

competent personnel are retained without the power to remove them.⁴⁴ It would seem that the court should be cautious in interfering with the internal administration of another department.⁴⁵

A divergence of view respecting the statute is easily understandable in view of the conflicting phraseology. Until that situation is remedied it would seem preferable to attribute to the legislature an intent to secure a rational division of functions between the administrative agency and the judiciary. It is believed that the method and scope of review suggested in this discussion would attain that objective.

EFFECT OF THE TAFT-HARTLEY AND ADMINISTRATIVE PROCEDURE ACTS ON SCOPE OF REVIEW OF ADMINISTRATIVE FINDINGS

In granting enforcement of an NLRB order the Second Circuit rejected the contention that the scope of judicial review of the Board's findings of fact had been broadened by the Taft-Hartley and Administrative Procedure Acts.¹ Judge Learned Hand pointed out that had this been contemplated Congress would not have adhered to the old formula that administrative findings of fact were to be sustained if supported by substantial evidence. He concluded that Congress had intended merely to codify previous law. Certiorari was granted to resolve a conflict with a contrary decision of the Sixth Circuit.²

In *Universal Camera Co. v. NLRB*,³ the Supreme Court acknowledged that the scope of review under the Wagner Act originally extended to an examination of the record to determine whether the Board's findings of fact were supported by substantial evidence such as a reasonable mind might accept as adequate to sustain a conclusion.⁴ The Court felt, however, that judicial

44. See HART, AN INTRODUCTION TO ADMINISTRATIVE LAW 111 (2d ed. 1950). The author concludes that in cases involving the internal administration of governmental organizations, the courts will apply rules of private law only to the extent that detriment or inefficiency in the agency's performance of its function will not result. GOONNOW, ADMINISTRATION LAW IN THE UNITED STATES (1900), aptly labeled this factor as the "official relation."

45. *City of Gary v. Yaksich*, 90 N.E.2d 509, 511 (Ind. 1950), saying "In proceedings for removal or discharge of a policeman, the protection of the public is a matter of paramount importance, exceeding perhaps the individual interests concerned." See DICKINSON, ADMINISTRATIVE JUSTICE AND SUPREMACY OF LAW 265 (1927).

1. *Universal Camera Corp. v. NLRB*, 179 F.2d 749 (2d Cir. 1950).

2. *Pittsburg S.S. Co. v. NLRB*, 180 F.2d 731 (6th Cir. 1950), *aff'd*, 71 Sup. Ct. 453 (1951).

3. 71 Sup. Ct. 456 (1951).

4. The Wagner Act provided: "The findings of the Board as to the facts, if supported by evidence shall be conclusive." 48 STAT. 926 (1934), *as amended*, 29 U.S.C. § 160(e) (1946). However, in *Washington, V. & M. Coach Co. v. NLRB*, 301 U.S. 142 (1937), the Court interpreted "evidence" to mean "substantial evidence." In *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), the Court further elaborated the rule, laying

deference to the expertise of administrative agencies—manifested by Supreme Court opinions—had gradually led some tribunals to regard narrowly their function in reviewing agency findings.⁵ These courts limited review to an inspection of only those portions of the record supporting the Board's order, for the sole purpose of ascertaining whether these excerpts, standing alone, substantiated the findings.⁶

Relying on Congress' apparent adoption of the minority views of the Attorney General's Committee⁷ on Administrative Procedure which recommended general legislation on the subject of scope of review, and emphasizing the assimilation into the APA of this group's proposal that review be "on the whole record," the Court held that Congress had "expressed a mood" that

down the standard enunciated in the text. Stated another way, the evidence "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

5. *Universal Camera v. NLRB*, 71 Sup. Ct. 456, 459 (1951).

6. The Court cited *NLRB v. Waterman Steamship Co.*, 309 U.S. 206 (1939), and *NLRB v. Bradford Dyeing Ass'n*, 310 U. S. 318 (1939). In each opinion particular attention was focused on excerpts from the record tending to substantiate the fact findings of the board with no mention of conflicting portions. These cases were prominently singled out for criticism by Dean Stason as probable examples of a "modified scintilla rule"—*i.e.*, the court looks only to one side of the record and is satisfied with discovery of barely more than a scintilla of evidence in support of the findings. Hearings before Subcommittee of the Committee on the Judiciary on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess. 1351 (1941) (hereafter referred to as Sub-committee Hearings); Stason, *Substantial Evidence in Administrative Law*, 89 U. OF PA. L. REV. 1026, 1049 (1941). However, Stason was careful to acknowledge that the Court's failure to point specifically to conflicting portions of the record did not necessarily mean that it had not considered them. Later, in Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A.J. 434, 515 (1947), the same cases are cited more emphatically as illustrations of the courts' failure to look at both sides of the record in reviewing findings of fact. Yet, Scanlan, *Judicial Review Under the Administrative Procedure Act*, 23 NOTRE DAME LAW. 501 (1948), insists that *Waterman* and *Bradford*, when read in connection with the records, do not appear at all in that light. And Shine, *Administrative Procedure Act: Judicial Review "Hotchpot"?*, 36 GEO. L.J. 16, 30 (1947), contends that these two cases must be strangely read to justify Dickinson's conclusion that the Supreme Court failed to look at evidence on both sides of the record, citing particularly the following language in *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1939): "We have scrutinized the entire record."

However, Mr. Justice Black, in Oral Argument, *Universal Camera Co. v. NLRB*, Case No. 40, 35, 36 (1950), remarked: "As far as I am concerned, if I looked at the record and found some evidence of a witness who was there and who was sworn and who said that he saw this happen, that made out a case so far as substantial evidence was concerned. . . . It wasn't my business to see whether somebody had successfully affected his credibility." Mr. Justice Jackson indicated his concurrence in this view. A similar position was taken by Mr. Justice Frankfurter in Oral Argument, *NLRB v. Pittsburg S. S. Co.*, Case No. 42, 32 (1950). But it by no means follows that the courts of appeals, which have the primary responsibility for initially reviewing administrative decisions, also generally entertained this view, prior to the *Universal* case. The contrary is strongly suggested by the numerous cases which recite specifically that the entire record has been examined. See note 23 *infra*.

7. REP. ATT'Y GEN. COMM. AD. PROC. 209 (1941) (hereafter referred to as FINAL REPORT).

courts should thereafter scrutinize more thoroughly the entire record.⁸ Under the APA the question of substantiality of the supporting evidence must be decided only after taking into account those portions of the record which detract from its weight;⁹ and the Court perceived an identity of purpose as to the

8. Another element of the legislative history upon which Mr. Justice Frankfurter placed considerable reliance was the presence of references to orders based on "suspicion, surmise, implications or plainly incredible evidence" in the committee reports. SEN. DOC. No. 248, 79th Cong., 2d Sess. 216, 279 (1946).

Justice Frankfurter candidly admitted that the legislative history of the APA is conflicting. And it should be recognized that his excursion into the statute's origins was at best selective. An equally strong case can be made for the contention that the underlying theme of the APA, as it relates to scope of review, was one of codification and not change. See *e.g.*, Comment, 56 YALE L.J. 670, 689 (1947). And Justice Frankfurter's inference from Congress' use of the formula proposed by the Minority Report is probably too broad. The minority wanted two things: codification of the prevailing scope of review and prevention of any resort to a narrower review. The majority opposed any legislative change. The fact that the first minority recommendation was adopted does not support the conclusion that Congress has created a new standard of review. See Scanlan, *supra* note 6, at 544, 545: Note that Dean Stason, who testified extensively in the 1941 Senate Judiciary Committee hearings, stated categorically that the formula proposed by the minority group purported to clarify and not to increase the scope of review. Subcommittee Hearings, *supra* note 6, at 1351. This view was reiterated in 1945 in the House committee hearings by Mr. Carl McFarland, another member of the minority. SEN. DOC. No. 248, 79th Cong., 2d Sess. 86 (1946). Attorney General Clark's interpretation of the bill, appended to the Senate Subcommittee Report, also stated that the review sections intended only to state the law as it had previously existed. SEN. DOC. No. 248, 79th Cong., 2d Sess. 230 (1946). For a lucid, persuasive analysis of the legislative history arriving at the conclusion that the scope of review provisions are merely codification of existing law, see Scanlan, *supra* note 6. Other commentators in accord with Scanlan's position include: Stason, *supra* note 6; Shine, *supra* note 6; Mr. Welch Pogue, General Counsel, Civil Aeronautics Board, Subcommittee Hearings, *supra* note 6, at 665; Davis, *Scope of Review of Federal Administrative Action*, 50 COL. L. REV. 559 (1950); Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368 (1941); Attorney General's Manual on the Administrative Procedure Act 108 (U.S. Dep't of Justice, 1947). Those who thought a change was intended include: Cohen, *Legislative Injustice and the Supremacy "of Law"*, 26 NEB. L. REV. 323 (1947); Mr. Allen Moore, Subcommittee Hearings, *supra* note 6, at 325; Blachly and Oatman, *Sabotage of Administrative Process*, 6 PUB. ADMIN. REV. 213 (1946); and Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A.J. 434 (1947).

Since Justice Frankfurter's contention—that the underlying theme of the Act communicates the idea of change—is softened by a later concession that this change will not require every court to alter its practice, it is of greater practical consequence to investigate his assumption that some courts will be forced to do so than to quibble with his general conclusion that the Act is something more than a codification.

9. Some writers have experienced difficulty in distinguishing judgment of substantiality in a comparative sense from judgment on the weight of the evidence. See, *e.g.*, Shine, *supra* note 6, at 30; Nathanson, *supra* note 8, at 417. At least one observer sees in the "whole record" test a duty to consider the record in its entirety for the purpose of weighing the conflicting testimony. Cohen, *supra* note 8, at 342, 343. Perhaps DICKINSON, NEW YORK UNIVERSITY INSTITUTE ON ADMINISTRATIVE PROCEDURE ACT 594 (1947), has formulated the most precise expression of the actual operation of the "whole record" test: "Substantial" has an element of the comparative about it. Something that is very small may be substantial compared with nothing on the other side. Something two inches long may not be very substantial compared with something one hundred inches long on the other side. I do not think the whole record formula requires the court to balance the evidence where it begins to get close . . . if there is a lot of evidence on one side and a lot on the other side, then the appropriate and sound application of the

desirable scope of review underlying this statute and the Taft-Hartley Act.¹⁰

In addition to enjoining upon appellate courts the necessity of reviewing the whole record, the Court thought the overall tenor of the two Acts unmistakably conveys the impression that Congress intended reviewing courts henceforth to assume a broader responsibility for the reasonableness and fairness of NLRB decisions than some courts have undertaken in the past. It was acknowledged that the legislative history is conflicting on the question whether codification or change in the scope of review was intended. It was also conceded that had a drastic change been desired the phrase "substantial evidence" would not have been retained. However, Mr. Justice Frankfurter insisted that although the intended change is so elusive as to defy precise articulation, it can not for this reason be ignored.¹¹

The assumption by federal and state governments of numerous additional functions in recent years and the resulting necessity of delegating many of these duties to administrative agencies have created a problem similar to that which has long taxed the resourcefulness of judges, lawyers, and political scientists in other contexts. To what extent should the judiciary act as a check on coordinate branches of government, in this case administrative agencies? The *Universal Camera* case attempted to solve only one complicated phase of this problem, the scope of judicial review of findings of fact.¹² If the judicial branch attempts to determine whether the agency's findings are supported by a preponderance of all the evidence in the record, the administrative body is transformed into an instrumentality for the gathering of

substantial evidence rule is to uphold the administrative body. But if the administrative body has only a little bit of evidence compared with a good deal of evidence on the other side, then you can argue that that is not substantial and I think that is the way the argument would have to run."

While advocates of this "substantial evidence on the whole record" test vigorously disclaim any desire to require the reviewing court to reweigh the evidence, *e.g.*, see the minority views of the Final Report, *supra* note 7, at 209, it seems clear that such a rule does require a weighing in a rough, approximate sense.

10. Justice Frankfurter may have been influenced in this decision by his conviction that the APA intended some change in the scope of review. Had he reached the opposite conclusion, it is by no means certain that he would have felt compelled to find such a close identity of purpose between the two acts. Although one of the authors of the review provision of Taft-Hartley made the unequivocal statement in conference committee that it was not the intent of the Senate to broaden the test of judicial review stated by the Administrative Procedure Act, 43 CONG. REC. 5289 (May 13, 1947), a contrary inference can be drawn from the committee reports. See note 41 *infra*.

11. Such a nebulous admonition will do little to clarify the scope of review of findings of fact for circuit judges. Mr. Chester Lane, General Counsel, Securities and Exchange Commission, Subcommittee Hearings, note 6 *supra*, at 325, emphasized the risk involved in laying down an "unfamiliar standard of review, the only clear significance of which is that it is intended to change the existing standard in some undefined way."

12. For a discussion of other problems involved in scope of review of administrative findings, including the complexities surrounding mixed questions of law and fact, see Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944); Davis, *supra* note 8.

evidence and its presentation to the courts for determination.¹³ This role largely defeats the purpose of the agency and ignores the high degree of specialization and competence which it presumably brings to bear upon problems within its sphere of activity.¹⁴ At the other extreme, if the court approves administrative findings supported by a mere scintilla of evidence or accords absolute finality to these findings it shirks a responsibility reposed in the judicial branch under a system based on checks and balances, and thus encourages arbitrary exercise of administrative functions.¹⁵

In an early attempt to solve this problem Congress provided that the Federal Trade Commission's findings of fact,¹⁶ if supported by substantial evidence, should be conclusive. This verbal formula, though it has enjoyed little uniformity in application,¹⁷ had prior to enactment of the APA been adopted as the standard of review of the findings of nearly all federal agencies.¹⁸ At this time much criticism was directed at alleged abuses in the

13. FINAL REPORT, *supra* note 7, at 91.

14. Blachly and Oatman, *supra* note 8, at 226, seriously contend that this will be the result of the APA, as apparently does Cohen, *supra* note 8, at 343. However, until the present decision, litigation under the Act has failed to confirm these fears and it has been readily admitted by the proponents of the legislation that no such result was either desired or intended. See note 8 *infra*.

15. Stason, *supra* note 6, contains a good discussion of the separation of powers implications of the substantial evidence rule. It should not be inferred that the principle of checks and balances requires that all administrative findings be reviewable by the judicial branch. Where statute so provides, review may be strictly limited or even curtailed. For example, decisions of the Veterans' Administration in benefit cases are not reviewable by the courts. 54 STAT. 1197 (1940), 38 U.S.C. § 11a-2 (1946). Judge Groner, a member of the Attorney General's Committee, testifying before the Senate Judiciary Committee in 1941, proposed that administrative findings of fact should be accorded absolute finality if a method could be devised to effect a complete separation between the functions of prosecuting and deciding. Subcommittee Hearings, *supra* note 6, at 1364. Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A.J. 434 (1947), expresses the view that numerous courts in effect had been applying the scintilla rule before the adoption of the APA and that to correct this situation was one of the major purposes of Congress in enacting review provisions.

16. 38 STAT. 719 (1914), as amended, 15 U.S.C. 45(c) (1946). Although the word "substantial" did not appear in this statute, the courts have consistently construed such provisions as requiring substantial evidence. See, e.g., Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

17. The words "substantial evidence" standing alone have no precise connotation and might conceivably denote anything ranging from the scintilla rule to a thorough reweighing of all the evidence for the purpose of making new findings of fact. Moreover, the applications of the test have varied to almost this extent. See Stason, *supra* note 6, for a classification and extensive discussion of these various applications. His conclusion: when, after an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man acting reasonably might have reached the same decision, the administrative findings should be accorded finality. This is the interpretation which he urged before the Senate Judiciary Committee in its 1941 hearings, maintaining that it constituted no change but only a codification of existing law.

18. FINAL REPORT, *supra* note 7, at 91, 92.

The substantial evidence rule has been equated with the rule placing a duty on the court to sustain a motion for a new trial in jury cases and the rule requiring direction of a verdict. Stason, Subcommittee Hearings, *supra* note 6, at 1351; BENJAMIN, ADMINIS-

courts' application of the substantial evidence test to administrative findings.¹⁹ The combination of prosecutive and deciding functions in a single agency early engendered a lack of confidence in agency proceedings²⁰ and heightened the intensity of appeals for a more thorough review. The American Bar Association, one of the original proponents of broader review, first advocated a measure which would have established the "clearly erroneous" test, the standard applied by appellate courts in reviewing findings of trial judges.²¹ This attempt was unsuccessful but the ABA was later instrumental in inducing

TRATIVE ADJUDICATION IN THE STATE OF NEW YORK 335 (1942). The latter opposes equation of the substantial evidence rule with the test by means of which a court *may* set aside a jury verdict. Although this test, as applied to a jury verdict, does not result in substitution of the court's judgment, such substitution might result from its use as a standard of review of administrative findings, due to the fundamental differences in the two types of procedures. When a court refuses to uphold an agency order because unsupported by the evidence it is remanded to the same administrative tribunal for further consideration. This reversal may well influence subsequent findings by the board. The substantial evidence test has also been analogized to motion for judgment *n.o.v.*, *Eastern Coal Corp. v. NLRB*, 176 F.2d 131 (4th Cir. 1949).

In attempting to define the substantial evidence test it no longer seems useful to analogize to the jury verdict rule. An appellate court's review of a jury's conclusion, where factual determinations are involved, is fraught with none of the variables attending review of administrative findings of fact. See note 29 *infra* and accompanying text.

If an analogy is desired, one which is perhaps more apt because it may readily be accommodated to those factors which *supra* affect scope of review of administrative findings is that suggested by Nathanson, *supra* note 8, at 417. He observes that the substantial evidence test possibly "takes us back to that curious split personality—the judge who must decide not what he thinks, but what he thinks a reasonable man might have thought." Stason, Subcommittee Hearings, *supra* note 6, at 1356, also makes use of the reasonable man test in this context, observing that substantial evidence is lacking when, on the basis of the entire record, a reasonable man, acting reasonably, could not have reached the result reached by the agency.

19. Many of the more vehement objections to administrative procedures, including those directed at scope of review, may be attributed not to the particular practices condemned but rather to dislike for the type of regulation the agency imposes. Scanlan, *supra* note 6, at 537. Nevertheless, there remain a number of cases in which it appears that the court has severely restricted its function of review by looking only to one side of the record. *E.g.*, *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1939); *NLRB v. Waterman S. S. Co.*, 309 U.S. 296 (1939); *NLRB v. Standard Oil Co.*, 138 F.2d 885, 887 (2d Cir. 1943). As Justice Frankfurter indicated in *Universal Camera Co. v. NLRB*, 71 Sup. Ct. 456 (1951), this was probably often due to "unintended intimations of judicial phrasing."

20. For a general discussion, see 61 A.B.A. Rep. 720, reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 423 (1938).

21. Although a few courts have used the words "clearly erroneous" to describe the scope of their review over administrative findings of fact, *e.g.*, *NLRB v. Caroline Mills*, 167 F.2d 212 (5th Cir. 1948), it is widely recognized that the "clearly erroneous" test applied by appellate courts to the findings of a trial judge is somewhat broader than the substantial evidence rule applied to administrative findings and jury verdicts, which are accorded a greater degree of finality by the reviewing court. Stern, *supra* note 12, at 78.

Congress to pass the Administrative Procedure Act embodying the judicial review provisions in controversy.²²

It is interesting to note that of the six circuits which had held, prior to the *Camera* case, that the APA and the Taft-Hartley Act had made no material change in the scope of judicial review of board orders, the opinions of only one circuit fail to reveal explicitly that the court had been interpreting the old substantial evidence rule to require scrutiny of the entire record.²³ This, coupled with the fact that reversal of the *Camera* decision was based on grounds other than the Second Circuit's failure to review the whole record,²⁴ suggests that the value of Mr. Justice Frankfurter's opinion as a workable criterion for future guidance of circuit judges is minimal. Nevertheless this case apparently does enlarge—although perhaps undefinably—the sphere of permissible judicial intervention in the process of administrative fact determination. It may encourage a hostile court of appeals to invade the province of administrative finality in a way previously unwarranted by the substantial evidence test. The significance of this increased judicial responsibility is augmented by the Court's assertion of unwillingness to intervene in the future in matters entrusted by Congress to the courts of appeals unless they have "misapprehended or grossly misapplied" the substantial evidence test.

The above aspects of the *Universal* case, in conjunction with the language of the APA, have further obscured the already perplexing problem of judicial review of "administrative questions." This language literally commands that administrative *actions, findings, or conclusions* be supported by substantial evidence. While previous statutes defining scope of review for particular

22. For a description of the role of the American Bar Association in the movement for administrative reform, see Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A.J. 434 (1937); McAllister, *Administrative Adjudication and Judicial Review*, 34 ILL. L. REV. 680 (1940); SEN. DOC. NO. 248, 79th Cong., 2d Sess. 48 *et seq.* (1946).

23. Although the Court in *Universal Camera Corp. v. NLRB*, 71 Sup. Ct. 456 (1951), granted certiorari to resolve a conflict between that case and a 6th Circuit opinion holding that the APA had enjoined upon the circuit courts a broader scope of review than that prevailing before the Act, and although the Court adopted the view of the 6th Circuit, *NLRB v. Pittsburgh S.S. Co.*, 71 Sup. Ct. 453 (1951), it did not reverse the 2d Circuit decision on this ground. Instead, it was observed: ". . . It is clear from the court's opinion in this case that it in fact did consider the 'record as a whole,' and did not deem itself merely the judicial echo of the Board's conclusion." Two other circuits, each holding that the Taft-Hartley and Administrative Procedure Acts had not changed the scope of review, had explicitly announced that an examination was made of the entire record. *NLRB v. Continental Oil Co.*, 179 F.2d 552 (10th Cir. 1950); *NLRB v. Booker*, 180 F.2d 727 (5th Cir. 1950). Of the other three circuits which had decided that these acts wrought no change in the extent of review, two had demonstrated that its scope was commensurate with the rule concerning jury verdicts, which admittedly requires scrutiny of the whole record. *NLRB v. Minnesota Mining and Mfg. Co.*, 179 F.2d 323 (1950); *Eastern Coal Corp. v. NLRB*, 176 F.2d 131 (1949). Thus, only the decisions of the 7th Circuit fail to reveal that a complete review of the record was considered essential; and this alone is no indication that no such review occurred.

24. The precise ground for reversal was the 2d Circuit's failure to consider in its review portions of the trial examiner's report which were rejected by the Board.

administrative bodies specifically limited the substantial evidence rule to findings of fact, questions of judgment peculiarly within the competence of the agency or which Congress intended it to determine with finality were often characterized as "mixed questions" or questions of fact, and thereby accorded the same amount of judicial deference as pure questions of objective fact. Since the basic ingredient of such "administrative questions" is judgment or discretion, rather than evidence, application of the substantial evidence test as a standard of review has never been accurate.²⁵ However, since the degree of finality accorded findings of fact prior to this case was considerable, there was little objection to the purported use of the same standard to review administrative questions, despite its logical inappropriateness. Now that the scope of review of facts has been expanded to an unpredictable extent, application to "administrative questions" of the broadened standard which may emerge in the future should not go unchallenged. While the imprecise draftsmanship of the APA prevents the contention that the substantial evidence test applies exclusively to findings of fact, the exceptive clause of section 10, which excludes from the review provisions of the Act questions committed to agency discretion, arguably embraces "administrative questions."

If there were, in fact, any judges who, prior to this decision, believed that the scope of their review of administrative fact determinations was limited to a one-sided examination of the record, their misconception has, of course, been corrected. However, it can not be expected, nor would the Court have desired,²⁶ that this opinion will dispense with all the variable factors which enter into judicial review of administrative fact findings. While Congress may have intended to stereotype scope of review of all agency findings of fact, such a result is fortunately unattainable. Future decisions occasionally may continue to create the impression of near-abdication of the judicial function or of a complete reweighing of all the evidence.²⁷ In any event the actual judi-

25. Isaacs, *Judicial Review of Administrative Findings*, 30 YALE L.J. 781 (1921), reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW, 976, 985 (1938).

26. "A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character. . . ." *Universal Camera Corp. v. NLRB*, 71 Sup. Ct. 456 (1951).

27. "The test of reasonableness under the substantial evidence rule is unprecise and susceptible of different applications by different courts or even by the same court in different cases. Any attempt to make the test more specific is likely to be unprofitable. Scope of judicial inquiry is not rigidly held to a single and unalterable degree but necessarily varies in accordance with the needs of particular cases, sometimes approaching judicial assumption of the fact-finding task and sometimes involving a seemingly blind acceptance of ill-supported findings." Davis, *supra* note 8, at 600, 601. While this commentary was written before the decision in the *Universal* case, it is believed that Davis' analysis will continue to be an accurate appraisal of the reviewing process.

cial process will continue to fluctuate according to the needs of the particular situation.

The necessity for, and actual scope of, judicial review of agency findings is roughly commensurate with the degree of administrative competence.²⁸ Whether this is due to judicial intuition or conscious appraisal of the variable factors involved, it is the inevitable approach to a problem which defies confinement to exact formulae. Unarticulated components of the courts' decision—including "the character of the administrative agency, the nature of the problems with which it deals, the nature and consequences of the administrative action, the confidence which the agency has won, the degree to which the review would interfere with the agency's functions or burden the courts, the nature of the proceedings before the administrative agency"²⁹—may influence the intensity of the investigation to which an administrative record is actually subjected, within the broad limits of the scintilla rule at the one extreme and an entire re-weighing of all the evidence at the other.

While all these considerations were pointed out by the Attorney General's Committee, the majority's recommendation against attempting to standardize the scope of review for all agencies under all circumstances was unheeded.³⁰ Possibly the review provisions of the APA, coupled with the present decision, will create a greater judicial awareness that the entire record must be examined and the reasonableness of administrative findings tested by the reviewing court. But the thoroughness of such an examination in a given case is not adaptive to rigid legislative definition. Variable judge-made criteria achieve a satisfactory case-by-case adjustment between public and private interests³¹ without undermining the position of the judiciary as a check on arbitrary administrative action.

A serious question either evaded or undetected in the *Universal Camera* case is posed by the Supreme Court's disposition, on the same day, of *Pitts-*

28. For an early article expressing a similar view see Dickinson, *Judicial Control of Official Discretion*, 22 AM. POL. SCI. REV. 275 (1928). FINAL REPORT, *supra* note 7, at 92, and Shine, *supra* note 6, at 31, also indicate that as administrative machinery for determination of facts inspires greater public confidence the need for judicial review should diminish.

29. FINAL REPORT, *supra* note 7, at 91.

30. FINAL REPORT, *supra* note 7, at 92.

31. Benjamin, *supra* note 18, at 338, recognizes that the problem of scope of judicial review involves a balancing of private interests against the public need for efficient administration. He advocates the version of the substantial evidence test which is patterned after the jury verdict rule, as a means of achieving this equilibrium. Cohen, *supra* note 8, at 345, while feeling that Congress has "contracted the area of administrative independence and broadened the area of judicial intrusion," and has failed to take cognizance of the variations among agencies and types of administrative functions, points out that the language of the standard established is sufficiently broad and subjective to enable the courts to allow for these factors Congress ignored. See also Shine, *supra* note 6, at 31: "The standards of judicial review, no matter how phrased, are necessarily subjective . . . considerable room is left to the courts to exercise choice and self restraint in the application of standards to specific instances."

burgh Steamship Co. v. NLRB.³² The Sixth Circuit had precipitated the controversy over the effect of the Taft-Hartley and Administrative Procedure Acts on scope of review by deciding, in the *Pittsburgh* case, that “. . . the conclusion that [these Acts] were intended to . . . create more effective review is inescapable in light of the legislative history.”³³ The court apparently found that the evidence provisions of the APA, requiring that agency sanctions, rules and orders be supported by “the reliable, probative and substantial evidence,” impose a duty on administrative bodies. Compliance with this standard is a question of law reviewable under 10(e)(B)(4), instructing reviewing courts to hold unlawful agency action not complying with statutory procedures.³⁴

This construction finds considerable support in the language of the Act and in the committee reports.³⁵ But if it is correct it would appear that clumsy legislative draftsmanship has emasculated the substantial evidence test em-

32. 71 Sup. Ct. 453 (1951).

33. *Pittsburg S. S. Co. v. NLRB*, 180 F.2d 731 (1950).

34. *Id.* at 733, 737.

35. Section 7(c) provides: “. . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.” The scope of review provisions embodied in section 10(e) of the Act instruct the reviewing court to “. . . hold unlawful and set aside agency action, findings and conclusions found to be . . . (4) without observance of procedure required by law.”

The discussion of 7(c) in the committee reports and Senate and House proceedings indicates that the evidence provisions of this section were considered mandatory rather than hortatory. SEN. DOC. NO. 248, 79th Cong., 2d Sess. 365 (1946).

Senator Austin, discussing “the reliable, probative and substantial” provision, remarked: “That is, in my opinion, a very important forward step in *judicial procedure* to say nothing about administrative procedure.” (Emphasis added.) SEN. DOC. NO. 248, 79th Cong., 2d Sess. 322 (1946).

The House Committee Report contains this comment: “. . . the accepted standards and principles of probity, reliability and substantiality of evidence *must* be applied. . . . They are to govern administrative proceedings.” (Emphasis added.) SEN. DOC. NO. 248, 79th Cong., 2d Sess. 270 (1946).

Senate Committee Report: “The basic provision respecting evidence in section 7(c)—requiring that any agency action must be supported by plainly ‘relevant, reliable and probative evidence’—will require full compliance by the agencies and *diligent enforcement by reviewing courts*. (Emphasis added.) SEN. DOC. NO. 248, 79th Cong., 2d Sess. 208 (1946).

Compliance with mandatory provisions is reviewable under 10(e)(B)(4) of the APA, quoted above. The frequent allusions to 7(c) as a duty imposed upon the agency seem to more than offset the few indications that this provision merely imposes a moral obligation. But the language of the provision itself lends some support to the latter contention: “. . . as a *matter of policy* agencies are required to provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction may be imposed or rule or order be issued except upon consideration of the whole record or such portions as any party may cite and as supported by and in accordance with the reliable, probative, and substantial evidence.” (Emphasis added.) While the second clause arguably relates back, also, to “as a matter of policy,” the Act’s history does not support this theory.

An explanatory note appended to *House Changes in the Senate Bill* also supports the “permissive” interpretation: “Obviously the agency will proceed in accord with the evidence which it finds reliable, probative and substantial—there is no reason why the

bodied in the scope of review provisions of the Act, and delivered a damaging blow to the finality of administrative fact determinations. Presumably "reliable, probative and substantial" evidence indicates a more rigorous criterion than merely "substantial evidence."

The Supreme Court summarily disposed of *Pittsburg Steamship Co. v. NLRB*, without alluding to this and other dangers lurking in the Sixth Circuit opinion, remarking simply that "our decision in that case [*Universal Camera v. NLRB*] controls this." However, while the legislative history is somewhat conflicting, it strongly suggests that "reliable, probative and substantial"³⁶ was intended merely as a more elaborate statement of the substantial evidence test. And no additional extension of the scope of review of facts need be anticipated as a result of possible future acceptance of the Sixth Circuit's reasoning.

bill should not say so." SEN. DOC. No. 248, 79th Cong., 2d Sess. 287 (1946). In addition, the Attorney General, in his interpretation of the Act, so construed section 7(c), SEN. DOC. No. 248 79th Cong., 2d Sess. 228 (1946). A similar judicial interpretation was predicted in Comment, 56 YALE L.J. 670, 690, 691 (1947).

36. This provision, as it originally appeared in the Senate Bill, stated: ". . . No sanction shall be imposed or rule or order issued except as supported by relevant, reliable, and probative evidence." SEN. DOC. No. 248, 79th Cong., 2d Sess. 30 (1946). The explanation of the Senate Bill clearly indicates that "relevant, reliable, and probative" was only an attempt to impose upon the agencies the same standard used by reviewing courts. "That some rule [of evidence] is necessary is evident from the fact that courts require administrative action to be supported by 'substantial evidence.' . . . Accordingly, subsection 7(c) adopts the 'reliable, probative and relevant' standard stated by the Attorney General's Committee . . . The courts have used the same standard." (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 226, 229 and other "substantial evidence test" cases.) *Ibid.*

In the "SUGGESTIONS" which accompany the Senate committee print the further comment is found: "It is said that "relevant, reliable and probative evidence" varies the present and tested rule in administrative law but this is erroneous." SEN. DOC. No. 248, 79th Cong., 2d Sess. 31 (1946).

The House amendment of 7(c) converted it into its present form: "as supported by and in accordance with the reliable, probative and substantial evidence." A footnote to the inserted provisions explains that the word "substantial" was substituted lest some "hypercritical mind might contend that the omission . . . was intentional. . . . Obviously the agency will proceed in accordance with the evidence which it finds reliable, probative and substantial—there is no reason why the bill should not say so." SEN. DOC. No. 248, 79th Cong., 2d Sess. 287 (1946). The unmistakable inference is that no substantive change in the Senate provision was intended and that the formula embodied in 7(c) merely codifies prior administrative practice. The House Committee Report and House proceedings, SEN. DOC. No. 248, 79th Cong., 2d Sess. 270, 365 (1946), do not contradict this interpretation.

When the amended bill was returned to the Senate it was asked whether any House changes would "materially affect the intent of the Act." As a result of Senator McCarram's assurance that they would not, no further discussion of the specific changes was undertaken. SEN. DOC. No. 248, 79th Cong., 2d Sess. 423 (1946).

One further point should be noted. While the legislative history contains no comment on insertion of the word "the" before "reliable, probative and substantial," the question was discussed in NEW YORK UNIVERSITY INSTITUTE ON THE ADMINISTRATIVE PROCEDURE ACT 489 (1947), in which it was suggested that someone had put the word in hoping that it would be read literally by the courts. *The* substantial evidence, it was noted, can only be on one side and implies a choice by the reviewing court.

But a more serious difficulty is inherent in the Supreme Court's unsatisfactory disposition of the *Pittsburg* case. While the Sixth Circuit relied mainly on the evidence provisions of the APA to support the contention that a broader scope of judicial review had been wrought by the Act,³⁷ it quoted with apparent approval from the House Conference Committee Managers Report³⁸ on the Taft-Hartley Act.³⁹ This report pointed out that provisions 10(b) and (c) of Taft-Hartley, requiring the NLRB to observe rules of evidence in so far as practicable and to base their decisions only upon a preponderance of the evidence, give rise to questions of law. This would seemingly authorize the court, in reviewing NLRB action, not only to set aside orders based on proceedings not adhering to judicial evidentiary practice but also to weigh the evidence *de novo* and arrive at an independent conclusion as to its preponderance. Consequently, when the Sixth Circuit is again confronted with a NLRB order, it may feel free to re-weigh all the evidence.

The House Managers' "Conference Report" indicated that these strict evidence requirements would eliminate "presumed expertness on the part of the Board in its field . . . [as] . . . a factor in the Board's decisions."⁴⁰ Such a result is not indefensible in view of manifestations of Congressional intent and the overall purposes of the Taft-Hartley Act.⁴¹ While the opinion

37. *Pittsburg S.S. Co. v. NLRB*, 180 F.2d 731, 736, 741 (6th Cir. 1951).

38. H.R. REP. No. 510, 80th Cong., 1st Sess. (1947). While it has occasionally been referred to as the "Conference Committee Report," this document was signed only by the House managers.

39. *Pittsburg S.S. Co. v. NLRB*, 180 F.2d 731, 733-735 (6th Cir. 1951).

40. H.R. REP. No. 510, 80th Cong., 1st Sess. 53 (1947). The committee pointed out that evidence would not meet the preponderance test merely by the drawing of expert inferences therefrom where it otherwise would not fulfill this requirement.

The House Committee Report concluded that the situation prevailing under the Wagner Act "renders the courts all but powerless to correct board abuses," and that administrative expertness is largely theoretical. "Requiring the board to rest its rulings on facts, not interferences (sic), conjectures, background, imponderables, and presumed expertness, will correct abuses under the act. . . . [The] Bill does this." H.R. REP. 245, 80th Cong., 1st Sess. 33, 40, 41 (1947).

41. Should the House Conference Committee Managers' construction of the evidence provisions of Taft-Hartley achieve judicial acceptance, see note 40 *supra* and accompanying text, the Labor Board would be precluded from drawing upon accumulated expert knowledge in arriving at its future decisions. The drastic curtailment in the agency's discretion which would ensue points up the necessity of attempting to avoid this construction. However, there are ample manifestations of Congress' desire to prevent agency reliance on "presumed expertness."

The House Report does contain one indication that the preponderance requirement of section 10(c) should not be used as a standard of review. The Report expresses the view that many Congressmen wanted to authorize the courts to modify the board's findings when against the *simple* weight of the evidence. However, the committee felt that with a new, impartial board, such a complete judicial reweighing would not be necessary, and agreed upon the provision making findings conclusive when not against the *manifest* weight of the evidence, and when supported by substantial evidence. (The weight-of-the-evidence provision was subsequently dropped out altogether.) The committee's reluctance to impose upon the board the duty of applying the simple-weight-of-the-evidence test, is inconsistent with requiring them to review, under 10(e)(B)(4), compliance with the preponderance test of 10(c). However, the following statement of the

in the *Universal* case unfortunately referred to neither the conference report nor the evidence provisions of Taft-Hartley, Justice Frankfurter, discussing 10(e) (the scope of review section) of the APA, observed that *this* provision did not eliminate utilization of administrative expertise.⁴² The effect of Taft-Hartley and the *Pittsburg* case on the Board's use of its accumulated experience and knowledge is a problem which must be worked out in the future. Unfortunately the questions of scope of review under Taft-Hartley and APA were presented to the Supreme Court in the same case. It is to be hoped that this fortuitous circumstance will not result in a limitation on the use of expert knowledge by agencies, other than the NLRB, functioning under the APA. However, such a result could be urged by analogy to the reasoning of the House Conference Committee Managers' Report on the Taft-Hartley Act.⁴³

That such a contention is not likely to succeed is suggested by the difference in the evidence provisions of the two acts⁴⁴ and by the previously indi-

House Report apparently nullifies any inference which might be drawn from the above by expressly stating: "These changes it is believed will require the board to support its rulings with facts and will end the substitution of assumed "expertness" for evidence in so far as the new board is concerned." H.R. REP. No. 245, 80th Cong., 1st Sess. 30, 40, 41 (1947).

Davis, *Scope of Review of Federal Administrative Action*, 50 COL. L. REV. 559, 563 (1950), suggests that the Taft-Hartley Act did not enlarge scope of review beyond that provided by APA because § 12 of this act requires: "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." He takes the position that the Taft-Hartley Act does not expressly do so. However, if the conference committee's version of sections 10(b) and (c) is accepted, it would appear that the Taft-Hartley Act does expressly change the scope of review.

42. *Universal Camera Co. v. NLRB*, 71 Sup. Ct. 456, 465 (1951). Justice Frankfurter discussed the scope of review problem throughout with reference only to the "substantial evidence on the whole record provision" of 10(e)(B)(5) of the APA and section 10(e) of Taft-Hartley. He apparently did not consider the potential effect of 10(b) and (c) (evidence requirements) of Taft-Hartley on scope of review of NLRB orders. If these sections are statutory requirements, compliance is reviewable under 10(e)(B)(4). However, he remarked: ". . . we hold that the *standard of proof* specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act." (Emphasis added.) *Id.* at 464. While use of the phrase "standard of proof" perhaps suggests an awareness of the intricate relationship between the scope of review and evidence provisions of both acts, this slight allusion is totally insufficient to support an inference that the Court did anything more than to equate 10(e)(B)(5) of the APA with the review provisions of Taft-Hartley.

43. Thus it could be contended that the language of section 7(c) of the APA, establishing rules of evidence, was calculated to preclude reliance on expert knowledge by other agencies in arriving at their decisions. In fact such a conclusion is suggested by *Pittsburg S.S. Co. v. NLRB*, 180 F.2d 731, 733 (6th Cir. 1951).

44. While Congress may have intended the Taft-Hartley Act to eliminate expertise as an element in the Labor Board's decisions, see note 40 *supra*, the contrary is indicated by the Congressional debates and reports on 7(c) of the APA. The House Committee stated explicitly: "While the exclusionary rules of evidence do not apply except as the agency may; as a matter of sound practice apply them, the accepted standards and principles of probity, reliability, and substantiality of evidence must be applied. These requirements do not preclude admission of or reliance on technical reports, surveys, analyses and summaries where appropriate." SEN. DOC. No. 248, 79th Cong., 2d Sess. 270 (1946). A simi-

cated probability that "reliable, probative and substantial" in the APA may properly be equated with the "substantial evidence test."⁴⁵ These problems might well have received definitive treatment in the *Universal Camera* case.

A RATIONALE OF NEGLIGENCE PER SE

When the plaintiff in a civil action bases his right to recover on the fact that the defendant has violated a criminal statute, the court must determine the effect, if any, such statute is to have upon civil liability.¹ The great majority of criminal statutes make no mention of a possible civil action, thus the courts are not compelled to consider them at all.² However, in a large percentage of the forty-eight state jurisdictions criminal violations are often labelled negligence *per se* and made to serve as the basis for civil liability.³ While the results of this procedure, on the whole, have been satisfactory, there are several aberrations, and the procedure itself has not been satisfactorily explained.

There have been attempts to explain why the courts recognize a relationship between a violation of the criminal law and the law of negligence. Professor Thayer has contended that the principles of negligence *require* that civil liability follow a criminal violation.⁴ Professor Lowndes, in answer to Thayer, denies the existence of any intrinsic relation between criminal conduct and negligence, asserting that when the courts recognize such they are but

lar statement was made in the Senate Committee Report, SEN. DOC. No. 248, 79th Cong., 2d Sess. 208 (1946).

While the Senate and House proceedings are more equivocal, there are several statements which lend support to this position and nothing which specifically controverts it. For example, the comment was made in the Senate Proceedings: "We are saying that there must be probative evidence of a substantive nature, and that even though the committee or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its findings." SEN. DOC. No. 248, 79th Cong., 2d Sess. 365 (1946); *Speech of Representative Walter*, 92 CONG. REC. 5653 (May 24, 1946).

45. See note 36 *supra* and accompanying text.

1. In accord with the great majority of cases, and with the literature on the subject, this note makes no distinction between statutes and municipal ordinances. But see Note, 14 VA. L. REV. 591 (1928).

2. Cf. KY. REV. STAT. § 446.070 (1948): "A person injured by the violation of any statute may recover from the offender such damage as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." For the effect of this provision, see Kepner, *Violation of a Municipal Ordinance as Negligence Per Se in Kentucky*, 37 KY. L.J. 358 (1949).

3. RESTATEMENT, TORTS § 286 (1934). The cases are too numerous for citation. See, *c.g.*, Hayes Freight Lines v. Wilson, 226 Ind. 1, 77 N.E.2d 580 (1947).

4. "It is an unjust reproach to our old friend the ordinary prudent man to suppose that he would do such a thing in the teeth of the ordinance. It would mean changing his nature, and giving over the very traits which brought him into existence." Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 326 (1914). This analysis should be compared with the language of Oates v. Union Ry., 27 R.I. 499, 63 Atl. 675 (1906): "None of the rules of the road are so imperative that it is always negligence to disobey them. . . . [I]t may often be the highest care for a driver to turn to his left when the rule of the road prescribes the right"; and that of Walker v. Lee, 115 S.C. 495, 106 S.E. 682 (1921): ". . . a person is bound to technically violate either [statute or ordinance], if by so doing he can avoid inflicting injury to person or property."