Claims as provided in Sections 138 to 187, inclusive of the Judicial Code, as amended (U. S. C. Tit. 28, Secs. 241 to
293, inclusive), the petition provided in this section may be to the said Court of Claims at the election of the aggrieved party.

(e) Where a Circuit Court of Appeals or the Court of Claims finds itself in disagreement with a previously rendered decision of another court having jurisdiction under this section, it shall certify to the Supreme Court of the United States a distinct and definite statement of the question or proposition of law upon which such disagreement rests, with a statement of the nature of the cause and of the facts on which such question or proposition of law arises together with a statement of the reasons in support of such disagreement. Such further proceedings shall be as provided in Section 239 of the Judicial Code as amended (U. S. C. Tit. 28, Sec. 346).

SECTION 5. Jurisdiction of Courts to Impose Damages Where Appeal was for Delay and for Costs. The Circuit Courts of Appeal or the Court of Claims, as the case may be, shall have jurisdiction and power to impose damages in any case where the decision or order of the agency or independent agency is affirmed and the court finds that the petition was filed merely for delay. In all cases the costs on review shall be allowed the prevailing party after final judgment, to be collected according to law.

SECTION 6. Exceptions and Reservations. (a) Nothing contained in this Act shall operate to modify or repeal any rights or procedure as now provided by law for any person to have his controversy with the United States heard and determined in any district court or circuit court of appeals of the United States, but the remedy herein provided shall be an alternate remedy for such remedy as may be otherwise provided by law.

(b) Nothing contained in this act shall apply to or affect any matter concerning or relating to the conduct of foreign affairs; the conduct of military or naval operations in time of war or civil insurrection; the trial by courts-martial of persons otherwise within the jurisdiction of such courts-martial; the conduct of the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Interstate Commerce Commission; the conduct of the Department of Justice and the offices of the United States Attorneys, except as otherwise herein specifically provided; or any matter concerning or relating to the internal revenue, customs, patent, trade-mark, copyright, or Longshoremen and Harbor Workers' laws; or laws relating to Indian lands; or any case where the aggrieved party was denied a loan, or may be dissatisfied with a grading service in connection with the purchase or sale of agricultural products, or has failed to receive appointment or employment by any agency or independent agency. Sections 1 and 2 of this Act shall not apply to the General Accounting Office.