THE FEDERAL ADMINISTRATIVE PROCEDURE ACT

AN ADDRESS
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It is always a joy for me to speak before a bar association group, but it is a particular pleasure to have this opportunity to appear here.

As my topic, I have selected a subject of broad national interest for lawyers, namely, the Administrative Procedure Act for Federal Agencies, commonly known as the McCarran-Sumners Bill, which was enacted into law on June 11, 1946.

A knowledge of its provisions will assist you greatly in any problems you may have with federal administrative agencies.

In discussing this topic, I usually find it necessary to trace briefly the history of administrative agencies in the federal government since some people are under the impression that the administrative process is a creature of the last few years, conjured up by alleged wild-eyed bureaucrats.

I need not tell you that the administrative process is as old as our government, that at the very first session of the First Congress under the Constitution, the Congress passed laws involving the administration of customs and the regulation of ocean-going vessels--laws which are the antecedents of statutes now administered by the Bureau of Customs in the Treasury Department, that at that time Congress delegated to the President the power to make regulations governing payments to invalid pensioners, that in 1796 provision was made for trading with the Indians according to such rules as the President should prescribe.

I could go on illustrating how the growth of the administrative process followed the path of the growth of the Union; how, for example, the growth of steam navigation gave rise to an act requiring the licensing of steamboat operators; how the rapid expansion of railroads, with its attendant evils of discriminatory rate adjustments, irresponsible financial manipulation and speculation, led to the creation of the Interstate Commerce Commission.

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But, such a discussion is not necessary with a group of Colorado lawyers.

The Federal Administrative Procedure Act governs the administrative processes of all agencies of the federal government, and is not limited to licensing functions.

It covers every phase of the administrative process, including rule making, adjudication and licensing.

The Federal Act will control the administrative porcesses of such powerful agencies as the Interstate Commerce Commission and the Securities and Exchange Commission, as well as the less known and less complex agencies, as the Grazing Service of the Department of the Interior and the Grain Standards Administration in the Department of Agriculture.

No agency, as such, has been exempted.

As you can see, it was quite a task to formulate a bill which would govern uniformly the procedures of all the agencies in the federal government and, at the same time, not affect adversely any one of them.

It required much patience and deliberation.

For well over a year the bill was the subject of extended study and consultation.

My Department collaborated with the Judiciary Committees of both Houses of Congress, at their specific request, in arriving at a final draft of the bill which would be acceptable to all interests concerned.

Numerous drafts were drawn, improved, modified, and revised.

Interested agencies of the government and outside bar groups were consulted.

The result -- the Administrative Procedure Act -- may be described as a restatement of the law of due process for federal administrative agencies.

One of the main purposes of the Act is to assure that the public receives adequate information concerning every agency of the federal government.

Thus, section 3 of the Act requires each agency to describe its central and field organization and the manner in which the public may secure information or make submittals or requests.

Further, each agency has placed in the Federal Register a statement of the general course and method by which its functions are channeled and determined, as well as a description of all formal and informal procedures it uses.

This required statement under section 3 should be of great assistance to the members of the bar throughout the country.

I remember how difficult it was in many instances for me, when I was in private practice, to ascertain what procedure to follow or what method to pursue in connection with problems which I had with federal agencies.

There seemed to be no authoritative source which gave me the information which I desired as to where to file papers or where to make requests of the agencies.

I believe that lawyers will no longer have this difficulty if they make use of the statements appearing in the Federal Register for each agency of the government.

It occurs to me that some of you may not be acquainted with the Federal Register.

Too few lawyers are aware of the existence of this publication.

The Federal Register is an official publication of the federal government in which are published all Executive orders, Presidential proclamations, and all documents of general applicability and legal effect issued by any government agency.

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Congress has provided that the publication of a government regulation in the Federal Register gives constructive notice of its contents so that, for example, if an agency such as the Office of Price Administration files a statement as to the prices to be charged for certain types of lumber, publication of this regulation in the Federal Register is sufficient to put everyone on notice.

Thus, should a client of yours fail to abide by the price schedule so published in the Federal Register, he would find himself in violation of the criminal provisions of the Emergency Price Control Act, despite the fact that he might have no actual knowledge of the regulation.

The Federal Register, published on September 11, 1946, is a particularly interesting document in that it sets forth the organization and procedures of government agencies in compliance with the provisions of section 3 of the Act.

For example, if you should desire to know the organization of my Department, you could refer to the Federal Register of that date and you would find that the Department of Justice is divided into various offices, divisions, bureaus and boards, with a description of the major functions of each of these units.

In addition, and probably more important, for your purposes, you could ascertain whether a particular Assistant Attorney General has authority to settle a case which you may have with the Department.

Thus, if the United States has a case against one of your clients for a sum not in excess of $50,000, the Assistant Attorney General in charge of the Division which is handling the claim, has final authority to settle the case with you.

Then, too, the procedure for submitting an offer in compromise may be found by reference to this issue of the Federal Register.

For those having an interest in the lighter side of government activities, reference to the 966 pages of this edition of the Federal Register, printed in four sections, will show that the Virgin Islands Company, under the general supervision of the Department of the Interior, is engaged in the milling of sugar and the distillation of rum, as well as operating a slaughter house.

Should you intend to visit Alaska on vacation, you will be interested in knowing that the Department of the Interior issues permits for fishing and hunting in that area.

Copies of the Federal Register may be obtained from the United States Printing Office.

Most large law libraries, however, have the Federal Register available for reference.

The basic scheme of the Administrative Procedure Act is to classify all administrative proceedings into two categories, namely, rule making and adjudication.

Rule making is the process whereby agencies make rules and regulations to implement their statutory policy.

Provision is made under the Act for the public to participate in the agency's formulation of rules.

Each agency will be required before it may adopt certain substantive rules to give notice in the Federal Register of the contents of the rule it proposes to adopt and to inform the public in what manner it may participate in the consideration of this rule.

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The agency, thereupon, may conduct its rule making proceedings by allowing the public to submit written views or arguments or to appear before it.

The other type of proceeding into which this Act separates administrative procedure is adjudication.

Adjudication relates to proceedings which are adversary in nature.

Individual compliance or behavior is the subject matter of the proceedings.

Licencing is, by definition, a form of adjudication.

Not all forms of adjudication, however, are subject to the Act.

The administrative Procedure Act does not give the full story on the administrative process.

It sets forth guides for conduct with relation to various types of hearings and proceedings.

In order to have the complete picture on any particular problem with which you are working, you will have to resort, as you did before, to the particular statute, or statutes, which govern the agency with which you have business.

Let me point out what this means. The introductory sentence of section 5 of the Act provides that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," an agency must abide by the provisions as to hearing and decision contained in sections 7 and 8 of the Act.

In order to determine whether the particular adjudication with which you are concerned is subject to the Act, you would have to turn to the statute under which the agency with which you are dealing has been established.

If the agency statute provides that a hearing will be necessary and that the agency's decision must be predicated on the record adduced at the hearing, then and then only will sections 7 and 8 of the Administrative Procedure Act apply.

A concrete example should be in point.

Let us suppose that the National Labor Relations Board issues a complaint against one of your clients, charging him with engaging in an unfair labor practice in violation of the National Labor Relations Act.

Naturally, you would turn to the Administrative Procedure Act to ascertain what provisions of law it contains relative to adjudications.

Adjudications, you will find, are covered in section 5.

Section 5, as I have stated, covers only such adjudications as are required by statute to be determined on the record after opportunity for an agency hearing. Accordingly, you would have to resort to the National Labor Relations Act to ascertain whether an adjudication involving an unfair labor practice comes within the coverage of the Administrative Procedure Act.

It so happens that such an adjudication under the National Labor Relations Act is embraced within the statutory language of section 5 of the Administrative Procedure Act.

Now you could turn to sections 7 and 8 of the Administrative Procedure Act to ascertain what procedural rights your client will have under the Act.

Under section 5, the agency is required to afford your client an opportunity to settle the case without formal hearing if time, the nature of the proceeding, and the public interest permit.

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If it is not possible to settle the controversy by consent, the formal provisions of sections 7 and 8 will apply.

This means that a hearing will be held, presided over by the agency or by an examiner appointed under the provisions of the Administrative Prccedure Act.

Section 7 provides, in part, that your client will have the right "To present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

The transcript of testimony and exhibits is to constitute the exclusive record for decision.

If the agency should rest its decision on official notice of a material fact not appearing in the evidence in the record, your client will, on timely request, be afforded an opportunity to show the contrary.

Under section 8, the examiner who presides at the reception of the evidence is to render a decision.

His decision may become final if no appeal is taken by your client or if the agency does not seek a review of the examiner's decision.

Further, provision is made that, in adjudications, there should be an internal separation of powers in the agency so that the examiner who presides at the hearing will not be subject to the supervision of any person who has investigative or prosecuting functions.

The examiner, moreover, is to perform no duties inconsistent with his duties as an examiner.

To assure his impartiality and to grant him a measure of security and tenure independent of the agency, no examiner is to be removed except upon

good cause proved by the agency before the Civil Service Commission.

There are some other features of the Act which I should like to discuss with you.

The question is often raised about lay practitioners practicing before various agencies of the government.

The Interstate Commerce Commission, for example, allows special consultants, such as transportation experts and accountants, to practice before it.

There has been an independent movement for quite awhile to attempt to restrict agency practice only to attorneys.

This Act does not attempt to regulate the practice of agencies in that respect.

In fact, the Act provides specifically that nothing in it shall be deemed "to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding."

Some lawyers also have objected to the requirement imposed by some agencies that a lawyer before appearing before the agency must be admitted to practice before the agency.

These lawyers feel that admission to practice in the highest court of any state should be sufficient evidence of their qualification to practice before any agency of the federal government.

There is nothing in the Act to restrict agencies from requiring, as some do now, special qualifications for practice before them.

In fact, the legislative history makes clear that Congress intended to leave untouched the existing powers of agencies to control practice before them.

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There is one provision which will satisfy all members of the bar, namely, that agency subpoenas are to be granted to parties to an agency proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought.

There has been much criticism, and in some instances justifiably so, that agencies have issued subpoenas to their prosecuting staff with no hesitation but when a private party has asked for a subpoena, he has found it exceedingly difficult to obtain.

Such a situation should no longer exist.

The section on judicial review of administrative action should be of particular interest to you.

It covers the right of judicial review, the form of action, reviewable acts, interim relief, and the scope of the court's power of review. Its provisions, while fully safeguarding the rights of aggrieved individuals, will not, in my judgment, hamper the proper conduct of administrative business.

Thus, there is no right to a review of any agency action which is by law committed to agency discretion or where statutes preclude judicial review.

Courts are not to set aside agency findings unless they are found to be arbitrary, capricious or otherwise not in accordance with the law.

Due account is to be taken of the rule of prejudicial error.

The bill thus enacts into statutory form those aspects of existing law which are generally recognized as most sound and practical in their application in the field of judicial review of administrative action.

The Administrative Procedure Act, in my opinion, can assure a reasonable uniformity and fairness in administrative procedure.

It need not hamper the proper conduct of administrative agencies, provided the courts, in interpreting its provisions, will abide by the judgment of the Supreme Court that "although the administrative process has had a different development and pursues somewhat different ways from those of courts," administrative agencies and courts "are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other."