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Book Review. Cooper, F.E., State Administrative Law

Ralph F. Fuchs

Indiana University School of Law

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STATE ADMINISTRATIVE LAW. By Frank E. Cooper.¹ Indianapolis: The Bobbs-Merrill Co. 1965. 2 vols. Pp. xliii, 951. \$35.00.

The production of this noteworthy book provides new evidence of the maturation of administrative law as a coherent body of legal doctrine. The much advocated agency-by-agency approach to the subject can lead to added insights and may be useful in teaching; but here is proof, if proof were needed, that even among the fifty states with their wide diversities of legislation, executive structure, and judicial attitudes, a common core of government-wide methods and conceptions has developed, giving rise to the possibility of much cross-influence of legislation and judicial decisions. The total scheme has much in common with the federal system, with which it interacts to a significant extent. The importance of the whole is enhanced by the seemingly accelerated extension of administrative services and controls as the welfare and regulatory functions of government are enlarged.

The author's text is written with simplicity and clarity under chapter titles and subsidiary headings that provide a convenient, well structured framework. The organization of the book largely follows the arrangement of the Revised Model Administrative Procedure Act, in the preparation of which Professor Cooper served as a consultant. The work was produced under the auspices of the American Bar Foundation and the University of Michigan Law School. Dean E. Blythe Stason, who was chairman of the committees which drafted the Model Act and Revised Model Act, as well as director of the Bar Foundation and Professor Cooper's teacher at an earlier time, has supplied an introduction.

Professor Cooper has had a noteworthy career as a practitioner and teacher of administrative law, yielding experience which illuminates his approach and enhancing the value of his judgments time after time. Most of these judgments, except for some with respect to judicial review of agency action, seem to be little influenced by the generalized antipathy to administrative agencies which he also expresses, often by means of side remarks; for he is too good a lawyer not to comprehend the functions and needs of administrative agencies, as well as the interests of parties appearing before them. He makes only sparing reference to the literature of administrative law, but frequently cites American Bar Association committee reports,² the so-called "minority report" of the Attorney General's Committee on Administrative Procedure,³ and the report of the Task Force on Legal Services and Procedure of the second Hoover Commission.⁴

The first three chapters, dealing with some pertinent history and then with the separation and delegation of powers, present an obstacle to appreciation of the book for those who disagree with some of Pro-

¹ Professor of Law, University of Michigan Law School.

² ABA SPECIAL COMM. ON ADMINISTRATIVE LAW, REPORTS (1933-1939).

³ ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 10, 77TH CONG., 1ST SESS. (1941). The "minority report" consisted of the Additional Views and Recommendations of Messrs. McFarland, Stason, and Vanderbilt.

⁴ COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE (1955).

fessor Cooper's general views. The historical account, which is brief, centers almost entirely on the development of administrative procedure reform in the United States. The discussion of the separation and delegation of powers deals in large part with the decay of traditional doctrines and the difficulty of controlling certain tendencies toward excess, which are said to result from the bestowal of overly broad discretion upon administrative agencies (pp. 35-42). The author is careful to attribute these tendencies only to "some" agencies, and to assert merely that certain evil consequences, such as shortcutting procedures or stretching authority, "may" or "can" result—not that they inevitably will. No account is given of the reasons for the establishment of administrative agencies or their characteristics, against which the significance of the author's assertions could be gauged. The agencies simply come into existence, receive certain authority, and need to be checked. The net impact of the discussion in these first three chapters concerning the value of administrative powers is therefore largely negative⁵ and, it seems fair to say, is lacking in the realistic quality that appears elsewhere in the book.⁶ In the chapter on delegation there is, nevertheless, a useful enumeration of the "factors that motivate [judicial] decision as to sufficiency of limitation on administrative discretion" (p. 71). These factors include such significant items as the traditions in particular fields of administration, the kinds of private interests affected, and the varieties of procedure and judicial review which accompany the exercise of discretion under particular statutes.

After three more chapters dealing respectively with definitions, constitutional rights to notice and hearing, and public information, the body of Professor Cooper's book consists of three chapters on rule-making, including judicial determination of the validity and applica-

⁵ Professor Cooper comforts the reader at one point (pp. 20-21) with Ernst Freund's perception of a "gradual and rather unconscious drift . . . toward displacement of discretion." Nowhere does Cooper document such a tendency. In the chapter on delegation he indicates the contrary by recognizing that in zoning, public health and safety regulation, and certain varieties of price fixing, it is difficult or impossible to prescribe meaningful standards to limit agency discretion (pp. 62-67). Except for price fixing, these are areas in which administrative powers are steadily being expanded.

⁶ The usual discriminating realism disappears in various passages of the book where Professor Cooper expresses dislike for administrative agencies. At one point he quotes with relish a Florida court's denunciation of "the administrative process as a whole" (pp. 684-85). Elsewhere the statement is made that "in almost every state agency there are some officials who are so imbued with a missionary zeal to further the public interests served by the agency that they are emotionally incapable of making findings of fact fairly and objectively in certain cases" (p. 723). To persons impressed by the somnolence or timidity, rather than the zeal, of many state agencies this statement seems exaggerated, to say the least. The feeling behind Professor Cooper's belief may not be unrelated to that which produces a reference to "the staunchest exponents of administrative absolutism" (p. 723). These people are unnamed, and one inevitably wonders what advocates of absolutism in this country he refers to. Cooper may have alluded to them in an earlier passage as "those who dub the whole separation of powers concept as an unhappy anachronism, the product of an 'Aristotelian theoretician'" (p. 16). A footnote reference is to the first two pages of J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). I find no such characterization of Montesquieu or anyone else at that point in Landis's text or in other relevant passages of it. Landis does not denigrate the theory of separation of powers, but only some modern encrustations upon it which he deems to be unsound.

tion of regulations; five chapters on adjudication, including specific treatment of licensing and *res judicata*; and five chapters on judicial review, including a brief treatment of certain aspects of review of regulations. The author restricts his discussion of adjudication to "contested cases" as defined in the original and Revised Model Administrative Procedure Acts. A contested case in this sense is a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing. Excluded from the Acts and from detailed discussion in this book are the great body of informal agency proceedings to which no requirement of opportunity for hearing attaches. The author takes note of the existence of "informal adjudication" and recommends legislation to require that hearings be made available in all adjudications that may substantially affect important rights of persons or property (p. 126). Improvement of administration in areas which would remain subject to informal processes is a different subject, not sought to be covered here.

To this reviewer, chapter V, "Constitutional Requirements of Notice and Opportunity to be Heard," is the best in the book. Its twenty-five-page discussion summarizes cogently the considerations that have influenced judicial decisions in spelling out these requirements, including traditions in particular fields of administration, the impact of particular administrative determinations on private persons, and the nature of the public interests to be served. Trends toward greater judicial sensitivity in recent times to the actual impact of administrative actions on such people as license holders and public employees are recognized.

An outstanding feature of Professor Cooper's book is the emphasis which is placed on statutes as well as judicial decisions. The treatment of many of the topics commences with a generalized analysis, in which pertinent provisions of the Revised Model Act and of the general administrative procedure statutes of the states that have enacted these laws are set forth. A more detailed discussion of significant cases follows. In the treatment of judicial decisions the statutory provisions under which they are rendered are usually noted. Suggestions for statutory drafting are often given. The resulting emphasis is valuable from the standpoint of both accurate understanding and improvement of law. Statutory terms provide, in addition, a core about which the discussion of decisions is organized, so as to avoid needless proliferation of case citations.

Little would be gained by discussion in this review of the numerous detailed points of agency procedure with which the author deals, on many of which he expresses judgments. A goodly number of these are controversial. Whether all staff memoranda furnished to the hearing officer or the members of the agency in deciding a case, even though they deal only with questions of law, must be made available to the parties, as the author believes and the Revised Model Act provides, and whether agency heads or other deciding officers should be permitted to engage in *ex parte* consultation only with personal assistants on questions of law are open to debate. The necessary relation between

the evidentiary record and the final decision in a proceeding is, on the other hand, cogently stated in a manner which captures the essence of indispensable fairness in this aspect of institutional decision making (p. 446).

Professor Cooper's chapters dealing with various aspects of judicial review of agency action are influenced more largely than the rest of the book by his broad distrust of administrative agencies. Whether this distrust stems from an a priori philosophy of administrative law or from experience, it contributes grounds for certain conclusions of questionable soundness. These conclusions are influenced also by an uncritical approval of virtually all courts and their work, which leads Cooper to advocate, for example, that judicial review of state agency action be in the trial rather than in the appellate courts. Review in trial courts is, he says, "more efficient" because trial judges "can take more time than can appellate courts to explore carefully, with the assistance of counsel, the complexities of the administrative record and unravel the skeins of proof (which have an unfortunate habit, in administrative proceedings, of becoming badly tangled)" (p. 612). This view ignores the incongruity of having a single local judge review the work of a state body or official such as a public utility or insurance commission, and takes no account of the not uncommon mediocrity and political motivation (in cases involving controversial public issues) of elected local judges in many of the states. Professor Cooper also advocates liberal use of injunctions against agency action, both in the absence of other means of review and as an adjunct to them (pp. 632-36); availability of declaratory judgment proceedings without much reference to the exhaustion of administrative remedies principle (pp. 636-40); and, in accordance with the Revised Model Act, the addition of "clearly unwarranted exercise of discretion" to arbitrariness and abuse of discretion as a ground for setting aside agency action (pp. 756-72).

For Professor Cooper, the words courts use in explaining reversals of administrative action are often to be understood in an expanded sense which buttresses his unfavorable estimate of what agencies are likely to do. The frequent "heady exuberance" of agencies, which sometimes leads them to stretch their statutory authority to an extent that places their actions "beyond or even at variance with those of the statutes they are created to administer," is evidenced, he says, "by a number of cases in which state courts have had occasion to strike down administrative orders on these grounds" (pp. 693-94). Some of the cases he cites do indeed bear out his contention, although rarely in the sinister sense that would attribute a calculated grab for power to the agencies involved.⁷ Many of the cases appear to involve rather ordinary differences of interpretation of the governing statute, as to

⁷ *E.g.*, *Obradovich Liquor License Case*, 386 Pa. 342, 126 A.2d 435 (1956), in which the agency applied tests to the transfer of liquor licenses that were not specified in the statute with respect to license issuance (two judges dissented, however, from the reversal of the agency's action); *Arnold Home, Inc. v. Labor Mediation Bd.*, 338 Mich. 315, 60 N.W.2d 905 (1953), in which the Board attempted to use its authority to conduct a strike vote in order to conduct a vote over employee representation. These cases are cited on pp. 694 and 695, respectively.

which the agency does not seem to have been indubitably wrong. In one case,⁸ for example, a local board of health thought its statutory power to make such "regulations as it deems necessary . . . for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances" authorized it to convey broader power to the health commissioner with respect to the regulation of garbage disposal than four of the seven supreme court judges thought it did. The other three judges agreed with the agency; but the court, although it sustained the constitutionality of the statute, spoke of the duty of the courts "to confine boards, commissions and officers to the exercise of powers which are regulatory and administrative," to the end that "we shall continue a government of laws and not of men." In another case⁹ the question was whether an elaborate revision of the state banking code narrowed the grounds on which the department of banking had previously been authorized to disapprove mergers that would transform existing banks into branches. The court characterized the amendment as "poorly drawn" but differed with the department as to its interpretation, apparently with some reluctance. In order to bring its reversal of the order within the scope of the certiorari-type review to which the court was confined, it spoke of the exercise by the agency of "powers beyond those granted or possessed." In still another case¹⁰ the agency's narrow interpretation of the circumstances that would cause an occupational injury to be compensable had the support of a decision of the supreme court five years earlier, which was here overruled "in so far as it holds to the contrary." The court said, however, that the agency had "superimposed" a requirement upon those specified in the statute.

None of these aspects of Professor Cooper's book detracts significantly from the major contribution it makes to the study and practice of administrative law. It unlocks a storehouse of statutes, decisions, and insights that will be of great continuing value. It is to be hoped that the pocket supplements, for which the volumes are equipped, will be provided well into the future.

RALPH F. FUCHS *

LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT. By Michael I. Sovern.¹ New York: The Twentieth Century Fund. 1966. Pp. ix, 270, 54 (notes). \$6.00.

Professor Sovern's study, five years in preparation,² has been well worth the wait. Addressed principally to the concerned layman, the

⁸ *Weber v. Board of Health*, 148 Ohio St. 389, 74 N.E.2d 331 (1947) (cited p. 42).

⁹ *Dauphin Deposit Trust Co. v. Myers*, 388 Pa. 444, 130 A.2d 686 (1957) (cited p. 694).

¹⁰ *Brown v. Industrial Comm'n*, 9 Wis. 2d 555, 101 N.W.2d 788 (1960) (cited p. 694).

* Professor of Law, Indiana University School of Law.

¹ Professor of Law, Columbia University School of Law.

² See Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962).