

# A Re-appraisal of the Ohio Administrative Procedure Act

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## INTRODUCTION

In recent years, with the steady growth and increase of administrative regulation, frequent consideration has been given to uniformity and standardization of the administrative process at both the federal and state levels. Many articles and speeches have advocated legislation on uniform administrative procedure with a view to establishing consistent procedural patterns and standards for administrative bodies.<sup>1</sup> These activities, stemming in part from a general dissatisfaction with some agency practices, have resulted in the enactment of a number of statutes on this subject.<sup>2</sup>

In 1937, a Committee on Administrative Agencies and Tribunals was created in the American Bar Association and in the following year the Committee issued a report on the Judicial Review of State Administrative Action in State Courts.<sup>3</sup> In 1939, the same Committee reported on the Judicial Review of Federal Administrative Determinations and accompanied this report with a draft of a proposed act relating to state administrative procedure.<sup>4</sup> This draft was referred to the National Conference of Commissioners on Uniform State Laws. During the years 1939-1943, the Uniform Civil Procedure Act's Section of the Conference and the corresponding committee of the American Bar Association met and considered numerous changes to the original draft. During this period annual

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<sup>1</sup> See Aitchison, *Reforming the Administrative Process*, 7 GEO. WASH. L. REV. 703 (1939); Alexander, *Administrative Law: A Threat to Our Constitutional Guarantees?* 3 NAT. B.J. 276 (1945); Blachly, *A New Approach to the Reform of Regulatory Procedure*, 32 GEO. L.J. 325 (1944); Grant, *The Search for Uniformity of Law*, 32 AM. POL. SCI. REV. 1082 (1938); Kaufman, *Is the Administrative Process a Fifth Column?* 6 JOHN MARSHALL L.Q. 1 (1940); Pound, *Proposed Legislation as to Federal Administrative Procedure*, 20 IND. L.J. 29 (1944); Schulman, *Administrative Procedure—A Survey of Suggested Reform*, 15 TEMP. L.Q. 1 (1940); Smith, *Administrative Law: A Threat to our Constitutional Government?* 31 VA. L. REV. 1 (1944); Smith, *A Step Forward in Administrative Law*, 57 N.J.L.J. 205 (1944).

<sup>2</sup> See Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 IOWA L. REV. 252, 253 (1948).

<sup>3</sup> 63 A.B.A. REP. 623 (1938).

<sup>4</sup> 64 A.B.A. REP. 407 (1939).

reports and tentative drafts were prepared for presentation to the Conference.<sup>5</sup> The final draft of the Model Act was approved at the October, 1946, annual meeting of the Conference.<sup>6</sup>

Meanwhile, to meet similar considerations and demands, Ohio passed an Administrative Procedure Act in 1943.<sup>7</sup> And, after a decade of legislative deliberation, Congress passed the Federal Administrative Procedure Act in 1946.<sup>8</sup>

While much similarity exists between the Model Act and the Ohio Act, there are variances between them. The writers propose to consider some of these differences which appear significant. The distinctions to be considered are created by the inclusion of certain provisions in the Model Act for which the Ohio Act has no comparable sections. The Model Act's major differences relate to petitions for adoption of rules, declaratory rulings by the agencies, rules of evidence, official notice, and decisions and orders. This article does not purport to review the sections of the Model Act which are covered by fairly comparable provisions of the Ohio Administrative Procedure Act, such as judicial review and the publication of regulations. Frequent references will be made to corresponding sections of the Federal Act in view of its extensive legislative history and subsequent analyses.

#### PETITIONS FOR ADOPTION OF RULES

Section 5 of the Model Act<sup>9</sup> provides for petitions for adoption of rules as does Section 4(d) of the Federal Act.<sup>10</sup> While these

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<sup>5</sup> National Conference of Commissioners on Uniform State Laws. Report of Special Committee on Uniform Administrative Procedure Act. Fifty-second Annual Conference, Detroit, Michigan, August 18-22, 1942.

National Conference of Commissioners on Uniform State Laws. Uniform Administrative Procedure Act as revised at the Fifty-second Annual Conference, Detroit, Michigan, August 18-22, 1942.

National Conference of Commissioners on Uniform State Laws. Report of Special Committee on Uniform Administrative Procedure Act. Fifty-third Annual Conference, Chicago, Illinois, August 17-21, 1943.

<sup>6</sup> Handbook of the National Conference of Commissioners on Uniform State Laws, 1944, page 329.

<sup>7</sup> OHIO GEN. CODE §§ 154-61 to 154-73 (1948). The 1943 legislation covered only administrative procedure in relation to licensing. (120 Ohio Laws 358). By amendment in 1945, the act was extended so as to cover many of the subjects suggested in the Model State Administrative Procedure Act. (121 Ohio Laws 578).

<sup>8</sup> 60 STAT. 237, 5 U.S.C.A. §§ 1001-11 (Supp. 1946), approved June 11, 1946.

<sup>9</sup> Section 5 of the Model Act reads as follows: "Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition."

<sup>10</sup> Section 4(d) of the Federal Administrative Procedure Act reads: "Each agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

provisions are phrased differently, they are identical in content.<sup>11</sup> Similar provisions have been adopted by most states that have administrative procedure acts.<sup>12</sup> California adds a requirement that denials of hearings be in writing and within thirty days or else a hearing be scheduled within that time.<sup>13</sup> Minnesota has carried the concept still further in its requirement that a public hearing is a necessary adjunct to a petition.<sup>14</sup>

In Ohio, there is one such similar section, but its application is limited to the Board of Building Standards.<sup>15</sup> There is also a section permitting petitions for rescinding the rules of the Tax Commissioner.<sup>16</sup> This, however, is fundamentally an appeal or review measure, since the section provides that the Board of Tax Appeals pass on the rules of the Commissioner.

A survey of the state agencies of Ohio,<sup>17</sup> conducted by the

<sup>11</sup> The United States Attorney General in his Manual on the Administrative Procedure Act (1947) has directed that "every agency with rule making powers subject to section 4 *should* establish, and publish under section 3(a) (2), procedural rules governing the receipt, consideration and disposition of petitions filed pursuant to section 4(d)." (*Italics ours*). Thus the essential effect is the prescribing of procedural rules for petitions by agencies under either act. See also, Fuchs, *The Model Act's Division of Administrative Proceedings into Rule-Making and Contested Cases*, 33 IOWA L. REV. 210, 232 (1948).

<sup>12</sup> MO. REV. STAT. ANN. § 1140.104 (Supp. 1946); WIS. STAT. § 227.04 (1945); CAL. GOVERNMENT CODE § 11426 (1947).

<sup>13</sup> CAL. GOVERNMENT CODE § 11427 (1947).

<sup>14</sup> MINN. STAT. ANN. §§ 15.042, 15.043 (1946).

<sup>15</sup> OHIO GEN. CODE § 12600-290 (1948).

<sup>16</sup> OHIO GEN. CODE § 1464-4 (1948).

<sup>17</sup> A letter and questionnaire were sent to each of the state boards, commissions, and agencies in Ohio, seeking the opinions of the state officials regarding the considerations treated by this article. The questionnaire follows:

QUESTIONNAIRE TO ADMINISTRATIVE AGENCIES OF THE STATE  
OF OHIO REGARDING THE OHIO ADMINISTRATIVE  
PROCEDURE ACT

<sup>1</sup> Is your agency engaged in licensing functions?

<sup>2</sup> Is your agency empowered to promulgate rules?

<sup>3</sup> If not, does any other agency or board have such authority in matters relating to your agency? (Please name the other agency.)

<sup>4</sup> Is your agency empowered to make adjudications?

<sup>5</sup> Are there within your knowledge any special statutes now in effect which apply provisions similar to those in the Model Act to your agency?

<sup>6</sup> If the answer to question five is 'yes', please list those statutes.

<sup>7</sup> Do your agency's rules provide for petitions for adoption of rules? (State the rule.)

<sup>8</sup> By what method could an outside party present a proposed rule, amendment or revocation of a rule to your agency for consideration and possible issuance?

<sup>9</sup> In the absence of such a rule, do you favor or do you object to having a section allowing such petitions apply to your agency? (Please state your reasons.)

<sup>10</sup> Do your agency's regulations provide for declaratory rulings by the agency? (State the rule.)

<sup>11</sup> By what method, if any, could an outside party obtain knowledge of whether a rule or statute enforced by your agency would be applicable

writers, revealed that a significant number of agencies informally permit applications for changes in their rules and give the requests such consideration as is deemed warranted.<sup>18</sup> While the Ohio agencies recognize the desirability of such practices, and do informally permit petitions, a bare majority of those answering the questionnaire expressed objections to the application of such a provision to their agencies.<sup>19</sup> The reasons given for these objections were of marked similarity to those expressed by critics of Section 4(d) of the Federal Act.

Various arguments for and against the petition sections of the Federal and Model Acts have been made. Congressman Francis E. Walter, speaking in Congress in favor of the Federal Act, said, "The right of petition is written into the Constitution itself. This subsection confirms that right where Congress has delegated legislative powers to administrative agencies."<sup>20</sup> A note to a similar section in a proposed uniform act,<sup>21</sup> which preceded the Model Act, stated that it would seem that such a right as outlined here already exists and that the purpose of the section is to familiarize indi-

to him should he take some particular action?

<sup>12</sup> In the absence of such rule, state any views you might have regarding a provision permitting declaratory rulings by your agency.

<sup>13</sup> Do your agency's rules contain a section on admissibility of evidence? (State the section.)

<sup>14</sup> What is your agency's present policy on admissibility of evidence at adjudications?

<sup>15</sup> In the absence of such a rule, what would be your views as to having a section similar to Section 9(1) of the Model Act apply to your agency?

<sup>16</sup> Do your agency's rules provide for the taking of judicial or official notice? (State the rule.)

<sup>17</sup> What is your agency's present policy on the taking of such notice?

<sup>18</sup> In the absence of such rule, what would be your views as to having a section similar to Section 9(4) of the Model Act apply to your agency?

<sup>19</sup> Do your agency's rules provide for written decisions accompanied by findings of fact and conclusions of law? (State the rule.)

<sup>20</sup> What is your agency's present policy on writing of decisions, and making findings of fact and conclusions of law?

<sup>21</sup> In the absence of such rule, what would be your views as to having a section similar to Section 11 of the Model Act apply to your agency?

While only eighteen agencies replied to the letter and questionnaire, they represent the more important state bodies; hence, it is felt that their replies are of sufficient import to merit appropriate attention.

<sup>18</sup> Of the twelve agencies which answered item eight of the questionnaire, eight permit individual petitions by some informal procedure. It should be noted that a negative answer to this question does not necessarily infer that the agency would refuse to accept requests for rule changes.

<sup>19</sup> Of the eleven agencies answering item nine of the questionnaire, five either favored or had no objection to such a provision. Six agencies objected to the provision; one objected solely on the ground that it was unnecessary.

<sup>20</sup> Administrative Procedure Act—Legislative History, SEN. DOC. No. 248, 79th Cong., 2d Sess. (1947), p. 359.

<sup>21</sup> Handbook of National Conference of Commissioners on Uniform State Laws (1943), pp. 234-5.

viduals with it and to apprise the agencies of their duty to receive and consider such requests.

The arguments against the section are essentially threefold. The first emphasizes the extra work which such a section would cause an agency. The second is that it encourages minority lobbying tactics, and the third is that it is unnecessary. Each of these grounds for objection merits consideration.

The critics, whose objections are founded on increased work load, point out that many additional steps are necessitated by the procedure without a corresponding gain of substantive benefits. Initially, regulations would have to be adopted, published, and disseminated to set up a formal procedure for submitting petitions. The petitions would require stamping, acknowledgment, and proper routing; a study of each proposal would be necessary; many more hearings would be held, causing increased paper work and loss of time; many more regulations would be drafted and published; and the agency personnel would need re-education regarding each change.

The writers believe that some of these obstacles are avoided by the precise wording of the Model Act section. It is phrased so as to provide flexibility, permitting ample discretion to each agency. Hearings on petitions are not a universal requirement. Each agency is authorized to formulate its own procedure. It does not follow that the procedural regulations should require hearings on all petitions for, as it has been stated, such a requirement would cause a serious waste of time.<sup>22</sup> In each instance, the agency would decide as to the merit of the hearing procedure.

It is admitted that the requirement would result in some added clerical work as well as the possible drafting of additional regulations or amendments. If the provision is meritorious, appropriations should be sought from the legislature to meet any additional staff load which might develop. Under the most adverse circumstances this should not result in the addition of more than a few new staff members. The argument that the section might result in the drafting of additional regulations should be balanced against the desirability for more effective formulation of agency policy.

While it is true that agency personnel would require some re-education as each regulatory change is made, this problem appears to be inconsequential if the modification is deemed necessary by the agency. At any rate, it is doubtful that so many regulatory changes would follow from the petitions as to create a staff educational problem.

The argument that the section encourages minority group tactics presents a two-fold consideration. The critics point out that

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<sup>22</sup> Nathanson, *ibid.*, 262.

a minority group could submit so many repetitious or unwarranted petitions as to overload an agency, causing a breakdown of its operations. They also express the fear of powerful minority lobbies. They feel that such minority groups have tight control over their memberships and can, by a volume of correspondence or full attendance at hearings, blind the agencies into believing that they reflect majority opinion, thereby unfairly influencing the agencies in their determinations.

Again, this first concern is recognized, but it is believed that the danger is more than compensated for by the advantages gained. The agency could summarily dispose of the repetitious petitions or consolidate them into a single action.

The second point relating to concentrated group action presents a more serious problem. However, the possible adoption of regulations favorable to a minority group exists with or without a petitioning provision where the policy-determining body is not fully alert to the issues at hand or is not sensitive to its administrative and public responsibilities. The argument merely supports the requirement that the policy-makers of administrative agencies be men of adequate capacities and possess the objective courage to perform their public duties.

The third objection to Section 5 of the Model Act relates to a general dissatisfaction with the policies and programs of administrative bodies and extends to a general criticism of administrative control, public officials and attorneys. While the section itself is very brief, the protagonists of this view believe that its adoption would result in additional regulation, helping to swell the already crowded law book shelves. While few would stand by such argument if a provision were necessary to meet a compelling situation, they point out that there would actually be few requests for rule changes and that the agencies, without a statutory requirement, already hear and give such requests merited consideration. Doubt is also engendered as to the effectiveness of the section to attain the results sought.

It is undoubtedly true that few petitions would be submitted to the agencies whose programs contain a minimum of restrictive or prohibitory features. Yet it does not follow that all petitions would be without merit. The mere fact that beneficial change in administrative regulation could result from a standardized procedure is of itself a strong argument in its favor.

It is also believed by its proponents that the section would help in fostering good public relations. The presence of a specific petition procedure could lead to a clarification of the reasons for the issuance of a necessary, yet unpopular or burdensome, regulation. Standardizing the petition procedure, especially in those agencies

where it is informally followed, would tend to emphasize agency fairness and objectivity and the danger of criticism of action as being arbitrary and privileged would be less likely under those circumstances.

While neither Section 5 of the Model Act nor Section 4(d) of the Federal Act accomplishes all that might be desired, each is of value for its educational content and the resultant strengthening of the administrative process. The public would be informed of its rights and the agencies would be committed to uniform, announced policies.

#### DECLARATORY RULINGS BY AGENCIES

Section 7 of the Model Act<sup>23</sup> and Section 5(d) of the Federal Act<sup>24</sup> provide for declaratory rulings by agencies. While the declaratory judgment has long been viewed with favor as a judicial instrument, it has not been generally accepted as a part of the administrative process. To date only Wisconsin has followed the leadership of the Model and Federal Acts by adopting this procedure.<sup>25</sup>

Essentially, both sections are intended to correct what is deemed a deficiency in the administrative field. Congressman Francis E. Walter emphasized the need for authorizing determinations which resolve administrative controversies without compelling a party to act upon his own view and at his peril in the absence of clear or specific administrative regulation.<sup>26</sup>

The sections of the Model and Federal Acts, while having the same objective, are differently worded. The Model Act section has been criticized in that its provisions regarding petitions, effect, appeal, and procedural rules appear to be "largely repetitive of other provisions of the Act and hence redundant."<sup>27</sup> Wisconsin, in adopting its procedure, extended it to provide that whenever an issue of

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<sup>23</sup> Section 7 of the Model Act is as follows: "On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. Such a ruling is subject to review in the [District Court] in the manner hereinafter provided for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition."

<sup>24</sup> Section 5(d) of the Federal Act reads as follows: "The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

<sup>25</sup> WIS. STAT. § 227.06 (1945).

<sup>26</sup> SEN. DOC. NO. 248, *ibid.*, page 362.

<sup>27</sup> Abel, *The Double Standard in Administrative Procedure Legislation: Model Act and Federal Act*, 33 IOWA L. REV. 228, 238 (1948).

fact arises in a declaratory judgment proceeding in a court, the court shall refer the case to the agency for its determination of the fact-issue under the declaratory ruling procedure.<sup>28</sup> Under this section the issuance of a declaratory ruling becomes mandatory.

While the Ohio statutes do not provide for declaratory rulings either in the Administrative Procedure Act or in any sections pertaining to individual boards, commissions, or agencies, our survey revealed that some Ohio agencies do issue "unofficial" rulings.<sup>29</sup> However, since these actions do not have the sanction of statutes, they are not necessarily binding, nor are they subject to judicial review.

The majority of the Ohio agencies replying to the questionnaire did not favor the statutory adoption of the Model Act's declaratory ruling procedure.<sup>30</sup> They contended that the work load of the agencies would be increased, that this system is more properly a judicial function, and that other interested persons would contend that their fact-situations are covered by declaratory rulings which are not in point.

The above arguments and others have been directed at the Federal Act and other similar proposals. Mr. Robert M. Benjamin, in his report to the Governor of New York, disapproved of such legislation on the ground that it is impossible to define the circumstances in which it will be practicable to issue administrative rulings, and it is therefore not desirable to impose on any administrative agency legal obligations to formulate such orders.<sup>31</sup> He further believed that, should there be a need for such legislation, it should be directed to the specific agencies in particular fields of administrative activity.

Additional reasons for objecting to such legislation are based upon a dislike of the declaratory judgment procedure and an unwillingness to see the procedure extended. This objection includes the belief that the regulations are generally written in simple language and are capable of interpretation by anyone. Further, when the subject matter is intricate and the regulation is necessarily complex, the interested party should hire an attorney for guidance. Fear has also been expressed that certain interested persons might attempt to exploit the procedure by submitting innumerable requests for rulings on slightly altered facts in "an effort to reach the outermost edge of legal conduct without stepping over the

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<sup>28</sup> WIS. STAT. § 227.05 (1945).

<sup>29</sup> Of the ten agencies replying to the question, seven rule on such requests in an informal manner.

<sup>30</sup> Four agencies objected, two favored, and four expressed no opinion as to this section of the Model Act.

<sup>31</sup> 1 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK 261 (1942).



boundary into actual illegality.”<sup>32</sup>

A further objection to this and other uniform administrative procedure regulations is that the undeviating court procedures which are ponderous and time-consuming should not be imposed upon the administrative process where flexibility and alacrity are so fundamental.

The preceding discussion of petitions for adoption of rules embraces some of the general arguments and answers which are applicable to these considerations. Undoubtedly, some increased work load would result from the enactment of this provision; however, it might reduce some phases of enforcement activity in that innocent violations might be eliminated by the clarification of the meaning of regulations. Also, where reasonable discretion is permitted the agencies, there need be little concern regarding increased work load. The Federal Act provision on declaratory rulings is restricted by the introductory provisions of Section 5 and permits the agency to use “sound discretion” in giving rulings. A refusal to give a declaratory ruling is subject to judicial review. The Model Act, on the other hand, provides that any agency “may” issue such a ruling. Since that procedure is enabling and permissive only,<sup>33</sup> no refusal could become the subject of judicial review. Notwithstanding the fact that the Federal Act does not provide the discretion allowed agencies by the Model Act, the experience of federal agencies does not indicate that the increase of work under the Federal Act has been excessively burdensome. The public benefits derived from the procedure seem to counterbalance these objections.

The Model Act is subject to almost irrefutable criticism in that a refusal to make a ruling, regardless of the merits, is not subject to judicial review. In view of this, it might follow that the Federal Act provision is more desirable than the Model Act section.

The belief that the declaratory ruling procedure is more properly a judicial function is incongruous since the administrative agencies to be affected have adjudicatory powers. While the Model Act purports to extend the declaratory ruling authority to “all” agencies, such authority would, in fact, be given only to those bodies having previously existing adjudicatory powers. Furthermore, this is an extension of powers, not a restriction. There seems to be little reason why an agency adjudication should be subject to greater limitation than is that of the courts.

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<sup>32</sup> Final Report of the Attorney General’s Committee on Administrative Procedure (1941), page 30.

<sup>33</sup> Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 204 (1948).

Strong objection to the section has been made on the ground that other parties would contend that their situations were covered by declaratory rulings which the agency considers inapplicable. Agency objection, for the most part, is based upon the difficulty of restricting declaratory rulings to the immediate factual pattern. If such rulings are, in fact, inapplicable, the cases should be sufficiently distinguishable. If, on the other hand, distinguishing features are not discernible as between the fact-issues, appropriate declaratory rulings should be made applicable to all affected parties. No reason is apparent why the principles of equal treatment to all and predictability of the law should be withheld from the administrative arena. This argument in opposition to the section could be presented with equal force to the drafting of any legislative, administrative or judicial measure. Any written document may be subject to misinterpretation. The answer to this problem is not in refraining from the performance of an essential or helpful function but in executing competent rulings by government officials charged with such responsibility.

The objections voiced by Mr. Benjamin as to the difficulty in defining the circumstances under which administrative rulings shall be made has been met by both the Model and Federal Acts. It should be noted that the Benjamin report was made in March, 1942, and that both Acts came later. The Model Act recognized and avoided the problem by leaving the issuance of such rulings to the discretion of the agency. No attempt was made to develop standards or criteria for the giving of declaratory rulings. The Federal Act, on the other hand, authorizes the issuance of declaratory orders within the "sound discretion" of the agency. Since the refusal to issue a ruling is subject to judicial review, it must be founded upon sound reasons to give support to the agency's position.

There is no need to consider the merits and demerits of the standard declaratory judgment procedure as used in the courts since that procedure is now almost universally accepted with evident success. As the functions of the declaratory judgment and declaratory ruling are markedly similar, it follows that any of the arguments against declaratory judgments would carry but relative weight when used against declaratory rulings.

Since "the perils of unanticipated sanctions and liabilities" are as great in the administrative field as they are in the judicial arena, requirements favoring certitude and definitiveness should be encouraged in that sphere as well as in the other. The declaratory ruling, in aiding the termination of a controversy or the removal of uncertainty, provides valuable guidance to the public—assistance which may be absent when the procedure has not been given statutory sanction.

## ADMISSIBILITY OF EVIDENCE

Although both the Ohio Act<sup>34</sup> and the Federal Act<sup>35</sup> contain sections relating to the admissibility of evidence before administrative tribunals, neither attempts to formulate standards for such admissibility. The section of the Federal Act restricts the use of evidence, however, by requiring that "no sanction shall be imposed or rule or order be issued except . . . as supported by and in accordance with the reliable, probative, and substantial evidence." Section 9(1) of the Model Act<sup>36</sup> differs from the Ohio and Federal Acts in two aspects. Firstly, it requires that the court rules of privilege be applicable to administrative agencies. And secondly, the section attempts to provide a standard by which agencies may test the admissibility of other proffered evidence. While the section may be criticized for not providing more specific standards, it affords "nonetheless a formula, in contrast with the federal act's *carte blanche*."<sup>37</sup>

The evidence provisions of the other state administrative procedure acts vary considerably. While California and Wisconsin subscribe to the Model Act's requirement as to privilege,<sup>38</sup> no state has adopted the admissibility standard of the Act. North Dakota<sup>39</sup>

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<sup>34</sup> OHIO GEN. CODE § 154-70(5) reads as follows: "The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing."

<sup>35</sup> Section 7(c) of the Federal Act is as follows: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

<sup>36</sup> Section 9(1) is as follows: "Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence."

<sup>37</sup> Abel, *ibid*, page 239.

<sup>38</sup> CAL. GOVERNMENT CODE § 11513(c) (Supp. 1945); WIS. STAT. § 227.10 (1947).

<sup>39</sup> N. D. REV. CODE § 28-3206 (1943).

attempts to standardize its agency rules of evidence by providing that the agencies shall use the same rules as do the state district courts except when such rules must be waived by the agency to ascertain the substantive rights of all the parties. And when such rules are waived, only evidence of probative value shall be accepted. The acts of four states<sup>40</sup> provide that their agencies shall not be bound by the usual common law or technical rules of evidence. Of these, California prescribes that any evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in the trial of a civil action.<sup>41</sup>

Some statutes in Ohio attempt to deal with administrative rules of evidence on an individual agency basis. Several provide that the agency shall apply the same rules as does a court in the trial of a civil action.<sup>42</sup> Other statutes provide that the appropriate agencies shall not be bound by common law, statutory, technical or formal rules.<sup>43</sup> In marked contrast to the Model Act's provision as to privilege, Section 1465-27 of the Ohio General Code provides that in any proceeding based upon or growing out of a violation of any law which is administered by the tax commission, a party may not refuse to testify or produce evidence on the ground of self-incrimination. However, to protect him, the section further provides that he cannot be prosecuted for any transaction concerning which he testified, except for perjury in his testimony. Our survey of state agencies and further research revealed that some agencies have regulations dealing with the admission of evidence in their adjudicatory hearings.<sup>44</sup> The survey also indicated that many agencies

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<sup>40</sup> CAL. GOVERNMENT CODE § 11513(c) (Supp. 1945); Ind. Acts 1927, c. 365, § 8; PA. STAT. ANN. Tit. 71, § 1710.32 (Supp. 1946); Wis. STAT. § 227.10 (1947).

<sup>41</sup> CAL. GOVERNMENT CODE § 11513(c) (Supp. 1945).

<sup>42</sup> OHIO GEN. CODE §§ 1465-90 (rehearings before the Industrial Commission), 1326 (State Dental Board), 552 (Public Utilities Commission — "Except as otherwise provided."), 2967-4 (hearings before Probate Judge to establish local park districts).

<sup>43</sup> OHIO GEN. CODE §§ 1465-91 (Industrial Commission), 1359-21 (Division and subdivisions of Aid to Aged), 1359-41 (Department of Public Welfare and Counties — in relation to charities).

<sup>44</sup> Illustrative of such regulations are Rule XIII, § 6 of the Civil Service Commission, Regulation A-9 of the Division of Securities, and Regulation 7, § 6 of the Board of Liquor Control which provide that the reception of evidence at such hearings shall be governed in general by the rules applied by the courts in the trials of civil actions. Regulation 8 of the Division of Social Administration takes the opposite approach, providing that technical rules shall not apply, but reasonable efforts should be made to obtain the most credible evidence. The regulation further provides that opinion evidence of a subjective nature or of an expert or technical nature may be introduced

have unofficial admissibility standards.<sup>45</sup> Most of the agencies expressing an opinion on the problem believed their present system to be satisfactory.<sup>46</sup>

While there has been agitation for applying all evidentiary court rules to administrative agencies, such views are less vocal today. Yet there is continuing expression which favors restricting agency discretion in evidentiary matters. It is thought that at least a few of the established rules of evidence, whose value is unquestioned, would have equal merit when applied to the administrative process. The Model Act provision relating to the rules of privilege is an outgrowth of such thought. The reasons why the drafters of the Model Act did not incorporate other positive rules of evidence must be left for conjecture. It would seem safe to assume, however, that all the other rules were evaluated and found to be wanting, or that the evaluation process was omitted for one reason or another. It is our belief that the Model Act could well have included other rules in addition to the rule of privilege. This latter rule was no doubt incorporated into the section since its workability went unchallenged and there appeared to be no reason why, assuming its social desirability, it should not be equally satisfactory in administrative tribunals. But these arguments might also favor the application of other rules to administrative bodies. Many studies have been made which evaluate specific evidentiary rules in the light of their applicability to the administrative process,<sup>47</sup> yet no persuasive argument has been found which supports

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only if the hearing officer has established the competency of the witness.

Regulation 308.23 of the Bureau of Unemployment Compensation and Rule I, 905.2 of the Board of Review of Unemployment Compensation are even more liberal in granting discretion to the hearing officer.

<sup>45</sup> Such standards vary widely from agency to agency. For example, the Motor Vehicle Dealers' and Salesmen's Licensing Board and the Board of Tax Appeals attempt to apply the usual judicial rules while the Division of Insurance and the Tax Commissioner apply a more liberal standard. Of interest is the fact that some agencies appear to apply standards quite different from the official statutory or regulatory controls. For example, the Division of Aid to the Aged, by reason of OHIO GEN. CODE § 1359-21, is not bound by the usual technical rules, yet the returned questionnaire from this agency revealed that they do apply the judicial rules of evidence. On the other hand, the Division of Securities indicated that they permit "broad latitude—not common law rules of evidence" in spite of a regulation on the subject providing that the judicial rules should apply as far as applicable. The situations would seem to call for amendments to the regulations.

<sup>46</sup> Of the agencies replying to the question, five expressed satisfaction with their present system and three favored the section.

<sup>47</sup> For such studies see: Stephen, *The Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence*, 24 A.B.A.J. 630 (1938), 18 ORE. L. REV. 229 (1939); Collins, *Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence*, 12 CONN. B.J. 278 (1938); Kach, *Evidence Be-*

the thought that the rule of privilege is more applicable to administrative law than are other rules, such as the rule against unsworn testimony. While a plea for the reconsideration of the rules of evidence for application to the administrative process could be effectively made, it is doubtful whether many of the rules would be found suitable for such purposes. At any rate, the study would point up the rules which have the characteristics essential for adoption into the administrative process.

Notwithstanding the application of additional evidentiary rules to the administrative field, a device would be necessary to resolve any remaining problems. It is granted that any attempt to apply all of the rules of evidence to the administrative field would be harmful, since they were evolved out of a lay jury system and their application to the administrative program would be untenable.

Section 9(1) of the Model Act includes the provision which gives effect to the rule of privilege and a broad general formula for the admission of evidence having probative value. Its broad terminology is so inclusive as to be generally ineffective in carrying forth the restrictive intentions of its authors. Furthermore, it is unlikely that the admission of irrelevant evidence or that having no probative value could constitute reversible error under the Model Act when the decision is founded upon sufficient probative evidence. Thus the Model Act seems impotent either as a mandatory or voluntary measure.

It appears that the drafters of the Federal Act were aware of these problems since the section was founded on the assumption that the exclusionary rules of evidence are not suitable for a general act. While the language of the two Acts is similar in the restrictive use of secondary evidence, the Model Act, by its terms, is less flexible in permitting the introduction of non-probative evidence. The Federal Act allows for the inclusion of secondary evidence which might be the center of controversy under the Model Act, but requires that the administrative determination be based upon probative evidence.

It has been the practice in Ohio to adopt special statutes or regulations on evidence which are directed toward only one agency. While this method lacks uniformity, it has the advantage of patterning the rules to the specific requirements of an agency. Its weakness is the absence of comprehensive coverage of the state bodies by such statutes or regulations.

Our thought is that a modification of the Ohio system to

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*fore Fact-Finding Boards*, 45 COM. L.J. 473 (1940); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

include the general provision of the Federal Act and appropriate statutes affecting specific agencies might be favored here over the Model Act. There are, no doubt, certain agencies which because of the nature of their programs, should be required to use a few or, perhaps, many of the judicial rules of evidence. Under such circumstances the rules deemed appropriate to individual agencies could be made mandatory by specific legislation. But for the agencies whose programs do not lend themselves to specific control, no requirements would be made as to admissibility. Then, with only a provision like that of the Federal Act applicable, determinations would be restricted to probative evidence.

#### USE OF FACTS NOT OF RECORD

Sections 9(2) and 9(4) of the Model Act<sup>48</sup> and Section 7(d) of the Federal Act<sup>49</sup> provide that agency determination should be founded only upon evidence of record or evidence officially noticed. Both acts require that any party whose position would be placed in jeopardy by the taking of such notice be given the opportunity to contest the facts so noticed. While the provisions requiring all evidence to be of record use different terminology, their effect is substantially the same. The Federal Act, however, adds a clause which permits the securing of a copy of the record by the interested party upon payment of its cost.

The provisions relating to official notice are dissimilar to a greater degree. The Federal Act does not specifically authorize agencies to take official notice nor does it define the limitations

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<sup>48</sup> Section 9(2) of the Model Act reads as follows: "All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference." Section 9(4) of the Act reads, "Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them."

<sup>49</sup> Section 7(d) of the Federal Administrative Procedure Act is as follows: "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where an agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

of such procedure. Instead, it merely provides for the consequences of such action. Section 9(4) of the Model Act, on the other hand, grants authority to agencies to take notice of "judicially cognizable facts and in addition . . . of general, technical, or scientific facts within their specialized knowledge." This section contains an additional provision which preserves the right of the agencies to utilize their knowledge and experience in the evaluation of the evidence without, at the same time, granting rebuttal rights to the interested parties.

The theory of requiring the agencies by statute to restrict their determinations to the record has been followed in North Dakota.<sup>50</sup> The resulting provision is substantially the same as are those of the Federal and Model Acts; however, it adds the clause, "except as otherwise provided," which must under the other acts be read into the sections to reconcile their provisions.

Four states' administrative procedure acts permit the taking of official notice. California<sup>51</sup> and Wisconsin<sup>52</sup> have sections essentially the same as Section 9(4) of the Model Act. Missouri,<sup>53</sup> while defining official notice in substantially the same manner, distinguishes the taking of judicially cognizable facts and exempts the taking of these facts from the requirement that the opportunity for rebuttal must be provided the interested party. North Dakota<sup>54</sup> also makes this distinction, but defines official notice differently. It permits the agency to "avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by such agency." This is a broad extension of the principle, yet usual protection is provided interested parties by granting them rebuttal rights.

Ohio has no such provisions either in its Administrative Procedure Act or elsewhere. Only one agency, the Division of Social Administration, was found to have a regulation restricting the making of decisions to evidence introduced at hearings.<sup>55</sup> Our survey of state agencies and further investigation did not disclose any agency regulation relating to official notice. However, the study revealed that the vast majority of the more important

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<sup>50</sup> N. D. REV. CODE, § 28-3206 (1943).

<sup>51</sup> CAL. GOVERNMENT CODE, §11515 (Supp. 1945).

<sup>52</sup> WIS. STAT., § 227.10 (1947).

<sup>53</sup> MO. REV. STAT. ANN., § 1140.107 (Supp. 1948).

<sup>54</sup> N. D. REV. CODE, § 28-3207 (1943).

<sup>55</sup> Regulation 8 of the Ohio Division of Social Administration.



state bodies take judicial or official notice of certain facts.<sup>56</sup> And there was no unanimity of opinion expressed by the agencies as to the desirability of the Model Act section.<sup>57</sup>

It is conceded that the application of a requirement that all evidence be of record, without an exception for official notice, would seriously hamper administrative adjudication. Such adjudication would, in fact, be more restricted than is that of the courts in which judicial notice is taken. It is our belief, however, that the resultant effect of the legislation is beneficial. Firstly, judicial review of an administrative determination is hindered by the absence of a record containing all the facts upon which the decision was based. Secondly, the legislation provides interested parties the bases for complete evidentiary information which may be essential in the preparation of their cases. Thirdly, the legislation provides for a more suitable use of the facts by all parties, avoiding problems of misconception or misapplication of facts, innocent or otherwise.

Various arguments are lodged against this legislation. Once again, the matter of increased work load of agencies is stressed. It is argued that the program lengthens procedure unduly by requiring the formal introduction and inclusion of less significant evidence or by requiring agencies to inform the disputants of each officially noticed fact and by providing the opportunity for the introduction of rebuttal evidence. The belief is that agency officials often possess information, the accuracy of which is unquestioned, but are unable to provide the source of such knowledge for introduction into evidence without undue burden. This formalization requires the supporting of such knowledge by source material which may be buried in inaccessible records or files. The information may also have been gleaned by experience from indeterminable reference data. If, on the other hand, the solution is found in the taking of official notice, then the hearings must be lengthened to permit rebuttal evidence. The contention is that this section would thereby deter agencies from using their accumulated knowledge and experience in the furtherance of their administrative responsibilities.

The section is also criticized as being unenforceable since it could never be shown that an agency restricted its findings to evidence of record. The problem is also raised that administra-

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<sup>56</sup> Of the thirteen agencies investigated, eleven take notice of judicially cognizable facts with five of these also taking notice of scientific or technical facts. Only two agencies indicated that they restrict their determinations exclusively to the evidence presented.

<sup>57</sup> Of the nine agencies replying to the question, two expressly objected to the section and five indicated no objection.

tive bodies find it very difficult to indicate which facts are to be officially noticed prior to making determinations since before that time the gaps in the evidence are indeterminable. In fact, both the Model and Federal Acts, in this regard, are also subject to the criticism that from a literal reading, both require the rebuttal rights to be granted even for judicially cognizable facts.<sup>58</sup>

Some arguments against the legislation are indisputable and they and other disadvantages must be weighed against the benefits gained. Admittedly, the work and time involved under this procedure would be increased. However, such increase would not be great, since most of the added evidence would be used through the notice provision rather than by formal introduction. As for providing source information, the agency would not generally be required to search out illusive data, except where they are in dispute or are not of general information. Frequently, the hearing officer, because of his detailed knowledge and experience, would recall and notice certain information; such action would not require an agency to furnish its sources. While we recognize the problem created by increased work load, that of itself, in our opinion, is insufficient to overcome the arguments favoring the program.

A clause in Section 9(4) of the Model Act reads, "Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of evidence presented to them." This is an attempt partially to allay the fear that agencies may be hampered in their use of accumulated knowledge and experience. While the use of that knowledge in the evaluation process differs only in degree from the use of such as a substitute for evidence,<sup>59</sup> the distinction is recognizable. It would seem, moreover, that should the agency desire to use its specialized knowledge as a substitute for evidence, this would be acceptable, under either Act, so long as the interested parties are so apprised. The point is well taken that agencies often are unable to indicate prior to making their decisions the facts which must be noticed; however, that is not always true, for the fact-patterns are frequently discernible for such purposes during the earlier stages of the proceedings. When this information can be determined during the hearing, such knowledge should be disclosed promptly to give the interested parties an opportunity to answer the contentions. On the other hand, when the agency cannot make

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<sup>58</sup> See Nathanson, *ibid.*, page 273, who also holds that this is unsound since facts judicially noticed are generally considered to be beyond the scope of reasonable dispute.

<sup>59</sup> See Benjamin, *ibid.*, page 210.

such determinations, notice can be deferred until the close of the proceedings when the issues are sufficiently crystallized. Then an opportunity can be given for the re-opening of the proceedings to rebut the issues raised by the taking of the notice.

Granted, the sections do contain unenforceable features, for so long as there is substantial evidence in the record and the agency purports to rely solely on it, an agency finding could not be reversed on the ground that extraneous information rather than the evidence of record was the basis of the determination. However, since the legislation would tend to discourage such agency action, its benefits would be salutary. Furthermore, the provisions regarding the rebuttal rights would be enforceable when official notice is taken and the rights of agencies as to the use of notice, both "judicial" and "official," would be expressly integrated and codified into legislation.

While it might appear incongruous to require agencies to permit rebuttal rights when judicially cognizable facts are noticed, such procedure has merit. If the facts noticed are seemingly beyond reasonable dispute, no rebuttal would be forthcoming to lengthen the proceedings. If, on the other hand, the agency's determination is in error as to the interpretation or scope of the doctrine, and goes beyond the recognized grounds for its findings, the interested party's rights would be protected.

A favorable conclusion can be reached, in view of these arguments, for the inclusion of provisions similar to Sections 9(2) and 9(4) of the Model Act into the Ohio Administrative Procedure Act. They provide a uniform basis for the integration of information or evidence without adversely affecting the operations of the agencies. They preclude agency officials from reaching their judgments on facts extraneous to the record. Yet agencies are not prevented from utilizing "their experience, technical competence, and specialized knowledge" in the evaluation of the evidence. While proficiency and expertness are essential for the effective execution of the administrative process, the public should have the privilege to refute data used by agency personnel or to explain or supplement such facts.

#### DECISIONS IN WRITING

Section 11 of the Model Act<sup>60</sup> and Section 8(b) of the Fed-

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<sup>60</sup>Section 11 of the Model Act is as follows: "Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or

eral Act<sup>61</sup> relate to decisions or orders of administrative tribunals. The two sections contain significant differences in phraseology and effect. Both sections require that decisions be accompanied by findings of fact and conclusions of law. While the Model Act provides that these shall be in "writing and stated in the record" and the Federal Act states that they shall "become a part of the record," this distinction, if any, is lacking in importance. A significant difference arises, however, since the Model Act contains no clause comparable to that of the Federal Act which requires the inclusion of the reasons or bases for the findings and conclusions with the decision. The sections also differ in that the Model Act requires findings "upon each contested issue of fact," whereas the Federal Act requires such for "material issues of fact." Furthermore, the Federal Act requires findings and conclusions, together with reasons therefor, upon matters of discretion. The Model Act also provides for notification of the interested parties and for delivery of the decision, findings, and conclusions to such parties upon request. While the Federal Act does not contain a similar provision in Section 8(b), it requires in Section 3(b) that each agency publish or make available to public inspection final opinions or orders in the adjudication of cases.

Most of the states with administrative procedure acts have similar sections.<sup>62</sup> Only one of these, Pennsylvania, specifically requires that the reasons for findings be given. An unusual feature, found in the North Dakota section, is a thirty-day time limit in which the decision must be rendered.

While there is no comparable section in its administrative procedure act, Ohio does have many specific statutes which apply this principle individually to agencies.<sup>63</sup> In view of the exten-

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by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or to his attorney of record."

<sup>61</sup>The pertinent provision of Section 8(b) of the Federal Act reads, "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

<sup>62</sup>CAL. GOVERNMENT CODE, § 11518 (Supp. 1945); MO. REV. STAT. ANN., § 1140.109 (Supp. 1948); N. C. GEN. STAT., § 150-1 (1943); N. D. REV. CODE, § 28-3213 (1943); PA. STAT. ANN., Tit. 71, § 1710.34 (Supp. 1946); VA. CODE ANN., § 580(7) (Supp. 1948).

<sup>63</sup>OHIO GEN. CODE, §§ 459 (Commission to consider claim that individual's property was destroyed by public works); 499-16 (Public Utilities Commission—hearing to ascertain value); 614-46a (Public Utilities Commission—all contested cases); 669-11 (Superintendent of Insurance—licensing of non-

siveness of such legislation in Ohio, few agencies attempt to regulate themselves on the subject.<sup>64</sup> It should be noted that our survey revealed that few state agencies favor the adoption of Section 11 of the Model Act in Ohio.<sup>65</sup> As this section is an entirely restrictive measure, this sentiment is not at all surprising.

Many arguments have been advanced which support this legislation. Initially, it is strongly urged that the formulation of findings of fact or the writing of opinions aid in insuring considered action by the agencies.<sup>66</sup> Such procedure would help the conscientious officials in differentiating between good reasoning and bias or superficial thinking. It would aid in effectuating a discipline "wholly absent where there is freedom to announce a naked conclusion." It would also expose agency rationale to public, professional, and academic scrutiny. However embarrassing or troublesome this might be to agencies, its effect on the fairness of the administrative adjudicatory process would be significant. In addition, it would have a placating effect upon disgruntled parties. Furthermore, written opinions would be of immeasurable assistance to affected parties in considering the advisability of appeal.

The use of opinions or findings of fact by agencies has also been favored since they serve as a basis for informed judicial review and as a guide in planning future conduct by all affected parties. Additional benefits are derived from the procedure when decisions of an agency are rendered by numerous subordinate officials. These officials, by being better informed of policy through the opinions, can coordinate their work with resultant

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profit hospital associations); 669-32 (Superintendent of Insurance—non-profit medical care associations); 687-2 (Superintendent of Insurance—taking possession of building and loan businesses—required only when association makes application and court orders Superintendent to so act); 1064 (State Board of Arbitration and Conciliation—labor dispute investigations); 1334-14 (State Board of Examiners of Architects—license revocations); 1464-1 (7) (Board of Tax Appeals—when there is finding on no tax liability or over taxation); 1464-3 (2) (Tax Commissioner); 1465-47a (Industrial Commission—referees—when there are no transcripts of testimony and evidence); 1465-90 (Industrial Commission).

<sup>64</sup> Our survey of state agencies and an independent search disclosed that only two agencies have such regulations. See Rule 421 of the Ohio Bureau of Unemployment Compensation and Regulation 8 of the Ohio Division of Social Administration.

<sup>65</sup> Of the agencies expressing an opinion on the subject, one favored the section, one had no objection, three felt it to be unnecessary, and four opposed it. It should be mentioned that two of those believing such a section unnecessary already are covered by specific statutes.

<sup>66</sup> Benjamin, *ibid*, page 253; Final Report, *ibid*, page 29.

uniformity and consistency. Another special situation to which written opinions fit themselves particularly well is that in which one agency or branch of an agency reviews the decisions of another. Opinion writing in this instance not only reflects the advantages given herein, but also better informs and instructs the lower echelon agency as to policy.

Imposing as the above arguments might seem, the principle of requiring agencies to write opinions or formulate findings has not met with universal support. The critics of this proposal, as do those of most of the sections considered in this discussion, cite the increase of the work load which the requirement entails. While some agencies are capable of taking on this task, it is believed that most are unable to meet the additional demands. Factors affecting this problem include the requirement for expeditious decisions, volume of business, size and character of the staff, and budgetary limitations.

The section has also been pointedly criticized as being unnecessary legislation. While the Model Act section does not require findings when the decisions are unfavorable to the agency and favorable to the outside interest, they are required for all decisions "adverse to a party . . . in a contested case." The Federal Act is even more stringent in that it provides that "all" decisions shall include findings, conclusions, and reasons therefor. While either section may be capable of being waived, the absence of discretion in the agency as to whether opinions or findings should be prepared raises forceful objections. Thus it might be charged that the proposal involves a borrowing of a court procedure and its application in an even stricter sense to agencies. While some courts are required by state constitution or statute to prepare opinions, this requirement generally is limited to appellate rather than trial courts. Furthermore, as to some states these requirements are not all-inclusive, since they are limited by general or specific standards. It should also be noted that the majority of the states have no constitutional or statutory provisions as to the writing of judicial opinions.<sup>67</sup> The Ohio Constitution, however, ordains that "the decisions in all cases in the supreme court shall be reported, together with the reasons therefor, and laws may be passed providing for the reporting of cases in the courts of appeals."<sup>68</sup> There is no constitutional or statutory provision requiring opinions to be written by the appellate or nisi prius courts of Ohio.<sup>69</sup> Notwithstanding the requirement

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<sup>67</sup> *Courts — Interpretation of Constitutional and Statutory Provisions Requiring Written Opinions*, 16 N.Y.U.L.Q. REV. 485 (1939).

<sup>68</sup> OHIO CONST. ART. IV, § 6; see also OHIO GEN. CODE, §§ 1483 and 1484.

<sup>69</sup> See *Feeman v. State*, 131 Ohio St. 85, 89, 1 N. E. 2d 620 (1936).

of the Constitution, the Supreme Court of Ohio, with justification, issues numerous memorandum decisions without supporting reasons. Were it to do otherwise, it would needlessly increase the bulk of opinions without furthering the clarification of legal principles.<sup>70</sup> The Ohio Supreme Court has also ruled that the syllabus, and not the opinion, is the law of the case,<sup>71</sup> thus appreciably reducing the importance of judicial reasoning in opinions. This is consistent with the views of some that the courts are more adept at decision-making than at reason-giving.<sup>72</sup> In view of these considerations, is it unreasonable to inquire why administrative bodies, which generally function on a plane comparable to trial courts, should be subjected to restrictions equal to those of the highest court in a state?

Another criticism relates to the extent or inclusiveness of findings or opinions of administrative agencies. The Model Act requires findings "upon each contested issue of fact" while the Federal Act assumes a more liberal view by requiring opinions only upon the material issues. Very few of the requirements placed upon the courts are so severe. Assuming, for the moment, that all cases contain some element worthy of discussion, it does not follow that each essential or material issue warrants inclusion. To a great extent much of the reasoning and decision-making would be repetitive or require the expenditure of agency efforts to "delineate the obvious." The resultant effect would be the issuance of many opinions containing matters which are so evident or repetitive as to be valueless. They would merely add to the continuing volume of dubious legal writings which appear, requiring integration, assimilation and analysis.

The critics of the sections also question the validity of the argument that opinions and findings are essential to sapient judicial review. Appellate courts have long been able to review the actions of lower courts by the simple device of presuming that all the necessary findings of fact were arrived at by the trial judge or the jury. In this regard, it is believed that even should the agency be required to write opinions or formulate findings, these would be framed in such a manner as to pass the test of judicial review. Finally, the critics of the section object to the formalization of administrative adjudication that might result from the procedure. They wish to preserve the informal character of the agencies' proceedings and decry the addition of anything hav-

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<sup>70</sup> For a criticism of the principle in regard to the courts, see Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 436 (1930).

<sup>71</sup> For a consideration of this subject, see POLLACK, *OHIO COURT RULES ANNOTATED*, 8 (1949).

<sup>72</sup> An example of such rumination is Powell, *Some Aspects of Constitutionalism and Federalism*, 14 N.C.L. REV. 1 (1936).

ing a litigious appearance.

We can find little support in answer to these criticisms of the proposal. The proponents have de-emphasized the extent of the increased work load which the procedure entails, arguing that the findings or opinions need not be lengthy or elaborate. It has also been suggested that in many situations forms could be used to reduce the work involved. Some who favor the principle insist on findings on each contested issue in each case, in the belief that what is or is not significant is not readily discernible. The Model Act may be more attractive to some critics than is the Federal Act since no reasons need be given with the decisions, thus considerably reducing the work. In answer to the critics' complaint against bulky volumes and materials, the proponents stress the progress that our legal system has made in its preparation of indexes, digests and other reference tools. Yet, how satisfactory have these instruments been in simplifying the problems in other areas?

While we believe that the arguments favoring the adoption of this legislation carry much weight, the procedure presents problems involving practical difficulties. These complications do not make for the ready adoption of the proposal on a uniform basis. The preparation of opinions and findings of fact should, however be encouraged by specific legislation or voluntary action by agencies as their individual programs permit. Ohio has overcome this problem to a great extent by the enactment of specific legislation affecting individual agencies. Other agencies have adopted portions of the program voluntarily and render opinions or findings without statutory compulsion.

#### CONCLUSION

We are now experiencing a resurgence of interest in the administrative organization of federal and state agencies, stemming in part from the Hoover commission reports on the organization of the executive branch of the federal government. Some states, including Ohio, are following the federal report with plans for the study of their state administrative organizations. While these studies may be expected to make significant contributions to the improvement of the administrative process, they are but segments of entire programs which should be considered. Studies for the standardization of procedures and the formulation and execution of consistent policies and uniform criteria of state agencies, where they are absent, are needed with equal urgency. While programs which affect needed economies in the administration of government, resulting in pecuniary savings, should be encouraged, the important procedural and policy operations of state agencies, which have a more direct bearing upon the conduct of agency affairs,



should be appraised with equal vigor. True, economies wrought by a more efficient administrative organization of agencies are desirable. However, studies affecting improvements in the procedure and policy of state bodies are also important. And since most state agencies are not equipped with budgets and personnel to undertake such programs, funds should be made available and efforts should be exerted to provide balance to each state program for the improvement of the administrative process.