Book Review. Davis, K.C., Administrative Law Text

Ralph F. Fuchs
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub
Part of the Administrative Law Commons, and the Legal Education Commons

Recommended Citation
BOOK REVIEWS


In this rather slim volume, when measured by law-book standards, Professor Davis has made available specifically to law students most of the text of his four-volume Treatise on Administrative Law.¹ In an effort to retain the depth of the discussion in the Treatise, its content has been substantially preserved; but certain amplifying passages have been omitted. Aside from the omissions, economy of bulk has been achieved through the use of a two-column format, characteristic of the publishers' contemporary Hornbook Series, and the reduction of footnote citations to a minimum. Occasionally the text is altered to take account of a development that followed publication of the Treatise.² Chapter and section designations are the same in the two works, so that the reader of the shorter one may readily refer to the longer work for additional citations and occasionally for additional illustrative text. The result is highly readable, with only occasional internal evidence that the discussion has been truncated at points.

The author's theory, expressed in the preface, is that law students do not want or need simplified exposition but, rather, desire full discussion, including "spirited criticism of the authorities," so as to "spark their own imagination" and provide the foundation for them to formulate "their own opinions on major issues." This theory is sound. Not spoon-feeding of over-simplified ideas, but guidance and challenges to thought are surely the due of students at the graduate professional level. Given the right kind of teaching, even the less brilliant ones are not likely to succumb without adequate thought to the lure of the author's ideas, ably stated.

In both the Treatise and the Text, Professor Davis writes expressively, using predominantly short sentences and sometimes rather graphic or homely language. Thus on page 6 the "purple hues of economic royalists" are referred to. On page 19 a mythical "Mr. Practitioner" is introduced as the medium for expressing conventional ideas about administrative law. On page 53 constitutional principles relating to the administrative power of investigation are said to have been "largely turned right around backwards." On page 188, "The institutional decision has turned out to be a mighty hardy animal." If some of the elegance of classical writing is sacrificed to this mode of expression, interest to students does not suffer.

The author deals with the topics of administrative law that have become standard since the subject took form in the late 1930's. His strong views permeate the book. He has clear judgments on almost all controversial issues, and he expresses them vigorously and effectively. His treatment, however, is not dogmatic; for he recognizes and respects opposing points of view, even while striking them down. On the whole he defends the utility and soundness of the characteristic pattern of agency organization

and procedure today, especially the institutional decision, even while he deplores such phenomena as the "ineffective regulatory agency, which often goes through the motions of regulating, thereby silencing the sponsors of the legislation that brought the agency into existence," but at the same time "is careful for the most part to regulate in the interest of the regulated, thereby silencing them." He also calls for simple, readily available methods of judicial review, and for review of adequate scope, to guide agency performance and serve as a safeguard against abuse.

The chief target of Professor Davis's criticism, far exceeding in prominence the decisions with which he disagrees, is the contradictions of reasoning that have emerged in Supreme Court opinions on important issues of administrative law, subjecting practitioners and the lower courts to conflicting generalizations from on high. It is so as respects, among other subjects, delegation of legislative power, exhaustion of administrative remedies, ripeness for review, "standing" to secure review, and mandatory judicial relief from administrative action. In the preface to his Treatise he articulates the standards of judicial performance which he thinks should be observed, especially abstention from "easy generalizations" that are almost necessarily ignored or augmented by others, or spuriously distinguished, in subsequent cases. His points are generally sound and supply needed critical judgments of judicial performance; yet the scholar is perhaps under an obligation to sense underlying factors and supply insight to the Court, subject to pressures it cannot escape, has left unexpressed from time to time. To some extent Professor Davis supplies such insights, even while condemning the Court for not expressing its true reasons for decision. In less mellow mood, he makes much at one point of the inconsistency between Federal Crop Insurance Corp. v. Merrill and Moser v. United States, holding, respectively, that the Government is not estopped and that it is estopped by failure to bring home to an affected party a clearly applicable rule of law operating to his disadvantage. The two decisions are indeed contradictory and difficult or impossible to reconcile logically, and the Court made no effort to square the later one with the earlier. Yet the facts and the human considerations in the two cases are utterly different. Whether one agrees with the results or not, one can rather easily recognize the practical factors that moved the Court in each instance, and suggest with at least tolerable assurance the possible course of future decisions, even if the Court failed to supply an explicit guide.

Basic to Prof. Davis's argument at several points is the distinction he

3 P. 18.
4 §§ 2.02-2.06.
5 §§ 20.01-20.07.
6 Ch. 21.
7 Ch. 22.
8 §§ 23.09-23.12.
9 See, for example, pp. 360-365, explaining the probable reasons for various decisions on the necessity of exhausting administrative remedies.
draws between "legislative" and "adjudicative" facts, upon which he bases his conclusions on a series of points, such as whether a trial-type hearing is required before an agency when facts are in dispute, and whether extra-record facts may be used. This classification of facts is highly useful and perhaps serves as well as any distinction could as a foundation for reasoning to settle a range of procedural problems. Yet it is far from adequate in itself and needs supplementation for the solution of some issues which Professor Davis apparently thinks it settles. It seems extreme, for example, to say that "Legislative facts are ordinarily general and do not concern the immediate parties." When a record-type hearing is secured by statute and the basic issues are legislative, such as the content of a food standard under the Food, Drug, and Cosmetic Act or the need for new transportation to serve the public convenience and necessity, the immediate parties may feel a strong interest which the legislature has in effect recognized for procedural purposes. Contrariwise, reasons of tradition and of practical administration may call for procedural freedom, at least as a matter of constitutional due process, in situations of vital importance primarily to an individual; and it seems extreme to condemn the Supreme Court for not reducing to complete doctrinal consistency the due process requirements for procedure in determining criminal sentences and that for the administrative determination of matters of somewhat lesser moment.

But these matters, involving differences of judgment, do not detract from the superb treatment which Professor Davis gives to many of the outstanding issues of administrative law, upon which his insights, applied to his knowledge, produce definitive essays. Among the outstanding portions of the Text are those which elucidate the significance and effect of legislative and interpretative rules, the place of institutional decisions and the desirability of separation of functions, the law of evidence in administrative proceedings, and the principles of primary jurisdiction. In the last of these passages, incidentally, as well as elsewhere in the Text, Professor Davis gives credit to the Supreme Court for what he regards as sound and consistent decisions.

All in all this student Text and its companion works constitute one of the handful of truly major achievements of American legal scholarship during the present century. The legal profession, legal education, and the cause of better government are deeply in debt to Professor Davis for the ability and the years of dedicated labor he has devoted to his self-imposed task of producing these books.

RALPH F. FUCHS*