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## AN ADMINISTRATIVE PROCEDURE ACT FOR TEXAS

*Whitney R. Harris\**

THE administrative process is a politico-legal fourth dimension in which traditional executive, legislative and judicial functions tend to be merged, obscured, lost and forgotten. Born of expediency, it has little respect for established legal procedures; designed for public service, it has little regard for private rights. It constitutes a new political form of great portent. Channeled and controlled, it holds promise of assisting government the better to perform recognized responsibilities in the regulation of business and labor. Left to its own devices, it threatens to convert traditional democratic processes into a new form of government by the few—an absolutism of bureaucracy—and to bear out Aristotle's warning that democracies degenerate inevitably into oligarchies.<sup>1</sup>

Thirty-five years ago, Elihu Root spoke of this problem at an annual meeting of the American Bar Association. His words were prophetic:

“There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by

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<sup>1</sup> *The Works of Aristotle* (Clarendon Press, Oxford, 1921) 1316.

superior authority. The necessities of our situation have already led to an extensive employment of that method. The Interstate Commerce Commission, the state public service commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect."<sup>2</sup>

Mr. Justice Jackson said recently that "multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the past half-century."<sup>3</sup> In the national area an important step toward the development of a sound system of administrative law was taken with the enactment in 1946 of the Federal Administrative Procedure Act.<sup>4</sup> This was a beginning, but by no means the end of the task in the federal field.<sup>5</sup> Now pending before Congress is a proposed Adminis-

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<sup>2</sup> *Address of the President*, 2 A. B. A. J. 736, 749 (1916).

<sup>3</sup> *Wong Yang Sung v. McGrath*, 339 U. S. 33, 37 (1950).

<sup>4</sup> 60 STAT. 237, 5 U. S. C. 1946 ed. § 1001 *et seq.*

<sup>5</sup> There is constant danger of impairment of the Act by later legislation. Gwynne, *Administrative Procedure Act: A Warning Against Impairment by Legislation*, 34 A. B. A. J. 9 (1948). Now exempt from the Administrative Procedure Act are the Federal Civil Defense Act, the Defense Production Act of 1950, and the Immigration and Naturalization Service.

trative Practitioners Act to provide for the licensing and discipline of administrative practitioners,<sup>6</sup> a plan for a statutory commission to formulate uniform rules of federal administrative procedure,<sup>7</sup> and a bill for the creation of an administrative court.<sup>8</sup> Some or all of these proposals may be enacted into law. They indicate the continuing concern of Congress with improvement of the administrative process.

Even greater need for clarification and standardization of the administrative system exists within state governments. Hundreds of administrative bodies in the several states pass daily upon important private rights, particularly in the issuance and revocation of licenses and permits. Comparatively little has been accomplished thus far to insure due process of law in this area of agency action. The Model State Administrative Procedure Act, approved in 1946,<sup>9</sup> has been adopted or followed by some states, and others have enacted legislation requiring the filing and publication of rules.<sup>10</sup> In 1945, California adopted three important laws relating to administrative procedure.<sup>11</sup> Texas has enacted no such general legislation.

The accepted test of due process in administrative proceedings is the presence or absence of "the rudiments of fair play long known to our law."<sup>12</sup> Perhaps this test would be sufficient if rules of practice and procedure applicable to judicial proceedings could be fully adapted to administrative action. Unfortunately this is

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<sup>6</sup> H. R. 8201, 81st Cong., 2d Sess. (1950).

<sup>7</sup> S. 527, 81st Cong., 1st Sess. (1949).

<sup>8</sup> S. 684, 81st Cong., 1st Sess. (1949).

<sup>9</sup> The Model State Administrative Procedure Act was the result of joint efforts of special committees of the American Bar Association and the National Conference of Commissioners on Uniform State Laws.

<sup>10</sup> Stason, *The Model State Administrative Procedure Act*, 33 Iowa L. Rev. 196 (1948).

<sup>11</sup> ADMINISTRATIVE PROCEDURE ACT, Calif. Stats. 1945, c. 867, p. 1626; JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS ACT, Calif. Stats. 1945, c. 868, p. 1636; DIVISION OF ADMINISTRATIVE PROCEDURE ACT, Calif. Stats. 1945, c. 869, p. 1637.

<sup>12</sup> Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 300 (1937); West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 71 (1935); Chicago, M. & St. P. Ry. v. Polt, 232 U. S. 165, 168 (1914).

not possible.<sup>13</sup> Furthermore, the administrative process involves investigative and legislative, as well as adjudicative, functions. Administrative rules may have as sharp an impact upon private rights as administrative adjudications. The essentials of "fair play" controlling the administrative process should be declared by the legislature, and not left to the discretion of various agencies subject only to constitutional limitations enforced by the courts after administrative action has been taken.<sup>14</sup>

The purpose of this paper is to suggest the form of an administrative procedure act for Texas. The articles set out below are based in part upon similar legislation enacted by other states and the experience of such states thereunder.<sup>15</sup> In some respects they go beyond what has been attempted elsewhere, particularly in respect to qualifications of persons permitted to appear in representative capacities in contested cases before administrative agencies. Brief discussion of important points precedes each article.

1. *A Division of Administrative Practice and Procedure should be established in the executive branch of the State government.*

Administrative agencies do not conform to the traditional scheme of government. They frequently operate with virtual independence, and they are seldom subject to positive executive controls. As Arthur Vanderbilt, Chief Justice of the Supreme Court of New Jersey, has pointed out, "the multiplication of independent agencies within the state not subject to his [the governor's] control cannot but hinder the effective over-all management of the executive branch and mean a relative weakening of the governor, in whom is vested 'the executive power'."<sup>16</sup>

Adequate executive supervision of administrative agencies re-

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<sup>13</sup> Vanderbilt, *The Technique of Proof Before Administrative Bodies*, 24 Iowa L. Rev. 464, 467 (1939).

<sup>14</sup> Harris, *The Administrative Law of Texas*, 29 Tex. L. Rev. 213, 230 (1950).

<sup>15</sup> The within act is based principally on the Model State Administrative Procedure Act and the three Acts adopted by the State of California in 1945. Several articles have been taken almost verbatim from these sources.

<sup>16</sup> VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* (New York Univ. Law Center, 1949) 455.

quires the establishment within the executive branch of a division responsible for coordinating and controlling administrative action. This division should be responsible for the publication of administrative rules, for the certification of persons qualified to appear in a representative capacity in contested cases before agencies, for furnishing hearing officers to conduct hearings in contested cases, and for study and research in administrative law and procedure with periodic reports and recommendations to the Governor and the Legislature. The division might be located in any of several departments of the executive branch; it is suggested here that it be placed under the Secretary of State.

### *Article 1*

There shall be established under the Secretary of State a Division of Administrative Practice and Procedure, headed by a Director, and staffed with hearing officers and other personnel necessary to perform the following functions: (1) receive, prepare for publication, and publish a Code of Administrative Regulations; containing the rules of practice and procedure and rules of substance filed from time to time by administrative agencies with the Secretary of State; (2) receive and publish a Monthly Bulletin of the Division containing proposed rules, notices of administrative hearings, digests of rules adopted by agencies during the preceding month, and other information pertaining to administrative practice and procedure; (3) certify, and maintain a current register of, persons qualified to appear in a representative capacity in contested cases before state administrative agencies; (4) maintain a staff of qualified hearing officers to be assigned to agencies for hearing contested cases; (5) study administrative law and procedure, advise with agencies concerning improvement in administrative practice and procedure, and submit recommendations to the Governor and Legislature; (6) perform such other duties in the field of administrative law and procedure as directed by the Governor or the Legislature.

#### *2. The act should contain definitions of basic terms.*

Of first consideration is the definition of the term "agency." In the Federal Act, subject to certain exclusions, "agency" is defined

as an authority of the government other than a legislative, judicial, or territorial authority. The Model State Act defines "agency" in terms of power to make rules or to adjudicate contested cases other than in the legislative or judicial branches. Neither act limits agencies to authorities which have the power to affect private rights. In the domain of general public rights executive controls normally are adequate, even though the powers are exercised by executive boards or bureaus; but in the area of private rights positive administrative controls are necessary regardless of the form in which such powers are exercised. For the purpose of an administrative procedure act, the term "agency" should be restricted to authorities which have the power to affect private rights.

The powers which agencies exercise may be described generally as legislative, adjudicative, or investigative. Investigations may inconvenience the persons investigated, but they do not finally determine rights, and the investigative powers of agencies are important mainly as they bear upon the other powers. Legislative power refers to rule-making, and comprehends rules of procedure and of substance, of general and special applicability, including the making of rates. Adjudicative power refers to order-issuance, and comprehends agency directives to specific parties, including action on applications for licenses, permits and certificates.

Administrative procedures must be adapted to the various types of action which agencies may take. Certain action, such as issuance of rules of procedure, may be taken without any hearing whatever. Other action, such as a general weight limitation on trucks passing over State highways, may be taken following the limited hearing that a legislative committee customarily accords. But in cases where specific private rights are involved, such as in the making of rates or the revocation of licenses, agency action should not be taken except following the full hearing that courts customarily give. Definitions must accord with these differentiations.

Proceedings may be initiated by a private party against an agency, as in an application for a license; by a private party

against other private parties, as in a demand for reparations by a shipper against a carrier; or by an agency against a private party, as in a proceeding to amend a certificate of public convenience and necessity. Where a formal proceeding is initiated by a private party, the pleading may be in the form of a complaint or application. Where a formal proceeding is initiated by an agency, the pleading may be in the form of a complaint or notice.

### *Article 2*

(a) "Agency" means any board, commission, department or officer of the executive branch of the government empowered by law to make rules, issue orders, or take other action affecting private rights.

(b) "Rule" means any statement of future effect, other than a regulation pertaining to internal management, promulgated by an agency to implement the law under which it functions or to carry out the purposes for which it was established, and includes the approval or prescription for the future of rates, wages, prices, facilities, appliances, and services. "Legislative power" is the authority of an agency to adopt, amend, repeal, or take other action in respect to rules.

(c) "Order" means any agency directive to specific parties, other than rules, and includes licenses, permits, certificates, exemptions, and other forms of agency permission. "Adjudicative power" is the authority of an agency to grant, deny, issue, amend, revoke, or take other action in respect to orders.

(d) "Case" means a proceeding in which the legal rights, duties, or privileges of specific parties, as distinguished from the rights, duties, or privileges of the class or group to which such parties belong or of the public generally, are to be determined by an agency in the exercise of its legislative or adjudicative powers, and any other proceeding in which by constitutional or statutory right parties are entitled to a full hearing on facts in controversy. "Contested case" is any case in which there are adversary parties. "Party" is any person entitled to appear in an agency proceeding, including the agency itself but not its members, officers or employees.

(e) "Decision" means the final action of an agency in a case, and includes the findings of fact, as well as the rule, order, or other action of the agency.



(f) Where a case is initiated by a private party, the first pleading shall be called "complaint" or "application." Where a case is initiated by an agency, the first pleading shall be called "complaint" or "notice." A pleading in response to a complaint, application or notice shall be called "reply." The party who files the complaint or application shall be called "complainant" or "applicant"; the party who files the reply shall be called "respondent."

3. *Administrative rules should be published and, where practicable, should be issued only upon notice to persons affected thereby.*

Administrative rules have the force and effect of law.<sup>17</sup> All rules should be regularly adopted and published, and agencies should be required to adopt rules of practice and procedure. Rules of substance which affect specific private rights should be adopted only after notice to persons affected, with full hearing, and right of judicial review as in contested cases. Other rules of substance, whenever practicable, should be adopted after notice to persons interested with opportunity afforded such persons to participate in formulating the rule.

### Article 3

(a) Agencies shall adopt rules of practice and procedure conforming to this Act. Such rules shall be filed with the Secretary of State and shall become effective upon filing, unless a later effective date is stated in the rule. Whenever practicable, proposed rules of practice and procedure shall be submitted to the Director of the Division of Administrative Practice and Procedure for publication in the Monthly Bulletin of the Division in advance of filing with the Secretary of State, with opportunity afforded interested persons to submit data or views, orally or in writing. Adopted rules of practice and procedure shall be published in the Code of Administrative Regulations.

(b) Agencies may adopt rules of substance conforming to statutory delegation of powers. Such rules shall be filed with the Secretary of State and shall become effective upon filing, unless a later effective date is stated in the rule. Rules of substance which affect specific

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private rights, as distinguished from rights of the class or group to

<sup>17</sup> Columbia Broadcasting System v. United States, 316 U. S. 407, 418 (1942).

which the party belongs or of the public generally, may be adopted only after notice, hearing, and opportunity for judicial review, as in contested cases. Whenever practicable, other rules of substance shall be submitted to the Director of the Division of Administrative Practice and Procedure for publication in the Monthly Bulletin of the Division in advance of filing, with opportunity afforded interested persons to submit data or views, orally or in writing. Adopted rules of substance shall be published in the Code of Administrative Regulations.

*4. Practice before administrative agencies should be restricted in contested cases to persons duly qualified and licensed.*

Only those persons properly qualified under the law, technically and ethically, should be permitted to serve in a representative capacity in contested cases before administrative agencies. Persons licensed to practice law in the State of Texas are so qualified and should be admitted to practice before all state agencies upon proof of admission to and good standing in the Bar. A lawyer whose license to practice has been suspended or revoked should be under the same disability to appear before administrative agencies as before the courts. Those who are not licensed to practice law in the State of Texas should be required to meet minimum standards of competence and should be subject to disciplinary control in a manner similar, at least, to controls over the members of the legal profession. Lawyers admitted to practice in states other than Texas might be enrolled under special rules and limitations established by the Director of the Division of Administrative Practice and Procedure.

*Article 4*

(a) The Division of Administrative Practice and Procedure shall maintain a current register of persons qualified to represent others in contested cases before administrative agencies in Texas. Only persons so enrolled may act in that capacity.

(b) A person licensed to practice law in the State of Texas shall be enrolled on such register and remain so enrolled while his license is in full force and effect. Attorneys from other jurisdictions may be

enrolled under such limitations and in accordance with such rules as the Director may reasonably impose.

(c) All other persons, prerequisite to enrollment, shall be required to pass an examination in administrative law and procedure prescribed by the Director of the Division of Administrative Practice and Procedure, shall meet or pass any special test or qualification required by any particular agency before which they desire to appear in such representative capacity, and shall submit proof of good character as required by the Director. Any such person may be removed from the register for a limited period of time, or permanently, for cause, after hearing before the Director, with right of judicial review as in other contested cases. Pending hearing in serious cases, such persons may be suspended from the register by order of the Director.

5. *There should be a separation of prosecuting and adjudicating functions, and hearing officers should be fully qualified.*

Inherent in the administrative system is the tendency toward merger of prosecuting and adjudicating functions. The officer who hears today's case may prosecute tomorrow's case. In whichever capacity he serves he is responsible to the agency for which he works. He cannot possess, under such circumstances, the degree of independence requisite to fully impartial hearings. This difficulty can be solved only by preventing hearing officers from serving as prosecutors and by removing them from direct control of particular agencies. Hearing officers should be qualified in law in order to be able to rule competently upon points of evidence and other law questions.

#### *Article 5*

(a) Every hearing in a contested case shall be presided over by a hearing officer serving alone or as non-voting member of an agency which itself hears the case. When the hearing officer alone hears a case, he shall exercise all powers related to the conduct of the hearing. When the hearing officer serves as non-voting member of the agency, he shall rule on the admission and exclusion of evidence, advise the agency on all questions of law, and perform such other functions as may be assigned to him by the agency.

(b) The Governor shall appoint a sufficient number of full-time

hearing officers to hear contested cases before state administrative agencies. Each hearing officer shall have been admitted to the practice of law for at least five years and shall possess such other qualifications as may be required by the Governor acting upon advice of the Director of the Division of Administrative Practice and Procedure. No hearing officer may, while holding such office, or within one year thereafter, engage in the practice of administrative law before the agencies or in the courts of this State.

(c) Hearing officers for contested cases before agencies shall be drawn from the panel of hearing officers in the Division of Administrative Practice and Procedure, and shall be assigned by the Director upon request of agencies. Requests for particular officers shall be granted when possible. Hearing officers shall be temporarily assigned for administrative purposes to the agencies for which they hear cases, but for pay, promotions, seniority, tenure, and other such purposes, shall remain attached to the Division of Administrative Practice and Procedure. Upon completion of assignments hearing officers shall return to the Division unless retained by the agency, with the consent of the Director, for hearing additional cases.

6. *Where agencies adopt informal procedures, provisions should be made for the protection of private rights.*

Although "informal" agency procedures are desirable and may greatly expedite settlement of cases, there is a continuing danger that such procedures may be utilized as alternatives to formal hearings prescribed by the administrative procedure act. Even if informal procedures are not substituted for formal procedures, the administrative hurdles may be so many and so formidable as to exhaust the ordinary contestant. Speed and efficiency are often advanced as factors in favor of the administrative process. Unfortunately, confused and complicated informal procedures sometimes result in frustration and inaction. Informal procedures should only be used where administrative processes can be shortened without endangering private rights.

#### *Article 6*

Agencies may utilize informal methods for adjusting conflicting rights and interests, but parties to informal proceedings shall have

the right to appear by counsel or an approved administrative practitioner, and rules governing informal procedures shall be issued and filed with the Division of Administrative Practice and Procedure for publication in the Code of Administrative Regulations. Parties shall not be compelled to participate in informal procedures prerequisite to formal proceedings prescribed by law.

*7. Pleadings should be non-technical and informative.*

The principal purpose of a pleading in an administrative proceeding is to give notice of facts in controversy. Technical allegations should not be required in administrative pleadings, nor should the rights of parties depend upon the skillfulness with which formal allegations are answered. No controverted matter should be initiated, however, except upon complaint, notice or application which adequately and accurately apprises the party served of the matters of fact in controversy.

*Article 7*

Agencies may by rule adopt the forms of pleadings to be used in administrative proceedings, including informal pleadings, applications, complaints, notices, and replies. Pleadings shall be non-technical. Applications, complaints, and notices shall state in ordinary and concise language the matters of fact in controversy. A complaint founded upon an alleged violation of a statute or rule shall not consist merely of a charge phrased in the language of such statute or rule but shall fully advise the respondent of the acts or omissions with which he is charged. A reply may admit or deny, in whole or in part, the allegations of the application or complaint, or may introduce new facts or affirmative defenses. But the failure of a respondent to deny matters alleged in the application or complaint, or to aver new facts or affirmative defenses, shall not bar introduction of evidence at the hearing. Agencies shall permit liberal amendments of pleadings.

*8. Hearings in contested cases should be based upon adequate notice to interested parties.*

Where pleadings show matters of fact in controversy which necessitate a formal administrative hearing, parties to the con-

troverly must be given adequate notice of the hearing.<sup>18</sup> A notice is not sufficient which simply advises the parties of the time and place of the hearing; it should in addition contain a brief statement of the matters to be considered. The notice should advise parties served of the basic rights to which they will be entitled at the hearing.

Notices may be served in the same manner as judicial process is served. But where a statute or agency rule requires a party to file his address with the agency and to notify the agency of any change, service of process by registered mail to that address would seem adequate.

### *Article 8*

(a) Notice of hearing in contested cases shall be served at least ten days prior to the hearing. The notice shall state the name of the agency, time and place of hearing, and, unless accompanied by the application or complaint, a brief statement of the matters of fact in controversy. The notice shall advise the party served of the right to be present at the hearing, to be represented by counsel or approved administrative practitioner, to present relevant evidence, to cross-examine witnesses, and to have the benefit of subpoenas to compel the attendance of witnesses and the production of books, records, documents, and papers.

(b) Notice of hearing shall be served in the same manner as judicial process is served in civil actions in the District Courts, except that service by registered mail shall be effective if a statute or agency rule requires the party served to file his address with the agency and to notify the agency of any change and the process is sent by registered mail to the party at the latest address on file with the agency. Service may be proved as in civil actions. Other notices may be served personally or by registered mail.

### *9. Hearings should be conducted by persons who are impartial and free from bias.*

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<sup>18</sup> For the most part, statutes are inadequate as to content and manner of service of notices. Thus, the Board of Insurance Commissioners is required to notify interested parties in writing, but what the notice is to contain or how it is to be served is not stated. TEX. REV. CIV. STAT. (Vernon, 1948) art. 4682b, § 10.

The separation of prosecuting and deciding functions helps to insure impartiality of the hearing officer, but, in addition, provisions should be made for the disqualification of a hearing officer or agency member who is unable to grant a fair and impartial hearing.

### *Article 9*

A hearing officer or agency member shall withdraw from any case in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any hearing officer or agency member by filing an affidavit, promptly upon discovery of the disqualification, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns an agency member or a hearing officer sitting as non-voting member of the agency, the issue shall be determined by the other members of the agency. Where the request concerns the hearing officer sitting alone, the issue shall be determined by the hearing officer, and his refusal to disqualify himself may be advanced as a ground for setting the proceedings aside on the submission of his proposed decision to the agency. No agency member shall withdraw voluntarily or be subject to disqualification if his removal would prevent a quorum necessary to decide the case.

*10. Adequate provision should be made for compulsory attendance of witnesses and production of documentary evidence.*

Several State agencies and commissions have statutory power to issue subpoenas,<sup>19</sup> but statutes do not generally specify the right of private parties to subpoenas, the area within which subpoenas may be served, or the procedure for enforcement.<sup>20</sup> All parties to

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<sup>19</sup> Railroad Commission, TEX. REV. CIV. STAT. (Vernon, 1948) art. 6471; Arbitration Boards, TEX. REV. CIV. STAT. (Vernon, 1948) art. 244; Board of Control, TEX. REV. CIV. STAT. (Vernon, 1948) art. 3184; Commissioner of Labor Statistics, TEX. REV. CIV. STAT. (Vernon, 1948) art. 5150; Firemen's and Policemen's Civil Service Commission, TEX. REV. CIV. STAT. (Vernon, 1948) art. 1269m, § 17; Secretary of State under Securities Act, TEX. REV. CIV. STAT. (Vernon, 1948) art. 600a, § 29; State Board of Pharmacy, TEX. REV. CIV. STAT. (Vernon, 1948) art. 4542a, § 5; State Board of Water Engineers, TEX. REV. CIV. STAT. (Vernon, 1948) art. 7565; State Industrial Commission, TEX. REV. CIV. STAT. (Vernon, 1948) art. 5190.

<sup>20</sup> The State Board of Pharmacy applies to the judge of a district court for punishment of the contumacious witness, TEX. REV. CIV. STAT. (Vernon, 1948) art. 4542a, § 5, but the Railroad Commission is given the power to fine and imprison the contuma-

contested cases should be entitled, equally with the agency itself, to issuance of subpoenas for the attendance of witnesses and the production of essential books, documents, records and papers. Since administrative hearings are commonly held in Austin and only infrequently held elsewhere, means should be provided to compel attendance of witnesses from any part of the State.<sup>21</sup> Affidavits of necessity should be required for issuance of subpoenas duces tecum to prevent unreasonable demands for documentary evidence. Witnesses responding to administrative subpoenas should have the same rights and privileges as witnesses answering civil subpoenas, including the payment of fees and mileage. Enforcement should be through the courts, and not by the agencies themselves. An adequate compulsory testimony clause should be provided.<sup>22</sup>

### *Article 10*

(a) Administrative agencies may issue subpoenas and subpoenas duces tecum in aid of investigative, legislative, and adjudicative powers and functions. In contested cases parties shall be entitled to issuance of subpoenas upon application, and to issuance of subpoenas duces tecum upon showing by affidavit of necessity for the books, records, documents or papers requested. Prior to the commencement of the hearing, subpoenas shall be issued by the agency, or person to whom the agency has delegated the power; after commencement of the hearing, subpoenas shall be issued by the agency if the case is heard by the agency itself or by the hearing officer. Refusal of a hearing officer to issue a subpoena may be advanced as a ground for setting the proceedings aside on the submission of his proposed decision to the agency. Subpoenas shall conform to those used in ordinary civil actions and shall be served in like manner.

(b) No witness shall be obliged to attend a hearing held out of

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cious witness for contempt in the same manner that a judge of the district court might do under similar circumstances, TEX. REV. CIV. STAT. (Vernon, 1948) art. 6471.

<sup>21</sup> Attendance of witnesses from out of the county of residence may be required in anti-trust cases, TEX. REV. CIV. STAT. (Vernon, 1948) art. 7439a.

<sup>22</sup> Compare varying language used in statutes governing the Texas Employment Commission, TEX. REV. CIV. STAT. (Vernon, 1948) art. 5221b-9(h), the Citrus Marketing Commission, TEX. REV. CIV. STAT. (Vernon, 1948) art. 5764a, § 16, and the Railroad Commission, TEX. REV. CIV. STAT. (Vernon, 1948) art. 6471.



the county of his residence except upon affidavit showing that the testimony of the witness is material and necessary and cannot satisfactorily be obtained by deposition. Should any witness summoned by subpoena regularly served upon him fail to appear and testify, or fail to produce the books, records, documents or papers subpoenaed, the agency or the hearing officer shall, at the request of the party who obtained and caused the subpoena to be served, or on its or his own motion, apply to the District Court within the jurisdiction of which the witness may be found for an order requiring the witness to show cause why he should not appear, testify, or produce the books, records, documents or papers subpoenaed. If the witness fails to show sufficient legal cause for failure to appear, testify, or produce the books, records, documents or papers subpoenaed, the court shall order him to do so under penalty of punishment for contempt of court.

(c) No witness shall be required to attend the hearing and testify in person until the party who subpoenas him shall have tendered, if he requests it, sufficient money to defray his actual traveling expenses, not exceeding five cents (5¢) per mile going to and returning from the place of hearing by the nearest practical conveyance, and five dollars (\$5.00) per day for each day he may necessarily be absent from home, provided that no such traveling expenses or witness fees need be paid where the attendance of the witness in person is not required for the production, authentication and introduction into evidence of books, documents, records or papers subpoenaed.

(d) No person shall be excused from attending and testifying or from producing books, documents, records or papers before an agency in obedience to a subpoena or subpoena duces tecum, regularly issued by or under authority of an agency, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, documents, records or papers, if in his power to do so, in obedience to the subpoena or

lawful requirement of the agency, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine of not more than \$500, or by imprisonment for not more than six months, or by both such fine and imprisonment.

11. *Hearings should conform as nearly as possible to ordinary civil non-jury trials.*

Contested administrative hearings are distinguishable in important respects from court trials. Unlike judges and juries, who do not have special knowledge of the facts in controversy, agencies acquire expertness in their special fields. There is less need for thorough exploration of preliminary considerations in administrative proceedings than in court trials. The agency is frequently in position to take official notice of matters which would have to be proved if the case were tried before a jury. Furthermore, administrative hearings usually are less contentious than court proceedings. Evidence consists largely of reports and records, and oral testimony seldom assumes the significance that it has in ordinary jury trials. For these reasons, administrative hearings may be conducted with "less formality" than court trials.

Merely to relieve administrative agencies from compliance with court procedure, however, is to cast the administrative process upon a sea of uncertainty. Although flagrant cases of non-observance of basic rights may be corrected by appeal to the courts, such appeals constitute a slow method of limiting administrative action, and constitutional due process provides only minimum protection to private rights. Agencies should be required to follow as closely as possible procedures applicable to non-jury civil trials.

### *Article 11*

In contested cases, procedures applicable to non-jury civil trials in District Courts of the State shall be followed as closely as may conveniently be done. Oral evidence shall be taken only on oath or affirmation given by the person presiding. Parties shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine

opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him. If the opposing party does not testify in his own behalf, he may be called and examined as if under cross-examination.

12. *Rules of evidence should conform as nearly as possible to rules applied in ordinary civil non-jury trials.*

It has been said of administrative hearings that "evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done."<sup>23</sup> Under the Federal Administrative Procedure Act "any oral or documentary evidence may be received," but no order may be issued except "in accordance with the reliable, probative, and substantial evidence." The Model State Act authorizes agencies to admit and "give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs." These statements require implementation.<sup>24</sup> Where lawyers act as hearing officers, rules of evidence applied by state trial courts in non-jury cases may and should be followed, subject only to certain qualifications arising out of basic differences between administra-

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<sup>23</sup> *John Bene & Sons, Inc. v. Federal Trade Commission*, 299 Fed. 468, 471 (2d Cir. 1924).

<sup>24</sup> Federal agencies have attempted to assist trial examiners by adopting rules governing admissibility of evidence. The Federal Trade Commission directs its trial examiners to admit relevant, material and competent evidence and to exclude irrelevant, immaterial and unduly repetitious evidence. 16 C. F. R. 1949 ed. § 2.18. The National Labor Relations Board requires hearings to be conducted, "so far as practicable," in accordance with the rules of evidence applicable in the district courts of the United States. 29 C. F. R. 1949 ed. § 203.39. The Federal Power Commission enjoins its presiding officers to exclude evidence which is unduly repetitious or cumulative, or "not of the kind which would affect reasonable and fair-minded men in the conduct of their daily affairs." 18 C. F. R. 1949 ed. § 1.26. The Federal Communications Commission requires hearings to be conducted according to rules of evidence governing non-jury civil trials, with the proviso that such rules may be relaxed in any case where the ends of justice will better be served. 47 C. F. R. 1949 ed. § 1.871.

tive and judicial proceedings. Such qualifications relate particularly to admissibility of hearsay, the use of affidavits, and the taking of official notice.

### *Article 12*

(a) In contested cases, rules of evidence applicable to non-jury trials in the District Courts of this State shall be followed as closely as may conveniently be done. Relevant evidence, including hearsay where it is the best evidence readily available, may be admitted and support a finding if it is of that quality which responsible persons are accustomed to rely upon in the conduct of serious affairs. Irrelevant and unduly repetitious or cumulative evidence shall be excluded. The rules of privilege shall apply as in civil actions.

(b) Evidence may be introduced by any party in affidavit form in lieu of oral testimony and shall be given the same effect as if the affiant had testified orally, provided that the opposing parties shall have the right on request, made prior to submission of the case for decision, to cross-examine the affiant. Copies of affidavits shall be given opposing parties before the affidavits are offered in evidence. Affidavits shall be entitled to the same weight as depositions taken upon notice to adverse parties.

(c) On verified petition of any party, an agency may order that the testimony of a material witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding, the name and address of the witness whose testimony is desired, the materiality of his testimony, a showing that the witness will be unable or cannot be compelled to attend, and a request for an order requiring the witness to appear and testify before an officer named in the petition for that purpose.

(d) Official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, including reports regularly submitted by a party to the agency, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on

request to refute officially-noticed matters, by evidence, or by written or oral presentation of authority, as determined by the agency.

13. *Contested cases should be decided by the agency, acting as such, upon the full record.*

A fundamental principle of modern administrative practice is that "the one who decides must hear."<sup>25</sup> And the Supreme Court of Texas has said that, unless otherwise authorized by law, the agency must arrive at its conclusion as a unit and may not delegate power of decision to individual members.<sup>26</sup> Where the controversy is heard by the agency itself, opportunity should be afforded for oral argument, the submission of briefs, and the presentation of proposed findings of fact, and the agency should be required to act independently in making its decision. Where the controversy is heard by a hearing officer, who prepares proposed findings of fact and a recommended order, the problem is more difficult. The parties should have opportunity for argument before the hearing officer and the right to submit proposed findings of fact to him; but since the agency, and not the hearing officer, has power of final decision, parties should have the further right to take exceptions to the proposed decision of the hearing officer, and to submit briefs to, and make oral arguments before, the agency. Only the agency should enter a final decision. Provision should be made for possibility of reconsideration within a limited time thereafter. In addition to the transcript of the proceedings and the final decision, the record should contain findings proposed by parties and the decision proposed by the hearing officer.

### *Article 13*

(a) If a contested case is heard by an agency itself, the hearing officer who presides may be present at deliberations of the agency, and may advise and assist the agency in the drafting of the findings, and the rule, order, or other action of the agency. Under no circum-

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<sup>25</sup> Morgan v. United States, 298 U. S. 468, 481 (1936).

<sup>26</sup> Webster v. Texas & P. Motor Transport Co., 140 Tex. 131, 166 S. W. 2d 75 (1942).

stances may the agency in reaching its decision or in preparing its findings, or the rule, order, or other action taken by it, utilize any personnel connected with the preparation, prosecution or presentation of the case. The agency shall afford the parties reasonable opportunity for oral argument, shall allow sufficient time for preparation and submission of written briefs, and shall permit the parties to present proposed findings of fact. Such proposed findings of fact shall be appended to, and become a part of, the record of the proceedings.

(b) If a contested case is heard by a hearing officer alone, he shall afford the parties reasonable opportunity for oral argument, shall allow sufficient time for preparation and submission of written briefs, and shall permit the parties to present proposed findings of fact. The hearing officer shall prepare a proposed decision, consisting of findings of fact and recommended order, rule, or other action, in such form that it may be adopted as the decision in the case. Copies of the proposed decision shall be served upon all parties, who shall then be given a reasonable time within which to submit to the agency exceptions to the proposed decision, and briefs in support thereof. The parties shall advise the hearing officer of the portions of the record they desire certified and transmitted to the agency, and the hearing officer shall cause a transcript, containing the portions of the record requested by all parties, to be prepared, and shall certify and transmit the same to the agency. The agency at its discretion may order the hearing officer to certify and transmit to it other portions or all of the record adduced before him. When requested, the agency shall grant the parties opportunity for oral argument before the agency in support of exceptions taken to the proposed decision of the hearing officer. Findings of fact proposed by the parties to the hearing officer, and exceptions taken to the proposed decision of the hearing officer, shall be appended to and become part of the record of the proceedings. The agency may reject, approve, or modify the decision proposed by the hearing officer; it may remand the case to the hearing officer for the taking of further evidence and submission of a revised proposed decision thereafter, in which case the parties shall have the same rights as in the original submission; or it may receive additional evidence itself, in which case the parties shall have the same rights as in a case heard by the agency in the first instance.

(c) The decision of the agency shall contain findings of fact, the order, rule, or other action of the agency, and the penalty, if any is assessed. The decision shall be in writing and certified as correct by

the agency. Copies shall be delivered to the parties personally or by registered mail.

(d) After decision, the agency may order a reconsideration of all or part of the case on its own motion or on motion of any party. The case may be reconsidered by the agency on the transcript certified and transmitted to it by the hearing officer, additional portions of the record which it may order certified and transmitted to it, or additional evidence which it may receive; or the case may be remanded to the hearing officer for reconsideration on the transcript certified and transmitted by him to the agency, or on additional portions of the record or new evidence which the agency may order the hearing officer to consider or receive. Reconsideration may be ordered within 20 days after the delivery or mailing of decision to the parties, and if no action is taken on a petition for reconsideration within that time, the petition shall be deemed denied.

14. *A uniform system of judicial review should be prescribed.*

No single aspect of administrative procedure has caused greater controversy than the ever-debated problem of the scope and manner of judicial review of administrative action.<sup>27</sup> It has been suggested, and rightly, that too much attention has been paid to the review of administrative action and too little attention to procedure before administrative agencies.<sup>28</sup> Since the basic purpose of the legislation here proposed is to assure observance of due process of law in administrative proceedings, it may be thought that the problem of judicial review should be left for separate treatment. Yet, agencies and courts play correlative roles in the administrative process,<sup>29</sup> and the revision of administrative procedures may affect review of administrative action in the courts.<sup>30</sup>

Under present statutes, Texas courts have evolved an unusual scheme of judicial review of administrative action calling for the

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<sup>27</sup> The latest discussion of this subject in Texas is Professor Larson's article appearing in this issue of the Southwestern Law Journal, *infra* p. 152.

<sup>28</sup> Davis and Willbern, *Administrative Control of Oil Production in Texas*, 22 Tex. L. Rev. 149, 150 (1944).

<sup>29</sup> *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940).

<sup>30</sup> Both the Federal and Model State Administrative Procedure Acts deal generally with the problem of judicial review in contested cases.

application of a test of "substantial evidence" to a record newly-adduced before the trial court rather than to the record adduced before, and actually considered by, the agency. It seems illogical to restrict a trial judge to determination of whether the evidence heard by him substantially supports an order of the agency which may have been based on materially different evidence.<sup>31</sup> Undesirable aspects of this application of the rule have been discussed elsewhere.<sup>32</sup> The Supreme Court of Texas has, however, placed sound limitations upon the use of the substantial evidence rule in Texas. There must be substantial evidence in the record which *reasonably* supports the order of the agency,<sup>33</sup> and the rule must be applied to the *whole* record, a limitation which recently has been approved in principle by the Supreme Court of the United States.<sup>34</sup> The rule is widely applied in Texas courts. We should not lightly discard it at this time.<sup>35</sup> But it should be applied to the record adduced before the agency, rather than to a new record adduced before the court.<sup>36</sup>

The substantial evidence rule, as thus modified to apply to the record adduced before the agency, will not be applicable to all appeals from administrative decisions. In some cases, constitutional or statutory provisions may require the exercise of the independent judgment of the court, and the appeal will have to be decided according to the weight of the evidence as it appears in

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<sup>31</sup> Evidence heard by the agency is not *per se* admissible upon the trial. "Whether it is admissible . . . must depend upon its own merits under the general rules of evidence, and without regard to whether it had theretofore been introduced before the agency." *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 80, 161 S. W. 2d 1022, 1030 (1942); *accord*, *Hawkins v. Texas Co.*, 146 Tex. 511, 209 S. W. 2d 338 (1948).

<sup>32</sup> *Harris, The Administrative Law of Texas*, 29 Tex. L. Rev. 213, 229 (1950).

<sup>33</sup> *Hawkins v. Texas Co.*, 146 Tex. 511, 209 S. W. 2d 338 (1948).

<sup>34</sup> *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474 (1951).

<sup>35</sup> It may be noted that in creating the Texas Real Estate Commission in 1949, the State Legislature expressly forbade use of the substantial evidence rule. *TEX. REV. CIV. STAT.* (Vernon, 1950 Supp.) art. 6573a, § 15 (a).

<sup>36</sup> This scheme of review is presently prescribed by statute for review of orders of the Board of Insurance Commissioners relating to casualty insurance, *TEX. REV. CIV. STAT.* (Vernon, 1948) art. 4698a, § 11, and orders of the Secretary of State under the Securities Act, *TEX. REV. CIV. STAT.* (Vernon, 1948) art. 600a, § 28.



the record adduced before the agency.<sup>37</sup> In other cases, the applicable statute may require a complete retrial in court, and the appeal will have to be decided according to the weight of the evidence as it appears in a record newly-adduced before the court.<sup>38</sup> In all cases, the court should properly consider the prior judgment of the expert agency in the matter and should accord *prima facie* validity to the decision appealed from.<sup>39</sup>

#### Article 14

(a) Any person adversely affected by a decision of an agency may appeal from the decision by filing suit against the agency in the District Court of the county in which he resides or has his principal place of business, for the purpose of setting aside the order (whether affirmative or negative in form), rule, or other action of the agency complained of. An appeal from a rule may be taken within 20 days after the rule has been served upon the appellant or has been published in the Code of Administrative Regulations, whichever occurs first. An appeal from an order or other action of the agency may be taken within 20 days after the last day on which reconsideration could be ordered by the agency, and the appeal shall be allowed irrespective of whether reconsideration was sought. Copies of the petition shall be served upon the agency and other parties of record in the administrative proceeding. The filing of the petition shall not stay enforcement of the order, but the agency may grant a stay, or the court may do so upon such terms as it deems proper.

(b) Where the appeal is taken from a decision of the agency following a proposed decision of a hearing officer, the appeal record shall consist of the transcript certified and transmitted by the hearing officer to the agency, his proposed findings and recommended rule, order, or other action, the findings proposed to him by the party appealing, the transcript of the proceedings before the agency, the findings, and the rule, order, or other action of the agency, and all pleadings, notices, motions, and rulings of the hearing officer and

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<sup>37</sup> *E.g.*, review of utility rates where the utility contends that the rates are confiscatory, or unjust and unreasonable as to it. *Lone Star Gas Co. v. State*, 137 Tex. 279, 153 S. W. 2d 681 (1941).

<sup>38</sup> *E.g.*, review of decisions of the Industrial Accident Board, *TEX. REV. CIV. STAT.* (Vernon, 1948) art. 8307, § 5, and art. 6674s, § 11.

<sup>39</sup> Harris, *A Reappraisal of the Substantial Evidence Rule in Texas Administrative Law*, 3 *Southwestern L. J.* 416 (1949).

the agency. Where the appeal is taken from a decision of the agency in a case heard by the agency itself, the appeal record shall consist of a transcript of the portions of the record requested by parties to the appeal, the findings proposed to the agency by the party appealing, the findings and the rule, order, or other action of the agency, and all pleadings, notices, motions, and rulings of the agency. Within 20 days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the appeal record, less such portions of the appeal record as may be omitted by stipulation of all parties to the appeal. Any party whom the court finds has unreasonably refused to stipulate to omission of portions of the appeal record which are unnecessary to the appeal may be taxed by the court for the additional costs occasioned thereby. The court may require or permit subsequent corrections of, or additions to, the record as it deems desirable.

(c) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the proffered evidence is material and that good cause existed for failure to present it to the agency, the court may order the additional evidence taken before the agency upon such conditions as the court deems proper. The agency may modify its decision in the light of the additional evidence so received, and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modification of its decision. Where the case was first heard by a hearing officer, the agency may remand the case to the hearing officer to receive the additional evidence and to proceed as in a case returned to him for reconsideration after decision.

(d) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency not appearing in the record, testimony thereon may be taken in court. The court shall, upon request, hear oral argument and receive written briefs.

(e) Review shall be limited to the following considerations: (1) whether the statute under which the agency acted, or the rule, order or other action of the agency made, issued or taken thereunder, is constitutional; (2) whether the rule, order or other action of the agency is in excess of the statutory authority or jurisdiction of the agency; (3) whether the hearing conducted by the agency was contrary to the rudiments of a fair hearing; (4) whether the rule, order or other

action of the agency was based upon an error of law which affected the substantial rights of the party seeking judicial review; (5) whether the rule, order, or other action of the agency is arbitrary, capricious, unreasonable or unfair; (6) whether the rule, order, or other action of the agency is supported as a matter of law by the findings of fact of the agency; (7) whether the findings of fact of the agency, and the rule, order or other action of the agency taken thereunder, are reasonably supported by substantial evidence in the record, considered as a whole, adduced before the agency.

(f) The limited review provided by subdivision (7) of section (e) of this article shall not apply to any case where, under constitutional or statutory principles of law, the court must exercise its independent judgment on the evidence; in such cases the court may determine whether the findings of fact of the agency, and the rule, order, or other action of the agency taken thereunder, are reasonably supported by the weight of the evidence in the record, considered as a whole, adduced before the agency, with regard given to the prior judgment of the agency upon the facts and to *prima facie* validity of the rule, order or other action of the agency. Nor shall the limited review provided by subdivisions (5), (6) and (7) of section (e) of this article apply to any case where, under constitutional or statutory principles of law, a complete retrial is required in court; in such cases the court may determine whether the rule, order, or other action of the agency taken thereunder, is reasonably supported by the weight of the evidence in the record, considered as a whole, adduced before the court, with regard given to the prior judgment of the agency in the case and to *prima facie* validity of the rule, order or other action of the agency.

15. *The Texas Administrative Procedure Act should not apply so as to conflict with statutory procedures applicable to particular agencies.*

Uniformity is one of the basic objectives of any administrative procedure act, and principally for this reason the Model State Act provides for repeal of all inconsistent legislation. Yet, some diversity in administrative procedures may be desirable, even within the broad outlines of this act, and some agencies may prefer to follow, for the present, practices prescribed by statutes under which they are now functioning. Thus, in the beginning at least,

a general administrative procedure act may be subordinated in conflicting provisions to statutes governing particular agencies. If this slows needed reforms, protection of existing agencies will justify the delay. This procedure will require, ultimately, the review and revision of all statutes governing administrative agencies in Texas. Such a task, vast as it is, could be performed successfully through joint efforts of the Southwestern Legal Center, the Texas Legislative Council,<sup>40</sup> and the Division of Administrative Practice and Procedure (herein proposed), in consultation with agencies concerned.

### *Article 15*

(a) Where any provision of this act conflicts with a provision of an act pertaining to a particular agency, the latter shall prevail.

(b) If any provision of this act or application thereof to any agency, person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

The Supreme Court of Texas and the State Legislature are working constantly to improve rules and laws governing practice and procedure in the courts. Yet, private rights and interests of comparable importance are determined every day by state administrative agencies, and no similar attention is given to administrative procedures. Legislation is essential to the protection of such rights and interests. When the Federal Administrative Procedure Act was under consideration, Congressman Francis E. Walter of the Judiciary Committee submitted a report in support of the bill in which these words were used: "This bill is not, of course, the final word. It is a beginning. If it becomes law, changes may be made in the light of further experiences; and additions should be made." He might equally have spoken of that which is here proposed—the beginning of the legislative simplification and standardization of administrative practice and procedure in Texas.

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<sup>40</sup> TEX. REV. CIV. STAT. (Vernon, 1950 Supp.) art. 5429b.