

Davis: Administrative Law

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or traveling. It is the kind of work which can be read for pleasure and relaxation—if you read the topics which are distinct from your daily endeavors.

FRANCIS J. SETTER*

Administrative Law. By KENNETH C. DAVIS. St. Paul: West Publishing Co., 1951. Pp. xvi, 1024. \$8.00.

One of the most distressing gaps in our legal literature—that due to the lack of a text, both compact and comprehensive, on administrative law—has been filled by two recent texts, one of which is Professor Davis' new book.

In spite of the vast importance of the subject, workers in the field have heretofore had to use, in the main, such inconvenient tools as law review articles, casebooks with or without supplementary "materials," special reports and monographs, or texts devoted to certain aspects only of the subject, or to the workings of particular, single, administrative agencies such as the Commerce and the Trade commissions. Even some of the standard encyclopedias and digests still do not have a title on administrative law. Therefore, to have available a systematic text treatment replete with analysis and criticism, between a single set of covers, such as is the present volume, is a matter for self-congratulation by the entire bar—practitioner (whether in or before the agencies), teacher and judge.

As the title indicates, the book deals comprehensively with administrative law, rather than with particular agencies or particular agency activities. This is an enormous improvement over the situation heretofore largely prevailing, under which it was often necessary to search under numerous and diverse titles such as constitutional law, taxation, public utilities, public officers, statutes, corporations, and so forth. The author's theory is the manifestly sound one that there is enough of generalized legal doctrine about administration in government to make it desirable, and even necessary, to deal systematically with the processes, principles and rules, which are—or should be—applicable to and by all kinds of administrative bodies.

This book is much more than a "hornbook." Unsettled problems in the field are so numerous that it is impossible to write comprehensively and usefully on the subject solely on the basis of established authorities. One of the very important features of the book is that these unsettled problems in particular have been subjected to critical analysis, and valuable aid is given in the consideration of possibly applicable competing principles, and in the search for sound solutions.

The author has noted and acted upon the circumstance that much of the fruitful development of administrative law has occurred in the federal field, as compared to the oftentimes undeveloped and, in cases, definitely backward state law, and has drawn heavily upon the comparatively richer federal sources of authority and doctrine.

The lawyer to whom there is still much of "mystery" in administrative law and processes, will be assisted in orienting himself to the field by the first chapter, entitled *The Administrative Process*, which deals among other things with a definition of administrative law, reasons for its growth, inadequacies of the judicial process, and an examination of the pros and cons of opposing the development of the process. The definition, familiar to workers in the field, is somewhat narrower than is sometimes used. It is confined to the powers and procedures of administrative agencies, as distinguished from the law made

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by them, and the agencies considered are those which have more than one or even all of the three kinds of governmental powers, legislative and adjudicative, as well as administrative. This combination of powers presents the problem of separation of powers, a matter also considered in the chapter. While a conventional analysis of the larger problems in the field is used, namely those relating to acquisition, and to procedure for the exercise of power, and to the judicial review of such exercise, heavy emphasis is placed on the two latter topics.

Other chapters, of course, do much to help those unfamiliar with the subject to understand the problems peculiar to employment of the administrative technique in government, often by means of patient, extended, and objective, analysis of differences in problems of administrative, as compared to the supposedly more familiar judicial, bodies. The chapters on Adjudication Procedure, Institutional Decisions, Bias (including consideration of the rule of necessity), Separation of Functions, Evidence, Official Notice and *Res Judicata*, will be found especially helpful in this respect.

Professor Davis has also gone to considerable pains to develop not only his helpful analyses, but the historical backgrounds of the problems dealt with, the perspective in which they should be seen, and especially to take note of the recent authoritative treatment of numerous problems by the provisions of the Federal Administrative Procedure Act of 1946,¹ the genesis of such provisions, and their probable proper application in doubtful cases. This statute, the culmination of years of study by important elements of the American bar and by Congress, is almost "constitutional" in its importance in the field of federal administration, and will doubtless have enormous influence on the development of state administrative law. The author's careful consideration of the Act's provisions should be appreciated by all who are interested in the field. In addition to incorporating pertinent provisions of the Act in the text, the Act is set forth in full in the Appendix.

The book also contains an extensive Table of Authorities, which although not indexed, provides a lead to important documents and writings on administrative law such as the report of the Committee on Ministers Powers, American Bar Association proposals and recommendations, the report of the President's Committee on Administrative Management, the reports and monographs by the Attorney General's Committee on Administrative Procedure, Congressional and agency reports and documents, the writings of "pioneers" like Freund and Dickinson, and the works of Carrow, Dicey, Gellhorn, Hewart, Landis, Schwartz, Stason, Vanderbilt, Vom Baur, and many others.

The table of cases is conventional. The index, while extensive, appears unfortunately to be just another index. The matter of demeanor of witnesses, for example can be found under D, but not under the heading of Witnesses; adequacy of notice appears under A, but nothing appears on this matter under the heading of Notice; the trial examiner or hearing officer can be run down only through the word Examiners or by cross reference from Presiding officers. Other instances of the same kind could be given, as, for one more instance, the omission under the heading of Pleadings and notice of anything about Answers, although the latter is found under A; and for a final example, while the heading of Judicial review appears, there is no heading for Administrative review.

Since the publication of this book belongs in the category not merely of casual happenings but of important events, some further consideration of it

¹ 60 Stat. 237 (1946). 5 U.S.C.A. § 1001 (1950).

is desirable even though it may somewhat extend this review. The frequent vigorous expression of opinion by the author is a valuable feature that should not be overlooked. One example, suggestive of possibilities and actualities in other cases, will be given here. In writing of our nightmare-like confusion in regard to actions and proceedings for judicial review, the author, near at least if not at his critical best, "pulls no punches" in describing the "system" we suffer under as the kind we would have as the result of a cunning plan to achieve the evil purpose of thwarting justice, devising procedural snares, and delaying or preventing determinations on their merits. Student, lawyer, teacher and judge, can and should profit abundantly from mind-opening jabs of that kind. For it is only in the light of an understanding of the wretchedness of the "system" of review that one can understand the need for avoiding the traps and be alerted to the problem of how to select paths, if any there are, which are relatively free of pitfalls. A review which failed to stress the point of the author's many contributions to understanding, as well as mere knowing, would be an injustice both to the author and to the readers of the review.

As to problems largely peculiar to administration, one among many good illustrations that could be given of the author's method and of the value of it to the user of the book, is found in his quite extended analysis of the problem of "fact" and "law" in connection with the matter of scope of judicial review; he bridges most helpfully the gap between the supposedly applicable but judicially repudiated analytical approach, and the "strange approach" of the Supreme Court in the *Dobson* case,² an approach forced almost inevitably by practical considerations of history and policy, and one which Professor Davis predicts will continue in use notwithstanding the specific demise of the *Dobson* doctrine. It bears repetition that it is this feature of analysis, criticism, and instruction, so characteristic of the book, as distinguished from—at a possible other extreme—an uncritical and unilluminating stringing together of digest paragraphs or case quotations, that makes the printing of this book an important event in the field of administrative law.

Because administrative processes are still involved more or less in what might be called "political" controversy, or at least in a split between "conservative" and "liberal" viewpoints, the matter of objectivity in dealing with the merits and demerits of administration is of special importance, especially since a large part of the contribution of a good writer in this field is in the form of an expression of his own views and opinions about how the administrative technique works, whether badly or well, and if badly, why, and what can be done about it. In the first chapter, a "conservative" reader might get the impression that Professor Davis has a few agencies of his own to sell, and that he is not above doing a bit of salesmanship in regard to them. He runs the first federal administrative law back to 1789, quotes Elihu Root on the inevitability of administrative development, describes Hewart's book criticizing the development as an emotional expression, and castigates Beck's anti-bureaucracy book as poor scholarship; and in other ways gives the administrative process an air of antiquity, respectability, and inevitability, together with a statement of reasons for the growth of the process and an appraisal of reasons for opposition to the administrative process, that does no harm to its continued development. But one should not judge by the first chapter. Many an evil chip is allowed to lie precisely where it falls, without the slightest indication that the author has any desire whatever to excuse or palliate its evil—on the con-

² *Dobson v. Comm'r Internal Revenue*, 320 U.S. 489 (1943).

rary, there is usually a very sharp criticism, together with reasons, as to what is bad and why it is bad. For instances of the latter, the treatments in the fourth chapter of the matters of, among others, the largely uncontrolled remission, mitigation or compromise of fines by some agencies, the coercion of consents to agency action by others, the lack of any limits on discretion to prosecute agency proceedings, and the badness of agency apathy as well as of excessive aggressiveness, are all evidences of the author's objectivity. Nor are the recent Congressional solutions by means of the Administrative Procedure Act of some of the problems in the field, immune from Professor Davis' sometimes sharp tongue—or pen. The 1946 limitations on agency powers to issue declaratory orders, for example, are said by him to seem to be without rational foundation—which in a way is reasonably strong language. But it contributes to understanding; and that, after all, is what a good book should do.

This is a good book. It is full of such contributions.

One more word for teachers in the field. Professor Davis has also compiled a casebook,³ recently published, which is an outgrowth of his work on the text book herein reviewed. The order of presentation of topics is parallel in the text and in the casebook. It would seem that teachers might be interested in the possibility of easy student transition, on a chapter basis, from the casebook to the text, for supplementary materials for study and investigation.

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³ Davis, *Cases on Administrative Law* (Little, Brown & Co., 1951).