The Davis Treatise: 
Meaning to the Practitioner

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As a practitioner I approach Professor Davis's treatise1 with two questions in mind: Will it help me win administrative law cases? Will it suggest means for improving the performance of administrative agencies? These questions go to the key factors in the administrative practitioner's professional life.

Instead of attempting to review this treatise, I am going to try to give the answers, and some related thoughts, to those two questions as they occur to me after considerable contemplation of Davis's enormous and ambitious undertaking. Necessarily, the contemplation brings to bear my personal experience in a quarter-century of practice, most of it in what the law schools call administrative law. No personal experience can give one confidence that his conclusions are sound, for it is limited by himself and is highly conditioned by his clients and his other professional contacts.

My answer to the first question is in four parts.

In the first place, the treatise provides a useful breakdown of many problems of administrative law; an extremely valuable collection of appellate cases bearing on each of those problems, sufficiently digested and discussed to provide a meaningful survey; and an often penetrating analysis of questions which the cases either have left unanswered or have succeeded in confusing. Likewise dealt with is a considerable amount of non-case information which sheds helpful light on many questions. In short, the treatise is a great aid not only to careful research but to the kind of quick "education" or refresher that a practitioner has to secure in order to keep pace with the problems marching across his desk. No administrative practitioner can afford not to have the book readily accessible. It is unique. It is indispensable.

In the second place, however useful this treatise is, it does not deal with the overwhelming bulk of the administrative practitioner's problems. It is mainly concerned with that part of administrative law which a reviewing court will determine for itself—which, for want of a better term, I will call non-substantive. But a practitioner's

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1. Davis, Administrative Law Treatise (1958) [hereinafter cited as Davis].
problems are principally substantive in nature: What is a reasonable rate? What does the public convenience and necessity demand?

In pointing this out I do not imply criticism of the author in the slightest degree. This treatise had to be written—and the bar is fortunate that it was Davis who had the energy, persistence, and insight to do the job. But, in all candor, it must be recognized that, from the standpoint of the practitioner’s practical interest, there is a huge area of administrative law beyond the confines of the problems dealt with in this treatise. Indeed, no single treatise could possibly deal with more than a fraction of this vast field.

In this larger, substantive area it is extremely difficult to produce helpful books or law review discussion. Judicial opinions furnish but little material therefor. The needed materials are to be found in the grubby, uninspired, and sometimes incoherent “opinions” of the agencies themselves and in related sources hard to secure and to research. Furthermore most of the substantive problems are of interest only to a narrow readership. It is probably for these reasons that the best brains among our scholars have been devoted, generally speaking, to the kinds of problems dealt with in Davis’s treatise and have left for the writers in trade publications, or in “learned” journals that are little more than trade publications, discussions of the substantive problems. Such writers often are not real scholars. So administrative agencies have not had the benefit of the kind of searching examination and criticism that would serve to keep them on their toes, that would give them perspective, and that would lead them to appraise their own doctrines with the care that is prompted by knowledge that an objective, scholarly eye may be scrutinizing their handiwork. Courts have the constant benefit of scholarly comment upon and criticism of their decisions, and are improved thereby; the agencies do not.

A third part of my answer to the question whether this treatise will help me win cases is not unrelated to the points I have just made. Even in the areas covered in this treatise, much of the discussion deals with materials which are of but limited importance. Principally they are decisions of the Supreme Court of the United States. Discussion of lower court federal cases is less complete (the treatise cannot go on forever), and discussion of state court decisions is limited (although, within such limits, significant).

In the case of the federal agencies, it is my observation that the appellate court decisions—especially those of the Supreme Court—do not greatly affect the day-to-day problems that arise in the practice before the agencies, even in the non-substantive categories with which the treatise is concerned. This conclusion would be difficult to prove and, based as it is upon personal experience, it may well be
faulty. Yet as I look back upon a considerable experience I find little significant impact of the advance sheets upon what actually goes on from one day to the next in agency practice.

Scholars, I find, strain to fit together into a doctrinal principle a decision of the Supreme Court on procedure before the Secretary of Agriculture with a decision of the Court on procedure before the Interstate Commerce Commission. Yet usually—not always, but usually—neither agency pays very much attention to a decision involving the other one. And even the agency directly involved in an appellate case often is not drastically affected thereby. A little adjustment of procedure, another form of words in “findings,” a slightly different evidentiary presumption—and life goes on rather as before in many, many cases; or, indeed, the appellate decision may have no effect at all save in the specific case immediately involved. The point of the matter is that the agency’s own decisions (and sometimes the decisions of sister agencies on related problems) are usually more important as precedents than the rulings of the appellate courts. Important, too, is a “feel” for the way the agency and its staff will react to a situation, a “feel” not to be disclosed in any precedents at all.

In other words, neither this treatise, nor any other that might be written based primarily on appellate court decisions, is especially close to the reality of a given agency’s day-to-day problems of procedure and jurisdiction. (These problems, be it noted, arise in particular agencies; they do not arise in some generalized form.) To develop a truly significant and live discussion of the meaning of such things as “adjudication,” “rule-making,” and so on for any particular agency would require treatment of a mass of agency orders, opinions and unarticulated practices. Even in the relatively rare case where an appellate decision has had considerable practical consequence (such as the Ashbacker case) not much light is shed by a discussion of the decision itself; the real light is to be found in what application has been made of the case by different agencies in a variety of circumstances, many of which undoubtedly were never dreamed of by the appellate court.

I have already noted the paucity of scholarly treatment of the substantive problems of administrative law. Here I suggest, even in the non-substantive field, another need for scholarly treatment, for treatment with sharp focus upon particular agencies. In generalized discussion, the scholar simply cannot get close enough to the knotty problems of reality to provide the practicing bar and the agencies themselves with the help they need—and abundant need there is.

Is it too much to hope that scholars may attack both the substantive and the non-substantive problems of particular agencies? Once there was a Henderson preoccupied with the Federal Trade Commission, a Sharfman with the Interstate Commerce Commission, a Loss with the Securities and Exchange Commission. Surely there is hope for more of that kind of particularized treatment.

But let me hasten to add a remark prompted by some of the few scholars' discussions of the work of particular agencies to be found in the journals. Especially in the substantive area, it is very difficult for an academician to achieve a familiarity which will equip him to express judgments on the economic or social soundness of the policies involved in the administrative decisions. Professors are not always tough minded—and are prey to the insinuated impressions of public relations artists no less than the rest of mankind. For the scholar's critiques to be truly helpful he must be very cautious and must shun as he would the plague the kind of superficial judgments that are reached—to take a couple of examples—by undiscriminating favor for the have-nots or by an untested assumption that volume effects economies.

The fourth part of my answer leads me to a point which seems to have been rather neglected. There are many appellate court decisions on questions of administrative procedure which, as written, are irreconcilable. Davis delights in referring to them. He properly takes the Supreme Court to task for dealing in easy generalities, for writing essays instead of tightly knitted opinions, and for deciding one case with seeming blithe disregard of another apparently like case but recently decided the other way. The practitioner wonders, on reading the treatise, as he has wondered on reading some of the cases as they appeared, whether all this can possibly be of help in the problems he must face tomorrow morning.

Unquestionably there are serious contradictions in what the courts—and notably the Supreme Court—have said, or in the drift of what they have said, from one case to another. But is this not due in large part to an effort of the courts, and of the scholars, to fit these administrative law cases into a single body of doctrine? And is not this a grievous error, which even Davis has not fully exposed?

Some of what Davis writes, and even more of what other scholars write, and much of what courts write, seem to assume that there are principles of general application to all agencies. Occasionally there is a suggestion that these principles are constitutional. More often it is not clear that constitutional requisites are referred to, but that, nonetheless, there is a kind of general common law governing the behavior and processes of the agencies. Naturally, therefore,
scholars try to reconcile decisions, and betray considerable frustra-
tion when, as is so often the case, the decisions do not fit together.

Yet, as a practical matter, these seeming inconsistencies, not to
say contradictions, in the decisions of the appellate courts do not
greatly disturb the practitioner. How can this be? The answer is
that the practitioner, living with these agencies from day to day,
realizes, intuitively perhaps, that each, to a large extent, is and
must be a law unto itself, with its own way of doing things. As
one considers the matter further, it seems that the courts them-
selves have probably been aware of that important fact if only
subconsciously. Hence seemingly inconsistent rationalizations or
dicta are voiced—yet the administrative process goes on in each
agency without the great disruption and confusion that one would
expect if the inconsistencies were as real as they appear.

The fact is that administrative agencies are very diverse. Each
was created for a special set of problems. Each has a special legis-
latively history behind its creation and each has, of necessity, de-
developed its own mores without too close regard for the evolution
of the mores of others. It is perfectly obvious that the methods of
the Veterans Administration are not suited to the methods of the
Interstate Commerce Commission. What is an adequate hearing
for the purposes of the former may be altogether inadequate for
the purposes of the latter.3 Seeming inconsistencies or contradic-
tions as to what a proper hearing amounts to, in decisions invol-
ving two different agencies, might be reconcilable if the opinions
were written in terms of the differing nature of the problems of the
two agencies and a differing imputed legislative “intent” for the
two. In these terms, it is perfectly possible that an identical
phrase in two different administrative statutes might be properly
interpreted and applied in entirely different or even opposite ways.

Thus it may be that certain of the general principles of the First
Morgan Case,4 which seemingly gave way or were drastically modi-
fied when put more closely to the test in the Fourth Morgan Case5
as far as the Secretary of Agriculture is concerned,6 nonetheless
could retain considerable vitality as originally stated for a differ-
ent type of agency. Indeed, a good deal can be said for treating
quite differently certain apparently common problems even as be-
tween agencies as superficially similar as the Civil Aeronautics
Board and the Federal Communications Commission. Conceiv-
ably the Ashbacker doctrine (to take a particularly difficult prob-

3. Cf. 1 Davis § 8.02, at 515 & n.4; 2 id. § 11.10, at 84.
6. 2 Davis § 11.05.
lem) might have a quite different proliferation in the procedures of the two agencies if rationalized by the courts in terms of the different problems the two agencies have and the different imputed legislative "intent" reflecting those different problems—even though the operative statutory words are virtually the same in the statutes for each.

The point is illustrated by the application of the doctrine of primary jurisdiction. The courts themselves have recognized that the doctrine applies in the case of the Railway Labor Act agencies in a way that is different from its application in the case of other agencies; and Davis correspondingly devotes a separate section to the Railway Labor Act cases in his discussion of primary jurisdiction. The difference is rational: it has to do with the difference in the nature of the agencies involved and the legislative purpose which gave them birth and form. I merely suggest that similar rationalization might explain different appellate court treatment of other specific problems as between different agencies. If the courts more often adopted that kind of rationalization, instead of writing so frequently as though there were a single body of administrative law doctrine, Davis could eliminate a good many pages of his treatise which are devoted to a showing of inconsistencies and to an effort to suggest either reconciliation or some new principle not yet adopted.

Davis recognizes that there is the diversity I refer to. He neatly destroys the argument of Chief Justice Vanderbilt that "uniformity of practice and procedure in the area of our federal administrative law . . . is a natural and logical development." I suggest only that Davis has perhaps missed an opportunity to point the way out of some of the inconsistencies in judicial dicta by failing to recognize even more fully that there should be no single body of administrative doctrine and that for each agency (or type of agency) there can be its own set of principles which should be recognized by appellate courts.

I come now to my second question: Does the treatise suggest means for improving the performance of agencies in the administration of justice? Davis is not a reformer; but for the thoughtful reader his treatise is bound to generate ideas.

The central problem which concerns every practitioner before the agencies is what can be done to secure more responsible decision making, more truly responsive to the evidence and argument adduced in the administrative proceeding. Most practitioners would agree, I believe, that the greatest obstacle to the secur-

7. 3 id. § 19.03. See also id. § 19.04 on the NLRB.
8. 1 id. § 8.02, at 515.
ing of that kind of decision is what Davis accurately describes as "the separation of the deciding function from the writing of the opinion or report."\(^9\)

This separation of functions is common among the agencies. It is accomplished in various ways. One of the more common is to have a section of the staff whose task is that of writing the opinions of the agency. The agency members meet, when the case stands submitted, and vote on the case. The opinion writing section then prepares an opinion—with a minimum of instruction, or none, from the agency as to what it is to contain—in support of the result dictated by the vote. Naturally the opinion is written with a view to making that result stand up in a reviewing court. The opinion writers comb the record and the briefs to marshal all the facts and argument they can find in support of the result they have been told to justify; the facts and argument to the contrary are examined only with a view to meeting possible attack on the result in a reviewing court.

Thus, instead of the decision of a case being based upon the findings of fact and determinations of policy disclosed in the agency opinion, the findings and determinations are based upon the decision.

This inversion makes a complete mockery of the limited judicial review of agency action as the courts have rationalized it. For judicial review is limited on the theory that an agency has first ascertained what it believes the facts to be, then has made determinations of policy, and from those facts and policy has arrived at the decision. If the appellate courts really faced up to the facts of life—that is that the agency first decides what result it wants and then facts and policy are found by its staff to fit the result—the present theory of judicial review would have to be scrapped. Reviewing courts, conceivably, might still arrive at a similar limitation on their review; but they certainly would have to rationalize it differently.

The facts of life I have described are well known, certainly among practitioners and agency members and staffs, even though sometimes only grudgingly admitted.\(^10\) But I have heard some judges—and distinguished judges—say things in conversation about the administrative process that indicated an incredible naiveté. Surely, though, many judges must realize that the decisional process is, indeed, as I have described it. Yet the courts go right

\(^9\) 2 id. § 11.11, at 90.
\(^10\) Hearings Before the House Subcommittee on Legislative Oversight, 85th Cong., 2d Sess. 3675-3703 (1958) (examination of Commissioner Hyde of the FCC by Representative Bennett); cf. id. at 3984–85 (testimony of Commissioner Craven).
ahead as though the process were what is judicially ascribed instead of what it is.

Consequently we are treated to a display of hypocrisy that does far more than the occasional instances of extra-record "influence" to cause loss of respect for the agencies. Fictions have contributed to the sturdy and healthy growth of the law in centuries past, but we must be adult enough by now to dispense with the fiction that is reflected in the articulated theory of limited judicial review.

The administrative process as it really is means that practitioners and clients spend an inordinate amount of time and money building up huge records, with meticulous research and great ingenuity, which are finally examined, for the purpose of making "findings" and "determinations," only with an eye to justifying a result already arrived at. What actually prompts the result—i.e., the votes of the agency members—may be a newspaper story, or a vague impression based upon the oral argument (which is usually ridiculously brief as compared with the vast records in so many of these cases), or some general preconceptions, or (possibly) a reading of briefs, or extra-record pressure—especially from members of Congress—or goodness knows what. One thing that all too often does not prompt the result is the record so laboriously and expensively compiled, or the facts demonstrated therein which the agencies are supposed to find with such highly respected "expertise."

The separation of decision making and opinion writing is one aspect of the "institutional decision." There are critics without number of the institutional decision, but the criticism is usually directed at the fact that the agency staff helps the agency make the decision: at such things as the provision to agency members of staff memoranda summarizing the facts and contentions in a case, or staff members consulting the agency members, individually or collectively, concerning the case. This kind of criticism has led to various proposals, some of which have found their way into legislation, looking to the insulation of the agency from portions of the staff or even from practically all of the staff.

Davis devotes an entire chapter to the "institutional decision" and his discussion contains considerable good sense. Thus he points out that agency members need the advice and assistance of staff members, many of whom possess the only true "expertise" to be found in the agency. He defends the institutional decision in his treatise, as he did recently in his testimony before the House Subcommittee on Legislative Oversight.

11. 2 Davis ch. 11.
I think that Davis is essentially right, and that many of the critics are both wrong and ill-informed. I, for one, would reverse the tendency to insulate the agency from the staff. I have been rather shocked to be told by agency staff members that, for one reason or another—and recent crescendo of criticism of agencies may have been the cause—they have not been consulted by their agency on matters of greatest importance with which the staff has the only “expert” knowledge that the agency could possibly possess.

But the separation of decision making and opinion writing is quite another matter. After quoting Landis’s statement of the harm that is done by this separation, and recognizing that “objection to the separation of deciding from opinion writing may be unanswerable,” Davis contents himself with saying that such separation is inevitable—because there is such a great volume of opinion writing to be done in an agency.14

I find Davis’s treatment of this question unsatisfactory. As I have indicated, I fully recognize the need, indeed desirability, of staff advice and assistance to the agency in decision making. But that is very different from having the agency decide a case for various reasons, good or bad, and then having the opinion—i.e., the findings and determinations according to which the decision is to be supported—written by a lawyer-opinion-writing section which is simply writing a brief to the appellate courts in support of the decision otherwise arrived at. That process means that decisions can be reached irresponsibly, with the deciders never having to think through their rationalization, never having to examine their conclusion in the light of any logical relationship to the record. They can get away with voting in accordance (for instance) with the whispered advice of a politician because they do not have to justify their vote; their skilled lawyer-opinion-writers will write a brief for them which will provide the necessary support for the purposes of a judicial review that is satisfied if “some” evidence in the huge records can be made to point to the “findings.” It is this irresponsibility, flowing from the separation of deciding and rationalizing, that opens the way to “influence,” to incredible inconsistencies, and to downright superficial or even thoughtless decision of matters involving millions of dollars.

Of course there is no way by any device of procedure absolutely to prevent such irresponsibility. (Nor, indeed, is there anything to prevent a conscientious agency member, under present

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13. 2 Davis § 11.11, at 90.
procedures, from fully discharging his responsibility, as some certainly do.) But there is a device of procedure, I believe, which would make irresponsibility more difficult and responsibility easier. That is the device of having each case assigned to an individual agency member for the preparation of the opinion and having the opinion appear as his product after final concurrences or dissents by his colleagues.

This procedure was recommended to the Civil Aeronautics Board in 1951 by a committee of practitioners which had been created by the Board to advise on its procedures. The recommendation was not adopted.

The House Subcommittee on Legislative Oversight has now strongly recommended the same procedure for all agencies of the commission type, saying:

The subcommittee has been impressed with the need for change in the practices followed by some commissions of letting the commission staff rather than individual commissioners assume responsibility for the preparation of commission decisions and opinions. It is the view of the subcommittee that inconsistencies in commission decisions over the years are traceable to a considerable extent to the failure of following the practice of having the commission, or the majority of the commission, designate individual commissioners to assume responsibility for the preparation of the decisions or opinions of the commission, or the majority of the commission. It is the view of the subcommittee that this practice, which is traditional with the courts and which has been followed by some commissions, should be adopted by all commissions. It is the hope of the subcommittee that this change will produce a sense of personal responsibility of individual commissioners for the decisions and opinions of the commission and will avoid the practice of having commission staffs assume the burden of reconciling inconsistent decisions reached by the commissions.\(^{15}\)

Although the House Subcommittee does not mention the point, the committee of practitioners which made the rejected recommendation to the Civil Aeronautics Board eight years ago did recognize that such a procedure might require an enlargement of the personal staffs of the agency members. In the case of that Board, each member has only one assistant. For most agencies, one assistant would not be enough to enable the agency member to do the job. In the case of the CAB, each member probably would need a personal staff of three assistants.

There is a vast difference between a member’s personal staff helping in opinion writing, with its incident analysis of the record, and having an anonymous section of the staff write the opinion after the event. For even though the personal staff were actually to draft many of the member’s opinions, the product still

\(^{15}\) H. REP. No. 2711, 85th Cong., 2d Sess. 41 (1958). See also id. at 11.
would be the individual responsibility of the member; and the other members, aided by their personal staffs, would have the individual responsibility of concurrence or dissent. But in the product of the anonymous opinion writing sections of the agencies as presently functioning there is little, if any, individual responsibility. The present system permits every member of the agency to shrug off responsibility for determining what the records show; that annoying detail can be—and often is—left to the opinion writing section.

Davis seeks to prove that opinion writing by agency members is too burdensome to be feasible. He cites the fact that the opinions of the NLRB average ninety-one pages a month per member; whereas the opinions of the Supreme Court average only nine pages a month per Justice.\* His statistics fail to prove his point. Ninety-one pages a month would be no great burden for a member, with his staff, working fairly hard. Many of those pages are much easier to write than Supreme Court opinions, for in agency opinions there is much boiler plate and other matter that can readily be taken from the examiner's initial decision or from some combination of the initial decision and the briefs.\*

If it were known that agency members were going to have to produce opinions, it is very likely that a higher quality of agency member would result. Over the years we have seen, among the federal agencies at least, instances where appointment to an agency was apparently regarded both by the appointing power and by the appointee as a means of providing a haven until some other opportunity opened up. The haven would be less comfortable and inviting if it were clear that the member would have to work very hard at the painful process of writing.

Doubtless there are some good men who cannot write, even with staff assistance. After all, there was once a great Justice of the Supreme Court, highly respected by his colleagues and the bar, for whom writing was so difficult that during a considerable portion of his long tenure his opinion output was very small. But such a man is quite out of the ordinary. I would maintain that, generally speaking, if a man really cannot write he has no business being on an agency.

Likewise, to require opinion writing by the agency members would contribute, because of the demands on their time, to pressures to rid the agencies of administrative or executive functions which should not be lodged in them.

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16. 2 Davis § 11.11, at 90; cf. id. § 11.07, at 67–68.
17. Nor would it be inconsistent with opinion writing by agency members to have a reasonable amount of the agency's business handled per curiam, with some or even a large part of the per curiam writing done by the staff.
From time to time agencies have been saddled with jobs which should be done by one of the normal executive offices. Sometimes this is a nuisance to the agency members; sometimes it may be a rather pleasant diversion. But in no event is it proper. The CAB, for example, has no business participating in the negotiation of executive agreements with other nations—yet members of that Board are often out of the country or otherwise preoccupied for extended periods on missions which much more properly could be handled by some combination of the State and Commerce Departments.

Likewise, in the case of another of our agencies, testimony before the House Subcommittee on Legislative Oversight has suggested an inordinate amount of attendance at various industry conventions and other functions, the time devoted to which might much better have been spent on the agency's real job.

It might be hoped, also, that a greater measure of delegation of “routine” functions by agency members to the staff could be worked out. Under proper safeguards, delegation of functions to the staff could result, in some areas, in wiser decision of matters delegated, because of the staff's greater “expertise,” as well as in improved efficiency on the part of the agency members themselves.18

Another pressure which would be created, I believe, by requiring agency members to write the opinions would be the pressure for a better quality of examiners' initial decisions. Much ink has been spilled on the subject of the quality of examiners. The problem is important—and perplexing. One reason that there has not been more progress toward a satisfactory solution is that there has not been enough demand from the agencies themselves for a higher quality of examiners.

This lack of demand would be attributed by some, I am sure, to the “independence” of the examiners provided by law and a consequent reluctance by the agencies to risk the accusation of interfering with the examiners' status. Perhaps I am unduly cynical, but I doubt that this has very much to do with the matter. Much more important, I believe, is the fact that the inadequacy of so many of the initial decisions written by examiners simply does not make much difference to the agency members. The agency members really do not have to study the examiners' initial decisions with close care for they depend, for their paper work, upon their opinion writing section. To an extent much greater than is generally admitted or even realized, the examiner's product can be and is largely ignored once the case reaches the agency level.

If the agency members themselves had to write the opinions,
they would soon come to feel much more keenly how deficient 
the examiners' initial decisions so often are. Necessarily they would 
demand a better product from the examiners on which they could 
rely more fully in the preparation of their own opinions. With this 
demand, I believe that the examiners would respond enthusiasti-
cally for their work would then assume greater dignity and im-
portance than it does under present conditions.

I said at the outset that I would not review Davis's treatise. 
Yet in this discussion I have touched on a good many points 
which are dealt with in that treatise directly or indirectly. It 
would be easy to write at much greater length, for every page 
of this huge treatise is thought provoking. As I reflect upon 
it, the thought that is most persistent is that Davis's work has dem-
onstrated anew that "administrative law" is not a single subject, 
but a whole congeries of separate subjects, each, moreover, so dy-
namic that it is almost impossible to write upon it without being 
out of date by the time of publication. I would hope that, now 
that this invaluable treatise has been produced, Davis may con-
tinue the writing of articles pinpointing particular problems, as 
he has done so often in the past. Perhaps he will turn to some of 
the problems to which I have referred in this discussion.

Especially is it to be hoped that he might find the means to 
examine the decisions and practices of specific agencies in some 
key areas. Thus, in this treatise, there is one chapter19 devoted 
to types of administrative action not susceptible to effective ju-
dicial review for either theoretical or practical reasons but which 
have enormous impact in the regulation of business—illustrated 
by the SEC staff's letters of comment upon a registration state-
ment which often have the force of edicts because of the threat of 
stop-order proceeding.20 Davis himself points out that in all 
likelihood the typical agency accomplishes more through what 
he calls its "supervising power" than it does through all its other 
powers in combination, including its powers of adjudication and 
rule-making.21 Yet the chapter is tantalizingly brief and incom-
plete, giving hardly more than a suggestion of the great scope 
and importance of the miscellaneous nonreviewable powers which 
agencies and their staffs use so effectively. In this area alone— 
and there are plenty of others—the practitioner sees a pressing 
need for scholarly analysis and synthesis, even for mere description, 
of the behavior of specific agencies. For such a job there 
could be nothing better suited than Davis's trenchant, critical pen.

19. Id. ch. 4.
20. Id. § 4.01, at 234.
21. Id. § 4.12, at 284.