

Part I

An Introduction to California Administrative Law

Two Decades of Administrative Law in California: A Critique

*Frank C. Newman**

In his foreword to Carl Kuchman's *California Administrative Law and Procedure*, Ralph Kleps, first Chief of the Division of Administrative Procedure and at present California Legislative Counsel, made this comment:

Members of the California bar will recall the consternation with which the 1936 decision in *Standard Oil Co. v. Board of Equalization*, 6 Cal.2d 557-565, was viewed. Touching the sensitive area of judicial review of administrative decisions as it did, it led to a series of proposed constitutional amendments, law review and bar journal criticism and demands for legislative action. It stimulated an intensive program of State Bar investigations and local bar committee activity. In short, that famous decision touched off some fifteen years of sustained California interest and activity in administrative law and procedure.

Now, in 1956—twenty years after the *Standard Oil* decision—one might comment, "And then, apparently, the problems were resolved satisfactorily." Our two decades of California administrative law are ending with remarkably little interest and activity. At the 1955 State Bar Meeting, for instance, the Committee on Administrative Agencies and Tribunals made no report; and on the published agenda the only related item was an esoteric conference of the Division of Administrative Procedure hearing officers. Similarly, the indices for 1955 of the five leading law reviews in California contain but one reference to the subject: an article dealing with federal-state regulatory conflicts.

By way of contrast, interest in administrative law at the federal level is accelerating. In Part VI of this symposium Herbert Clark describes for us the work of the Hoover Commission Task Force, and the action taken this year with respect to the Task Force proposals by the ABA House of

* Professor of Law, University of California, Berkeley.

Delegates.¹ The ABA Section of Administrative Law publishes a comprehensive *Administrative Law Bulletin*, with four issues annually; the Section has more than 1200 lawyer members; and, of these, scores are actively engaged in committee work. Similarly, the nation's law reviews contain a wide range of articles dealing with the federal issues.

Why the difference? Why should Sacramento problems concern us less than Washington, D.C., problems? Are lawyers and clients less affected by state than by federal agencies? Are state officials perhaps more malleable, and thus less productive of conflict than federal officials? Has law reform been so effective in California that we no longer need fret regarding the state bureaucracy and what it does to citizens?²

Let us keep in mind that "administrative law" is *not* tax law or labor law or water law or public utility law. It is rather the law concerning procedural matters that more or less affects generally the officials administering tax, labor, water, public utility, and other kinds of "public law." But regarding those procedural matters is there reason for concluding that, in California, lawyers and their clients are less affected by state than by federal activities? With respect to taxation, it may be true that the Federal Commissioner and his colleagues intrude more drastically than the various state tax collectors. But the chances are that our lawyers appear more often before the Industrial Accident Commission than before the NLRB; more often before the Public Utilities Commission than the ICC, FCC, and CAB combined. Our farmers are probably more involved with the state than with the federal Department of Agriculture. And nowhere in the federal government are laws administered that have the impact in California of our complicated water laws, or our laws affecting bankers, barbers, cosmetologists, dry cleaners, pest controllers, pharmacists, and the people in dozens of other occupations and professions.

I do not think our present apathy results from our past successes. The reforms in California have been impressive, but they hardly solve all our

¹ Mr. Clark suggests that the application of the Hoover reports to California administrative law ". . . lies largely in such influence as they may ultimately have in eliminating from the federal field conflicts with state authority." I think federal-state conflicts are less the domain of the Hoover Legal Services and Procedure group than of the Kestnbaum Commission on Intergovernmental Relations. See the master index, S. Doc. No. 111, 84th Cong., 2d Sess. (1956); cf. *Mr. Hoover and Uncle Sam*, 34 TAX DIGEST 46 (1956); Tyler, *The Majority Don't Count*, Cong. Rec., Jan. 19, 1956, p. A527 (reprinted from *The New Republic* of Aug. 22, 1955). My hope is that continuing work on the Hoover Legal Services and Procedure proposals will lead us to federal reforms that could serve as models for California and other states, just as federal APA provisions have served as models. See Kleps, *The California Administrative Procedure Act (1947)*, 22 CALIF. S.B.J. 391, 393 (1947); cf. Whitney Harris, *Administrative Practice and Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29 (1953).

² ". . . California's Administrative Procedure Act . . . was designed to prevent the abuses of bureaucracy and to eliminate the spectacle of 'Kangaroo Courts.'" Earl Warren, *Cooperation with Laymen: A Practical Program Needed by the Profession*, 33 A.B.A.J. 101, 103 (1947).

problems. The members of the bar responsible for those reforms deserve great credit; but many of *them*, even, looked upon their work as only a beginning.³ Here are a few points illustrating what I have in mind:

1. *The adjudication requirements of the California Administrative Procedure Act have a startlingly limited application.*

The sections of the California APA that govern administrative adjudication may be the best in the nation.⁴ Nevertheless, how can we defend as adequate adjudicatory reforms that literally have no effect on workmen's compensation proceedings, unemployment insurance proceedings, tax proceedings, public utilities proceedings, blue sky proceedings, water permit proceedings, or, in general, any proceedings that do not directly involve licensing? Such is the result of section 11501 of the act, which limits the act's coverage; and the recent case of *Bertch v. Social Welfare Dept.*,⁵ holding the act inapplicable to most social welfare proceedings, indicates that the California Supreme Court does not intend to extend section 11501 by analogy.

2. *The Division of Administrative Procedure hearing officers have a startlingly limited role.*

The California hearing-officer system has won nationwide recognition.⁶ But a non-California audience is often astounded to learn that only seven lawyers handle all the hearings conducted by the Division of Administrative Procedure. The Industrial Accident Commission alone, for its business, employs more than forty hearing officers; and they get better pay.⁷ Even when the proceedings involved licensing, and the kind of licensing that is subject to the APA, the Division's hearing officers in 1955 heard only twenty-five per cent as many cases for more than twenty agencies as liquor control officers heard for their own agency. For a three-year period (1953-55), only 324 of 829 Real Estate Board hearings and only 205 of 770 Insurance Commission hearings were conducted by the Division.

³ CAL. BUS. & PROF. CODE § 110.6; TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 10 (1944); cf. Kleps, *What Safeguards Should the California Legislature Provide for Administrative Rule Making?*, 22 L.A. BAR BULL. 201 (1947).

⁴ For description see John Clarkson's contribution to Part I of this symposium. I confess I have not adequately studied the Massachusetts statute. See Segal, *The New Administrative Procedure Law of Massachusetts*, 39 MASS. L.Q. 31 (Oct. 1954).

⁵ 45 Cal.2d 524, 527, 289 P.2d 485, 487 (1955).

⁶ See DIVISION OF ADMINISTRATIVE PROCEDURE, FIFTH BIENNIAL REPORT 8 (1955).

⁷ See Bancroft, *Some Procedural Aspects of the California Workmen's Compensation Law*, 40 CALIF. L. REV. 378, 381 (1952); cf. in Part II of this symposium Boris Lakusta's discussion of the PUC hearing officers, Professor tenBroek's comments on Social Welfare, and Carl Kuchman's general comments; and in Part III see Professor Netterville's notes on the weight of the hearing officer's findings.

3. *The Bar has shown startlingly little concern regarding improvements in administrative rule making.*

With respect to adjudication the state government has pinched pennies, and the Bar has hardly been zealous in assuring that the provisions of the APA were adequately financed. But that default is minimal when compared with the Bar's lethargy regarding rule making.

"California has achieved the most complete and most usable publication scheme of any state in the union."⁸ But is there any justification for statutory language that for nine years has permitted two important agencies, the IAC and the PUC, to file for the *California Administrative Code* only their procedural regulations, and not their substantive and interpretive regulations? Is there reason for the State Bar's filing none of its regulations? Are the functions of the IAC and the PUC and the State Bar so unique that their officials should continue to be allowed to promulgate all their regulations without regard to the requirements of Government Code sections 11423-4 (notice), 11425 (public proceedings), and 11440 (judicial review)?

More broadly, why have so few lawyers taken advantage of the privilege granted by section 11423(b), providing that notice of proposed rule making shall be "mailed to every person who has filed a request for notice thereof with the state agency"? Why have the Bar and lawyers generally cared so little about the violations by agencies of the rule making provisions of the statute—violations that have been constant and notorious?⁹ Is it because we are still oriented so completely to the litigation process? As a profession are we enough aware that, in general, the public and even our clients are affected much more by rules than they are by adjudicative orders?

4. *In California the literature of lawyers (legal journals, committee reports, speeches, etc.) in recent years has reflected very little of the turmoil that characterizes problems of administrative law elsewhere.*

Our practitioners and professors have provided us with a rich literature on judicial review.¹⁰ But should California have administrative courts? Should administrative judges be permitted to consult secretly with investigators, prosecutors, and other persons? Should some rule making procedures (e.g., milk pricing procedures) be formalized and made subject to requirements like those now prescribed for initial licensing? Should the

⁸ HEADY, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES 124 (1952).

⁹ See William Andrews' discussion of the 1955 Senate Interim Committee report, herein Part IV. More than six years ago I reminded the State Bar Committee that a pattern of violation was beginning. *But with* 25 CALIF. S.B.J. 319 (1950), compare 24 *id.* 372 (1949).

¹⁰ See the many citations in Professor Netterville's article, herein Part III.

state's legal career service be strengthened? These are a few of the many questions that seem to be getting more attention elsewhere than here.¹¹

Our state is not plagued by the difficulties of due process and personal liberty that inhere in selective service, loyalty-security, and alien cases at the federal level;¹² but we are confronted by other substantive issues that cause procedural perplexities, about which little is being done. For example, to whom do we turn for analysis and critique concerning the manner in which aggrieved customers are now using license-policing procedures instead of superior court lawsuits? It was once assumed that a home owner dissatisfied with the work of his building contractor could in the normal case process his complaint only in civil litigation. Now, however, he has an alternative forum: the Contractors' State License Board. I do not know whether statistics show how much of this agency's work involves private disputes between contractor and customer, but unquestionably those disputes bulk largely. And unquestionably the decree in many instances has become, "Fix the windows and the plaster, unless you want your license suspended." How much activity like that is there within the Real Estate Commission, the Insurance Commission, the Board of Dry Cleaners, and other agencies where customers often are not satisfied with work done by the members of a regulated occupation or profession? As lawyers do we support or oppose this kind of encroachment on the assumed business of courts?

For a second example, our record as lawyers is certainly meager on urban planning and zoning reforms. Immense economic and personal interests are jeopardized in these cases, and yet the procedures remain archaic. Partly this is because many of the powers are local, and regarding most local governing the organized profession has done little. But even at the state level we have allowed planning and public works officials to proceed pretty much as they think best.¹³

Professor Pickerell's comments on secrecy in administrative practice, Part V herein, help demonstrate the importance to other people of many

¹¹ See REPORT OF THE SPECIAL COMMITTEE ON LEGAL SERVICES AND PROCEDURE TO THE 1956 MIDYEAR MEETING OF THE [ABA] HOUSE OF DELEGATES (Jan. 31, 1956); cf. Nathanson, *Central Issues of American Administrative Law*, 45 AM. POL. SCI. REV. 348 (1951); Rep. of the Committee on State Admin. Law, ABA Sec. of Admin. Law, 4 AD. L. BULL. 131 (1952).

¹² But cf. Kadish, *A Case Study in the Signification of Procedural Due Process—Institutionalizing the Mental Ill*, 9 W. POL. Q. 93 (1956).

¹³ Cf. San Francisco Chronicle editorial of May 2, 1956 ("Public Has No Say on Highways"); Orinda Sun editorial of June 24, 1955 ("Advance Notice Should be Given on Freeway Hearings"); 2 BRIT. J. OF AD. L. 98-9 (1956) ("Planning: Policy, not Justice").

Another field where we ought to be busier than we are involves civilian defense. See Cavers, *Legal Planning Against the Risk of Atomic War*, 55 COLUM. L. REV. 127 (1955); Crotty, *The Administration of Justice and the H-Bomb: What Follows Disaster?*, 37 A.B.A.J. 893 (1951).

of these problems that seem essentially "legal". Here, as a journalist, he has done the field research and also the library work. Yet how can lawyers stand complacent when far too much public business has been done behind closed doors, on the basis of information kept in locked files?¹⁴

Two other contributions to this symposium, Mr. Loring's good faith reliance act and the conflict-of-interest provisions drafted by Messrs. Norman, Peterson, and Reynolds, illustrate the kind of special reform project that seems to me essential. The drafts proposed are by no means perfect, but they are at least a meaningful beginning. The former attacks a brand of bureaucratic harm-doing that in my experience is resented more than any other agency action. The latter, an attempt to prescribe for ills that can be insidiously corruptive, exemplifies what should be a constant resolve to improve ethics in government. The much-touted "Code of Ethics for Administrative Officials in California"¹⁵ has been a flop, but it scarcely follows that law reform regarding ethics is not feasible.

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Concluding, I will stress a contention that is somewhat antithetical to those already stated. In California our reforms have been less impressive than we sometimes pretend, and we no longer qualify for the vanguard of those who strive toward administrative law reform. Yet if we were to classify the major problems of governing in this state—the problems that affect the largest numbers of citizens, that unless solved may harm us seriously—would administrative law reform rank high on the list? I believe not. We need such reform, but our need here seems less compelling than our need for answers (and the aid of lawyers) with respect to questions that involve education, public health, highways, conservation, and other more crucial issues.

To some extent our concerns regarding bureaucracy should reflect the complaints made against bureaucrats. If there are few complaints we need not be overly concerned, usually. My hunch is that for the past ten years we could calibrate a significant drop in the intensity of complaints concerning state officials. Our prosperities have made us less resentful of the bite of state law. The Warren and Knight administrations have not regulated aggressively; and when the law does require an agency decision against *A*, in *B*'s favor or the state's favor, which will be costly to *A*, even *A* has normally been led to believe that the decision was made with a decent awareness of his interests. Our governing is relatively decentralized; and

¹⁴ Cf. the comments of the two newspaper representatives in Part 3 ("Panel Discussion With Legal Experts") of *Hearings on Availability of Information from Federal Departments and Agencies before a Subcommittee of the House Committee on Government Operations*, 84th Cong., 2d Sess., 430, 529 (1956).

¹⁵ 23 CALIF. S.B.J. 178, 181, 219, 319 (1948).

when those who are governed can see, hear, and talk to those who do the governing there is typically less basis for charges of callousness or arbitrary action.

Further, the practical impact of the APA may be greater than is indicated by the annotations to its words. There is reason to believe that prior to 1945 the worst abuses were within the licensing agencies; and we may thus have solved most of our *real* difficulties, even though a strictly legal analysis suggests the job was only begun. And who can measure the salutary effect of the APA's serving within the state as a model? On occasion the State Athletic Commission and the Social Welfare Board and perhaps other agencies have utilized Division of Administrative Procedure hearing officers in cases not subject to the APA.¹⁶ Some agencies empowered by Government Code section 11502 to hire their own hearing officers have nonetheless assigned cases to the Division.¹⁷ And there is no doubt that some non-APA proceedings (*e.g.*, in the Department of Agriculture and the State Personnel Board) have been much improved partly because of APA influences on the procedural regulations and practices.

A disinterested observer might be justified in concluding that Californians, in practice, do not suffer from "too many" administrative law inadequacies. Nonetheless, as several articles in this symposium testify, our statutory scheme is hardly adequate. Our law must continue to improve; and if for any reason the conditions of practice change for the worse, the need for improvements might become crucial. In either case the situation calls for continued projects, backed by the Bar, like those culminating so effectively in 1945 (APA adjudication) and 1947 (APA rule making).¹⁸

¹⁶ But regarding the social welfare experiment, see Professor tenBroek's article, Part II *infra*, note 23 *passim*.

¹⁷ And see 31 CALIF. S.B.J. 243 (1956), regarding the Bar's proposal for 1957 that the power of agencies to hire their own hearing officers be revoked.

¹⁸ *But cf.* § 16H of the 1956 Oil and Gas Conservation initiative measure, providing that neither the rule making nor the adjudication sections of the APA shall apply "... to this Act, or to any rule, regulation, or order issued thereunder." (I do not know why the draftsmen believed this reactionary provision to be necessary.)