Washington Law Review

Volume 33
Number 1 *Symposium on Washington Administrative Law*

3-1-1958

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WASHINGTON LAW REVIEW

AND

STATE BAR JOURNAL

VOLUME 33 SPRING 1958 NUMBER 1

THE MODEL STATE ADMINISTRATIVE PROCEDURE ACT

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The present issue of the Law Review, devoted to a symposium on Washington administrative law, appears to be particularly timely. For, during the 1957 session of the Washington legislature, a bill was passed which would have placed this state in the ranks of those jurisdictions which have, in recent years, sought to deal by statute with the problems posed by the modern growth of administrative law. The bill in question failed of enactment, however, since it was vetoed by the Governor —though on grounds not relating to the ultimate merits of such legislation.[1]

The bill which thus almost became a part of Washington administrative law in 1957 was entitled: "AN ACT Relating to procedure of state administrative agencies and review of their determinations."[2] In actuality, the scope of the bill was not as far-reaching as its title would seem to indicate. A true Administrative Procedure Act, of the type enacted by the Federal Congress in 1946, contains, at the very least, provisions devoted to rule-making, adjudication and judicial review. Last year's Washington bill dealt in detail only with administrative rule-making. This, to be sure, does not mean that it was not of great importance. But it does indicate that, even had it been enacted into law, it would have, at best, resolved only part of the problems that statutes like the Federal Act were intended to meet.

As Professor Peck points out,[3] Senate Bill 180, in its original form, incorporated the substance of the first seven sections of the Model State Administrative Procedure Act. It is this which makes specially relevant an article devoted to the Model Act in a symposium devoted to Washington administrative law. If, as appears likely, a bill similar

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[1] For a discussion of the attempted legislation, see Peck, *Legis. Note,* 32 WASH. L. REV. 181 (1957).

[2] S.B. 180, 1957 WASH. LEGIS. SESS.

[3] *Supra* note 1.

to S.B. 180 should become law in the near future, it is important to have available in this state a convenient analysis of the parent legislation from which the Washington law will, in large part, have been derived.

BACKGROUND

The Model State Administrative Procedure Act must be considered in light of what has well been termed the pronounced "movement toward the enactment of general statutes containing codes of procedure to be followed by regulatory agencies."[4] This movement has certainly been one of the most important recent developments in our administrative law. It is a natural response to the tremendous expansion of administrative authority that has occurred during the present century. Many have felt, in Justice Jackson's phrase, that administrative power was not sufficiently safeguarded and sometimes put to arbitrary and biased use.[5] The movement for administrative procedure legislation has been a result of that widespread feeling.

The most important tangible result of this movement thus far has, without a doubt, been the Federal Administrative Procedure Act of 1946. That law, rightly heralded as marking the beginning of a new era in American administrative law, was the culmination of a long and vigorous campaign by the organized bar—a campaign that was so successful in securing bipartisan support for its objectives that the 1946 Act was passed without a dissenting vote in both houses of Congress. Though the contrary may often have been asserted, the Federal Act is far from a comprehensive code of fair administrative procedure. Instead, it lays down the general procedural principles which are to govern administrative exercises of rule-making and adjudicatory authority. The fact that it is a general framework rather than a detailed code does not, however, mean that it is not of fundamental importance. Such importance results from three things:

(1) The Federal Act represents the first important legislative attempt to state the essential principles of fair administrative procedure.[6] Congress, in enacting the Act, mirrored the mood of discontent with the administrative process which existed among many of those subject to administrative authority. But, as the Supreme Court

[4] Heady, *State Administrative Procedure Laws: An Appraisal*, 12 PUB. AD. REV. 10 (1952).

[5] Wong Yang Sung v. McGrath, 339 U.S. 33, 37 (1950).

[6] It should be noted, however, that Wisconsin enacted an administrative procedure law in 1942. WIS. STATS. §§ 227.01-21.

aptly put it, Congress expressed its mood not merely by oratory, but by legislation.[7]

(2) This means that the principles of fair procedure laid down in the 1946 Act are binding upon the federal administrative process as a whole. The Act is one whose provisions control the procedures of all the agencies whose acts affect personal or property rights. It is true that the draftsmen of the Act relied primarily upon the best pre-existing administrative practice. What is of basic importance, however, is that the Act, by stating the essentials of such practice in statutory form, in effect imposes the best pre-1946 procedures upon all the federal agencies.

(3) Just as significant, in assessing the impact of the Federal Act, is the fact that the Act, in some important respects, does go beyond even the most advanced pre-1946 procedure in any of the federal agencies. This is particularly true, for example, with regard to the crucial question of the administrative hearing officer which is at the heart of our administrative procedure.

Though the attention of students of administrative law in this country has, quite naturally, been focused primarily upon the Federal Administrative Procedure Act, this does not mean that the movement for procedural reform has been confined to the federal field. On the contrary, the states, too, have become increasingly active. There have been several state reports comparable to that of the celebrated United States Attorney General's Committee on Administrative Procedure. The most notable of these has been the Benjamin Report on Administrative Adjudication in New York. The value of the Benjamin Report, it should be noted, is not limited to New York State. It does for state administrative law what the Attorney General's Committee Report did for federal administrative law.[8]

Even more significant perhaps than studies like the Benjamin Report has been the influence of the legal profession, whose close contact with the administrative process gave it special cause to be disturbed at the inadequacies of existing administrative procedures. "The credit for the reform of administrative procedure," in the words of Chief Justice Vanderbilt, "must be given to the practicing lawyers of the country working through the American Bar Association."[9]

[7] Universal Camera Corp. v. NLRB, 340 U.S. 474,487 (1951).

[8] See Stason, HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 193 (1946).

[9] IN THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 8 (1947).

After 1937, when the American Bar Association Section on Judicial Administration formed a Special Committee on Administrative Agencies and Tribunals, the Bar's concern, in the state field, can be traced in this Committee's reports. In 1938, at the American Bar Association meeting, the Committee presented a comprehensive report on judicial review of administrative action in the states. This report was most favorably received, and has been termed the major impetus to constructive thinking about state administrative law.[10] In 1939 the Committee reported again, accompanying its report with the draft of a proposed Act dealing with the major phases of state administrative procedure. This Act was prepared to serve as a model for state legislation on the subject. It was this draft statute which served as the origin of the Model State Administrative Procedure Act.[11]

This draft Act was referred by the American Bar Association Section to the National Conference of Commissioners on Uniform State Laws. At the 1939 meeting of the Conference, the Act was discussed and a Conference Committee was appointed for further study of the draft. After the publication of the Attorney General's Committee and Benjamin Reports, a revised draft was prepared and submitted at the 1942 session of the Conference.[12] The matter was again submitted at the 1943 session of the Conference, when it was decided to offer the proposed law as a Model Act rather than as a Uniform Act. In 1944 the Model State Act was tentatively approved by the National Conference of Commissioners on Uniform State Laws, and, in October 1946, the Act was finally approved by the Conference.

Why was the Act promulgated as a Model Act, rather than a Uniform Act, as had originally been intended? The basic reason stems from the very nature of administrative law. In such a field—relatively new and still in a state of flux—it is neither desirable nor feasible to have uniformity among the several states. "There is something to be said for allowing the continuation of the evolution of ideas rather than the freezing of matters in the form of uniform legislation.... Therefore, we feel that a Uniform Act would neither be desirable nor feasible."[13]

What are the essential procedural principles provided for in the

[10] Stason, *The Model State Administrative Procedure Act,* 33 IOWA L. REV. 196, 198 (1948).

[11] Stason, HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 192-194 (1946).

[12] This measure was enacted almost verbatim in 1942 in Wisconsin.

[13] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 83 (1943).

Model State Administrative Procedure Act? According to the Handbook of the National Conference itself, they are the following:

1. Requirement that each agency shall adopt essential procedural rules and that, so far as practicable, all rule-making (both procedural and substantive) shall be accompanied by notice of hearing to interested persons;

2. Assurance of proper publicity for administrative rules that affect the public;

3. Provision for advance determination or "declaratory judgments" on the validity of administrative rules, and provision for "declaratory rulings" affording advance determination of the application of administrative rules to particular cases;

4. Assurance of fundamental fairness in administrative hearings, particularly in regard to rules of evidence and the taking of official notice in quasi-judicial proceedings;

5. Provision assuring personal familiarity on the part of the responsible deciding officers and agency heads with the evidence in quasi-judicial cases decided by them;

6. Assurance of proper scope of judicial review of administrative orders to guarantee correction of administrative errors.[14]

It will be the purpose of the remainder of this article briefly to analyze the key provisions of the Model State Act, in order to determine how these procedural principles are given effect by them. Such an analysis should prove of great value in a state like Washington, where, as already stated, at least the first part of the Model Act came so close to being enacted into law.

RULE-MAKING

The Model State Act, like the Federal Administrative Procedure Act, is based upon the fundamental dichotomy between rule-making and adjudication. In this it differs from Senate Bill 180, which, as pointed out above, dealt essentially only with administrative rule-making. It should, however, be emphasized that a law which covers only the rule-making function is, at best, merely a truncated administrative procedure statute. Rule-making is, of course, a vital weapon in the modern administrative armory. But adjudicatory power is at least as important. The present-day agency both legislates and adjudicates and, if anywhere, it is in the exercise of the decision-making power that there is the greater danger of abuse.

[14] *Id.* at 195.

The procedural provisions of the Model State Act are thus grounded upon the rule-making—adjudication distinction. The procedure prescribed with regard to rule-making is largely informal in nature. The requirements imposed where administrative adjudications are concerned are more formal and, while not as detailed as those in the Federal Administrative Procedure Act, still tend, in large part, to be modeled upon the procedure of the judicial process.

What are the requirements imposed by the Model State Act upon administrative exercises of rule-making power? The question of procedure is, of course, of basic importance to those who are affected by such power. The prescription of proper procedures should be one of the basic purposes of any administrative procedure legislation. The aim of such procedures should be to ensure some participation to those affected in the rule-making process. The basic goal here is to democratize the rule-making process as much as can feasibly be done, without imposing such burdensome requirements that the effective working of the agency concerned will be unduly hampered.[15]

How is this aim to be achieved without the danger referred to becoming a reality? The Model State Act seeks to accomplish this by providing for antecedent publicity before an agency engages in any exercise of its rule-making powers. Section 2(3) of that Act provides that, before an agency adopts, amends, or repeals a rule, it "shall so far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing." It should be noted that a similar provision was contained in Senate Bill 180.

Section 4 of the Federal Administrative Procedure Act also aims at securing prior publicity before rules are published by federal agencies. The Federal Act is, however, more detailed than the Model Act in this respect. Thus the federal law expressly indicates how the notice of proposed rule-making is to be given, i.e., in the Federal Register. The lack of a publication analogous to the Register in most states makes a similar direction in the Model Act impractical. In addition, the details of the required notice are prescribed in the Federal Act, but left to agency discretion in the Model Act. Yet it should be noted that details similar to the federal statute were contained in section 3(2) of Senate Bill 180.

Neither the procedure prescribed by section 4 of the Federal Act

[15] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 225 (1941).

nor that imposed by section 2(3) of the Model Act places undue burdens upon an agency's exercise of its rule-making authority. The only real mandatory requirement in either statute is the giving of the notice of proposed rule-making as prescribed. There is, it is true, also the requirement that interested persons be given an opportunity to state their views. But the details of such "opportunity" are left entirely to the discretion of the agencies concerned. The form and extent of the participation by persons in rule-making are entirely for the agency to determine. Thus, it is up to it to decide whether there shall be any public hearing procedures, and their nature, or whether those interested shall merely be given an address to which they can send any views in writing. Nor is there any requirement that the views of interested persons be given any real weight. This is true even under the Federal Act, despite its requirement that the agency act after "consideration of all relevant matter presented." Whether an agency did or did not give the required consideration is a matter locked within its own mental processes—which means, in effect, that the question of what weight, if any, is to be given to the representatives of interested persons is left entirely to the particular federal agency.

It is interesting to note that, under Senate Bill 180, there was an express provision to permit agencies to dispense with the requirement of antecedent publicity if they find "that immediate adoption or amendment of a regulation is necessary for the preservation of the public health, safety, or general welfare, and that observance of the requirements of notice and opportunity to present views on the proposed action would be contrary to the public interest." The agency concerned might then issue the regulation in question as an emergency regulation. This, however, would not give the agencies as much discretion as the relevant provision of the Federal Act. Under it, an agency can dispense with the requirements of section 4 merely upon its finding that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." In addition, under Senate Bill 180, emergency regulations could not remain in effect for longer than ninety days, while, under the Federal Act, the agencies can dispense with the necessary procedures for as long as they choose.

It should be emphasized that neither the Federal Act nor the Model Act requires the agency concerned to afford an oral hearing to anyone desiring to participate in the rule-making process. This is true despite the fact that the use of such hearings has become a common feature of both the federal and state administrative processes. The draftsmen

of both Acts have hesitated to provide a requirement of public hearings in connection with all exercises of the rule-making power. Such a requirement, it has been felt, might well prove too burdensome, and it may well be that the informal safeguard of antecedent publicity is really as far as such statutes can practically go.

The remaining matter concerning rule-making dealt with in the Model Act is that of publication. The desirability of prompt publication of administrative rules seems almost too obvious today to require detailed comment. "[I]t would be intolerable if it could be said that obscure clerks in [an agency] poured forth streams of departmental legislation which nobody had any means of knowing. This would be the method attributed to Caligula of writing his laws in small characters and hanging them upon high pillars 'the more effectively to ensnare the people.' "[16]

As far as the federal field is concerned, there has been a system of publication of administrative rules in effect since the enactment of the Federal Register Act of 1935, and the Federal Administrative Procedure Act has consequently not had to deal with the basic problem. Sections 3 and 4 of the Model Act have in view the setting up of a similar system in the states. Section 3 provides for the filing forthwith in the office of the Secretary of State, or other equivalent officer, of each rule adopted by any agency. Under Section 4, the Secretary of State is to compile, index, and publish all rules adopted by each agency and remaining in effect. Compilation shall be supplemented or revised as often as necessary and at least once every two years. In addition, the Secretary of State is to publish a monthly bulletin setting forth the text of all rules filed during the preceding month.

Senate Bill 180 in this state contained essentially these provisions of the Model Act with regard to publication. From a practical point of view, it may well be that these were the most important parts of Senate Bill 180. Certainly, it is vital to practitioners and public alike that all rules be available in convenient form, outside the pigeonholes of the agencies themselves. Until a system of publication is provided for, there remains a dangerous lacuna in any system of administrative law.

DECLARATORY RULINGS

Senate Bill 180 provided expressly for the issuance by administrative agencies of declaratory rulings upon petition by any interested parties. If stated to be binding, such rulings are binding between the

[16] Carr, COMMITTEE ON MINISTERS' POWERS, MINUTES OF EVIDENCE 208 (1932).

agency and the petitioner on the state of facts alleged, unless such ruling is altered or set aside by a court. This provision is similar to that contained in section 7 of the Model State Act. Its purpose is to provide a device akin to the declaratory judgment procedure in the courts. By the declaratory judgment procedure, it is possible to obtain binding judicial determinations which dispose of legal controversies without the necessity of any party acting at his peril upon his own view. A like instrument is of equal value in the administrative field.

Advisory rulings of the type now issued by both federal and state agencies do not, of themselves, answer the problem of the need for predictability in the administrative process. They do, it is true, go part of the way toward meeting the needs of private parties. "The value to the public of this means of guidance in advance of action is apparent."[17] It should, however, be emphasized that advisory rulings do not entirely solve the problem, for they are not binding upon the agency issuing them. Normally, of course, such rulings can be safely relied upon; yet the rare case does occur where a different view is taken at a later stage because of some change in agency personnel or policy. "Consequently advisory rulings do not entirely eliminate, though they materially reduce, the element of uncertainty. Greater certainty can be achieved only by attaching to the ruling the same binding effect upon the agency that is attributed to other adjudications."[18]

A general statute in this field should consequently authorize administrative agencies to issue binding declaratory rulings in appropriate cases. The dangers of abuse which some have seen in such a procedure can be avoided by providing for the issuance of such rulings in the discretion of the relevant agency and by governing their issuance by the same basic principles that govern declaratory judgments in the courts. Such binding declaratory rulings would, of course, be subject to judicial review, just as are ordinary administrative adjudications. This is, in fact, what is done by both Senate Bill 180 and section 7 of the Model State Act.

Adjudicatory Procedure

Senate Bill 180, as already stated, provided essentially the procedures which are to govern administrative rule-making. The Model State Administrative Procedure Act is far more comprehensive, for it also deals with adjudicatory procedure and judicial review. It is true

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[17] Benjamin, Administrative Adjudication in New York 262 (1942).

[18] Final Report of the Attorney General's Committee on Administrative Procedure 31 (1941).

that even the Model Act is less complete on these subjects than is the Federal Administrative Procedure Act. Even so, the Model Act does clearly constitute an important step in the direction of more detailed legislative control of administrative procedure.

To be sure, to have an over-detailed prescription of procedural requirements in an administrative procedure law like the Model Act is neither desirable nor feasible. The provisions of such a statute cannot go beyond stating the essentials of fair adjudicatory procedure; their detailed application must be left to the individual agencies concerned. Such an Act should recognize that "certain fundamentals of fairness with regard to notice, pleadings and proof are as appropriate in administrative quasi-judicial hearings as in hearings before courts,"[19] and should then seek to state such principles.

Notice. "Specification of the issues to be determined in a quasi-judicial proceeding appropriate to the character of the particular proceeding, is one of the basic elements of fair procedure."[20] The giving of adequate notice in contested cases is consequently the first point on adjudicatory procedure with which the Model Act attempts to deal. For the right to a hearing, however generously preserved, is of little use unless those affected are informed beforehand of the contemplated agency action. Section 8 of the Model Act guarantees reasonable notice of the hearing which is to state the time, place, and issues involved. It may be, as has been asserted, that "when the statute covers many different types of proceedings, it is practically impossible to say anything more meaningful than that adequate notice shall be given."[21] The notice provisions of the Model Act do, however, appear to assure to parties affected by administrative adjudications at least a minimum specification of the issues prior to hearing.

Rules of Evidence. It is almost hornbook law today that the common-law rules of evidence are not, as such, binding upon administrative agencies in the absence of statutory provisions. This is clearly recognized by section 9(1) of the Model State Act, under which "agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs." As Dean Stason points out, "This is a rational standard, considerably less rigorous than the rules of the common law

[19] Stason, *The Model State Administrative Procedure Act,* 33 IOWA L. REV. 196 at 208 (1948).

[20] Benjamin, ADMINISTRATIVE ADJUDICATION IN NEW YORK 77 (1942).

[21] Nathanson, *Recent Statutory Developments in State Administrative Law,* 33 IOWA L. REV. 252, 268 (1948).

which were designed primarily for jury trials, yet considerably short of admitting everything that whim and fancy of counsel may offer."[22]

Exclusiveness of Record. "Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing."[23] This fundamental principle of exclusiveness of the record is given statutory effect in section 9(2) of the Model Act, which provides that, apart from evidence in the record, "no other factual information or evidence shall be considered in the determination of the case." A similar provision is contained in section 7(d) of the Federal Administrative Procedure Act. Such legislative statement of the exclusiveness of the record principle should be useful in clarifying the law in those states which have not yet had judicial articulations of it.

Closely related to the above is the subject of official notice. "Statutory provisions with respect to official notice, if not very carefully worded, may have an unfortunate tendency to drive underground the inevitable use by an administrative agency of its accumulated knowledge and experience in the evaluation of the evidence presented in the particular case."[24] Section 9(4) of the Model State Act seeks to avoid this tendency by encouraging the use of administrative *expertise* through a provision definitely recognizing the doctrine of official notice. It reads: "Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge."

At the same time, it is essential that the doctrine be kept within the bounds permitted by the principle of exclusiveness of the record. The parties should be notified of matters officially noticed, with adequate opportunity to contest them. Section 9(4) of the Model Act contains an express provision to this effect, stating that "parties shall be notified either before or during or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed." There is an analogous provision in section 7(d) of the Federal Administrative Procedure Act.

Separation of Functions. One of the principal omissions from the Model State Act, as compared with the Federal Administrative Pro-

[22] Stason, *The Model State Administrative Procedure Act,* 33 IOWA L. REV. 196 at 205 (1948).

[23] Benjamin, ADMINISTRATIVE ADJUDICATION IN NEW YORK 206 (1942).

[24] Nathanson, *Recent Statutory Developments in State Administrative Law,* 33 IOWA L. REV. 252, 274 (1948).

cedure Act, is its failure to make any attempt to deal with the problem arising from the concentration of the functions of prosecutor and judge in administrative agencies. "In the field of administrative jurisdiction," Chief Justice Vanderbilt has stated, "the greatest controversy has been over the commingling of investigating, prosecuting and judicial functions in one man or one body of men."[25] That the concentration of functions has given rise to such controversy should occasion little surprise. "Concern with the problem of merger of the powers of prosecutor and judge in the same agency springs," as Justice Brennan pointed out before his elevation to the Supreme Court, "from the fear that the agency official adjudicating upon private rights cannot wholly free himself from the influences toward partiality inherent in his identification with the investigative and prosecuting aspects of the case; in other words, that the atmosphere in which he must make his judgments is not conducive to the critical detachment toward the case expected of the judge. In a sense the combination of functions violates the ancient tenet of Anglo-American justice that 'No man shall be a judge in his own cause. . . .' The litigant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards that he has been taught to revere."[26]

The problem of concentration of functions, Justice Brennan goes on to inform us, "can be best dealt with by legislation, as its solution implicates considerations of administrative efficiency in effectuating legislative policy."[27] It is clear that an effort to deal with the problem was one of the prime purposes of the draftsmen of the Federal Administrative Procedure Act. The fundamental purpose of that Act, indeed, according to the United States Supreme Court, "was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."[28] The Federal Act did not go so far as some had urged and require a complete separation of investigating and prosecuting functions from adjudicating functions.[29] It did, however, make an effort to provide some safeguards within the existing framework of the agency by so-called internal separation.[30] "That statute embodies the theory of internal separation, leaving the func-

[25] Vanderbilt, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 90 (1953).
[26] In re Larsen, 17 N.J. Super. 564, 86 A.2d 430 (1952) (concurring opinion).
[27] 86 A.2d at 436.
[28] Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).
[29] *Id.* at 46.
[30] Vanderbilt, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 92 (1953).

tions with the agency but providing safeguards to assure their insulation from one another and to further the independence of personnel engaged in judging."[31]

Some have criticized the provisions of the Federal Act on this point on the ground that they do not go far enough. But it cannot be denied that they do constitute a serious legislative attempt to deal with the problem of the concentration of functions. The failure of the draftsmen of the Model State Act is to be regretted, for the problem involved is one of the most pressing in our administrative law. "There is general agreement that there is substance in the fear that in such concentration inheres the danger of partiality in judgments having an impact upon private rights and that the danger cannot be ignored."[32]

Process of Decision. "In the entire quasi-judicial process, the process of decision is of paramount importance."[33] In the case of some administrative decisions, it is the agency itself (meaning the agency head or heads) which hears the evidence and makes the decision. The process of decision in such cases is similar to that in the judicial process and serious problems do not arise. It is where, as in most cases, the hearing is held before a subordinate officer, with the actual power of decision vested elsewhere in the agency, that difficulties may arise. This type of procedure, with the hearing before one officer and the decision by another, is today well established in the administrative field.

The primary question that arises where the hearing is conducted by one officer with the actual decision being made elsewhere in the agency is that of "how the officer (or body) who makes the decision is to acquaint himself with the evidence and arguments of the parties."[34] That the "one who decides must hear" principle of the first *Morgan* case,[35] taken literally, is inadequate as an answer seems obvious when one considers the great volume and complexity of the matters dealt with by many modern agencies. The agency head, whether a single individual or board, could not possibly dispose of them unaided in the sense in which a court judges the cases which come before it. The device used in most cases, as has been indicated, is for the administrative hearing to be conducted by subordinate officers, with the process of decision taking place elsewhere in the agency. This device, however, when carried to the extent it often is, may cause private parties to lose faith in the justice of administrative proceedings, for if the hearing

[31] In re Larsen, 17 N.J. Super. 564, 86 A.2d 430 at 436 (1952) (concurring opinion).
[32] *Ibid.*
[33] Benjamin, ADMINISTRATIVE ADJUDICATION IN NEW YORK 221 (1942).
[34] *Id.* at 225.
[35] Morgan v. United States, 298 U.S. 468 (1936).

officer "becomes divorced from responsibility for decision two undesirable consequences ensue: the hearing itself degenerates and the decision becomes anonymous."[36] That the vicarious process of decision prevalent in the administrative field is not conducive to public confidence is shown by the many criticisms which have been directed against it.

Section 10 of the Model Act seeks to deal with this problem, at least in part. It provides that whenever, in a contested case, a majority of the agency officials who are to render the final decision have not heard or read the evidence, no decision adverse to the private party shall be made until a proposed decision, including findings and conclusions, has been served on the parties and an opportunity given them to argue thereon before a majority of the officials who are to render the decision. Such officials are personally to consider such portions of the record as are cited by the parties.

This is certainly a step forward, especially in the express requirement of familiarity on the part of the deciding officers with the pertinent parts of the record. One wonders, however, whether that requirement is any more enforceable in practice than the rule of the first *Morgan* case. The Federal Act follows a different approach. It tries to resolve the problem of the institutional decision by assimilating the roles of hearing and deciding officials within the agency to those of trial and appellate courts. Under section 8(a), the hearing examiner is given the power to make an initial decision, which, unless appealed from or reviewed, becomes the decision of the agency. Possible impairment of administrative efficiency is avoided by allowing the agency to require (in specific cases or by general rule) that the record be certified to it for initial decision. In the latter case, the examiner must first make a recommended decision.

It should be noted that the process of decision prescribed in the Federal Act depends, for its effectiveness, upon the existence of the corps of qualified hearing examiners provided for in section 11. It may well be that the failure of section 10 of the Model State Act to go as far as section 8 of the Federal Act results from the absence of provision in it for a similar system of examiners.

JUDICIAL REVIEW

Aside from provision for review by declaratory judgment of the validity of agency rules, Senate Bill 180 did not deal with the all-

[36] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 45 (1941).

important subject of judicial review of administrative action. This subject is dealt with in some detail in section 12 of the Model Act.

In the first place, the Model Act takes the important step of doing away with the forms of action in administrative law and substituting in their place a single review action. This appears to be the aim of section 12(2) of the Act. It provides for review proceedings to be instituted by a simple petition filed in the court of general jurisdiction. The Federal Act, it should be noted, does not go so far, for, in section 10(b), there "is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review."[37]

The provisions of the Model Act, with regard to the availability of review, aside from the matter of forms of action, appear, more or less, to restate existing law. "Any person," reads section 12(1) of the Act, "aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof." In this language, there is a legislative restatement of the principle of *Stark v. Wickard*[38] that review is available even in the absence of other express statutory provision therefor, of the requirment of "standing" on the part of the person seeking review, and of the requirement of ripeness for review, as modified by the rejection of the so-called "negative order" doctrine in the celebrated *Rochester Telephone* case.[39] Section 10(a) of the Federal Act, whose language is analogous, appears to have a similar effect.

Until relatively recently, the question of the proper scope of review was one of the most hotly contested questions in our administrative law. In the federal field, as is well known, prior to the Administrative Procedure Act, the scope of review had been progressively narrowed by the courts. It was dissatisfaction with the restricted scope of review in the federal field, as much as anything else, which gave impetus to the movement which resulted in the Federal Administrative Procedure Act. Yet, although the scope of review of federal administrative action has clearly been somewhat broadened by section 10(e) of that statute, it would still seem to be, on the whole, a restricted one. The Federal Act expressly re-enacts the substantial evidence rule which had previously governed the scope of review in the federal courts.[40] Nor does it have any effect upon the restricted review avail-

[37] ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY 212 (1944-1946).
[38] 321 U.S. 288 (1944).
[39] Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939).
[40] See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

able in the federal field over so-called mixed questions of law and fact.[41]

The Model State Act appears to go somewhat further than the Federal Act in broadening the scope of review. Under section 12(7), the reviewing court is expressly given the authority to review administrative decisions as to "inferences" and "conclusions" as well as "findings." In the federal cases there has been some question as to the existence of this power.[42] Aside from this, however, the Model Act, in its effect, is like the Federal Act. The substantial evidence rule is widened so that administrative decisions may be reviewed or modified if they are "unsupported by competent, material, and substantial evidence in view of the entire record as submitted." The direction to the court here to review "the entire record" is not unlike that with regard to "the whole record" contained at the end of section 10(e) of the Federal Act. The requirement that the agency decision be supported by evidence which is "competent" and "material" as well as "substantial" is, it is true, not present in the judicial review section of the federal statute. It is interesting to note that such a provision was contained in that section in the form in which the bill was originally presented to Congress. The references to competency and materiality were, however, deleted by the Senate Judiciary Committee. No reason was given for the deletion. As explained by Dean Stason, "the addition of the word 'competent' will require that under the Model Act there shall be at least a little legally competent evidence to support each finding of essential fact."[43] Hence, it appears to state the so-called "legal residuum" rule in legislative form. Under that rule, first enunciated by the New York Court of Appeals,[44] an administrative decision cannot rest solely upon incompetent evidence, such as hearsay. Instead there must be somewhere in the record at least a residuum of legal evidence to support the decision, else it must be set aside. To many students of the subject, this is a needed check upon the agency power to admit any evidence it chooses, unhampered by the courtroom rules.

[41] See O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951)).
[42] See Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 208 (1948).
[43] *Ibid.*
[44] Matter of Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916).