

## CHAPTER VIII

# OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE

The Committee has been impressed in the course of its inquiries not only by the need for dissimilarities in administrative procedures, to which allusion has been made in this report, but also by the possibilities for greater uniformity in many subordinate particulars. The Committee has also been much impressed by the absence in many agencies of information or interest concerning the procedures in other parts of the Federal administrative establishment.

These circumstances, especially when joined with others about to be mentioned, strongly suggest the desirability of establishing within the Federal Government a permanent organization to devote attention to the agencies' common procedural problems. True, the vigor of procedural reform and the alteration of existing practices depend perhaps not so much on forces outside the agencies as on the agencies' own sensitivity to the need for self-criticism and improvement; nevertheless, improvements may well be stimulated by an organization especially qualified to perceive existing defects and suggest correctives.

To this end the Committee recommends that there be established by law an Office of Federal Administrative Procedure somewhat comparable in dignity and responsibility to the Administrative Office of the United States Courts. The Office should have at its head a board composed of (1) a Justice of the United States Court of Appeals for the District of Columbia, to be designated by the Chief Justice of that Court; (2) the Director of the Administrative Office of the United States Courts; and (3) the Director of Federal Administrative Procedure, to be appointed by the President of the United States, with the advice and consent of the Senate, for a term of seven years. The Director of Federal Administrative Procedure should be empowered to prepare a list of the administrative bodies which determine the rights, duties, immunities, or privileges of private persons. Each such agency may thereupon designate one of its responsible officers to serve as adviser to the Director. In addition, the Director should be able to call upon committees composed of representatives of the agencies as well as representatives of the public, to assist and advise him in the conduct of his inquiries and other functions.

In general, it should be the major function of the Director to examine critically the procedures and practices of the agencies which may bear strengthening or standardizing, to receive suggestions and criticisms from all sources, and to collect and collate information concerning administrative practice and procedure. As the Committee has discussed in chapter II of this report, not the least of the difficulties which have confronted the orderly development and un-

derstanding of administrative procedure is the absence of detailed information and study. Recurring problems have been treated by each agency without regularized reference to other agencies; separate bodies of law have grown up and some degree of confusion has resulted. On the one hand, this has resulted in considerable loss of time and energy to each agency, which has been forced to build up its procedures and gather its own law as best it might. On the other hand, the absence of information has proved irritating to the members of the bar and the public dealing with the agencies. Knowledge and regularization of procedures should go far toward creating that confidence in the administrative process which is necessary for its successful functioning.

In addition to these general duties of investigation and collection of data, the Committee recommends, as discussed in chapter IV of this report, that there be vested in the Office of Administrative Procedure important duties with respect to the selection and removal of hearing commissioners. Finally, the Committee suggests certain problems in addition to those dealt with in this report, to which attention of the Director, with advice of such committees and representatives as he might select, could usefully be turned:

### 1. ADMISSION TO AND CONTROL OVER PRACTICE BEFORE THE AGENCIES

Especially among lawyers' organizations there has been manifest a sentiment in recent years that only members of the bar should be admitted to practice before administrative agencies. The Committee doubts that a sweeping interdiction of nonlawyer practitioners would be wise, nor does it believe that corporations or other organizations should in all cases be forbidden to appear through and be represented by their officers.<sup>1</sup> At the same time, it appears to the Committee that members of the bar are subjected to an unjustifiable annoyance in connection with their admission to practice before the agencies.<sup>2</sup> Recognizing that some variations may be needed to fit particular situations, the Committee nevertheless feels that too little has been done by the agencies themselves in reexamining their present requirements and in considering cooperative, centralized machinery to lighten the load of the agencies and of those who practice before them.

### 2. SUBPENAS

The practices of the several agencies in respect of the issuance of subpoenas upon request of private parties and upon request of the

<sup>1</sup>For example, the work of nonlawyer employees of service organizations (American Legion, American Red Cross, etc.) in representing claimants before the Veterans' Administration has been much commended. See this Committee's Monograph No. 2, "Veterans' Administration," Sen. Doc. No. 186 (76th Cong., 3d sess.) pt. 2 at 38-39. In proceedings under the Walsh-Healey Act corporate respondents have often been represented by their own officers, and the Division of Public Contracts has not felt that its proceedings were damaged by that fact. See this Committee's Monograph No. 1, "Division of Public Contracts, Department of Labor," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 1 at 11, footnote 11.

agencies' own employees, show wide differences.<sup>3</sup> Some of them are readily understandable in the light of the special uses to which subpoenas may be put by those to whom they have been made available. Other differences are no doubt largely accidental and reflect nothing more profound than the haphazard growth of administrative processes. The Committee doubts the justifiability of a requirement that applications be made in a way that is burdensome to respondents nor does the Committee perceive justification for issuing subpoenas for the use of an agency's officers without first requiring a showing that they are needed and will be properly used. To the extent that they will not be governed by the proposals already made by this Committee in connection with adjudicatory proceedings, these are all matters which can readily be regularized by the agencies themselves and which should be evaluated by the Director of Federal Administrative Procedure with a view to conforming and strengthening present practices.

### 3. DEPOSITIONS

The formalities involved in the taking of depositions vary somewhat in different agencies, though the common provision is that they may be taken in accordance with the law of the state in which the particular case is pending. No one of the procedures employed by the several agencies in this particular has seemed to the Committee to be unfair or unwieldy. It may be, however, that in this respect a higher degree of uniformity than now exists is attainable and would be desirable. That possibility is commended to the study of the Director of Federal Administrative Procedure, along with the possibility that specific provision should be made for the taking of depositions where it is now lacking.

### 4. FORM OF BRIEFS AND PLEADINGS

A variety of requirements now marks the agencies' choices concerning the desirable form and style of briefs, applications, and pleadings. While the contents of these papers must necessarily remain unstandardized, there appears on the surface to be no reason why printing specifications, size and quality of paper, and like matters should not be uniform by agreement among the agencies.<sup>4</sup> The needs of legibility are not likely to be affected by circumstances peculiar to any one of the administrative bodies.

### 5. ANSWERS

The officers of agency after agency have expressed to the Committee the opinion that the answer is not a useful pleading in admin-

<sup>3</sup> An excellent compilation of requirements in respect of admission and disbarment appears in a report of the District of Columbia Bar Association's Committee on Administrative Practice, *Admission to and Control over Practice before Federal Administrative Agencies* (1938). See, also, J. S. Waterman, *Federal Administrative Bars: Admission and Disbarment* (1936), 3 U. Chi. L. Rev. 261.

<sup>3</sup> For a detailed description of the procedure for issuance of subpoenas, see appendix K, *infra*, pp. 414-435.

<sup>4</sup> That these matters may be of moment is illustrated by this Committee's Monograph No. 3, "Federal Communications Commission," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 3 at 67: "A trade association of paper manufacturers recently requested the Commission to reconsider one of its rules of practice and procedure which required applications and pleadings to be made on paper of stated dimensions. Upon a showing that the additional cost involved in conforming to the Commission's regulation would far outweigh any benefit the agency might derive from using that particular size of paper, the Commission amended its regulation."

istrative procedure. Answers which contain only general denials do no more than give advice that a contest may be expected. They do not serve to narrow the issues of that contest. Consideration should be given by the Director of Federal Administrative Procedure to the present provisions of statutes and regulations concerning answers, with a view to determining whether they should be drastically altered, perhaps by substituting for the answer a mere notice of desire to be heard. Failure to file such a notice within a stated period might constitute a default obviating the necessity of scheduling unwanted hearings.<sup>5</sup>

## 6. AVAILABILITY OF RECORDS

The sheer costliness of securing a stenographic transcript of a record compiled in an administrative proceeding is shocking. A careful survey should be made in order to determine whether cooperation among the agencies might not secure a lowering in the expense. While in many agencies the cost of transcripts is less than for corresponding records of most court proceedings, there is no uniformity in this respect, and the charges are in almost every instance more than is seemly when cheapness is one of the asserted virtues of the administrative process. It is possible that a grouping of the reporting services for which the agencies now contract might lower costs. In any event, continued inattention to this detail of the conduct of proceedings is not justifiable.

## 7. REPORTS AND RECORDS

The Committee has noted in chapter VII of this report that it is often necessary for agencies, in preparing regulations and in the course of other duties, to require individual citizens and corporations to make extensive reports. These may be in the form of periodic reports of answers to questionnaires or the like. The information so gathered is usually necessary for informed regulation and, indeed, may be the very means whereby an agency acquires expertness. Yet returns and reports to administrative agencies should be held within the limits of what is actually necessary. It is unquestionable that one of the factors proving most irritating as well as expensive to the public is the duty of collecting and submitting extensive information. Sometimes there is considerable duplication among the agencies. The Committee accordingly recommends that the Director of Administrative Procedure continue the study of this problem already initiated by the Division of Statistical Standards, Bureau of the Budget, with a view toward limiting requests for information and toward harmonizing the activities of the agencies so as to avoid harassment of individuals. Consideration might well be given to the creation of a central bureau for the collection of necessary data.

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<sup>5</sup> See appendix E, "Proceedings in Default Cases," *infra*, pp. 307-313.