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THE SUBSTANTIAL EVIDENCE RULE

AND

THE ADMINISTRATIVE PROCEDURE ACT

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THE QUESTION of the scope of judicial review of administrative determinations has been a pivotal one in American administrative law. Since review is generally available over administrative determinations, the extent of review in particular cases may determine whether or not full effect is given to the legislative purpose in creating administrative agencies. "One of the principal reasons for the creation of such [agencies] is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field."¹ If the review of administrative determinations is to be very broad, with the reviewing court deciding the case *de novo* upon its own independent judgment, "administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications."²

We should not forget that "in the whole of administrative law the functions that can be performed by judicial review are fairly limited."³

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¹ Securities and Exchange Commission v. Associated Gas & El. Co., 99 F.(2d) 795, 798 (C.C.A. 2nd 1938).

² Report of the Attorney General's Committee on Administrative Procedure 91 (1941).

³ *Id.* at 76.

The role of the courts in this field "is to serve as a check on the administrative branch of government—a check against excess of power and abusive exercise of power in derogation of private right."⁴ The judicial function is thus one of control; we may expect "judicial review to check—not to supplant—administrative action."⁵ Broadly speaking, adequate judicial control is assured where review can be had on the following grounds: (1) *ultra vires*—to ensure that the administrative determination was within the authority delegated to the agency; (2) *natural justice*—that at least minimum standards of fairness for the process of administrative adjudication—what the Supreme Court has called "the fundamentals of fair play"⁶—were observed; (3) *substantial evidence*—that the administrative determination has a basis in evidence of rational probative force.

The scope of judicial review has largely been governed by the development of the so-called "substantial evidence" rule, namely, "the scope of judicial review over administrative action is limited to questions of law and to whether or not the findings of fact underlying the administrative conclusion are based upon substantial evidence."⁷ That rule has been mainly of judicial handiwork, although it has also been included in many statutory review provisions.⁸ "It evolved naturally as an appreciation arose of the undesirability of trying cases *de novo* in the courts and of the value of having the tribunal, informed by experience, assume a real responsibility for weighing and considering the facts in the fields where it had a peculiar competence."⁹

Review upon questions of fact, limited by the substantial evidence rule, is a vital element in the judicial control of the administrative process. As expressed by a lower federal court: "The rule of substantial evidence is of fundamental importance and marks the dividing line between law and arbitrary power."¹⁰ The requirement of an evidentiary basis for factual determinations is essential if administrative action is to be confined within legal limits. "The power of administrative bodies to make findings of fact which may be treated as conclusive . . . is a

⁴ *Ibid.*

⁵ *Id.* at 77.

⁶ *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

⁷ Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1092 (1940).

⁸ See Report of the Attorney General's Committee, 89, for some of these; for a more extensive list, McAllister, *Administrative Adjudication and Judicial Review*, 34 ILL. L. REV. 680, 691 (1940).

⁹ Landis, *loc. cit. supra* note 7.

¹⁰ *Carlay Co. v. Federal Trade Commission*, 153 F.(2d) 493, 496 (C.C.A. 7th 1946).

power of enormous consequences. An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'"¹¹

At the same time, there are those who feel that review restricted by the substantial evidence rule as it has been interpreted by the federal courts is not broad enough. Their view is well stated by the American Bar Association's Special Committee on Administrative Law:

To be effective, review of an administrative decision must not only be by an independent body . . . *but must extend to the determination of issues of both law and fact.* Most of the statutes which provide for judicial review of administrative decisions specifically limit the reviewing court to questions of law. . . . With such a restriction, the right of judicial review becomes, in the great majority of cases, a mere empty shell, particularly when the administrative tribunal (through its attorneys) consciously frames its findings of fact with an eye not so much to the evidence as to justify an *a priori* decision.¹²

Prior to the Administrative Procedure Act of 1946,¹³ it seems clear that broader review, such as that advocated by the Special Committee, was not available in the federal courts. Has the 1946 Act changed this situation? Or, to put it more specifically, has the scope of review in the federal courts been broadened by section 10(e)¹⁴ of the A. P. A. so that a wider review is now available over questions of fact than was the case before 1946?

In the opinion of the Attorney General, the judicial review section of the A. P. A., "in general, declares the existing law concerning judicial review."¹⁵ The law of judicial review as it had developed in the federal

¹¹ Hughes, C. J., in address to Federal Bar Association in 1931, quoted in LANDIS, *THE ADMINISTRATIVE PROCESS* 136 (1938).

¹² Report of the Special Committee on Administrative Law, 59 A. B. A. REP. 539, 546 (1934).

¹³ 60 STAT. 237 (1946), 5 U.S.C.A. § 1001.

¹⁴ Section 10(e), A. P. A.: "SCOPE OF REVIEW—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

¹⁵ Attorney General's Manual on the Administrative Procedure Act 136 (1947).

courts prior to the A. P. A. was, as has been indicated above, relatively simple. It was based upon the distinction between "law" and "fact" and rested upon a division of labor between judge and administrator, which sought to give full play to the particular competence of each. Questions of law were to be decided judicially, for the judge was best equipped to deal with them. Questions of fact, on the other hand, were primarily for the administrator; as to them, the judicial function was exhausted when the administrative finding was found to be grounded in substantial evidence.

Section 10(e) of the A. P. A. would seem, at least at first glance, to follow the above stated theory of review. Under it, the reviewing court is, first of all, to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action." This appears to be but a restatement of the general principle that issues of law are to be decided by the reviewing court on its own independent judgment. With regard to "agency action, findings, and conclusions," on the other hand (and this can only refer to issues of fact, for questions of law have already been covered), they are to be set aside if found to be "unsupported by substantial evidence" in cases reviewed on the record of agency hearings.

It has been asserted that the substantial evidence requirement of section 10(e)(B)(5) of the A. P. A. is but "a general codification of the substantial evidence rule which, either by statute or judicial rule, has long been applied to the review of federal administrative action."¹⁶ If this view is correct, then the term "substantial evidence" as used in this section of the A. P. A. is intended to embody the famous definition of that term in *Consolidated Edison Co. v. National Labor Relations Board*.¹⁷ "Substantial evidence," said Mr. Chief Justice Hughes in that case, "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁸ Viewed in this light, the substantial evidence rule becomes a test of the rationality of an administrative finding. Under it, the administrative finding stands only if it has "a basis in evidence having rational probative force," i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁹

¹⁶ *Id.* at 109.

¹⁷ 305 U.S. 197 (1938).

¹⁸ *Id.* at 229.

¹⁹ *Id.* at 230.

In applying the test of the *Consolidated Edison* case, the reviewing court does not determine the correctness of the administrative fact finding upon its own independent judgment. It has only to see if the finding is supported by substantial evidence; it is not concerned with the weight of the evidence. "In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."²⁰

After he had stated what was meant by the term "substantial evidence," Chief Justice Hughes went on in the *Consolidated Edison* case to assert that "assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force."²¹ As the substantial evidence rule is commonly interpreted in the federal courts, one may wonder whether this portion of the Chief Justice's opinion is not now largely lost sight of. "Under this interpretation, if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find evidence there, the administrative action is to be sustained and the record to the contrary to be ignored."²²

Substantial evidence under this interpretation would thus appear to mean such evidence as *standing alone* would lend rational support to the administrative finding. If such evidence is found anywhere in the record, then the finding must be sustained, regardless of how heavily the evidence may preponderate the other way—or, indeed, even if all the remaining evidence in the record supports the opposite finding. Thus, in a discriminatory discharge case, if the finding of the National Labor Relations Board is supported by the testimony of one credible witness (and it must be remembered that the credibility of witnesses is for the Board, not the courts, to determine²³), it cannot be set aside, even if the supporting testimony is contradicted by all the other witnesses.

²⁰ *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936).

²¹ 305 U.S. at 230.

²² Report of the Attorney General's Committee, 210.

²³ See cases cited 2 LABOR LAW REPORTER 6294.

The example given is, of course, an extreme one, which rarely, if ever happens, but the result follows clearly from our above analysis. That the federal courts do, in fact, tend to look only to the evidence in support of the administrative fact finding, ignoring the evidence to the contrary no matter what its weight may be, is shown by the opinion in *National Labor Relations Board v. Waterman S.S. Co.*²⁴ In upholding the finding of the Board that certain employees had been discharged because of union activities, the Court refers to the testimony of several union witnesses, extracted from a lengthy record, which lends support to the finding. "All of this is not to say," admits Mr. Justice Black, "that much of what has been related was uncontradicted and undenied by evidence offered by the Company and by the testimony of its officers. We have only delineated from this record of more than five hundred pages the basis of our conclusion that all of the Board's findings . . . are supported by evidence which is substantial."²⁵ In other words, as we have stated, the reviewing court looks only at the evidence in support of the administrative finding. The record the other way must be ignored regardless of how heavy it may be.

There is danger that an interpretation of the substantial evidence rule such as that in the *Waterman* case will lead to judicial review over questions of fact becoming merely an empty form. An administrative agency rarely acts without *some* evidence in the record to support its action. Yet what appears to be substantial evidence standing alone may often prove to be much less when considered as part of an entire record. Where the reviewing court is required to overlook all but the evidence in support of the administrative finding, however meager it may be when taken in comparison with the record considered as a whole, "important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error."²⁶

It will, however, be objected that any other interpretation of the substantial evidence rule would lead to the meticulous weighing of the evidence in support of issues of fact by the reviewing court, which would destroy the valued expertness, specialization, and the like that were sought in the establishment of administrative agencies. This objection appears to rest upon the fear that the courts will substitute their judgment for that of the administrative body upon questions of fact.

²⁴ 309 U.S. 206 (1940).

²⁵ See, similarly, *National Labor Relations Board v. Bradford Dyeing Association*, 310 U.S. 318 (1940).

²⁶ Report of the Attorney General's Committee, 211.

But such a substitution of judgment is not proposed. Clearly, judicial re-examination of the facts must not be so broad as to reduce the role of the administrator to a nullity. At the same time, the *Waterman* interpretation of the substantial evidence rule can, in effect, lead to the preclusion of review over all but pure questions of law. And such a limited review may prove of little efficacy as a practical matter. "Give a partisan examiner or board the right to fix the facts and the right to declare the law may well be but as 'sounding brass or a tinkling cymbal.'"²⁷

That the draftsmen of the Administrative Procedure Act were familiar with and disapproved of the *Waterman* interpretation of the substantial evidence rule is shown in the legislative history of section 10(e). Thus, the Senate Judiciary Committee Print of June, 1945, after referring to suggestions that review be provided for of the "preponderance of the evidence," goes on to state that "substantial evidence would seem to be as sound a rule as language will permit. The real difficulty has been that reviewing courts either accept something less than really substantial evidence or devise formulas of administrative discretion which render the absence of proof immaterial."²⁸

The minority of the Attorney General's Committee on Administrative Procedure, who had similarly rejected the *Waterman* type of interpretation, thought that the substantial evidence rule should be construed so as to require "support of all findings of fact, including inferences and conclusion of fact, upon the *whole* record."²⁹ This requirement would lead to a broader review than is available under the *Waterman* interpretation, for, as has been indicated, evidence which standing alone might be considered as substantial may prove to be far less when viewed in the light of the whole record.

We have seen that section 10(e)(B)(5) of the A. P. A. authorizes the reviewing court to set aside administrative findings of fact if they are unsupported by substantial evidence. By itself, this could be construed as a legislative ratification of the judicial application of the substantial evidence rule in cases like the *Waterman* case. Section 10(e)(B)(5) does not, however, stand alone, for there is also the general provision at the end of section 10(e) that, in making its de-

²⁷ *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 161 F.(2d) 798, 804 (C.C.A. 5th 1947); *Brisbois v. Hauge*, 85 F. Supp. 13, 14 (D. Mass. 1949).

²⁸ ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY 40 (1946). See, similarly, *id.* at 216, 279, 325.

²⁹ Report of the Attorney General's Committee, 211.

terminations, the reviewing court "shall review the whole record or such portions thereof as may be cited by any party." This provision, read together with the substantial evidence requirement of section 10(e)(B)(5), appears to reach the same result as that desired by the minority of the Attorney General's Committee. If these provisions do in fact have that effect, they "eliminate from judicial review of fact determinations . . . that interpretation of the substantial evidence rule which would permit the reviewing court to examine only one side of the evidence."⁸⁰ As stated by the Senate Judiciary Committee: "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."⁸¹

As Professor Dickinson points out, "it seems entirely clear that language which differs as widely as that contained in the last sentence of [section 10(e) of the A. P. A.] from the hitherto accepted formulae for fact review would not have been used, and that there would have been no reason or excuse for using it in the statute, if it was the intention of Congress . . . to make no change in existing law but merely to restate it."⁸² If the legislative intent had been merely to restate the substantial evidence rule, then section 10 (e)(B)(5) would have sufficed. The "whole record" requirement at the end of section 10 (e) must mean something. If it does not mean a broadening of review, with specific reference to the *Waterman* interpretation of the substantial evidence rule, is it not fair to ask what it *does* mean?

One looking to see whether section 10 (e) of the A. P. A. does broaden the *Waterman* interpretation of the substantial evidence rule can find, as yet, little help in the reported decisions. *National Labor Relations Board v. Thompson Products*⁸³ appears to be the only case in which a federal court has dealt with the "whole record" requirement of section 10 (e). In the course of its opinion there, the court stated:

We follow the findings of the Board upon matters in which they are supported by substantial testimony, but upon matters upon which it made no findings, we have followed the undisputed testimony. We think this is the purport of the provision in the Administrative Procedure Act . . . that the reviewing court in making its determinations shall "review the whole record or such portions thereof as may be cited by any party and due account

⁸⁰ John Dickinson in *The Federal Administrative Procedure Act and the Administrative Agencies* 587 (Warren ed. 1947).

⁸¹ A. P. A., LEGISLATIVE HISTORY, 214.

⁸² *Op. cit. supra* note 30, at 588.

⁸³ 162 F.(2d) 287 (C.C.A. 6th 1947).

shall be taken of the rule of prejudicial error." On the whole record, we find that it was prejudicial in this case not to find undisputed material facts.³⁴

This passage does not appear to add much to an understanding of the effect of the last sentence of section 10 (e) of the A. P. A. Indeed, it indicates a misconception by the court of its role upon review. If the evidence is undisputed, as the court states, why should it follow the evidence only where the agency has made findings? On the other hand, if what is meant is that the substantial evidence rule applies to the findings of the Board, but that upon matters upon which the Board made no findings the court will itself make the proper findings from the record, then this, too, is inconsistent with established concepts of review. Normally, when an agency has failed to make material findings, the reviewing court will not search the record but will simply reverse and remand.³⁵ To assume that the last sentence of section 10 (e) of the A. P. A. changes this well-established review principle is to make what appears to be an unwarranted assumption.

Aside from the *Thompson Products* case, there is nothing in the decisions so far reported to aid one in determining the effect of the "whole record" requirement at the end of section 10 (e). It is true that some courts have made general statements agreeing with the conclusion of the Attorney General that section 10 merely restates the law of judicial review which had been accepted prior to the A. P. A. Thus, there is the assertion in *Olin Industries v. National Labor Relations Board*³⁶ that "section 10 is merely declaratory of the existing law of judicial review and that it neither confers jurisdiction on this court above and beyond that which it already has, nor grants to aggrieved parties any rights they did not have [prior to the A. P. A.]."³⁷ On the other side, however, there is the statement of District Judge Lindley, concerning section 10: "The legislative history convinces me that Congress thought they were doing more than codifying existing law."³⁸

³⁴ *Id.* at 300. See also *Willapoint Oysters v. Ewing*, 174 F.(2d) 676, 689 (C.C.A. 9th 1949), where Judge Bone stated, with regard to the "whole record" requirement of section 10(e), "this was not intended to require reviewing courts to weigh the evidence and make independent findings of fact; rather it means that in determining whether agency action is supported by substantial evidence, the reviewing court should consider all the evidence in its measure as an integrated whole and not just the evidence favoring only one side."

³⁵ See C. C. H., *Federal Administrative Procedure* 4027.

³⁶ 72 F. Supp. 225 (D. Mass. 1947).

³⁷ *Id.* at 228. See, similarly, *Hargis v. Wabash Railroad Co.*, 163 F.(2d) 608, 611 (C.C.A. 7th 1947); *United States v. Carusi*, 72 F. Supp. 193 (E.D. Pa. 1947).

³⁸ *Unger v. United States*, 79 F. Supp. 281, 286 (E.D. Ill. 1948). See, similarly, *Snyder v. Buck*, 75 F. Supp. 902, 908 (D.C. 1948).

These judicial generalizations, one way or the other, on the effect of section 10 of the A. P. A. upon the law of judicial review appear to be of little help, except inferentially, in determining the narrower problem with which we are concerned, namely, the effect of the "whole record" requirement at the end of section 10 upon the substantial evidence rule. Nor is any more assistance to be obtained from decisions which imply that the scope of review under section 10(e) is governed by the substantial evidence rule. These are cases where, since the A. P. A., administrative findings have been upheld as supported by substantial evidence.³⁹ Similarly, there are decisions which set aside administrative findings which do not meet the test of substantial evidence. Thus, in *Willapoint Oysters v. Ewing*,⁴⁰ an order of the Food and Drug Administration was set aside which required western canners of oysters to label their products as "Pacific Oysters" while permitting packers of eastern and southern oysters the option of either labeling their product "Cove Oysters" or "Oysters." The order had been attacked on the ground that it unreasonably gave the exclusive use of the generic term "oysters" to the eastern and southern packers, when that term applied equally to both. "To be sure," the opinion reads, "there is some evidence in the record that consumers distinguish the eastern and southern from the 'Pacific' oysters by virtue of the large size of the latter. However, there is neither a scintilla nor iota of evidence in the entire record that anyone considers the eastern and southern product only to be 'oysters.' Any conclusion resting upon such an assumption cannot be said to be founded upon substantial evidence, or upon any evidence at all, within the requirements of the Administrative Procedure Act, §10 (e)."⁴¹

The above cases do not, however, tell us whether the role of the reviewing courts in searching for substantial evidence has been broadened beyond that permitted under the *Waterman* case as a result of the "whole record" requirement of section 10 (e). There is thus still no direct judicial authority on whether the imposition of that requirement leads to the result desired by the minority of the Attorney General's Committee.

A provision similar to the "whole record" requirement of section 10(e) of the A. P. A. is to be found in sections 10(e) and (f) of the

³⁹ For illustrative cases, see Schwartz, *Administrative Law*, 1947 ANNUAL SURVEY AM. L. 240, 1948 ANNUAL SURVEY AM. L. 166, 172, n. 99.

⁴⁰ 174 F.(2d) 676 (C.C.A. 9th 1949).

⁴¹ *Id.* at 697.

Labor-Management Relations Act of 1947.⁴² Under the National Labor Relations Act of 1935,⁴³ review of orders of the National Labor Relations Board was of the limited type already discussed. The substantial evidence rule had, indeed, received its narrowest interpretation insofar as the power of the reviewing court was concerned in cases dealing with the Labor Board. "The Supreme Court has admonished, again and again, the Courts of Appeal of their most limited power of review in controversies of which the National Labor Relations Board has taken cognizance and exercised jurisdiction."⁴⁴ Review of the Board was controlled by the interpretation of the substantial evidence rule exemplified by *National Labor Relations Board v. Waterman S. S. Co.*,⁴⁵ under which, as one court put it, in determining whether there was substantial evidence to support the Board's findings, "we shall consider only the evidence that sustains the Board's findings."⁴⁶

The framers of the Taft-Hartley Act felt that the courts under the Wagner Act had "in effect 'abdicated' to the Board."⁴⁷ Nor was it felt that the provisions of section 10(e) of the A. P. A. had done much to correct this situation. "While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included [in the Labor-Management Relations Act] language making it clear that the act gives to the courts a real power of review."⁴⁸ The language referred to is to be found in the following from sections 10(e) and (f) of the 1947 Act: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Despite the legislative intent to clarify the uncertain language of section 10(e) of the A. P. A., it is difficult to see how the scope of review over questions of fact under the Taft-Hartley Act differs from that provided for under the A. P. A. Under section 10(e)(B)(5) of the

⁴² 61 STAT. 136 (1947), 29 U.S.C.A. § 141.

⁴³ 49 STAT. 449 (1935), 29 U.S.C.A. § 151.

⁴⁴ *S. H. Camp and Co. v. National Labor Relations Board*, 160 F.(2d) 519, 522 (C.C.A. 6th 1947).

⁴⁵ *Supra* note 24.

⁴⁶ *National Labor Relations Board v. American Car and Foundry Co.*, 161 F.(2d) 501, 502 (C.C.A. 7th 1947).

⁴⁷ CONF. REP., H. R. No. 510, 80th Cong., 1st Sess., printed in 1 Legislative History of the Labor Management Relations Act, 1947 559 (1948).

⁴⁸ *Id.* at 560. See note, 42 *ILL. L. REV.* 479, 484 (1947).

A. P. A., as we have seen, fact findings are to be set aside only if unsupported by substantial evidence, and, under the last sentence of section 10 (e), in determining whether there is substantial evidence, the court is to review the whole record. This appears to be exactly what the above-quoted portions of sections 10(e) and (f) of the Labor Act provide. A consideration of the effect of the Labor-Management Relations Act upon the scope of review of fact findings of the National Labor Relations Board should, therefore, be of great assistance in determining the effect of section 10 (e) of the A. P. A.

As stated by the House Conference Report, the language of the Taft-Hartley Act with respect to Labor Board findings of fact was intended "very materially [to] broaden the scope of the courts' reviewing power."⁴⁹ "We are in no doubt," asserts Circuit Judge Hutcheson, "that the invoked provisions of the Labor Management Act were directed at these abuses of administrative expertise so-called, which the prevailing climate of Washington opinion, both Board and Court wise, has done so much to foster and encourage. Neither are we in any doubt that their total purpose has been and their effect will be, not only to prescribe bad, while prescribing good, practices for the Board, but to give the courts more latitude on review."⁵⁰

It is when one seeks to determine the exact extent and nature of the increased latitude of the reviewing court that difficulties arise. One possible interpretation of the effect of the Taft-Hartley Act upon the scope of review is that applied in a case in the Seventh Circuit. "While there is no doubt," says Circuit Judge Kerner, "that it was the intention of Congress that the scope of the courts' reviewing power be broadened, there is a question of how far the test to be applied should go. Certainly there is to be no trial de novo and this quite definitely would seem to eliminate the doctrine of weighing the evidence. We are impelled to the conclusion that, in effect, the scope of our review under the new Act is only immaterially changed from the scope of our review under the National Labor Relations Act."⁵¹

If the result of the 1947 Act upon the scope of review is as stated by Judge Kerner, what purpose was served by the change in language from the original Wagner Act? Circuit Judge Martin has recently sought to

⁴⁹ *Loc. cit. supra* note 48.

⁵⁰ National Labor Relations Board v. Caroline Mills, 167 F.(2d) 212, 213 (C.C.A. 5th 1948).

⁵¹ National Labor Relations Board v. Austin Co., 165 F.(2d) 592, 595 (C.C.A. 7th 1948). Compare Judge Kerner's statement in *Victor Mfg. and Gasket Co. v. National Labor Relations Board*, 174 F.(2d) 867, 868 (C.C.A. 7th 1949).

answer this question. "In the matter of factual review," he states, "the Taft-Hartley Act . . . merely broadened the Wagner Act . . . to the extent that the findings of fact of the National Labor Relations Board must now be based upon substantial evidence rather than upon evidence unqualified by the adjective 'substantial'; and that determination of issues of fact must be reached upon consideration of the record as a whole."⁵² If the above means anything, it must mean that the Taft-Hartley Act changes the *Waterman* interpretation of the substantial evidence rule. Otherwise, the Act merely restates existing law. The suggested change in the addition of the word "substantial" adds little, for ever since the *Consolidated Edison* case⁵³ the requirement of "evidence" in the Wagner Act had been construed as meaning "substantial evidence."

We are thus back to the position we took in connection with the "whole record" requirement of section 10(e) of the Administrative Procedure Act. Either the A. P. A. and the Taft-Hartley Act broaden the substantial evidence rule as advocated by the minority of the Attorney General's Committee, or they have no effect upon the scope of review of administrative findings of fact. And to follow the latter construction, especially in the case of the Labor Act, would be to ignore the clear legislative intent as manifested in the legislative history of the Act.

A *caveat* should perhaps be interposed at this point. As we have seen, the most reasonable interpretation of the "whole record" requirement in section 10(e) of the A. P. A. and sections 10(e) and (f) of the Labor-Management Relations Act is that it does away with the *Waterman* construction of the substantial evidence rule and broadens that rule to the extent advocated by the minority of the Attorney General's Committee. Whether the federal courts will follow this interpretation is, however, quite another matter. In view of the extent to which the substantial evidence rule as interpreted in the *Waterman* case is at present established in our administrative law, it is at least doubtful that the federal courts will hold that the rule is materially changed by the 1946 and 1947 acts. This would appear to be underscored by the temper of the present Supreme Court, which has not yet had the occasion to pass upon the problem we have been considering. A court that has

⁵² *National Labor Relations Board v. Tappan Stove Co.*, 174 F.(2d) 1007, 1008 (C.C.A. 6th 1949); compare *NLRB v. Minnesota Min. & Mfg. Co.*, 179 F.(2d) 323, 326, to the effect that neither the A. P. A. nor Taft-Hartley have made "any material change" in the scope of review of NLRB orders.

⁵³ *Supra* note 17.

consistently self-limited its own review power⁵⁴ is not likely to interpret a statute so as to do away with a theory of review which has been the product of its own handiwork, unless compelled by the clearest legislative mandate. And the "whole record" requirement of the A. P. A. and Taft-Hartley acts, it must be admitted, is not so clear as to compel the result we have been advocating.

Until now, we have been concerned with the question of whether section 10 (e) of the Administrative Procedure Act has broadened the substantial evidence rule as it was construed in the *Waterman* case. There is another important aspect of the problem of the effect of the A. P. A. upon the scope of review of findings of fact which should also be dealt with. This aspect concerns those cases where, prior to the A. P. A., the scope of review was even narrower than that afforded under the substantial evidence rule. As an example of these we may take the alien deportation cases. As put by Mr. Justice Stone, in such cases, "it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial."⁵⁵ Before the A. P. A., if there was any evidence to sustain the fact findings of the deportation authorities, they apparently were not subject to further review by the courts.⁵⁶ In the opinion of Justice Holtzoff, the law on this point has been changed by the A. P. A. The vital provision of section 10(e), he says,

is found in Clause (5), which empowers the court to determine whether the findings of fact made by the administrative agency are supported by substantial evidence, and to set them aside if its conclusion is in the negative. The statute contains no exceptions to this provision. Consequently, in those cases in which the scope of judicial review had been restricted within narrower bounds, it was enlarged to that extent. . . . It is no longer sufficient, as has been true in some instances, that the findings be supported by some evidence. The result is that in a habeas corpus proceeding to review a deportation or exclusion order of the immigration authorities, it is not enough that there be some evidence to sustain the findings of fact. They must be supported by substantial evidence.⁵⁷

Review under the A. P. A. is thus governed by the substantial evidence rule, even where the scope of review had previously been a nar-

⁵⁴ See Schwartz, *Administrative Finality and the Administrative Procedure Act*, 37 GEO. L. J. 526 (1949).

⁵⁵ *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927). See *Bridges v. Wixon*, 326 U.S. 135, 167 (1945).

⁵⁶ *United States v. Watkins*, 73 F. Supp. 216, 219 (S.D. N. Y. 1947).

⁵⁷ *Ibid.*

rower one. At the same time, as we have seen, it appears unlikely that the scope of review under the Act will be broadened beyond the substantial evidence rule as it has been applied by the federal courts. That a broader review is possible under the A. P. A. is shown by our analysis of the "whole record" requirement at the end of section 10(e). That requirement can be construed as doing away with the *Waterman* interpretation of the substantial evidence rule and by requiring the reviewing court to look at both sides of the record, as, in effect, adopting the scope of review proposed by the minority of the Attorney General's Committee. This appears to have been the result intended by the draftsmen of the A. P. A. The *Waterman* interpretation appears, however, to be firmly established in our administrative law, and it is, to say the least, doubtful that the federal courts will construe section 10(e) as changing it. .