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## Book Review. Heady, F., Administrative Procedure Legislation in the States

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## BOOK REVIEWS

ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES. By Ferrell Heady. Ann Arbor: University of Michigan Press, 1952. Pp. 137. \$1.00.

In this modest but incisive study Professor Heady, who teaches political science at the University of Michigan and is Assistant Director of its Institute of Public Administration, makes an informative and valuable contribution to the literature of administrative procedure. His monograph in pamphlet form embodies not only the results of careful study of statutory texts, judicial decisions and official regulations, but also data gathered at first-hand in an on-the-scene survey of five representative states possessing administrative procedure legislation and one state, Oklahoma, in which determined efforts to secure the passage of such legislation are continuing. The other states are California, Michigan, Missouri, North Dakota, and Wisconsin.

Professor Heady begins his study with a brief account of the movement toward state administrative procedure legislation. He emphasizes especially the Model Act of the National Conference of Commissioners on Uniform State Laws, to which he refers for comparison throughout his text. In his final chapter he states his conclusions as to the advantages and difficulties of the legislation he has investigated and the merit, or lack of it, of certain proposals for additional enactments which he has encountered. He is aware of passing judgment to a large extent on the efforts of lawyers to deal with matters of professional importance, as to which they have taken the initiative. He rightly asserts the justifiability of such an appraisal "with a questioning and critical eye" by one who looks at the issues from the standpoint of maintaining effective regulatory administration.

The author's objectivity and ability to analyze the questions presented are admirable.<sup>1</sup> "Administrative procedure," he emphasizes, "must strike a balance between the objective of protecting individuals from arbitrary action by administrative agencies and the equally important goal of expeditious execution of public policy. . . . The problem is of equal concern to the lawyer and the public administrator. . . ."<sup>2</sup> One question has been whether general administrative procedure legislation is wise or whether the regulation of procedure should be by

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1. Professor Heady's previous inquiries into administrative procedure and allied problems include his article, *Administrative Rule-Making Under Section 701(e) of the Food, Drug, and Cosmetic Act*, 10 GEO. WASH. L. REV. 406 (1942), and studies as a member of the staff of the Commission on the Organization of the Executive Branch of the Government (Hoover Commission). See his Comment, *The Operation of a Mixed Commission*, 43 AM. POL. SCI. REV. 940 (1949).

2. P. 3.

separate statutes in the several fields of administration. As to this, Professor Heady concludes that "the comprehensive procedural statutes enacted in the four states of North Dakota, California, Wisconsin, and Missouri . . . have had in the balance a beneficial effect in each state" but he also believes "there is a point of diminishing returns in imposing uniform procedural requirements," which there is danger of passing if pending proposals for additional legislation in Missouri and Michigan should be adopted.<sup>4</sup>

In the body of his study Professor Heady treats successively, with reference to each of the states covered, the various aspects of rule making, adjudication and judicial review which are dealt with in the statutes. He sets forth comparatively the provisions of the various enactments and of the Model Act, states the practice under the existing provisions as it is revealed in published sources or was disclosed in the course of his personal inquiries and brings out the successes and the unsolved problems that have emerged in the several jurisdictions. The result is a panorama of the whole which, like an infra-red aerial photograph, also supplies a wealth of detail. No similar body of information is available elsewhere.<sup>5</sup>

The most noteworthy development reviewed by Heady is the establishment of the California Division of Administrative Procedure and that Division's maintenance of a panel of hearing officers for voluntary use by state agencies in formal proceedings and its publication of a loose-leaf California Administrative Code and supplemental Administrative Register. By these measures California has led the way in attempts to make administrative regulations genuinely available to those concerned with them and in efforts to provide effectively for the orderly, responsible conduct of administrative hearings. Professor Heady reports that the publication system is beneficial despite its elaborateness and somewhat high cost, since it not only distributes over three hundred full sets of regulations throughout the state but results in the economical distribution of larger numbers of subject-matter portions and reprints of the regulations. The panel of hearing officers has won its way to increasing use despite the discouragement, usual in less spectacular efforts at improving administration, of inadequate salaries. The success that has been achieved has resulted in large part from the existence of an over-all Division and the work of its able director. The Division watches over the whole of adminis-

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3. P. 121. The Michigan legislation which was studied was not of the "comprehensive" variety, but included only provisions for the preparation and publication of regulations.

4. P. 122.

5. Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 IOWA L. REV. 252 (1948), is an excellent summary and commentary with respect to the state statutes in existence at its date, embracing those covered by Heady and others as well; but it does not purport to deal with actual experience under these laws.

trative procedure in the state and funds for its needs in periodical reports and in the efforts to bring about improvement, which it makes. Even though the example of this experience is applicable specifically to the Federal Government and the minority of big states,<sup>6</sup> more largely than to the states as a whole, its lesson that continuous, informed attention to the problems of administrative procedure by an official charged with responsibility brings good results, is applicable everywhere.

Requirements for the filing and publication of regulations are frequently a problem, Professor Heady finds. Interest in securing notice of the regulations and access to them is far less widespread than might be supposed. The result is that poorly maintained files go unchallenged and evasion of statutory waiting periods before regulations are to become effective is often practiced. The principal means of evasion is the device of branding regulations as "emergency" measures, which are exempted by statute from the waiting period requirement. The success of methods of publication is largely a matter of economics. In addition to California, only Michigan and Wisconsin, among the states studied, are carrying out publication requirements. In execution the publication plans have left a good deal to be desired; but in both states improvements, which seem possible within the limits of available resources, are contemplated.

Unlike Indiana and Ohio which require hearings in connection with the adoption of regulations, the states studied follow the Model Act by omitting mandatory rule-making procedures, except California. There notice and an opportunity for interested persons to submit statements in writing or orally, with an exception for emergency regulations, are prescribed.

As to adjudication, procedural requirements similar to those of the Model Act are included in the statutes of California, Missouri, North Dakota and Wisconsin. Those of the California act apply to designated agencies, while those in the other states apply to "contested cases" or "formal proceedings," as defined, occurring in all agencies. Only one serious problem appears to have arisen with respect to the application of these requirements, and that relates to the always-troublesome question of the methods of decision by agency heads in a case where not they but a hearing officer has heard the evidence and has rendered a report or made an initial decision. A tendency has arisen in Cali-

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6. The federal Attorney General's Committee on Administrative Procedure recommended unanimously in 1941 that an Office of Federal Administrative Procedure be established and be given research and advisory functions, together with the duty of appointing hearing examiners upon nomination by the agencies and of passing upon their removal for cause if a hearing by the Office should be demanded. FINAL REPORT 193-94, 196-97, 221-23, 237-39 (1941). Although other recommendations of the Committee, including many emanating from its "minority," have been accepted, this central one has never been adopted or, it would seem, seriously considered.

ifornia to require the agency heads to consider the whole record if the proposed decision of the hearing officer is not accepted in its entirety, even where the only disputed question is whether that decision recommends an adequate period of suspension of a licensee for violations of law. Professor Heady soundly suggests that the provision of the Model Act placing the burden on the parties to point to the portions of the record that bear on the problem before the agency heads offers a sound solution. He also endorses Professor Nathanson's suggestion that, as has been done in California, the practice be adopted of not requiring the hearing officer's proposed decision to be submitted to the parties in advance if the agency is accepting it as its own. Heady goes along with the requirement that decisions adverse to a private party be in writing and accompanied by findings of fact and conclusions of law, although this requirement may at times be burdensome and goes beyond judicial practice in most trial courts. As this requirement indicates, there is a tendency of administrative procedure legislation to expand the necessity for written documents; and it is significant that, as Heady notes, the Wisconsin motor vehicle transportation act was amended in 1947 at the behest of the regulated interests to dispense with the administrative procedure act's requirement of written reports by hearing officers in licensing cases and to compel decisions within sixty days in such cases. Obviously the line between methods which tend to insure open, precise administrative reasoning and those adapted to the efficient dispatch of business is difficult to draw.

As respects judicial review, Heady notes the inadequacy of some of the new state legislation to establish a uniform, simple form of review proceeding, such as has been forcefully advocated.<sup>7</sup> In California the reasons are constitutional; elsewhere they reside in reluctance to supersede familiar methods or to dispense with a broader scope of review in some existing proceedings than would prevail in a new, over-all form of review. In North Dakota and Wisconsin, however, uniformity has been achieved. In the former state the legislation has been construed in accordance with prior practice to provide a broader scope of review than the familiar "substantial evidence" formula produces. In Wisconsin the scope of review has been extended by the administrative procedure act in accordance with that formula, as compared to a more restricted scope previously in effect with respect to at least some classes of administrative decisions.

At various points in his discussion Professor Heady takes note of proposals which would impose stricter procedural requirements upon administrative agencies than at present, or would otherwise limit their authority. In Missouri a bill to "judicialize" the hearings in formal

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7. DAVIS, *ADMINISTRATIVE LAW* 718-19 (1951).

proceedings by detailed provisions for pleadings, evidence and other elements of procedure was vetoed by the governor in 1950. In California and Michigan proposals have been made to give considerable finality to the decisions of hearing officers who would be on central panels, as against agency revision. Such proposals would in effect elevate hearing officers to the status of independent tribunals and would require the agencies to submit to the determinations of officers who would not be answerable to them or be especially versed in the matters with which the agencies are concerned. The advantages of agency initiative and specialization, which are among the principal reasons for resorting to administrative processes, would thus be lost to a large extent. There seems to be no justification for such a development, except possibly in situations, which are rare or nonexistent in state administration, where financial sanctions are to be imposed for defined misconduct. As Heady points out, such proposals have less to recommend them than those to establish specialized quasi-judicial tribunals, split off from regulatory agencies, with decision-making powers. The President's Committee on Administrative Management made such a proposal in 1937; but the Attorney General's Committee on Administrative Procedure and the Hoover Commission later rejected it.

Professor Heady also deplores a peculiar type of legislative-committee review of administrative regulations which has arisen in Michigan. Under statutory interpretations by the attorney general, this review creates the possibility of a paralysis of rule-making—a possibility which has been realized in at least one instance, despite agency efforts to cooperate. The review committee proceedings, moreover, take on the aspect of a judicial trial, with pleadings and issues. This particular form of supervision of agency action has boomeranged, since there is evidence that the agencies, in order to avoid it, have tended to refrain from announcing their policies in filed regulations, thus depriving the public of the guidance to which it is entitled.<sup>8</sup>

The real or threatened extremes to which administrative procedure legislation can go may justly be charged to an excess of zeal on the part of lawyers eager to protect the interests of private parties who are subject to administrative regulation. The possible baneful effects of such zeal must be overcome. So far they have been largely avoided; for the activities of the bar as they have emerged in the measures Professor Heady reviews have on the whole produced good results. This record is encouraging, for it gives promise that the jungle of state administrative processes will actually be tamed. Professor Heady's

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8. At its last session the Michigan legislature adopted an administrative procedure act patterned after the Model Act. It omits the stricter requirements as to hearing officers' decisions previously advocated and leaves the previous form of review of administrative regulations undisturbed. Mich. Pub. Acts (1952) No. 197.

study contains an effective account of the effort so far made, accompanied by significant suggestions for the future. It is definitely worthy of attention by all who have an interest in its subject.

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BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR. Prepared by Committee on Bar Examinations and Requirements for Admission to the Bar for the Survey of the Legal Profession. Colorado Springs: Shepard's Citations. 1952. Pp. xvii, 498. \$5.00.

This book is a part of The Survey of the Legal Profession which is being conducted under the auspices of the American Bar Association. It consists of 12 articles written by experts in the field of bar examinations and admission to the bar. These articles have been published previously as they were completed in the *Bar Examiner* and in the *American Bar Association Journal*. There has been added a report of the consultant which summarizes the articles and culminates in 32 specific recommendations.

This work is a valuable contribution to the administration of justice. For, by and large, our system of justice will be no better than those whose duty it is to administer it. These are the lawyers and judges who have been admitted to the practice of law.

All the articles are carefully prepared, thoroughly documented and ably presented. All features of bar examinations and requirements for admission to the bar are thoroughly covered. The practices and requirements of the various states are set out and there is made available information of what other states are doing. This is valuable for purposes of study and comparison and should result in the best practices being adopted by all the states and in the discard of practices which have proven inadequate. All of those directly concerned with the education, examination and admission to practice of applicants for law licenses will profit by a careful study and analysis of the material presented in this book.

A brief study of the system used in Tennessee and comparison with practices in other states will be made. The 32 recommendations of the consultant serve as a good focal point for this approach.

Five of the recommendations are not applicable to state practices. Of the remaining 27, Tennessee complies with ten. Tennessee does require three years of pre-legal education before permitting students to begin the study of law, and does not accept private study, correspondence school, law office training or recognize the "diploma privilege." Tennessee does stress character qualification and uses the

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