The Tennessee Administrative Procedures Act: An Outsider's Perspective

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The Editors of the Review have asked me to contribute to this symposium as an outsider who is interested in administrative procedure and its reform and improvement. The following observations are made from that perspective. I have the privilege of being the Chairman of the Division of State Administrative Law of the Section of Administrative Law of the American Bar Association. As most readers will know, the Section of Administrative Law of the A.B.A. is concerned with improving the fairness, clarity and efficiency of administrative law generally. As a matter of historical fact, the Section's attention has been directed chiefly to problems of federal administrative procedure, particularly the Administrative Procedure Act of the United States. The Section is also interested in administrative law at the state level, though its expression of this interest has been more or less indirect and episodic. The Section simply does not have the staff and other resources to sustain concerted effective interest in the administrative law of our several states. Nevertheless, the activities of its Division of State Administrative Law, modest as they are, constitute at least symbolic recognition that state administrative law has an importance in the legal life of our national community that is at least comparable to that of federal administrative law. Hence my participation in this symposium.

It is inappropriate that I attempt to deal in detail with the new Tennessee Act. That responsibility has been assumed and discharged by other contributors hereinafter. Moreover, an intelligent detailed analysis of any statute of major importance requires familiarity with the law that it amends and supersedes, knowledge of the statute's immediate legislative history and an awareness of the potitical forces that both animated and constrained the development of the reform. Of all this I know nothing, except what can be surmised from experience dealing with procedural reform in other settings. On the basis of that experi-

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ence, I infer that the new Tennessee Act is an accomplishment of which those who contributed to it may be justly proud.

The impediments to this kind of legal change are always formidable. The agencies themselves tend to assert that the existing law "works well," which often means only that overt rebellion and total immobilization have been avoided. The bench and bar tend to feel that they comprehend the law as it is and are understandably concerned that they may not comprehend the law that is to become. There are clusters of persons around each agency (administrators, practitioners before the agency, businessmen and others whose activity is regulated, etc.) who have made a heavy investment in the status quo. The constituency for reform is diffuse and often weak; the old form books will be made obsolete; there probably will not be enough staff to implement the new law; etc. In the face of these impediments it is often surprising that anything gets done. It is therefore an occasion for celebration when it does. Hence this symposium.

What I can say by way of a contribution to the symposium are essentially three things. First, the Act has some internal problems that will create difficulties which will eventually have to be worked out. Second, some of these difficulties are the result of deficiencies in the legal work that has gone into administrative law generally. And third, the experience that Tennessee has undergone ought to be an inducement to augmenting the resources that are available to this state and other states when they go through that experience.

First, as to internal problems with the Act as it stands. These are noted in the contributions which follow, and I can only highlight some of them. One is the relatively narrow scope of the Act. It exempts several important agencies; it does not apply at all to local agencies of government (cities, counties and special purpose governmental units). Further, it permits the exemption of certain agencies when it is determined that the application of the Act to them will run afoul of controlling federal law and regulations. These limitations in scope no doubt were necessary on the political ground that without them the Act could not have been passed, and on the practical ground that the inclusion of many of these agencies would have required an even more complex piece of legislation. On the other hand, the breadth of these exemptions means that a great variety of very important administrative processes are still governed by what I assume is a hotch-pot of existing legal rules. In particular, in most jurisdictions with which I have any acquaintance the matter of local agency administrative law is the region of darkness in the applicable jurisprudence.

Without general regulation through state law, it usually remains that way. The same is usually true of the operations of some of the agencies that obtain exemption from procedural control. The combination of the importance of their functions and the informality with which those functions are performed creates centers of power whose penetration is strongly resisted.

An equally important limitation on the Act's scope is established only by implication. This is the limitation of the Act's provisions concerning adjudication of cases where a right to a hearing is provided by some other legal source. As several of the contributors point out, the Act does not prescribe the instances in which a person is entitled to the "contested case" procedure; the Act becomes operative only when some other rule of law, statutory or constitutional, prescribes such an entitlement. No doubt this approach was made necessary by practical considerations. There are many interchanges between citizen and government that should not be fitted into the adjudicative mold, although the choice in favor of adjudication rather than some other form of decision-making in many instances is pretty clear. For example, when the effect of agency action will be to impair what can be defined as an interest in property or personal liberty, an adjudicative type of determination is usually fitting. But many situations of citizen-government interaction do not readily define themselves this way as affecting interests of property or liberty. Some such situations are defined as involving "privileges," and others are still more amorphous. With respect to them it is problematic whether a trial-type hearing is the right form of decision-making. It is impossible to generalize about these situations, and the draftsmen of the Act were wise not to try. But that leaves to the legislature or to the courts the task of deciding whether, in any particular situation, there is a right to a "contested case" hearing.

A somewhat related limitation is the fact that the Act does not say anything about how agencies should handle citizen-government interactions *before* they reach the "contested case" stage. In the parlance of administrative law this is the domain of "informal agency action." It includes the administrative mechanics by which citizens can make applications for agency action; how these applications are processed; what opportunities and obstacles exist for developing the relevant evidence through the agency's reception of data from the citizen or generation of its own data by investigation; the structure and process of internal agency review up to the point when the agency "takes a position" in the matter; its methods of internal audit to make sure that

these procedures are working properly; and so on. From the viewpoint of administrative science or bureaucratic management, these procedures are anything but "informal." They are the subject of the internal government of the agency, expressed as procedural regulations and practices; of the daily work of agency directors of administration and the heads of section or departments; of external criticism on grounds of inefficiency or partiality; and, of scandal when things go really wrong. They are also the processes that actually affect most average citizens, whose worst fear is often that their case may wind up as a "contested case."

These vital aspects of the administrative process are "informal" only from the viewpoint of lawyers and judges. This is because lawyers and judges ordinarily do not become involved in agency action except in cases which have the actual or likely destiny of becoming "contested." If the agency is running properly, the cases falling in the category of "contested cases" should be a small fraction of the agency's "intake." The situation is analogous to the relationship in ordinary civil controversies between the number of legal disputes and the number of cases that get as far as the pleading stage of litigation. If most all civil legal disputes found their way into litigation, rather than being disposed of by negotiation between the parties or their lawyers, the process of civil dispute resolution would be a disaster. The same is true of matters coming into an agency. Yet because an agency is a part of government, these "informal action" matters are, in the strict sense, legal problems and should be governed by law. Most administrative procedure statutes, however, have little or nothing to say on the subject. The Tennessee law is no exception. This is of little practical concern to lawyers and judges, for the reasons indicated above. But it is of concern to the average citizen. The regulation of "informal action", therefore, should get more attention from the legislature than it has.

Still another problem with the Act is that it does not deal with administrative procedures that have legal effects equivalent to preliminary adjudication but which do not involve hearings. I have in mind administrative decisions based on tests, measurements, grading and the like. An example is the driver's license test. Another is the professional licensing examination (including the bar examination). Another kind of example is the grading of agricultural products. The fairness and regularity with which such procedures are conducted is a legal problem of great importance to the general community. It is becoming a matter of legal concern in the narrower meaning of being a subject of dispute in

court, as witness the ramifications of *Griggs v. Duke Power Co.*[1] (validity of tests for job applicants) and the grain-grading scandal in New Orleans. These procedures have long been immune from criticism on legal grounds. This immunity is no doubt partly explained by the fact that they were not thought to involve "legal" problems. Also, it has been thought that they involved only "technical" questions and expert evaluation. *Griggs* and subsequent decisions dissipate that illusion, but leave us with a large legal vacuum.

Another but more conventionally "legal" problem posed by the new Tennessee Act is that it provides a uniform procedure for all adjudications ("contested cases") and rulemaking. There are very distinct advantages of uniformity to the extent that uniformity is feasible. But there are distinct disadvantages in trying to establish a single type of procedure for a set of legal processes that differ from each other. Compare, for instance, a hearing on cutting off a family from welfare and a hearing to determine the rates of a public utility. The Act covers them both. But is it not relevant that there are hundreds of welfare cases and only a handful of utility rate cases; that each welfare case involves a relatively small amount of money, whereas each rate case involves hundreds of thousands or millions of dollars; that the public agency ordinarily has the balance of staff power in welfare cases, whereas in utility cases the balance is usually adverse to the agency; that maintaining consistency of outcome is a major element of fairness in welfare cases, while utility rate cases tend to turn on their own "peculiar facts" and hence are difficult to compare in outcome?

Similar differences exist in types of rulemaking. These differences are enlarged by the fact that the *composition* of rulemaking agencies differs widely. Some are made up of representatives of those who are regulated (e.g., professional licensing boards). Others are more or less broadly representative of the general public. There are nearly infinite variations between these extremes. Why should it be assumed that a single rulemaking procedure should fit all?

A set of related problems arises regarding the jurisdiction and procedure for judicial review of agency action. If the internal processes of agency decision-making have fundamental differences among them, why should a single set of judicial review procedures be appropriate? This is not to say that the new Ten-

1. 401 U.S. 424 (1971).

nessee Act is not a great improvement over what the law was before. What Tennessee had before was a complicated set of review procedures based on the old common law writs of certiorari (including distinct constitutional and statutory varieties), mandamus, prohibition and injunction. Only a worshipper of the past could suppose that writs originally devised for royal control of medieval local government could be useful prototypes for modern judicial review of administrative agency action. So modernization and streamlining were clearly in order and the Act therefore moves in the right direction. But is a single prototype the right solution? Does this bring to mind the F-111, the all-purpose warplane?

This brings me to my seond point. Many of the difficulties that the drafters of the Tennessee Act encountered resulted from the fact that they had so little help from outside. I have had experience as a legislative draftsman for a state (several of them). What you need at the start is something besides a recognition that you have some serious problems to deal with. You want some well-developed models, ones that cover the various types of problems you know you have. You want some studies, made in jurisdictions that seem to have similar problems, that have worked the problems through, explained what they are, identified the important determinants of workable solutions and suggested the relationships between various components of a solution. You also want some experts to consult. ("Experts" are people who have already made the mistakes you are likely to make, but are willing to admit it.)

Given all this, what do we have in state administrative law? We have a set of legal models and a body of legal literature that mostly reflects the experience of federal agencies. Most of these are, moreover, preoccupied with formal hearings (adjudicatory and rule-making) at the agency level and with judicial review of such hearings. We have a few scattered individuals who have worked through many of the problems in one state or another but who have had little opportunity to compare their work or to abstract and to generalize from the particulars of specific state situations. We have several organizations (e.g., the Council of State Governments, the Advisory Committee on Intergovernmental Relations) that have been concerned with state government but which have been more or less unconcerned with its legal aspects. So each state goes into the process of reforming state administrative law pretty much as though the wheel remained to

be invented. What is learned is a relearning of what others had learned before. And it having been relearned, it is then lost.

This brings me to my third point, which is what the Tennessee experience might suggest that would benefit other states (and benefit Tennessee as it works through the problems that its new Act does not resolve). One non-solution is to beef up the activity of such groups as the Section of Administrative Law of the American Bar Association or the National Conference of Commissioners on Uniform Laws. National organizations of lawyers, such as these, can help the long term effort to improve state administrative law. They provide indispensable networks for the dissemination of information and the introduction to each other of people who have had experience in the subject. The problem with these organizations is not the medium but the message: Having a network, what do you transmit? Carefully worked-out "programs" suitable for local transmission, so to speak, simply don't exist. And these organizations do not have the staff apparatus necessary to compile, organize, and help make available the "program" material that is available.

What we need is a law-oriented organization whose purpose is to facilitate improvement of state (and local) administrative law. There are models for such an organization—the Administrative Conference of the United States at the federal administrative level, and the National Center for State Courts in the field of state judicial administration. Milton Carrow and the Section of Administrative Law have been struggling, without much success so far, to create such an instrumentality. They have been frustrated by the lack of funds and the lack of interest. The problem of funding is ludicrous, given the importance of the problem and the scale at which we throw money around for other purposes. We are talking of, at most, a couple of million a year (less will do quite well, thank you, for the first three or four years).

As for the lack of interest, it can only be explained on the ground that the problem is so pervasive that no one assumes it can be dealt with, like air pollution used to be in St.Louis, Pittsburgh and Los Angeles. One would have thought, in this day when the public is properly concerned about "big government," that some serious attention would be given to improving "little government" (meaning the states) so that it can be made a serious competitor in the business of public ordering. Perhaps the experience in Tennessee can be brought to the attention of powers that be, so that an even better job can be done elsewhere and next time around.