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Book Reviews

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Administrative Law Text. By Kenneth Culp Davis. St. Paul. West Publishing Company, 1959, pp. xxiv, 617. $8.00.

Perhaps no other test of a book is so all-conclusive as pitting it against its avowed objectives. Does it meet, in satisfactory manner, those objectives? Mr. Davis states[1] that he is writing ". . . exclusively for law students. . . . not for practitioners, not for judges, not for administrators, and not for legal scholars." Being, by choice, a teacher of law students, Mr. Davis feels qualified to set forth those items which he believes they want in a text, namely:[2]

> ". . . significant problems to be opened up for them. They want informational background, and they want reasons, pro and con. They want to know the general drift of the authorities and they want spirited criticism of the authorities. They want ideas to spark their own imagination in trying to solve problems. They want the foundations for formulating their own opinions on major issues. They want illustrations and concreteness, not abstraction."

Measured against even this formidable array, it can quite fairly be said that Mr. Davis's book answers such needs most adequately.

His approach to the shibboleth of "separation of powers" is at once frank and refreshing. He takes little time and less space to demolish this erstwhile bastion of administrative law as it was viewed and taught even as recently as this reviewer's law school days, using as his wrecking tool Mr. Justice Jackson's dissenting statement[3] that in describing administrative agencies as ". . . quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution," the courts have implicitly confessed ". . . that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." In seeking to direct the student's approach to this matter, Mr. Davis lays

[1] DAVIS, ix.
[2] *Ibid.*
[3] *F.T.C. v. Ruberoid Co.*, 343 U. S. 470, 487 (1952).

down the view that the principal guide is that of check, not separation, of powers; for ". . . tyranny or injustice lurks in unchecked power, not in blended power."[4] Concomitantly, he points out that in the federal courts, the doctrine of nondelegation of power has been so far watered down as to be of relatively small importance while also making it clear that the same doctrine has found favor in many state court decisions. Having disposed of these matters, Mr. Davis plunges exuberantly into the work of dissecting and analyzing the many other facets of his chosen field.

While recognizing full well that oft-times one may become impatient and irritated in his contacts with some of the individuals who collectively make up the vast agglomeration of boards and commissions on both state and federal levels, it is nonetheless regrettable that at times Mr. Davis allows his feelings to discolor an otherwise dispassionate treatment of his subject. His repetitive use of the term "petty," carrying with it a sense of small-mindedness or unyielding rigidity of position, to denote those agency officials or employees who carry out the lesser functions of such bodies, detracts from his work and, so far as this reviewer's experience is concerned, is largely without warrant. But of more importance, this attitude, manifested by one of the real authorities in administrative law, may bias students against such persons before they appear or practice before one or more of these many agencies.

That Mr. Davis has not merely produced a work of great scholarship, but has at the same time demonstrated a very practical working knowledge of the various administrative agencies themselves was forcefully brought home to the reviewer by the coincidental reading of Mr. Davis's chapter entitled "Supervising, Prosecuting, Advising, Declaring and Informally Adjudicating," and Mr. Louis Loss's Foreword to the October, 1959, issue of the Virginia Law Review, devoted in its entirety to "Contemporary Problems in Securities Regulation." Mr. Davis, in critically pointing out the virtual unreviewability of the Securities and Exchange Commission's exercise of its supervisory powers, they being neither adjudicatory or legislative,[5] went on to illustrate their awesome coerciveness so far as registrants under the federal securities acts

[4] DAVIS, 30

[5] 69 § 4.01.

are concerned.[6] It was, therefore, noted with a great deal of interest that Mr. Loss, who has written the landmark

[6] To the reviewer, whose administrative agency experience has been gained primarily in the field of securities regulation, it seems that Mr. Davis, steeped as he is in his subject, assumes for the student a knowledge of this specialized field of corporate finance which few, if any, students possess, and by so doing loses some of the force of his illustration of the Securities and Exchange Commission's coercive powers over registrants, after the deficiency letters have been complied with and the final price amendment has been filed, *via* the granting or withholding of acceleration when he summarily says that at this point in the issuer's registration process, "[b]usiness reasons usually make acceleration of amendments so compelling that the registrant is willing to yield to onerous conditions". (70). To assign "business reasons," rather than explaining that it is the fear of the collapsing of the underwriting contract which is the force involved, seems oversimplification. In practically every large public offering of securities, the issuer (a) in the case of a negotiated sale of bonds or equity securities not having preemptive rights, executes a purchase contract with an investment banking house in which it is agreed that the investment banker will purchase all of the offered securities at a certain price, or (b) in the case of a negotiated underwriting of equity securities which do have preemptive rights, executes an underwriting contract which provides that for a fee, plus not infrequently certain profit sharing possibilities and additional fees for shares "laid-off," the underwriter will purchase at a certain price all of the offered securities which are not subscribed for by the issuer's stockholders under their preemptive rights within a stated number of days (usually about two weeks) after the initial public offering. This latter firm-commitment type of underwriting contract is the issuer's assurance that it will receive at least the agreed-upon price for its securities even if it cannot sell any of them to such stockholders. The underwriter's fee to the issuer for underwriting the sale of the preemptive securities is based, of course, on several factors such as the past performance of the issuer in earnings, its standing in the industry, and the current state of the market generally in the type of securities being issued. Overriding all of this, however, is the fact that, in the case of bonds or nonpreemptive equity securities, the purchase price is predicated upon the registration statement becoming effective promptly after the underwriting agreement is signed, and, in the case of a preemptive offering of securties, the underwriter's fee is predicated on this same factor. Under the Federal Securities Laws, the underwriter is unable, until the registration statement becomes effective, to "lay-off" or spread (through sales) the risk of having to take up and pay for the unsubscribed securities. Since securities markets fluctuate, often with great rapidity, the price which the underwriter agrees to pay for the securities is one based on his judgment of the market at the moment. However, without substantially increasing his fee to protect himself against possible declines in the market, no underwriter is willing to remain solely liable for the securities at a set price without being able to sell for a period of *twenty days* after the making of the underwriting contract. It is customary, therefore, for the underwriter and the issuer to conclude that the underwriter's fee and the price which he agrees to pay for the securities will be based upon the registration statement promptly becoming effective. To this end the underwriting contract contains a more-or-less standardized paragraph which provides:

> "The obligations of the Underwriter to purchase and pay for the [Securities offered under the registration statement] will be subject to . . . the following conditions:
>
> (a) The Registration Statement *shall have become effective not later than* [a stated hour] — *Standard Time, on the second business day following the date of this Agreement. . . .*"

Here the SEC's power to grant or withhold acceleration following the filing of any amendment to the registration statement comes into proper

work in the securities field,[7] should be making the same point in his Foreword when he wrote:[8]

> "Still another matter which cannot be reiterated too frequently is the *largely theoretical nature of judicial review in great areas of the Commission's work.* In the case of Securities Act registration especially, there is no need to belabor the point that the Commission — if not a Branch Chief or Assistant Director of Corporation Finance — is the Supreme Court of the United States to all intents and purposes." (Emphasis added.)

This is corroborative evidence, if indeed such were needed, of Mr. Davis's keen insight into a very technical and detailed segment of administrative law.

In only two instances involving substantive analysis of decisions of the Supreme Court did this reviewer find Mr. Davis's delineations somewhat hard to follow. First, in his chapter on Bias,[9] Mr. Davis, after noting that "[bias] in the scene of crytallized point of view about issues of law or policy is almost universally deemed no ground for disqualification," reviews the minority position as expressed

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focus. The student must visualize the registration statement relating to the security as filed with the SEC containing almost all of the necessary statements and disclosures with respect to the issuer and the security *save for the price at which the security is to be sold.* This price is not fixed until a day or two before the contemplated offering and is then negotiated between the issuer and the underwriter in the execution of the underwriting agreement. The issuer then files its price amendment to the registration statement and requests acceleration of the newly begun 20-day waiting period which, as Mr. Davis explains, was activated by the filing of such amendment. The grant of acceleration then becomes vital in the face of the above-quoted provision in the underwriting contract and this is the compelling "business reason" to which Mr. Davis refers. Unless acceleration is granted, the underwriter folds its tent and slips away, while the registrant solaces itself by gnashing it corporate molars.

Finally, Mr. Davis did not make it clear that no such "acceleration" problems exist in the case of a registration statement covering securities to be offered at competitive bidding. Rule 415 of the SEC requires the issuer to include in such registration statement an undertaking "to file an amendment to the registration statement reflecting the results of the bidding, the terms of the reoffering and related matters . . ." and provides that the order declaring such a registration statement effective for bidding, "shall be deemed to declare . . . [the price] amendment thereto . . . effective at the time such [price] amendment is filed" unless a stop-order proceeding has been previously instituted. This effectively removes the necessity for requests for acceleration upon the filing of the price amendment to such registration statements.

[7] LOSS, SECURITIES REGULATION (1951) supplemented (1955). Mr. Loss, in 1951 Associate General Counsel for the SEC, is presently Professor of Law at Harvard University.

[8] 45 Va. L. Rev. 787, 791 (1959).

[9] DAVIS, 215, Chapter 12.

by the British Committee on Ministers' Powers[10] (quoted with approval by the Administrative Law Committee of the American Bar Association[11] that "[b]ias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest."

In commenting on the view of the British Committee, Mr. Davis refers to the case of *F.T.C. v. Cement Institute*.[12] In his description of the factual background, he states:[13]

> "The Commission had issued a cease and desist order against use of a multiple basing-point system in the selling of cement. The Commission before instituting the proceeding had made reports to Congress and to the President expressing the opinion that the multiple basing-point system was a violation of the Sherman Act. The companies contended that the Commission had expressed a 'prejudgment of the issues' and that it was 'prejudiced and biased.' The Court specifically said that it was deciding 'on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations.' Then the Court held that the Commission's previously formed opinion 'did not disqualify the Commission.'"

Without reference to the Supreme Court's opinion here, one would be entitled (aside from the extremely oblique reference to the Commission's "prior official investigation") to assume from Mr. Davis's text that the Federal Trade Commission had of its own initiative and without directive or other sanction from Congress, begun a study of the multiple basing-point system and filed its conclusion with respect thereto with Congress and the President in an effort (a) to secure legislative action with respect to such system, or (b) to have the President direct the Attorney General to institute proceedings against the cement companies under the Sherman Act, all in addition to the action which the Federal Trade Commission planned under the Federal Trade Commission Act. If this had been the fact, then the Supreme Court's refusal to hold the Commission disqualified for bias would have been quite extreme. Upon reading the full opinion, however, one finds very sound grounds upon which the court could and did

[10] Report of Committee on Ministers' Powers (1932) 78.
[11] 61 A.B.A. Rep. 734 (1936).
[12] 333 U. S. 683 (1948).
[13] DAVIS, 216.

reach its conclusion. It pointed out that one of the cement companies:[14]

> "[I]ntroduced numerous exhibits intended to support its charges [that the Federal Trade Commission had previously prejudged the issues and was prejudiced and biased against the cement industry]. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, *as required by § 6 of the Federal Trade Commission Act.* 15 U.S.C.A. § 46. [This section of the act states in part that "The Commission shall have power . . . (d) *upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violation of the antitrust acts by any corporation.*] These reports, as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act." (Emphasis added.)

The court went on to state that the fact that the Commission had entertained such views as a result of its prior investigations did not mean that the minds of the members were closed on the subject of the defendant's basing point practices for here the industry participated in the hearings and produced some 49,000 pages of testimony on the matter. It concluded:

> "[The argument that because the Commission had previously concluded that the operation of multiple basing point system was a violation of the Sherman Act] . . . if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should

[14] *Supra*, n. 12, 700 *et seq.*

any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if [the complainants are] right, the Commission by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are 'unfair,' from any cease and desist order by the Commission or any other governmental agency.

"There is no warrant in the act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. . . . Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. * * *

"Neither the Tumey decision [holding it a violation of procedural due process for a judge who had a direct personal pecuniary interest in convicting the defendant, to try, convict, and commit him to jail] nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues every time, although these issues involve questions of both law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

While this case does reject the view of the British committee, it would certainly seem that the student would be more likely to understand the basis for such rejection had Mr. Davis placed this case under his discussion of "The Rule of Necessity."[15] In that section, he quite well points up [though for some reason without using this case as an illustration] the principle that "many cases recognize a clear reason for disqualification, but, nevertheless, hold on the basis of the rule of necessity that the tribunal

[15] DAVIS, 221, § 12.04

should act" for without such action persons might enjoy immunity from violations of the law.[16]

The second of these matters arises in what is probably his most scintillating and instructive chapter — Official Notice.[17] Having there stated the proposition that:[18]

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[16] See Timbers and Garfinkel, *Examination of the Commission's Adjudicatory Process: Some Suggestions*, 45 Va. L. Rev. 817 (1959), which brings this matter down to date in discussing the case of *Gilligan, Will & Co. v. SEC.* 267 F. 2d 461 (2d Cir., 1959), *cert. den.* U. S. , 4 L. ed. 2d 152, 80 S. Ct. 200 (1960). There a broker-dealer involved in the distribution of securities in the *Crowell-Collier* case was, on August 9, 1957, named in an order of the SEC which commenced administrative proceedings against the broker-dealer and others. On August 12, 1957, and before the briefing and argument of the case before the Commission (hearing and recommended decision by hearing examiner having been waived by stipulation), the Commission issued a press release (Securities Act Release No. 3825) in which it indicated that Gilligan, Will & Co., along with others, had violated Section 5 of the Securities Act of 1933 by its distribution of unregistered securities of Crowell-Collier. Thereafter, following briefs and argument, the Commission found a violation of such act by the defendant (Securities Act Release No. 5689, May 7, 1958) and suspended it from membership in the National Association of Security Dealers, Inc., for five days.

The broker-dealer appealed to the Second Circuit, contending among other things that the Commission, by its press release of August 12, 1957, had prejudged the matter. The Second Circuit dismissed this contention on the ground that the broker-dealer's failure to raise such issue before the Commission was a waiver of such objection on appeal. Nonetheless, referring to the bias, or prejudgment, issue the court cited Commissioner Sargent's statement (unreported but set out in Appellant's Brief) of his reason for not participating in the hearing "because I reached a definite conclusion of law upon findings of fact on August 12, 1957," and said (267 F. 2d 461, 468-469):

> "While we of course express no opinion on the correctness of Commissioner Sargent's assertion that §5 of the Administrative Procedure Act does not permit such participation as occurred here by the Commission itself in both the release and subsequent proceedings, we think it appropriate to express our doubts whether such participation was either necessary or desirable.
>
> ". . . the Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."

Here is the critical reaction of the Second Circuit that denouncement, ahead of the hearing, of the acts of the defendant by the agency prosecuting the defendant was neither "necessary or desirable."

In the Cement Institute case, 333 U. S. 683 (1948) such action, as noted above, was required by Section 6 of the Federal Trade Commission Act, and a denouncement by the F.T.C. without such responsibility imposed by statute could well have fatal results so far as a later hearing is concerned.

[17] DAVIS, 267, Chapter 15, which begins with the statement that "[n]o other major problem of administrative law surpasses in practical importance the problem of use of extra record information in an adjudication."

[18] *Ibid.*, 269, § 15.02.

> "Whatever the proper limits on official notice may be, those limits apply only to proceedings in which a trial type of hearing is required. Far more difficult is the determination of what fact finding is subject to the limits when it is clear that a trial type of hearing is required. Two Supreme Court cases give rise to the question whether a tribunal may use extra-record information as it chooses, without giving parties a chance to meet the information, when the information bears upon devising a remedy or imposing a penalty."

After having considered one administrative agency case, he discusses a criminal case in the final development of this theme. Recognizing the difficulty involved in using a criminal case to illustrate his point, Mr. Davis notes that the *Williams*[19] case, which ". . . may have unduly broadened the principle" [that a tribunal may use extra-record facts bearing on a remedy or penalty], did "not involve administrative action, but the basic problem of fairness — of due process — is the same in all types of adjudications.[20] He then proceeds to consider that case, wherein the Supreme Court affirmed the action of the New York Court of Appeals[21] which had affirmed a conviction of murder and the imposition of the death sentence by the trial judge despite the jury's recommendation of a life sentence. The trial judge had decided on the death sentence for the defendant after receipt of a pre-sentence probation report which covered some thirty other burglaries by the defendant in the same area where the murder was committed, and which pointed up other distasteful propensities of the defendant. Having set out these facts, Mr. Davis follows with the Supreme Court's flat holding that:[22]

> "In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. * * * We cannot say that the due process clause renders a sentence void merely because a judge

[19] Williams v. New York, 337 U. S.. 241 (1949).
[20] DAVIS, 270.
[21] 298 N.Y. 803, 83 N.E. 2d 698 (1949).
[22] *Supra*, n. 19, 251-252.

> gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."

He states that the court reached this result by reasoning that a trial judge has to rely on extra-record probation reports because [23] ". . . the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open-court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." From this, Mr. Davis concludes that this is the Supreme Court's guide to administrative agencies in their own use of extra-record facts. Certainly, this seems an unwarranted conclusion when the adjudicative process (if one may so divide a criminal case) was fully completed when the defendant had been convicted by a jury on record facts so that the only use of extra-record facts was not to determine adjudicative facts at all, but merely to assist in sentencing the defendant.

Although one might wish at times (for who among us has not done the same thing?) that Mr. Davis would not conclude that on a particular point the better reasoned opinions support his views, whilst aligning with any dissent from such conclusions the less well-thought-out decisions;[24] or that he would pontificate less dogmatically upon what the Supreme Court will or will not do in the future on various issues,[25] it would certainly be unfair to hold out that such matters detract seriously from a most effective and erudite work. This text serves a very definite need and is a fine distillation of the disciplines which abound in this field of law.

BIRD H. BISHOP*

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[23] *Ibid.*, 250.

[24] DAVIS, 291, § 15.14.

[25] *Ibid.*, 294, § 16.04, "The Supreme Court since the *Panama* case [293 U.S. 388, (1935)] has not again assigned constitutional reasons for the findings requirement, and it is unlikely to do so."

* A.B. 1942, Johns Hopkins University; LL.B. 1950, University of Maryland School of Law.