A Government Lawyer Comments on the Davis Treatise

Earl W. Kintner

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Earl W. Kintner*

I am pleased and grateful for the opportunity to review Professor Davis's Administrative Law Treatise. His stature, ability and prior performance made it easy to predict before its publication that this work would dominate the field. The actuality is no disappointment. It is not an exaggeration to say that the publication of this treatise is one of the truly monumental events of this generation of legal writing.

As the chief legal officer of an agency dealing with the day-to-day grist of the administrative process, I have made constant use of the one-volume Davis on Administrative Law published in 1951. That excellent work was the first comprehensive treatment of this subject in the literature. The present work, which considerably expands the earlier edition,¹ is the culmination of seventeen years' preparation and the crowning achievement to date of a careful and conscientious but daring and imaginative scholar.

That is not to say, however, that the Treatise is in any sense a "definitive" statement of the law. Far from it. As Professor Davis recognizes, "administrative law at its present stage of development is probably as unruly as any other major segment of law."² This is in part owing to its relatively late development and the reluctance of the legal profession to recognize it as a category, and in part to the paucity until recent years of theoretical writing in the field. Because of the unruly subject matter, this treatise is by no means a hornbook setting forth the black letter principles of the law. It is much more. For those areas in which the law is more or less settled, the existing rules are clearly described and adequately an-

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¹. The new treatise consists of four volumes, thirty chapters, 385 sections, 2,555 pages. The old was one volume, twenty chapters, 257 sections, 1,024 pages.

². Preface to Davis, Administrative Law Treatise at iv (1958) [hereinafter cited as Davis].
notated. Where the law is less clear, available judicial opinions and other legal materials are employed in “the creative construction of principles.” Finally, there is a considerable No Man’s Land in which the author’s major function has been “digging out and organizing the problems, presenting such law as is susceptible of summary, discussing pros and cons, and attempting to make contributions to the solution of the problems of law making.” To this task he brings vast experience, a gift for penetrating analysis and a powerful writing style. The result is a work that will exert an important influence upon the future development of administrative law.

Various categories of users will profit from the treatise. For teachers and students of law it contains much challenging material that should enliven classroom discussion. Especially helpful will be the careful analysis of conflicting cases, suggestions of possible alternative solutions for unsettled problems and the author’s analysis of relevant policy considerations. Judges and practitioners will additionally profit from the excellent research aids contained in volume 4: exhaustive tables of cases and of authorities, a 124-page section of procedural forms for use in pleading before six typical agencies and the federal courts, and a competently-prepared index. All of those features combine to make the treatise an indispensable tool for lawyers employed by administrative agencies and for lawyers employed for representation before administrative agencies.

Professor Davis is a convinced and convincing advocate of the administrative process. Throughout the text he identifies imperfections and uncertainties, but never does he leave the slightest doubt of his fundamental confidence in the role of the administrative agency as the pre-eminent operational instrument of modern government. Citing the remarkable growth of the administrative process on both the federal and state levels, he notes that the impetus did not come from “philosophers or theorists” but from “down-to-earth men who were seeking workable machinery for stamping out particular evils.” The traditional legislative and judicial processes were unable to cope with the many new governmental tasks demanded by social, political and economic pressures of a civilization grown vastly more complex than that under which our tripartite government developed. As new needs have arisen,

3. Ibid.
4. Ibid.
5. 1 DAVIS § 105, at 35-36.
6. The legislative process and the judicial process, which are the principal alternatives to the administrative process, frequently fall far short of providing what is needed. A legislative body is at its best in determining the direction of major policy, and in checking and supervising administration. It is ill-suited for handling masses of detail, or for applying to shifting and continuing problems.
new agencies have been created to fill the gaps. These factors, the author concludes, forecast long-term continued growth of the administrative process.

I

The first chapter is a sparkling exposition and defense of the administrative process. The remainder of the Treatise exhaustively covers the entire field of administrative law. Some theoretical-constitutional questions occupy less space than might be anticipated. "Supremacy of law" and "separation of powers" doctrines are discussed relatively briefly in the early part of the Treatise, and "delegation" is covered in a single chapter. In contrast, the major portion of the Treatise is devoted to the functioning of the agencies themselves and problems arising in the exercise of those functions. The Administrative Procedure Act is not handled as a separate topic, but applicable portions are discussed in functional context. Consideration of the knotty problems of judicial review of administrative action and tort liability of administrative bodies and officers occupies the latter part of the Treatise.

As reasons for the development of systems of administrative adjudication, the author listed (1) convenience because such issues naturally grow out of the administrative handling of cases; (2) the fact that many issues developed by the process are outside the area of judicial competence; (3) advantages of agency specialization; (4) the difficulty of separating adjudication from administration; (5) the belief that the judicial process is awkward, slow and expensive whereas administrative hearings are simple and nontechnical; (6) the fact that administrative agencies, unlike courts, are charged with protecting the public interest even in the absence of a moving party; and (7) the widespread belief that the conservative biases of judges disqualify them to administer new programs with social objectives that may conflict with private rights. Id. at 37–44.


Professor Davis’s organization and emphasis favor the practical over the theoretical, but his scholarship is nonetheless consistent and thorough. The treatment of delegation of legislative power to administrative agencies is a case in point. In a marvelously pithy section called “Federal Delegation Law in a Nutshell,” he sums up the subject in thirty-two lines, concluding with the observation that “In absence of palpable abuse or true congressional abdication, the nondelegation doctrine to which the Supreme Court has in the past often paid lip service is without practical force.” He then vindicates his scholarship with an exhaustive chapter, replete with documentation and analysis, in which he views the history, problems and policy conflicts of both state and federal delegation. The two concluding sections of that chapter are a critique of non-delegation doctrine in state courts (which Professor Davis suggests have been much more sticky than federal courts about delegation, writing opinions about the need for “standards” when the real need is for safeguards against arbitrariness) and, in the federal area, an inquiry into desirable criteria for congressional delegation of policy-making power (the author believes that delegation with few statutory controls, followed by continuing supervision by means of investigations and required reports would provide desirable safeguards while promoting effective use of administrative techniques in case-to-case development of principles).

Two of the most interesting and significant chapters deal with institutional decisions and official notice. These two topics are intimately related and, taken together, perhaps the most distinctive features of administrative adjudication. Notwithstanding their advantages from the point of view of efficiency, these techniques present difficult problems of procedural fairness such, for example, as (1) whether agency heads may consult with staff members in making decisions and, if so, with which ones, and (2) to what extent a party may meet and contest matter which has been officially noticed. Professor Davis has carefully sifted the conflicting judicial and legislative materials in these areas and superimposed upon them his own analysis of relevant policy considerations. On the question of consultation by decision makers, he seems to approve the Administrative Procedure Act solution, which leaves agency heads free to consult any staff members except those engaged in

9. 1 Davis § 2.01, at 75.
10. Id. at 76.
11. 1 Davis, Delegation of Power ch. 2.
12. Id. § 2.15, at 148.
13. Id. § 2.16, at 152.
14. Id. ch. 11.
15. Id. ch. 15.
investigating and prosecuting. Professor Davis is more enthusiastic, however, about the solution to the official notice problem provided in section 7(d) of the APA: "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." He regards it as preferable to the position of the American Law Institute that facts may not be noticed unless they are indisputable or are contained in sources of indisputable accuracy. Professor Davis also regards the APA solution as superior to the recommendation of the Second Hoover Commission, which would place the burden upon the agency to provide parties an opportunity to rebut officially noticed facts. The concern in both areas is to maintain acceptable standards of fairness without sacrificing the peculiar advantages of the administrative method.

Professor Davis recognizes that the power of investigation is vital to an administrative agency; that an agency must be empowered to obtain relevant data not only for law enforcement purposes, but also for other purposes such as the formation of policy and the supervision of compliance with orders; that compulsory process is essential; and that the effectiveness of such process depends ultimately upon judicial enforcement. Commenting in 1924 upon the statutory power of the Federal Trade Commission to investigate a corporation, the Supreme Court stated:

Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire [citation] and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.  

But, speaking in 1950 of the same power of the same agency, it said:

Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

The dramatic difference in attitude reflected by those two judicial utterances epitomizes the development of the administrative power of investigation, an area in which modern decisions have now settled most of the important legal questions. The history and significance of that development is covered in the chapter on in-

vestigations. The concluding paragraph is a fine example of the author's penetrating style and ability to summarize a complex situation in a few words:

But a better understanding of the significance of what has happened emphasizes the inevitability. Each step follows inexorably: Industrialization brings regulation. Regulation necessitates administrative processes. Agencies cannot operate without access to facts. Ideas about privacy, standing in the way of agencies which seek information indispensable to intelligent regulation, have to give way. In the same way that the gasoline engine made inevitable the development of the airplane, mass production methods and all they symbolize produce complex business arrangements which bring forth equally intricate governmental mechanisms requiring effective exercise of the administrative power of investigation. And the courts as a result feel called upon to write out of the Constitution the protections that the courts at an earlier time felt called upon to write into the Constitution.

II

The preface of the Treatise and, by implication, much of the text are concerned with the problem of law development. Although one of the reviewers of his 1951 volume concluded that "the period of synthesis and systematization is now at hand," Professor Davis does not agree. Before a systematic statement of principles is possible there must be "a good deal more interaction of imagination and experience, a longer period of case-to-case development, more evolution through trial-and-error methods." He rightly recognizes that the United States Supreme Court, which spends one-third of its time reviewing administrative action, must be the main instrument for the development, and he expresses serious doubts that it is measuring up to its responsibility in this respect.

Somewhat regretfully, and with careful qualifications, the author refers to the Court's decisions on problems of joinder of superior officers, exhaustion of administrative remedy and ripeness for judicial review. He points out opinions that ignore the real problem presented, or contain misleading generalizations, or do not

19. 1 Davis ch. 3.
20. Id. § 3.14, at 231–32.
22. Preface to Davis at iv.
23. One hesitates to criticize the Supreme Court at this time, because most recent criticism of the Court has been unfortunate, and because the Court's total performance in recent decades may well deserve admiration rather than attack. Furthermore, we must remind ourselves that the Justices are not superhuman, that the Court's business is sifted to emphasize the most perplexing problems in many diversified areas of law and government, and that the case load seldom allows the Court to restudy whole bodies of law in perspective.
24. See, e.g., Adler v. Board of Educ., 342 U.S. 485 (1952), which is discussed in 3 Davis § 21.06, as a case which presents, but ignores, a ripeness problem.
even attempt to explain contradictory holdings.\textsuperscript{26} His conclusion is that in many areas the Court has failed to produce a coherent body of principles, sometimes seeming to act \textsuperscript{2} without any regard for the needs of law development.\textsuperscript{27}

The Supreme Court would be more useful and effective in this important area, he suggests, if it would adopt these five constructive suggestions:

(1) The Court probably should write fewer general essays in its opinions and it should give more meticulous care to the ones it does write.

(2) The Court should take greater advantage of the values of case-to-case development of law. (3) The Court should make further effort to reduce the frequency of contradictory holdings, and it should check its apparently growing tendency to indulge in easy generalizations that are misleading if read literally. (4) The Court should have greater respect for its own holdings and for its own opinions; without restricting its freedom to overrule, it should restrict its freedom to violate its own doctrine. (5) The Court should inquire whether it is often too light-hearted about the manipulation of technical doctrine in order to produce desired substantive results in particular cases.\textsuperscript{28}

Those suggestions were made with deference to the difficulty of the Supreme Court’s job, the pressure of its case load, and the desirability of maintaining enough flexibility to “manipulate doctrine” to fit particular cases. In spite of the qualifications, however, it seems to me that the criticism should be balanced by some positive factors. Specifically, the criticism failed to recognize that the Supreme Court has acted to clarify other administrative law questions with a sure sense of the problems involved and has arrived at intelligible and lasting solutions.

Particular examples are two recent cases which I had the privilege of arguing before the Supreme Court. One involved the scope of the Federal Trade Commission’s discretion in fashioning its cease and desist orders at the conclusion of adjudicative proceedings; the other concerned the resulting effects of such orders. In deciding each of these cases, the Supreme Court displayed a keen awareness of the underlying problem and produced a result that eliminated existing uncertainty and substantially contributed to the development of sound doctrine.

which generalizes that “so long as there is warrant in the record [a rational basis] for the judgment of the expert body it must stand.” The Treatise at 4 Davis § 30.05 cites other general statements to the same effect, but at § 30.06 it discusses other holdings in which the Supreme Court has ignored such general statements and substituted the Court’s judgment for that of the administrative body.

\textsuperscript{26} See id. § 30.07, which considers the Supreme Court’s failure to explain its contradictory holdings on whether to use the “rational basis” or the “substitution of judgment” test in reviewing the agency’s application of the law to undisputed facts.

\textsuperscript{27} Preface to Davis at ix.

\textsuperscript{28} Id. at v.
The Commission's order in the *National Lead* case not only prohibited agreements or conspiracies among respondents of the sort that had resulted in price fixing, but further prohibited each individually to use a zone delivered price system "for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers. . . ." On review the Court of Appeals set aside the quoted portion of the order on the grounds that the illegality of the zone system had not been determined in this proceeding. Thus, the questions presented to the Supreme Court were what constitutes a permissible relationship between the prohibition and the practices found to be illegal and to what extent Commission remedies are subject to modification on review.

The Commission argued that not only did its prohibition bear a reasonable relationship to the unlawful practices found to exist, but that in the Commission's exercise of "allowable judgment" this prohibition was necessary as a means of bringing about individual pricing policies that would not amount to a legal perpetuation of the past illegal price system. The Commission further contended that its judgment in any determination of this nature must be based not only on the facts of the particular case, but also on considerations derived from past experience in effecting or enforcing compliance with orders aimed at eliminating such conspiracies. In addition, it was pointed out that the particular prohibition was only temporary in nature, its duration depending upon how quickly the effects of the conspiracy were eliminated.

The Supreme Court reinstated the Commission's order, and reaffirmed the Commission's responsibility to fashion orders which would effectively "close all roads to the prohibited goal." The Court held that the remedy selected had a reasonable relationship to the unlawful practices. It concluded that under the circumstances here, the Commission was justified in its determination that it was necessary to include some restraint in its order against the individual corporations in order to prevent a continuance of the unfair competitive practices found to exist.

The scope of the Commission's discretion in fashioning orders for particular situations was raised again in the *Niehoff* case. Niehoff contended throughout the proceeding that if an order were

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30. National Lead Co. v. FTC, 227 F.2d 825, 843-44 (7th Cir. 1955), citing Salt Producers Ass'n v. FTC, 134 F.2d 354 (7th Cir. 1943). See also Milk & Ice Cream Can Institute v. FTC, 152 F.2d 478 (7th Cir. 1946).
33. *Id.* at 430.
issued against it before similar orders were issued against its competitors, its business would suffer economic extinction. The Commission rejected Niehoff’s plea that the order be held in abeyance pending action against the competitors, stating in part:

That respondent’s business may be adversely affected by the requirement to cease its unlawful conduct does not counterbalance the precedent which would be set by the requested action which, if followed, would mean that Commission orders would be forever pending and unlawful practices rarely, if ever, corrected.\(^{35}\)

The Court of Appeals stated that because the Commission had not exercised its permissive power to delay or postpone compliance with its orders, the court itself would consider the effect of the order upon Niehoff in light of equitable principles and, accordingly, modified the Commission’s order to take “effect at such time in the future as the . . . Court of Appeals . . . may direct . . .”.\(^{36}\)

Before the Supreme Court, the Commission contended that the particular circumstances in the automotive replacement parts industry made it impossible to enforce the applicable statute in the manner proposed by Niehoff and directed by the court below, and that it was solely within the discretion of the Commission to decide against whom it would proceed.\(^{37}\)

In its opinion, reversing the court below and affirming the Commission’s order in its entirety, the Supreme Court stated:

In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commission order. This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment . . . . [T]he Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress . . . . If the Commission has decided the question, its discretionary determination should not be overturned in the absence of a patent abuse of discretion.\(^{38}\)

National Lead and Niehoff establish the principle that proper exercise of administrative discretion to decide the scope and effect of orders to cease and desist may include a consideration of practical factors essential to the effective administration of orders after their issuance. That, I submit, is a solid contribution by the Supreme Court to the development of administrative law and to the effectiveness of the administrative process.

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35. Id. at 1153.
36. C. E. Niehoff & Co. v. FTC, 241 F.2d 37, 43 (7th Cir. 1957).
37. See 26 U.S.L. Week 3209 (U.S. Jan. 21, 1958). The Niehoff case was argued along with Moog Industries, Inc. v. FTC (No. 77).
III

In 1940, a student of administrative law said:

From the very beginning the administrative tribunal has faced the hostility of the legal profession. ... The administrative tribunal ... is often penetrating into new fields where precedents do not exist. Its concern is with the future more than with the past, and it counts the probable progeny of its decisions as of more importance than their ancestry. ... Those who dislike such activities of the government as regulation of the utility holding companies, of labor relations, or of the marketing of securities, rightly conceive that if they can destroy the administrative tribunal which enforces regulation, they would destroy the whole plan of regulation itself. 39

In 1956 the House of Delegates of the American Bar Association adopted a resolution on specialized courts, recommending, among other things, that certain “judicial functions” of the Federal Trade Commission be transferred to a specialized court under the Judicial Branch of the Government. 40 In 1958 a bill 41 was introduced in the Senate “To amend Title 28 of the United States Code, ‘Judiciary and Judicial Procedure,’ and incorporate therein provisions relating to the United States Trade Court, and for other purposes.” The bill was referred to the Committee on the Judiciary but no hearings were held during the 85th Congress. An identical bill 42 has been introduced in the 86th Congress.

This bill would create a trade court composed of five judges to hold office during good behavior, and declares that the court shall be “a court established under Article III of the Constitution of the United States.” Provision is made for temporary assignment of any district judge of the United States to serve as a judge of the trade court. The Court is authorized to appoint “not more than 15 Commissioners who shall be subject to removal by the court.” The

40. The resolution reads as follows:

SPECIALIZED COURTS. RESOLVED, That the American Bar Association recommends to the Congress the establishment, by amendment of Title 28 of the United States Code, of one or more courts of special jurisdiction within and as part of the judicial branch of the government, such courts to have original jurisdiction in specified cases to ensure the tradition of independence in areas presently subject to administrative action equivalent to judicial action in courts of general jurisdiction, and their final orders and judgments to be subject to review by the Courts of Appeals; and that there be transferred to divisions of a single such court or to several such courts:

(a) Limited jurisdiction in the trade practice field with respect to certain powers now vested in the Federal Trade Commission and in certain other agencies.

(b) The jurisdiction now vested in the National Labor Relations Board over the adjudication of representation and unfair labor practice cases.

(c) Such other adjudicatory functions as the Congress may from time to time determine.

bill provides that "the rules of evidence applied in the District Courts in civil actions tried without a jury shall be applied in trials and proceedings of the Trade Court and its commissioners." Courts of Appeals are given jurisdiction to review decisions of the trade court "in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury."

The trade court would be given exclusive jurisdiction to hear proceedings, render judgments, and issue decrees and orders under the following statutes:

3. Section 6(a) of the Wool Products Labeling Act . . .
4. Section 8(a) of the Fur Products Labeling Act . . .
5. Sections 5(a) and (b) of the Flammable Fabrics Act . . .
6. Section 611 of the Civil Aeronautics Act . . .
7. Sections 203, 204 and 205 of the Packers and Stockyards Act . . .

The bill would amend the present statutes to provide that the Federal Trade Commission may institute proceedings by petition in the trade court.

Professor Davis, with the aid of careful scholarship and academic detachment places these recent proposals in proper perspective and demonstrates that there is a close relationship between Mr. Justice Jackson's analysis in 1940 and the American Bar Association's action in 1956 with the resulting trade court bill in the present Congress. This Treatise makes a particularly important contribution at a time when the administrative agencies are under fire from many directions. At this important point in the development of the administrative process, this Treatise deserves careful consideration by all those concerned with administrative law. Professor Davis demonstrates for all who have the objectivity to look deeper than emotion-charged cliches, the lack of merit and futility of proposals to dismember the administrative process. I say lack of merit and futility to accomplish the stated objectives of those making the proposals. The trade court bill, if adopted, might very well aid, as Mr. Justice Jackson suggested, in destroying effective trade regulation.

Professor Davis demonstrates carefully and thoroughly what he terms "the cardinal observation" that "administration and adjudication run into each other in such a way that they are often inseparable. . . ." This observation from a distinguished student and teacher is completely consistent with my own shirt-sleeve experi-

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44. 1 Davis § 1.02, at 11.
ence at the Federal Trade Commission. The Commission, over a period of many years, has developed a range of administrative techniques to encourage and enforce compliance with the trade regulation laws. Where violations appear inadvertent and most likely never to reoccur, the Commission may decide with a minimum of formality that further proceedings are inappropriate. Where stronger moral pressure may be needed, the Commission requires written stipulations that further law violations will not occur. Many cases seem to call for use of the Commission’s statutory complaint and order procedure but can expeditiously be settled by agreements permitting a formal order by consent of the respondent. The Commission has also developed a procedure for trade practice conferences looking toward rules for particular industries which need official assistance in encouraging voluntary compliance with the trade regulation laws. Behind this range of administrative techniques, and giving them meaning and authority, is the Commission’s power to issue enforceable cease and desist orders in contested proceedings. To take away this power would destroy, in great part, the effectiveness of other techniques by which the Commission achieves compliance with the trade regulation laws without resort to formal proceedings.45

The trade court bill would withdraw from the Federal Trade Commission authority to hear and decide cases under various provisions of law. The Commission without power to issue a cease and desist order would have no power to approve stipulations to cease and desist. It is likely, therefore, that if the proposed trade court were created, it would find itself faced with several times as many cases as are now litigated before the Federal Trade Commission.

The Attorney General’s Committee on Administrative Procedure in 1941 stated that negotiations and informal settlements constitute “the lifeblood of the administrative process.”46 The following conclusion of that Committee is equally valid today:

Clearly, amicable disposition of cases is far less likely where negotiations are with officials devoted solely to prosecution and where the prosecuting officials cannot turn to the deciding branch to discover the law and the applicable policies.47

Professor Davis finds: “The fundamental reason for resort to the administrative process is the undertaking by government of

45. Since 1914 more than 9,000 stipulations to cease and desist have been approved; approximately 5,000 cease and desist orders have been issued by the Commission.

46. ATT’Y GEN. COMM., REPORT ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 58–59 (1941).

47. Ibid.
tasks which from a strictly practical standpoint can best be performed through that process." 48 This statement applies, in my opinion, with great force to the creation of the Federal Trade Commission.

Effective regulation of trade requires the administrative as well as the judicial approach. Review of the legislative debate and reports, the comment of students, and the platforms of political parties preceding enactment of the Federal Trade Commission and Clayton Acts shows that judicial enforcement was not adequate, even in 1914, to meet the growing problem of trade restraint. With continued growth of our economy the need for a dual approach is even greater today. The Supreme Court emphasized this in the Cement Institute case:

[L]egislative history shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the federal district courts but also to supplement that enforcement through the administrative process of the new Trade Commission. . . . All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages. 49

The several laws under which the Federal Trade Commission, the Department of Justice, and other agencies deal with monopolistic practices and restraints of trade and commerce state a broad public policy of relying upon competition. To this end, the Sherman Act  50 prohibited private contracts, combinations and conspiracies in restraint of trade. The duty of executing that law was assigned to the Department of Justice and the courts. The act left it to the courts to define "restraint of trade." Experience of the first twenty years after enactment of the Sherman Act convinced Congress that court definition of unlawful restraints did not sufficiently cover all the business practices which may result in undesirable injury to competition. The Clayton Act  51 supplements the Sherman Act by cataloging certain specific practices, such as discriminations in price, services, or facilities, tying or exclusive dealing contracts and arrangements, intercorporate acquisitions, and interlocking directorates, where they may adversely affect competition. The Federal Trade Commission Act  52 prohibits all "unfair methods of competition."

48. 1 Davis § 1.05, at 34.
The Federal Trade Commission Act and the antitrust laws are parts of a comprehensive plan developed by Congress over a period of many years to deal with monopolistic and trade restraining practices in a rapidly expanding industrial economy of increasing complexity. The many practices involved are too varied to be covered by a single or master law, or to be dealt with by only one agency or method of enforcement. Congress wisely placed responsibility for the accomplishment of the policy of these laws in both the Department of Justice and the Federal Trade Commission and thus provided "the government with cumulative remedies against activity detrimental to competition."\(^5\)

To commit to the courts (even specialized courts),\(^6\) sole and complete responsibility for antitrust enforcement would be to discard the fully considered, studiously devised means developed by Congress in 1914 to meet the antitrust problem and to lose the basic features and special techniques carefully provided to insure more effective enforcement.

The Federal Trade Commission has developed a special competence in the prevention of false and misleading advertising. The trade court proposal would seriously impede and could possibly destroy the operations of the Commission in this area. The prevention of false and misleading advertising is much more suitably adapted to administrative than to judicial handling. This is particularly true where the parties are willing to terminate the deceptive act or practice without litigation. The vast majority of false and misleading advertising cases before the Commission are settled without litigation.

Professor Davis thoroughly disposes of the "separation of powers" argument for the proposed dismantling of the Federal Trade Commission and other administrative bodies. He concludes that "we have learned that danger of tyranny or injustice lurks in unchecked power, not in blended power."\(^7\) The separation of powers argument is particularly inappropriate to the proposal to split up the Federal Trade Commission's powers.

This argument proceeds: (1) good government requires that all powers of government be divided into three branches: executive, legislative, and judicial; (2) a number of administrative agencies, including the Federal Trade Commission, exercise a combination

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\(^6\) In 1910, in response to pressure from the American Bar Association, Congress created a specialized Commerce Court. Act of June 18, 1910, ch. 309, 36 Stat. 539. Despite the specialization, the Commerce Court was reversed in ten of its twelve decisions which were reviewed by the Supreme Court. Three years after its creation, the Commerce Court was abolished. Act of Oct. 22, 1913, ch. 32, 38 Stat. 208, 219.

\(^7\) 1 Davis § 1.09, at 74.
of executive, legislative, and judicial powers; (3) a start can be made toward unscrambling this improper mixture by transferring the "judicial" powers of the Federal Trade Commission to a "court."

The Federal Trade Commission Act declares unlawful "unfair methods of competition" and "unfair or deceptive acts or practices." With certain exceptions, the statute does not define "unfair methods of competition" or "unfair or deceptive acts or practices." Congress gave this task to the Commission. Each time that the Commission issues an order to cease and desist under the Federal Trade Commission Act, it is filling in the meaning of the statute, as well as deciding a dispute over facts between the respondent and the Bureau of Litigation. Although this departure from the theory of separation of powers has been protested by some as unconstitutional, the Supreme Court of the United States has never found it so.

Whether or not the Constitution permits it, proponents of the trade court say that this "impairment of the basic structure of the national government" is an undesirable development, and we should try to return "essentially judicial functions to the judiciary." Even if we assume, for purposes of argument, no present validity in the reasons of policy which motivated Congress to establish the Federal Trade Commission in 1914 with the particular powers assigned to it, it is difficult to isolate the Commission's "essentially judicial functions." Experts disagree. One group finds the issuance of cease and desist orders to be a "judicial function"; another finds this a "mixed function"; a third finds it "approaches closely the legislative field." One distinguished group found that the only properly "judicial function" of the Federal Trade Commission is its duty to aid the federal courts in working out dissolution decrees.

The American Bar Association proposal would transfer all the Commission's cease and desist order authority under both the Federal Trade Commission and Clayton Acts to a trade court, to be established under article III of the Constitution. To the extent that such transfer includes the Commission's authority to define "unfair methods of competition" and "unfair or deceptive acts or

58. Ibid.
59. Ibid. at 243, 245.
60. PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES 231 (1937).
61. AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMM. ON ADMINISTRATIVE LAW 238 (1936).
practices," it could be argued this might be an unconstitutional
delegation of legislative power to the judicial branch of the gov-
ernment, in violation of the very doctrine which the transfer is
supposed to strengthen.63
Regardless of such legal niceties, the practical reason behind
the doctrine of separation of powers is that it is wise to prevent
any one man or group of men from becoming so powerful that they
can dominate, rather than represent, the American people. Where
this reason does not apply, neither should the doctrine. The danger
to be avoided is one of unchecked power, not combination in
one government agency of functions different in legal concept.
There is little danger that the Federal Trade Commission, through
its power to issue cease and desist orders subject to judicial re-
view will be able to dominate and control the entire government,
or any part of it.
Professor Davis has made a great contribution by destroying
completely the arguments advanced by proponents of the trade
court. He refutes them explicitly in the early sections of volume I
and he refutes them implicitly throughout the entire Treatise.
“All in all,” Professor Davis concludes, “the political outlook is
for a long-term continued growth of the administrative process.
Few informed people of any political persuasion are likely to dis-
agree with a 1955 statement by the Attorney General for the most
conservative national administration we have had since 1933: ‘Ad-
ministrative agencies have become an established part of our con-
stitutional government, accepted by Congress, the judiciary and
the people as an essential part of the governmental structure. They
were created as a necessary means for protecting public interests
which could not be suitably protected by the courts or other
means. . . . Administrative agencies must be enabled and permitted
to function efficiently and effectively if the public interest, which is
their primary concern, is to be preserved.” 64

63. See Comment, The Distinction Between Legislative and Constitutional Courts,
43 YALE L.J. 316 (1933).
64. 1 DAVIS § 1.05, at 44.