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Davis: Administrative Law Treatise—A Symposium Review[†]

The Review takes great pleasure in presenting the following reviews of Professor Kenneth Culp Davis's recently published Administrative Law Treatise. Seeking to convey the reactions of those most concerned with this publication, we present here the considered thoughts of four of the men most eminently qualified to evaluate this new work, and who are also representative of the four most distinguishable professional interests—the judges, the practitioners, the administrators, and the scholars.

A General Appraisal

Charles E. Clark*

FOR fifteen years or more Professor Davis has been writing authoritative articles for the law reviews, each one covering some important facet of administrative law. Having made himself both architect and builder of this rapidly developing field of litigation and of regulation, in 1951 he published his one-volume book which was immediately recognized as the outstanding authority on the subject. And now we have this sumptuous four-volume set expanding his previous work and bringing it down to date. I do not find that his ideas have changed substantially; for present conclusions go back directly to the book and the articles. Nor need they, so carefully were the originals developed. But the progression is a useful one which may be commended to other legal writers; it is in effect from an audience of scholars to the law schools generally and now to the law offices. As we have to realize, a four-volume set has a greater appeal to the managers of large-firm libraries than can be expected for short texts or volumes of law reviews. And this set is to be welcomed as the definitive expression of views of the now recognized master of the subject. It should have the professional circulation it so amply deserves.

Professor Davis writes with vigor and decisiveness. His views

† ADMINISTRATIVE LAW TREATISE. By Kenneth Culp Davis. St. Paul: West Publishing Co., 1958. \$70.00 (4 Vols.).

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are clearly stated and strongly advanced. Thus the reader has here the inestimable privilege of having the results of a thinking mind at work in a legal area of challenge and opportunity. This therefore is anything but the "agglutinative" type of legal writing so gently condemned by Cardozo in his famous essay on law and literature.¹ I expect that is about all one can say profitably in a to-be-read review of a work of these dimensions—that it is the expression of deep thought and careful conclusions of an excellent scholar and as such is a boon and stimulus to all workers in the field, be they judges, lawyers, or teachers. Whatever I may add to this judgment can be at best only some gilding of the lily as to points which have particularly stimulated my personal interest and whose brief exploration may help to demonstrate the richness of the work.

Professor Davis is a strong supporter and defender of the administrative process and of the agency type of business and social regulator. He makes a convincing demonstration of the considerable amount of foolishness dispensed by so many bar leaders against "our wonderland of bureaucracy," "administrative absolutism," the "new despotism," and all the other well-known clichés which now sound more than faintly ridiculous in perspective. Also he shows how the development has gone on, notwithstanding attempts, on the whole rather ill-advised, to curb and block it. He is no lover of the Administrative Procedure Act, but succeeds in blunting its destructive trend by holding it largely declaratory. He returns many times to a critique of the "ill-considered" recommendations of the Task Force of the second Hoover Commission and its view of "consistent distrust of agencies."² And his criticism is direct of other ill-starred proposals as well as of various restrictive state decisions.

With his major position and the general case he builds I am in thorough sympathy. Perhaps his enthusiasm may lead him to understate how much the federal agencies do tend to reflect the general economic view of the executive, and not of Congress. True, they are independent in the sense that they are not to be controlled directly by the executive—though recent investigations in Washington have disclosed that personal connections and ties do have their effect. But I am referring to the broader aspects of change of underlying regulatory law with change of the executive. Thus a favorite iteration is that the gains of the New Deal have been retained by later administrations. That is true so far as

1. CARDOZO, *LAW AND LITERATURE* 10, 31-32 (1931).

2. 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.04, at 31, 32 (1958) [hereinafter cited as DAVIS]. This is the first of some twenty-five references to the Task Force of the second Hoover Commission.

outward forms are concerned; but there has been much undoing even in the particular case of law previously settled and enforced by the courts.³ Even judges of naturally conservative bent are not altogether happy in these rapid shifts in what has been advanced as basic legal principle, and it is to be wondered whether Congress is fully briefed as to their extent. Such play in the joints is probably inevitable; true, it occurs to a considerable extent in the courts themselves and is sure to be reflected in the more politically sensitive agencies. But I believe it would be better all around if this were more thoroughly understood and more often explained, and the vital significance of our electoral processes better apprehended. It must be conceded, however, that a professional law text is hardly the most convenient vehicle for the analysis of these political nuances.

Among dragons which the author faces head-on and slays are the rule of law, the separation of powers, the delegation of power, the iron requirement of hearing and assimilated court process, the glorification of the hearing examiners, the rigid separation of functions, and the necessity of personal decision. I found all this rather sprightly reading, notwithstanding the technical nature of the subject matter, because of Davis's gusto in attack. Here I must insert a caveat against my own enthusiasm lest I give the impression that this is a highly explosive and crusading book. It is not; indeed, it is restrained and quite legal in approach. But these are among the technical doctrines widely employed to denigrate the administrative process. Hence for complete exposition of the present status of administrative law they must be stated, explained, analyzed, and eventually reduced to the comparatively small role they actually play in modern administrative adjudication. And this the author does thoroughly and convincingly.

A particularly revealing example of the author's approach is the long chapter on "institutional decisions" which first appeared in article form in the *Columbia Law Review* for March 1948.⁴ Here is the heart of professional criticism of the administrative process—the anonymity of the decision—but, as we have to see, it survives as a "mighty hardy animal." Davis asks ironically if its

3. Illustrative cases are *Milk Drivers and Dairy Employees v. NLRB*, 245 F.2d 817 (2d Cir. 1957), *rev'd*, *NLRB v. Milk Drivers and Dairy Employees*, 357 U.S. 345 (1958); *Greene v. Dietz*, 247 F.2d 689 (2d Cir. 1957); *Rosenblum v. FTC*, 214 F.2d 338 (2d Cir. 1954). Compare Hutchins, *Is Democracy Possible?*, *Saturday Review*, Feb. 21, 1959, p. 58:

And if a Federal agency is established to regulate us, never fear, we have the pressure that will shortly make the agency the servant and mouthpiece of the interests it was intended to control. And as we laughingly count our gains at the expense of the public, we can reverently repeat the solemn incantation that helped to make them possible: that government is best which governs least.

4. Davis, *Institutional Administrative Decisions*, 48 *COLUM. L. REV.* 173 (1948).

hardihood is "one of the diabolical features of a pernicious bureaucracy that threatens traditional concepts of procedural fair play."⁵ Of course the answer is to be found in the practicalities of the situation. Various types of hearings call for the personal decision of the official who has heard the case; this is ordinarily true of cases in court. But there is much less occasion or need when the administrative responsibility is to enforce a general congressional policy—of unionization, of supervision of security sales, and so on. Here intelligent clerks can document the written evidence to see if the case falls into the typical groove and can do so economically and expeditiously, whereas a requirement of exclusive agency or board action would paralyze regulation in view of the great volume of work facing these important agencies—far outdistancing all court activity. There have been many calls for a rigid approach in the state courts also, such as New Jersey. But in the main, common sense has prevailed and the agencies have been allowed to function. And that is the rational answer actually being made to this basic problem.

Many of the topics herein considered belong also in the main body of the law, and the author draws on general principles for the solution of administrative problems. Often these chapters are brief treatises which have a broader application than the mere subject in hand. One of the best is the chapter on evidence, which well might be the basis also for treatment of evidence in the courts of law. This would follow the principle of the Model Code and the Uniform Rules that all relevant evidence should be admitted unless barred by some quite specific rule of exclusion.⁶ Another excellent chapter is that on "official notice" or "judicial notice" as we understand it in court terminology.⁷ Davis adopts in general the view of the text writers that expansion of the usefulness of this concept is in the interest of wise administration.

The law of procedure comes in for some acute examination, which particularly centers on the appropriate parties in an administrative proceeding. Here we have some of the intricate rationales upon "standing to sue" and the broad grants of some state practices as compared to the federal confusion. Davis argues for a broad right of anyone injured and therefore supports as "the most

5. 2 DAVIS § 11.01, at 38. See also Davis, *supra* note 4.

6. See 2 DAVIS §§ 14.01-.04. When Professor Davis skips to other fields than his own, he may at times generalize too hastily, as where he accepts too readily a superficial criticism of FED. R. Crv. P. 43(a) that it lacks precision of meaning and overlooks the beneficial effect of its trend toward discretionary and broad admissibility. 2 DAVIS at 267-68. See also the overbrief reference to interlocutory appeals. 3 *id.* § 20.05, at 87-88.

7. 2 *id.* ch. 15.

comprehensive and penetrating opinion"⁸ that of Judge Frank upholding such a right in a decision which "may well be an instance of the rare phenomenon of a lower court's decision superseding a recent Supreme Court decision."⁹ Another interesting discussion occurs in connection with the enjoining of public officers and the restriction on any right of suit against the government. The present unsatisfactory situation as to substitution of successor officers comes in for consideration, with some criticism of the substitute rule for rule 26(d) of the Federal Rules of Civil Procedure proposed by the Advisory Committee in 1955. Professor Davis makes the solution seem considerably simpler than it appeared to some of us who have worked upon substitute drafts to solve the problem.¹⁰

There is a wealth of other fascinating material—on "primary" and "secondary" jurisdiction, on the supposed necessity of exhausting all administrative remedies before resort to the courts, on "ripeness" of administrative action for review, upon unreviewable administrative action, and upon the scope and standard of judicial review in general. I can do no more than summarize to indicate the rich and varied content of the treatise. But before I close I must refer to the author's (perhaps necessary) ambivalent attitude toward the Supreme Court. As he says in a Preface, which he cherishes to the point of reprinting for separate distribution, he hesitates to criticize because much recent criticism has been unfortunate and the Court's total performance in recent decades deserves admiration, rather than attack. But when he turns to his particular field he finds a distressing lack of consistency, coupled with a tendency to overgeneralization in the one case, subject to repudiation or plain overlooking in the next case. Thus on the question of superior officers as indispensable parties, he finds seven opinions going in seven directions, an eighth restoring practicality,

8. 3 *id.* § 22.05, at 225.

9. *Id.* at 225 n.8, discussing *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

10. See *id.* § 27.09, at 608, 611, criticizing both proposals for easy substitution of an official successor and for suit against an officer by his official title, and not by name, and offering instead a version that, where the suit is "by or against the government in reality," the substitution of a new nominal party is not required. This I fear is both facile and academic; it bypasses completely the long history of sovereign immunity and the definite legacy of obstacles due in part to a mistake of the Code revisers which the Advisory Committee faced. See, e.g., *Vibra Brush Corp. v. Schaffer*, 256 F.2d 681, 683, 684 & n.1 (2d Cir. 1958); *ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES*, 28-33 (1955). The Advisory Committee built on a rather solid historical foundation of the permissible to develop a workable, rather than a purely theoretical, procedure; even the suit against the office has come to be thoroughly recognized in certain instances, such as "Commissioner of Internal Revenue," "District Director," and the like. See *ibid.* and late volumes of the *Federal Reporter*.

but a ninth returning to the "old confusion," seemingly "with an aura of indifference"¹¹ and with the Court destroying its own brain child, "like the mother mink who eats her young."¹² I can sympathize with a good deal of this impatience; I have had similar reactions with the Supreme Court's approach to a specialty of my own peculiar interest, civil procedure, although my concern is as to the Court's diffidence, rather than its precipitousness, in the field.¹³ Perhaps such earnest exhortation to greater interest and consistency may bring some results. But on the whole I think so much discontent is rather naïve and hardly consonant with the normal expectations really to be associated with our federal system and the headship of the Supreme Court.

The difficulty goes back to our unusual reliance upon law as the emollient to settle all matters and adjust all disputes, even those of high social policy—the rule of law again—and the Supreme Court as the chosen oracle to give all the answers. Thus the Court has too much to do, both literally and figuratively. The whole world properly looks to it for leadership in personal liberty, individual equality, and all the great faiths which give our country reason and means to exist; while we lawyers expect it to define the procedures and processes of government—matters which, however important they may be to us professionally, can hardly loom as large as its major concern. I hope the Court accepts and acts on Professor Davis's friendly advice. But even if it does not, I think we must give thanks for what it is doing so superbly in the modern age and expect that time will continue—as it has done not altogether badly in the past—to iron out the kinks in effective details of procedure of government agencies as well as of courts. Meanwhile we can accept with pleasure the monumental aid to enlightenment and understanding action afforded by this fine work of scholarship.

11. *Preface* to 1 DAVIS at vi.

12. 3 *id.* § 27.08, at 597. Also particularly criticized is the confusion in the decisions as to a requirement of exhaustion of administrative remedies before appeal to the courts. See *Preface* to 1 *id.* at vii; 3 *id.* §§ 20.01–04; and the scope of judicial review, *Preface* to 1 *id.* at viii; 4 *id.* §§ 30.05–07.

13. Thus I have tried to point out that the Court has actually shown more leadership in the field of procedural reform than it has properly been credited or apparently is willing to credit itself, and that it is more fitted for such leadership than it appears to assume. See Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 437–42, 444 (1958). So the Judicial Conference of the United States has not supported proposals to substitute itself for the Court. See ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1957, at 7–8 (1958); ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1958, at 6–7 (1959).