

## Book Review

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>

---

### Recommended Citation

*Book Review*, 5 Md. L. Rev. 119 (1940)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol5/iss1/9>

This Book Review is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

## Book Review

---

**FEDERAL REGULATORY ACTION AND CONTROL.** By Frederick F. Blachly and Miriam E. Oatman. Washington. The Brookings Institution, 1940. Pp. xviii, 356. \$3.00.

This study of Federal administrative boards in operation presents a realistic approach to problems of government and law. The authors are well known in their own right, and have behind them the dispassionate point of view, the facilities and the deserved reputation for research of The Brookings Institution. The resulting work is an outstanding contribution in the field of administrative law.

It would be a relief of itself to find a study in administrative law which is free of all *a priori* approaches. There is no glorification here of the Federal administrative bodies as the perfection of government in action. Neither is there an instinctive condemnation of the administrative process. The policies of Congress which have been entrusted to the administrative bodies for execution are neither endorsed nor attacked. Instead, these bodies are portrayed and studied as existing organisms. Their varying functions are analyzed and, where the structures of their organizations differ, the variations are contrasted and compared.

The first part of the study is a presentation of the Federal administrative system in action, the second part deals with various suggestions which have been made as to its improvement. The analysis of the existing structure goes beyond a consideration of such typical bodies as the Securities and Exchange Commission and the National Labor Relations Board, which we think of as clearly administrative in nature, for the authors have perceived that the subject of their work is not the exposition of a defined and isolated legal phenomenon known as administrative law, but rather a study of the way modern government is seeking to solve the problems with which the conditions of modern life have confronted it. The analysis, therefore, necessarily includes processes which we customarily regard as executive, such as the appointment and dismissal of officers by the President of the United States and heads of executive departments, as well as the workings of such bodies as the Board of Tax Appeals, which is often considered a part of the judicial system. The authors analyze the method of Federal regulation of forty

different subject matters, involving approximately one hundred different tribunals.

This analysis shows how the various bodies were established, the method of their organization, their functions and procedure, the means by which their actions are enforced and the right of court appeal. The authors bring clearly to light a fact which is often overlooked in administrative law; the natures of the various administrative functions and the relationships of the governmental authority to the businesses and individuals involved vary as much as do the judicial and legislative branches of the Government.

The relationship involved in some cases is political or sovereign, such as the command of the Army and Navy and control over foreign relations. Here, although the individual may be seriously affected by the action taken, he has no redress except through Congress. Again, the relationship between the sovereign and the individual may be contractual, as where Congress, by passing the Court of Claims Act, waived governmental immunity. The proprietary functions of the Federal Government are in yet another category; in such enterprises as the Alaska Railroad, the Panama Canal and the Tennessee Valley Authority, the Federal Government acts as though it were a private corporation. Sometimes the Federal Government may be acting as a benefactor, as in the relief of youth or emergency conservation work and low cost housing. The regulation of business and industry by Government presents within itself quite different methods of approach, for the relationship may be one of the regulation of policy, as in the control of unfair methods of competition by the Federal Trade Commission and the regulation of the transportation system by the Interstate Commerce Commission; or the Government may act as a policeman, as in the administration of the Pure Food and Drug Law by the Department of Agriculture.

Functional analysis, of course, is not enough; the governmental process is of necessity dynamic. Theoretical lines of demarcation may in practice, through the erosion of time, be blurred or obliterated. So the beneficiaries of the Social Security Law, while in theory recipients without rights, nevertheless, through the acceptance of social security as a necessity of modern economic life, may well be regarded as having rights as well as privileges.

Yet the fact that classifications may change does not lessen the importance of realizing the difference in function in governmental activities. The Supreme Court of

the United States has often been criticised for the difference in its approach to questions of administrative law as those questions are presented in connection with different administrative bodies. This book makes clear that the nature of the governmental function being exercised may make one method of procedure proper in one type of administration where it would be improper and unfair in another.

Another important fact in government and law is clarified by this work. The many types of administrative agencies created by Congress have seemed to present a weed-like wilderness of organizations. It is still sometimes difficult to understand in a particular instance why one administrative agency is independent and another is set up as a division of an executive department, but the authors make apparent the general advisability of differentiation in the forms of administrative organizations. Some governmental functions, from their nature, can best be administered by the heads of executive departments, others by quasi-independent agencies or quasi-independent divisions, and others by independent boards and commissions.

The difference in function of these bodies and the difference in the relationships of government to the individual necessarily result in varying forms of administrative action. The authors illustrate and analyze a number of these forms. The clarity of their analysis can be illustrated by what is said of the fundamental difference between an administrative rule or regulation and an administrative order:<sup>1</sup>

“The rule or regulation differs from the order primarily in the fact that the purpose of the former is to establish a standard of general applicability, whereas the purpose of the latter (with exceptions which will appear presently) is to take action upon an individual situation. The subject matter of the rule or regulation is essentially that of the statute, extended and developed; the subject matter of the order is a specific situation and the application of the statute thereof. The rule or regulation does not inquire into the past or present conduct of a particular person or organization, or into a specific situation, whereas the order usually results from an inquiry into a specific problem of this type.”

---

<sup>1</sup> P. 67.

There is a wide variation in the methods by which administrative actions are enforced, and a corresponding variation in the incidence of the different types of enforcement upon the individual or the corporation subject to the process. For example, one agency may properly have to appeal to the courts for the enforcement of its order, while, at the other extreme, the mere decision of an administrative body to institute a certain kind of proceeding may have far more drastic repercussions than a final order. An underwriter against whom the Securities and Exchange Commission issues a show-cause stop order with respect to the sale of securities may be injured far more than a taxpayer against whom the Commissioner of Internal Revenue issues a jeopardy assessment. The initiation by the Board of Governors of the Federal Reserve System of an action to forfeit the membership of a state bank in the Federal Reserve System for alleged non-compliance with statutory requirements may have a far more sweeping effect than the issuance of a cease and desist order by the Federal Trade Commission affirmed by a court.

The authors deal with judicial control of administrative action as only one of the means of insuring a proper balance between the enforcement of governmental policy and the preservation of the rights of the individual. Control by Congress may, in some instances, be far more potent, for Congress may drastically modify the entire structure of its creature or may abolish it entirely. One of the most effective methods of control is non-legal in nature; a thorough investigation by a Congressional committee may produce more drastic reforms than courts, by the limited nature of their right of review, can properly achieve. Finally, there is the control of public opinion which, aroused by studies and investigations, private or public, or by the direct impact of the workings of the governmental system, must, in our democracy, be the ultimate safeguard of the efficiency and fairness of our institutions.

The second part of the book deals with certain suggestions as to reform of the present system. The authors first pay their respects to the executive management doctrine. This doctrine, embodied in the report of the President's Committee on Administrative Management, favors placing almost every regulatory agency within an executive department. The authors criticize this doctrine from both the points of view of administrative and legal technique and broad administrative policy. They point out that the

work of regulation of most of the administrative agencies is largely legislative in nature, that since they are acting for Congress in exercising delegated legislative power, they should be responsible directly to Congress. Wherever they touch constitutional or other substantive rights, they should be and are controlled by judicial action. Unlimited control by the executive department would, in the opinion of the authors, certainly impair and might destroy the value of the regulatory authorities as agencies of the law-making bodies.

Neither, however, do the authors agree with some of the proposals of the Walter-Logan Bill. After a closely reasoned analysis of this proposed statute, they come to the conclusion that some of its provisions are impractical and that others offer no real protection to the citizen but menace effective administration. Their criticism is buttressed by specific illustrations of the problems which would arise if the bill were enacted. The criticisms of the proposed statute here contained are non-partisan in nature and are made by an Institute which has been one of the foremost critics of the present administration on economic grounds.

Finally, the authors consider the so-called "Revisionist Doctrine", which may be summarized as a belief in the *ad hoc* examination of every administrative agency as to its functions, method of operation, caliber of personnel, efficiency of operation in carrying out the policy entrusted to it, and fairness to the citizens upon whom its operations impinge. Two illustrations of this method in operation are the investigation by the Senate Committee as to the workings of the National Labor Relations Board and, in our own State, the report of the Committee on the State Industrial Accident Commission. Other examples of this method are contained in the series of monographs already published by the Attorney General's Committee on Administrative Procedure, which merit the consideration of every student and practitioner of administrative law, whether or not there is agreement with the criticisms and recommendations which they contain.

One great advantage of the *ad hoc* approach is that it is in the soundest tradition of the common law, which is at its best in dealing with concrete situations rather than with abstract principles. Another advantage is that, through such examination of the workings of particular agencies, there can be an appraisal of the most important factor in any governmental institution: its personnel. The provi-

sions of statutes, forms of organization and contents of regulations, even judicial review, are in themselves inadequate to protect the state and the citizen, if the men charged with the actual carrying out of the policies misjudge their functions or, for other reasons, are inadequate or inefficient. Our confidence in our courts is largely based upon the quality and independence of our judges. The greatest need in connection with administrative tribunals, State or Federal, is for us to make sure that its administrators are and remain of the same high caliber.

REUBEN OPPENHEIMER.\*

---

\* Of the Baltimore City Bar.