

drawn statute will restrict judicial discretion within a smaller area than a broad statute like the Sherman Act. But regardless of the type of statute, a decision interpreting that statute in the first instance need not be considered an *amendment* to the statute by virtue of the theory of separation of powers.⁴⁶ The feeling that the Court might usurp the legislative authority becomes a phantom when it is considered that Congress is free to overrule any decision of the Court if it is so desired.⁴⁷ Concomitantly, the practical hardships upon the individual litigant and on Congress itself are minimized by this modification. The one chance doctrine would coerce consistency regardless of knowledge gleaned through experience. Justice Frankfurter's words are peculiarly apt: "Wisdom too often never comes and so one ought to reject it merely because it comes late."⁴⁸—The Court must be given a "second chance."

JUDICIAL REVIEW OF REMOVALS OF MUNICIPAL POLICEMEN AND FIREMEN IN INDIANA

An intermittent controversy regarding the proper function of the courts in reviewing dismissals of municipal policemen and firemen was renewed by the Indiana Appellate Court in *Bishop v. City of Fort Wayne*.¹ Judicial concern is invoked by legislation which prohibits the removal of such personnel except for cause, other than political considerations, after notice and oppor-

(1950). This extreme position completely saps the vitality of the separation of powers concept. It is here that separation of powers should apply and demand that a statute be applied as "intended" until affirmative action by Congress indicates otherwise.

46. See note 34 *supra*.

47. The most striking illustration of this is the Congressional reversal of *May v. Heiner*, 281 U.S. 238 (1930), and three cases, *Burnet v. Northern Trust Co.*, 283 U.S. 782 (1931); *Morsman v. Commissioner*, 283 U.S. 783 (1931); *McCormick v. Burnet*, 283 U.S. 784 (1931) decided on the authority of that case. Two days after these cases were decided Congress overruled them. Joint Resolution of March 3, 1951, c. 454, 46 STAT. 1516; GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION 168 (2d ed. 1946).

48. *Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Dissenting opinion.).

1. 91 N.E.2d 368 (Ind. App. 1950). Marie Bishop, a policewoman for the city of Fort Wayne, was discharged for misconduct, after a hearing by the Board of Public Safety. She appealed pursuant to IND. ANN. STAT. § 48-6105 (Burns Repl. 1950), to the Allen Circuit Court where, over the objection of the city of Fort Wayne, the case was tried anew on the merits and the decision of the board reversed, and reinstatement ordered. On appeal, the Appellate Court was unanimous in support of the circuit court's interpretation of the statute as to reviewing procedure, but felt that *contra* ruling precedents of the Indiana Supreme Court were controlling. Therefore, the case was transferred to the higher court with accompanying reasons for the differing interpretation. The Supreme Court in affirming found it unnecessary to reconsider its former position. Instead the court chose to dispose of cause upon grounds that the board had failed to comply with the statutory requirement that charges sufficiently specific as to time, place, and nature of the offenses, are to be entered formally on the record of the board. Therefore, since no lawful charges were filed, the court held the removal proceedings to be arbitrary and void. *City of Fort Wayne v. Bishop*, 92 N.E.2d 544 (Ind. 1950).

tunity for hearing, by the local Board of Public Safety.² The statutory provision permitting an "appeal" from dismissal by the board was construed by the Appellate tribunal as prescribing a complete retrial on the merits by the courts.³ Prior Indiana Supreme Court decisions⁴ are to the contrary and clearly define the province of the judiciary as one of limited inquiry. The divergent views respecting the nature of the appeal and the scope of judicial review merit further consideration.

The initial statute,⁵ creating the tenure status, failed to designate a review procedure. Judicial consideration was not precluded, however, and the appropriate remedy was by action of mandamus to compel reinstatement.⁶ Since mandamus historically will not lie to control the legally exercised discretion of an administrative officer or body,⁷ the review was correspondingly limited. It was held not to be the court's prerogative to weigh the evidence and thereby substitute its judgment for that of the commissioners.⁸ The sole issues before the reviewing judge were whether there was substantial evidence before the

2. IND. ANN. STAT. § 48-6105 (Burns Repl. 1950) provides: "Every member of fire and police forces . . . shall hold office until removed by said board. They may be removed for any cause other than politics, after written notice . . . and opportunity for hearing is given, if demanded, and the written reasons for such removal shall be entered on the record of such board." The causes for which removal is justified are statutorily enumerated as: conviction of any criminal offense, neglect of duty, violation of rules, neglect or disobedience of orders, incapacity, absence without leave, immoral conduct, conduct injurious to public peace or welfare, conduct unbecoming an officer, or other breach of discipline. Exclusive control of fire and police forces is generally vested in the Board of Public Safety, IND. ANN. STAT. § 48-6105 (Burns Repl. 1950). For cities of first and second class, a civil service commission is created to administer a civil service system, IND. ANN. STAT. §§ 48-6204-6249 (Burns Repl. 1950). Police and fire forces are placed under the auspices of a metropolitan police commission in cities of 10,000 to 35,000 population, IND. ANN. STAT. §§ 48-6301-6315 (Burns Repl. 1950).

3. 91 N.E.2d 368 (Ind. App. 1950) at 372, "It seems clear that the statute provides an independent action for relief from an unwarranted order of an administrative board and a trial *de novo* of the issues upon which the order was made," citing *Texport Carrier Corporation v. Smith*, 8 F. Supp. 28, 33 (S.D. Tex. 1934).

4. *Zellers v. City of South Bend*, 221 Ind. 452, 48 N.E.2d 816 (1943); *Lloyd v. City of Gary*, 214 Ind. 700, 17 N.E.2d 836 (1938); *City of Elkhart v. Minser*, 211 Ind. 20, 5 N.E.2d 501 (1937); *accord*, *School City of Peru v. State ex rel. Youngblood*, 212 Ind. 223, 7 N.E.2d 176 (1937).

5. IND. ACTS 1905, c. 129 § 160, p. 219.

6. *State ex rel. Szweda v. Davies*, 198 Ind. 30, 152 N.E. 174 (1926); *Shira v. State ex rel. Ham*, 187 Ind. 441, 119 N.E. 833 (1918); *Roth v. State ex rel. Kurtz*, 158 Ind. 242, 63 N.E. 460 (1902).

7. The writ, an extraordinary remedy, issues from a common law court in the name of the state against a public officer or administrative body to compel action of a non-discretionary nature. See HIGH, I EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896); Sherwood, *Mandamus to Review State Administrative Action*, 45 MICH. L. REV. 123 (1946). In Indiana, mandamus proceedings have been transformed by statute into the action mandate, which is commenced by complaint, IND. ANN. STAT. §§ 3-2201-2205 (Burns Repl. 1946).

8. *State ex rel. Felthoff v. Richards*, 203 Ind. 637, 642, 180 N.E. 596, 598 (1932), saying, "In short, the court will not correct errors of judgment made during a hearing by a board of safety in weighing evidence presented to support a cause for dismissal of a policeman or fireman."

board upon which to support the decision,⁹ and to determine the legality of the order in terms of fraud, arbitrariness, fairness of the hearing, interpretation of the statute and jurisdiction.¹⁰ Such is the prevailing view in jurisdictions having similar legislation whether the non-statutory review be by action of mandamus or by writ of certiorari.¹¹

The present statutory provision for "appeal" was added by amendment in 1933.¹² The aggrieved incumbent may invoke judicial aid by filing a complaint in the circuit or superior court, stating the charges against him, the decision of the board thereon, and the demand for relief. Following a provision concerning the appropriate pleadings and parties, the controversial section provides:

Any such decision of the board shall be deemed prima facie correct and the burden of proof shall be on the party appealing. All such appeals shall be tried by the court unless written request for a jury be made . . . and shall be heard *de novo* upon the issues raised by the charges upon which the decision of the board was made. . . . Within ten days after service of summons the board shall file in said court a full, true and complete transcript of all papers, and entries and other parts of the record relating to such particular case. . . . Each party may produce such evidence as it may desire, relevant to the issues and the court upon such appeal shall review the record and decision of such board.¹³

9. The "substantial evidence test," included in the formula of review is often invoked but its exact limits and proper application are by no means uniform. See *Universal Camera Co. v. NLRB*, 71 Sup. Ct. 456 (1951); See Davis, *Scope of Review of Federal Administrative Action*, 50 Col. L. Rev. 599, 600 (1950); Stason, "Substantial Evidence in Administrative Law," 89 U. of Pa. L. Rev. 1026 (1940). Even in Indiana the test has had various formulation; thus, "If there is any substantial evidence to support the order," *New York C. R.R. v. Public Service Commission*, 212 Ind. 329, 332, 7 N.E.2d 957, 958 (1937); "If wholly unsupported by evidence," *Heflin v. Red Front Cash & Carry Stores, Inc.*, 225 Ind. 517, 523, 75 N.E.2d 662, 665 (1947); "If there was substantial evidence which tends to support the legal cause," *Stiver v. State ex rel. Kent* 211 Ind. 380, 384, 1 N.E.2d 1006, 1007 (1936).

10. *State ex rel. Felthoff v. Richards*, 203 Ind. 637, 180 N.E. 596 (1932), stating that the court will inquire to see: (1) that the cause of dismissal bears a reasonable relation to the accused's fitness to hold the position in question, (2) that the cause comes within the meaning of the statute as construed by the court, and (3) if the hearing though regular in form, is in truth not a fair hearing; *State ex rel. Szweda v. Davies*, 198 Ind. 30, 152 N.E. 174 (1926); *State ex rel. Julian v. Board of Metropolitan Police Commissioners of the City of Logansport*, 170 Ind. 133, 83 N.E. 83 (1907).

11. DILON, MUNICIPAL CORPORATIONS §§ 484-488, (5th ed. 1911); THROOP, PUBLIC OFFICERS § 398 (1892). However, elsewhere, as in Indiana presently, the method of review applicable to removals of municipal policemen and firemen has frequently been prescribed by statute. See, *Removal of Municipal Policemen and Firemen in New Jersey*, 62 N.J.L.J. 71 (1939); Kern, *Judicial Review of the Municipal Civil Service Commission*, 18 N.Y.U.L.Q. REV. 46 (1940).

12. IND. ANN. STAT. § 48-6105 (Burns Repl. 1950).

13. *Ibid.* It is further provided that the court, if it finds that the decision should not in all things be affirmed, "shall make a general finding, setting out, however, sufficient facts to show the nature of such proceeding and the court's decision thereon, and shall render judgment either reversing the decision of the board, or ordering the same to be modified as the court shall find and adjudge to be proper. . . ." The statute attempts

This provision, as interpreted by the Supreme Court in *Lloyd v. City of Gary*,¹⁴ rendered nebulous the change in the scope of review theretofore accorded in the action of mandate. The contention that the trial *de novo* terminology denoted an action independent in substance was rejected. The court characterized the so-called "appeal" as in the nature of a mandatory injunction to seek reinstatement, and thus, a mere alteration in the form of the review proceedings. The grounds of reversal previously recognized remained the only concern of the court on review.¹⁵ In *City of Elkhart v. Minser* it was said that to attach the requirement of full review of both law and fact to the provision would render it unconstitutional as imposing administrative duties upon the courts in violation of the separation of powers clause.¹⁶

The Appellate Court in the *Bishop* case questioned both the merits and necessity of so restrictive an interpretation of the appeal provision.¹⁷ In a

to prevent an appeal from the judgment of the circuit court, but such appeal may not be denied, *Wilmington v. South Bend*, 221 Ind. 538, 48 N.E.2d 649 (1943); *cf.* *Warren v. Indiana Telephone Co.* 217 Ind. 93, 26 N.E.2d 399 (1940).

14. 214 Ind. 700, 17 N.E.2d 836 (1938). Following dismissal of plaintiff, a policeman, the circuit court received evidence solely upon the issue of "legality" of the board's action. On appeal to the Supreme Court, plaintiff contended that the statute prescribed submission to the jury of the same issues upon which the decision of the board was made. The court rejected the argument as against the weight of authorities, citing *City of Elkhart v. Minser*, 211 Ind. 20, 25, 5 N.E.2d 501, 503 (1937); *School City of Peru v. State ex rel. Youngblood*, 212 Ind. 225, 7 N.E.2d 176 (1937).

The court's reliance upon the *Youngblood* case may be questioned because of differences in the applicable statutes. The court was there reviewing the dismissal of a school teacher by the board of education under IND. ANN STAT. § 28-4308 (Burns Repl. 1950), which provides that the decision of the board shall be final, in contrast to the language of the present statute. See *Board of School Trustees v. Moore*, 218 Ind. 286, 33 N.E.2d 114 (1941).

15. *Lloyd v. City of Gary*, 214 Ind. 700, 703, 17 N.E.2d 836, 838 (1938). See *Zellers v. City of South Bend*, 221 Ind. 432, 48 N.E.2d 816 (1943); *City of Frankfort v. Easterly*, 221 Ind. 268, 46 N.E.2d 817 (1943), *rehearing denied*, 221 Ind. 268, 47 N.E.2d 319 (1943); *Coleman v. City of Gary*, 220 Ind. 446, 44 N.E.2d 101 (1942).

16. 211 Ind. 20, 5 N.E.2d 501 (1937). Article 3 Section 1 of the Indiana Constitution provides: "The powers of government are divided into three separate departments; the legislative, the executive and the judicial; no person charged, with official duties under one of these departments, shall exercise any of the functions of another, except in the constitution expressly provided." For similar avoidance of unconstitutional imposition of administrative duties upon the courts, see *State Board of Medical Registration and Examination v. Scherer*, 221 Ind. 92, 46 N.E.2d 602 (1943); *In Re Northwestern Indiana Telephone Co.*, 201 Ind. 667, 171 N.E. 65 (1930). For a general historical treatment of the separation of powers, see Sharp, *The Classical American Doctrine of "Separation of Powers"*, 2 U. OF CHI. L. REV. 385 (1935).

17. 91 N.E.2d 368 (Ind. App. 1950). The court recognized that under proper legislative direction review may be limited to questions of law; but this does not imply that more complete review may not be provided. In several jurisdictions, under similarly phrased statutes, a complete new trial has been granted in the reviewing court. *Edwards v. Civil Service Commission*, 227 Ia. 74, 287 N.W. 385 (1935); *Hall v. Putthoff*, 252 Ky. 370, 67 S.W.2d 948 (1948); *Kearins v. Ziegewer*, 135 N.J.L. 119, 50 A.2d 865 (1946); *cf.* *Costa v. Justices of Dist. Court*, 305 Mass. 85, 25 N.E.2d 172 (1940), where the trial judge, without hearing new evidence, was held authorized to reweigh the evidence from the record; *but cf.* *Denver R.G.W. R.R. v. Public Service Commission*, 98 Utah 431, 100 P.2d 552 (1940).

per curiam opinion the court regarded the language as clearly imposing a requirement that the determination of fact be concluded by the court without litigation by the administrative determinations. It was reasoned that otherwise the statutory right to a jury trial would become meaningless.¹⁸ The proceedings were analogized to appeals from justice of the peace courts¹⁹ with the exception that under the present statute the administrative conclusions are prima facie correct. And since the proceedings related to removal for cause, were adversary in nature, and required a determination of facts and decision thereon, it was deemed sufficiently judicial to avoid constitutional defect.

The constitutional objection to a full review of the action of the Board of Public Safety is predicated upon the assumption that the board functions in an administrative capacity when removing policemen and firemen,²⁰ a position which finds support in several jurisdictions.²¹ Others, while admitting that the board is generally an administrative agency, maintain that the removal process is sufficiently judicial in nature to permit review by direct appeal.²²

It is established terminology in Indiana that the removal of public officers

18. In *Lloyd v. City of Gary*, 214 Ind. 700, 704, 17 N.E.2d 836, 838 (1938), the court commented upon the provision, which authorizes a jury trial, if requested, concluding that since the issues presented questions of law only, the jury could serve solely in an advisory capacity upon some question of controverted fact that might arise in equitable cases triable by the court as provided for in IND. ANN STAT. § 2-1204 (Burns 1933). It was reasoned that the title of the statute was not broad enough to constitute an amendment to the civil code with respect to jury trials, and the legislature did not intend that questions of law were to be submitted to the jury.

19. IND. ANN. STAT. §§ 5-1001-1008 (Burns Repl. 1946) (governing appeals from justice of the peace courts). The causes tried by the court on appeal are limited to those tried by the justice, *Flanagan v. Reitmier*, 26 Ind. App. 243, 59 N.E. 389 (1901); *Pritchard v. Bartholomew*, 45 Ind. 219 (1873). The cause is not to be tried on errors but upon the merits of the original papers, *Hughes v. Cincinnati I. & L. R.R.*, 50 Ind. App. 278, 98 N.E. 317 (1912); *Briton v. Fox*, 39 Ind. 369 (1872). The trial is governed by the same rules as those governing the proceeding before the justice, *Davis v. King*, 180 Ind. 387, 103 N.E. 98 (1913); *Phillipps v. Cox*, 61 Ind. 345 (1878).

20. *Zellers v. City of South Bend*, 221 Ind. 452, 48 N.E.2d 816, 817 (1943), saying, "The board of public works and safety of a city in determining questions presented by charges against employees acts in a ministerial capacity and as a fact finding board."

21. *Re Harold Fredricks*, 285 Mich. 262, 280 N.W. 464 (1938), saying that the commission in removing for cause, though judicial in a sense and sometimes referred to as judicial, remains primarily administrative, and not subject to appeal to the courts. An attempt to provide for a complete review of law and facts would be unconstitutional, *Aurora v. Schoeberlein*, 280 Ill. 496, 82 N.E. 860 (1907).

22. *Selectmen of Milton v. Judge of District Court*, 286 Mass. 1, 189 N.E. 607 (1934); *Driscoll v. Burns, Mayor*, 213 Mass. 493, 495, 100 N.E. 640 (1913), saying, "A statute which requires a court to review the decision of questions like these, upon petition after notice to all parties and a hearing, according to judicial procedure, does not impose the performance of executive duties." See *Jennings, Removal From Public Office In Minnesota*, 20 MINN. L. REV. 721 (1935); *Removal of Municipal Policemen and Firemen in New Jersey*, 62 N.J.L.J. 71 (1939).

is a judicial function²³ while the discharge of governmental employees involves the exercise of executive powers.²⁴ Because of the impossibility of precisely classifying policemen or firemen exclusively as public officers or employees, a solution to the present constitutional problem which would utilize this judicial dichotomy is unsatisfactory. Some decisions have held that policemen are public officers under the common criterion that they exercise a portion of the sovereign power.²⁵ Yet, other holdings affix the label of employee and require suit in contract to recover accrued wages following wrongful discharge.²⁶ It is obvious that policemen possess characteristics of each category.²⁷ Therefore, to assert that because the personnel involved are employees, the removal is administrative and thus may not be imposed upon the courts, is to engage in meaningless labeling and questionable logic. Legislation should not be invalidated on this tenuous basis.

Nor does the nature of the public functions performed by the Board of Public Safety indicate with certainty whether the agency is exercising administrative or judicial powers.²⁸ Considering only the process of removal, the board would seem to be acting judicially.²⁹ This is plausible in light of

23. *Hyde v. Board of Commissioners of Wells County*, 209 Ind. 245, 255, 198 N.E. 333, 334 (1935), saying the removal of an officer for cause and after hearing, whether exercised by the appointing power or another body, is essentially a judicial function. See also *Board of Commissioners of Knox County v. Johnson*, 124 Ind. 145, 24 N.E. 148 (1890); *State ex rel. Carlson v. Harrison*, 113 Ind. 434, 16 N.E. 384 (1887).

24. *Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270 (1941); *cf. Humphrey's Executor v. United States*, 295 U.S. 622 (1935); see THROOP, *PUBLIC OFFICERS* § 361 (1907).

25. *Shelmadine v. City of Elkhart*, 75 Ind. App. 493, 129 N.E. 878 (1921); *Hopewell v. State*, 22 Ind. App. 489, 54 N.E. 127 (1899); *City of Lafayette v. Timberlake*, 88 Ind. 330 (1892).

26. *State ex rel. Palm v. Brazil*, 225 Ind. 308, 73 N.E.2d 485 (1947), *petition for rehearing denied*, 225 Ind. 318, 74 N.E.2d 917 (1947); *City of Evansville v. Maddox*, 217 Ind. 39, 25 N.E.2d 321 (1940); *Shanks v. City of Washington*, 212 Ind. 38, 7 N.E.2d 968 (1937) (firemen); *City of Peru v. State ex rel. McGuire*, 210 Ind. 668, 199 N.E. 151 (1936) (firemen).

27. For comment concerning the confusion in classifying a given position as that of a public officer or employee see, GOODNOW, *PRINCIPLES OF ADMINISTRATIVE LAW OF THE UNITED STATES* 225 (1905); HART, *AN INTRODUCTION TO ADMINISTRATIVE LAW* 116 (2d ed. 1950).

28. See Pillsbury, *Administrative Tribunals*, 36 HARV. L. REV. 405 (1923). The author rejects as invalid numerous tests which are frequently proposed by courts in distinguishing administrative from judicial adjudication. He concludes that the true test, if there be one, lies neither in the department exercising the power nor in the form of the proceeding, but rather in the character of the act. See also Brown, *Administrative Commissions and The Judicial Power*, 19 MINN. L. REV. 261 (1925).

29. By analogy the board of county commissioners is vested with both administrative and judicial powers but it is not necessary that the board in a given instance shall act entirely in one capacity or the other. *Hyde v. Board of Commissioners of Wells County*, 209 Ind. 245, 198 N.E. 333 (1938). If the board is acting judicially, an appeal to the courts may be had, but if the body was functioning administratively the courts will limit their inquiry to whether the board acted within its legal jurisdiction. *State ex rel. Sink v. Circuit Court of Cass County*, 214 Ind. 323, 15 N.E.2d 624 (1938); *Potts v. Bennett*, 140 Ind. 71, 39 N.E. 518 (1895). No discernible criterion has been provided for determining in what capacity the board is acting in a particular situation.

the recognized doctrine that judicial powers may be delegated to municipal officers without violating the separation of powers clause.³⁰ However, viewing the entire function of the board in providing adequate and efficient police and fire protection, it is manifest that the removal power is only one of the incidental means of effectuating a larger responsibility.³¹ Hence, a dilemma is also presented by this approach.

Although the courts have construed strictly the Indiana separation of powers clause³² writers have expressed doubt that the various powers of government are susceptible of such exact definition as to justify the invalidation of legislation because of logical nonconformity to a priori conceptions.³³ Whatever view is accepted, it must be conceded that there are insurmountable difficulties in ascertaining definitely the nature of the board's removal power. Hence, to permit the function to be categorized as judicial and, therefore, subject to full review would not seem to violate the spirit of the separation of powers doctrine.³⁴ This seems even more valid in view of the tendency to uphold legislation where at all possible.³⁵

However, to conclude that the legislature could constitutionally enact a provision requiring a new and independent trial is not to assert that it did so

30. *Snarls, City Clerk v. State ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270 (1929); *Livengood v. City of Covington*, 194 Ind. 633, 144 N.E. 416 (1924); *Baltimore Etc. R.R. v. Town of Whiting*, 161 Ind. 228, 68 N.E. 266 (1903); *City of Terre Haute v. Evansville Etc. R.R.*, 149 Ind. 174, 46 N.E. 77 (1897); *Waldo v. Wallace*, 12 Ind. 569 (1859). Thus, it would seem impossible to say with certainty for constitutional purposes that the Board of Public Safety is not acting judicially.

31. *Pillsbury, Administrative Tribunals*, 36 HARV. L. REV. 405 (1923), concluding at 420, "The test of administrative or judicial character is whether the power or act in question is reasonably necessary or incidental to the proper carrying out of an executive or judicial function."

32. *Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270 (1941); *Peden v. Board of Review*, 208 Ind. 213, 195 N.E. 87 (1935); *State ex rel. Black v. Burch*, 226 Ind. 445, 80 N.E.2d 614 (1948); *but cf. Petition for Appointments of Magistrates of Beech Grove*, 216 Ind. 417, 24 N.E.2d 773 (1940); *Board of County Commissioners v. State ex rel. Brown*, 147 Ind. 476, 46 N.E. 908 (1897); *City of Indianapolis v. State ex rel. Barnett*, 172 Ind. 472, 132 N.E. 165 (1909); *State ex rel. Buttz v. Marion Circuit Court*, 225 Ind. 7, 72 N.E.2d 225 (1946).

33. See *Davis, Judicial Review of Administrative Action in West Virginia—A Study of Separation of Powers*, 44 W. VA. L.Q. 270 (1937). See *Sharp, The Classical American Doctrine of "The Separation of Powers,"* 2 U. OF CHI. L. REV. 385 (1938), at 436, "The functions of government cannot, however, be simply or perfectly classified and apportioned to different organs of government. Blending has from the first been to some extent approved and relied on, in securing an effective balance in government." See *BONDY, SEPARATION OF GOVERNMENTAL POWERS* 76 (1893).

34. In this view the problem is not purely theoretical, but requires that a realistic approach be maintained. See *Fuchs, An Approach to Administrative Law*, 18 N.C.L. REV. 183 (1940), expressing the view that it is a separation of the tasks of government not logically-defined functions, which is to be maintained. Perhaps, the nature of the act is attributable to historical rather than logical reasoning.

35. *State v. Gerhardt*, 145 Ind. 439, 451, 44 N.E. 469, 473, (1896), admonishing that "It is only when made to appear clearly, palpably, and plainly and in such manner as to leave no reasonable doubt or hesitation in our minds that a statute violates some provision of the constitution that we can declare it void."

in the statute here involved. The difficulty is enhanced by the fact that the appeal provision contains inconsistencies and the terms employed lack uniform meaning. The phrase trial *de novo* is susceptible of varied definition especially where it is used to describe a method of judicial review of administrative action.³⁶ Militating against the conclusion of the Appellate Court is the statutory direction that a complete transcript of the record be filed and that the "court shall review the record and decision of such board."³⁷ Construing this language in conjunction with the authorization to receive evidence the court might well find that the legislature intended to restrict the reviewing court to the taking of additional evidence only, and in that sense conduct a trial *de novo*.³⁸ Under this procedure it is feasible to further conclude that the legislature intended a judicial deference to the board's determination of facts. Unless unsupported by substantial evidence in the record or invalidated by additional evidence taken by the court, these findings would be sustained.³⁹

36. The term used in its normal connotation would indicate a judicial determination of a cause on the merits, upon evidence taken by the court. But the courts are prone to imply some self-limitation on review. Thus, in *N.Y.C. & St. Louis R.R. v. Singleton*, 207 Ind. 449, 454, 190 N.E. 761, 763, (1934) it was said, "A proceeding in a trial court to review an order of the public service commission, is an action *de novo* as distinguished from appeal; but it does not follow that such a proceeding is *de novo* in the sense that a trial court hears and determines on its merits the cause which was heard and determined by the public service commission." See *Denver R.G.W. R.R. v. Public Service Commission*, 98 Utah 431, 100 P.2d 552 (1940); *Fowler v. Young*, 77 Ohio App. 20, 65 N.E.2d 399 (1945); but *cf. Texport Carrier Corp. v. Smith*, 8 F. Supp. 28 (S.D. Tex. 1934). See Kearney, *The Problem of De Novo Judicial Review of Administrative Action*, 14 NOTRE DAME LAW. 233 (1939).

37. An argument most emphasized by the Appellate Court was to the effect that there was no provision for forwarding a transcript of the record of the hearing, and therefore the court of necessity must determine the facts anew, 91 N.E.2d 368, 369 (Ind. App. 1950). However, the statute expressly provides for filing of the transcript by the defendant city, *supra*, and such filing is mandatory, *City of Gary v. Yaksich*, 90 N.E.2d 509 (Ind. 1950).

38. For a similar statutory interpretation to this effect of IND. ANN. STAT. §§ 54-429-442 (Burns Repl. 1951) which provides for judicial review of Indiana Public Service Commission orders in the form of an action to vacate the order, see *Public Service Commission v. City of Laporte*, 207 Ind. 462, 193 N.E. 668 (1935). Although provision is made for forwarding a transcript of the record to the reviewing court, additional evidence may be heard. *N.Y.C. & St. Louis R.R. v. Public Service Commission*, 209 Ind. 466, 199 N.E. 573 (1936). However, it would seem to be a logical corollary that evidence adduced at the hearing and properly placed in the record should not be retaken on review. *Pittsburg Etc. R.R. v. Backus*, 154 U.S. 461 (1894). Such an interpretation would attach meaning to the provision granting jury trial. If the proceeding be in the nature of a mandatory injunction the jury could be utilized to try issues of fact raised by this additional evidence in conformance with IND. ANN. STAT. § 2-1204 (Burns 1933).

39. This may be said to be the general scope of review of administrative determinations of fact in Indiana. *N.Y.C. R.R. v. Public Service Commission*, 212 Ind. 329, 7 N.E.2d 957 (1937); *Russell v. Johnson*, 220 Ind. 649, 46 N.E.2d 219 (1943); *Smith v. Lippman*, 222 Ind. 261, 53 N.E.2d 127 (1944); *Board of Zoning v. Wheaton*, 118 Ind. App. 38, 76 N.E.2d 597 (1948); *Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940). Although perhaps only applicable to state administrative agencies and not to the municipal level, the Indiana *Act of 1947* governing administrative adjudication adopts a similar scope of review. IND. ANN. STAT. § 63-3018 (Burns Supp. 1949). See

If this interpretation of the statute be valid, the issue next presented is the extent to which the courts should review the administrative conclusions based upon these findings.

The Supreme Court's position in the *Lloyd* case also appears sound respecting the recognition by the courts of administrative discretion and judgment which is exercised in reaching these conclusions. The legislative vesting of such discretion in the board is consistent with the commissioners' familiarity with standards of fitness and capacity required of policemen and firemen. It follows that the purpose of the appeal section was not to usurp this conferred discretion but to permit resort to the courts in cases of abuse or error of law.⁴⁰ Thus, under either interpretation allegations of fraud, arbitrariness, or fundamental unfairness at the hearing call for inquiry by the reviewing judge.⁴¹

Perhaps the problem resolves itself into an endeavor to attain the proper balance in the relationship between the administrative and judicial branches of government.⁴² Obviously the underlying policy of the enactment is to prevent indiscriminate dismissals of policemen and firemen with each political change in the municipal administration.⁴³ Fitness and capacity rather than politics are to govern continuance of employment. Sufficient control by the judiciary to insure adherence to this policy is necessary. Nevertheless, other factors warn against overzealous intervention on the part of the courts. The public has an interest in efficient and adequate fire and police protection. The Board of Public Safety is unduly hampered in serving that interest if in-

Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 IOWA L.J. 252 (1948). Generally, see Issacs, *Judicial Review of Administrative Findings*, 30 YALE L.J. 781 (1921); REP. ATT'Y GEN. COMM. AD. PROC. 75, 87 (1941).

40. *City of Elkhart v. Minser*, 211 Ind. 20, 23 N.E.2d 501, 503 (1937), saying, "The court will not undertake to control the discretion of such boards in making orders in the administration of the affairs of the state so long as the orders are not tainted with fraud, capriciousness or illegality." See Marx, *A Note on Review of Discretion*, 87 U. PA. L. REV. 954 (1939); Dickinson, *Judicial Control of Official Discretion*, 22 AM. POL. SCI. REV. 275 (1928).

41. Such are grounds for judicial control independently of statutory authorization. *Coleman v. City of Gary*, 220 Ind. 446, 44 N.E.2d 101 (1942); *Roth v. State ex rel. Kurtz*, 158 Ind. 212, 63 N.E. 460 (1902); *City of Peru v. Youngblood*, 212 Ind. 223, 7 N.E.2d 176 (1937). In the *Coleman* case the court declared, in discussing review of administrative conclusions, "while the courts will not interfere with the exercise of discretion by the commission in such a case as this, and will not weigh evidence which the commission has heard and which has some reasonable relation to the fitness and capacity of the person who has been demoted, it is the duty of the court to declare void the action of such commission . . . where there has not been a fair hearing accorded such officer. . . . It is not sufficient that the commission follow the formal procedure provided by statute and the rules of the commission. The law requires more than mere formality. It requires a valid cause assigned for demotion and a fair hearing in which evidence tending to support the decision of the commission is heard and considered." *Coleman v. City of Gary*, *supra*, at 460, 44 N.E.2d at 105.

42. See LANDIS, *THE ADMINISTRATIVE PROCESS* 142 *et seq.* (1938); Stone, *The Common Law in the United States*, *THE FUTURE OF THE COMMON LAW* 136, 146 (1937).

43. *Felthoff v. Richards*, 203 Ind. 637, 180 N.E. 596 (1932); *Roth v. State ex rel. Kurtz*, 158 Ind. 292, 63 N.E. 460 (1932).

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