From "Good Ol' Boys" to "Good Young Law": The Significance of the Oklahoma Administrative Code

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FROM "GOOD OL’ BOYS" TO "GOOD YOUNG LAW": THE SIGNIFICANCE OF THE OKLAHOMA ADMINISTRATIVE CODE

PHYLLIS E. BERNARD

I. INTRODUCTION

The first day of January—for most of us—marks the roisterous beginning of the new calendar year. Typically, this beginning is attended by a number of resolutions to reform and improve behavior—resolutions that typically last only until they prove less comfortable and convenient to follow than the habits with which we have grown comfortable. January 1, 1992, marked the extremely quiet beginning not only of a new year but, potentially, of a new era in administrative law within the State of Oklahoma.

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I wish to thank my research assistant Lynne F. Saunders, a 1993 graduate of Oklahoma City University School of Law, for her assistance in compiling the tables included in this article. I especially thank Dean Robert Henry for his incisive wit and generosity as a scholar. Most especially, on behalf of everyone who will benefit from the Oklahoma Administrative Code, I thank the two women who bore most of the unheralded burden of creating this landmark document: Peggy Coe, Director of the Office of Administrative Rules, and Rebecca Rhodes, Assistant Attorney General for the State of Oklahoma.
Under the 1991 amendments to the Oklahoma Administrative Procedures Act (OAPA), January 1, 1992, marked the date by which all agencies must have had their permanent rules published by the Office of Administrative Rules in the new Oklahoma Administrative Code. Permanent rules

2. Id. § 256. Section 256 states

A. 1. The Secretary [of State] shall provide for the codification, compilation, indexing and publication of agency rules and Executive Orders in a publication which shall be known as the Oklahoma Administrative Code in the following manner:

a. On or before January 1, 1992, the Secretary shall compile Executive Orders which are effective ... and agency rules which have been submitted pursuant to the agency schedule of compliance and have been accepted as properly codified .... Such compilation shall be maintained by the Office of Administrative Rules and shall be updated by agencies, in a manner prescribed by the Secretary, to reflect subsequent permanent rulemaking. ... Effective January 1, 1992, any permanent rule not included in such compilation shall be void and of no effect.

b. On or before July 1, 1992, the Secretary shall provide for the indexing and publication of all codified agency rules and Executive Orders in the Oklahoma Administrative Code. Any permanent rule not published in the first Code shall be void and of no effect. A finally adopted rule filed and published in The Oklahoma Register may be valid until publication of the next succeeding Code or Code supplement following the date of its final adoption. ...

2. Compilations or revisions of the Code or any part thereof shall be supplemented or revised annually. The Code shall be organized by state agency and shall be arranged, indexed and printed in a manner to permit separate publications of portions thereof relating to individual agencies.

3. Annual supplements to the Code shall be cumulative. Emergency rules shall not be published in the Code or in any supplements thereto.

4. The Code and the supplements shall include a general subject index and an agency index of all rules and Executive Orders contained therein. The supplements shall also include a sections-affected index of the Code. The Code and supplements shall contain such notes, cross references and explanatory materials as required by the Secretary.

Id.; see also Okla. Stat. tit. 75, § 250.7(C) (1991), which provides,
not included in the Oklahoma Administrative Code—or rules that are not pending publication in the next succeeding Code or supplement that are currently published in the Oklahoma Register—are void under statutory law and of no effect. Theoretically, then, one should be able to time the demise of "secret law" in Oklahoma administrative agencies from January 1, 1992, forward. At any rate, the statutory structure for that demise has been erected.

Will the institutional changes signaled by development of the Oklahoma Administrative Code become, in fact, a reality?

C. Rules published in the Code and in the supplements thereto, and permanent rules published in The Oklahoma Register after the closing date for publication in the last preceding Code or Code supplement, as announced by the Secretary, but prior to publication of the next succeeding Code or Code supplement, shall constitute the official permanent rules of the state.

Id.

3. Professor Michael P. Cox, the leading contemporary scholar of Oklahoma administrative law, offered an excellent explanation of this term when he examined the serious deficiencies in Oklahoma's public information statutes. Michael P. Cox, The Oklahoma Administrative Procedures Act: An Aid or a Hindrance?, 37 OKLA. L. REV. 1, 9-10 (1984). He described "secret law" as

the term in administrative law used to describe agency resource materials (e.g., rules, orders, memoranda, letters, interpretations, etc.), which may have the force and effect of law or influence agency action, but which are not generally available to the public. In this regard the United States Supreme Court has stated,

[The public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency constitute the "working law" of the agency. ... The affirmative portion of the Act [The Freedom of Information Act (5 U.S.C. § 552)] expressly requiring indexing of "final opinions," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public," represents a strong congressional aversion to "secret law," and represents an affirmative congressional purpose to require disclosure of documents which have "the force and effect of law."

Id. at 9 n.38 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152-53 (1975) (citations omitted)).
At the time of this writing, the Oklahoma Administrative Code existed in one set of looseleaf binders in the State Capitol Library. Whether, when, and how it will be reprinted in a more durable form and then, most importantly, be made generally available for purchase by attorneys and law libraries is unclear. With so many budgetary pressures, the monies necessary for such reprinting, updating, and dissemination are not necessarily viewed as the highest governmental priority.

On the other hand, for the first time, there exists at least one official, comprehensive compilation of administrative regulations for Oklahoma. Heretofore, the regulations purporting to have the force and effect of law over so many aspects of economic and social transactions by Oklahoma citizens and businesses existed only in pamphlets, booklets, miscellaneous photoduplicated sheets, memoranda, circulars, and press releases. In addition, some regulations were duly published in the Oklahoma Register. Rules and regulations that agencies had published in the Oklahoma Register had the advantage not only of being valid but also of being findable.

At any rate, an attorney, legal assistant, law clerk, or sufficiently dogged and probably irate layperson might be able to cull through the Oklahoma Register to identify the specific regulation at issue—if that person already basically knew what he or she was searching for. Unfortunately, the Oklahoma Register is not indexed and does not provide a compilation of the rules and regulations published therein. Thus, persons searching for the rules and regulations affecting their activity under Oklahoma’s administrative authority would find themselves at a virtual loss. The starting point returns, for all practical purposes, to the administrative agency itself with its panoply of miscellaneous pamphlets, booklets, and circulars.

An indexed and regularly updated Oklahoma Administrative Code coupled with the existence of the Office of

Administrative Rules\(^5\) ought to represent the mechanism that breaks this oftentimes frustrating, always inefficient, and sometimes illegal cycle. While there may be room for cynics to decry the changes of January 1, 1992, as little more than a soon-to-be-broken New Year’s resolution, there is more than ample room for optimists to celebrate the effort behind this attempt to make public law truly public.

The importance of the mere existence of an Oklahoma Administrative Code can probably only be appreciated if one first appreciates two vital factors underlying the development of the Code: (1) the history and politics of administrative agencies in Oklahoma and (2) the difficulties experienced in the development of the Federal Register and the Code of Federal Regulations (C.F.R.)—on which the Oklahoma Register and Oklahoma Administrative Code are modeled. Therefore, part II of this article will first examine the development of administrative agencies in Oklahoma. Next, part II will trace how Oklahoma’s “traditionalistic” model of political culture demonstrates itself in the historical development of three major agencies. Part II will also outline how this model revealed itself in Oklahoma’s early administrative law. Next, part III will examine the early days of administrative procedure at the federal level, focusing specifically on

\(^5\) OKLA. STAT. tit. 75, § 250.9(F) (1991). Section 250.9(F) states,

F. There is hereby established an Office of Administrative Rules within the Office of the Secretary of State. The Office of Administrative Rules shall have the primary responsibility for publishing The Oklahoma Register and the Oklahoma Administrative Code and otherwise implementing the provisions of Article I of the Administrative Procedure Act. The Secretary of State shall provide for the adequate staffing of the Office to implement the provisions of this section including but not limited to an editor-in-chief.

Id. (footnotes omitted). This commentary’s purpose is not to set out the detailed operations of the Oklahoma Administrative Code. Others have done that already. I refer the reader to Jerry Barnett, The New Oklahoma Administrative Code: Coming Soon to an Office Near You, 62 OKLA. B.J. 1280 (1991), and Jerry Barnett, Update on the Oklahoma Administrative Code, 63 OKLA. B.J. 600 (1992). Rather, this commentary attempts to put the changes into some sort of historical perspective. I endeavor here to highlight the meaning of those changes because their significance can be lost or minimized if the changes are not understood in a larger context.
the development of the Federal Register Act, which also created the Code of Federal Regulations. The federal government also struggled to end "secret" (i.e., unpublished, unavailable, and uncodified) agency law. The road to install a modern rulemaking apparatus was rocky.

Having briefly examined the state and national need for a more sophisticated and even-handed notice and publication of administrative rules, this article will then turn to examine the maturation of Oklahoma's administrative procedures. In part IV, this article will trace the development of the Oklahoma Gazette, which evolved into the Oklahoma Register, which in turn is now capstoned by the Oklahoma Administrative Code. Here the article will compare Oklahoma's pace of development to that of other selected states.

II. TRADITIONALISTIC POLITICAL CULTURE AND THE DEVELOPMENT OF ADMINISTRATIVE LAW IN OKLAHOMA

This section focuses on what some observers might argue is the central political tension in state administrative agencies. Then-Attorney General Robert H. Henry so aptly stated that political tension is "the conflict . . . between Oklahoma's past and its present."6 That past has been described in a small handful of contemporary books.7 The most recent adopted the description of Oklahoma political culture as "traditionalistic," defined as being

rooted in preindustrial attitudes emphasizing an ordered hierarchy of social dominance laced with interpersonal, often familial and "old boy" social and political ties. Political power tends to be confined to small, relatively closed circles of established elites who may or may not be elected officials. As a result, widespread popular participation is not only not

expected, but often discouraged through various direct and indirect devices.⁸

At first look, it might seem that Oklahoma's proliferation of administrative agencies indicates a populist-oriented diffusion of power. If so, then in accord with populist principles, the power of government has been spread broadly into the hands of many citizens. That would perhaps undercut the above-quoted depiction of Oklahoma government as harboring tendencies toward consolidating power in the hands of a relative few.

Surely, one can approach this issue in a number of ways. This commentary approaches this issue in two steps. First, although this commentary is not intended to be a discourse on legal history, it is helpful to see how the history and politics of some key agencies might indeed correspond to the traditionalistic model. Therefore, this commentary looks briefly at two agencies developed early in the history of statehood to oversee big business and at an agency developed during the New Deal to organize assistance, providing for the health and welfare of Oklahoma citizens. These are also agencies that have had some of the greatest impact on the activities of state businesses and citizens: the State Department of Highways (currently called the Department of Transportation), the Corporation Commission, and the Department of Public Welfare (currently called the Department of Human Services), respectively.

It is always possible, as the above-quoted passage explains, that the influence exerted by the relative few is not direct but, rather, indirect. A powerful indirect means of control is to control access to critical information. Clearly, no information is more critical in administrative law than knowing what rules an administrative agency has adopted to regulate entities subject to that agency's jurisdiction. Surely, the next most critical information is knowing what rules the agencies intend to adopt, modify, or reverse. Therefore, the

second step in examining the Oklahoma administrative process takes us into the early case law concerning publication and notice. Here, this article traces the few reported cases that indicate practices in the period preceding Oklahoma's adoption of a modern register system and code modeled on the federal example.

A. Signs of Direct Control

The Directory of the State of Oklahoma lists thirty-one executive branch agencies, boards, and commissions that were created under the Oklahoma Constitution. Oklahoma also has a bewildering array of other administrative entities within the executive branch titled variously as boards, commissions, committees, advisory councils, or trusts. As described in Oklahoma Politics and Policies: Governing the Sooner State,

[T]he state has spawned a host of relatively obscure boards and commissions. Some are more visible and important than others. For example, a separate Board of Mental Health and Substance Abuse operates a large program and dozens of institutions for treating the mentally ill and substance abusers. Literally hundreds of obscure boards flourish, ranging from the Oklahoma State Board of Public Accountancy to the Will Rogers Memorial Commission. Some have full-time paid directors; others do not. Among the more inconspicuous are the Santa Claus Commission (created to purchase Christmas gifts for orphans in state-supported homes), which lists both a treasurer and an executive secretary, and the J. M. Davis Memorial Commission in Claremore, which lists no administrative officers (it was created in 1965 to provide state control over the large private collection of guns and historical artifacts of J. M. Davis).
Of course, despite the proliferation of small boards and commissions, the primary functions of Oklahoma government rest in only a handful of administrative agencies: those responsible for highways, welfare, health, utilities, and education. In a state that is the eighteenth largest in the United States, larger than any state east of the Mississippi and larger than all of New England, highways assumed critical importance soon after statehood. As a result of the efforts of Governor Lee Cruce, the State Highway Department originated in 1911 to establish an office that could assist in long-range and coordinated state planning for economic development. Highways, however, quickly became a battlefield among the Governor, the Legislature, and the County Commissioners because the placement of roads could decide the balance of power between rural and urban areas, could create markets where none existed before, and could supply significant patronage. By 1935, the Brookings

13. I thank David Morgan, Robert England, and George Humphreys for reminding us all of the unwieldy size of Oklahoma. It is all too easy, even for a native daughter like myself, to overlook how important a factor the geography can play in forming the politics and history of state government. See especially their discussion on “Influences Affecting Oklahoma’s Political Culture.” Id. at 9-14.

14. Oklahomans have entertained an ironic attitude toward this issue in all administrative agency affairs. It perhaps shows most readily with regard to the state highway system. Then-Attorney General Robert H. Henry shared an apocryphal story in the foreword to Oklahoma Politics and Policies which is most telling:

A young man returned to rural Oklahoma after completing college and law school. Armed with his law degree he set about to open an office. Realizing that he was largely unknown after his scholastic absence, he decided, as any knowledgeable rural Oklahoman would, that the best way to get his name known was to run for political office.

He knew he wouldn’t win; it was the publicity that was important. So, to the amazement of all, he filed against the long-time incumbent county commissioner, the most powerful politician in the area.

At the first “speakin’,” virtually the entire county gathered to see what the young upstart with no experience or organization could possibly have to say. The lad knew it would be an uphill battle, so he closed his speech with a powerful peroration appealing to the presumed universal disdain for corruption: “Ladies and gentlemen, good voters of this county, I remind you that there is only one, only one hard-paved road in the entire county, and that
Institute of Washington, D.C., in a report commissioned by Governor E. W. Marland, had determined that the State Highway Department had "utterly failed to accomplish the end desired" by Governor Cruce. The continuing power struggles among county commissioners—their "unwholesome manipulations"—affected even the chief engineer and technical staff, preventing them from carrying out their duties as modern professionals.

In a state where the oil and gas industries provided a major source of revenue, the regulation of these industries through the Corporation Commission assumed paramount concern—at least as an intermittent item of political controversy. Initially, the Corporation Commission began as a triumph of the Progressive Movement in the State of Oklahoma. In the Constitutional Convention of 1907, article 9, section 15 of the Oklahoma Constitution established the elected, three-member Commission. The lengthy constitutional provision (longer than the entire United States Constitution) outdid the federal Sherman Antitrust Act by estab-

runs straight from the incumbent's farm right to the county seat. Now is that the kind of county commissioner you want?" "It damn sure is!" a voice cried from the back. "Why, he's already got his road."

Henry, supra note 6, at xi. The grand master of so-called "political road-building" was Governor Raymond Gary. Governor Gary could not be accused of building roads to county commissioners' homes. SCALES & GOBLE, supra note 7, at 303. Rather, he "allowed the distribution of road funds to mirror legislative power"—meaning that because rural areas in the Oklahoma Legislature of the 1950's dominated in votes, they dominated in roads also. Id. For a much more extensive and enlivening discussion of highways in Oklahoma and their political history, see SCALES & GOBLE, supra note 7, at 302-03. For a discussion regarding Governor Cruce, see id. at 54-55.

15. THE BROOKINGS INSTITUTE, REPORT ON A SURVEY OF ORGANIZATION AND ADMINISTRATION OF OKLAHOMA (1935).
16. Id. at 122.
17. Id.
18. Id. The State Highway Department did not bear the full brunt of blame for administrative inefficiency. As the report further notes, "politically-minded legislators" saw the Department as "a source of patronage which has been exercised to the fullest possible extent." Id. at 125. The problems created by such a politicized system continued many decades. H. O. WALBY, THE PATRONAGE SYSTEM IN OKLAHOMA 4-12 (1950).
19. OKLA. CONST. art. IX, § 15.
lishing as thorough control as possible over businesses involved in railroad activity, mineral and timber resources, freight charges, stock and bond issues, and utility charges.\textsuperscript{20}

The anti-corporate spirit of the Oklahoma Constitutional Convention waned as Oklahoma matured. In the decade following 1908, the agrarian and labor movements that had supported extensive and strict controls over public utilities, oil and gas drilling, and motor carrier transportation fell apart with the national economic depression of 1907. Over the next decade, a decidedly pro-business orientation arose in its place. By the 1920's, the Corporation Commission was the recognized forum for "the debate between rival corporate

\textsuperscript{20} It is interesting to compare the treatment of this genesis in different Oklahoma histories. See MORGAN & MORGAN, supra note 7. The authors stated,

The constitution's controversial provisions regulating business were not designed to destroy corporations, but to prevent or control monopolies. Railroad activity in promoting townsite development and in exploiting mineral and timber resources had long angered the Five Tribes. Settlers in western Oklahoma were also hostile to railroads because of discriminatory freight rates and schedules. After the turn of the century, eastern oil companies seeking to control local production seemed, to many people in the state, another major villain. Reflecting a thorough knowledge of the weaknesses in the Sherman Antitrust Act, the framers established a state corporation commission to control freight rates, stock and bond issues, and utility charges. It also had the power to levy fines for violations of its rules. Monopoly was formally prohibited, and corporate records were subject to state examination.

MORGAN & MORGAN, supra note 7. Scales and Goble offer a somewhat sharper commentary. SCALES & GOBLE, supra note 7.

The article bristled with anticorporate provisions. Corporations were forbidden to conduct business without an Oklahoma charter. They could not contribute to or otherwise "influence" political campaigns. Neither could they own stock in competing firms nor attempt to effect a monopoly. Railroads, the most prominent local examples of big business, were effectively divorced from mining, ending their long control of the Indian Territory coal fields. Long suspected of tax-dodging, the carriers were compelled to pay taxes on all rolling stock and other "movable property" on the same basis as an individual's personal property.

... [The Corporation Commission] had enormous investigative and administrative authority; its powers were as great as those of the most ardent statutory commissions in the existing states.

SCALES & GOBLE, supra note 7, at 23-24.
interests"\textsuperscript{21} from which the "state's consumers were all but voiceless."\textsuperscript{22}

The fading of the Progressive spirit may have had a magnified impact due to the structure that these Progressives had established in the Oklahoma Constitution. That structure made the Corporation Commission constitutionally the strongest agency in Oklahoma government. Its members were elected by the public and did not answer directly to the Governor, and its decisions were appealed directly to the Oklahoma Supreme Court.\textsuperscript{23}

Despite the constitutional heft of the Corporation Commission, Oklahoma's Department of Public Welfare (currently known as the Department of Human Services) far outweighed the Corporation Commission in terms of budget outlay and potential for grassroots patronage. Oklahoma established its Department of Public Welfare in reluctant compliance with the Federal Social Security Act of 1935,\textsuperscript{24} which required states to establish an agency meeting federal standards in order to receive federal grants. Some state legislators viewed the arrival of federal matching funds for old age assistance as a patronage bonanza. At the inception of the new state agency, some legislators attempted to route funds through county welfare boards where loyal party workers would dispense the funds to worthy voters.\textsuperscript{25} This initial attempt at bypassing the federal-state administrative system illustrates the proof of Scales and Goble's insight that "[a]t bottom, Oklahomans were psychologically unprepared for the swift transition of an agrarian, patronage-minded commonwealth to a social welfare state supporting vast new

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21. SCALES \& GOBLE, supra note 7, at 129.
22. Id.
25. SCALES \& GOBLE, supra note 7, at 187.
\end{flushleft}
agencies and requiring a high degree of administrative skill."26 After the Federal Social Security Administration temporarily suspended all federal relief funds to Oklahoma, the errant legislators conceded. Federal accounting standards and the use of professional, trained social workers prevailed. The Department of Public Welfare (DPW) grew within a decade to be the largest single activity of Oklahoma government. By 1946, DPW had spent nearly three times the total expenditures for state government during the year before its establishment in 1934.27

27. The federal Social Security Board investigations into the Public Welfare Commission provide fascinating reading. They chronicle the unapologetic use of DPW/SSA funds to provide political patronage. I have excerpted just a couple of examples from the testimony of Rose McHugh, Chief of the Division of Administrative Surveys of the Bureau of Old Age Assistance, Social Security Board:

A strong, well qualified field staff is of vital necessity for the proper administration of the program, but this group of the [DPW] staff has been made to feel especially insecure because of the outspoken opposition to it of several members of the Commission, and the attempt to abolish it made at the Commission meeting on February 26, 1937. . . . The declaration of members of the Commission that they . . . did not approve of high educational requirements for members of the staff, nor of social work qualifications, has tended to make the staff feel the Commission is not interested in the welfare aspects of the program.

Transcript of Hearings Before the Social Security Board, box 21, at 19-20 (on file in Clayton H. Hyde Collection, Western History Collection, University of Oklahoma) [hereinafter Transcript].

McHugh went on to cite examples revealed through the federal investigation, including how in Latimer County, "a member of the Commission [had] . . . told the county director that a member of her staff should be discharged because a member of the County Assistance Board wished to replace her with a woman to whom he had promised a job." Id. at 20.

The raw nature of the political powerplay revealed itself most clearly in the struggle over roll-padding, i.e., adding people to the assistance rolls who were not eligible according to federal objective standards. Five counties in particular (Latimer, Ellis, Cherokee, Harmon, and Tulsa) stood out in the federal investigations for the manner in which applications for assistance were approved or denied—or held hostage—based solely on the applicant's patronage status. Id. at 25-26. Typically, the mechanism for carrying out the political mission was to appoint a staff "visitor" from DPW who understood the political agenda of the county board or commissioner. This visitor understood who should and should not be approved, according to the patronage needs of the county office. As McHugh recounts, "In Latimer County, the county assistance board on one occasion threatened to burn the public assistance files should the State Commission refuse to accede to its demands..."
Other large, influential administrative agencies might have been chosen to illustrate this movement. The three chosen here merely present visible, concise examples of the traditionalistic model in action. A large governmental apparatus harnessed state and federal dollars for the purpose of strengthening and concentrating political and economic power. The mechanisms were clear and uncluttered: move money and other economic benefits toward those who are on your side and keep money and other economic benefits away from those who are not on your side. Those who were unfortunate enough to be the party, person, or property-holder out of favor may have rightly sensed exclusion not only from the political system but also from the system of the administrative law. Exclusion from the administrative process also occurred in more subtle, indirect ways as this article examines below.

B. Indirect Control Through Phantom Rulemaking

Modern administrative procedure, so familiar at the federal level, remains a surprisingly new and developing area of state law. At the federal level, agencies and lawyers have grown accustomed to participating in a uniform and readily accessible system for notice and publication of the rules that govern activities within the agencies' jurisdictions. This system, however, took some time to develop.

A regularized format and forum for notice and publication of federal regulations did not exist until the mid-1930's

to appoint a visitor designated by them." Id. at 25.

While the transcripts are not conveniently located for most readers, the Scales and Goble summary of the DPW-SSA battles is. As the authors described, of the 69,222 citizens receiving pensions as needy elderly, at least 20,766 were ineligible. Many were ineligible because they were not needy; others were ineligible because they were not old. In three counties, the subsequent roll-padding was so excessive that the number of "needy recipients of old-aged pensions was actually greater than the county's total elderly population in all income brackets." SCALES & Goble, supra note 7, at 199. For the reader who wishes to explore more deeply, I have found these references in McHugh's testimony. Transcript, supra, at 120, 125. My thanks to Patti Monk, Assistant Director of the OCU Law Library, for her assistance with this research.
with passage of the Federal Register Act.\textsuperscript{28} A clear statutory requirement that federal agencies promulgate substantive rules through notice and comment in the \textit{Federal Register} did not exist until the mid-1940's with the adoption of the Federal Administrative Procedure Act (APA).\textsuperscript{29} Contemporaneously with the development of the APA, the National Commission on Uniform State Laws developed a model version of the APA for states' usage.\textsuperscript{30} The Model State Administrative Procedure Act (MSAPA), with its provisions for promulgation and publication of rules, won acceptance slowly. By 1963, less than half the states had adopted a version of the MSAPA. It took until the 1970's—three decades after the original MSAPA—for half of the states to establish an administrative apparatus similar to that at the


federal level. Many other states have followed a path similar to Oklahoma's evolution.

Until Oklahoma adopted the Oklahoma Administrative Procedures Act (OAPA) in two sessions from 1961 to 1963, Oklahoma had no general law governing the publication and promulgation of substantive rules. Despite the length and unique detail of the Oklahoma Constitution, that document remained largely silent concerning this important area. Almost uniformly, in pre-OAPA law, a state agency could develop and apply law that changed the rights, benefits, or obligations of persons subject to the agency's jurisdiction with little or no prior notice. Further, the agency could do so with little or no opportunity for the public to obtain a copy of the agency rule. As this article discusses in greater detail in part IV, throughout much of Oklahoma's history, there was no general law requiring publication as a condition precedent for a substantive rule to be effective.

31. Two scholars, Professors Henry P. Tseng and Donald B. Pedersen, have completed invaluable surveys on the challenges presented by the "nonexistence of an administrative code or otherwise systematic compilation" of state agency rules and regulations. Henry P. Tseng & Donald B. Pedersen, Acquisition of State Administrative Rules and Regulations, 28 ADMIN. L. REV. 277 (1976). In their first article on this subject, they quote the observations of Professor Kenneth C. Davis who noted that in 1972, many states had not yet reached the modern age:

The old time system still in effect in some states is that of filing regulations in a central state office, usually that of the Secretary of State; a lawyer may have to go to the state capitol to know the effective law, and even if he goes the clerks may be unwilling to dig out the material he seeks, for indexes are often inadequate or non-existent.

Id. at 277-78 (quoting KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT 141 (3d ed. 1972)). When Professors Tseng and Pedersen surveyed law libraries throughout the nation, they received both solicited numerical information and unsolicited comments that indicated the depth of the problem beyond mere numbers. They quoted a response by a state supreme court librarian: "The whole problem is so troublesome that except for a very few agencies, we call each time we have a request to the agency involved, as we dare not feel secure in believing we have the latest material."


1. Pre-OAPA Constitutional Law

The Oklahoma Constitution did not totally ignore administrative agencies. The Corporation Commission's authority and procedures were set forth in the 1907 Oklahoma Constitution. In addition, article 9, section 18 of the state constitution carried forward a provision from the Virginia Constitution, requiring notice and publication of rules promulgated by the Corporation Commission. There was, however, no mechanism for obtaining copies of the Corporation Commission's rules outside the agency itself. Finally, the agency's compliance with even this constitutional requirement became, over time, spotty.

Was this already-limited and still-shrinking forum perceived as a problem? Usually at the federal level, one would answer such a question by referring to the congressional committee reports or agency rulemaking records. Because Oklahoma's legislature and administrative agencies prepare and retain few records on the background to laws and regulations, we must rely primarily on the accounts of scholars, journalists, and participants.

Professor Maurice Merrill—not only the leading scholar on Oklahoma administrative law in the period but also a major participant in creating the OAPA—has left us with an intriguing and puzzling insight into the pre-OAPA practice of the Oklahoma Corporation Commission. Professor Merrill acknowledges that the Commission is one of the "most important administrative agencies of the state." He lauds the early, rudimentary constitutional efforts to assure public notification of Corporation Commission rules. However, he notes that after 1907, publication languished. Indeed, with a curious lack of criticism, Professor Merrill describes the Corporation Commission as operating "under very fully

33. OKLA. CONST. art. IX, § 18. Professor Merrill points out that this provision originated in section 156(b) of the Virginia Constitution.
35. Id. at 20.
developed and sophisticated procedures” that were “well understood both by staffs and by practitioners.”

Some Corporation Commission procedures were established in the Oklahoma Constitution. But other procedures developed over time, along with still others like the substantive rules. Those might or might not be reduced to writing in a readily-accessed format or forum. That these evolving standards and procedures might not be available to, nor understood by, the general public, the regulated entities themselves, or the attorneys who were not Corporation Commission “regulars” did not seem to be a problem in Professor Merrill’s history of the issue. Or, possibly, after so many years of observing the struggle for publication of agency rules, Professor Merrill saw little reason to chastise one of the only agencies making any attempt whatsoever at systemized rulemaking.

2. Pre-OAPA Case Law

Much of the law on administrative rulemaking in this early period emanated from the Oklahoma Supreme Court. For example, in a handful of cases during the 1930’s, the state’s highest court held that an agency’s substantive rule could only be applied after there had been notice and some sort of hearing.

For example, in Herrin v. Arnold, the Oklahoma Supreme Court reviewed a challenge to the schedule of minimum prices set by the State Board of Barber Examiners. The Board of Examiners apparently did not follow the modern protocol of notice, public hearing, and publication of its rule (i.e., the price schedule). Nevertheless, its procedures were found to be valid because the Board had followed its statutory mandate to approve price agreements only “after

36. Id. at 4.
37. Id. (emphasis added); see also Cox, supra note 3, at 4.
38. Merrill, supra note 23, at 292-93.
40. 82 P.2d 977 (Okla. 1938).
ascertaining by such investigations, and proofs as the condition permits and requires, that such price agreement [was] just" and because the procedures would "enable the barbers to furnish modern and healthful service and appliances" to protect public health.

More pointedly, in Associated Industries v. Industrial Welfare Commission, the Oklahoma Supreme Court explained that when statutes required an agency to develop policies "of a legislative character," the administrative body had to execute the mandate in a way that assured some degree of public accountability. In this case, the Industrial Welfare Commission (Commission) was "empowered to determine upon investigation what [were] adequate minimum wages and wholesome conditions of employment." Moreover, it had express authority to "promulgate rules for the creation and maintenance of such wages and conditions." The State Legislature had granted the Commission authority "to hold public hearings, at which time employers, employees or other interested persons may appear and give testimony." The court noted that such public notice and participation were legally sufficient to validate the regulatory scheme. Further, the enabling legislation required the Commission to make a biennial report to the Governor and the State Legislature covering its investigations and proceedings. To bolster the validity of the administrative scheme, the court prompted the Commission to read this reporting function liberally: to make the legislative report sufficiently detailed to serve as a judicially reviewable record explaining Commission actions "of a legislative nature."

Generally, however, if the administrative agency did not operate under a legislative requirement to provide notice and

41. Id. at 982.
42. Id.
43. 90 P.2d 899 (Okla. 1939).
44. Id. at 906.
45. Id.
46. Id.
47. Id. at 907.
48. Id.
49. Id.
a hearing before taking action affecting interests that were not constitutionally guaranteed, then it could act without the protection of notice that has become so essential to modern administrative practice. Where the agency published that notice raised yet another concern. As the court stated in *Tennyson v. Oklahoma* 50 (a re-visit of the barber minimum price schedules), it was perfectly sufficient for the State Barber Board merely to post a notice of the fee schedule in the Office of the State Board in Oklahoma City and to file a copy with the Secretary of State, again in Oklahoma City, at the State Capitol.51 No other notice was necessary even though the fee schedule might apply to any city or town in the state. Nevertheless, any barber in violation of the fee schedule could be found guilty of a misdemeanor punishable by a fine of $25 to $300 or by imprisonment for a maximum of six months.52

Operating with 20/20 hindsight, it might strike a contemporary observer as curious that during this period Oklahoma administrative law accepted, with little comment or criticism, a system that today would be viewed as wholly inadequate. Today, it would be indefensible for an administrative agency to argue that, as long as those "in the know" understand the agency regulations and procedures, that is sufficient. The concept of an open, regularly publicized process for agency rulemaking has only just dawned in Oklahoma administrative law. In part IV, this article explores this in more detail and shows the difference that the required publication, notice, and codification made under the OAPA.

To a certain degree, the elimination of phantom rulemaking was also making its debut at the federal level in the 1930's. Indeed, if we take a look at the slow, shaky development of the federal apparatus for the publication and compilation of the federal rules, we might well question whether the difficulty in accessing administrative regulations

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50. 106 P.2d 1114 (Okla. 1940).
51. Id. at 1119.
52. Id. at 1118-19.
is as much a matter of indirect control as it is a matter of Kafkaesque inefficiency.

III. THE ROCKY ROAD TO DEVELOPING A NON-SECRET MODERN SYSTEM OF FEDERAL ADMINISTRATIVE LAW

The early difficulties that Oklahoma experienced in developing a non-secret, modern system of administrative law were shared by the federal government. Because the national government was, almost by definition, more diffuse, power consolidated less readily in the hands of a relative few. Thus, direct means of control were limited. On the other hand, because the federal bureaucracy was so large, means of indirect control—through phantom rulemaking and other failures to publish—abounded.

Senator Elihu Root, in his noted 1916 address to the American Bar Association (ABA), projected the clear ascendency of administrative law in the twentieth century.\(^53\) As the country grew, the bureaucracy that regulated the country also grew, and thus the increasing development of administrative law was inevitable. However, in the second decade of the century, federal administrative law hardly could be called a “system” of law. Rather, it was a confusing jumble, a hodge-podge of edicts, policies and rules. Senator Root asked that the ABA direct its efforts toward improving this non-system, which was “still in its infancy, crude and imperfect.”\(^54\)

The most important first step in creating a true system of federal administrative law was the development of the Federal Register. That publication brought together “the diverse parts” that until then had “been scattered” throughout the increasingly complex federal bureaucracy.\(^55\)


\(^{54}\) *Id.* at 369; see also Walter Gellhorn, *Symposium on Procedural Administrative Law*, 25 IOWA L. REV. 421 (1940) (reconfirming the vision of Senator Root).

A. The Kafka’s Castle of Federal Administrative Law. Prior to the Adoption of the Federal Register Act

The early days of federal administrative law (i.e., the days before the New Deal) featured only a handful of agencies attempting to manage the work of a relatively small bureaucracy, relative to how the country’s work would expand logarithmically during the New Deal. Be that as it may, even in 1920, a landmark article by Professor John Fairlie on administrative legislation noted that the system for accessing the law tried the patience and stamina of the layman and lawyer alike. In an often-cited quote, he stated,

In the matter of publication there is a maximum of variety and confusion. Not only is there no general system, but no department has developed a system for itself. Each bureau, and often each local office, has its own methods, or more often lack of method .... [S]pecial instructions may be issued in the form of ... circulars or circular letters, or even in telegrams sent to certain officials which may never be reissued in any of the regular series.\(^{57}\)

Professor Fairlie went on to describe that agencies lacked uniformity in issuing regulations and regulatory amendments which often resulted in subordinate officials applying law that was inapplicable or had been superseded because they had failed to receive their official publication from their own superiors.\(^{58}\) Further, one branch of an agency may not have received publications issued by another branch although those publications may have had “an important bearing” on the work of each branch.\(^{59}\) As difficult as this working environment was for bureaucrats, the impact on private citizens could be devastating.\(^{60}\)

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57. Id. at 199.
58. Id. at 199-200.
59. Id. at 200.
60. Id. at 199-200.
One case from the United States Court of Appeals for the Second Circuit gave voice to the frustration that federal judges experienced due to the difficulty in finding the applicable administrative regulations.61 The Second Circuit decried the general failure of government officers to cite the various regulations that were being applied in the prosecutions appealed to the federal courts.62 More specifically, that court chastised the federal government for failing to supply pertinent postal regulations in Nagle v. United States.63

No department ever sends its compilation of regulations to the judges. They are frequently amended, and, without special information from the department, no one can tell whether a particular regulation in some printed compilation was in force a year later. . . . It is a hopeless task for an appellate court to determine what such regulations were at any particular time.64

Almost thirty years later, Professor Erwin Griswold noted in his seminal article, Government in Ignorance of the Law,65 that many of the same practices were still in effect. Professor Griswold described the process and stated,

If a pamphlet is discovered which purports to contain the rules and regulations in question, there is no practicable means of telling whether the entire regulation or the article in question is still in force, or, as is so often the case, has been modified, amended, superseded, or withdrawn. There is no feasible way of determining whether or not there has been any subsequent rule or order which might affect the problem.66

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62. Id. at 306.
63. 145 F. 302 (2d Cir. 1906).
64. Id. at 306.
66. Id. at 204.
Griswold pointed out that the publication of rules, regulations, and executive orders of the President on single sheets of paper or separate pamphlets raised concerns that far exceeded mere aesthetics. Such publications were "fragile and easily lost." Moreover, creating a complete compilation of such administrative rules "would be an almost insuperable task for the private lawyer." Finally, it appeared that the task was so daunting that not even any public or private law library in the country had all the rules, regulations, and executive orders in their possession. In short, the system was chaotic.

This chaotic structure, so similar to the bureaucratic nightmare described in Kafka's Castle, eventually resulted in the all-too-real spectacle that Professor Fairlie had warned against: that the United States Government would marshall its massive authority to litigate all the way to the Supreme Court on an issue which in fact was a dead-letter, having been superseded much to the surprise of the Solicitor General. At the time, Panama Refining Co. v. Ryan was almost as famous for this embarrassing oversight as for its role in the battle between President Franklin Roosevelt and "the nine old men" who thwarted FDR's New Deal reforms. Another federal case added to the nightmare. In United States v. Smith, the Supreme Court in the same term dismissed an indictment and appeal taken by the federal government to the Supreme Court. It was not until the appeal had reached the highest court in the land that it was discovered the regulation on which the government based its proceedings did not even exist.

67. Id.
68. Id.
69. Id.
70. Id.
72. Griswold, supra note 65, at 204; see generally Fairlie, supra note 56.
73. 293 U.S. 388 (1935).
74. 293 U.S. 633 (1934).
75. Griswold, supra note 65, at 204.
The cases of Panama Refining and Smith created enough public embarrassment, at least within legal circles, to undo the government's apparent willingness to acquiesce in administrative chaos. It was not merely the spectre that any government or private attorney might be the next one to be embarrassed before Chief Justice Hughes. It was a deeper dread founded in the entire system that caused concern. Professor Griswold perhaps captured the concern best when he, along with contemporaries, warned that the explosive growth of administrative agencies to implement President Roosevelt's New Deal programs had created a massive, virtually invisible web of administrative law that could entrap well-intentioned citizens.76

Professor Griswold called for the United States to adopt an "Official Gazette" of the sort used by most Western nations at that time.77 In addition, he called for an annual compilation of rules and regulations with updating and indexing.78 Again, even at that time, such compilations were common throughout Western law and had been since the Victorian era.79 He saw this as being particularly important in the United States at that time because, as he noted, relying on the Special Committee on Administrative Law of the American Bar Association, the total amount of administrative law created during the first year alone of the New Deal exceeded some 10,000 pages.80 It was estimated that this exceeded the total amount of statutory law in the United States Code. Yet, because no organized apparatus existed for regularly publishing and compiling those administrative rules, laymen and lawyers alike found it virtually impossible to comply with the law.

Griswold likened this situation to that of historical despots: "We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience

76. Id. at 198-204.
77. Id. at 208.
78. Id. at 205.
79. Id. at 206-08.
80. Id. at 199.
to laws or orders which he had kept them from the knowledge of."\textsuperscript{81} Other writers in that period likened the situation to "the tactics of the Roman tyrants,"\textsuperscript{82} where Caligula imposed taxes by acts that were "never submitted to public inspection."\textsuperscript{83} When the Romans had protested the unfairness of being forced to submit to law of which they were unaware, Caligula agreed to publish the law. However, "it was written in a very small hand and posted up in a corner so that no one would make a copy of it."\textsuperscript{84}

Between 1933 and 1934, a special committee of the American Bar Association, which included select governmental officials (and Erwin Griswold), worked to develop a proposal for President Roosevelt to establish the Federal Register.\textsuperscript{85} The Federal Register, analogous to the British Official Gazette, would publish daily administrative orders, rules, and regulations promulgated pursuant to public law.\textsuperscript{86} It would also include presidential proclamations, executive orders, and other federal statements of policies that were binding and enforceable.\textsuperscript{87}

Although the Committee had recommended against printing news items or texts of judicial decisions, President Roosevelt refused to accept the Committee's recommendations on the basis that he "did not want a government newspaper."\textsuperscript{88} Apparently, despite the Committee's stated reasons for establishing the Federal Register and the format, the President confused the proposed Register with the Official Bulletin that developed toward the end of World War I.\textsuperscript{89} The Committee on Public Information (the Secretaries of State, War, and Navy) published the Official Bulletin from May 1917 through March 1919. Although its originally

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} Id. at 198 (quoting Jeremy Bentham, 5 Bentham Works 547 (1843)).
\item \textsuperscript{82} James H. Ronald, Publication of Federal Administrative Legislation, 7 Geo. Wash. L. Rev. 52, 56 (1938).
\item \textsuperscript{83} Id. at 56 n.14.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id. at 64.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id. at 66.
\item \textsuperscript{89} Id. at 65.
\end{itemize}
\end{footnotesize}
stated mission was coterminous with that of the proposed Federal Register, the Official Bulletin went further, publishing news stories on “all other subjects related to the prosecution of the war, to which publicity may properly be given.”

According to one commentator, there was apparently no attempt even to continue the Bulletin as an official gazette alone. Why?

The Bulletin had become a government newspaper capable of becoming a dangerous propaganda machine which might be used for political purposes in peace time, and the idea of continuing it sans news and sans comment probably did not occur to those in positions of influence. The fact that it lacked a statutory basis doubtless hastened its departure.

Professor Griswold’s article, Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation, did not wallow as a mere academic piece. To avoid the fate of the Bulletin, Professor Griswold combined with some members of the special committee and drafted a bill to carry forward the ideas presented in his article. That bill, with some modification, became the Federal Register Act that President Roosevelt signed into law on July 26, 1935. Appropriations for the Federal Register Act were not approved until February 11, 1936, and the Federal Register began publication on March 14, 1936.

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90. Id. at 57.
91. Id. at 58.
92. Id.
93. Griswold, supra note 65.
B. The Beginning of the End of Secret Agency Law

Thus, the first four decades of administrative law on the national level bore a number of traits resembling the traditionalistic model of political culture. As in Oklahoma during the same period, the federal government had neither a regularized format nor a central forum for publishing general notice of agency rules and actions. Also, until the 1940's, with the adoption of the Federal Administrative Procedure Act,\textsuperscript{96} there was no uniform, binding statute requiring federal agencies to engage in public promulgation of substantive regulations in order for those regulations to be effective. These deficiencies in federal administrative procedure surely resulted in discouraging widespread popular participation. On the other hand, unlike Oklahoma, contemporaneous accounts give little, if any, indication that federal legislators did not expect public participation.\textsuperscript{97} Reports show little or no discouragement of such participation by controlling access to critical information. Moreover, the clash of three powerful and equally balanced branches of the federal government under the watchful eye of competitive journalists worked against establishing the devices of direct control that flourished in the smaller, closed arena of Oklahoma.

One might argue that the process which excluded the public from full and appropriate participation in the development of rules stemmed from a full-blown traditionalistic model or from the chaotic bureaucracy of Kafka's \textit{Castle}. Both devices reach the same unfavorable result: public exclusion due to lack of public information. However, if the problem is examined more deeply, differences appear. In particular, it is necessary to look closely at how the federal and the state governments moved to remedy the problems of public exclusion due to lack of information once these problems were brought to their attention in a systematic way. How long did it take the respective governmental bodies to

\textsuperscript{97} See generally Ronald, supra note 82.
respond? What form did those responses take? Did the proposed responses ask the government to break new ground?

Dating from the turn of the century, the federal government had fielded complaints from private citizens, litigants, lawyers, federal judges, and legislators about the incoherent jumble of regulatory pronouncements. Yet, the first systematic exposition of the problem with a specific legislative proposal did not appear until the 1930's with the introduction of the Federal Register Act. Congress acted quite promptly in adopting this legislation, requiring only a year. Of course, any new program requires money in order for it to take on life. Senator Huey Long came close to filibustering to death appropriations for this new venture. Nevertheless, it survived. The idea of a Federal Register, as mentioned before, was not new to Western law. For example, years earlier, Great Britain and its commonwealth nations had adopted a gazette format to unravel its chaotic bureaucracies. As this article explores more fully in part IV, the State of Oklahoma and other states had the benefit of observing the experience of the federal government and adopted analogues to the Federal Register Act in their own jurisdictions. In light of the federal experience, therefore, one would have expected speedy changes at the state level. Possibly though, the continuing dynamic of traditionalistic culture hindered the adoption of modern bureaucratic methods and administrative procedures not only in Oklahoma but also in other states.

Yet still, for all the improvements a register or gazette system brought to the federal or state administrative process, the system in and of itself failed to address a central concern of laypersons and legal scholars alike. Namely, following traditions of common law, a federal or state administrative agency could adopt a new standard and apply the standard against a citizen without the citizen having notice or knowledge of the regulation as “notice” and “knowledge” are understood by the general public. To resolve that problem in a workable compromise with common law principles, Con-

99. Ronald, supra note 82, at 69.
gress (and the states) had to adopt a statutory solution. The somewhat imperfect but better-than-nothing improvement came in the APA requirements for notice in rulemaking\textsuperscript{100} and in the Model State Administrative Procedure Act;\textsuperscript{101} both were adopted in 1946.

To illustrate, let us return to a common scenario where a regulatory body has developed a set of substantive rules purporting to have the full force and effect of law. The rules have not been published or distributed among the persons in businesses that are subject to the regulations. A notice of the new rules was posted within the office of the regulatory agency. The rules were not distributed to local libraries or to the offices of private (or even public) attorneys. Notwithstanding this general lack of availability, the administrative agency moves to enforce its rule against "Everycitizen," imposing administrative fines of up to $250 per offense and leaving open the possibility of criminal prosecution for continuing offenses. An irate "Everycitizen" challenges the agency's action in court, claiming that lack of notice barred prosecution and claiming that the agency could not act on the basis of secret law.

Clearly, this illustration reflects the concerns raised in Herrin v. Arnold\textsuperscript{102} and Tennyson v. Oklahoma.\textsuperscript{103} But Oklahoma courts did not wrestle alone with this problem. Other states and the federal government confronted the issue. Their resolutions differed. For example, the Illinois Supreme Court, in a case similar to the above illustration, upbraided the Board of Health for attempting to enforce regulations that were not a matter of public record.\textsuperscript{104} The opinion echoes the concern of legal scholars who then and later cautioned that such procedures invited abuse.

Such rules and regulations are not public laws, which are conclusively presumed to be known. It would be

\begin{itemize}
\item \textsuperscript{100} 5 U.S.C. § 553 (1988).
\item \textsuperscript{102} 82 P.2d 977 (Okla. 1938).
\item \textsuperscript{103} 106 P.2d 1114 (Okla. 1940).
\item \textsuperscript{104} Illinois v. Tait, 103 N.E. 750 (Ill. 1913).
\end{itemize}
monstrous to hold that a citizen was to be penalized for the violation of a rule or regulation of which he had no knowledge, and . . . which [was] not made a matter of record.\textsuperscript{105}

Because this problem was also familiar at the federal level, the Federal Register Act established two different general categories of documents to be published daily in the \textit{Federal Register}. One group under section 5(a) of the Act was required to be published in the \textit{Federal Register} in order for penalties to be legally effective under section 7 of the Act. The second category of documents under section 5(b) was authorized, though not mandated, to be published in the \textit{Federal Register}. The large first group of mandatory publications included all executive branch and legislative branch documents having general applicability and legal effect. In order for the general public to know about such regulations, proclamations, or executive orders, copies had to be filed with the newly created division of the \textit{Federal Register} in the National Archives and a copy must have been made available for inspection by the public. Did this signal the demise of secret law among federal agencies? Not fully.

As a practical matter, a legally effective regulation filed in the Federal Register Office in Washington, D.C., and made available for public inspection realistically does not give notice any better than the posting of barber regulations at the State Capitol in Oklahoma City gave notice to barbers who lived far away from the State Capitol. To be sure, after the regulation was actually published in the \textit{Federal Register}, the \textit{Register} was available for distribution to libraries and attorneys throughout the nation. But long-standing principles of common law held that the mere filing of the regulation with the Office of the Federal Register provided constructive notice to the general public of its provisions. Thus, the regulation was valid and operative although not yet published and disseminated.\textsuperscript{106}

\begin{footnotes}
\item \textsuperscript{105.} \textit{Id.} at 752.
\item \textsuperscript{106.} \textit{Annotations of Opinions of the Attorney General of the United States}, 4 GEO. WASH. L. REV. 268 (1936).
\end{footnotes}
With passage of the APA in 1946, the pragmatic distance between actual and constructive notice narrowed. In the procedures for informal rulemaking established under section 5 of the APA, substantive agency rules not only had to be filed but also had to be published in order to be effective.\(^\text{107}\) Moreover, under the APA, the Federal Register publication preceded the effective date of the regulation by at least thirty days.\(^\text{108}\) This allowed significantly greater opportunity for the general public not only to obtain constructive knowledge but also actual knowledge of the agency rule.

Congress recognized that in order to bring closure to the era of secret law, Congress had to take at least two additional steps. First, the publication provisions of section 5 coupled with section 7 of the APA had to be extended retrospectively, not only prospectively. Thus, in section 11 of the Federal Register Act, Congress instructed all federal agencies under the auspices of the Federal Register Committee to compile within six months a complete listing of all current regulations, rules, and policies to determine whether or not they should be subject to the mandatory publication requirements of section 5(a) and of section 7 of the APA. Second, the daily notices in the Federal Register needed to be compiled into a permanent record, codifying at a minimum all substantive regulations of federal agencies. Further, to make the codified regulations useful as a research tool, Congress mandated that the Code of Federal Regulations (C.F.R.) be regularly updated, supplemented, and indexed. The C.F.R., like the United States Code, was to be made available for purchase by libraries, law schools, and law offices anywhere in the country.\(^\text{109}\)

\(^\text{108}\) Id. § 553(d).
As we see by the very existence of *NLRB v. Sears*, these changes did not wholly eliminate secret law in federal agencies. However, this apparatus—a forum for publication and codification coupled with a statutory requirement for publication—did eliminate wholesale abuse. Surely, it reversed the presumptions on which the government operated. Instead of presuming that unpublished substantive policies were legal, they were presumed to be invalid.

Of course, the presumption has retained some flexibility, especially at the federal level. The clear preference is for substantive policy to be made through substantive rules that are published, codified, and indexed to make them readily accessible to the public. However, agencies that possess both rulemaking and adjudicatory powers may instead choose to set such policies through adjudication. Notwithstanding

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110. 421 U.S. 132 (1975); see also Cox, supra note 3, at 9.
111. Of course, the current leading case on the APA's publication requirements for rules is American Bus Ass'n v. United States, 627 F.2d 525 (D.C. Cir. 1980). The next key inquiry becomes, where was the notice published: in the Federal Register or in the C.F.R. or both? Federal courts have come to view the forum of publication as a significant, though not a determinative, indicator of whether an agency publication was a mere policy statement or a substantive rule. For example, in Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987), the D.C. Circuit reinforced its prior decision in Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986). The Brock court noted that "the real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations." Brock, 796 F.2d at 539. The court explained its conclusion: "Failure to publish in the Federal Register is indication that the statement in question was not meant to be a regulation . . . . The converse, however, is not true: Publication in the Federal Register does not suggest that the matter published was meant to be a regulation, since the APA requires general statements of policy to be published as well."

*Id.* at 538-39. It is publication in the C.F.R. that indicates that it is a regulation having legal effect.

112. The National Labor Relations Board holds the dubious honor of being the agency that the U.S. Supreme Court has most famously challenged on ad hoc rulemaking. In the landmark case of *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Court criticized the NLRB for adopting through adjudication a rule that should have been "published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted." *Id.* at 764. Indeed, the NLRB had not used its rulemaking powers during the first forty years of its existence; the NLRB did not use its rulemaking powers until the Supreme Court directly instructed it to do so. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).
that the federal courts reluctantly tolerated such ad hoc rulemaking through cases, in time, those same courts severely limited agencies’ discretion to make rules through case law. Why? The Supreme Court recognized the operational difficulties and inherent unfairness of this practice. For, while agency rules had finally become regularized, agency cases generally remained a challenge to locate in a similarly organized manner.\(^\text{113}\)

While the federal courts wrangled with federal agencies about making policy by rules available to the general public, the 1981 version of the MSAPA chose a legislative approach. Section 2-104(3) of the 1981 MSAPA attempted to end the discussion by simply requiring state agencies “as soon as feasible and to the extent practicable” to adopt rules “embodying appropriate standards, principles, and procedural safeguards” that the agencies apply in their areas of jurisdiction.\(^\text{114}\) If the agency has established, modified, or rescinded a policy or standard through case law, then “as soon as feasible and to the extent practicable” that agency must

\(^{113}\) In some ways, NLRB’s practice of establishing general and binding policies through adjudications bears a facial resemblance to the Oklahoma Corporation Commission’s practice described by Professor Merrill. The Solicitor General in Wyman-Gordon and Bell Aerospace Co. depicted an agency that had for decades operated rather smoothly for staffs and practitioners. One can easily read into the Solicitor General’s arguments that labor attorneys who practiced regularly before the NLRB (like attorneys who regularly practiced before the Corporation Commission) knew the system. They knew to ask about cases and how to search to find cases that set out the new rule of law. Moreover, the federal labor law system enjoyed the benefit of private legal research firms that regularly compiled, updated, and indexed NLRB cases.

Despite these implied operational benefits, the Supreme Court cautioned that any such system did not fit the legal framework for rules. For adjudicated cases to be difficult to find is not ideal, but it is not unworkable. Administrative case law merely provides a general “guide to action that the agency may be expected to take in future cases.” Wyman-Gordon, 394 U.S. at 765-66. Administrative case law is not law that is binding in the way that statutes are. “Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents.” \textit{Id.} at 766. They are not “commands, decisions, or policies announced” like rules that “must, without more, be obeyed by the affected public.” \textit{Id.} If the agency seeks that level of general, quasi-legislative impact, then the agency must engage in the notice and publication procedures that allow the affected public to participate in the promulgation of the rule and then inform that public about the standard—in advance.

adopt that policy or standard through rulemaking procedures.\textsuperscript{115} Although most states have not yet adopted the 1981 version of the MSAPA, it is worthwhile to examine the rationale behind section 2-104(3) for what it illustrates about the situation of state administrative law generally.

According to the chief author of this provision, Professor Arthur Earl Bonfield, state administrative agencies needed this legislative solution for a number of reasons.\textsuperscript{116} Of course, he noted the bedrock concern of accountability: opening the rulemaking process to public participation forces lawmakers and bureaucrats to be more accountable to the public will. In addition, Professor Bonfield stressed that

\begin{quote}
[agency rules are almost always more highly visible than agency case law to members of the public. The reason for this is that members of the public can more easily ascertain the existence and specific contents of agency law that is embodied in rules than agency law embodied in adjudicatory decisions.\textsuperscript{117}

This is true, of course, in a state that regularly compiles administrative rules and publishes them, making them “available in public libraries and law libraries in all communities in the state.”\textsuperscript{118} Otherwise, even the rules, along with the case, law become secret law. If not duly compiled, published, and distributed, then state agency regulations can become nearly invisible like state agency case law. Professor Bonfield explained that “regulated persons seeking to ascertain the precise contents of the law to which they must conform” face immense difficulties when that law is not published in a readily accessible form.\textsuperscript{119}
\end{quote}

\textsuperscript{115} Id.
\textsuperscript{117} Id. at 171.
\textsuperscript{118} Id.
\textsuperscript{119} Id.; see also Carl A. Auerbach, Bonfield on State Administrative Rulemaking: A Critique, 71 MINN. L. REV. 543 (1987); Arthur E. Bonfield, State Administrative Policy Formulation and the Choice of Lawmaking Methodology, 42 ADMIN. L. REV. 121 (1990).
Unfortunately, virtually all state case law and some state regulatory law remain difficult to access because these laws are not published in a systematic, widely disseminated manner. In short, most states have only partially entered the modern era of administrative procedure.

With the federal APA and the MSAPA examples in mind, let us ask again how Oklahoma's efforts to end so-called secret law measure up. How quickly did Oklahoma move to remedy problems of public exclusion due to lack of information? How effective were those responses? Did the responses manage to counteract the deeply rooted traditionalistic culture and open the administrative process to the general public?

IV. THE DEVELOPMENT OF A MODERN ADMINISTRATIVE APPARATUS IN OKLAHOMA AGENCIES

Assume that the keynote of a modern system of administrative law is an efficient, open, and professional process that facilitates public participation. Accordingly, the development of a gazette or register system and the requirement for publication and codification of regulations probably mark the first steps in achieving modern status. Using these assumptions, we can look back at the birth of the Oklahoma Administrative Procedure Act (OAPA) and the Oklahoma Gazette and Oklahoma Register to identify the beginnings of the break between Oklahoma's past and its present. That break with traditionalistic agency practices took on real meaning when the Oklahoma Administrative Code became a reality.

In this final section, we shall see that once the challenge had been presented to Oklahoma's government in a systematic way, Oklahoma wrestled with the dilemma of modernizing administrative processes much as her sister states did. No, she did not move with the alacrity of Oregon, which adopted its own publication requirements in 1939.\(^{120}\) But Oklahoma moved more swiftly than many others to adopt final statutory provisions. For example, Oklahoma's statutory apparatus

\(^{120}\) OR. REV. STAT. § 183,360 (1991).
existed well before those of Texas\textsuperscript{121} and New York,\textsuperscript{122} states with far larger administrative structures and far more money to fund the effort.

A. A Brief Review of From Whence We Came

1. An Initial, Abortive Effort

Through numerous reports and articles concerning the development of the federal APA and the MSAPA published between the early 1930's and the late 1940's, the various states knew that problems existed in the current system (or non-system) for public notice of and participation in agency actions. More to the present point, the hue and cry concerning how difficult it was for the regulated entities to know what law was being applied against them underscored the problems that resulted from having uncodified regulations.

The National Conference of Commissioners on Uniform State Laws presented the original MSAPA for adoption in 1946.\textsuperscript{123} Within three years, the Oklahoma Legislature had developed a bill to enact a version of the MSAPA "with adaptations to Oklahoma institutions."\textsuperscript{124} Adoption of the MSAPA within three years would have placed Oklahoma on the cutting edge of modern state administrative law. Unfortunately, this early effort at modernizing the legal process suffered collateral damage in the larger battle to end "political roadbuilding"\textsuperscript{125} as described in part II of this commentary.

During the expansive era following World War II, political roadbuilding took on even larger proportions. During the war, Oklahoma's population had shifted to urban areas, taking with it the majority of state tax dollars while receiving relatively meager state services in return.

\begin{itemize}
  \item \textsuperscript{121} TEX. REV. CIV. STAT. ANN. art. 6252-13a (West Supp. 1993).
  \item \textsuperscript{122} N.Y. A.P.A. LAW § 202 (McKinney 1984 & Supp. 1993).
  \item \textsuperscript{123} See supra text accompanying note 101.
  \item \textsuperscript{124} Merrill, supra note 34, at 1.
  \item \textsuperscript{125} See supra text accompanying notes 14-18.
\end{itemize}
Principally, commercial interests and urban residents wanted efficient, durable highways to connect those cities with other cities in the nation. This objective required reorganizing and professionalizing the Department of Highways or required circumventing this traditionalist agency by creating a new, central agency for building highways according to community need rather than personal politics. However, most Oklahoma highways remained in rural areas where "farmers joined county officials to hold out for the more locally attuned—and much less efficient—authority of the county commissioners to decide a major portion of public spending."  

Governor Roy J. Turner attempted to maintain the momentum created by his predecessor, Governor Robert S. Kerr, who had dedicated his terms in the executive office to modernizing Oklahoma's economy and modernizing its politics. Governors Kerr and Turner both had understood the need for government agencies to be "directed by men qualified neither by party affiliations nor their campaign contributions but by . . . professional competence."  

Without such efficiency in government, unswayed by back-room alliances, Oklahoma would fall into "the economic chaos that had followed the First World War."

Governor Kerr had already set in motion the restructuring of administrative agencies along those lines; public education and state economic planning had gained new strength and political independence. Building on Kerr's start, Turner moved forward to challenge directly the Department of Highways. Turner managed to reorganize the agency, to create some political insulation for members of the Highway Commission, and to appoint an actual engineer to run the day-to-day-operations of the agency. These were all hard-won firsts. Next, Turner tackled the second objec-

126. SCALES & GOBLE, supra note 7, at 243.
127. Id. at 233 (drawn from Minutes of Planning and Resources Board Meetings, July 7, 1943; on file with Departmental Correspondence, Robert S. Kerr Collection, Western History Collections, University of Oklahoma, Norman, Oklahoma).
128. Id.
129. Id. at 253.
tive, creating the Oklahoma Turnpike Authority to build super-highways connecting the state’s cities with broader markets.\footnote{130}{Id. at 253-54.}

The fight to end old-style political roadbuilding coupled with broader changes in administrative appointments and structure used an enormous amount of Governor Turner’s political capital. Indeed, those struggles and the backlash they created seriously undercut support for any bid to reform further the administrative process. Despite these difficulties during the 1949 legislative session, the Oklahoma House and Senate passed a bill that would have adopted the MSAPA for Oklahoma’s use as modified to accommodate requirements of the state constitution.\footnote{131}{Merrill, supra note 34, at 1.}

Unfortunately, the efforts of the bill’s supporters were for naught. Professor Maurice Merrill recounted, “[D]ue to the opposition of some agencies and unfounded fears that it might affect adversely the just launched turnpike program, [the 1949 bill] received a pocket [veto].”\footnote{132}{Id. at 253-54.} Thus, the initial effort to open the regulatory process by law ended because the effort was threatened into submission by the shadow of an already-dying sector, otherwise known as the “good ol’ boys.”

2. A Partial Success

a. The Creation of a Forum—The Oklahoma Gazette and the Oklahoma Register Come to Life, While the Code is Freeze-Dried

The contest between Oklahoma’s administrative past and its present did not abate simply because of Governor Turner’s

\footnote{130}{Id. at 253-54.}
\footnote{131}{Merrill, supra note 34, at 1.}
\footnote{132}{Id. The articulated concern involved establishing published standards for turnpike construction contracts—both in general and regarding specific contracts. As Professor Merrill recounts, the pocket veto occurred in significant part because of ill-founded worries that “the newly launched turnpike authority might be hampered by requiring its [specific] contracts to be filed, published and awarded after an opportunity for general discussion by the public at large. It really seemed clear that no such effect would result from the act as it was drafted.” Id. at 10.
pocket veto of the initial administrative procedure legislation. During the following decade, the Oklahoma Bar Association worked fairly continuously to develop legislative proposals on administrative law and procedure.\textsuperscript{133} In 1961, the legislature adopted and Governor Henry H. Bellmon signed into law the first statutory mandates: (1) Oklahoma must create a gazette system to publish and give general notice of agency actions, especially substantive rules; and (2) agencies must publish their rules in the newly-created \textit{Oklahoma Gazette}.\textsuperscript{134}

When the federal government created its register system, lawyers and scholars from around the country observed and participated in the process. It was a "hot" topic. Unfortunately, when Oklahoma undertook a similar endeavor, the topic had cooled somewhat among the larger public. Those individuals who were regularly involved in agency operations, however, surely appreciated the difference this new publication could make in their work. For the first time, Oklahomans could find out the administrative law that applied to their activities. Not only would Oklahomans know post facto, but they could also learn of agencies' rules and policies that were in the making. Armed with that notice, citizens could then participate in shaping those policies, adding their voices to the discussion of standards, necessity, and impact.

Did anyone recognize that Oklahoma administrative law had just made history? According to the leading scholar on this enterprise, probably not. As Professor Merrill described the situation in his landmark article on the 1963 OAPA, "[P]erception of the need for authoritative and convenient sources of information concerning rules seems to have stopped with the Constitutional Convention."\textsuperscript{135} Although there had been efforts throughout the 1940's and the 1950's

\textsuperscript{133} \textit{Report of Committee on Administrative Law Procedure}, 25 \textit{OKLA. B.J.} 1941 (1954). As Professor Merrill, a key participant in the effort to enact the OAPA, relates, "Bills were introduced into almost every session, but, for one reason or another, failed of passage." Merrill, supra note 34, at 1. \textit{Report of Committee on Administrative Law Procedure}, 23 \textit{OKLA. B.J.} 1551 (1991).


\textsuperscript{135} Merrill, supra note 34, at 20.
to develop a comprehensive Oklahoma administrative practice act, there had been "no systematic concern with publicizing administrative rules."\(^{136}\) Hence, those individuals involved in Oklahoma administrative processes—from the outside, or from the public side—found themselves in the situations typified by the cases of \textit{Herrin} and \textit{Tennyson}. Namely, the statutory provisions allowed for "such rudimentary forms of publication as posting in the office of the agency."\(^{137}\)

The 1961 Act creating the \textit{Oklahoma Gazette} marked a major change that apparently engendered only a minor round of applause at the time. The statute required semi-monthly publication of all agency rules and regulations. Finally, "Everycitizen" could know what Oklahoma agency law was, and, \textit{presumptively}, "Everycitizen" knew where to find it: in the \textit{Gazette}. Just as critically, "Everycitizen" and—judging from the federal experience—"Everyprosecutor" could know what rules and regulations had been revised, amended, or revoked. Further, the \textit{Gazette} was not only available in the agency office, which might be many hundreds of miles away. The \textit{Gazette} was also supplied to "every county clerk, court clerk, and county law library in the State of Oklahoma, [and] to members of the legislature."\(^{138}\) In addition, the State Librarian and Archivist was authorized to furnish the \textit{Gazette} more broadly to "such other appropriate agencies, libraries, and officials as he may select."\(^{139}\) At long last in this far-flung state, one did not have to be at the State Capitol in order to find and read agency regulations. Indeed, one could simply pay a subscription fee and have the \textit{Gazette} on site. The Oklahoma public had taken a first and important step toward notice of and participation in agency rulemaking.

However, a number of further steps lay ahead on the road to opening the administrative process. Whether the objective is to know what the law already is or to participate in shaping what the law will be, one needs to be able to

\begin{footnotes}
\item[136.] \textit{Id.}
\item[137.] \textit{Id.}
\item[139.] \textit{Id.}
\end{footnotes}
research agency law. Thus, a mere booklet in the form of the Oklahoma Gazette or its successor, the Oklahoma Register, that listed agency notices by simple chronology would not suffice. Most particularly, the lack of an index to the Gazette and Register seriously hampered efforts by attorneys and knowledgeable laypersons to research agency regulations, current and past.

The Oklahoma Legislature was not blind to the deficiencies of the Gazette and Register. It recognized that, although these compilations helped significantly, the limited formats hindered their real usefulness. Perhaps the Legislature believed that other changes in the publication apparatus would resolve those problems. For example, as early as 1961, the State Legislature attempted to address an even more serious deficiency in the register system: it simply did not reach far enough.

The original state register system, like the federal system, merely updated agency rules and regulations. That system did not by itself create a comprehensive unified compilation of the policies in force by Oklahoma agencies. The Legislature addressed this key problem by authorizing the state to follow the federal example and to establish a Code of Oklahoma Rules and Regulations, similar to the Code of Federal Regulations. This Code, like the federal model, would not only preserve a compilation of future agency laws (from the 1961 enactment onward) but also apply retrospectively. In order to create a comprehensive, authoritative source of agency law and to make it all public, the agencies were to do what their federal counterparts had been compelled to do in 1938: to cull through their formal and informal rules, to commit them to writing, to publish them first in the Gazette, and then have them compiled in the Code of Oklahoma Rules and Regulations. Any rule not duly published was "void and of no effect."

The Legislature may have thought that unless it required agencies to use the register system, agencies might continue

140. Id.
141. Id. § 252.
to shun a process to aid public notice and participation. The Legislature may further have presumed that it had clinched the problem by requiring agencies to publish their rules in the Gazette as a condition precedent for their validity. However, by the next legislative session, the long-term solutions represented by the Code and the publication requirement had faded. The codification effort went unfunded.\textsuperscript{142} Even the updating of agency rules appeared to have been placed on hold until 1991.

A 1962 case highlighted the political and legal struggles at play: \textit{Oklahoma ex rel. Villines v. Freeman}.\textsuperscript{143} In this case, the State of Oklahoma applied for a writ of prohibition against its own Corporation Commission to bar the Commission from full compliance with the 1961 rule publication provision. The Corporation Commission had interpreted the retroactive stretch of the law to apply to “all of its rules, regulations and orders that have ever been issued.”\textsuperscript{144} This created a mammoth task. For example, the agency estimated that these documents for oil and gas conservation alone totalled more than 40,000 pages.\textsuperscript{145} The State, on behalf of Mr. Villines, argued that filing and publishing this volume of documents with the State Librarian and Archivist was “a physical and financial impossibility... at the present time.”\textsuperscript{146} However, if the Commission did not comply with the publication requirements, the Commission’s rules and regulations would be void, and Mr. Villines could lose valuable property rights created under or controlled by those regulations.\textsuperscript{147}

Because the Oklahoma Legislature adopted such a bold and novel publication requirement, the state judiciary spoke for the first time at length on the theory of law and policies underlying this requirement. In \textit{Freeman}, the Oklahoma Supreme Court took this opportunity to stress that the state

\textsuperscript{142} Merrill, \textit{supra} note 34, at 19-21.
\textsuperscript{143} 370 P.2d 307 (Okla. 1962).
\textsuperscript{144} \textit{Id.} at 309.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
needed modern rulemaking procedures in order to keep abreast with the "social and economic problems of a power age."\textsuperscript{148} The court signalled that Oklahoma had now fully entered a complex, post-agrarian era. Now, "the manifold response of government to the forces and needs of modern society" must be the "building up a body of laws not written by legislatures" but, rather, written by specialists and experts in the bureaucracy.\textsuperscript{149} Oklahoma had arrived in the modern age where Governor Kerr envisioned dedicated professionals needed to develop an efficient, workable body of administrative law.

After outlining its theory, the court then focused on the practical problem raised and resolved by the 1961 publication requirement. The court wrote, "One of the greatest practical problems in the field of administrative legislation" is "to determine what rules and regulations have been adopted."\textsuperscript{150} Although this commentary has described in some detail the Kafka's \textit{Castle} that existed before the \textit{Federal Register} and C.F.R., the court in \textit{Freeman} did not. At the risk of attempting to read the minds of the justices, perhaps they assumed the problem was self-evident. For example, the court stated, "This undoubtedly is the reason for the adoption of Senate Bill No. 266" (the 1961 legislation).\textsuperscript{151}

Thus, the Oklahoma Supreme Court soundly endorsed the efforts (initiated in the 1940's) of a small body of Oklahomans to establish a regularized, publicly available system for notice of rulemaking and publicization of final rules. Further, the court affirmed the necessity and wisdom of having a full compilation of all rules and regulations "both substantive and procedural, which are legislative in nature, and are of general effect and have state-wide application."\textsuperscript{152}

The State (and the Corporation Commission) had balked at the prospect of publishing all such documents—plus or-

\textsuperscript{148} \textit{Id.} at 310.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} (citation omitted).
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
ders—"that have ever been issued." The court cut through some of the self-induced drama and concluded that such publication was not an impossibility. It was not an overwhelming, illegal burden. If the task seemed too burdensome to be feasible, this situation was because the Corporation Commission and practitioners had "sometimes" used the phrases "rules and regulations" and "orders" as if they were "synonymous." Orders result from proceedings of a judicial nature and apply to a "particular present situation" while rules and regulations "are actions in which the legislative element predominates." The 1961 legislation simply and clearly did not include "orders" in its retrospective completion. Neither did it include future orders. Therefore, the court granted the writ only with respect to filing and publishing "past or future orders."

The forward movement shown by the Oklahoma Supreme Court in Freeman lost its drive the following year. When the Twenty-Ninth Oklahoma Legislature convened in 1963, it adopted the 1963 OAPA that, perhaps inadvertently, thwarted the 1961 efforts to produce promptly a full compilation of agency rules and regulations.

b. Limitations of the New Forum—Secret Law Continues

As the federal APA illustrated, the mere creation of a register or gazette by itself does not create the apparatus necessary to assure the public legal notice of agency action. At the federal level, it took another decade (largely due to the delays caused by World War II) for Congress to adopt the broad APA that limited the ability of agencies to circumvent publication. Interested Oklahomans continued to press the cause of administrative reform and did not rest with the

153. Id. at 309.
154. Id.
155. Id. at 310.
156. Id. at 310-11 (citation omitted).
157. Id.
creation of the Oklahoma Gazette. Finally, in the Oklahoma Legislature, the desired APA proposal was introduced at the right time. Hence, in 1963, Governor Bellmon signed into law the Oklahoma Administrative Procedure Act (OAPA),\(^{158}\) which was based on the MSAPA as revised in 1961.

i. Statutory Limitations

As with the federal act, the OAPA forced administrative agencies under its coverage to promulgate substantive rules according to modern and open methods: notice, oral hearing if requested, and publication in the Oklahoma Gazette (or its successor, the Oklahoma Register).\(^{159}\) Further, the OAPA required agencies under its coverage to adopt rules of practice and procedure so that agency representation was no longer a matter of gnostic wisdom.\(^{160}\) These changes embodied significant improvements from the past. However, in terms of ending secret law among state agencies, Oklahoma still had much further to go. Where? We need mostly to look at the key word "coverage."\(^{161}\)

The Oklahoma APA did not cover many of the state agencies with the largest impact on its citizens and businesses. Three omissions provided the most concern: the Corporation Commission (except regarding the filing of rules), the Department of Highways, and the Department of Public Welfare. Why did the OAPA allow these large administrative bodies to circumvent the full scope of its coverage? According


\(^{159}\) Id. § 303.

\(^{160}\) Id. § 302.

\(^{161}\) I say "mostly" here because this commentary focuses primarily on the political history underlying the effort to publicize agency standards. There are, of course, any number of other limitations. For example, it was unclear when rules needed to be filed—i.e., the timing for filing; how they needed to be filed—i.e., whole or partial text; and what needed to be filed—i.e., whether an agency standard or procedure was a substantive rule or not. See Texas County Irrigation & Water Resources Ass'n v. Oklahoma Water Resources Bd., 803 P.2d 1119 (Okla. 1990); Associated Builders & Contractors v. Oklahoma ex rel. Okla. Dep't of Labor, 628 P.2d 1156 (Okla. 1981); Oklahoma ex rel. Pollution Control Coordinating Bd. v. Kerr-McGee Corp., 619 P.2d 858 (Okla. 1980); City of Sand Springs v. Department of Pub. Welfare, 608 P.2d 1139 (Okla. 1980); Oklahoma v. Oklahoma Gas & Elec. Co., 536 P.2d 887 (Okla. 1975).
to Professor Merrill whose article supplied the legislative history of the 1963 Act, "as a matter of practical politics, it seemed wise to exclude these agencies from the act."\textsuperscript{162}

With the Corporation Commission, those practical politics appeared to be an internal matter. Practitioners were comfortable with the present system. Changing a tradition that had worked well for those powerful persons already a part of that tradition presented a daunting political challenge. As Professor Merrill apologized, "It is understandable that all concerned would be reluctant to abandon these procedures in favor of a novel system."\textsuperscript{163}

With regard to the Highway and Welfare Departments, Professor Merrill recorded that the original House of Representatives bill included these agencies.\textsuperscript{164} However, in the Senate, the agencies raised the spectre that the OAPA might somehow "jeopardize federal aid moneys."\textsuperscript{165} Merrill recognized this as a straw man because relatively "few states having general administrative procedure acts exclude agencies of this character."\textsuperscript{166} He hoped that Oklahoma might eventually follow the lead of other states by "eliminating the blanket exemption."\textsuperscript{167}

Thus, while the 1963 OAPA took major steps forward in the effort to regularize agency operations, it stopped short of a full challenge to the traditionalistic political culture. The changes anticipated by the 1961 Act and Freeman\textsuperscript{168} dwindled. Almost as if there were an unspoken trade-off in return for passage of a broad procedures act, the more focused efforts at improving publicization halted. Neither the Corporation Commission nor other state agencies performed a retrospective evaluation of their rules. The Oklahoma Gazette and later the Oklahoma Register merely updated current and proposed agency standards. The Code of

\begin{footnotesize}
\begin{enumerate}
\item[162.] Merrill, supra note 34, at 4.
\item[163.] Id.
\item[164.] Id. at 5.
\item[165.] Id.
\item[166.] Id. at 5 n.13.
\item[167.] Id. at 6.
\item[168.] 370 P.2d 307 (Okla. 1962); see supra text accompanying notes 145-59.
\end{enumerate}
\end{footnotesize}
Oklahoma Rules and Regulations remained an unfunded, inchoate provision on the books only.

When Professor Michael Cox looked back on the situation from the perspective of the 1981 MSAPA, he found that little if anything, had changed in the intervening decades. Echoing the concerns expressed by Professor Bonfield and others, he noted,

    The 1981 Model Act confirms the need for a state to have a compilation of its rules and regulations (provided for in Oklahoma, but never implemented) and that all orders be indexed . . . . Without a state FOIA [Freedom of Information Act], a general compilation of agency rules and regulations, and a restriction against using an order as precedent unless indexed and made available to the public, the practice of administrative law is severely hampered.\textsuperscript{169}

Let us consider briefly what that practice of law resembled when people had to engage in agency representation without a general compilation of the applicable standards.

ii. Secret Law Limps On

Three cases offer a glimpse of the difficulties present-day Oklahomans confronted in a post-agrarian administrative system. The chief contemporary case on this issue dates from 1974: \textit{Adams v. Professional Practices Commission}.\textsuperscript{170} In this case, the Board of Education of Waurika, Oklahoma, found itself whipsawed in a controversy among some of its teachers, members of the public, and a school superintendent, Dr. Warren Adams. Even when reading the case today, one can sense the administrative nightmare in which Dr. Adams found himself.

Accusations of moral misconduct and improper expenditures of funds had been directed at him. However, upon

\textsuperscript{169} Cox, supra note 3, at 10 (citations omitted); see also Michael Cox, \textit{The Oklahoma Administrative Procedures Act: Fifteen Years of Interpretation}, 31 Okla. L. Rev. 886 (1978) [hereinafter \textit{Oklahoma Administrative Procedures Act}].

\textsuperscript{170} 524 P.2d 932 (Okla. 1974).
inquiry, the School Board had determined that those accusations were merely hearsay.\textsuperscript{171} To its credit, the Board refused to take action on the basis of rumor. Seventeen persons dissatisfied with the Board's inaction took their concerns to the state level, filing a complaint with the Professional Practices Commission (PPC). According to the PPC Enabling Act, complaints had to be verified. Nevertheless, the agency accepted the unverified complaint, charging Dr. Adams with "willful neglect of duty."\textsuperscript{172}

The Kafka's \textit{Castle} began to build. The PPC notified Adams that it would conduct a hearing into the complaint on June 25, 1973. That hearing date did not hold; the date rescheduled several times. Nevertheless, Adams did not receive copies of the complaints filed with the PPC until September 25, 1973.\textsuperscript{173} In addition to this procedural outrage, the PPC intended to pursue the hearing without having adopted any published, substantive standards for determining what constituted willful neglect of duty.\textsuperscript{174}

The Oklahoma Supreme Court soundly chastised the PPC for failing to comply with its statutory responsibilities. Regarding its practices, Justice Hodges reminded the agency that the "method and procedure to be utilized in initiating a hearing before the PPC is usually clarified by the rules and regulations of that commission or state agency."\textsuperscript{175} Failure to promulgate such rules of practice violated the OAPA.\textsuperscript{176}

Regarding its substantive duties, the State Legislature had charged the PPC with "developing, through the teaching profession, criteria of professional practices in [the] areas of contractual obligations . . . and ethical performance of members of the profession."\textsuperscript{177} Failure to promulgate such standards as rules not only violated the OAPA but also

\textsuperscript{171} Id. at 933.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 933-35.
\textsuperscript{175} Id. at 933.
\textsuperscript{176} Id. at 934. Professor Cox has raised some interesting questions about the scope of the court's decision regarding filing requirements. See \textit{Oklahoma Administrative Procedures Act}, supra note 169, at 895-96 n.54.
\textsuperscript{177} Adams, 524 P.2d at 933.
rendered the purported standards void.\textsuperscript{178} As Justice Hodges instructed, "The teachers of this state are entitled to be treated according to a previously established uniform system of published rules and regulations pertaining to professional practices."\textsuperscript{179} He continued, quoting from \textit{Boller Beverages, Inc. v. Davis}:\textsuperscript{180}

The object [of administrative rulemaking] is not legislation ad hoc or after the fact, but rather the promulgation, through the basic statute and the implementing regulations taken as a unitary whole, of a code governing action and conduct in the particular field of regulation so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards administrative control lacks the essential quality of fairly predictable decisions.\textsuperscript{181}

Thus, the Oklahoma Supreme Court concluded that, because the PPC had not adopted any rules, it had no authority to conduct a hearing on Dr. Adams's conduct "until such time as the PPC has complied with the Administrative Procedures Act."\textsuperscript{182}

Ten years later, a similar situation arose in \textit{Oklahoma Water Resources Board v. Texas County Irrigation},\textsuperscript{183} concerning the standards for approving the use of fresh ground water for secondary and tertiary oil recovery. At first look, this subject matter might not appear as compelling a topic as the moral peccadillos of a school administrator. However, in a semi-arid region such as the Oklahoma Panhandle, allowing the removal of surface groundwater can result in the economic death of the surrounding agricultural community. Who should benefit from the use of such water—Mobil Oil

\textsuperscript{178} Id. at 933-34.
\textsuperscript{179} Id. at 934.
\textsuperscript{180} 183 A.2d 64 (N.J. 1962).
\textsuperscript{181} Id. at 71.
\textsuperscript{182} Adams, 524 P.2d at 935.
\textsuperscript{183} 711 P.2d 38 (Okla. 1984).
Company to flush out more petroleum from the rocks below, or the farmers and ranchers who rely on the Ogallala aquifer for their livelihood? As Justice Kauger pleaded in her eloquent concurrence,

We cannot wait until tomorrow to worry about this problem. It must be faced today, before the last acre-foot of water is sucked from the breast of the Ogallala, and the Panhandle becomes a desolate desert—a stark and silent monument to our unwillingness responsibly to function, and a place where the price of water exceeds the price of oil. 184

The Water Resources Board (WRB), however, attempted to resolve this problem through an administratively improper method. Mobil Oil Company applied for a temporary permit to withdraw the water needed for secondary and tertiary oil recovery, which the Texas County Irrigation and Water Resources Association and three landowners opposed. The WRB granted the Mobil permit for a term of twenty years, ruling that Mobil had “complied with all applicable statutory and administrative prerequisites.” 185

Justice Kauger’s concurrence targets this as clear error. At the time of Mobil’s application, the WRB had not yet adopted or published “any rules concerning the use of fresh water for enhanced oil recovery.” 186 Shortly after Mobil filed its application, the WRB adopted rules concerning secondary oil recovery. The rules that the WRB hastily published regarding tertiary oil recovery did not go into effect until after the hearing date on Mobil’s application. Thus, “[a]t the time of the hearing, no rules existed on the subject of the rights of the parties or the procedures to be followed before the Board regarding tertiary oil recovery.” 187

The post facto promulgation of rules and the failure to use the modern administrative apparatus of the OAPA and

184. Id. at 56 (Kauger, J., concurring).
185. Id. at 40.
186. Id. at 57 (Kauger, J., concurring).
187. Id.
the *Oklahoma Register* to inform the public of the standards to be used in deciding whether Mobil could or could not proceed all too strongly resembled the secret law of *Adams v. Professional Practices Commission.*\(^{188}\) Indeed, Justice Kauger quoted at length from the court's decision of ten years prior, warning that an agency must not decide what is wrong "from its hindsight conception of what the public interest requires in the particular situation."\(^{189}\) Rather, such standards of right and wrong must be published in advance in the *Oklahoma Register* according to requirements of the OAPA.

Sometimes an agency's substantive rules appeared to be secret even from the agency itself. In *Standridge v. Board of Review,*\(^{190}\) a case reminiscent of *Nagle v. United States,*\(^{191}\) the Oklahoma Employment Security Commission (ESC) had denied unemployment benefits to Iris Standridge without citing any authority. The ESC merely stated that its

\footnotesize
188. 524 P.2d 932 (Okla. 1974).
189. *Texas County*, 711 P.2d at 59 (Kauger, J., concurring) (quoting *Adams v. Professional Practices Comm'n*, 524 P.2d 932, 934 (Okla. 1974), quoting *Boller Beverage, Inc. v. Davis*, 183 A.2d 64, 71 (N.J. 1962)). In a brief but pithy commentary on *Texas County*, Professor Michael Cox praised the Oklahoma Supreme Court's decision as being in line with the concerns we have discussed here about the difficulties state agencies throughout the nation face in promulgating standards according to proper procedures and then providing appropriate notice. Professor Cox stated, "What is being suggested is that, prior to *Texas County*, many Oklahoma agencies may not have understood (and perhaps still do not understand) the full extent of the APA's substantive rule-making requirement." Michael Cox, *Has Administrative Law Finally Arrived in Oklahoma?*, 40 OKLA. L. REV. 63, 67 (1987). He further stated,

Without regard to whether agency deficiencies in substantive rule making are unintended or otherwise, the message of *Texas County* seems clear: The Oklahoma Supreme Court has put the state's administrative agencies on notice that, as a general principle, before they may proceed to decide substantive issues, not only do they have to adopt procedural rules, they also have to use rule making to develop, promulgate, and publish substantive rules. Prior to resolving substantive issues, agencies must generally utilize statutorily mandated, rule-making procedures to inform the public in general, and affected individuals in particular, as to what factors, standards, guidelines, and the like will be used to resolve the substantive issues under consideration.

*Id.* (footnote omitted).
191. 145 F. 302 (2d Cir. 1906). *See supra* text accompanying notes 61-64.
procedures were "a proper exercise of [its] administration of the Employment Security Act." The court of appeals and the plaintiff appeared amazed that the ESC "refers to its procedure for establishing benefits, yet it cites no source for the procedures nor any publication in which these procedures are included." Because the ESC had "never apprised either the Plaintiff or this court of the appropriate reference to its rules" and had not complied with the rulemaking and publication provisions of the OAPA, the court reversed the ESC's decision below.

Standridge was decided during the time that the OAPA was undergoing its first major overhaul since 1963. In particular, during the end of the 1980's, revisions of the OAPA were enacted to make the end of secret law a statutory matter rather than a judicial task. The Oklahoma Administrative Code was revived. In so doing, the Oklahoma Legislature brought the state administrative apparatus into the mainstream of modern practice.

B. The Oklahoma Administrative Code in Comparative Perspective

During the 1970's and the 1980's, administrative law at the federal level experienced a virtual explosion in rulemaking. The large, programmatic legislation of the period required a complex regulatory scheme overseen by experts and a maze of bureaucrats. In addition, contemporary federal legislation often has been drafted based on the federal-state model of the Social Security Act, requiring states to adopt certain legislative and regulatory standards in order to receive federal benefits. Thus, the huge increase in federal rulemaking led to a parallel increase in state

192. Standridge, 788 P.2d at 971.
193. Id.
194. Id.
rulemaking. Yet, the state administrative apparatus for promulgating, filing, compiling, and disseminating the new regulatory scheme often remained mired in the past.

Oklahoma was caught in the tension between its past and its present. But Oklahoma did not struggle alone. Again, if we look at the level of openness and accessibility as a key measure of a state's rulemaking sophistication, then Oklahoma, until recently, has not fared too poorly. When one considers the impact of state administrative regulations and the proliferation of state agencies creating substantive rules, it seems surprising that only thirty-five jurisdictions in the mid-1970's had general compilations of state rules and regulations. As with the early federal system, persons involved in state agency representation could easily find themselves adrift because "in terms of sheer volume, more substantive and procedural law [is found] in the regulations than in the state statutes." Clearly, more states needed to prepare administrative codes.

Two examples illustrate how Oklahoma fared comparatively in the effort to modernize administrative procedure. In both instances, Oklahoma had the foresight to recognize early that the state required a comprehensive system for publicizing agency standards. On the time-line of state administrative law, 1961 qualifies as early. But Oklahoma lost the advantage of being in the forefront because the Oklahoma Administrative Code went unfunded throughout the 1960's, 1970's, and 1980's.

1. Timely Reform, Compared to What?

The 1975 survey by Professors Tseng and Pedersen kindled a spark of shame in Texas. One correspondent wrote, "Upon receipt of your letter indicating your interest in a compilation of Texas administrative rules and regulations, we wept. Would that we could provide you with such

197. Tseng & Pedersen, supra note 31, at 278.
198. Id. at 279.
information, for that would mean that the creature existed. Unfortunately, such a compilation does not exist." Like Oklahoma, Texas had been studying the development of an administrative procedure act for some time. Indeed, the 1951 draft of a Texas APA had contributed to the OAPA as enacted in 1963. However, it was not until 1976 that the Texas Legislature finally adopted the Administrative Procedure and Texas Register Act (APTRA), requiring a modern, uniform system of rulemaking and publicization.

Although Oklahoma had preceded Texas by more than a decade in adopting an APA and a register system, by 1979, Texas had funded a comprehensive compilation of its agency rules and regulations while Oklahoma's Code remained in limbo. Professor Ron Beal, in one of a series of fine articles on Texas administrative law, underscored the legislative purpose behind these changes: namely, to move the "good ol' boys" aside and to make way for "good young law."

The comprehensive and detailed procedure of APTRA as it relates to rulemaking evidences a clear legislative intent to bring rulemaking outside the closed doors of an agency smoke-filled room and subject the policy formation process to the sunlight of a meaningful public hearing that results in the statewide publication of a legislative rule.

Professor Beal warned against the dangers of ad hoc rulemaking as did Professor Bonfield and the 1981 MSAPA. He further pointed to the creation of the Texas Administrative Code as a key antidote for the "closed doors of an agency smoke-filled room." Professor Beal saw clearly that the ultimate danger of the traditionalistic process is that "due to the lack of statewide publication of an ad hoc rule, the first

199. Id. at 278 (quoting a correspondent, who wrote to the authors about "li[f]e with the "old time system").
200. Merrill, supra note 34, at 2.
203. Id.
time one may become aware of it is when it is cited in a contested case proceeding. Such ‘Surprise, I got you’ notification of the applicable rules is totally alien to notice and comment rulemaking.\(^{204}\)

Thus, the Texas equivalents of Adams v. Professional Practices Commission\(^{206}\) should hopefully die. Professor Beal concludes, “Viewing APTRA as a whole, the Legislature clearly intended to place policy formation in a public context aided by the public’s ability to participate with the ultimate result being published in a statewide publication.”\(^{206}\)

Oklahoma also preceded New York in having a general statute governing rulemaking and requiring state agencies to publish their rules using the register system. New York first began systematically studying the need for statewide rulemaking standards back in 1942. Yet, according to one scholar of rulemaking in New York, the state Legislative Record and Index indicated that while Oklahoma at least was considering how to fashion an APA that suited its needs, New York had not even introduced a single bill.\(^{207}\) From 1942 until 1962, rulemaking reform in New York was dead.

In 1965, two years after Oklahoma had established its register system and APA, the New York Legislature began debating a general rulemaking bill. New York adopted a State Bulletin, but it failed to satisfy the need for general publicization of agency standards because few agencies were required to publish in that forum.\(^{208}\) No general statewide rulemaking and publicization requirements were enacted until 1975, and even then, the State Administrative Procedure Act (SAPA)\(^{209}\) limited its coverage as the OAPA did. The limited coverage of the SAPA undercut the real effectiveness of New York’s Official Compilation of Codes, Rules and Regulations.

\(^{204}\) Id. at 120.

\(^{205}\) 524 P.2d 932 (Okla. 1974); see supra text accompanying notes 172-84.

\(^{206}\) Beal, supra note 202, at 120 n.143 (directing the reader to the Texas Administrative Code as the preferred means of “broader notice” to the “general public”).


\(^{208}\) Id. at 1059-60.

Comparing Oklahoma's progress in modernizing administrative procedure to that of states much larger and richer, such as Texas and New York, Oklahoma seems to fare well. The legislative will to reform had coalesced into action as early as 1961-1963, predating Texas and New York by a decade. Unfortunately, the Oklahoma Legislature also needed to unloose the pursestrings in order to fully implement that action. Here, the legislative will failed.

Other jurisdictions had recognized the need for an administrative code at roughly the same time as Oklahoma and yet had moved forward to finance the necessary response. Publicizing a code was costly, but it was also essential. As the Pennsylvania Bar Association explained,

[A] regulation which remains for all practical purposes lodged in the bosom of the agency which adopted it constitutes an unsteady foundation for the punishment of those who unknowingly violate it, and wholly fails to perform its principal function of shaping public conduct in a socially desirable direction.210

The Pennsylvania Bar recognized that state legislatures faced innumerable, competing demands for funds. It also candidly recognized that most legislators might see funding the cost of an administrative code as a far-from-attractive vote, not nearly as compelling as voting for flood relief or school aid. Thus, the Bar took pains to enunciate how funding the compilation of a comprehensive administrative code was in fact a significant constituent issue. Moreover, in the grand scheme of things, publication and dissemination of an administrative code would likely save far more public (enforcement) dollars than it would cost to edit and print.

Dollar-for-dollar, the sums spent for the publicity of an agency's regulations and statements of policy are the most efficient dollars spent by the agency in the enforcement of its policies. Indeed in sharp contrast,

the customary practice in this Commonwealth, whereby agency time and money is [sic] expended to detect violations of the agency's privately circulated regulations, followed by the mailing to the violator of a copy of the regulation and a demand for compliance therewith, is as inefficient a use of public funds as it is unfair to the unwitting violator.  

By the end of the 1980's, most states had concurred in the wisdom of this approach. One could find at least a rudimentary compilation of the rules and regulations of state agencies in all but the following states: Mississippi, New Mexico, Rhode Island, Wyoming, Virginia, and Oklahoma.

2. Better Late Than Never

While Oklahoma had the early foresight to establish an administrative code, implementation lagged far behind her sister states. It was not until 1987 that the Oklahoma Legislature finally revised section 256 of the OAPA to set a deadline for publication of the Oklahoma Administrative Code. No longer would it languish in limbo. The Legislature even established a Task Force on Administrative Rules. However, the Legislature did not provide funds for the project.

In the following year, the Legislature enlarged the scope of the Oklahoma Administrative Code, reviving the 1962 vision of Freeman. A new section 256.1 required agencies to cull through their operations in an initial attempt to root out and eliminate secret law. Section 256.1 states,

[T]o assure that only current and official agency rules will be published in the Code, each agency shall

211. Id.
conduct an internal review of its rules to determine whether each of its rules is current and is a rule as such term is defined by the Administrative Procedures Act. Any rule determined by an agency to be obsolete or an internal policy statement, or any agency statement which does not meet the definition of a rule pursuant to the Administrative Procedures Act may be deleted by the agency.\textsuperscript{216}

The amendment offered an incentive for agencies to engage in the laborious task of retrospective housecleaning. In a one-time-only offer, an agency could make such deletions without having to submit them to legislative or gubernatorial review. The agency would, nevertheless, have to publish—in the Oklahoma Register—a notice of its intent to make the deletions so that any aggrieved person could duly challenge the action.\textsuperscript{217}

Given the size of the enlarged undertaking, the Oklahoma Legislature extended the deadline for publishing the Code. Instead of July 1, 1990, the publication date became July 1, 1991. On the other hand, the Legislature still did not appropriate monies for the project. At this point, the burden of implementing the Code fell to the generation of clear-eyed professionals in state government that Governor Kerr had anticipated so many years before. Only this time, the two persons who bore the greatest load in directing the project were not “men qualified neither by party affiliation nor by their campaign contributions, but . . . by professional competence.”\textsuperscript{218} Rather, they were two remarkable women qualified by their professional competence and indefatigable energy: Peggy Coe of the Department of Libraries and Rebecca Rhodes of the State Attorney General’s office.\textsuperscript{219} In

\textsuperscript{216} Oklahoma Stat. tit. 75, § 256.1(A) (1991).
\textsuperscript{217} Id.
\textsuperscript{218} Scales & Goble, supra note 7, at 233.
\textsuperscript{219} “[T]he Office of the Attorney General shall provide such legal assistance to the Office [of Administrative Rules] as is necessary to implement” the compilation of the Code. Oklahoma Stat. tit. 75, § 257(A) (1991). Clearly, though, the effort to develop an administrative code would have founded without the unfailing support which Attorney General Henry provided through his office, both directly and in setting the
order to meet the publication date despite the lack of funds and staff, Coe and Rhodes proceeded to gather from Oklaho-
ma agencies their retrospective review of rules and regula-
tions. Some agencies required more education about rulemaking and publiciztion than others. Some agencies had much more staff to assist in the effort than did others. Most agencies appeared willing to cooperate in the effort, recognizing the time had come for "good young law."

In 1991, the Oklahoma Legislature established the Office of Administrative Rules (OAR) within the Office of the Secretary of State to oversee the Oklahoma Administrative Code on a permanent basis.\textsuperscript{220} Peggy Coe became Director of the OAR. The compilation project continued as an endeavor virtually self-funded by the agencies because the Legislature still had not appropriated staff and monies for the effort. Looking back at the lack of financial support, one is struck by the goodwill and industriousness of the state agencies as they sought to comply with the overwhelming task.

A 1991 informational publication by the newly established OAR fully explained the situation that the state agencies were now attempting to reform. The Oklahoma Register (the successor to the Gazette) contained only "new, amended, or revoked sections affected by the particular rulemaking action."\textsuperscript{221} Further, as previously explained, there was "no index to the state's rules."\textsuperscript{222} Therefore, "access to a complete set of current rules of the state, or even a single agency,"\textsuperscript{223} encountered severe, indeed insurmountable, roadblocks. The confusing situation was compounded by the "lack of uniformity in rulemaking over the years, and the lack of any attempt at basic quality control."\textsuperscript{224} As the OAR described,

\begin{itemize}
  \item \textsuperscript{220} \textit{Okla. Stat. tit. 75, § 250.9(F)} (1991).
  \item \textsuperscript{222} \textit{Id.}
  \item \textsuperscript{223} \textit{Id.}
  \item \textsuperscript{224} \textit{Id.}
\end{itemize}
Rules are issued by many agencies, and the traditions and practices of those agencies with respect to contents, style and form of their rules vary greatly. This diversity of agency tradition and practice is confusing to those members of the public who must consult or research rules, and raises unnecessary legal questions.\(^{225}\)

Hence, the Legislature pushed to implement the *Oklahoma Administrative Code* after a thirty-year wait.

Yet Oklahoma still has lagged in funding a full implementation. What would full implementation require? First, the *Code* would be indexed by subject and preferably with annotations and cross-references. Second, the *Code* would be made truly accessible by having it printed and disseminated according to section 257.1 of the OAPA,\(^{226}\) which would put its access essentially on an equal footing with access to the *Oklahoma Register*. As of this writing, the Office of Administrative Rules anticipates taking accessibility one step further into the modern age. For example, in the not-too-distant future, the *Oklahoma Administrative Code* should be available on-line as a part of standard computerized legal data bases. If this is funded as expected, then Oklahoma will return to the forefront of state administrative practice.

V. CONCLUSION

With the compilation and publication of the *Oklahoma Administrative Code*, the state has surely come a long distance from the classic "good ol' boy" politics of the past. The "agency smoke-filled room" has been replaced with an open, modern process of rulemaking modeled on the federal example. The *Oklahoma Administrative Code* coupled with an updated OAPA have set in place most of the administrative apparatus necessary to put a statutory end to secret agency law.

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225. *Id.*
226. *OKLA. STAT. tit. 75, § 257.1 (1991).*
It may seem easy to criticize the slow pace of implementation. Hopefully those who rush to a facile censure will consider the depth and extent of the traditionalistic political culture that reformers confronted. Many states have found themselves enmeshed in similar struggles as they attempted to bring their past administrative processes in line with their present-day needs.

Even the federal government has found the maturation process a difficult one. The Federal Register and the C.F.R. suffered criticism and attempts to choke off funding. Further, without the federal APA and the federal judiciary to force agencies to use the publication process, the federal example would not be as successful as it is today.

To its credit, Oklahoma numbered among the states that recognized early the need to adopt the open processes of the Model State Administrative Procedure Act when it debuted in 1946. Indeed, the Oklahoma Legislature had acted to put Oklahoma on the cutting edge of administrative reform. But Governor Turner's veto cut the drive short. 227 Again to its benefit, Oklahoma has had its own "Erwin Griswolds"—Professors Merrill and Cox—who along with a dedicated Oklahoma Bar pressed on through decades of legislative indifference to develop the OAPA and the revised OAPA.

Yet, Oklahoma still has further to go. Some unfinished business remains. Despite the improvements made in revisions to the OAPA from 1987 to 1991, coverage persists as a problem. The state has made great strides in attempting to bring the Corporation Commission under the uniform rulemaking procedures of the OAPA. The standards of the former Department of Public Welfare, now the Department of Human Services, have finally been codified in conformance with state and federal administrative requirements. But the "operation and control of the State Highway System" under the Oklahoma Department of Transportation continue to be exempt from OAPA rulemaking. 228

227. Merrill, supra note 34, at 1.
In addition to coverage, one must harbor concerns about specificity and long-term effectiveness. Did the language of the revised OAPA go far enough in eliminating ad hoc rulemaking? Probably not. Granted, the revised act required agencies to engage in one mammoth housecleaning and to cull through agency policies to determine which needed to be duly promulgated or which merely needed to be deleted. However, Oklahoma’s legislatures in 1987-1991 only modified the existing act (based on the 1961 MSAPA) and did not adopt the 1981 MSAPA. Therefore, the new version of the Oklahoma Act does not include the specific language of section 2-104(3) of the 1981 MSAPA, which mandates the statutory end to ad hoc rulemaking. The Oklahoma Supreme Court, as demonstrated in Texas County Irrigation, has proven a vigilant protector of the principle embodied in section 2-104. On the other hand, should citizens be forced to litigate a case all the way to the state supreme court in order to rest secure in those procedural protections? Surely not.

Finally, one must raise the issue of funding. A sophisticated administrative apparatus to provide public access and information costs money. Other states and even the federal government have balked at the prospect of paying what is necessary to fully implement contemporary principles of openness. We can only hope that current and future Oklahoma legislatures will embrace the cost-benefit analysis of the Pennsylvania Bar and support the Office of Administrative Rules not only with kudos but also with dollars.

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<tr>
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<tr>
<td>1. State Election Board</td>
<td>Same</td>
<td>1974</td>
<td>Article 3 § 2</td>
<td>Title 28 § 2-101</td>
<td>Promote voter registration &amp; participation; Supervise County Election Boards</td>
<td>3 Members appointed by Governor w/advice &amp; consent of Senate</td>
<td>§ 2-107—Requires procedures set in Oklahoma APA</td>
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<td>2. Board on Legislative Compensation</td>
<td>Same</td>
<td>1973</td>
<td>Article 5 § 21</td>
<td>Title 74 § 291.2</td>
<td>Review &amp; change Legislative Compensation if necessary</td>
<td>5 Members appointed by Governor; 2 Members appointed by President Pro Tempore of Senate; 2 Members appointed by Speaker of House</td>
<td>None</td>
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<tr>
<td>3. State Board of Health</td>
<td>Same</td>
<td>1963</td>
<td>Article 5 § 39</td>
<td>Title 63 § 1-103</td>
<td>Enforce State Public Health Code, ensure health of all citizens; select Comm'n to Public Health to carry out rules, regulations &amp; policies of board</td>
<td>9 Members from different counties appointed by Governor, confirmed by Senate. Board selects President, Vice President &amp; Secretary. Term—9 years</td>
<td>§ 1-106—Requires use of Oklahoma APA</td>
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<tr>
<td>4. Board of Pharmacy</td>
<td>Same</td>
<td>1961</td>
<td>Article 5 § 39</td>
<td>Title 59 § 363.3</td>
<td>Regulate practice of pharmacy &amp; sale &amp; dispensing of drugs &amp; medicines</td>
<td>5 Members appointed by Governor w/advice &amp; consent of Senate from list of names voted on by members of Pharmaceutical Association</td>
<td>Rules of Professional Conduct printed on Application for Registration &amp; License Renewal § 363.7(11)</td>
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<tr>
<td>5. State Dental Board</td>
<td>Board of Governors of Registered Dentists of Oklahoma</td>
<td>1970</td>
<td>Article 6 § 39</td>
<td>Title 59 § 329.7</td>
<td>Enforcement of State Dental Act through licensing, establishing minimum standards of dental care &amp; promulgating rules to do so</td>
<td>8 Dentists—1 elected from each 8 districts; 1 Dental Hygienist elected by licensed Dental Hygienist; 2 members from general public appointed by Governor. Term—3 years</td>
<td>§ 328.47—Board sets own procedures for handling complaints which control over any act including Oklahoma APA § 323.15—Power to promulgate rules &amp; regulations</td>
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<td>6. Pardon &amp; Parole Board</td>
<td>Same</td>
<td>1943</td>
<td>Article 6 § 10</td>
<td>Title 57 § 332.1</td>
<td>Impartial investigation &amp; study of applicants for commutations, pardons, or paroles; makes recommendations to Governor</td>
<td>3 Members appointed by Governor; 1 appointed by C.J. of Sup. Ct.; 1 appointed by Presiding Judge of Ct. Cr. Appeals; Chairman selected by Board</td>
<td>§ 355—Power to promulgate rules &amp; regulations</td>
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<tr>
<td>7. State Board of Agriculture</td>
<td>Same</td>
<td>1955</td>
<td>Article 6 § 31</td>
<td>Title 2 § 2-1</td>
<td>Enforce State Agricultural Code; maintain jurisdiction on all matters relating to animal husbandry/industry &amp; agriculture</td>
<td>5 Members—1 from each of the 5 Agricultural Commodity Districts with 5 years practical experience, appointed by Governor with advice &amp; consent of Senate. Term—5 years</td>
<td>§ 2-7—Rules &amp; regulations when published shall be deemed notice to public</td>
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<td>8. State Insurance Board</td>
<td>State Board for Property &amp; Casualty Rates</td>
<td>1957</td>
<td>Article 6 § 22</td>
<td>Title 36 § 301 &amp; § 331</td>
<td>Enforce &amp; administer State Insurance Code</td>
<td>4 Members appointed by Governor w/advice &amp; consent of Senate; Insurance Comm'n is Chairman. Total 5 members. Term—4 years</td>
<td>§ 341.1—Requires use of Oklahoma AFA</td>
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<td>9. Corporation Commission</td>
<td>Same</td>
<td>1910</td>
<td>Article 9 § 15</td>
<td>Title 17 § 1</td>
<td>Supervise, regulate &amp; control all transportation &amp; transmission companies doing business in the State</td>
<td>3 Persons elected by the public. Term—6 years</td>
<td>§ 40.1(6)—Rules &amp; regulations promulgated pursuant to Oklahoma APA</td>
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<td>10. State Board of Education</td>
<td>Same</td>
<td>1971</td>
<td>Article 13 § 5</td>
<td>Title 70 § 3-101</td>
<td>Control State Department of Education; supervise Public School System through standards, certification &amp; accreditation, &amp; inspections</td>
<td>6 Members appointed by Governor w/advice &amp; consent of Senate—1 Superintendent of Pub. Instruction shall be member &amp; Chairperson. Term—6 years</td>
<td>§§ 3-104.4, 3-104.5—Plan of educational developments &amp; improvement—Board can make changes of rules pursuant to Oklahoma APA</td>
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<tr>
<td>11. Banking Board</td>
<td>Banking Department</td>
<td>1965</td>
<td>Article 14 § 1</td>
<td>Title 6 § 202</td>
<td>Govern conduct, operations &amp; management of all banks &amp; trust companies; administer Oklahoma Banking Code</td>
<td>6 Members appointed by Governor w/advice &amp; consent of Senate; Banking Comm'n is Chairman. Term—6 years</td>
<td>§ 203(3)(b)—To amend, modify or repeal rules &amp; Oklahoma regulations in force, notice must be mailed within 10 days of action</td>
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<tr>
<td>12. State Highway Commission</td>
<td>Same</td>
<td>1968</td>
<td>Article 16 § 1</td>
<td>Title 69 § 302</td>
<td>Advisory, administrative &amp; policy making Board for Director of Department of Highways</td>
<td>8 Members—1 from each of the 8 Districts of State, appointed by Governor with advice &amp; consent of Senate; Governor is ex officio member</td>
<td>§§ 301, 304—Rules &amp; regulations filed &amp; recorded in Secretary of State Office</td>
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<td>13. Commission for Human Services</td>
<td>Public Welfare Commission</td>
<td>1939</td>
<td>Article 25 § 3</td>
<td>Title 56 § 162</td>
<td>Appoint Director of Department of Human Services; work with federal Social Security Board to qualify for federal aid to assist needy persons</td>
<td>9 Members appointed by Governor; Governor designates Chairman. Term—8 years</td>
<td>None</td>
</tr>
<tr>
<td>14. Oklahoma Wildlife Conservation Commission</td>
<td>Same</td>
<td>1974</td>
<td>Article 26 § 1</td>
<td>Title 29 § 3-101</td>
<td>Advisory, administrative &amp; policy making Board for Director of Department of Wildlife Conservation</td>
<td>8 Members appointed by Governor with advice &amp; consent of Senate. Term—8 years</td>
<td>§ 3-204—Must use Oklahoma APA—Rules, regulations &amp; amendments filed &amp; recorded in Secretary of State Office</td>
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<tr>
<td>15. ABLE Commission</td>
<td>Alcoholic Beverage Law Enforcement Commission</td>
<td>1985</td>
<td>Article 28 § 1</td>
<td>Title 37 § 506.1</td>
<td>Supervise, inspect, &amp; regulate business of selling alcohol; enforce Oklahoma Alcoholic Beverages Control Act</td>
<td>5 Members at large; 2 Members w/ Law Enforcement experience. All appointed by Governor with advice &amp; consent of Senate. Term—5 years</td>
<td>§ 517—Must use Oklahoma APA—Rules &amp; regulations filed &amp; recorded in Secretary of State Office</td>
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<tr>
<td>16. Ethics Commission</td>
<td>Same</td>
<td>1990</td>
<td>Article 29 § 1</td>
<td>None</td>
<td>Promulgate rules of ethical conduct for campaigns of state officials &amp; employees</td>
<td>5 Members appointed, one each by Governor, Attorney General, President Pro-Tempore of Senate, Speaker of House &amp; Chief Justice Sup. Ct. Term—5 years</td>
<td>§ 3—Public hearings before promulgating rules</td>
</tr>
<tr>
<td>17. Apportionment Commission</td>
<td>Same</td>
<td>1964</td>
<td>Article 5 § 11A</td>
<td>None</td>
<td>Ensure legislature apportionment after Federal Decennial Census—Activated if Legislature fails to do so</td>
<td>Attorney General, Superintendent of Public Instruction &amp; State Treasurer</td>
<td>§ 11B—Order of Apportionment must be filed with Secretary of State</td>
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<td>19. Oklahoma Industrial Finance Authority</td>
<td>State Industrial Finance Authority</td>
<td>1959</td>
<td>Article 10 § 33A</td>
<td>Title 74 § 654</td>
<td>Public Corporation &amp; Instrumentality to promote industrial &amp; manufacturing activity in State</td>
<td>7 Members—1 from each of the 6 Congressional Districts &amp; 1 Member who is the Director of the Oklahoma Department of Commerce; Appointed by Governor w/advice &amp; consent of Senate; State Treasurer is ex officio member. Term—6 years</td>
<td>None</td>
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<td>20. Commissioners of the Land Office</td>
<td>Same</td>
<td>1933</td>
<td>Article 6 § 32</td>
<td>Title 64 § 1</td>
<td>In charge of sale, rental, disposal, managing school lands &amp; other public lands of State, &amp; funds &amp; proceeds from them</td>
<td>Governor, Lt. Governor, State Auditor &amp; Inspector, Superintendent of Public Instruction &amp; President of Board of Agriculture</td>
<td>§ 1—Rules &amp; regulations prescribed by Legislature</td>
</tr>
<tr>
<td>21. State Textbook Committee</td>
<td>Same</td>
<td>1971</td>
<td>Article 13 § 6</td>
<td>Title 70 § 16-101</td>
<td>Prepare official list of textbooks to be utilized by State schools</td>
<td>2 Members from each Congressional District—Majority Teachers; 1 Member a lay citizen; all appointed by Governor w/advice &amp; consent of Senate; Superintendent for Public Instruction serves as Secretary. Term—3 years</td>
<td>§ 16-102.1—Public Hearings held on proposed textbooks § 16-118—Power to adopt rules &amp; regulations</td>
</tr>
<tr>
<td>22. Oklahoma State Regents for Higher Education</td>
<td>Same</td>
<td>1941</td>
<td>Article 13A § 2</td>
<td>Title 70 § 3202</td>
<td>Coordinating Board for control of all state institutions of higher learning</td>
<td>9 Members appointed by Governor, confirmed by Senate. Term—9 years</td>
<td>None</td>
</tr>
<tr>
<td>23. Board of Regents of University of Oklahoma</td>
<td>Same</td>
<td>1944</td>
<td>Article 13 § 8</td>
<td>None</td>
<td>Governing body of University of Oklahoma that sets policies &amp; procedures</td>
<td>7 Members appointed by Governor w/advice &amp; consent of Senate. Term—7 years</td>
<td>None</td>
</tr>
</tbody>
</table>
Table I continued

<table>
<thead>
<tr>
<th>COMMON AGENCY NAME</th>
<th>FORMAL NAME</th>
<th>DATE ORIGINATED</th>
<th>CITATION TO OKLA. CONST.</th>
<th>CITATION TO OKLA. STATUTES</th>
<th>PURPOSE/FUNCTION</th>
<th>ORGANIZATION</th>
<th>RULEMAKING PROCESS</th>
</tr>
</thead>
<tbody>
<tr>
<td>24. Board of Regents of Oklahoma Colleges</td>
<td>Same</td>
<td>1948</td>
<td>Article 13B § 1</td>
<td>None</td>
<td>Supervise, manage &amp; control State Colleges</td>
<td>9 Members appointed by Governor w/advice &amp; consent of Senate; Board elects President &amp; Vice President. Term—9 years</td>
<td>None</td>
</tr>
<tr>
<td>25. Board of Regents for Oklahoma Agricultural &amp; Mechanical Colleges</td>
<td>Same</td>
<td>1965</td>
<td>Article 6 § 32</td>
<td>Title 70 § 3409</td>
<td>Supervise, manage, &amp; control State Agricultural &amp; Mechanical Colleges</td>
<td>8 Members appointed by Governor w/advice &amp; consent of Senate; Majority Farmers; 1 Member is President of State Board of Agriculture. Term—8 years</td>
<td>None</td>
</tr>
</tbody>
</table>
### Table II: Examples of State Boards, Commissions, Committees, Authorities, and Councils

<table>
<thead>
<tr>
<th>BOARD</th>
<th>ENABLING LEGISLATION</th>
<th>APA REQUIREMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Board of Child Abuse Examination OKLA. STAT. tit. 10, § 601.30</td>
<td>Board vested with duty to establish a statewide system to provide expert medical evaluation for children suspected to be the victims of child abuse or neglect.</td>
<td>§ 601.31(B)—Authority to prepare rules, standards, &amp; forms. No notice &amp; comment required.</td>
</tr>
<tr>
<td>2. State Board of Registration for Professional Engineers &amp; Land Surveyors OKLA. STAT. tit. 59, § 475.3</td>
<td>Board vested with the duty to administer provisions of the Act including testing of applicants for registration.</td>
<td>§ 475.8—Authority to adopt bylaws &amp; rules of procedure; authority to adopt &amp; promulgate rules of professional conduct. § 475.18—Requirement to notify all registrants of the rules of professional conduct in writing &amp; publication of the rules is due notice to all registrants.</td>
</tr>
<tr>
<td>3. Oklahoma Water Resources Board OKLA. STAT. tit. 82, §§ 1085.1, 1085.2</td>
<td>Board vested with the power to make &amp; execute contracts, to develop state &amp; local plans for use &amp; control of water, to determine, charge &amp; collect fees, &amp; to promulgate rules &amp; regulations.</td>
<td>§ 1085.10—Must comply with Oklahoma APA.</td>
</tr>
<tr>
<td>4. State Board of Medical Licensure of Supervision OKLA. STAT. tit. 59, §§ 481, 489</td>
<td>Board vested with the power to adopt rules &amp; regulations, to establish fees, &amp; to establish educational requirements for license to practice medicine.</td>
<td>No comment &amp; notice required.</td>
</tr>
</tbody>
</table>
### Table II continued (Boards)

<table>
<thead>
<tr>
<th>BOARD</th>
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<th>APA REQUIREMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. State &amp; Education Employees Group Insurance Board Okla. Stat. tit. 74, §§ 1304, 1306</td>
<td>Board vested with the power to administer &amp; manage group insurance &amp; benefit plans, handle claims, determine payroll deductions, contract with organizations, collect fees, &amp; promulgate rules &amp; regulations.</td>
<td>§ 1306(1)(m)—Must comply with Oklahoma APA.</td>
</tr>
<tr>
<td>6. Oklahoma Basic Health Benefits Board Okla. Stat. tit. 36, § 6504</td>
<td>Board shall determine &amp; approve state certified health benefits plan &amp; provide for the administration of the plan in accordance with the provisions of this act as well as adopt rules &amp; procedures.</td>
<td>§ 6504 (D)—Must comply with Oklahoma APA.</td>
</tr>
<tr>
<td>7. Good Samaritan Board Okla. Stat. tit. 76, § 5.3</td>
<td>Board determines claims &amp; whether state should indemnify claimants for injury, death, or damage.</td>
<td>§ 5.3—Must comply with Oklahoma APA in all proceedings before the Board.</td>
</tr>
<tr>
<td>8. Oklahoma State Board of Public Accountancy Okla. Stat. tit. 59, §§ 15.2, 15.5</td>
<td>Board vested with power to adopt &amp; issue rules &amp; regulations necessary to regulate professional conduct of accountants.</td>
<td>§ 15.23—Must comply with state administrative procedures for hearings &amp; rulemaking.</td>
</tr>
</tbody>
</table>
Table II continued (Commissions)

<table>
<thead>
<tr>
<th>COMMISSION</th>
<th>ENABLING LEGISLATION</th>
<th>APA REQUIREMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Sheep &amp; Wool Commission OKLA. STAT. tit. 2, §§ 1502, 1508</td>
<td>Commission has power to develop public education programs, to contract, to conduct research, to call meetings, &amp; to adopt rules &amp; regulations.</td>
<td>No notice or comment required.</td>
</tr>
<tr>
<td>2. Santa Claus Commission OKLA. STAT. tit. 10, § 361</td>
<td>Commission has power to purchase &amp; ensure receipt of Christmas presents by children in state-supported institutions. Commission has no rulemaking power.</td>
<td>No notice or comment required.</td>
</tr>
<tr>
<td>3. Oklahoma Real Estate Commission OKLA. STAT. tit. 59, §§ 858-201, 858-208</td>
<td>Commission has authority to regulate &amp; issue licenses to brokers &amp; sales associates. Commission is responsible for testing &amp; disciplining. Commission shall have power to prescribe rules &amp; regulations.</td>
<td>§ 858-208—Must comply with Oklahoma APA.</td>
</tr>
<tr>
<td>4. Oklahoma Merit Protection Commission OKLA. STAT. tit. 74, §§ 841.1, 841.3</td>
<td>Commission has power to administer Oklahoma Personnel Act, investigate violations &amp; abuse, establish &amp; compile reports on commission cases, &amp; establish rules &amp; regulations.</td>
<td>§ 841.3(B)—Must comply with Oklahoma APA.</td>
</tr>
<tr>
<td>5. Human Rights Commission OKLA. STAT. tit. 74, §§ 952, 953</td>
<td>Commission shall work toward removing discrimination &amp; work toward promoting unity among people of Oklahoma through public campaigns. Commission shall conduct research, investigate complaints, hold hearings, &amp; report to the Governor.</td>
<td>No notice or comment required.</td>
</tr>
<tr>
<td>6. Oklahoma Employment Security Commission OKLA. STAT. tit. 40, §§ 4-102, 4-302</td>
<td>Commission shall administer Employment Security Act. It shall have power to adopt rules, employ persons, &amp; require reports &amp; investigations.</td>
<td>§ 4-310A—Must comply with Oklahoma APA.</td>
</tr>
<tr>
<td>7. Commission on Consumer Credit OKLA. STAT. tit. 14A, §§ 5-501, 5-504</td>
<td>Commission shall be policy-making &amp; governing authority of Department of Consumer Credit. It has power to review, repeal, &amp; modify rules or regulations adopted by the Administrator.</td>
<td>No notice or comment required.</td>
</tr>
<tr>
<td>8. Oklahoma Commission on Children &amp; Youth OKLA. STAT. tit. 10, §§ 601.1, 601.4</td>
<td>Commission authorized to plan &amp; coordinate youth agencies' services, to review programs, policies, &amp; services, to contract, to provide reports on commission activities, &amp; to promulgate rules &amp; regulations.</td>
<td>§ 601.2(C)—Must comply with Oklahoma APA.</td>
</tr>
</tbody>
</table>
### Table II continued (Committees)

<table>
<thead>
<tr>
<th>COMMITTEE</th>
<th>ENABLING LEGISLATION</th>
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</tr>
</thead>
<tbody>
<tr>
<td>1. Oklahoma Licensed Professional Counselors Committee OKLA. STAT. tit. 59, § 1904</td>
<td>Committee administers provisions of Licensed Professional Counselors Act. Committee shall make recommendations to the State Board of Health regarding formation of rules of implementation &amp; of professional conduct.</td>
<td>§ 1914—Must comply with Oklahoma APA in conducting hearings.</td>
</tr>
<tr>
<td>2. Committee of Electrical Examiners</td>
<td>Committee administers examinations to applicants for license under Electrical License Act &amp; formulates rules, regulations &amp; standards.</td>
<td>§ 1689—Committee acting as Electrical Hearing Board must comply with Oklahoma APA.</td>
</tr>
<tr>
<td>OKLA. STAT. tit. 59, §§ 1683, 1685</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Oklahoma Inspector Examiners Committee OKLA. STAT. tit. 59, §§ 1034, §1055</td>
<td>Committee shall have duty to assist State Commissioner of Health in regulating building &amp; construction inspectors &amp; shall assist State Board of Health in testing, licensing, &amp; investigating violations.</td>
<td>No notice or comment required.</td>
</tr>
<tr>
<td>4. Radiation Advisory Committee OKLA. STAT. tit. 63, § 1-1504</td>
<td>Committee shall assist State Board of Health in establishing standards of safe levels of radiation, identifying hazards, &amp; reporting accidents.</td>
<td>§ 1505—State Board of Health adopts rules &amp; regulations after public hearing.</td>
</tr>
</tbody>
</table>


Table II continued (Authorities)

<table>
<thead>
<tr>
<th>AUTHORITY</th>
<th>ENABLING LEGISLATION</th>
<th>APA REQUIREMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Oklahoma Development Finance Authority OKLA. STAT. tit. 74, § 5062.2</td>
<td>Authority has power to adopt rules &amp; procedures to conduct business considered instrumentality of the state.</td>
<td>§ 5062.6(I)—Must comply with Oklahoma APA.</td>
</tr>
<tr>
<td>2. Oklahoma Student Loan Authority OKLA. STAT. tit. 70, § 695.3</td>
<td>Authority created as a state trust that provides student loan funds, accumulates loan applications, disburse funds to institutions, &amp; collects interest payments. Promulgates rules &amp; regulations.</td>
<td>No notice &amp; comment required.</td>
</tr>
<tr>
<td>3. Oklahoma Educational Television Authority OKLA. STAT. tit. 70, § 23-105</td>
<td>Authority is instrumentality for the state with power to plan, construct, operate, &amp; maintain educational television. No rulemaking powers.</td>
<td>No notice &amp; comments required.</td>
</tr>
<tr>
<td>4. Oklahoma Turnpike Authority OKLA. STAT. tit. 69, § 1703</td>
<td>Authority is instrumentality of the state with power to construct, operate, &amp; maintain state's turnpikes. Power to adopt rules &amp; regulations.</td>
<td>No notice &amp; comment required.</td>
</tr>
<tr>
<td>5. Grand River Dam Authority OKLA. STAT. tit. 82, § 861</td>
<td>Authority is governmental agency of state with powers to preserve, store, &amp; distribute Grand River Waters. Responsible for conservation &amp; development of hydro-electric power.</td>
<td>No notice &amp; comment required.</td>
</tr>
</tbody>
</table>
### Table II continued (Councils)

<table>
<thead>
<tr>
<th>COUNCIL</th>
<th>ENABLING LEGISLATION</th>
<th>APA REQUIREMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. State Arts Council OKLA. STAT. tit. 53, § 163</td>
<td>Advisory Council to Governor on Arts. No rulemaking power.</td>
<td>None</td>
</tr>
<tr>
<td>4. Oklahoma Planning &amp; Coordinating Council for Services to Children &amp; Youth OKLA. STAT. tit. 10, § 601.7</td>
<td>Advisory Council to Oklahoma Commission on Children &amp; Youth. No rulemaking power.</td>
<td>None</td>
</tr>
<tr>
<td>5. Air Quality Council OKLA. STAT. tit. 63, § 1-1802</td>
<td>Advisory Council to Board of Health. Council recommends rules &amp; regulations to control or prohibit air pollution &amp; holds hearings on codes, rules, &amp; regulations.</td>
<td>Hearing on codes &amp; rules open to the public.</td>
</tr>
</tbody>
</table>