

Louisiana Law Review

Volume 2 | Number 2

January 1940

Forum Juridicum - The Administrative Law Bill: Unsound and Unworkable

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Repository Citation

Alfred Jaretzki Jr., *Forum Juridicum - The Administrative Law Bill: Unsound and Unworkable*, 2 La. L. Rev. (1940)

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Forum Juridicum

THE ADMINISTRATIVE LAW BILL: UNSOUND AND UNWORKABLE

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A careful analysis of the American Bar Association bill on administrative law shows it to be fatally defective. It is poorly drafted and is fantastic in its application to many of the situations which are embraced within its scope. It is based upon an *a priori* approach to a problem that can be dealt with adequately only after a careful study of the actual working of the many administrative agencies whose functioning it attempts to regulate. That the Bar Association Committee which drafted this bill was equipped to make any such study is doubtful and there is at any rate no evidence of any such investigation having been made or attempted.¹

The fundamental objectives of the bill are ably set forth by Colonel O. R. McGuire, Chairman of the American Bar Association Special Committee on Administrative Law, in an article published in the March 1939 number of the Louisiana Law Re-

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1. An interesting document prepared by F. F. Blachly of The Brookings Institution "in cooperation with" the Bar Association Committee, entitled "Working Papers on Administrative Adjudication," may be considered a first step in this direction (75th Cong., 3rd Sess. (1938), Committee Print). But these working papers, far from affording any reasonable basis for the bill in question and while not prepared for the specific purposes of the bill under discussion, upon examination will be found to indicate clearly the impossibility of applying a uniform standard of procedure to the federal administrative agencies as a group in the manner attempted.

A subsequent analysis prepared by Professor Blachly of the Bar Association bill for use of the House Committee on the Judiciary reaches this conclusion:

"This bill has very far-reaching implications which can only be appreciated by applying its provisions to some five or six hundred situations established by statute where actions of the Federal Government affect individuals. Such a detailed examination shows that many of the provisions of this bill are in opposition to principles of constitutional law as developed by the courts, to the whole system of administrative law that Congress and the courts have been developing for over a century, and are incompatible with sound administrative action." (Printed as part of the Hearings before Sub-committee No. 4 of the Committee on the Judiciary on H.R. 4236, H.R. 6198, and H.R. 6324, 76th Cong., 1st Sess. (1939) 156.) This paper is an invaluable document in connection with any study of the subject matter of the bill.

view.² Colonel McGuire has voiced the need for a reform of federal administrative processes, while giving recognition to the importance and necessity of the administrative agencies in today's complex industrial and economic development. But there is required a careful balancing between the desire to safeguard the rights of individuals and the necessity of providing for efficiency in the unfortunately, but necessarily, ever-increasing activities of the federal government.

As to the general provisions of the bill, namely, public hearing before administrative rule-making, judicial review of rules, improved machinery for intra-departmental appeals and provision for more extensive judicial review of administrative decisions, the conclusion is reached in this article that it is unlikely that any single procedural machinery can be devised which will operate satisfactorily with respect to all of the many and varying activities of the numerous administrative bodies. Nor is a uniform procedure found to be desirable. Many of the matters covered by the bill call for differences in treatment, both in theory and in practice. Furthermore, it must be recognized that, while improved procedural machinery is a matter of great importance, in many aspects satisfactory relief can only be had by substantive changes in the statutes under which some of the administrative agencies operate. There is real danger that faults of substance will be overlooked if too much reliance is placed upon reform in practice and procedure.

Possibly because of the prestige of the American Bar Association the bill in question was, with some changes, reported favorably by the Senate Committee on the Judiciary without a hearing,³ by the House Committee on the Judiciary after a perfunctory hearing only⁴ and passed by the Senate by unanimous consent without debate,⁵ only to be recalled in like fashion upon the insistence of the Administration leader of the Senate in whose absence the bill had passed in the first instance.⁶ Testimony that this bill is opposed by all government agencies which it

2. McGuire, *The American Bar Association's Administrative Law Bill (1939)* 1 *LOUISIANA LAW REVIEW* 550.

3. Sen. Rep. No. 442, 76th Cong., 1st Sess. (1939).

4. H.R. Rep. No. 1149, 76th Cong., 1st Sess. (1939). See also Hearings on H.R. 4236, *supra* note 1. A number of the documents printed as a part of these hearings were received too late for consideration by the Sub-committee.

5. July 18, 1939, S. 915.

6. July 19, 1939, motion to reconsider. August 1, 1939, motion agreed to and bill returned to Senate calendar.

affects⁷ and telling briefs in opposition filed with the House Committee on the Judiciary by a number of the agencies⁸ seem for the most part to have been disregarded. It can hardly be doubted that a rising tide of hostility to the acts of many administrative agencies and to the legislation under which such agencies are functioning is in no small way responsible for the uncritical acceptance of the bill.⁹ Furthermore an effective campaign has been carried on in behalf of the bill which it seems has led many sympathetic with the general objectives of the bill to endorse it without adequate scrutiny in the belief that it is the result of careful and considered study on the part not only of the Bar Association Committee on Administrative Law, but on the part also of a number of distinguished individuals whose names are loosely associated with the bill.¹⁰ That this Committee, as from time to time constituted, has made valuable studies on the subject of administrative law will not be questioned.¹¹ But a consideration of the ambiguities of the bill and of many of the statements made in the accompanying report,¹² leads to the belief that no very careful attention could have been given to the actual bill itself.

The particular draft of the bill discussed here will be that passed by the Senate.¹³ Applying with a few exceptions to all the one hundred thirty odd administrative agencies of the fed-

7. See statement of Chester T. Lane, Hearings on H.R. 4236, *supra* note 1, at 14.

8. See briefs and letters filed by Federal Trade Commission, Department of Interior, Department of Agriculture, Department of War, Treasury Department, Federal Communications Commission, Federal Power Commission and Veterans' Administration, all printed as part of Hearings on H.R. 4236, *supra* note 1. See also Sellers, *The Extent to which S. 915 or H.R. 4236 Would Affect the Work of the Department of Agriculture* (1939) 7 *Geo. Wash. L. Rev.* 819, 923.

9. This hostility is evident in both the Senate and House Committee reports.

10. The report of the Senate Committee on the Judiciary, *supra* note 3, at 14, and the report of the House Committee on the Judiciary, *supra* note 4, at 8, each state, "It is doubtful if there has been legislation proposed in a century which has had more extended and careful study than that given to this bill."

11. See reports of the Special Committee on Administrative Law: (1934) 59 *A. B. A. Rep.* 565; (1936) 61 *A. B. A. Rep.* 720; (1937) 62 *A. B. A. Rep.* 789; and especially (1938) 63 *A. B. A. Rep.* 331.

12. See Report and Draft of Bill of The Special Committee on Administrative Law of the American Bar Association to the Chicago Meeting, January 1939. A number of the statements contained in the report and annotations to the draft bill, referred to later, do not correctly reflect the text of the bill itself. An abbreviated report together with the draft of the bill are also found in (1939) 25 *A. B. A. J.* 113.

13. S. 915, 76th Cong., 1st Sess., Print of July 27, 1939, attached as an appendix to this article.

eral government, the bill is procedural in that it provides (1) for public hearings upon all rules to be issued by any administrative agency, (2) for court review to test the validity of any such rule in a proceeding for a declaratory judgment, (3) procedure for intra-departmental review of decisions in all single-headed agencies and (4) procedure for review by federal appellate courts of all final decisions of administrative agencies. Being procedural, its sponsors seem to have thought it self evident that uniformity among the many administrative agencies was not only desirable but feasible in respect of the matters covered by the bill. Any doubts expressed in this regard are lightly dismissed by likening those entertaining such doubts to the practitioners at early common law who insisted there should be a separate writ and procedure for each action.¹⁴ No attempt seems to have been made to determine whether such uniformity was desirable or possible by study of the actual application of the bill to specific situations.

Before proceeding to a discussion of the main sections of the bill, it will be illuminating to consider briefly the exceptions to its operation and the comments on these exceptions contained in the report of the American Bar Association.¹⁵ It is provided that the act shall not apply to any matter relating to the conduct of military or naval operations. In addition there are excluded trials by courts martial, the conduct of the Federal Reserve Board, the office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the Interstate Commerce Commission, the Department of State, the Department of Justice and any matter concerning or relating to the internal revenue, customs, patent, trade mark, copyright or long-shoremen and harbor workers' laws. Furthermore, the act does not apply to 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 department or independent agency. It is also provided that Sections 2 and 3, those applying to public hearings on the issue of rules and to the judicial review of rules, shall not apply to the General Accounting Office.

14. Sen. Rep. *supra* note 3, at 9. McGuire, *supra* note 2, at 568; also McGuire, *Have We a Government of Laws or a Government of Men?* (1939) 73 U.S. L. Rev. 331, 334.

15. S. 915, *supra* note 13, at § 7(b); Am. Bar Ass'n draft, *supra* note 12, at § 6(b).

The exception as to the conduct of military or naval operations was limited to times of war or civil insurrection in the original bill sponsored by the Bar Association. It was apparently only upon the vigorous protest of the War Department that any such limitation would completely hamstring the operations of the Army and Navy that the exception was extended.¹⁶ A plea by the Treasury Department that at least the operation of the coast guard be excepted from the bill was, however, rejected.¹⁷ The original bill excepted matters relating to the conduct of foreign affairs, but on protest from the Department of State that the procedure of the Department, developed since the inception of the federal government, would in large measure be completely nullified by this bill which had no justifiable application to most of the operations of the Department of State, including such matters as the issue of passports and visas, the entire State Department was eliminated from the application of the act.¹⁸ In like manner the Federal Trade Commission was not excepted from the original provisions of the bill nor from the bill as reported by the Senate Committee on the Judiciary, but the Commission was apparently able to persuade the House Committee, that the Federal Trade Commission was operating satisfactorily under a procedure that had been developed over a period of years and that was in many respects considered a model for administrative agencies.¹⁹ The Bar Association bill contained an exception relating to Indian lands made out of deference to wishes of members of the Oklahoma Bar, but apparently these wishes were not controlling with the Senate or House Committees. The House Committee on the Judiciary further suggested the exemption of all federal lending agencies from the scope of the act, instead of mere exception of cases where the aggrieved party was denied a loan.²⁰

In explaining these exceptions²¹ the report of the American Bar Association Committee on Administrative Law states that the general counsels of the Federal Reserve Board, office of the Comptroller of the Currency and Federal Deposit Insurance Corporation insisted that these agencies dealing with finances of the country should be excluded. There is no statement of the reasons

16. Hearings on H.R. 4236, *supra* note 1, at 102.

17. Hearings on H.R. 4236, *supra* note 1, at 104.

18. Hearings on H.R. 4236, *supra* note 1, at 50.

19. Hearings on H.R. 4236, *supra* note 1, at 63. A similar amendment was proposed by Senator Wheeler and adopted by unanimous consent, 84 Cong. Rec. 9976 (1939).

20. H.R. Rep. No. 1149, *supra* note 4, at 1.

21. Am. Bar Ass'n report, *supra* note 12, at 47, 48.

for the exclusion or any indication that the functions and operations of these bodies were given any special study. In the light of this experience it would seem that other agencies of the federal government have cause to regret their failure to protest to the American Bar Association against the application of the act to themselves.²² Internal revenue, customs, patents, trade mark and copyright matters apparently were excluded from the operation of the act in deference to the wishes and demands of the American Bar Association's Committees on taxation, customs, patents, and so forth. It would appear that these committees were satisfied with existing procedure. Here again it would seem that direct or indirect contact with the actual functioning of particular agencies led to the conclusion not to interfere with existing practices. While it is true that there exists judicial review of administrative decisions on tax matters, there is no public hearing on the rules and regulations issued by the Treasury Department in respect of internal revenue matters nor would it seem feasible that there should be. And the suspicion arises that there must be numerous other agencies of the federal government which in like manner are not adaptable to the provisions of the bill. One wonders whether the coast guard might not have qualified under the exemption granted to the conduct of military or naval operations and whether the Bar Association Committee had in mind the particular problems of the Veterans' Bureau which operates under a statutory procedure deliberately made quite peculiar to itself. Indian land matters were excluded due to requests made on behalf of some members of the Oklahoma Bar. This is stated to be a local matter excepted from the operation of the act in deference to the suggestion of those most interested who seem satisfied with the present status of such matters. Satisfaction with existing procedure would seem a reasonable basis for exception to the act were it made a principle of universal application and the result of determination reached after study. The Interstate Commerce Commission is apparently exempted from the bill, in spite of the fact that the scope of the review in its case is quite narrow, because of the possibility of

22. In view of the fact that Colonel McGuire is counsel in the General Accounting Office it may be presumed that the exception of the General Accounting Office from the operations of Sections 2 and 3 of the act were made in the light of experience with the operations of the General Accounting Office, and such knowledge, as it is suggested, should be obtained with respect to all the agencies affected by the bill. That the balance of the bill is made applicable to Colonel McGuire's own department is certainly a tribute to his personal faith in these provisions.

some overhauling of the substantive law relating to at least some of the work of the Commission. This is a recognition not generally shown by the proponents of the act, that there may be some relationship between the substantive powers and duties of an administrative agency and the appropriate procedure relating to such agency. Exceptions of the denial of a loan, dissatisfaction with a grading service or failure to receive an appointment only emphasize the wide scope of the act not only in respect of the agencies involved, but in respect of the particular actions affected.

SECTION 1. "DEFINITIONS"

Section 1 of the act contains a series of definitions most of which are not contained in the original bill of the Bar Association. To some small extent these definitions are helpful, but unfortunately the most important definition, that of "decision," which in turn is dependent on the definition of "controversy," is so difficult to understand that, as will be seen later, it adds only more confusion to an already ambiguous bill. The insertion of appropriate definitions would be of great assistance.

SECTION 2. "IMPLEMENTING ADMINISTRATIVE RULES"

Section 2 of the bill²³ provides that after its enactment administrative rules and all amendments of existing rules 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 and by each independent agency charged with the administration of any statute only after publication of notice and public hearings.²⁴ "Agency" and "independent agency" are defined to mean, and will hereafter be referred to as, single-headed and multiple-headed administrative bodies, respectively—i. e., a department of the government, as distinguished from a board or commission. All such rules are to be published in the Federal Register within ten days after approval and are not to become effective until such publication, except when a public emergency is declared by the President. Administrative rules under all statutes thereafter enacted are to be issued within one year after the date of the enactment of the statute, subject to the adoption thereafter

23. Section 1 of the Am. Bar Ass'n draft, *supra* note 12.

24. Both the Senate and House Reports, *supra* notes 3 and 4, at 10 and 4, respectively, state that public hearings are required only *if requested*. This, however, is clearly erroneous. See also Am. Bar Ass'n report, *supra* note 12, at 21.

of further rules. (In the original Bar Association bill the period for the enactment of rules was ninety days after the enactment of the statute.) In respect of an existing rule, any person substantially interested in its effects may petition for a reconsideration of any such rule, after which public hearings are to be held in the manner provided for the original adoption of such rule. A sound provision is included giving immunity in case of reliance in good faith upon a rule later rescinded or declared invalid.

In the original Bar Association bill this section contained a rather doubtful provision authorizing and requesting the Supreme Court of the United States to prescribe uniform rules of practice and procedure for the hearings of all claims and controversies within the jurisdiction of the administrative agencies. In later drafts this provision was appropriately transferred to another section of the act and it was finally eliminated in the bill as approved by the Senate and House Committees on the Judiciary and as passed by the Senate. The draftsman of the Senate Committee report, however, seems to have been oblivious of this deletion as the report twice makes mention of the provision authorizing the Supreme Court to issue uniform rules of practice and procedure, in one case as one of the four basic purposes of the bill.²⁵

It is difficult to understand just what is the scope of the provision governing the issue of rules "implementing or filling in the details of any statute affecting the rights of persons or property." The definition states that "'administrative rules' include rules, regulations, orders and amendments thereto of general application issued by officers in the executive branch of the United States government interpreting the statutes they are respectively charged with administering." This so-called definition is really no definition at all but an addition to the scope of the language with respect to administrative rules in Section 2 of the act, and by including the words "regulations" and "orders" only adds confusion. The Bar Association draft of this section was substantially the same, except as to the definition and except for a provision which wisely excepted rules relating to hearing procedure from the operation of the section. Under the bill as passed, then, it would seem that many, if not all, rules relating to hearing procedure may be held to be rules implementing or filling in the details of a statute affecting the rights of persons

25. See Sen. Rep., *supra* note 3, at 6, 13.

or property and consequently to require publication of notice and public hearings before their issuance.

Must the agency issue rules determining who is entitled to be heard at any such public hearing and, whether or not the agency must issue such rules, if it does do so, may it be only after publication of notice and public hearing? It is provided that "any person substantially interested in the effects of an administrative rule in force on the date of the approval of" the act may obtain a reconsideration of any such rule after publication of notice and public hearing. Is the meaning of the words a "person substantially interested" left to the reasonable discretion of the agency? If so, must it issue rules and regulations implementing or filling in the details of this provision and must it hold public hearings before issuing any rule on the question of who is entitled to require public hearings? Obviously every administrative agency must issue a host of procedural rules, both in respect of hearings and otherwise. It would hardly seem sound that the issuance of such rules should be subject to the rigid requirements of the bill in respect of notice and public hearings. Possibly some such provisions might ultimately be held not to be covered by the terms of the bill under a "reasonable" interpretation of its terms, and it might even be that the courts would leave the extent of its application to the reasonable interpretation of the administrative agencies. However that may be, it would have been distinctly helpful had the bill been more specific in this respect.

It should be noted that the exception in the case of a public emergency declared by the President relates only to the publication of rules in the Federal Register and does not permit the waiving of the requirement of notice and public hearings. However, in view of the fact that the Bar Association report and annotations and the reports of the Senate and House Committees on the Judiciary consistently treat this exception as relating to the necessity of notice and public hearings as well, the language of the bill may presumably be considered a mistake of draftsmanship.²⁶

Whatever may be the meaning of the provision that "administrative rules under all statutes hereafter enacted shall be issued—within one year after the enactment of the statute subject to the adoption thereafter of further rules from time to time as provided in this act," the extension to one year from the Bar

26. Am. Bar Ass'n Report, *supra* note 12, at 1, 2, 22, 23, 25. Sen. Rep., *supra* note 3, at 10, 11. H. R. Rep., *supra* note 4, at 4.

Association period of ninety days is certainly a great improvement. It seems to have been the intent of the framers of the bill to impose an affirmative duty on all administrative agencies to issue rules by way of explanation or otherwise under all statutes which may hereafter be enacted.²⁷ But this is far from clear under the language of the bill. What is the meaning of the words "subject to the adoption thereafter of further rules"? Does that mean that notwithstanding the provision for the enactment of rules within a year, rules may be enacted after the expiration of a year or does it mean that the rules enacted after the expiration of the year may only be supplemental to or amendatory of rules enacted within the one year period? If the latter is the case, does it then mean that rules are to be declared invalid by the courts if not enacted within the scope of this provision?²⁸ If it does mean that rules enacted after the expiration of the year's period may only be supplemental or amendatory to existing rules, the absurd result would follow that if a rule were duly promulgated within a year, then at any time after the expiration of the year an amendatory rule could be promulgated providing just the opposite; whereas if no rule had been issued within the period of a year, then thereafter no rule of any kind could be issued on that subject.

A further question is presented as to whether more than one reconsideration may be demanded in respect of any rule, if requested by divergent parties. The bill is silent in that regard. Is this a subject in respect of which the administrative agency may issue rules and, if so, the question of public hearings with respect to such rules is again raised. Probably the framers of the bill are correct in their belief that as a practical matter there will be no tendency to abuse the privilege of asking for reconsideration. Nevertheless the effect of this provision is so sweeping, applying as it does to all rules of administrative agencies of no matter how long standing, that it would seem that there might at least be something in the nature of a statute of limitations preventing the right to demand reconsideration of rules outstanding for more than a certain period. In this connection it should be noted that there is no provision for rehearing of rules promulgated after the

27. The Am. Bar Ass'n Report, *supra* note 12, at 1 states: "Sec. 1 [Sec. 2 in the Senate Bill] requires every Federal Administrative Agency to implement, by rules and regulations, statutes administered or enforced by it." See also *id.* at 21 *et seq.*, and Sen. Rep., *supra* note 3, at 10 *et seq.* and H. R. Rep., *supra* note 4, at 3 *et seq.*

28. See Section 3 of the bill which provides for a declaratory judgment nullifying any rule for failure to comply with Section 2.

enactment of the bill and, accordingly, it is logical to assume that it was not intended that there should be more than one rehearing on rules promulgated before the act becomes effective. If it is the purpose of the bill that there should be one public hearing with respect to every rule, then should not logically the right of reconsideration be granted only in respect of rules which have been issued without public notice and hearing? Under existing practice, in some cases voluntarily and in others by specific statutory requirement, many rules and regulations have been issued upon public notice and hearing. And finally, what is the effect of the requirement of a reconsideration of any existing administrative rule in the manner provided, upon a rule already issued under a law requiring greater procedural formalities, including, say, findings of fact on the part of the rule maker?

Even in their theoretical approach to the subject, there seems to have been no attempt on the part of the sponsors of the bill to distinguish in its application between the substantive functions of the various agencies involved. The agencies affected by this bill carry on a variety of quite distinct functions. Thus the Securities and Exchange Commission, among other things, regulates the issuance of securities, stock exchanges, over-the-counter markets, public utilities and trust indentures as well as conduct of persons in relation to such matters, the Procurement Division of the Treasury exercises proprietary functions incident to the ownership of property on the part of the Government, the Post Office Department carries on the business of delivery of mail for remuneration, the Veterans' Bureau administers relief and the Department of the Interior leases lands not primarily for profit but for public service. Other differences which have been pointed out by Professor Fuchs²⁹ involve the character of the parties affected, the character of the administrative determination, and the character of the enforcement which attaches to the resulting regulations. Is it to be expected as a matter of course that when issuing rules in these different types of situations the same procedure should uniformly be followed? A rule making unavailable some minor privilege under certain circumstances is quite different from one whose violation may result in a penitentiary sentence. In matters affecting health the occasional urgency of action and the technical nature of the questions arising tend to minimize the need of formality in rule-making procedure.³⁰ Rules

29. Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 *Harv. L. Rev.* 259, 266.

30. *Id.* at 268.

governing the use of radio for purposes of promoting safety of life at sea and in the air must frequently be adopted in short order and cannot be made the subject of extensive public hearings.³¹ Rules issued by the Securities and Exchange Commission providing complicated form of registration in respect of both the issuance and listing of securities are of so technical a nature as not readily to lend themselves to the procedure of public hearings, even if certain other types of rules issued by that Commission, may.³² On the other hand, existing statutes, as in the case of the Bituminous Coal Act of 1937³³ and the Food, Drug and Cosmetic Act of 1938,³⁴ require in many instances a much greater degree of formality in connection with the issuance of rules and regulations than that provided in the Bar Association bill which is designed to provide minimum standards only.³⁵

Furthermore, it should be noted that no distinction is made between rules which may be issued under statutes giving such rules to all intents and purposes the force and effect of law³⁶ and rules which have no legal force but constitute merely interpretations made by administrative agencies of the statutes under which they may be acting.³⁷

As to general principles: While there is great force in the theoretical arguments in favor of public hearings before the promulgation of administrative rules, and undoubtedly in many instances there are great practical advantages as well, it is doubtful whether in most of the cases covered by the sweeping scope of the bill the benefits to be achieved will outweigh the disadvantages. The theory of a public hearing is that there will thereby

31. See letter of Federal Communications Commission to Chairman, Committee on the Judiciary, House of Representatives, House Hearings, *supra* note 1, at 109. In this letter the Federal Communications Commission states that it has been its policy whenever such action seemed practicable and expedient to hold public hearings before the adoption of rules; that many of the Commission's technical rules are of such a character as to render of no practical value the holding of hearings in which any interested party might participate; and that in many cases the Commission has found helpful the conference method in which experts representing interested groups have cooperated with the Commission in the adoption of the best rules and regulations governing the particular matters under consideration.

32. See also Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 *Yale L. J.* 647, 659-661.

33. 50 Stat. 72 (1937), 15 U.S.C.A. § 829(a) (1939).

34. 52 Stat. 1055, 21 U.S.C.A. § 371(e) (Supp. 1938).

35. No exception is taken to these divergences. They are merely pointed to as examples of differences which may require divergence in treatment.

36. Securities Act of 1933, §§ 3(a, 11) and (b), 7, and 10(d), 48 Stat. 906, 78, and 81 (1933), 15 U.S.C.A. §§ 77c(a, 11) and (b), 77g, and 77j(d) (Supp. 1938).

37. *Sanford's Estate v. Commissioner of Internal Revenue*, 60 S.Ct. 51, 84 L.Ed. 53 (U.S. 1939).

be insured due consideration of all points of view and perhaps that the spotlight of publicity will exercise a wholesome influence on the regulatory bodies. Experience has shown that this is not always the case. On the one hand hearings are often perfunctory, on the other hand they frequently develop antagonisms which are not conducive either to sound legislation or beneficial cooperation between agency and the particular persons affected, and in either event time is often wastefully consumed. This results in a reluctance on the part of many persons whose experience might be helpful in the formulation of rules to appear at public hearings. Some administrative agencies have developed the practice of calling upon persons interested or expert in the subject matter with which they have to deal for consultation, or such consultation may result from the initiative of interested persons or groups. In informal conferences and discussions of this nature there can be a very great measure of cooperation and mutual help between government agencies and private persons.³⁸ A conscientious administrative body can and will obtain from the individual or group subject to its jurisdiction as much cooperation and assistance as is feasible in ways more effective than any public hearing and will combine the information so obtained with its own expert knowledge and experience. Conversely, an agency which wishes to act arbitrarily cannot be compelled to exercise its rule-making discretion impartially and fairly by any requirement of the formality of a public hearing. Nothing in this bill or in any other bill could effectively require the rule-making authority to give proper weight to any evidence adduced at any hearing if that authority were determined to disregard or minimize certain evidence and to act arbitrarily. Moreover the medium of a public hearing in the hands of arbitrary and unfair persons can effectively be used as a weapon to coerce individuals and to stifle any real opposition to proposed measures. The weapon of publicity thus given to an administrative body in connection with public hearings is an extremely powerful weapon which, if abused, can far outweigh any possible advantages from public hearings. Examples of this type, both in respect of hearings before Congressional committees and administrative bodies, are too well known to require specification.

38. Greater flexibility is secured through this method, which is particularly desirable in the case of the newer agencies where rules must frequently be amended in the light of greater experience. Prompt changes of this kind made by the Securities and Exchange Commission at the request of individuals and groups have been of great practical value.

It is not suggested here that the principle of public hearings in rule-making should be completely abolished. It is merely suggested that such procedure has disadvantages which in many instances completely outbalance its advantages and that these advantages and disadvantages must be weighed in the case of each agency in relation to the objectives of the particular agencies and the actual functioning of such bodies. Nor is it to be expected that uniform procedure will be found desirable in respect of all types of rule-making within a given agency. While to some extent the development of variations between the requirements of the different acts under which the agencies function may have been on a hit or miss basis, it is fair to assume that in the main the subject of adaptability to the particular problems received reasonably adequate consideration in the formulation of the respective laws governing the various agencies. This does not mean that it would not be wise to review these laws and the practices established thereunder with a view to improvement of procedure. Possibly in some cases where public hearings are not now provided for, a reconsideration will lead to the conclusion that public hearings are desirable or, on the other hand, that in some instances where public hearings are now required a reconsideration may lead to their elimination. A fair expectation would be that any such survey would conclude that in some instances public hearings should be mandatory, in other instances within the discretion of the rule-making authority and possibly in still other instances only upon request.³⁹

SECTION 3. "JUDICIAL REVIEW OF RULES"

Section 3 of the bill⁴⁰ provides that the United States Court of Appeals for the District of Columbia shall have jurisdiction, upon petition filed (it does not say by whom) within thirty days from the date of publication of any administrative rule, to hear and determine whether any such rule is in conflict with the Con-

39. In this connection it is interesting to note the conclusions stated by Professor Fuchs in his interesting article, *supra* note 29, at 280: "Certainly there will never be a time when it will be possible to assert that the details of rule-making procedure, or even the 'basic requirements of fair play' in such procedure, should be the same in all the varied circumstances that arise. Many regulations, even where private interests are affected, should continue to be issued on the basis of administrative knowledge or after merely informal investigation; others will call for systematic consultation with affected parties or regularized opportunities for such parties to be heard; still others, perhaps, will involve adversary proceedings in which parties are accorded virtually the status of litigants."

40. Section 2 in the Am. Bar Ass'n draft, *supra* note 12.

stitution of the United States or the statute under which it is issued and to enter a declaratory judgment to such effect. The grounds for holding any such rule invalid are violation of the Constitution, conflict with a statute, lack of authority conferred upon the agency issuing such rule or failure to comply with Section 2 of the act (which deals with the procedure for rule-making). The defense of the rule is vested in the Attorney General of the United States.⁴¹ Any such petition is to receive a preference and the court may refer such petition, and any reply, for the taking of such evidence as shall be material and relevant thereto. If the rule is held invalid it shall thereafter have no force or effect except to confer immunity for action taken thereunder in good faith. If, on the other hand, the rule is upheld, this does not prevent the redetermination of its validity or invalidity in any suit or review of an administrative decision or order in any court of the United States.

Thus the constitutionality or validity of a rule may be challenged in a proceeding in which there is no controversy in the ordinary legal sense and a determination of this character is to be binding against the administrative agency but not against the petitioner. This probably results in giving the United States Court of Appeals for the District of Columbia the power to declare unconstitutional a rule issued by one of the government agencies without any review by the Supreme Court of the United States. This is so because the Supreme Court has repeatedly declared that it will not take jurisdiction in a case in which no actual controversy is involved, and being a constitutional court it cannot be compelled to do so.⁴²

Needless to say, while the challenge to the constitutionality of a given rule need not in a particular instance be a challenge to the constitutionality of the statute under which it has been issued, nevertheless in many if not most cases a determination of the constitutionality of the rule will involve a determination of the constitutionality of the statute involved.⁴³ The bill does

41. It would seem preferable that the agency itself, rather than the Attorney General, should defend the rule. See also note 60, *infra*.

42. *Muskraat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 47 S.Ct. 282, 71 L.Ed. 541 (1927); *Piedmont & N. Ry. Co. v. United States*, 280 U.S. 469, 50 S.Ct. 192, 74 L.Ed. 551 (1930); *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 419, 115 A.L.R. 105 (1938).

43. Chairman Walter of the House Sub-committee on the Judiciary seems to feel that in a proceeding under the bill there must be assumed the constitutionality of the statute under which a challenged rule has been issued (House Hearings, *supra* note 1, at 41). But this hardly seems a tenable construction.

not give the court power in a proceeding for a declaratory judgment to hold unconstitutional the statute under which a challenged rule has been issued. It is probable, therefore, that a judgment declaring a rule to be invalid will be binding only as to such rule and that the statute under which the rule has been issued will continue in full force and effect. But even if the bill does not give directly to the District Court of Appeals the power to declare invalid an act of Congress in a proceeding for a declaratory judgment, as a practical matter this power will in many respects exist anyway because the power to declare unconstitutional all rules issued under a given statute must, if it does not completely nullify the effect of any such statute, go a long way towards doing so. That confusion will result is obvious.

It would seem useless to speculate about the possible variation of circumstances under which there could exist (of course only until the matter was finally disposed of in some case recognized by the courts as an actual controversy) a valid act of Congress under which all regulations could successfully be challenged. A rule under a particular statute might be held invalid because of the unconstitutionality of the statute, while another rule under the same statute continued in full force and effect for failure of challenge within the thirty-day period. To the extent that the particular provisions of a statute were to be effective only as supplemented by rules, such statutory provisions would of course be completely nullified by declaratory judgments invalidating the rules. To the extent that particular provisions were not so dependent they would not be nullified and would remain effective for all purposes except their administration by government agencies through rule-making and processes dependent thereon.

There remains the question of the wisdom of the provision for judicial review of rules issued by administrative agencies, irrespective of the very serious objection because of constitutional limitations. The objective stated in the American Bar Association report⁴⁴ is to provide a means of challenging the validity of regulations that affect the public by a simplified procedure without delay and at nominal cost. To this objective little if any exception can be taken. The question, however, remains of the feasibility of the provisions made for declaratory judgments. Unfortunately little that is helpful appears in the Bar Association annotations to its bill. The House and Senate Committee reports

44. Am. Bar Ass'n report, *supra* note 12, at 26.

pass over this question and there is no substantial comment by Colonel McGuire in his article in the Louisiana Law Review. Perhaps it is from lack of confidence in this procedure that recourse thereto is limited to thirty days after the publication of a rule and the expectation is expressed that such jurisdiction will be invoked only in limited instances.⁴⁵ It is felt by the proponents of the bill that the fact that the jurisdiction is there will be sufficient for most purposes.⁴⁶

A somewhat fuller discussion of this particular proposal appears in the 1937 report of the Special Committee on Administrative Law.⁴⁷ If preventive justice by way of injunction against future official acts under an unconstitutional statute is expressly upheld by the Supreme Court of the United States where the individual interest is clear and immediate, why cannot this result be achieved by provision for a declaratory determination where present individual interests are threatened by exercises of administrative rule-making power? So runs the argument. But it must be remembered that the courts will only entertain proceedings for injunctions of this character where the jeopardy to the petitioner is clear and immediate and where, in consequence, a substantial controversy involving a definite state of facts is presented.⁴⁸ It is precisely because of the absence of a requirement of such clear and immediate interest that the doubt exists as to the advisability of the remedy by declaratory judgment. It is feared that in many cases a court attempting to act under this section would either pass upon the validity of a rule without the necessary factual background or would be led into burdensome and yet necessarily incomplete consideration of many possible factual variations. That the proposed procedure runs contrary to the long established tradition of the common law is no adequate answer to a legitimate attempt at improvement. Testing the validity of statutes in actions for declaratory judgments is a procedure of growing acceptance in state courts, but even so it is doubtful whether there has been sufficient experience to warrant its application on so broad a scope as under the present act. Conditions under federal laws are in many respects quite different and of much wider application than under state laws. It

45. *Ibid.*

46. *Ibid.*

47. (1938) 63 A. B. A. Rep. 334-336.

48. *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 48 S.Ct. 507, 72 L.Ed. 880 (1928); *Piedmont & N. Ry. Co. v. United States*, 280 U.S. 469, 50 S.Ct. 192, 74 L.Ed. 551 (1930); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936).

would certainly seem sounder to proceed cautiously with its application, in the first instance with respect only to a relatively small number of agencies or types of rules chosen with respect to their particular adaptability to such procedure.

SECTION 4. "STATUTORY APPROVAL AND AUTHORITY FOR ADMINISTRATIVE BOARDS AND PRESCRIBING THEIR PROCEDURE"

Section 4 of the bill⁴⁹ provides for intra-departmental appeals in respect of action taken by administrative bodies. Two categories of procedure are established, the one for single-headed agencies and the other for independent agencies.⁵⁰

It is provided that there shall be established from time to time in each single-headed agency such intra-departmental boards, consisting of three members, as may be necessary and desirable. Where intra-agency boards already exist they are to be re-established and to function in accordance with the act. At least one employee designated for each such board shall be a lawyer and shall act as chairman of the board. No member of a board who has participated in a particular case or in the preparation, draft or approval of any rule which may be involved shall sit in appeal of the case or application of the rule. It is then provided that when any person is aggrieved by a decision of any official or employee of any independent agency, such person is entitled to have the controversy referred for hearing and determination to an intra-agency board constituted as above provided. Whether or not a trial *de novo* is required before the intra-agency board where there has already been a hearing before an individual examiner, is not clear. If not, the relationship between the two proceedings gives rise to a host of complications not covered by the bill.

In the Bar Association bill the right of appeal is granted in sweeping terms to any person aggrieved by "a decision, act or failure to act" (including any regulatory order) by any official or employee of such single-headed agency. In the bill as amended the word "decision" is defined to mean "any affirmative or negative decision, order or Act in specific controversies which determines the issue therein involved" and "controversy" is in turn defined to mean "any dispute or disagreement concerning any

49. Section 3 of the Am. Bar Ass'n draft, *supra* note 12.

50. See definitions p. 300, *supra*.

claim, right, or obligation for or against the United States and any refusal to grant any license, permit or other privilege."⁵¹ At the hearings before the intra-agency board a written record is to be taken, a copy of which is to be furnished to the aggrieved person upon his request. Any person having a substantial interest in the controversy has the right to intervene. Within thirty days after the evidence and arguments have closed the intra-agency board is required to make written findings of fact and a separate decision which is to be subject to the approval, disapproval or modification of the head of the single-headed agency concerned or such person as he shall designate in writing to act for him. (Under the section of the bill following, any such decision is subject to appeal by the individual to the United States Court of Appeals for the District of Columbia or to one of the Circuit Courts of Appeals.)⁵²

Provision is made for the issue of subpoenas and reference is made to the taking of depositions, although no provision is made therefor. No provision for stay pending appeal is provided, but redress is given when the matter in controversy is such that the delay incident to the hearing and decision 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. Curiously enough no redress is provided in the event of injury resulting from any action or inaction where no emergency has warranted such action or inaction.

It will be noted that the bill provides in respect of intra-departmental boards created for single-headed agencies that at least one employee designated for each such board shall be a lawyer who shall act as chairman of the board. This seems too sweeping a provision. The value of having at least one lawyer, presumably familiar with legal proceedings, on most boards can be understood and perhaps no objection should be made to such a requirement on principle, even though the question arises as to whether any investigation has been made as to how many

51. See definitions in Section 1 of the bill. Note however that in the very next sentence of Section 4, the bill refers to "receipt of a registered letter notifying . . . of the decision, act or failure to act," lapsing into the language of the original Bar Association draft.

52. The Bar Association report, *supra* note 12, at 3, states that the agency is given no appeal from the decision of its own board, but inasmuch as the head of the agency has the power to approve, disapprove or modify the findings of fact and decision of the board, this comment is not understood.

boards which may now be functioning effectively will have to be re-established by such a provision. Has any consideration been given, for example, to the question of why there should be a lawyer on the Board of Tea Appeals,⁵³ or upon a board established by the Bureau of Marine Inspection and Navigation?⁵⁴ In any event, that the lawyer need be chairman of the board is quite another matter. It may well be that in many cases the qualifications of the lawyer will be such as to make him the logical contender for this post, but even lawyers should be willing to admit the possibility that one of the lay members of such a board might have superior qualifications of intellect, judgment and leadership which would make him preferable as chairman. Surely this is a matter which might be left to the agency itself for solution. The further provision that no member of a board who has participated in the preparation, drafting or approval of any rule which may be involved shall sit in the application of such rule seems questionable. That no member who has participated in a particular case should sit in appeal on such case will certainly be generally accepted, among lawyers at least. But why a person who has participated in the preparation of a rule should be disqualified from taking part in a determination of the application of such rule is indeed difficult to understand. Again the provision that a decision must be made within thirty days after the termination of the proceedings is drastic and unreasonable. There can be no doubt of the strong desirability of early determinations. But that a determination can be made in each case, many of which must necessarily involve complicated questions of both law and fact, within thirty days after the evidence and arguments are closed, is not to be expected. Such expedition is neither required of nor practiced by most courts.

The procedure in respect of independent agencies is different from that of single-headed agencies, but the language of the subsection dealing with this is so confused as to defy accurate analysis in many respects.⁵⁵ It is stated that "where any matter arises out of the activities of any independent agency, it may be provided by rule that such matter may be heard in the first instance by one of its trial examiners." Precisely what is meant

53. This agency passes upon the quality of tea. See 29 Stat. 606 (1897), 21 U.S.C.A. § 47 (1927).

54. This agency passes upon the qualifications of pilots, masters, engineers, etc., and administers the Steamboat Inspection Laws. See 46 U.S.C.A. § 224 and §§ 391 et seq. (1928).

55. Section 4(e) of the Bill.

by the words "where any matter arises out of the activities of any independent agency" is far from clear. The previous paragraphs of Section 4 have dealt with intra-departmental appeals and so it might be logical to expect that the "matters" referred to in this sentence are actions of the independent agency calling for review. However, it is probable that the "matters" referred to are not limited to appeals, but include also such matters as the independent agencies may by rule⁵⁶ refer to trial examiners in the first instance, in line with existing practice. The Bar Association Committee report would indicate an intent to regularize the existing practice of the appointment of trial examiners by independent agencies.⁵⁷ Provision for trial examiners is made purely voluntary under the bill and apparently would involve only such matters as may be covered by rules of the independent agency. Certainly no independent right of appeal such as is provided in the case of single-headed agencies is given to an aggrieved party in respect of an act of an independent agency or of one of its employees. However, where any such matter is heard, either by a trial examiner in the first instance or by the independent agency itself, there is stipulated a "full and fair hearing" after "public notice"⁵⁸ in the manner provided for in the earlier paragraphs of the section.

It is provided that the independent agency shall at the expiration of thirty days "enter such appropriate decision as may be proper" unless the aggrieved party either consents thereto or objects to the findings of the examiner, in which event there must first be a public hearing upon reasonable notice. This obviously does not make sense and the proviso with respect to consent of the aggrieved party, which did not appear in the original Bar Association bill, must have crept in by error. But it is not clear whether the agency is bound by the findings of fact and separate decision of the trial examiner or whether it may disregard these and enter such decision as it in its discretion may deem appropriate. The provision for a public hearing before the entry of the decision by the independent agency where the aggrieved party objects to the findings of fact and decision of the trial examiner, but not where no such objection is made,

56. Must rules of this kind be issued only after notice and public hearing? See discussion p. 302, *supra*.

57. Am. Bar Ass'n report, *supra* note 12, at 35.

58. This slip, calling for public notice instead of public hearing, can be traced back to the original Bar Association draft. Am. Bar Ass'n report, *supra* note 12, at 29.

would indicate that the decision entered by the agency must correspond to the decision of the examiner. But if this is so, there is no right of review or appeal whatsoever on the part of the independent agency from a decision of its own trial examiner adverse to it.

Where the independent agency has less than three members it is provided that an intra-agency board shall be constituted in the manner provided in the previous paragraphs of this section, upon which the members of the independent agency may serve at their election. But it must be remembered that there is no mandatory function for the board of the independent agency unless the agency itself voluntarily sets up a procedure of hearings before a trial examiner. By inference, hearings may in the first instance be before members of the independent agency itself or a board, if the membership is less than three. There is no provision for the taking of a written record in any proceeding before a trial examiner or members of an independent agency, for the issue of subpoenas, or for intervention. Whether or not it was expected that such and other procedural provisions would carry over from the earlier sub-section of Section 4 is not clear.

It should be said that the objectives of Section 4 are sound. There can be no doubt as to the imperative need for improvement of the judicial process within the administrative agencies themselves. Whether, however, the act goes too far in the extent to which review is provided and whether or not it is possible or desirable to legislate so broadly in respect of so many administrative agencies without a study of the effect of such legislation on each agency is another question. This subject, together with the provisions of the bill defining the scope of administrative action subject to review, will be discussed in connection with a consideration of Section 5 of the bill which provides for judicial review of administrative decisions. Both sections are dependent upon the definition of the word "decisions" for the scope of their application.

SECTION 5. "JUDICIAL REVIEW OF DECISIONS OR ORDERS OF ADMINISTRATIVE AGENCIES"

Section 5 of the act⁵⁹ provides for judicial review of final decisions or orders of administrative agencies. Any party to a proceeding before an administrative agency as provided in Sec-

59. Section 4 in the Am. Bar Ass'n draft, *supra* note 12.

tion 4 of the act, who may be aggrieved by the "final decision or order" of the agency may appeal the "decision" at his election to the United States Court of Appeals for the District of Columbia or to the Circuit Court of Appeals within whose jurisdiction he may reside or maintain his principal place of business or in which the controversy arose. Appearance is to be made on behalf of the United States by the Attorney General.⁶⁰ The court may affirm or set aside the "decision" or may direct the agency to modify its "decision" or the case may be remanded for further evidence. Any "decision" of any agency "shall be set aside if it is made to appear to the satisfaction of the court (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 is not supported by the findings of fact; or (4) that the decision was issued without due notice and reasonable opportunity having been afforded the aggrieved party for a full and fair hearing; or (5) that the decision is beyond the jurisdiction of the agency or independent agency as the case may be; or (6) that the decision infringes the Constitution or statutes of the United States; or (7) that the decision is otherwise contrary to law."⁶¹

There can be no doubt as to the sweeping character of the provisions of the original Bar Association bill which provided in respect of the single-headed agencies for an appeal to a board from any decision, act or failure to act, including any regulatory order, of any official or employee of any such agency and for court review of any final decision or order of either single-headed or independent agencies. So sweeping indeed was this provision that it was necessary to provide that nothing in the act should apply to "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." As has been seen, the act passed by the Senate has limited the scope of permissible appeal by definition of the word "decision," but whether by accident or design the reserva-

60. See note 41, *supra*. It is suspected that hostility to the administrative agencies is responsible for these provisions.

61. It will be noted that the word "order" is used only in the head note and in the beginning of the first sentence of the section. In the Bar Association draft the words "decision or order" are used throughout. Quite apparently in the bill as passed by the Senate the word "decision" is intended to and would naturally be interpreted to mean a decision as previously defined, and the inclusion of the word "order" in the two places is merely a careless holdover from the original draft.

tion above quoted still remains and for the purposes of this discussion must be considered as a part of the bill in endeavoring to interpret its language. But while the definition of decision, from which a right of appeal is given, would seem to narrow in some respects the extent to which appeal may be had from administrative acts, it cannot be said that this definition in any manner clarifies the matter. Quite the contrary. " 'Decision' means any affirmative or negative decision, order, or Act in specific controversies which determines the issue therein involved." This by itself might be capable of analysis, even though the language itself is not very artistic. However "controversy" is in turn defined to mean "any dispute or disagreement concerning any claim, right or obligation for or against the United States and any refusal to grant any license, permit or other privilege." The words "refusal to grant any license, permit or other privilege" are clear, if sweeping in their extent. Again, the expression "any claim . . . against the United States" perhaps presents no difficulty of understanding, although very broad in scope. A "right . . . against the United States" would presumably be the equivalent of a valid claim. The expression "any claim or right for the United States" is perhaps not good English, but if interpreted to mean "any claim or right of the United States" can also be understood. What, however, is an obligation either for or against the United States? If it means an obligation of or to the United States even this, except in an extremely narrow sense of the word "obligation," is rather difficult of application.

As has been seen, the extent to which an appeal may be had as of right to an intra-agency board established under Section 4 of the bill with respect to single-headed agencies and from such agencies to the appellate court, is measured by the definition of the word "decision." Inasmuch as it would appear that under this bill proceedings within independent agencies may only be instituted to the extent permitted under their own rules, this definition will affect independent agencies only in relation to court appeals. The right of appeal under existing statutes is not affected, but as will be seen the appeal given under the Bar Association bill provides for a broader review of fact on the part of the appellate court than in the normal review of actions of administrative bodies under existing statutes.⁶²

That there should in many instances be a right of appeal from administrative action is self evident and that there is

62. See discussion p. 320 et seq., *infra*.

opportunity for improvement of the administrative processes in this respect probably no practicing lawyer would deny. The question raised here is only as to the extent to which such right of appeal should be granted. Obviously administrative processes could not function satisfactorily if the right of appeal were given in respect of every minor administrative determination. It would seem that the Bar Association bill, even as amended by the Senate, goes too far in this direction and is altogether too indiscriminate in the nature of the acts from which an appeal may be taken. It is a difficult task to draw any satisfactory line, so difficult indeed that to some degree this should perhaps be left to administrative rule-making in so far as intra-departmental appeals are concerned. It will certainly be apparent that any departure from the general practice of permitting appeals as of right only from final orders, intended to reach the more informal determinations of administrative subordinates, can be made only after careful factual study of the particular agency in respect of which the legislation is intended to operate.

Under the Bar Association bill it would appear that a decision by the Procurement Division of the Treasury Department that a low bidder lacks the technical or financial qualifications necessary to undertake a contract would be subject to appeal.⁶³ Heretofore it seems there has been no right of court review in respect of situations involving the disposition of public lands in the nature of voluntary grants, but such class of claims might be held to come within the definition of the bill.⁶⁴ If it should appear wise that so substantial a change be made in existing procedure, certainly such conclusion should be reached after adequate consideration and not merely as the result of a dragnet provision in the bill.⁶⁵ As is stated in the brief of the Department of Agriculture:

“Under the proposed statute, an intra-departmental board would be set to work not only to review the revocation of a poultry dealer’s license or the refusal of a sheep grazing permit, but to appease a resident on a resettlement project

63. House Hearings, *supra* note 1, at 106.

64. *Id.* at 74.

65. Under the Sugar Act of 1937 a hearing is required in connection with the making of quota allotments and not required in connection with the determination of the quota itself. House Hearings, *supra* note 1, at 87. Presumably this distinction would hold under the definition of the word “decision,” which in this respect is an improvement over the original Bar Association bill which, without consideration of the particular subject, would have permitted an appeal from the determination of the quota itself as an act by an officer or employee of a single-headed agency.

who had been denied a renewal of his lease or a department employee who had been refused special parking privileges, and so on."⁶⁶

It is indeed possible that decisions with respect to the personnel of a given agency may come under the scope of review. For, while there is excepted from the provisions of the act any case where an aggrieved party "has failed to receive an appointment or employment," no such exception applies to the discharge of any employee, the failure to receive promotion, dissatisfaction with grading, and so forth.

At the present time there is no right of court review of proceedings of the Veterans' Administration. The statute goes so far as to provide that:

"All decisions rendered by the Administrator of Veterans' Affairs under the provisions . . . of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decisions."⁶⁷

Obviously major reasons of policy dictated these provisions.⁶⁸ But whether or not these provisions and the policy which dictated them are sound, it must be clear that the existing law was enacted with special reference to particular problems and that it should not lightly be discarded without any consideration whatsoever of these problems. Other instances where Congress has in the past apparently concluded that special circumstances required special treatment are in relation to the Civil Service Commission, dealing with matters of government personnel;⁶⁹ the Bureau of Marine Inspection and Navigation under the Department of Commerce, having the power to suspend or revoke licenses of pilots, masters, engineers, etc., and to administer the Steamboat Inspection Laws⁷⁰ and the Boards of special inquiry appointed by the Commissioner of the Immigration and Naturalization Service of the Department of Labor, which deal among other things with deportation cases.^{70a} In none of these cases do

66. House Hearings, *supra* note 1, at 87.

67. 48 Stat. 9 (1935), 38 U.S.C.A. § 705 (Supp. 1938).

68. See *Armstrong v. United States*, 16 F. (2d) 387, 389 (C.C.A. 8th, 1926), for discussion of like provisions of an earlier statute.

69. 37 Stat. 555 (1912), 5 U.S.C.A. § 652 (1927). *Eberlein v. United States*, 257 U.S. 82, 42 S.Ct. 12, 66 L.Ed. 140 (1921); *Golding v. United States*, 78 Ct. Cl. 682 (1933).

70. 46 U.S.C.A. §§ 224, 391 et seq. and § 731 (1928). *Williams v. Potter*, 223 Fed. 423 (C.C.A. 2nd, 1915).

70a. 39 Stat. 887 (1917), 8 U.S.C.A. § 153 (1926).

direct appeals lie to the courts.⁷¹ Surely an administrative determination dealing with questions of safety of life at sea does not *ipso facto* call for the same degree of judicial review as proceedings for the suspension of a member from a stock exchange. And while employees of the government are entitled, through access to boards of review, to protection against the possibility of capricious acts of their superiors, there seems to be no need to involve the judiciary in the adjustment of problems of this sort. In any event, these are matters for individual consideration which cannot be dealt with soundly by blanket legislation.

On the other hand, certain matters of importance which might under existing procedure come before the board of an independent agency would probably not be appealable under the terms of the act. Thus an order of the Federal Power Commission fixing rates of depreciation⁷² would not be reviewable under this act because it could hardly be deemed to involve a "dispute or disagreement concerning any claim, right or obligation for or against the United States" or "any refusal to grant any license, permit or other privilege." On the other hand the refusal of the Securities and Exchange Commission to grant an exemption from the operation of the utility act⁷³ or to permit the withholding of confidential information from a registration statement⁷⁴ would come within the scope of the court review granted. The distinction would seem to be the arbitrary consequence of the haphazard language of the bill, rather than the result of any deliberation in respect of the particular classifications involved.⁷⁵

As has been stated, Section 5 is intended to give the courts a greater scope of review than had been customary in respect of administrative agencies. The words "clearly erroneous" have been taken from Rule 52 of the new Rules of Civil Procedure of the Federal District Courts, on the basis that the power of the court to review findings of fact of an administrative agency should be at least as great as its power of review in respect of findings of fact of a trial judge without a jury.⁷⁶ The annotations to the Bar

71. Collateral attack, where permitted, and habeas corpus proceedings in deportation cases involve court review of but limited scope.

72. 16 U.S.C.A. § 797 (Supp. 1938). 1 Fed. Reg. 691 (1936).

73. 49 Stat. 810 (1935), 15 U.S.C.A. § 79c (Supp. 1938).

74. 48 Stat. 901 (1935), 15 U.S.C.A. § 78x (Supp. 1938).

75. Under the language of the bill refusals are appealable in rather broad measure, but affirmative orders are only appealable if they fall within the narrow definition of the word "controversy."

76. Am. Bar Ass'n report, *supra* note 12, at 42.

Association draft in several places speak of the power of review given by Section 5 as permissive, but it is difficult to interpret the language of the act as other than mandatory.⁷⁷ To the extent that court review or relief is sought by an individual outside the provisions of this act, the scope of court review of any administrative determination will not be as great. Such court review outside the provisions of this act may be the result of a voluntary choice of remedies on the part of the individual or because of his inability to qualify his case as an appeal from a "decision" as provided in the bill.⁷⁸ Instead then of accomplishing uniformity there results in this respect a serious lack of unity where uniformity would be desirable. Whether or not a court could review the factual basis of a given controversy within a particular agency, would depend upon the procedure elected by, or in some cases forced upon, the appellant.

The question of the extent to which the courts should be permitted or required to review the factual determination of administrative agencies is one as to which there is sharp divergence of opinion and on which much has been written. It will, therefore, serve no purpose at this time to more than touch upon the theoretical aspects of this subject. It should, however, be pointed out that to the extent that Section 5, taken in conjunction with Section 4 of the act, grants the right of appeal in respect of a large variety and vast number of administrative acts which have not heretofore been subject to review by the courts, the additional burden placed upon the courts by the provision for a more extensive review of the facts is very great. It may be pointed out again that there is here as elsewhere real occasion for a detailed examination of the many agencies covered by the scope of the act. It is quite possible that a review of the actual operation of the various agencies may disclose that the activities of some in particular lend themselves to greater court supervision than others, aside from any general view as to whether greater or less supervision is desirable. For example, some decisions of administrative bodies involve in part at least purely "administrative" determinations, while others are purely judicial in that they involve only such considerations as would normally come before a court. A decision of the Securities and Exchange Commission refusing approval of the acquisition of securities or utility assets under Section 10 of the Public Utility Act of 1935,

77. *Id.* at 3, 42, 43.

78. This latter contingency could not have arisen under the Bar Association draft.

involving a determination, among other things, that such acquisition would either unduly complicate the capital structure of the holding company system of the applicant or would be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding company systems would come within the former category,⁷⁹ while an order expelling an individual or firm from the Stock Exchange would probably constitute an adjudication involving no administrative determinations. Without reaching any conclusion on this subject, it may merely be suggested that there would be ground for distinction in the treatment of these two classes of cases on review.⁸⁰

There would seem to be fairly general agreement that the administrative process needs improvement and that a tendency to arbitrary action on the part of many administrators must be firmly checked. Many believe that unless the power of administrative bodies is curbed by the courts this country is headed for despotism, if indeed such state of affairs does not already exist. Others conclude that unless democratic government can become more efficient through the operation of administrative agencies, fascism will result. The one group emphasizes the present threat to individual liberties, while the other group, recognizing and deploring this situation, takes a longer range point of view in fearing an ultimately much greater threat to individual liberty if administrative processes are unduly curbed. The courts cannot shoulder the burden of protecting the individual from the acts of administrative agencies. The problem can be met only through reform within the agencies themselves. An increased rather than lessened responsibility in such agencies will contribute to this result. On the other hand, the placing of too great a burden on the courts might ultimately lead to a complete breakdown of the judicial system. In this connection there must be recognized a tendency, not entirely conscious, among many of those who would curb administrative agencies by judicial process, to attempt in some degree to nullify indirectly the objectives set by

79. Grave questions are presented as to the wisdom of granting so broad a discretion to an administrative body without setting up adequate standards, of the feasibility of this type of regulation and so forth. But these questions are not answered by providing a wide scope of judicial review of the findings of fact involved in any such determination.

80. See Duffy (1937) 23 A.B.A.J. 844, for suggestions that administrative, legislative and judicial functions should be distinguished, and full court review be allowed in the case of judicial functions only, and also Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 Yale L.J. 538, 553.

statute for these administrative agencies. And it may be said with justice that a large measure of support for the so-called procedural reforms of administrative process arises out of a deep-rooted antagonism to the legislation under which the administrative agencies are functioning.

SECTION 7. "EXCEPTIONS AND RESERVATIONS"

Sub-paragraph (b) of Section 7, dealing with specific exceptions, has already been discussed.⁸¹ The first paragraph of the section⁸² significantly enough provides that nothing contained in the 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. This provision is frankly explained in the Bar Association report on the bill⁸³ as being due to the insistence of members of the Bar Association who wanted to retain all existing procedures open to individuals until such time as the procedures provided for in the new bill had been placed in operation and proven their worth. This reluctance on the part of members of the Bar Association to accept the provisions of this bill as substitutes for the presently existing rights of individuals can readily be understood, but does not show any great confidence in the proposed legislation. As far as the Bar Association members are concerned the trial and error method may be substituted for action taken only after investigation, provided only it does not affect the rights of the individual. What effect this procedure might have on the operation of the administrative agencies would appear to have been to them a more theoretical and less pressing question. Nor is it meant here to disapprove of the trial and error method within limited scope. Quite the contrary, it is believed that appropriate procedure for the accomplishment of the main objectives of the Bar Association bill should involve not only a thorough study of the operations of the agencies to be affected by the bill, but also a trial of certain of the resultant proposals by applying them first to particular agencies. If these provisions are then found satisfactory in operation, they can readily be extended to other agencies in so far as they may seem applicable.

81. See pp. 297-300, *supra*.

82. Am. Bar Ass'n draft, *supra* note 12, at § 6.

83. *Id.* at 47.

CONCLUSION

The foregoing discussion leads to these conclusions: Whatever may have been the scope of the theoretical studies of administrative law which preceded the Bar Association bill, there is no evidence of any adequate consideration of the detailed application of the proposed legislation and of its effect on the operation of the many agencies is affected. As a result the proposed bill is vitally defective. A thorough study is needed of the operations of each of the many federal administrative agencies to determine to what extent the principles of the proposed bill may properly and effectively be made to apply. Thereafter a bill should be drafted, or the present bill redrafted, with detailed consideration given to the particular application of its provisions in each instance.

As to the general objectives of the bill, namely public hearing before administrative rule-making, judicial review of rules, improved machinery for intra-departmental appeals and provision for more extensive judicial review of administrative decisions, it may be said that it is unlikely that any uniform procedural machinery can be devised in most of these matters which will operate satisfactorily in respect of the varying activities, both in a given agency and as between the different agencies, of the many administrative bodies. The method for public hearing before the issuance of rules has its disadvantages as well as advantages. In reference to particular applications, in some instances the one and in some instances the other, predominate. Public hearing before rule-making should not be universal but should only be required in the particular type of case where it is found to be advisable and, generally speaking, not in respect of minor rules. An attempt to provide for court review of rules is faced with a very serious obstacle in the probable inability as a general rule to secure a United States Supreme Court determination in this type of proceeding. At best it is a procedure which should initially have fairly limited application and should not be made applicable to rules of lesser importance. Improved procedure for intra-departmental review of administrative action and greater opportunity for appeal by aggrieved persons are generally accepted as desirable. But if the federal administrative agencies are to be permitted to operate effectively and efficiently, great care must be exercised in the application of any such legislation to the specific activities of the various agencies. Uniformity in this respect would seem absolutely impossible. As to the extent

of court review of administrative acts, it is the belief of the writer that in the main the increased scope of review provided in the Bar Association bill is not desirable. This subject, however, like the others, is entitled to be considered in the light of the particular type of act which the court may be called upon to review, and it is not impossible that in relation to certain types of administrative activity a broader scope of review on the part of the courts may be found to be desirable.

APPENDIX

S. 915 IN THE SENATE OF THE UNITED STATES

July 27 (legislative day, July 25), 1939

Ordered to be printed as passed by the Senate

AN ACT 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 of America in Congress assembled,

Definitions

SECTION 1. As used in this Act, unless the context otherwise requires—

(1) "Administrative rules" include rules, regulations, orders, and amendments thereto of general application issued by officers in the executive branch of the United States Government interpreting the terms of statutes they are respectively charged with administering.

(2) "Administrative officers" means officers and employees in the executive branch, except the President of the United States.

(3) "Agency" means any department, independent establishment, administration, corporation, or other subdivision of the executive branch of the United States Government with one chief officer as the immediate head thereof.

(4) "Independent agency" means any board, commission, authority, corporation, or other subdivision of the executive branch of the United States Government with two or more officers at the head thereof as board, commission, or other members.

(5) "Circuit court of appeals" means the United States Circuit Court of Appeals and the United States Court of Appeals for the District of Columbia.

(6) "Days" means calendar days, exclusive of Sundays and national holidays.

(7) "Person" includes individuals, corporations, partnerships, or other organizations.

(8) "Decision" means any affirmative or negative decision, order, or Act in specific controversies which determines the issue therein involved.

(9) "Controversy" means any dispute or disagreement concerning any claim, right, or obligation for or against the United States and any refusal to grant any license, permit, or other privilege.

Implementing Administrative Rules

SECTION 2. (a) Hereafter administrative rules and all amendments or modifications or supplements of existing rules 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 and by each independent agency respectively charged with the administration of any statute only after publication of notice and public hearings. All such rules shall be published in the Federal Register within ten days 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 when the President declares that a public emergency exists.

(b) Administrative rules under all statutes hereafter enacted shall be issued as herein provided within one year after the date of the enactment of the statute subject to the adoption thereafter of further rules from time to time as provided in this Act.

(c) Any persons substantially interested in the effects of 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, if requested within ten days thereafter, 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.

(d) 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 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 after the publication in the Federal Register of the rescission or final judicial determination of the invalidity of such rule.

Judicial Review of Rules

SECTION 3. 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 within thirty days 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 2 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 2 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 direct 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 2 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.

Statutory Approval and Authority for Administrative Boards and Prescribing Their Procedure

SECTION 4. (a) Every head of an agency 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 reestablished and function in accordance with this Act. Wherever practicable, such boards shall be designated in various sections of the United States to hear any controversy which may have there arisen. 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 hereinafter provided, such employees shall be assigned to other duties in the service of the agency con-

cerned. No member of a board who has participated in a particular case or in the preparation, draft, or approval of any rule which may be involved, shall sit in 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 is aggrieved by a decision of 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 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 appeal before said board. Any person having a substantial interest in the controversy shall have the right to intervene herein. 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 the actual cost thereof. Within thirty days after the day the evidence and arguments are closed, the board shall make written findings of facts and separate decision 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, 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 mailed 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 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, 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 inde-

pendent agency shall enter at the expiration of thirty days such appropriate decision, 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 shall enter at the expiration of thirty days such appropriate decision as may be proper unless within said thirty days the aggrieved party shall signify his written consent to the entry of the decision or shall file by registered mail with the independent agency his written objections to the findings of fact and decision of the examiner, in which event the independent agency shall not enter its decision 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.

(f) No hearing shall be permitted before any agency or independent agency seeking affirmative relief against the United States concerning any controversy which arose more than one year prior to the date on which there was filed with such agency or independent agency a written request for such hearing as provided in this section.

Judicial Review of Decisions or Orders of Administrative Agencies

SECTION 5. (a) Any party to a proceeding before any agency or independent agency as provided in section 4 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 after the date of receipt 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. 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 of the agency or independent agency concerned. The Attorney General of the United States and the agency or independent agency shall each be served 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 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 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 may direct the agency or independent agency concerned to modify its decision. Any case may be remanded for 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 of 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 of any agency or independent agency shall be set aside if it is made to appear to the satisfaction of the court (1) that the findings of fact are clearly erroneous; or (2) that the findings of fact are not supported by substantial evi-

dence; or (3) that the decision is not supported by the findings of fact; or (4) that the decision 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 is beyond the jurisdiction of the agency or independent agency, as the case may be; or (6) that the decision infringes the Constitution or statutes of the United States; or (7) that the decision is otherwise contrary to law.

(b) The judgments of the circuit courts of appeals 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., title 28, secs. 346 and 347).

(c) Where the cause of action is otherwise within the jurisdiction of the United States Court of Claims as provided in sections 136 to 187, inclusive, of the Judicial Code, as amended (U. S. C., title 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.

(d) 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., title 28, sec. 346).

*Jurisdiction of Courts to Impose Damages Where Appeal Was
For Delay and for Costs*

SECTION 6. The courts shall have jurisdiction and power to impose damages in any case where the decision of the agency or independent agency is affirmed and the court finds that there was no substantial basis for the petition for review. In all cases the costs on review shall be allowed the prevailing party after final judgment, to be collected according to law.

Exceptions and Reservations

SECTION 7. 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.

(b) Nothing contained in this Act shall apply to or affect any matter concerning or relating to the conduct of military or naval operations; 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 Federal Trade Commission, the Interstate Commerce Commission; the conduct of the Department of State; 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 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 2 and 3 of this Act shall not apply to the General Accounting Office.

Passed the Senate July 18, 1939.