SOME ASPECTS OF MARYLAND ADMINISTRATIVE LAW

By LEONARD E. COHEN*

It should be obvious to every lawyer that the field of administrative law has expanded rapidly in the recent past and is continuing to expand at the present time. The direction in which the field is growing, however, may not be as obvious; in fact, it may, on occasion, seem that the growth proceeds in many directions at the same time, some of them being contradictory. This uncertainty sometimes stems from decisions within the same jurisdiction which seem conflicting at first glance. In many instances, such a conflict can be resolved by close and careful scrutiny of the particular circumstances of the cases; nevertheless, some decisions remain puzzling despite the most exact examination. More often confusion arises because the courts of different jurisdictions adopt different rules regarding the same type of issue. For instance, the Maryland rule and the federal rule conflict on several points of administrative law.¹

In an attempt to clarify the situation for Maryland lawyers, this article will provide a general view of Maryland administrative law by considering various points which seem to merit special attention. Judge Reuben Oppenheimer published a similar article in 1938² that was of great benefit to the bench and bar of Maryland, and it is not the intent of this article to repeat his work. During the years, however, significant alterations have occurred in some of the areas which he discussed, new issues have arisen as the result of more recent decisions, and the pas-

* A.B. 1953, Johns Hopkins University; LL.B. 1958, Harvard Law School; Member, Baltimore City Bar; Partner, Frank, Bernstein, Gutberlet & Conaway.

¹ For example, the right to a hearing when an agency is acting legislatively, as discussed infra, at n. 27, and the application of the doctrine of res judicata, as discussed infra, at n. 54.

² Oppenheimer, Administrative Law in Maryland, 2 Md. L. Rev. 185 (1938).
sage of the Maryland Administrative Procedure Act\(^4\) in 1957 has made a fundamental change in the field as a whole.

At this point, it might be well to define "administrative law". As stated by Judge Oppenheimer, "administrative law involves the nature of the operations of administrative agencies, as well as the control exercised by courts over their creation and activities."\(^4\) The term "administrative agency" encompasses all government bodies and officials, excluding the legislature and the judiciary, which exercise legislative or adjudicatory functions similar to those exercised by the legislature and the judiciary.

**The Maryland Administrative Procedure Act**

The Maryland APA applies to all of the State administrative agencies except those six agencies which are expressly exempted. Its coverage is accomplished by the following definition of "agency":

"Agency means any State board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and except the Department of Parole and Probation, the State Industrial Accident Commission, the State Insurance Department of Maryland, the Public Service Commission, the Employment Security Board and the State Tax Commission."\(^5\)

The act may be divided into two main parts, (1) that dealing with the adoption, publication, and judicial review of rules, and (2) that dealing with the procedure and judicial review of contested cases. "Rule"\(^6\) and "contested case"\(^7\) are defined in the first section of the act, and these definitions must be studied and applied in each matter arising under the act. As a broad analogy, an agency rule may be compared with legislation enacted by a legislature, and a contested case before an agency may be compared with a judicial trial without a jury. This analogy, however, is greatly over-simplified and is offered only as an aid to basic understanding, not as a formula for the resolution of problems in the administrative field. A special word of caution might prove helpful respecting "contested cases"

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\(^4\) Md. Code (1957) Art. 41, §§ 244-56, hereinafter sometimes referred to as Maryland APA.

\(^5\) Supra, n. 2, 187.

\(^6\) Md. Laws 1963, Ch. 305, § 244(a).

\(^7\) Supra, n. 3, § 244(b).

\(^7\) Supra, n. 3, § 244(c).
as defined by the act. To the lawyer accustomed to judicial trials, "contested case" connotes an adversary as distinguished from an ex parte proceeding. Such a view may be an erroneous over-simplification. The act provides as follows:

"CONTESTED CASE means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."

Under the statutory definition, an agency proceeding is a "contested case" only when an agency hearing is required by law or constitutional right. If a hearing is not required on these grounds, the proceeding presumably would not be a contested case, and the various provisions of the act dealing with contested cases would not apply.

Despite the enactment of this statute, the large body of case law which preceded it still has relevance. As stated above, six large administrative agencies are exempted from the act; as to these agencies, therefore, the decisional rules have been affected only tangentially by its passage. More important, the act provides only a bare outline of administrative procedure which must be supplemented by judicial statements concerning proper conduct of agency affairs. The prior case law is still helpful in filling in the large statutory gaps.

**Delegation of Power**

One of the dramatic developments in the field of administrative law during this century has occurred in connection with the delegation of power from Congress, state legislatures and municipal legislative bodies to the multitude of administrative agencies which now exist in this country. As government expanded, legislators realized that they possessed neither the time nor the technical competence to enact legislation containing the specifics necessary for the complicated programs being instituted, and it became their practice to pass a statute or ordinance setting forth in broad outline the goals to be accomplished and giving to the agency which would administer the legislation the responsibility for implementing it by means of rules, regulations and decisions. For many years there was grave doubt as to whether legislators could constitutionally delegate their responsibility respecting legislation to administrative bodies, which were, of course, not chosen by the
electorate. Over a period of time, however, various judicial decisions throughout the country, in both the federal and state jurisdictions, indicated that such a practice would be constitutional as long as the legislation in question set forth standards limiting the discretion of the agency and indicating the results desired by the legislature. This trend also occurred in Maryland. In his article on Maryland administrative law, Judge Oppenheimer discussed the Maryland cases up to 1938 dealing with the delegation of power and derived the following principle from them:

“One of the universal rules of administrative law is that the discretion entrusted to the board or commission to carry out the policy of the legislative body must be exercised according to reasonably definite standards. * * * 

“The phrase ‘reasonably definite standards’ like the phrase ‘due process of law’, takes on meaning only as it is applied to concrete circumstances. It is a fundamental, although often unexpressed, principle of administrative law, that whether or not standards are reasonably definite is to be determined, not by abstract argument, but by scrutiny of the nature of the governmental policy which is to be exercised, the field of operation and the practical difficulties and results of regulation in that field.”9

As reflected by this statement, into the 1930's the great concern of the Maryland courts and of the courts in general in this country, in deciding a delegation of power case, was whether the statute in question contained adequate standards to guide and limit the discretion of the agency. This concern is illustrated vividly by a comparison of two early Maryland cases dealing with this question. *Tighe v. Osborne*10 involved a Baltimore City ordinance instructing the Zoning Commissioner to grant permits for the construction of buildings or for a change in the use of land or buildings unless he found that the proposed construction or change of use would create a hazard from fire or disease or would menace the “public welfare, security, health or morals”. The Court of Appeals held that the ordinance was unconstitutional because the discretion of the Zoning Commissioner was not limited by reasonably definite standards. Thereupon, the Baltimore City Council enacted a similar ordinance but omitted therefrom the words "public wel-

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9 Oppenheimer, supra, n. 2, 199.
10 149 Md. 349, 131 A. 801 (1925).
fare”. The Court of Appeals upheld the new ordinance on the ground that the change in language had sufficiently narrowed the area of discretion delegated to the Zoning Commissioner.\(^{11}\)

With the advent of the New Deal, federal legislation became characterized by extremely broad delegations of power to administrative agencies coupled with extremely indefinite standards in the legislation for the guidance and limitation of the agencies. Although such legislation was initially jolted by the cases of *Panama Refining Co. v. Ryan*\(^{12}\) and *A.L.A. Schechter Poultry Corp. v. United States*,\(^{13}\) in which the United States Supreme Court held first part and then all of the National Industrial Recovery Act to be unconstitutional, the attitude of the Court seemed to change, with the result that the Court began to uphold legislation containing standards which were very vague. For example, the Federal Communications Act gives to the Federal Communications Commission the enormous power of licensing radio and television stations throughout the country and directs the Commission to grant such licenses “if public convenience, interest, and necessity will be served thereby”.\(^{14}\) It is submitted that such a standard is more a matter of form than of substance and that it does not give the Federal Communications Commission any meaningful guidance by way of a specific standard in the performance of its duties.

As such legislative standards became more and more common, it also became evident that the judicial rule requiring definite standards was being strained to the breaking point. In the federal system, the break occurred with the Supreme Court's decision in *Fahey v. Mallonee*,\(^{15}\) a case growing out of the Home Owner’s Loan Act of 1933. Under this act, the Federal Home Loan Bank Board was given the power to appoint a conservator to take charge of the affairs of a savings and loan association. However, the act was completely devoid of standards regulating the exercise of such power. When shareholders of the Long Beach Federal Savings and Loan Association sued to enjoin the Board from appointing a conservator for their association, a three-judge federal district court held the act unconstitutional for the reason that it did not lay down stand-

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\(^{11}\) Tighe v. Osborne, 150 Md. 452, 133 A. 465 (1926).


\(^{13}\) 295 U.S. 495 (1935).


\(^{15}\) 332 U.S. 245 (1947).
ards for the appointment of a conservator. The district court expressly relied on the Panama Refining and Schechter Poultry cases. The Supreme Court reversed, even though it recognized the fact that the act did not contain standards. The Court stated that well-defined practices for the appointment of conservators had grown out of various state and federal statutes regulating banking, and the Federal Home Loan Bank Board had merely followed such practices. Thus the act was constitutional even in the absence of explicit standards.

As shown by the Fahey case, the Supreme Court has become more pragmatic and less theoretical about the requirement of legislative standards. If an agency can be guided by standards existing outside of legislation, and if a court can refer to such standards in reviewing the agency’s actions, it seems that a delegation of power without standards in the legislation may be proper.

This type of approach has apparently been adopted to some extent by the Maryland Court of Appeals. For example, such an approach would explain two cases which appear to be similar on their facts, but which reached opposite results. In Theatrical Corp. v. Brennan, a statute prohibited the holding of various types of public entertainment in Baltimore City without first paying a fee of between $5 and $100 as set by the Police Commissioner. The Court of Appeals held the statute to be invalid because it did not provide standards to control the Commissioner’s discretion. In Md. Coal Etc. Co. v. Bureau of Mines, a statute required persons engaged in strip mining to fill in the land mined so that vegetation could grow on it. The statute also required such persons to post a performance bond in an amount between $5,000 and $20,000 as set by the Director of the Bureau of Mines. The Court of Appeals upheld the statute even though it contained no standard for fixing the amount of the bond.

The statutes involved in these two cases have obvious similarities: both authorize an official to regulate conduct by choosing a monetary sum from among a wide range of possible choices, and neither provides a standard to guide such discretion. However, there are significant practical distinctions between the two cases which tend to support the different results. In the Theatrical Corp. case, nothing in the nature of the various types of public entertainment would provide meaningful guidance to the Commissioner or a means of reviewing alleged abuses of his discretion.

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18 180 Md. 377, 24 A. 2d 911 (1942).
17 193 Md. 627, 69 A. 2d 471 (1949).
Also, the difference between a $5 fee and a $100 fee might well determine the profitability of an enterprise. The evidence showed, in fact, that the Commissioner had set the maximum fee for a “walkathon” and for a “dime dance hall” in order to discourage such enterprises. The opposite was true in the Md. Coal case. The amount of the bond was clearly intended to depend on the estimated cost of filling in the land. Also, the facts showed that the bond premium would only have varied between $50 and $200, depending on the amount of the bond required, and neither sum was likely to be important to the financial success of a mining operation.

In recent years, the Court of Appeals has gone very far in upholding delegations of power to administrative officials in the fields of public health and safety. In Givner v. Commissioner of Health, the court stated that in the field of public health flexible standards are permissible because the concept of public health is more definite than that of general welfare and because there is practical necessity for expert interpretation in concrete situations. In Pressman v. Barnes, the court went even farther. A Baltimore City ordinance empowering the Traffic Director to adopt traffic regulations did not set forth any standards to guide him. Nevertheless, the court upheld the ordinance, stating as follows:

“Generally, a statute or ordinance vesting discretion in administrative officials without fixing any standards for their guidance is an unconstitutional delegation of legislative power. But we also hold, as a qualification of the general rule, that where the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, legislation delegating such discretion without such restrictions may be valid.”

The Pressman case illustrates the progression in administrative law from concern with the sufficiency of statutory standards to inquiring whether any such standards are necessary. As standards with less and less real substance were upheld by the courts, the ultimate position

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18 207 Md. 184, 113 A. 2d 899 (1954).
20 Id., 555.
adopted by the Court of Appeals in the Pressman case became only a question of time. It must still be remembered, however, that the orthodox view requires a definite statutory standard, except under special circumstances.

NECESSITY OF A HEARING

One of the continuously perplexing problems of administrative law is deciding whether, in a particular situation, an agency may act without granting a hearing to interested parties. The word "hearing" often changes meaning with the context: for example, it may refer to a proceeding similar to a judicial trial, with testimony, cross-examination and oral argument; it may connote a simpler proceeding, limited to testimony and/or oral argument; it may even mean a procedure whereby written views are considered in reaching a determination. In general, the word "hearing" seems to connote at least the presentation of testimony and argument in some form, however simple.

This problem of what constitutes a hearing has gained added importance in Maryland with the passage of the Maryland Administrative Procedure Act. A large part of this act applies only to "contested cases", and there is a contested case only when an agency hearing is "required by law or constitutional right".

Usually, the right to a hearing derives from the statute governing the agency in question, either by express provision or by judicial implication; therefore, the word "law" in the definition of a "contested case" would normally mean "statute". As an example of a statute expressly providing for an administrative hearing, consider the following provision pertaining to the Maryland Department of Motor Vehicles:

"Upon refusing or suspending the license of any person as hereinafter in this section authorized the Department shall immediately notify the applicant or licensee in writing and upon his request shall afford him an opportunity for a hearing. . . ."21

All statutes, however, are not as clear as this one on the question of the right to a hearing, and, when the statute is ambiguous, it is the duty of the court to decide the question of whether a "hearing" must be afforded, with particular reference to the matters at issue or the parties concerned. A situation involving a question whether a particular party

— in this case an intervening party — had a right to a hearing, occurred in the case of *FCC v. National Broadcasting Co.*,22 decided by the United States Supreme Court. Radio stations WHDH in Boston and KOA in Denver operated on the same frequency. When WHDH applied to the FCC for an increase in power and for unlimited broadcast time, KOA petitioned to intervene in the hearing on the ground that such application, if granted, would interfere with its signal in the Eastern United States. Section 312 (b) of the Federal Communications Act provided that if the Commission wanted to modify an existing license, it must notify the licensee of the proposed action and the reasons therefor and give the licensee a reasonable opportunity to show why modification should not be ordered. KOA claimed that this provision gave it a right to participate in the hearing on WHDH's application. The FCC denied KOA's petition to intervene, but on appeal the Supreme Court decided, four to two with three abstentions, that KOA had a right to a hearing, stating:

"A licensee cannot show cause unless it is afforded opportunity to participate in the hearing, to offer evidence, and to exercise the other rights of a party."23

It is arguable that the word "law" in the above definition of "contested case" should be interpreted to have a broader meaning than "statute" even though "statute" would be the normal meaning. For instance, assume that the statute governing an administrative agency does not require a hearing on a given matter but that the agency, pursuant to the powers delegated to it under the statute, promulgates its own regulations providing for a hearing. Since an agency is generally bound by its own regulations, and since an administrative regulation validly issued under statutory authority normally has the force of law,24 it could be said that in such a situation an agency hearing is "required by law" within the meaning of the above definition. If this view is adopted, it would mean that an agency could theoretically make itself subject to the "contested cases" provisions of the Maryland APA in cases where it otherwise would not be.

"Contested case" is also defined to include a proceeding in which an agency hearing is required by "constitutional right". This phrase is probably used because there may be

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22 319 U.S. 239 (1943).
23 *Supra*, n. 22, 246.
situations where the statute in question does not require a hearing, but where the state or federal constitution requires one as a matter of due process of law. The leading case on this point is *Londoner v. City and County of Denver*, decided in 1908 by the United States Supreme Court. Denver had placed an assessment for the cost of paving a street on the property abutting the street. The city clerk had published a notice of the proposed assessment, stating that the city council would hear written complaints, if filed within thirty days, before it passed an ordinance assessing the cost. However, no hearing in the usual sense was afforded to the property owners involved. The United States Supreme Court held that this procedure violated the due process clause of the federal constitution, stating:

"Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."

Thus it may be held in the future, under the principles of the *Londoner* decision, that the federal constitution requires a Maryland administrative agency in a given situation to grant interested parties a hearing even though the applicable Maryland statute does not provide for one. Such a case would seem to be a "contested case" within the meaning of the Maryland APA.

As illustrated by the Supreme Court cases discussed above, the right to a hearing in a given case is often a difficult question in the federal judicial system, involving the consideration of subtle distinctions and particular factual situations. It almost seems that every federal "hearing" case falls into the large gray area between a seldom seen black and an equally elusive white. The Maryland decisions on this topic, on the other hand, appear to be governed by a suspiciously well-defined set of hornbook rules. For example, the Court of Appeals has said that there is no constitutional right to a hearing where the agency in question is acting legislatively as opposed to judicially or where the issue before the agency involves a privilege as opposed to a right. These rules, however, seem to gloss over the very difficult questions of what is meant by "privilege" and by "acting legislatively". Also, they do
not seem to address themselves to the underlying considerations which should enter into a decision whether or not an administrative hearing should be granted as a matter of constitutional right.

The state of the law in Maryland on this issue is well illustrated by the decision of the Court of Appeals in Albert v. Pub. Serv. Commission. One hundred taxicab drivers applied to the Public Service Commission for permits to operate their own taxicabs in Baltimore City. The Commission refused to act on their applications on the ground that a prior study made by it showed that there was no need for additional taxicabs in Baltimore City. The applicants then petitioned the Commission for a hearing to show that there was such a need. When the Commission denied them a hearing, they petitioned in court for a writ of mandamus requiring the Commission to grant them a hearing. The Court of Appeals decided, inter alia, that there was no right to a hearing, the court setting forth four main grounds to support this decision: (1) the statute did not require a hearing on an application for a permit although it expressly required a hearing for the suspension or revocation of a permit; (2) the denial of a hearing was not unconstitutional because the Commission was acting in a legislative capacity, and due process requires a hearing only when an agency is acting judicially; (3) there was no constitutional right to a hearing because a taxicab permit is a privilege, and, therefore, no vested rights of liberty or property were involved; and (4) the statute provided for an appeal from the Commission's action, and where the due process question is close, the availability of judicial review indicates that no hearing is required.

This reasoning is certainly open to question. The first point — that the statute did not require a hearing — appears valid as a matter of legislative intent. It does not, however, settle the constitutional point, for as shown by Londoner, the United States Supreme Court has held that under some circumstances due process requires a hearing regardless of statutory provisions. For this reason, the Court of Appeals was forced to discuss the constitutional issue.

Its second point — that due process did not require a hearing because the Commission was acting legislatively — seems to be an over-simplification. The court was apparently assuming that because a legislature is usually not required to grant hearings, and because a court usually is,
it follows that an agency must grant a hearing when it is acting judicially but not when it is acting legislatively. The court then concluded that the granting or withholding of a permit was legislative action which did not require a hearing. There are two doubtful aspects to the court's position on this point. First, it is arguable that the action of the Commission was not legislative. The court stated that one test of legislative action is whether "there is laid down a rule of future action which affects a group, and not the direct application of policy or discretion to a specific individual." If the court were concerned with the action of the Commission in arriving at a policy decision not to issue any new permits, its characterization of such action as legislative seems proper under the aforementioned test. However, the court might have been saying that any time an agency passes on an application for a permit, it is acting "legislatively". Such a view of the court's position would be supported by its statement that "the granting or withholding of a franchise or license under the standards prescribed by the legislature is legislation by delegation." It would seem, however, that in considering an application for a permit, an agency often does not act "legislatively" under the test enunciated by the court. In making its decision, the agency must often apply broad rules to facts peculiar to the applicant, a process more akin to the general concept of adjudication than to legislation. In fact, the Federal Administrative Procedure Act defines adjudication to include licensing.

More important, it is arguable that the right to a hearing should not be made to depend upon whether agency action is considered legislative or adjudicative. It does not necessarily follow that because legislatures do not have to conduct hearings on prospective legislation, agencies should enjoy a similar exemption. An agency acting legislatively is different from a legislature in several important respects. Its members are not elected and, therefore, are probably not as responsive to public sentiment. Also, the very purpose of quasi-legislative administrative agencies is to carry out functions in a manner which would be impossible for a legislature. Such agencies are expected to become expert about limited segments of our society and

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5 U.S.C. § 1001(d) (1946): "'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."
thus to regulate those segments with a knowledge not possessed by a legislature, which must devote its attention to society as a whole. There may be many instances where a quasi-legislative administrative agency would best perform its duties by affording a hearing to interested parties. The United States Supreme Court held in the Londoner case\textsuperscript{82} that the city, in assessing a tax for the cost of paving a street, was required by due process to afford a hearing to the owners of land abutting the street. It seems beyond argument that assessing taxes would be "legislation" rather than "adjudication" as those terms are generally understood.

On the other hand, an administrative agency acting in a judicial manner should not be required to grant a hearing merely because courts normally do so. Agencies have means of deciding an issue which courts do not have — investigatory and technical staffs to ascertain facts and analyze materials, and experts to give opinions based on such research. Since courts must wait for the facts to be presented to them, the judicial system is naturally predicated upon hearings. Agencies, however, can aggressively seek facts and might, therefore, be able to perform their functions properly without a hearing in some instances.

A sensible approach to cases of this type would be to ignore whether an agency is acting "legislatively" or "judicially", but to ask whether a hearing seems warranted under the particular circumstances. In deciding this question, it would be important to know whether the party requesting the hearing has sufficient interest in the pending case and can contribute significantly to a proper result. Also, the group involved in the matter may be too large to permit an effective hearing. A question affecting all the residents of a state, for instance, would probably not lend itself to a hearing.

This view is illustrated by the decision of the United States Supreme Court in Bi-Metallic Investment Co. v. State Board of Equalization,\textsuperscript{83} which should be compared with the Court's decision in the Londoner case only seven years before. In the Bi-Metallic case, the state board increased the valuation of all taxable property in Denver by forty per cent without granting a hearing to property owners. Relying on the earlier Londoner decision, one property owner claimed that the action of the board violated due process. The Court, however, distinguished the

\textsuperscript{82} Supra, n. 25.

\textsuperscript{83} 239 U.S. 441 (1915).
Londoner case on the basis that there a small number of people were concerned, who were exceptionally affected by the assessments on individual grounds. Mr. Justice Holmes stated in the opinion:

"Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole."\(^4\)

Considering the second point in Albert v. Pub. Serv. Commission on a practical basis, the holding of the court that no hearing was required seems correct. The one hundred applicants did have a real interest in the matter, and a hearing could probably have been conducted practically by limiting testimony to that of representatives of the group. But it is not clear that such testimony, or even argument, would have helped significantly in the decision of the case. The Public Service Commission had recently completed a study of the problem and had concluded that, in the public interest, no additional taxicab permits should be granted in Baltimore City. Facts peculiar to the individual applicants were irrelevant, as were their individual opinions. Expert testimony would not be required since the Commission itself is deemed to be expert in such matters. What purpose would have been served in conducting a hearing?

To test this practical approach, assume that the Commission denies an application for a taxicab permit because the applicant is of bad moral character. Should the Commission be able to refuse him a hearing on the ground that it is acting legislatively? Is it not clear that the facts peculiar to him should be determinative of the case and that he would probably be the primary source of such facts?

The Maryland Court of Appeals' third point in the Albert case — that no vested right was involved because a taxicab permit is a privilege — has probably been weakened by recent decisions of the Supreme Court of the United States. In a long line of cases, the Supreme Court has held that government employment constitutes a right rather than a privilege.\(^5\) Even more directly in point, the Court has held that there is a right to practice

\(^4\) Supra, n. 33, 445.

law\textsuperscript{36} and engineering\textsuperscript{37} which cannot be taken away without due process of law. The practice of a profession such as law or engineering can be distinguished from other types of employment, such as driving a taxicab, because of the great investment of time and money necessary to qualify for such a profession. The same distinction, however, would not apply to government employment in general. It is doubtful, therefore, that the Supreme Court would recognize a constitutional distinction between the right to hold a government job or to practice a profession and the right to drive a taxicab.

The fourth point in \textit{Albert} — that the right to judicial review may show that no agency hearing is required — does not seem supported by the practicalities of the situation. Judicial review is, of course, always important to prevent arbitrary administrative action, but every lawyer realizes that the vital part of any case is to compile a favorable record below rather than to rely upon appellate argument. Although the Maryland Court of Appeals suggests that the applicants could have presented evidence on appeal, if an applicant is going to present evidence at some stage during litigation of this type, it seems sensible for him to do so before the Commission passes on his application, rather than to wait for an appeal to the court.

\textbf{Evidence in the Record}

Agencies generally adjudicate cases in a more informal manner than courts. The absence of juries, the assumed expertness of the members of the agency as regards the subject matter before them, the desire for expeditious handling of cases, and frequently the absence of counsel representing the parties, all contribute toward the elimination of the technical rules of evidence and procedure found in a courtroom. Nevertheless, an agency must follow rules of practice which afford fair treatment to parties appearing before it. One of the basic requirements of fair procedure is that an agency's decision should be based upon the evidence produced at the hearing before the agency. There are two obvious reasons for this. First, a party would be unduly prejudiced if an agency based its decision on evidence outside of the record which he had no

\textsuperscript{36}Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957). This decision is particularly significant in that it involved a refusal to grant a license, thus refuting the commonly heard generalization that although there may be a right involved in the revocation or suspension of an existing license, no right is involved in the refusal to grant a license.

opportunity to rebut or explain. Also, a court cannot intelli-
genously review agency action based on evidence not con-
tained in the record. These principles are followed as a mat-
ter of course in judicial procedures, and it may be surprising
 to many people that they pose any problem in the administra-
tive field. Difficulty does arise, however, because of the inher-
ent differences between administrative agencies and courts. Many agencies possess technical
and investigating staffs which may be prone to supple-
ment an agency record with evidence gathered as a re-

sult of their independent efforts. Also, many agencies main-
tain extensive files containing detailed material respec-
ting the parties falling within their jurisdiction. This is
especially true of regulatory agencies which receive peri-
odic reports from parties under their control. It is tempt-
ing for an agency in an adjudication involving such a
party to examine its own files in a search for informa-
tion in addition to that produced at the hearing.

The tendency of some agencies to base their decisions
on evidence outside of the record has resulted in several
United States Supreme Court decisions holding that such
practice is unconstitutional as a denial of due process
of law. For example, in United States & I.C.C. v. Abilene
& Southern Railway Co.\(^3\) the Interstate Commerce Com-
mission decided a rate making case by referring to the
annual reports of the carriers involved filed with the Com-
mission, without giving the parties an opportunity to re-
but or explain the evidence thus obtained. In setting aside
the Commission's order, the Court stated:

"The objection to the use of the data contained in
the annual reports is not lack of authenticity or un-
trustworthiness. It is that the carriers were left with-
out notice of the evidence with which they were, in
fact, confronted, as later disclosed by the finding made.
The requirement that in an adversary proceeding
specific reference be made, is essential to the preserva-
tion of the substantial rights of the parties."\(^3^9\)

There are several decisions of the Maryland Court of
Appeals which follow the Supreme Court's rule that an
agency's decision must be based on the record before it.
In Dembeck v. Shipbuilding Corp.,\(^4^0\) the State Industrial
Accident Commission held a hearing to determine the ex-

\(^3\) 265 U.S. 274 (1924).
\(^4\) Id., 289.
\(^5\) 166 Md. 21, 170 A. 158 (1934).
tent of a claimant’s disability. After the hearing, the doctor who served as the Commission’s medical advisor examined the claimant and submitted his report to the Commission. Although the Commission included the report in the record, the claimant was not given the opportunity to interrogate the doctor regarding the report. The Court of Appeals held that the Commission had acted improperly by denying the claimant an opportunity to confront the witness.

Duncan v. McNitt Coal Co.41 involved a similar issue, but the Court of Appeals refused to follow the Dembeck case. An employee filed a claim under the Workmen’s Compensation Act for disability allegedly caused by silicosis. Pursuant to the statutory procedure for claims involving an occupational disease, a hearing was held before the Medical Board. At the hearing, the only witnesses were the claimant and his doctor, who testified that the claimant had silicosis. There was also in evidence X-rays of the claimant and the report by his doctor of tests made on him. The Medical Board found that the claimant did not suffer from silicosis, but from heart disease unrelated to his occupation, which finding was affirmed by the State Industrial Accident Commission. The Court of Appeals upheld this finding despite the claimant’s contention that there was no expert testimony in the record to support such a conclusion. The court stated that although administrative bodies may not rest their decisions on matters of private knowledge not in the record, the Medical Board could apply its expert knowledge to the medical evidence before it.

There is some similarity between the Dembeck and Duncan cases — in both cases the Commission based its decision on the opinions of doctors assigned to it despite the fact that the claimants had no opportunity to examine them respecting their decisions. The different results in the two cases, however, seem justified by important differences in the facts. In the Dembeck case, the extra-record evidence furnished through the examination by the Commission doctor concerned basic facts regarding the claimant’s physical condition, that is, the primary medical data necessary for an expert opinion. The claimant might have been able to explain or contradict certain of this data and thus obtain a decision in his favor. Conversely, the Medical Board in the Duncan case merely pronounced its opinion based on the medical data.

41 212 Md. 386, 129 A. 2d 523 (1957).
which the claimant had introduced in evidence. Its expert knowledge was properly used to evaluate facts in the record rather than to add material to the record.

The cases are distinguishable on yet another ground. In the Duncan case, the claimant had the opportunity to argue against the Medical Board's opinion at a subsequent hearing before the Commission. He was apprised of the Board's position and had the opportunity to prepare an answer. The claimant in the Dembeck case had no such opportunity since the Commission received the doctor's report without giving the claimant a chance to rebut it.

The issue of evidence outside of the record was also discussed by the Court of Appeals in Bosley v. Quigley, although the point did not determine the result. This case involved the question whether additional bus service was needed over a particular route. After the close of a hearing conducted by it, but before its decision, the Public Service Commission sent several members of its staff to observe the existing bus service. Relying to some extent on the report of such members, the Commission found that the existing service was adequate. The Court of Appeals rebuked the Commission for considering such extra-record evidence in the following language:

"Of course, the Commission being a quasi judicial tribunal must act solely on the evidence before it, and not on knowledge or information otherwise acquired by it but not offered in evidence."

On the point of evidence in the record, the Maryland Administrative Procedure Act follows the philosophy of the Federal Administrative Procedure Act, which in turn adopts the judicial rules discussed above. The Maryland APA requires all evidence considered in the determination of a case, including records and documents in the possession of the agency, to be offered and made a part of the record. However, agencies may take notice of judicially cognizable facts and of general, technical, or scientific facts within their specialized knowledge, provided that the parties are notified either before or during the hearing, or by reference in a preliminary report or otherwise, of the material so noticed and are afforded an opportunity to contest it.

42 189 Md. 493, 50 A. 2d 833 (1948).
43 Id., 508.
45 4 Md. Code (1957) Art. 41, §§ 252(b) and (d).
Just as an agency is generally not permitted to base its decision on evidence outside of the record, it is also not permitted to decide issues without any evidence in the record to support its decision. For instance, an agency cannot merely hold that given action would be in the public interest in the absence of basic facts showing that the public interest would be served. This principle is illustrated by *Heath v. M. and C.C. of Baltimore,*\(^4\) in which a property owner applied for a special exception permitting him to erect a two-car garage in the rear of his apartment house. When the Building Engineer disapproved the application, the property owner appealed to the Board of Zoning Appeals. On the date set for a public hearing, no one appeared before the Board except the property owner. The Board thereupon passed a resolution stating merely that it had "made a study of the premises and neighborhood" and approved the application. Shortly thereafter, neighboring residents petitioned in court to have the order of the Board set aside, and the Court of Appeals held that the resolution of the Board should be reversed. Under the Zoning Ordinance, the Board had to take into consideration all pertinent factors, such as fire hazards, traffic problems, transportation requirements and facilities, streets and pavings, schools, parks, and playgrounds, in passing on an application for a special exception. In this case, the Board announced merely that it had "made a study of the premises and neighborhood", and there was no supporting evidence upon which to base a rational judgment. The Court of Appeals concluded that it was arbitrary and unlawful for the Board to make an essential finding without supporting evidence.

The Maryland APA contains several provisions designed to require agencies to support their decisions by findings of fact based upon evidence in the record. Every decision or order of an agency in a contested case must be accompanied by findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact.\(^4\) Also, a reviewing court may reverse an agency decision which is unsupported by competent, material and substantial evidence in view of the entire record, or which is against the weight of such evidence.\(^4\)

It is interesting to note that the act requires an agency decision to be supported by "competent" evidence. The

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\(^{46}\) 138 Md. 296, 49 A. 2d 799 (1946).
\(^{47}\) *Supra,* n. 45, § 254.
\(^{48}\) *Supra,* n. 45, § 255(g).
term "competent" in this context normally means admissible under the legal rules of evidence. For many years, there has been an unsettled question in the administrative law field whether an agency decision based entirely upon legally incompetent evidence should be upheld. In the federal sphere, there are many conflicting decisions on this point, most of them dealing with the problem of hearsay. Some states have adopted the so-called "residuum rule", which requires the presence of some competent evidence supporting an agency's decision, in addition to any incompetent evidence. Maryland decisions do not seem to have followed the residuum rule in the past, but it is arguable that the act has introduced this rule into the state by requiring agency decisions to be supported by competent evidence.

Assuming that the act has made this change, it does not follow that legally incompetent evidence may not be introduced and relied upon in agency proceedings. The act itself provides that "agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs." At most, the act would seem to require the existence of some competent evidence after all other evidence is ignored, a requirement similar to that of the residuum rule.

RES JUDICATA AND REOPENING

The question of the application of the doctrine of res judicata to administrative agencies has been the subject of much scholarly writing, and it is not the intent of this article to repeat such discussions. Nevertheless, as background for the Maryland law on this point, it might prove helpful to provide a broad outline of the general authority on the question.

The general rule is that the doctrine, which arose in connection with judicial decisions, does not apply to administrative action of a legislative nature. Further, it

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For a thorough discussion of this topic, see 2 DAVIS, ADMINISTRATIVE LAW, §§ 14.01-14.17 (1958).


Oppenheimer, Administrative Law in Maryland, 2 Md. L. Rev. 185, 205-208 (1958).

4 Md. Code (1957) Art. 41, § 252(a). This language is based on the statement of Judge Learned Hand in his opinion in N.L.R.B. v. Remington Rand, 94 F. 2d 862, 873 (2d Cir. 1938).

See, e.g., 2 DAVIS, op. cit. supra, n. 49, §§ 18.01-18.12.

is sometimes said that the doctrine does not even apply to administrative action of a judicial nature since res judicata is relevant only to courts. Many writers take issue with this latter view and suggest that courts should invoke the doctrine in a proper case and that often they do invoke it in substance if not in form. The United States Supreme Court, for example, refused to allow the Interstate Commerce Commission to order a railroad to pay reparations to a shipper on account of unreasonable rate charges when the Commission some years earlier had approved the rates as reasonable. In so ruling, the Court nevertheless stated that the Commission was not bound by the rule of res judicata. There is also some question whether the order of a court reviewing administrative action becomes res judicata as to the agency even though the agency would not be bound by its own decision in the absence of judicial review. In Sunshine Anthracite Coal Co. v. Adkins, the United States Supreme Court gave res judicata effect to an agency finding, which had been upheld by a federal court, without discussing whether the court order or the agency decision caused the rule to be invoked. Thus the case could stand for one of two propositions: that res judicata applies to agency decisions; or that the rule applies to such decisions only when enforced by order of court.

The basic problem created by these cases is whether the rule of res judicata should be ignored merely because an administrative agency rather than a court is involved. Res judicata basically is a rule originated by the judiciary for the efficient administration of justice, premised upon the desire for the termination of litigation at some point. Certainly, this desire seems relevant to litigation before administrative bodies, many of which function like courts and have jurisdiction over important rights and interests. It may require as much, or more, time and effort to try a case before an administrative body, such as the Public Service Commission, as before a court. Also, the absence of the principle of res judicata in the administrative sphere

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56 For example, in Churchill Tabernacle v. F.C.C., 160 F. 2d 244, 246 (D.C. Cir. 1947), the court said that there is a "well settled doctrine that res judicata and equitable estoppel do not ordinarily apply to decisions of administrative tribunals."

57 2 Davis, op. cit. supra, n. 49, § 18.02; Stason and Cooper, Law of Administrative Tribunals, 510-514 (1957); Jaffe and Nathanson, Administrative Law, 410-415 (1961).


59 2 Davis, op. cit. supra, n. 49, § 18.11.

60 310 U.S. 381 (1940).
could result in the costly defeat of actions or expectations based on a prior decision.

There is, of course, one distinction between judicial and administrative adjudications which lends support to the orthodox view. In general, the public has a greater interest in administrative proceedings, which often affect persons besides the parties themselves, than in judicial proceedings, which usually affect only the litigants. This distinction tends to show that the principle of res judicata should not be applied as freely to administrative action where such application would prejudice the public interest by perpetuating a decision which was initially wrong or which had become outdated.

The Maryland Court of Appeals has apparently settled the question in this state in accordance with the orthodox view that res judicata does not apply to administrative decisions. The Maryland rule of res judicata is clearly illustrated by the case of Knox v. City of Baltimore. The owner of property located in an area zoned residential had been using a garage on his property to store tools. Claiming a non-conforming use of his property, he applied for a permit to enlarge the garage. After a hearing, the Board of Zoning Appeals found a non-conforming use and approved the application. However, when the owner failed to exercise the permit within six months as required by the ordinance, the permit expired. The next year, he again applied for the same type of permit, but this time, after another hearing which was more thorough than the first one, the Board found no non-conforming use and refused to grant the permit. The owner contended that the first ruling of the Board was res judicata on the issue of the non-conforming use. In upholding the Board's action, the Court of Appeals held that, since the Board was not a judicial tribunal, its first ruling could not be considered res judicata.

The Knox case was followed in Dal Maso v. County Commrs., where property owners applied for the rezoning of their property from residential to commercial. After a public hearing, the County Commissioners approved the rezoning. One week later, upon the requests of residents in the area, the Commissioners rescinded the order and scheduled a rehearing the following month. Before the rehearing took place, the owners petitioned for a writ of mandamus to compel the Commissioners to reinstate the original order. Citing the Knox case, the

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\[1\] 180 Md. 88, 23 A. 2d 15 (1941), noted, 6 Md. L. Rev. 256 (1942).
\[2\] 182 Md. 200, 34 A. 2d 464 (1943).
Court of Appeals held that the order was not *res judicata* since the Commissioners were not a judicial body. It also held that boards and agencies to which legislative power has been delegated can change any of their rules affecting persons who have not acquired vested rights. In this case, the owners had not changed their status during the week when the order was in effect.

The *Dal Maso* case seems to go beyond the *Knox* case by indicating that, although *res judicata* does not apply to administrative agencies, an agency may be prevented from changing a decision if a party has acquired vested rights therein. There is the further suggestion that a party may acquire vested rights by changing his status in reliance on a decision. Thus, the Court of Appeals may be willing to employ an estoppel-type of approach in cases of this sort even though it has thus far rejected the traditional *res judicata* approach.

The issue in the *Dal Maso* case was actually different from, although related to, the issue in the *Knox* case. The *Dal Maso* case involved the right of an administrative body to reopen a decision, while the *Knox* case involved the right of such a body to change in a later case a finding made by it in an earlier case. In the judicial context, there would be the same difference between the question when a decision becomes final and the question whether a court is bound by a final decision in a prior case.

Subsequent Court of Appeals cases have viewed the *Dal Maso* case as one concerning reopening rather than *res judicata*. In *Zoning Appeals Board v. McKinney*, the court held that the Zoning Board of Baltimore City could not reopen a decision in the absence of fraud, mistake, surprise or inadvertence, even though the Baltimore City Zoning Ordinance contained no provision to this effect. The court reasoned that such a restriction could be implied from the nature of the Board as a quasi-judicial body. In *Kay Const. Co. v. County Council*, the Montgomery County Council acting legislatively first granted an application for rezoning and then, upon reconsideration, denied it. The applicable zoning ordinance permitted reconsideration "for good cause shown", which language the court interpreted to incorporate the test laid down in the *McKinney* case for the reopening of a quasi-judicial decision. The court then held that the reconsideration was improper in that the only reason therefor was

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174 Md. 551, 199 A. 540 (1938).
227 Md. 470, 177 A. 2d 694 (1962).
an alleged error of judgment and there was no showing of fraud, surprise, mistake or inadvertence. Recently, the court again relied on the McKinney test in striking down a reconsideration by the Montgomery County Planning Board respecting an application for a subdivision.65

In summarizing the effects of these decisions, it is clear that the Court of Appeals has held that an administrative agency may not reopen its decision, in the absence of fraud, surprise, mistake or inadvertence, where the agency is acting as a quasi-judicial body, or where it is acting legislatively and the governing statute requires good cause for reconsideration. The Dal Maso case, however, held that where an agency is acting legislatively, and the governing statute does not require good cause for reconsideration, the agency may reopen a decision as it sees fit as long as vested rights are not affected.

As a concluding thought on the issues of res judicata and reopening, there should be considered a possible difficulty that might arise as a result of the similarity of the principles but the different treatment accorded them by the Court of Appeals. Res judicata refers to the relitigation of a claim or an issue settled in a previous case; it does not bind administrative agencies. Reopening refers to reconsideration of a claim or an issue settled in the same case; certain agencies may not reopen a case in the absence of fraud, surprise, mistake or inadvertence. What would happen if the losing party before such an agency files a new petition, seeking identical relief, promptly after the denial of his first petition? Which doctrine is called into play — res judicata or reopening? Should the second petition be considered tantamount to a petition for reconsideration? Would the period of time between petitions be important? Regarding this last question, the United States Supreme Court permitted the Interstate Commerce Commission to reopen a case two years after its decision.66 The answers to the questions remain for the future and the Court of Appeals.

**Primary Jurisdiction**

The problem of primary jurisdiction, which has caused great confusion in the federal courts, was handled with apparently little trouble by the Maryland Court of Appeals when the problem was presented to it. The doctrine of primary jurisdiction, stated simply, is that, when

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a court and an agency seem to have concurrent jurisdiction over a matter within the area of the agency's special interest, the court should defer to the agency at the initial stage of the proceedings. This enables the agency to apply its special knowledge, often referred to as "expertise", to the matter and gives a reviewing court the benefit of the agency's findings. Also, channeling all cases of a given type to a particular agency is supposed to result in a uniformity of decision which might not occur if various courts or juries decided the issues. In some cases, however, the only disputed issue may be one of law; a court may then feel that it is as capable, if not more capable, than the agency to resolve such an issue. Where there is only an issue of law to be decided, there has been great uncertainty regarding the applicability of the doctrine of primary jurisdiction in the federal sphere.

The federal problem is clearly illustrated by the Supreme Court's decision in Federal Maritime Board v. Isbrandtsen Co. The case grew out of the practice of conferences of international steamship companies to charge lower freight rates to shippers who agreed to use member companies exclusively. In an earlier case, the United States had brought an anti-trust suit in a federal district court against another shipping conference maintaining such a practice. The Supreme Court had held that the suit should be dismissed on the ground that the matter fell within the primary jurisdiction of the Federal Maritime Board. In Isbrandtsen, the Board had approved a similar rate structure of a different conference on the ground that it was necessary to offset the effect of non-conference competition. The Supreme Court held that such approval was improper in that the conference system of rate-setting was a violation of the Federal Shipping Act. Two Justices dissented, stating that the earlier decision had implied that such a rate structure would be lawful if approved by the Board. Otherwise, they argued,
there was no sense in holding that the Board had primary jurisdiction over the matter. If the Board could not lawfully uphold the system, the Court might just as well have decided the legal question in the first instance.

A similar situation was presented to the Maryland Court of Appeals in *Cambridge v. Eastern, etc., Co.* The Commissioners of Cambridge claimed that they had statutory authority to distribute electric power in Cambridge; the Eastern Shore Public Service Company, however, claimed that it had an exclusive franchise to carry on such activity. The Commissioners brought a suit for a declaratory judgment, desiring a resolution of the question before they applied to the Public Service Commission for a certificate authorizing them to distribute power. It would have cost them a great deal for surveys and other expenses in connection with such an application. The Company demurred on the ground that prior resort to the Public Service Commission was required. It contended that the Commission had extensive records pertaining to its operations and that, therefore, trial of the issue before the Commission would be more convenient. The Court of Appeals held that prior resort to the Commission was not required, stating that the extent of a franchise is a question of law, or of mixed fact and law, completely subject to review by the judiciary. Declaratory relief would result in a judicial determination of the question which could guide the parties and the Commission.

The manner in which the Court of Appeals handled this case seems to provide an efficient method for cases of this type. It obviates the necessity for parties to spend the time and effort to try such a case before an agency only to find that the case is governed by a purely legal issue which a court can resolve more expeditiously than the agency. Since the doctrine of primary jurisdiction is based chiefly on practical as opposed to technically legal considerations, it seems appropriate that the courts should be practical in applying it.

**Exhaustion of Remedies**

There have been a number of Maryland cases dealing with the question of the exhaustion of administrative remedies, and, although the rules set forth in these cases can be expressed simply, they are often difficult to apply.

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192 Md. 333, 64 A. 2d 151 (1949).
The basic rule is that a party who desires a clarification of his rights under a statute, or who seeks relief from administrative action pursuant to a statute, must follow the avenue of relief provided by the statute in question. For example, assume that someone who wants to obtain a driver's license alleges that the regulations governing the issuance of licenses would improperly prohibit him from obtaining one. In order to test his rights, he would normally have to apply for a license and argue his case before the officials of the Department of Motor Vehicles. He could not by-pass the Department by simply suing in court for a resolution of the question. Similarly, a party should not sue in court to reverse the action of a lower official of an agency when the statute provides for an appeal to a higher official of that agency. Also, he should not appeal from an agency to one particular court when the statute requires him to file his appeal in a different court.

In approaching any case of this type, the first thing to consider is whether there is any effective statutory remedy available to the party in question; if there is none, no problem of exhaustion of remedies arises. Although this point seems obvious, in some instances it becomes very subtle. As an illustration, consider the case of County Commis. of A. A. Co. v. Buch. A taxpayer filed a petition with the County Commissioners of Anne Arundel County for a hearing concerning the under-valuation of assessments on property of other taxpayers in the county. When the Commissioners denied his petition on the ground that all property in the County had been or was being reassessed, he petitioned in court for a writ of mandamus requiring the Commissioners to afford him a hearing. A statute expressly granted the right to such a hearing; it also provided that a taxpayer aggrieved because of a refusal or failure to make a change in an assessment could appeal to the State Tax Commission. The Court of Appeals held that the petitioner had not failed to exhaust his statutory remedies by seeking relief from the court rather than from the State Tax Commission since the refusal to grant the hearing was not the same as a refusal to change an assessment. Rather, it was a refusal to consider whether a new valuation was in order. Supporting this view, the court noted that the State Tax Commission did not seem to have the authority to grant the relief which the taxpayer would have de-

190 Md. 394, 58 A. 2d 672 (1948).
sired on appeal to it. The Commission did not have express authority to remand a case to the County Commissioners for a hearing. If the Commission itself held a hearing, it would be exercising original jurisdiction rather than appellate jurisdiction as contemplated by the statute.

Contrast this decision with that in the *Albert* case,\(^7^3\) where the Public Service Commission had refused to act on applications for taxicab permits and had later refused to grant a hearing on such refusal. The applicable statute permitted an appeal from the Commission’s refusal to grant the permits. However, instead of employing this method of relief, the applicants sought a writ of mandamus requiring the Commission to grant them a hearing. The Court of Appeals held that mandamus would not lie because the applicants had not exhausted their administrative remedies.

Although the court did not refer to the *Buch* case in its opinion in the *Albert* case, the two cases are surprisingly similar if it is assumed that the applicants in *Albert* had a right to a hearing. Following this assumption, it appears that in both cases mandamus was sought not to obtain the ultimate relief desired, but to obtain a hearing which, it was hoped, would lead to such relief. The taxpayer in the *Buch* case ultimately wanted various assessments to be raised. The applicants in the *Alpert* case ultimately wanted taxicab permits. Why, then, did the court hold that mandamus was properly sought in one case but not in the other?

Since the court did not compare the two cases, it is impossible to answer the question with any certainty. In the *Buch* case, the court stressed the fact that the Commissioners had refused to consider the merits of a revaluation, but had not refused to change an assessment. This distinction was said to make the statutory appeal provisions inapplicable. It may be argued that such a distinction is more verbal than meaningful. It would not be difficult to hold that a refusal to set in motion the proceedings requisite to a change of assessments is in effect a refusal to change assessments. Would it not be just as meaningful to say that the Commission in the *Albert* case had not denied the applications but had, as it in fact did, merely refused to pass on the applications on the ground that it was not then considering the issuance of additional permits?

\(^7^3\) 209 Md. 27, 120 A. 2d 346 (1956).
It is possible to distinguish these two cases on a more substantial ground. If the taxpayer in the Buch case had appealed to the State Tax Commission, he would have requested the Commission to remand the case for a hearing or to hold a hearing itself. However, as the court noted, it is not clear that the Commission had authority to do either. Thus, the statutory appeal might not have been effective. Conversely, in the Albert case, the statutory procedure appeared to be effective since the court would probably have remanded the case for a hearing if one had been required.

The purpose behind the doctrine of exhaustion of remedies is clear and laudable — efficient administration of agencies and efficient review of agency action require parties to follow statutory procedures rather than to improvise according to their whims. There are occasions, however, when circumstances seem to require a relaxation of the rule to some extent. The Maryland Court of Appeals has recognized two broad exceptions to the rule. First, a court of equity may hear a case involving a constitutional question without requiring an exhaustion of administrative remedies. Second, if an agency requires a person to follow an unauthorized procedure, he may sue in court to force the agency to adopt a proper procedure.74

The first exception regarding constitutional questions is often stated by the court as if it were inflexible, but on occasion, the court has indicated that it would be proper for a court of equity to require the exhaustion of remedies even in a case involving a constitutional question. As an example of the orthodox statement of the rule, consider the following formulation by the Court of Appeals in Schneider v. Pullen:

"Appellant has a special interest in bringing this proceeding because he is engaged in the business of operating a trade school, and therefore must, under the terms of the statute, obtain a permit. He does not have to apply for this permit, and then, if it is refused, take the various appeals outlined in the statute, in order to raise the constitutional question

74 In Shpak v. Mytych, 231 Md. 414, 418, 190 A. 2d 777 (1963), the Court of Appeals stated that exceptions to the exhaustion of remedies doctrine "only apply where the act of the administrative agency is alleged to be unconstitutional, ultra vires or illegal and may injuriously affect the rights and property of the claimant." Although this language might imply a broadening of the exceptions recognized under prior decisions, the citation in the opinion of such prior decisions suggests that no broadening was intended.
of the validity of the act as a whole. That has been raised by a proceeding in equity in many cases. . . . The appellant had the undoubted right to raise the questions he does as to the constitutionality of the statute by means of the bill in equity he filed.”

In the same year, the Court of Appeals restated the rule in Kracke v. Weinberg, but this time the “right” mentioned above seemed to be converted into a privilege which a court of equity would grant reluctantly:

“It has been, of course, well settled that where a constitutional question is involved, equity may intervene and enjoin action by an administrative body, although this is not favored where there are statutory remedies which permit the raising of such a question.”

In fact, the Court of Appeals has required resort to an agency in a case involving a constitutional question. This case, Bogley v. Barber, is discussed more fully below, and the court’s action can, perhaps, be explained on another ground. Nevertheless, the following language respecting the constitutional question is still significant:

“In the instant case it is not suggested that the zoning ordinance is unconstitutional except (if at all) if and as applied to appellant’s property. We see no reason why in the instant case the pending proceedings before the Council should be halted by injunction and the whole controversy taken over by the court.”

An examination of the Maryland decisions dealing with the constitutional exception question thus reveals that at first glance many of the cases seem inconsistent. In order to discuss this apparent inconsistency, it will be helpful to consider three cases which fairly represent the decisions of this type. All three cases involve situations where a party sought judicial relief without first presenting the problem to an administrative agency which had jurisdiction over the matter. The action of the Court of Appeals was substantially different in each case.

198 Md. 64, 69, 81 A. 2d 226 (1951). This view was reaffirmed recently in Richmark Realty v. Whittlef, 223 Md. 273, 173 A. 2d 196 (1961).


194 Md. 632, 72 A. 2d 17 (1950).

Id., 640.
Kahl v. Cons. Gas El. Lt. & Pwr. Co.\textsuperscript{79} involved a bill to enjoin the Gas Company from constructing an overhead power transmission line through Baltimore County to its Mt. Washington sub-station. For such construction, a recently adopted zoning regulation of Baltimore County required a special permit which was to be granted only when such lines could be carried overhead without impairing the public health, safety or general welfare. The Company did not apply for such a special permit, contending that the zoning regulation was unconstitutional. The Court of Appeals held that the zoning regulation was valid, having real and substantial relation to the public health, safety and welfare. However, the court would not consider the right of the Company under the zoning regulation to construct the line in question since the Company had not applied for a special permit and thus had not exhausted its administrative remedies.

In Kracke v. Weinberg\textsuperscript{80} owners of unimproved land brought a suit for a declaratory decree to test the validity of an ordinance zoning their property residential. The court noted that the owners could have judicially tested the validity of the ordinance in a statutory appeal following an application to build upon the land in question. However, it held that they did not have to wait until they were ready to build on their land before obtaining a determination of their right to use it for other than residential purposes. On the merits, the court held that this land could not be used practically for residential purposes, and that, therefore, respecting this property, the ordinance amounted to an unlawful taking of property without compensation.

In Bogley v. Barber,\textsuperscript{81} the County Commissioners of Montgomery County, after a hearing on the matter, granted the application of a property owner for a re-classification of his property from residential to commercial. Thereafter, certain neighboring property owners filed with the County Council (successor to the County Commissioners) an application for reversal of the action re-classifying the property. Before the Council had passed on the application the property owner filed a bill to enjoin the Council from reversing the action of its predecessor. The property owner claimed that he had a constitutional right in the existing zoning of his property by

\textsuperscript{79} 191 Md. 249, 60 A. 2d 754 (1948).
\textsuperscript{80} 197 Md. 339, 79 A. 2d 387 (1951), noted, 13 Md. L. Rev. 242 (1953).
\textsuperscript{81} Supra, n. 77.
virtue of his reliance on the commercial zoning. The Court of Appeals held that it was not required to decide the question of his alleged vested interest. It stated that in this case the action sought to be enjoined was action feared but not yet taken. The court concluded that there was no reason to enjoin the pending proceedings before the Council and have the whole controversy taken over by a court.

The variations in the handling of these cases by the Court of Appeals is interesting. In the *Kahl* case, the court determined the constitutionality of the zoning regulation but refused to apply the regulation to the facts of the case, holding that the zoning officials should do so upon application for a special permit. In the *Kracke* case, the court did apply the zoning ordinance to the facts of the case and held that the ordinance was unconstitutional regarding the particular property involved. In the *Bogley* case, the court refused to consider, before the County Council had passed on the question, the property owner's constitutional argument that he had a vested interest in the existing zoning of his property.

Why did the court in the *Kahl* case determine the constitutionality of the regulation but refuse to apply it? Why did the court resolve the issue of fact, or of mixed law and fact, in the *Kracke* case when it refused to resolve similar issues in the *Kahl* and *Bogley* cases? There are two ways to approach an answer to these questions: first, by analyzing these cases on the basis of the applicability of the constitutional question exception to the doctrine of exhaustion of remedies; second, by viewing the cases strictly from a practical standpoint.

Using the first approach, there is a clear distinction between the two issues in the *Kahl* case which might explain the difference in treatment. The Company contended that the regulation was unconstitutional; it did not seem to allege that the application of the regulation to it was also unconstitutional. Thus, pursuant to the constitutional question exception, the court was obliged only to determine the constitutionality of the regulation. The absence of any contention that the application of the regulation would be unconstitutional also distinguishes the application issue in the *Kahl* case from such issue in the *Kracke* case. In the latter case the contention was that the application of the zoning ordinance would be an unconstitutional taking of property. Since this contention raised a constitutional question, the court did not require resort to the zoning officials.
The constitutional question approach, however, seemingly fails to distinguish the *Kracke* case from the *Bogley* case. In *Bogley* the property owner was similarly contending that any change in the zoning classification of his property would be unconstitutional because he had a vested interest in the existing zoning. Nevertheless, the court refused to apply the constitutional question exception and held that his suit should be dismissed. Perhaps, the court's action resulted from its belief that the constitutional issue was really not substantial. In discussing the vested right contention, the court stated:

"... intentional destruction of a building of value in preparation for rebuilding would present a serious question. But permitting destruction of property by vandals is an odd way to create property rights. A vested right so created would seem as frail as the house was.”

The second approach to these cases, one which seems fundamentally sounder than the approach just employed, emphasizes the practical aspects in either granting or refusing permission to by-pass an administrative agency. The reason why the court was willing to determine the constitutionality of the regulation in the *Kahl* case was probably that it is senseless to litigate a case in a lengthy administrative hearing only to find that the governing legislation is unconstitutional. The facts of the case developed at the hearing would be unnecessary to the determination of the validity of the legislation. On the other hand, if the issue in the case concerns the application of legislation, and therefore the particular facts must be developed and considered, it would make sense to try the case before the agency having jurisdiction over the matter. Either a court or the agency must conduct a hearing, and it seems that the agency should be preferred since the legislature gave it jurisdiction for that purpose. This assumes, of course, that it is possible to raise the issue before the agency. If it is not, then the only practical way of resolving the issue would be by a suit in court.

Applying these principles to the cases under discussion, it is possible to explain why the court might have decided to determine the application issue in the *Kracke* case but not in the *Kahl* and *Bogley* cases. In all three cases the issue would have required detailed considera-

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*Id.,* 639.
tion of the facts, indicating that the agency involved normally would be the proper tribunal to decide the issues initially. In both the Kahl and Bogley cases, it was also apparent that the issue could have been presented to the agency without undue delay. The Gas Company in the Kahl case could have applied for a special permit, which it clearly wanted, and thereby have raised the issue of its right to one under the regulation. The property owner in the Bogley case could have argued the issue of his vested right at the hearing before the County Council. On the other hand, the property owners in the Kracke case did not have a practical way of raising the issue without suing in court. Although they had the right to apply for a building permit, this would have been a meaningless gesture since they had no intention of building on their land.

The second exception to the exhaustion of remedies doctrine recognized by the Court of Appeals is that if an agency requires a person to follow an unauthorized procedure, he may sue in court to force the agency to adopt a proper procedure. This exception certainly makes sense in a situation where a party would be required to follow a lengthy procedure unnecessarily. On the other hand, trivial procedural errors might warrant invocation of the de minimus doctrine so that courts would not be burdened with inconsequential suits. The difficult situations, as usual, are those which fall in the broad area between these poles.

The court referred to the second exception in Stark v. Board of Registration, although it did not apply the exception on the merits of the case. Under the statute for the registration of professional engineers, the Board of Registration was instructed to issue certificates without oral or written examination to professional engineers who had performed work of a character satisfactory to the Board. An engineer applied for a certificate, but the Board required him to submit further evidence of his practical experience before it would grant his application. The applicant felt that the evidence of his experience which he had already submitted was sufficient to support his application. He, therefore, petitioned for a writ of mandamus compelling the Board to issue to him a certificate of registration as a professional engineer. The statute provided that any person aggrieved by any action of the Board could appeal to the Supreme Bench of Baltimore City or to the Circuit Court for any county. The Court

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83 179 Md. 276, 19 A. 2d 716 (1941).
of Appeals held that the petition was improperly brought since there was a statutory proceeding available for review and the statutory method had not been followed. The court noted that if an agency pursues a method contrary to statute, or sets up unauthorized standards of qualification, then mandamus will lie to compel the observance of the law. However, in this case, all that the Board asked the applicant to do was to supply evidence that he had performed work of a satisfactory character, as required by the act. Therefore, there was no evidence that the Board had acted arbitrarily in a manner at variance with the statute.

METHODS OF REVIEW

The preceding discussion of exhaustion of administrative remedies should have made one point clear — when the applicable statute provides for an effective appeal from administrative action, this avenue of relief must be followed. Suppose, however, that the statute is silent regarding such an appeal. Under such circumstances, may a court review administrative action at all? If it may, what procedure should an aggrieved party follow to obtain judicial review?

The absence of a statutory provision for judicial review of administrative action may be construed to mean that the legislature desired the agency's decision to be final and free from review by the courts. There are federal cases where courts have held that under such circumstances administrative action was not reviewable by the judiciary. Such a construction, however, would allow an agency, created by the legislature, to act unchecked by the judiciary and would thus appear to conflict with the basic principles of separation of powers and checks and balances. For this reason, many federal cases have allowed judicial review in cases of this type to correct arbitrary administrative action. The Maryland Court

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84 Chapter 1100, Subtitle B of the Maryland Rules of Procedure now provides for a uniform method of taking an appeal from an administrative agency to a court. This method applies only where the statute involved authorizes judicial review; thus the rules do not by themselves give a right to appeal. Kone v. Baltimore County, 231 Md. 466, 190 A. 2d 800 (1963). This method supplants the particular forms of proceeding in the various statutes, except that mandamus is governed by Subtitle BF of Chapter 1100.


86 E.g., Harmon v. Brucker, 355 U.S. 579 (1958); American School of Magnetic Healing v. McAnulty, 187 U.S. 94 (1902). In Stark v. Wickard,
of Appeals has taken a very firm position on this issue, holding that under the state constitution the legislature cannot completely preclude judicial review:

"... The legislature is without authority to divest the judicial branch of the government of its inherent power to review actions of administrative boards shown to be arbitrary, illegal or capricious, and to impair personal or property rights; but the courts are likewise without authority to interfere with any exercise of the legislative prerogative within constitutional limits, or with the lawful exercise of administrative authority or discretion."  

This statement shows that Maryland courts will review allegedly arbitrary agency action even though the applicable statute does not provide a procedure for appeal. The question remains, however, what procedure should be followed in such a situation to obtain judicial review. In some states the procedural choice is difficult because of rules concerning the use of various writs. Fortunately, the Maryland lawyer does not have to concern himself with such intricacies since the Maryland forms of action are relatively clear-cut. Where the Maryland Administrative Procedure Act applies, the act permits the institution of proceedings for judicial review by the filing of a "petition" in the proper court. The term "petition" is not defined in any manner and is not connected by reference with the common law forms of action. Thus, the act eliminates the requirement of filing any particular type of writ and employs a simple petition for review. Where the act does not apply, review may normally be obtained by proceedings for mandamus, injunction, habeas corpus or declaratory judgment, depending, of course, upon the type of relief desired. The procedural questions surrounding the use of these forms of action are the same in the administrative law field as in other branches of the law, and will not be discussed here. One point, however, should perhaps be noted. The

321 U.S. 288, 307 (1944), the Supreme Court said: "There is no direct judicial review granted by this statute for these proceedings. The authority for a judicial examination of the validity of the Secretary's action is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents as hereinafter considered."


It must be remembered that the judicial review provisions of the act only apply where: (1) the agency involved is covered by the act; (2) the matter involved is a "contested case" as defined in the act.

Court of Appeals has mentioned repeatedly the familiar doctrine that mandamus will not lie to review discretionary action by administrative officers unless such action is arbitrary and an abuse of power. View the situation practically, this doctrine could probably be expanded to say that usually no form of action will be effective to obtain review of such discretionary action, because, on the merits, a court will generally not reverse decisions of administrative officers properly within their discretion.

There are two leading Maryland cases illustrating judicial review of agency decisions when the statute in question is silent. Both involved the Board of Trustees of the Employees' Retirement System of Baltimore City. In *Hecht v. Crook*, a member of the Appeals Tax Court of Baltimore City was not reappointed to this office when his term expired. Under the governing ordinance, he was entitled to a pension only if he had been "removed" from office. When the Board refused to approve his application for a pension, he sought a writ of mandamus requiring the Board to grant him a pension. The Court of Appeals held that the decision of the Board was subject to judicial review even though the ordinance did not provide for such review. It stressed the points that the Board's decision was based purely on its interpretation of the ordinance and that such questions of law, which do not involve discretion, are normally for the court. On the merits, however, the Court of Appeals upheld the Board's decision.

In *Heaps v. Cobb*, the Chief Engineer of Baltimore City died in an automobile accident while driving to work. Although the city provided him with a car, on this occasion he was using his own car. All of the testimony before the Board indicated that he had died as a result of the accident. Nevertheless, the Board denied his widow's application for benefits on the ground that he had died as a result of a heart attack rather than from the accident. As an additional basis for its decision, the Board found that his death had not occurred during the course of his employment. The widow then sought mandamus to require the Board to approve her application, and the Court of Appeals ruled in her favor on two grounds: (1) the Board's finding that the decedent had died as a re-

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90 See, e.g., District Heights v. County Comrs., 210 Md. 142, 122 A. 2d 486 (1956); Hecht v. Crook, 184 Md. 271, 40 A. 2d 673 (1945).
91 Supra, n. 90.
92 Ibid.
93 185 Md. 372, 45 A. 2d 73 (1945).
result of a heart attack was arbitrary in that there was no evidence to support such a finding; and (2) as a matter of law, driving to work was in the course of his employment because the city furnished a car for such purpose.

It is interesting to note that the issues reviewed in these two cases represent the different types of issues which generally arise in litigation. The question in the Hecht case regarding the interpretation of the word "removed" in the ordinance would normally be considered a question of law. In the Heaps case, the scope of employment issue seems to be one of mixed law and fact, while the cause of death issue appears clearly to be one of fact. These cases indicate, therefore, that the availability of the various forms of action in cases of this type is generally not affected by the kind of question involved.

JUDICIAL REVIEW OF EVIDENCE

A. Substantial Evidence Rule

The availability of judicial review of administrative action does not necessarily mean that a court will treat an appeal from an agency as if it were an appeal from a lower court. It is said to be the general practice of courts, when reviewing a decision of an administrative agency, to uphold the agency's findings of fact unless they are arbitrary. This practice is often referred to as the "substantial evidence rule", meaning that an agency's findings of fact will be upheld as long as there is some reliable evidence in the record to support such findings, even though the weight of the evidence is to the contrary. To give a simple illustration of the rule, assume that in an agency hearing five witnesses testify on one side of a proposition, and one witness testifies on the other. In its findings, the agency states that it does not doubt the credibility of any of the witnesses, but that it is relying on the testimony of the one witness and disregarding that of the five. Under the substantial evidence rule, a court would be required to uphold such findings. Although this rule applies with greatest force to pure questions of fact, courts sometimes employ it respecting the application of the law to the facts, i.e., what is usually referred to as mixed questions of law and fact. This attitude differs from that of a court reviewing the findings of a lower

94 For example, in O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), the Supreme Court held that a federal court should not have reversed a Deputy Commissioner's determination that an employee's death
court, in which case the reviewing court will normally take more liberty in reversing findings of fact. This practice has resulted from the belief that administrative agencies have special knowledge and experience which better enables them to decide questions, often technical, falling within their jurisdiction.

The Maryland Court of Appeals consistently adhered to this philosophy of reviewing agency action in cases decided prior to the passage of the Maryland Administrative Procedure Act. After reviewing the Maryland cases on this topic, Judge Oppenheimer concluded:

"In no other phase of the subject has the liberal attitude of the Court of Appeals been more marked than in the much mooted matter of the scope of judicial review. The position of the Court has been consistent; it will not substitute its own judgment on the facts for the finding of the administrative agency."

However, the act appears to enlarge the scope of judicial review of facts in appeals from agency action. Section 255 (g) (6) provides that a court may reverse or modify a decision if the administrative findings are "against the weight of competent, material, and substantial evidence in view of the entire record, as submitted by the agency and including de novo evidence taken in open court".

As a result of this section, it will seemingly no longer be enough, in cases where the act applies, that administrative findings are supported by substantial evidence. Such findings presumably will still be upheld when the evidence is so neatly balanced that there is equal support

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arose out of his employment even though his determination clearly involved a mixed question of law and fact and the point could have been decided either way on the facts.

Appellate courts in reviewing the factual findings of trial courts are bound by the "clearly erroneous test". As stated by the Supreme Court in United States v. Gypsum Co., 333 U.S. 364, 395 (1948):

"[J]udicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury... A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Consider, for example, the following statement of the Supreme Court in the leading case, Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 49 (1954):

"One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration..."


for differing conclusions. When there is a preponderance of the evidence favoring a single conclusion, it would seem that under the above-quoted language, the agency must find in accordance with that conclusion.

The Maryland Court of Appeals discussed the change in judicial review of agency findings brought about by the act in Bernstein v. Real Estate Comm., the first appeal to the Court of Appeals under the act. The Real Estate Commission of Maryland suspended the licenses of two real estate brokers after finding that they had engaged in unethical conduct. After reviewing the evidence, the court held that the Commission's findings of fact and conclusions of law were supported by competent, material and substantial evidence in the entire record and were not overcome by countervailing evidence. In reaching its decision, the court considered the effect of the new act and indicated that, although the function of reviewing courts is now broader than before, the change was not intended to be drastic:

"While it appears that the scope of judicial review by a trial court of the findings, inferences, conclusions and decisions of administrative agencies under the statute has been broadened to some extent, it is clear that the statute did not intend that the court should substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken."

In a subsequent decision, Board v. Oak Hill Farms, the Court of Appeals seems to suggest that as a practical matter, the act did not actually change the scope of judicial review, even though the language of the act would seem to indicate a change. In that case, the governing statute (which applied to Prince George's County) permitted the reviewing court to reverse the County Commissioners, acting as a District Council, if their decision was "against the weight of competent, material and substantial evidence in view of the entire record". This language is identical to the corresponding language in the Maryland Administrative Procedure Act, quoted above. Construing this language, the court reviewed the history

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99 See N.L.R.B. v. Consolidated Copper Corp., 316 U.S. 106, 106 (1942), where the Supreme Court said: "The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board from drawing one of them, as the court below seems to have thought."
100 221 Md. 221, 156 A. 2d 657 (1959).
101 Id., 230.
of the substantial evidence rule and concluded that "the line between the test of substantiality of evidence on the whole record and that of the weight of the evidence is thin and difficult to delineate."\textsuperscript{103} The court also stated as follows:

"Whether the test of substantial evidence on the entire record or the test of against the weight of all the evidence is followed, the courts have exercised restraint so as not to substitute their judgments for that of the agency and not to choose between equally permissible inferences or make independent determinations of fact, because to do so would be exercising a non-judicial role. Rather, they have attempted to decide whether a reasoning mind could reasonably have reached the result the agency reached upon a fair consideration of the fact picture painted by the entire record."\textsuperscript{104}

In reaching these conclusions, the court reasoned that under the substantial evidence rule, the whole record must be considered in order to determine whether the evidence supporting an agency's decision is substantial, and whatever in the record detracts from the weight of such evidence must be taken into account. This, the court said, emphasized the fact that there is a thin line between a test based on substantial evidence and one based on weight of the evidence.

On the facts of the \textit{Oak Hill Farms} case, this reasoning is understandable in that there was practically no evidence to support the decision of the County Commissioners. The decision would have been reversible under either of the two tests. The question remains, however, whether the court will also equate the substantial evidence rule with the weight of the evidence rule in a case where the result could depend on which test is employed. To explain, first assume a set of facts similar to those in the \textit{Oak Hill Farms} case. There are one hundred pieces of evidence in favor of proposition I and only one piece of evidence in favor of proposition II. Although there would be evidence supporting proposition II, it would clearly not be substantial evidence, considering the evidence to the contrary. Also, the weight of the evidence would clearly be in favor of proposition I. Next assume that five pieces of evidence favor proposition I and one piece of evidence favors proposition II. This is similar

\textsuperscript{103} Id., 283.
\textsuperscript{104} Ibid.
to the illustration given at the beginning of this section. It would seem that, even taking into account the contrary evidence, there would be substantial evidence supporting proposition II, assuming that the one piece of evidence is of a reliable nature. Nevertheless, it would also seem that the weight of the evidence is against proposition II. In this type of situation, the test employed would probably be determinative. If under these circumstances the Court of Appeals still equates the substantial evidence test with the weight of the evidence test, it would be ignoring the fact that the leading writers in the field of administrative law have recognized a meaningful difference between the two tests.\(^{105}\)

The Court of Appeals in *State Board v. Ruth*\(^ {106} \) stated that, on questions of the scope of judicial review, the Maryland Administrative Procedure Act takes precedence over a concurrent statute also granting judicial review. In the *Ruth* case, an appeal from the agency’s action was permitted by both the Professional Engineers and Land Surveyors Law\(^ {107} \) and the Maryland Administrative Procedure Act. The trial judge concluded that since appeal was available under the Professional Engineers Law, the scope of judicial review was broader than in the case of an appeal permitted solely by the Administrative Procedure Act. The Court of Appeals held to the contrary, stating that by virtue of the enacting legislation, the provisions of the Administrative Procedure Act are controlling in the event of any inconsistency between that act and other statutes.

**B. Independent Judicial Review**

One important case decided by the Maryland Court of Appeals involved the issue whether a court, in reviewing an administrative determination of a constitutional fact, should refuse to give any weight to the finding of the administrative agency. The background for the issue was a series of United States Supreme Court decisions which are landmarks in administrative law. In *Ohio Valley Water Co. v. Ben Avon Borough*,\(^ {108} \) a company contended that rates set for it by the Public Service Commission of


\(^{106}\) 223 Md. 428, 165 A. 2d 145 (1960).


\(^{108}\) 253 U.S. 287 (1920).
Pennsylvania were so low as to be confiscatory. The Supreme Court held that due process required the Pennsylvania court, in reviewing the order alleged to be unconstitutional, to exercise an independent judgment regarding the law and the facts — that is, the court must not consider itself bound by the findings of the agency. In *Ng Fung Ho v. White*,\(^\text{109}\) the Supreme Court held in a deportation case that a claim of American citizenship supported by evidence raised an essential jurisdictional fact which the reviewing federal court must determine independently. In *Crowell v. Benson*,\(^\text{110}\) the issue was whether an employee's accident was covered by the Longshoremen's and Harbor Workers' Compensation Act. The Supreme Court held that this issue raised constitutional and jurisdictional questions and that, therefore, the federal court reviewing the agency action should determine independently questions of law and fact. In addition, the Court held that the reviewing court should compile its own record as a basis for decision. In *St. Joseph Stock Yards Co. v. United States*,\(^\text{111}\) involving allegedly confiscatory rates set by a federal agency, the Supreme Court reaffirmed the above line of decisions but noted that in exercising its independent judgment, a federal court could give appropriate weight to the agency findings.

The problem of these cases was presented to the Maryland Court of Appeals in *Beckett v. Housing Authority*.\(^\text{112}\) Residents and taxpayers of Baltimore City sought an injunction against the construction of certain public housing projects by the Housing Authority of Baltimore City. The statute provided that the Housing Authority could rent or lease the housing only to persons of low income. The Housing Authority employed a technical and statistical staff which assisted it in determining what persons should be admitted to these housing units. After a study of the data gathered by this staff, the Housing Authority set up a schedule of income limits for families.

The suit was based upon the contention that the determination by the Housing Authority as to who were persons of low income was arbitrary because it allowed occupancy of low rent projects to persons who had incomes up to $2950 per year. The plaintiffs claimed that it would violate the state and federal constitutions for a statute to provide for housing with public funds for persons not of low income. They therefore contended that

\(^{109}\) 259 U.S. 276 (1922).
\(^{110}\) 285 U.S. 22 (1932).
\(^{111}\) 298 U.S. 38 (1936).
\(^{112}\) 198 Md. 71, 81 A. 2d 215 (1951).
the Housing Authority's determination as to who were persons of low income involved a constitutional fact, and that the reviewing court had to hear and determine the facts independently.

The Court of Appeals rejected this contention, holding that the public utility rate cases and cases involving civil and personal rights relied on by the plaintiffs were not applicable where, as in this case, the plaintiffs had no direct, personal or property rights involved. The plaintiffs were suing as taxpayers only. The court then stated that the question was whether or not the Housing Authority had acted arbitrarily in fixing income limits. It noted that the Housing Authority had a staff of technical and statistical experts, whereas a court did not, and that, therefore, the finding of the Authority should not be disturbed where there appeared to be substantial evidence to support it. The court concluded that, on the facts, it would sustain the income schedule determined by the Housing Authority, however broad or narrow the scope of judicial review.

This case actually involved two separate points: (1) whether the Maryland courts are required by the Fourteenth Amendment to determine independently issues of constitutional fact when it is contended that an agency has acted unconstitutionally; and (2) whether the Maryland courts should review such findings independently as a matter of their own judicial policy. On the first point, it does seem meaningful to distinguish the federal cases on the ground that in the *Beckett* case no personal rights were involved. The Fourteenth Amendment prohibition, which was the basis for decision in the *Ben Avon* case, concerns only the deprivation of life, liberty or property without due process of law. Since the only interest claimed by the plaintiffs was that of taxpayers, with no greater rights than any other taxpayers, their plea for independent judicial review was not as strong as that of the Company in the *Ben Avon* case or of the aggrieved parties in the other cases discussed above. By analogy, the Supreme Court has held that a general federal taxpayer has no standing in court to attack a federal appropriation.\(^\text{113}\) On the second point, however, such a distinction does not seem as meaningful. Assuming that it is a court's policy to review independently a case of this type when it involves personal rights, such a policy might also apply when the case involves alleged unconstitutional action affecting an entire community. Improper expenditure of

millions of dollars of public funds, as alleged in the *Beckett* case, would appear to warrant at least as much judicial attention as an unlawfully low rate set for a public utility.

On the other hand, the Court of Appeals may be indicating that it will not follow the philosophy of the *Ben Avon* case and similar decisions as a matter of general policy. This philosophy has been greatly criticized by writers in the administrative law field, and it appears to have been ignored in recent federal decisions. The criticism has focused upon the impracticability of expecting a reviewing court to examine a lengthy administrative record and perhaps to compile its own record in order to make independent findings about extremely complicated and technical issues. The Court of Appeals appeared to be in sympathy with such criticism when it emphasized the fact that the Housing Authority had a staff of experts but the reviewing court did not. In addition, it is often difficult, if not impossible, to decide whether or not the challenged findings involve jurisdictional or constitutional facts requiring independent judicial review. Almost any administrative decision contains findings which, if analyzed unreasonably closely, could be made to raise jurisdictional or constitutional questions by an attenuated process of reasoning.

The Maryland Administrative Procedure Act provisions dealing with the scope of judicial review are rather broad, but they do not require independent judicial review. They seem, however, to infer that an agency’s decision should be upheld if it is supported by competent, material and substantial evidence.

**CONCLUSION**

The various aspects of administrative law discussed above do not even approach a complete review of this vast area of the law. The reader is cautioned, therefore, that this article must be supplemented by his own research before he can begin to feel familiar with Maryland administrative law in general. Also, it should be remembered that administrative law is a fast growing, continually fluctuating field in which the decision or rule of today may become obsolete within a few years.

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114 The Court of Appeals has consistently refused to follow such cases. See Oppenheimer, *supra*, n. 97, 206-210.