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THE ACHESON REPORT: A NOVEL APPROACH TO ADMINISTRATIVE LAW

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The publication in January, 1941, of the report of the Attorney General's Committee on Administrative Procedure, commonly known as the Acheson Committee from its distinguished Chairman, marked the completion of one of the most thoroughgoing and exhaustive investigations ever conducted into an important phase of governmental activity. Comparison at once suggests itself with the well known "Report on Ministers' Powers," made in 1932 by a British Committee, but only a cursory examination of the two documents is needed to show the wide differences between the two reports, both in scope and method of approach.

Some years ago when the writer of this paper was asked for suggestions by the committee of the American Bar Association on administrative law, which was then about to embark on its recommendations in that field, the sole suggestion which he ventured to advance was that a point had been reached where no recommendations with respect to administrative law could be fruitfully made without a thorough and detailed study of the functions and procedures of each of the multitude of existing administrative agencies. While it is no doubt true that certain common issues are raised by the activities of all administrative regulatory bodies, and while it may be that common principles will be found applicable to certain phases of the work of all alike, still it seems obvious that with the multiplication of these agencies

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in recent years, their work has ramified into such diverse fields, and such different tasks have been imposed upon different agencies, that any attempt at generalization must follow, rather than precede, a minute and specific study of the agencies themselves. Such a study the Acheson Committee devoted almost two years to making. The Committee’s report, when finally formulated, was based on a detailed series of monographs covering specific administrative agencies of the Federal Government, which have no predecessor or parallel in the literature of administrative law.

Perhaps the first impression produced by the Acheson Committee’s report is a sense of the breadth and variety of the ground which it covers. Obviously the Committee approached their task with no preconceived idea of a limited number of already defined issues. Rather they appear to have taken the whole field of administrative regulation for their province, and ranged over it broadly. There is in this respect a marked difference from the concentration with which the British report on ministers’ powers was focused on a few well-defined issues. The broader approach pursued by the Acheson report has the value of having turned up along the way a variety of observations and comments which enlarge the scope of the conclusions ultimately reached.

A second impression produced by the report is that the Committee leaned over backwards to be “practical.” Not merely did they avoid preconceived and conventionalized issues, but they took obvious pains to avoid any approach to the subject matter of their investigation which was formal in character. The usual and familiar categories of thinking about administrative law are notable for their absence from the report. Rather the Committee appears to have interested itself in the numerous things done by this or that agency under one or another set of circumstances, and to have attempted to apply an ordinary practical man’s first-hand judgment as to whether what was done was about right, without resort to remoter or more intellectual categories. The method is empirical, eclectic, ad hoc, if you will; but it has the merit of avoiding as much controversy as possible.

In keeping with such a method, the Committee’s ultimate recommendations appear to have been deliberately and intentionally so cast as to embody no point of view with respect to fundamental disputed issues upon which there might be difficulty in securing agreement. Like practical men, the Committee kept their eyes as well as their feet on the ground, and found and followed a path which safely avoided areas about which people are likely to quarrel. The controversies which the report raises will all be found to relate to specific matters of detail, rather than to what some people are fond of calling issues of principle.
A most useful gloss on the report and a guide for understanding its spirit and intention is afforded by the testimony which Mr. Acheson subsequently presented on May 15th last, before the Sub-committee of the Judiciary Committee of the Senate, which was conducting hearings on the bill in which the recommendations of the report were embodied. Mr. Acheson’s statement explains and sets in relief the points around which the interest of the Committee appear to have ultimately settled. The first of these is the very great importance of the informal action of administrative bodies as contrasted with their formal proceedings.

I

In the past, discussion of administrative action has tended to center largely about the conduct of administrative hearings, the giving of formal notice, the filing of pleadings, the presentation of testimony, the making of findings; in short, about those matters wherein the administrative procedure is most obviously quasi-judicial and most closely resembles the action of a law court. The Acheson Committee was impressed with the relatively small proportion, quantitatively, of administrative business which falls into this formal category. Mr. Acheson, in his testimony, put their impression as follows:

“The case where a complaint . . . was sent out, where an examiner sat to hear testimony, where testimony was put in as of record, where findings were made . . . we began to think of that as administrative procedure, but as we studied the actual workings of these agencies, we found that, from a quantitative point of view, the very reverse of that was true. Approximately 92 to 94 percent of all the matters which come before administrative agencies are disposed of without any formal procedure, without any controversy, and by agreement between the agency and the individual citizen who is affected.” 2

The Committee reached the sound conclusion that no fruitful result would be attained by attempting to formalize and make rigid all this informal kind of action. In Mr. Acheson’s words:


The same point was stated as follows in the Committee’s Report:

“It is of the utmost importance to understand the large part played by informal procedure in the administrative process. In the great majority of cases an investigation and preliminary decision suffice to settle the matter. . . . Examples could be multiplied from nearly every agency in the Federal Government. Enough have been given, however, to make clear that even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process.”

"You could not run the Government if every question had to be conducted as a trial in court is conducted." 3

Informal administrative action involves primarily discussions and conferences between the agency and the individual or individuals to be affected, looking towards a possible settlement of the matter either through compliance by the individual with the agency's wish, or abandonment by the agency of its position, or some intermediate compromise. Mr. Acheson's testimony indicates a recognition by the Committee of the enormous advantage which the Government enjoys in such informal negotiations. However, the Committee did not see fit to concern itself with this issue. Instead, it directed its attention primarily to another and more immediate aspect of the matter, namely, the practical confusion in which the citizen is ordinarily involved when attempting to deal with a large and complex governmental agency. In Mr. Acheson's words:

"We were impressed with the fact that in many cases . . . the agency is one great obscure organization with which the citizen has to deal. It is absolutely amorphous. He pokes it in one place and it comes out another. No one seems to have specific authority. There is someone called the commission, the authority; a metaphysical omniscient brooding thing which sort of floats around in the air and is not a human being. That is what is baffling. The citizen goes to it. He goes to room 835 and, then he is sent to some other room. Finally somebody says, 'I have no power to decide this, but I will recommend it to the commission.' Then he says, 'How can I talk to the commission?' But he can't talk to the commission. That is the thing that is baffling." 4

The Committee in its report attempted to deal with this "vagueness of the administrative front which is presented to the citizen," as Mr. Acheson phrased it. 5 It did so by a recommendation that authority be definitely delegated by each agency to subordinate officials to dispose of matters informally. This recommendation is expressed as follows:

"Similar delegation to high officers in the agency is . . . desirable in respect of settlements and other negotiations looking toward the disposition of cases without hearings. . . . Settlements and agreements close out the great majority of cases before hearing. The flexible and expeditious adjustment of controversies between the Government and individual citizens is a major objective of the administrative process. Yet the Committee has noted a tendency on the part of some agencies to hinder such adjustment by withholding from all but the agency heads power effectively

3. Hearings, 804.
4. Id. at 807.
5. Ibid.
to settle and negotiate cases. An individual seeking a definitive statement of an agency's position and exploring the possibilities of amicable adjustment may be frustrated because the subordinates with whom he deals are forced to disclaim responsibility or authority. Delays and red tape result, and settlement is discouraged. The Committee believes that this situation will be considerably relieved, and the agency heads themselves will be able to turn their energies to more difficult problems, if there is delegation of power to responsible officers to conduct and approve settlements.\(^6\)

Clearly, the adoption of this recommendation would entail practical advantages. It would enable the informal negotiations to go on in a manner likely to bring them to an effective conclusion and avoid the present risk of having them ultimately break down because higher officials, whom the individual has never seen and talked with, are unwilling to approve what was done by the subordinate official or officials who actually handled the case. The likelihood of the determination of controversies with the agency prior to formal hearing would certainly be enhanced by the enactment of the proposed legislative provision in which the recommendation just considered is embodied, namely, Section 3 of the bill appended to the Committee's report. This section reads as follows:

"(a) Subject to such supervision, direction, review or reconsideration as it may prescribe, every agency or agency tribunal is authorized to delegate to its responsible members, officers, employees, committees, or administrative boards power . . . to dispose informally of requests, complaints, applications, and cases."\(^7\)

There would not appear to be latent in this proposal any danger that onerous and oppressive burdens might be imposed upon the individual by subordinate officials without his having at least an opportunity to bring the matter to the final judgment of the agency itself. The proposal as drafted would apparently confine the authority of the subordinate officials to the informal disposition of cases. If, however, a case is to be disposed of in a manner to which the affected individual refuses to consent, it would clearly seem necessary that a formal order should issue, and a formal order would, of course, require the authority of the agency itself after an appropriate hearing in those cases where hearings are constitutionally or by statute made necessary.

II

It has been mentioned above that the Committee expressed the view that formal administrative procedure was of relatively less

\(^6\) Report, 23.
\(^7\) Id. at 193.
moment than informal administrative action, because of the greater quantitative preponderance of the latter. However, in spite of this, approximately six times more space is given in the Committee's report to the formal procedure than to the informal, and the details of formal procedure occupy considerably more than half of the bill which the Committee drafted to embody its recommendations.

This is only what might have been expected. While it is true that quantitatively the number of matters which reach the stage of formal adjudication and determination are vastly less than those which are informally determined at some prior stage, it is also true that the cases reaching formal adjudication are those where the individual has been unwilling to accept what the agency offered, and where consequently the controversy comes to a frank determination on the merits. While it may often be the part of practical wisdom and expediency for an individual to take what a governmental agency chooses to give him and raise no issue which brings him into conflict with the preponderant power of Government, still, unless we are willing to accept the view that an individual has no rights under the law against the Government, he should be afforded an opportunity to try out those rights on the law and the facts in accordance with principles of fair procedure.

Indeed, if the administrative agency were not subject to the possible check of such an open trial of its powers, it would be in a position to insist much more strongly and arbitrarily on compliance with its wishes in its informal proceedings. Thus, the availability of fair and impartial formal procedure affords an essential check on the fairness of the informal procedure. It is the outcome of the formal proceedings which largely establishes the line beyond which the agency or its subordinate officials are careful not to go in their informal dealings with individuals.

In keeping with this point of view, the Committee made its most important and elaborate recommendations in connection with the conduct of formal administrative hearings. Some of these recommendations embody very drastic departures from prevalent existing practice. The nature of the recommendations indicates that the Committee viewed the central factor of a fair and adequate administrative hearing as consisting in the status, powers and qualification of the "hearing officer"—that is to say, the actual official before whom the testimony is taken and the case initially presented and argued. Its basic recommendations with respect to formal administrative procedure all look to establishing and safeguarding a certain definite status for this officer.

Mr. Acheson's testimony indicates that the Committee approached this matter from the standpoint of a certain uneasiness and discom-
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fiture at the practices pursued with respect to hearing officers by some Federal agencies. The following is his statement of the situation:

"Mr. A. heard the case and then it goes into this great building and mills around and come out with a commissioner's name on it but what happens between is a mystery. That is what bothers people. . . . Some of the agencies have developed a hearing officer so he is a man of real stature and real dignity and real ability, accepted by practitioners and the public as a man of fairness and ability and knowledge. Others have treated him as a mere clerk. He is just somebody who sits there, preserves a semblance of order and turns the record on to somebody else. . . . Where the hearing officer is disregarded, then there comes some anonymous group who operates perfectly fairly and properly and in the public interest but they are anonymous. You don't know who they are. The practicing lawyer, the person appearing, is worried. He does not know who is deciding his case and where it is. . . . I do not know of any case in my own professional practice and we have heard of none in our committee meetings where any person was unfairly or unjustly dealt with, but I myself have felt baffled in presenting cases because I knew that the man who was listening to me argue was not the man who was going to decide the case and what I wanted to do was to get my hooks into the fellow who was going to decide the case.”

To give effect to the point of view thus expressed, the Committee in one of its most important recommendations proposes that the powers of hearing officers shall be drastically enlarged beyond the scope which they at present have in any agency. These recommendations are contained in Sections 308 and 309 of the Committee's draft bill, the salient provisions of which read as follows:

"Section 308. (1) In the absence of timely appeal to the agency tribunal, a decision of a hearing commissioner shall without further proceedings become the final decision of the agency.

8. Hearings, 856.
The point is discussed as follows in the Committee's Report:

"In most of the agencies the person who presides is an adviser with no real power to decide. . . . In those agencies where the hearing officer plays, and is known to play, an important part in the disposition of the case, he exercises real authority in keeping the testimony to the relevant and important issues, reducing its volume and sharpening the issues. Where this is not the case, the testimony wanders and the proceeding loses direction. . . . Also, if the hearing officer is not to play an important part in the decision of the case, other persons must. The agency heads cannot read the voluminous records and winnow out the essence of them. Consequently this task must be delegated to subordinates. Competent as these anonymous reviewers or memorandum writers may be, their entrance makes for loss of confidence. Parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to the officer who in the first instance must decide or recommend the decision. In many agencies attorneys rarely exercise the privilege of arguing to the hearing officer. They have no opportunity to argue to the record analysts and reviewers who have not heard the evidence but whose summaries may strongly affect the final result." Report, 45-46.
tribunal, and as such enforceable or reviewable to the same extent and in the same manner as though it had been duly entered by the agency tribunal, . . . except that the agency head may on its own motion direct that a decision of a hearing commissioner be reviewed by it after notice to the parties and within such period of time and in accordance with such rules as it may prescribe. . . .

"Section 309. (1) When an appeal is taken to the agency tribunal from the decision of a hearing commissioner, the appellant shall set forth with particularity each error asserted, and only such questions as are specified by the appellant's petition for review and such portions of the record as are specified in the supporting brief need be considered by the agency. Where the appellant asserts that the hearing commissioner's findings of fact are against the weight of the evidence, the agency may limit its consideration of this ground of appeal to the inquiry whether the portions of the record cited disclose that the findings are clearly against the weight of the evidence. . . ."

The effect of such a provision would obviously be to convert the administrative body itself, sitting as what is described as an "agency tribunal", into essentially an appellate body for the review of the decisions of the hearing officer, either on application by the affected individual or on the agency's own motion. Authority to make the initial decision, as well as to make the initial finding of facts, would thus by statute be vested independently in the hearing officer himself. Relegated in this fashion to a purely appellate position, the agency head or heads would, as the report points out, be relieved from the necessity of acting directly upon the full record, with the consequent elimination of the necessity of calling in the assistance of subordinate and anonymous reviewers and review attorneys. Responsibility for initial decision would be squarely placed upon the identified hearing officer, and for appellate decision on the heads of the agency, constituting the so-called agency tribunal.

Not merely would there thus result an identifiable allocation of responsibility, but there would also result a definite separation of function between the person chargeable, in the first instance, with the task of decision and the head or heads of the agency. A further step in the direction of such separation is involved in the additional recommendations of the Committee with respect to the status of the hearing officer. These recommendations are purportedly designed to secure to that officer a tenure in some degree independent of the agency head. Here again, the recommendations depart widely from any practice which at present prevails and have been subjected to more criticism than has been aimed at any other part of the report.

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The first recommendation is that hearing officers or "commissioners" as they are called in the draft statute, shall be appointed for a definite term of seven years, during which time a hearing commissioner may not be removed except for cause and by a trial board independent of the agency.\textsuperscript{10} Furthermore, the initial designation of a Government employee as a hearing commissioner is not left exclusively with the agency itself. The agency is indeed given a power of nomination, but the power of actual appointment is vested in the so-called "Office of Federal Administrative Procedure", a proposed new body to consist of a Director appointed by the President and confirmed by the Senate, an Associate Justice of the United States Court of Appeals for the District of Columbia, designated by the Chief Justice of that Court, and the Director of the Administrative Office of the United States Courts appointed by the Supreme Court.\textsuperscript{11}

Obviously, the adoption of these recommendations would materially alter the entire relationship which at present exists between hearing officers and the administrative body for which they act. Not merely would they have powers and responsibilities conferred upon them by statute rather than by the agency itself, and protected against interference by the agency, but their tenure would be such as to make them in some degree independent of the agency and free, up to a certain point, from responsibility to it.

In these novel recommendations the Committee was apparently aiming at a single solution for a number of problems which have been increasingly discussed in connection with administrative practices. First of these is the problem, already referred to in connection with the informal procedure, of focusing responsibility at a definite point to which affected individuals can look with certainty. Second is the unsatisfactory present situation under which administrative bodies appear frequently to base their decisions upon recommendations and information supplied to them by employees who have not heard the evidence or participated in the hearing. Finally, there is the important criticism, increasingly voiced in discussions of administrative procedure, that there ought to be a clear separation in administrative procedure between the so-called prosecuting function and the adjudicating function or, in other words, that those persons whose task and interest it has been to build up and make out a case against an individual, or under whose supervision such a case has been built up, ought not to sit in judgment to determine whether on the law and the facts a case has actually been made out. Apparently the Committee was seriously

\textsuperscript{10} Draft Bill, § 302, sub-secs. 5, 6, Report, 196-197.
\textsuperscript{11} Report, 47. Draft Bill, § 302, sub-sec. 3, Report, 196; § 5, sub-secs. 1, 2, Report, 193.
impressed with this criticism and devoted an important and interesting section of their report\textsuperscript{12} to wrestling with it. They evolved the conclusion that such a separation in the form in which it is usually urged is neither practicable nor desirable, but the novel recommendations respecting the hearing officer, which vest him with both a function and a status comparatively independent of the agency itself, seem designed to embody, in part at least, the principle implicit in the criticism in question.

Without at this point expressing any comment upon the feasibility or wisdom of these recommendations of the Committee with respect to the functions and status of hearing officers, one element of significance which they have is that they clearly indicate a conscious or unconscious purpose to assimilate the processes of administrative adjudication more closely in an important respect to adjudication in a court of law. Their aim appears to be to vest the initial determination of questions of fact and law in a deciding officer having a substantially independent position analogous to the judge of a law court. As Mr. Acheson put it in his testimony:

"But the examiner is a free man. He is not a subordinate employee who has to take his orders, and that is the kind of person we want to create."\textsuperscript{13}

And again:

"Under our procedure they would have a hearing commissioner, a man drawing the salary which a Federal Judge drew until a few years ago, a man appointed with very considerable care, a person who has no other duties except to hear cases, who cannot be discharged because they do not like his opinion."\textsuperscript{14}

The obvious intention, in other words, seems to be to vest the power of administrative decision, at least initially, in an official who, like a judge, will have no other duty than to decide on the evidence and the law without regard to "policy", and whose responsibility is his own personal responsibility and not that of the agency itself. The agency, if it undertakes to decide at all, must decide in a purely appellate capacity and on the basis of findings made by the independent adjudicating officer.

\textbf{III}

This tendency of the Committee to conform administrative procedure more closely to legal procedure is further illustrated by another

\begin{itemize}
\item \textsuperscript{12} \textit{Report}, 55-60.
\item \textsuperscript{13} \textit{Hearings}, 819.
\item \textsuperscript{14} \textit{Id.} at 821.
\end{itemize}
important section of their recommendations, namely, those which deal with the making and application of administrative rules and regulations. These recommendations fill a large section of the report and supply the material for one of the four titles into which the draft bill is divided.

The matter of administrative regulations which result from the so-called quasi-legislative activity of administrative bodies has engaged the attention of observers of administrative law for some years. The Committee on Administrative Law of the American Bar Association concerned themselves with it and it formed the subject matter of some of their most controversial recommendations.

It is elementary that statutes entrusted for enforcement to administrative agencies are couched in broad language which the administrative body is expected to fill out and make more definite from time to time, either in the process of its decisions or by the formulation of express rules and regulations. So long as the administrative body has not thus indicated how it will interpret and apply the statute, those who are subject to the statutory provisions are inevitably left in much confusion as to what they may do if they wish to keep within the limits of the law. It has always been a principle of our legal system that the power of Government shall not be exerted against individuals except for acts the illegality of which they had an opportunity to know at the time when the acts were committed. In other words, it has always been regarded as unfair to apply a law without having first given individuals a reasonable chance to know, as far as possible, what the law was in advance. Hence it has been deemed of importance, where the terms of a statute itself are relatively so vague as to supply unsatisfactory information, that the administrative body shall exert itself promptly to give notice of how it will interpret and apply the statute. This was the objective, obviously difficult of attainment, to which the Bar Association committee directed themselves in their recommendations. The admitted difficulty is that, of course, it is impossible to foresee all possible situations in advance, and that an agency may not be able to face the question of how to deal with a particular situation under the statute until the situation has actually arisen. Rules and regulations simply cannot be formulated and published in advance to cover all possible contingencies. Many interpretations of the statute will have to be left to be worked out, like the common law itself, by the decisional process from case to case.

Nevertheless, the Acheson Committee recognized the desirability of having administrative bodies give notice, so far as practical, of the specific interpretations of the statute which they have decided to apply,
either by express regulations embodying such interpretations, or by opinions in particular cases stating the grounds of decision which are to constitute a precedent to be followed in future cases. Mr. Acheson discussed the matter and stated the Committee's point of view in his testimony, as follows:

"When . . . an agency has a perfectly definite and clearly formulated policy for its own cases, for deciding cases, and does decide cases on the basis of it, that should be made public. The public should know it. . . . We are not saying that they should not proceed case by case. . . . If there is no general policy and if you are picking out a policy by taking cases as they come, why, fine. Then you just do not have anything to publish, but what we do say is that when you have created a policy and we know in many cases the agencies have policies which definitely determine how they are going to dispose of matters, . . . then that policy ought to be stated in an opinion. . . . They should not have a policy which guides them, guides all of their officers but about which the public is kept in the dark because you thrash about hopelessly not knowing where you are." 15

Such publication of an administrative agency's interpretations of the law, and of the principles which it determines to follow in applying the law, has not merely the advantage of giving to affected individuals the information to which they are entitled, but is also necessary to inform Congress, as the legislative body, of the constructions which are being placed upon its enactments so that if it so desires it may itself construe those enactments in a different sense. Accordingly, the Committee in its report makes the following recommendation:

"Congress and the public are however entitled to know of the rule-making activities of administrative agencies. The progress of the law which these agencies are developing should be recorded and submitted for information and criticism in such a way as to give an over-all view of what is being done, rather than mere information of isolated instances. Not only new regulations adopted but unaccepted proposals for change in existing regulations or for additions to them, emanating from outside the agencies, are of importance. It has been charged that in the present large aggregate of Federal regulations there are some that cannot be justified. The Committee does not and cannot pass judgment upon this charge. But a means of throwing light upon existing regulations and upon requests for changes or additions is desirable.

"To secure attention for requests for changes in regulations and to provide a report of rule-making activity to Congress, the Committee recommends that each agency be required by statute

15. Id. at 811.
to make an annual report of its rule-making during the preceding year, embracing both the regulations adopted and a summary of the proposals, emanating from outside the agency, that were not acted upon or were rejected. Administrative agencies exercise a delegated power, for the wise use of which they are responsible to the legislature and the people as a whole and also, in a very real sense, to those upon whom their activity directly bears and those members of the legislature who take a special interest in their work. Aside from any question of possible abuse, those interested should know and understand the reasons for administrative determinations, . . . rule-making as well as adjudicatory."

To elicit outside suggestions and criticisms, the draft statute submitted by the Committee contains a provision to the effect that, "any person may file with an agency a petition requesting the promulgation or amendment of a rule in which the petitioner has an interest." 17

The thought behind these suggestions and recommendations of the Committee with respect to administrative rule-making seems to be that in the process of administrative adjudication, individuals should be entitled, substantially as in a law court, to the determination of their cases, so far as possible, in accordance with known and established rules and principles rather than by the mere ad hoc "discretion" of the agency.

Here again, there seems to emerge on the part of the Committee an opinion that the procedure of administrative adjudication should consist, like legal procedure, of applying to facts, rules and principles worked out in advance by a process of deliberation, and duly formulated and published. Adjudication proceeding along such lines would eliminate, so far as humanly possible, the type of administrative action which consists of applying to individuals the mere day-to-day arbitrary preferences of government, political or otherwise. It would make administrative adjudication, adjudication in a true and proper sense, and that is apparently what the Committee has in mind.

IV

It thus appears that in their two principal groups of recommendations, namely, those relating to formal administrative hearings and those relating to administrative rules and regulations, the objective of the Acheson Committee is to assimilate administrative adjudication more closely to judicial adjudication. This prevailing objective has a definite bearing upon a subject which the majority of the Com-

mittee avoided, perhaps rather ostentatiously, in their draft statute and which formed one of the principal grounds of difference between the majority and the minority members of the Committee, namely, the subject of judicial review.

Judicial review has been the battleground of the hottest controversies in the field of administrative law for many years. No doubt, it was in part the Committee's policy of avoiding deep-seated and fundamental controversies which led the majority to avoid this issue so conspicuously. However, if one reads between the lines of their report, the impression seems inescapable that the most important recommendations of the Committee which have already been reviewed were made with the question of judicial review definitely in mind. In other words, those recommendations appear to have been shaped in part at least in order to avoid the necessity of dealing with judicial review. This impression is confirmed by a sentence from the testimony of Professor Shulman, one of the members of the Committee, before the Senate sub-committee. Professor Shulman said:

"The necessity of judicial review becomes less and less important the more we improve the process below in the administrative tribunal so that we have confidence in its determinations." 18

The same strategy is apparent from the comments which it elicited on the part of Chief Justice Groner of the Court of Appeals for the District of Columbia, another member of the Committee, both in the additional views and recommendations which he filed as a supplement to the Committee's report and in his subsequent testimony before the Senate Sub-committee. Judge Groner's views are of special interest as bringing into focus the issue which apparently caused the Committee the greatest difficulty and upon which the majority and minority ultimately split. Judge Groner's position was that the present law with respect to judicial review, and more specifically with respect to the conclusiveness of administrative findings of fact, if supported by substantial evidence, is satisfactory or would be satisfactory, provided that in the administrative procedure there is adequate separation between the prosecuting functions, on the one hand, and the adjudicating functions, on the other. He felt very strongly, however, that under existing administrative practice, such a proper separation does not exist. His principal interest, therefore, in the recommendations of the Committee was to provide for such separation. If, however, for any reason, separation of the functions of prosecutor and judge within

the administrative procedure would be impractical or ineffective, then he took the position that the decision of the administrative officer or tribunal, including findings of fact, should be subject to full review, and went on to say:

"Judicial review of administrative decisions might be expanded to include a review of the findings in the light of the weight of the evidence, just as a trial judge may set aside a jury's verdict on this ground." 19

It was no doubt to meet the point of view thus held and expressed by Judge Groner that the majority report went as far as it did in the recommendations, reviewed above, concerning the powers and status of hearing commissioners. The majority, in other words, sought to anticipate and overcome the argument in favor of broadening the scope of judicial review by creating a higher degree of independence for the subordinate officers charged, in the first instance, with deciding cases and finding the facts. The minority members of the Committee dissented on the ground that this attempt, in the form recommended by the majority, was not successful or adequate. Their views are clearly expressed in the testimony of one of their number, Mr. Arthur T. Vanderbilt, at the Senate hearings. Mr. Vanderbilt pointed out that he and his colleagues had the authority of the President’s Committee on Administrative Management, sometimes known as the Brownlow Committee, for the proposition that the judicial work incidental to administrative regulation should be separated from the policy-making functions of administrative agencies, and quoted from that report the following language:

"Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness, it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself." 20

Mr. Vanderbilt and his colleagues were decidedly of the opinion that the majority recommendations with respect to hearing commis-

20. Hearings, 1309.
vioners were not adequate to establish the kind and degree of separation which they felt to be necessary. The minority believed that the hearing commissioners under the proposed recommendations would not and could not be in any proper sense independent. They believed that the proposed separation would be a merely formal and colorable one. Mr. Vanderbilt continues:

"It is therefore no answer in attempting to justify internal separation [within the agency] to say that the men who make investigations and initiate proceedings and conduct the prosecution before the commission, are different persons from the ones who do the deciding, because the plain fact is, in the commissions and agencies as now organized everyone is subject to the few men who are the commissioners or the agency heads. . . . In law and in fact everyone in the agency is subject to them. In fact, the majority of the committee itself admits that its argument does not meet the situation. . . . They go on . . . to express the hope that it will be possible to insulate the hearing commissioner from the investigator, the prosecutor, and the advocate, within the agency. The difficulty with that arrangement, as a matter of every-day fact, is that the investigator and the prosecutor, as well as the hearing commissioner, are working for the same commissioners at the top and are subject to the same organizational, legal, and psychological pressures. They are all parts of the same group, and subject to the dictates of group loyalty." 21

Accordingly, the minority, while accepting with certain modifications the majority proposals for hearing commissioners, felt it necessary to go farther and went on record as advocating the availability of a somewhat broader judicial review on questions of fact than that which is in many instances now accorded. They point out in their report:

"The present scope of judicial review is subject to question in view of one of the prevalent interpretations of the 'substantial evidence' rule set forth as a measure of judicial review in many important statutes. Under this interpretation, if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate. . . . Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions clearly contrary to the

21. Id. at 1311-1312.
manifest weight of the evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error.”

Accordingly, the minority, in the draft bill which they annexed to their report, recommended a clause providing that administrative orders shall be set aside “where findings, inferences, or conclusions of fact” were “unsupported upon the whole record by substantial evidence.”

Dean Stason in his testimony before the Senate Committee explained that there was no intention on the part of the minority of imposing upon the courts the task of weighing the testimony, but that the purpose was merely to provide a “scope of review up to the level that now prevails in connection with the direction of verdicts in jury trials, and up to the level that has been accepted in a good many judicial decisions in which the substantial evidence rule has been equated to the direction of verdicts in jury cases.”

Mr. Vanderbilt said that he looked forward to the time, after the newer agencies had settled down and become established, when it would be possible to set up for such agencies a truly independent administrative reviewing board occupying the same relation to the agency that the Board of Tax Appeals holds with respect to the Bureau of Internal Revenue. After such an independent adjudicating body should be established, it would then no longer be necessary to insist on the same broad scope of judicial review which the minority regarded as necessary while the adjudicating functions remained completely located within the agency itself. It would be for Congress to determine in the case of each agency when the time had come to establish the outside

22. REPORT, 210-211.
23. Minority Draft Bill, § 311(e), REPORT, 246.
24. Hearings, 1316.
adjudicating body, and this would be done by separate statutes. The complete separation incidental to the establishment of such outside bodies could not be done by any blanket bill.\textsuperscript{25}

This position was substantially concurred in by Chief Justice Groner, who said in the course of his testimony:

"Assuming that it is impossible to separate in the different agencies the function of prosecutor and judge, and that it is likewise impossible to establish such a body comparable to the Board of Tax Appeals, then the hearing officer . . . should be constituted in such a way as to insure his complete independence. If that can be done, and if—still following the provisions of the [majority's bill]—the decision of the hearing officer is subject to review by the agency so that, however, unbiased the hearing officer may be, the original prosecutor is still the original judge, that is to say, that the agency itself retains the power to set aside findings of fact and decisions of the hearing officer, then in every case in which the agency or commission sets aside and annuls the decisions of the hearing commissioner or his findings of fact, the difference between them should in every case, on judicial review, be subject to be weighted [weighed?] by the court."\textsuperscript{26}

Judge Groner thought that the majority recommendations with respect to the hearing officer were totally inadequate to provide him with a status that could in any true sense be called independent. He said at the hearings:

"I insist on the accepted theory that these commissioners are intended to be completely independent, that the provisions put into the bill and urged by the majority of the committee that these hearing officers shall be a part of the agency, that they shall be paid by the agency, that they shall be called and put into operation in the hearing of cases by the agency heads or head, that they shall be subject to reappointment or renomination by the agency, that the agency shall, in the first instance—and this I think is the vital point—nominate them to this commission which shall appoint them only on such nomination, is absolutely destructive of the very principle which is sought to be attained."\textsuperscript{27}

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In the light of these expressions by the minority, it seems necessary to regard the more important of the majority's recommendations as in a measure designed to be a deliberate substitute for the proposals in favor of broader judicial review which have been pressed with increas-

\textsuperscript{25} Id. at 1314-1323.
\textsuperscript{26} Id. at 1364-1365.
\textsuperscript{27} Id. at 1365-1366.
ing frequency in recent years, and which culminated in the Walter-Logan Bill. From this standpoint, the Committee's recommendations with respect to the powers and status of "hearing commissioners" invite discussion both as to their practical feasibility and as to the likelihood that they would accomplish the supposedly intended result.

It is first of all to be noted that the recommendations, while contemplating an independent judicial stage at the administrative level of the proceedings, locate this stage differently from prior proposals which have been put forward for separating the judicial from the policy-making and more purely administrative functions within the administrative process. Prior proposals have always followed the line referred to by Mr. Vanderbilt and Judge Groner, and have contemplated an independent administrative adjudication by a body like the Board of Tax Appeals, subsequent to and following after the more purely administrative action of the agency, which is allotted the initial place in the procedure. In other words, under these prior proposals the purely administrative action would come first, and would then be reviewed, on the facts as well as on the law, by the independent administrative adjudicating body. The Acheson Committee's proposals reverse this order. They propose an initial determination in the first instance by the supposedly independent hearing commissioner, which is then subject to review and reversal on the facts by the policy-determining agency itself. Thus, the decisions of the supposedly independent judicial officer might be reversed by the agency if it did not like the result. The independent determination would in that sense be subject to agency-control, instead of the agency being subject to control by the independent determination. Where the agency did in fact reverse the hearing commissioner, then it would be the agency's own findings of fact which would come before the courts on judicial review, although apparently the party seeking review might also include in the record such findings by the hearing commissioner as he chose to rely on. In such a case, the review court would be presented with a novel problem in the review of facts for which the Committee's bill apparently provides no solution. What weight, if any, would the reviewing court be entitled to give to the hearing commissioner's findings which had been overruled by contrary findings of the agency? Under the present law of judicial review, the courts would have to sustain the agency-finding if supported by any evidence that could be called substantial, although both the hearing commissioner in the first instance, and the reviewing court itself might feel that, looking at the whole record, the vast preponderance of evidence was the other way. Under these conditions, what value would findings by the independent
hearing commissioner have? The Committee does not tell us, but the answer is apparently not much.

Thus, the Committee's recommendations in locating the independent quasi-judicial officer's function before, rather than after, action by the agency would appear to have the effect of largely doing away with the independence of his findings in any real sense. Furthermore, as pointed out by Mr. Vanderbilt and Judge Groner, the nature of the commissioner's appointment, tenure and conditions of work, as proposed by the Committee, would render independence on his part extremely unlikely. He could not be appointed to the important, comfortable and well-paid job which is proposed to be created, without first being nominated by the agency itself to the appointing body. He would presumably be assigned by the agency to the cases in which he would sit. At the end of his seven years' term, he would always be subject to be dropped back into a less important and less well-paid job by the failure of the agency to renominate him if it was not satisfied with the course of his decisions. Finally, his working days would be spent amid the surroundings of the agency, in contact with, and in the company of, its employes, and subject to all the resulting "organizational and psychological pressures," as Mr. Vanderbilt describes them.

What would be the value of the "independence" of such an official from the standpoint of diminishing the need for judicial review? Hardly very much, it would seem; and yet, following the line which the majority of the Committee mapped out for themselves, it is difficult to see how they could have vested their proposed hearing commissioners with any greater or more substantial degree of independence consistently with the effective functioning of the administrative agencies, and with their ability to perform the tasks laid upon them by statute. As a practical matter, it would seem to be almost inevitable that the initial stage in the administrative process, the original or first determination, should be primarily administrative, giving full effect, in the first instance, to the policy, or perhaps what may even be called the bias, of the agency in applying its interpretation of the law. Of course, this is not to say that the hearing officer who presides at this original stage of the proceedings should not act fairly, permitting the introduction of all relevant evidence, and listening with attention to the arguments addressed to him so that a record can be made upon which subsequent stages of the proceedings can be based. He can and should be expected to show this degree of independence. Nonetheless in making his findings, it is almost inevitable that the inferences drawn from the evidence, and the evidence accorded determinative weight, will be the infer-
ences and the evidence which support what the agency is trying to do. If there is to be correction it must come later. If the inferences and the evidence are to be filtered through a dispassionate glass, if conclusions are to be drawn which are not dictated by the desire to further the agency’s policy without regard to individual rights, then it would seem that the process of filtration and of drawing conclusions must necessarily take place somewhere else than within the agency. If this is true, the adoption of the Committee’s recommendations would have slight, if any, effect in achieving the objective which judicial review exists to accomplish, and there would at the same time be introduced into the administrative machinery a novel, cumbersome and expensive element resulting in no correspondingly important advantage.

This is again not to say that the initial stage of the administrative process should not be in the hands of able and responsible trial examiners who are given a real responsibility for making decisions and findings, in the first instance. Of course, it should be. There should be definite provision of law that where a hearing is conducted not before the agency itself, but before an examiner, the examiner should be required, as in the case of the Interstate Commerce Commission, to make and publish a proposed report which becomes the basis for subsequent proceedings before the agency. Such a statutory requirement is highly desirable, but it does not in any respect touch the difficulties which are sought to be remedied by the demand for judicial review.

In other words, the elaborate recommendations of the Acheson Committee respecting quasi-judicial administrative hearings and respecting the establishing of the novel institution of hearing commissioners, however valuable they may possibly be for other reasons, would not seem to contribute any substantial suggestion with respect to the problem of judicial review. That problem remains essentially where it was before. It is a problem which demands to be faced, and it is unfortunate that the labors of the Committee majority should have thrown no additional light upon it.

In this respect, the minority of the Committee have been more helpful. Their contribution is twofold. They are apparently willing that where there exists outside of an agency an independent reviewing board, like the Board of Tax Appeals, the findings of fact by such a reviewing body shall be practically conclusive. This at least seems to be the position of Judge Groner and Mr. Vanderbilt from their testimony. However, where no such independent review is available, they believe that the present scope of review of administrative determinations of fact should be sufficiently broadened to enable the reviewing court, not to balance the evidence for itself, but to look at the whole
record in order to determine whether the evidence in support of the administrative findings is really substantial in the light of the rest of the evidence. Such a clarification and definition of the so-called "substantial evidence rule" seem desirable and were suggested by the present writer in a paper presented at the Institute of Administrative Law held in connection with the 1940 meeting of the American Bar Association and subsequently published in the Minnesota Law Review. It does not seem that such a proposal can properly be objected to by any agency which really desires to be fair, since no evidence can be said to be substantial which is in fact clearly negatived by impressive evidence elsewhere in the record. Such a clarification of the "substantial evidence rule" would supply a needed safeguard against those instances where an administrative body is so eager to carry out a policy that it is unwilling to let facts stand in its way. There are such instances inevitably, and there are bound to be more, unless the possibility of reversal in review proceedings hangs over the agency heads. It is no doubt important that the public policies of government should be carried out, but the time has hardly come for us to forget Dryden's classic remark about Sir Matthew Hale, that in the eyes of that great Judge, "the causes of the Crown were always suspicious when the privileges of subjects were concerned."

There seems to be no difficulty about making such a legislative clarification of the substantial evidence rule applicable to administrative findings of fact generally. It is, of course, true, as so often pointed out, that the various kinds and fields of administrative action are so different as frequently to make uniform legal requirements unwise. But this argument can hardly have application to a matter so simple and fundamental as the necessity that findings should be founded upon facts.

Mr. John Foster Dulles, in his interesting review of the Acheson Committee's report in last April's issue of the Columbia Law Review, suggested the one point of caution that needs to be kept in mind. He there very properly emphasized the need for protecting in review proceedings the legitimate discretionary power of administrative agencies within their special field of technical competence. The courts in review proceedings should be careful not to permit themselves, under the guise of reviewing inferences from facts, to ignore the rightful power of a technical agency to draw the inferences which

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29. Dryden, PROSE WORKS (Malone ed. 1800) 156.
their specialized competence entitles them to draw. This point would seem to be covered by a proviso in the draft bill submitted by the Committee minority, to the effect that in the course of judicial review "due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency, as well as the discretionary authority conferred upon it." Such a mandate to the reviewing court might be expected to accomplish what Mr. Dulles had in mind.

When all is said and done, the most practical present approach to the pressing problems presented by the growth of the administrative process on its formal quasi-judicial side, would appear to lie through the enactment of a comparatively simple statute which would, in the first instance, require proposed reports from trial examiners and would, secondly, adopt some such clarification of the substantial evidence rule in judicial review proceedings as is suggested by the Committee minority.

In the meanwhile, the labors of the Acheson Committee have resulted in a vast amount of detailed information respecting the different procedures of different administrative agencies of the federal government, which is of the greatest possible value in bringing to light conditions that can be corrected without legislation and in suggesting to the agencies themselves the possibility and need for such correction. The Committee's recommendation that a permanent organization to be known as the "Office of Administrative Procedure" shall be set up to carry on its work in this field is perhaps the most fruitful item in its report.