

Louisiana Law Review

Volume 13 | Number 2

*The Work of the Louisiana Supreme Court for the
1951-1952 Term*

January 1953

ADMINISTRATIVE LAW, by Kenneth Culp Davis. West Publishing Company, St. Paul, 1951, pp. 1024. \$8.00.; ADMINISTRATIVE LAW, by Reginald Parker. The Bobbs-Merrill Company, Inc., Indianapolis, 1951, pp. x, 344. \$5.50.; FEDERAL ADMINISTRATIVE LAW, by F. Trowbridge vom Baur. Callaghan and Company, Chicago, 1947 Supplement, pp. 303.

Melvin G. Dakin

Repository Citation

Melvin G. Dakin, *ADMINISTRATIVE LAW*, by Kenneth Culp Davis. West Publishing Company, St. Paul, 1951, pp. 1024. \$8.00.; *ADMINISTRATIVE LAW*, by Reginald Parker. The Bobbs-Merrill Company, Inc., Indianapolis, 1951, pp. x, 344. \$5.50.; *FEDERAL ADMINISTRATIVE LAW*, by F. Trowbridge vom Baur. Callaghan and Company, Chicago, 1947 Supplement, pp. 303. , 13 La. L. Rev. (1953)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol13/iss2/31>

This Book Review is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

ADMINISTRATIVE LAW, by Kenneth Culp Davis. West Publishing Company, St. Paul, 1951, pp. 1024. \$8.00.

ADMINISTRATIVE LAW, by Reginald Parker. The Bobbs-Merrill Company, Inc., Indianapolis, 1951, pp. x, 344. \$5.50.

FEDERAL ADMINISTRATIVE LAW, by F. Trowbridge vom Baur. Callaghan and Company, Chicago, 1947 Supplement, pp. 303.

It has been only a decade and a half since the report of the President's Committee on Administrative Management and only a dozen years since the publication of the final report on Administrative Procedure in Government Agencies by the Attorney General's Committee, but during this interim, administrative law has come of age. Since 1947 the American Digest System has carried an administrative law heading with the case collection extending back to 1936 and, as Mr Parker chidingly notes, American Jurisprudence managed in 1942 to include it in the then current volume by prefixing "public" to administrative law. Through the years the United States Code Annotated has been a source of case material and some legislative history has there been collected by agencies and subject matters. Since 1948 West Publishing Company has published an excellent adjunct to the code in the Congressional and Administrative News Service, with new legislation and administrative rules and rulings carried in full text as they become available.

Easier access to some of this material has been had since 1936, when the Federal Register Act was enacted in answer to judicial and congressional indignation over the rules carried to the premises of the Panama Refining Company in the "hip pocket" of Mr. Ryan.¹ Since 1946 and the congressional enactment of the Administrative Procedure Act we have enjoyed the full impact of a flood of federal agency procedures printed in the Federal Register and the Code of Federal Regulations. Of the two loose-leaf services which have sought to deal with this material on the general level of administrative law, only Pike and Fischer has survived to become a standard reference work. CCH, no longer current, is useful now primarily for its carefully and minutely detailed analysis of the 1941 report of the Attorney General's Committee on Administrative Procedure.

While we have not had the advantage of the scholarship of

1. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

pioneers Goodnow, Freund, and Frankfurter on these more recent developments, at least in treatise form, there has nonetheless been a steady stream of classroom and reference material from government and commercial presses. There is now an abundance of casebooks in the field and there are many special studies.

Of the three current works prepared in treatise form which are here reviewed, Reginald Parker's is the most recent although it is antedated by Kenneth Davis's work by a matter of only a few months. The third work was written some ten years ago by Frederick vom Baur of the New York City Bar but was rendered current after the enactment of the Federal Administrative Procedure Act by the preparation of an extensive supplement integrating the new statutory provisions into Vom Baur's treatment of pre-existing case law and special statutes. An introduction to the supplement was prepared by Dean Roscoe Pound.

As Professor Davis notes in his prefatory and introductory remarks: "Possibly no other major field of law has been so long so much in need of systematic statement of principles. . . . The field is still so unruly that one is sufficiently ambitious who attempts to dig out and to organize the problems, to present such law as is susceptible of summary, to discuss pros and cons, and to contribute here and there to solutions. . . . [A]s of the middle of the century, the theory of separation of powers, while still guiding the drafters of constitutions, has hardly any influence upon administrative arrangements or activities. . . . The heavy emphasis is now upon the administrative process itself—rule making and adjudication. . . . In addition to adjudication procedures in the narrow sense—what takes place in initiating and conducting a proceeding—administrative law is concerned with problems of collective or group decisions, commonly referred to as institutional decisions; bias of agencies and officers; separation of judging from other functions, such as investigating and prosecuting, which may contaminate the judging function; substitutes for the exclusionary rules of evidence; the extensive use of extra-record information and understanding; findings, reasons, and stare decisis; and the binding effect of determinations." Thus Professor Davis pitches his work primarily at the level of the administrative process.

It is the administrative process which gets major emphasis in Mr. Parker's work as well, with only very sketchy treatment of judicial review. Thus in his prefatory pages Parker notes that:

"Administrative law [in earlier years] was believed to be essentially the law of judicial review—of court control against administrative excess. Living and teaching in the middle of the twentieth century, however, the author views administrative law in a different light. He thinks of it as law that 'protects' not only citizens but also the government as well. The book, then, shows the limits placed upon the individual and the executive branch of the government. The government is to be for the people and it can function only through law. That the executive branch may do so in an adequate fashion is the concern of administrative law." Implementation of the rather enigmatically stated description of administrative law as law "protecting the government" as well as citizens appears to lie in the author's fairly close analysis, in treating judicial remedies and elsewhere, of the rules which the judiciary has imposed upon itself against undue interference with the administrative process.

Only ten years earlier, Mr. vom Baur, in the opening paragraphs of his treatise, set the stage for a treatment of administrative law almost wholly in terms of judicial review by noting that: "The real heart of the field appears to lie in . . . the rules governing the validity of the acts and conduct of the administrative agents of the government. This is the one homogeneous branch of the subject. . . . [T]he great bulk of [these] principles of law governing acts of public agents are established in litigated cases, and these arise, with rare exceptions, only where asserted private interests are affected. It is obvious that the heart of the field, and the reason for its existence, lies in the assertion of private rights [on judicial review]."

On the basis of the rightness of his analysis, Vom Baur devotes possibly ten per cent of his treatise to formal consideration of the administrative process and proceedings and substantially the remainder to the principles and prestidigitations of judicial review. Mr. Parker, on the other hand, endeavoring as he says "to present administrative law as a part of modern public law," reverses the process and devotes only some ten per cent of his work to the formally headed topic of judicial review. It seems apparent that work which slight either judicial review or administrative process and procedure to the extent indicated can hardly qualify as general treatises on administrative law. Professor Davis's work, on the other hand, approaches expectation of a balanced treatise on the subject in its modern development, devot-

ing as he does about a third of his text to problems of judicial review and about two-thirds of it to the administrative process and proceedings.

Currently, of course, the central fact in federal administrative law, with which these works are mainly concerned, is the history and enactment of the Federal Administrative Procedure Act in 1946. What they contain by way of comment and analysis of the crucial provisions of the 1946 Act is, as a consequence, a fair criterion of the function these books will serve, or continue to serve, in the practitioner's or law school's library.

Thus Vom Baur, the traditionalist, finds the heart of administrative law in the principles of judge-made law resulting from litigation. He finds "the backbone of administrative law" in the doctrines of "the supremacy of law and separation of powers." A paucity of modern judicial support for at least a part of his backbone is evidenced by the fact that he finds it necessary to cite the *St. Joseph Stockyards* case² thirty-four times and *Crowell v. Benson*³ forty-two times. However, Vom Baur has no difficulty in finding in the 1946 act categorical reaffirmance of the proposition (in Section 10 of Judicial Review) that, "Under the supremacy of law embodied in Article III of the Constitution, the ordinary courts are empowered to control government officials and agencies to the extent of holding them to the law." While he cites Dicey's "nine editions" in support of his position, he neglects to point out that even the man who wrote the introduction to the last of the nine editions has stated that Dicey's thesis needs modification. As might be expected, Vom Baur is content merely to quote, largely without analysis, the bulk of the act, devoted as it is to regulating the administrative process directly rather than through judicial review.

Parker's opinion of the 1946 act is best exemplified in his own rather pungent phrasing: "Some opponents greeted the new law with the same undiluted antipathy with which they had opposed the prior bills. Most critics, however, were more or less satisfied with the comparatively small innovations the Act has brought about. This acquiescence, of course, contrasts somewhat with the attitude of the admirers of the law, which was repeatedly hailed as 'the most important statute affecting the administration of justice in the federal field since the passage of the Judiciary

2. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936).

3. *Crowell v. Benson*, 285 U.S. 22 (1932).

Act of 1789.' . . . [A] more temperate investigation reveals, indeed, that the Act's chief merit lies in the fact that it has refrained from any telling innovation. . . . [T]he APA is anything but a codification of administrative procedure. . . ." Mr. Parker amply demonstrates the extent to which the act does not supplant case law, particularly in his two excellent and exhaustive chapters on "administrative regulations and interpretations" and "administrative decisions."

One of the permanent values of the Davis work is its careful analysis and documentation of the forces which finally culminated in the enactment of the APA in 1946. Particularly is this so of his treatment of the separation of functions and adjudication sections of the act which are even more "hilariously complicated" than the recent amendments to Section 60 of the Bankruptcy Act. It is possible to make the provisions intelligible only in the context of, on the one hand, determined opponents' attempting to "kill the institutional decision" and, on the other, highly persuasive administrative considerations militating against such a result. Professor Davis succeeds in holding the welter of gossamer-thin distinctions in focus throughout his able commentary on this attempt to emasculate the administrative process by transferring a staggering burden of agency decisional work from the usually capable but anonymous agency "staff" to the often limited competence of an identifiable "examiner." The compromise which Congress has attempted by providing for the separation of investigating and deciding functions within an agency (but not at the top of the agency), the shielding of initial licensing and rule-making from even this degree of separation, the later congressional adoption of separation of functions even at the top of the agency in the case of the National Labor Relations Board, all this is etched out with consummate skill. Not a little of the wealth of delightfully enlightened comment consists of pointing the way for interpretation of numerous ambiguities so as to accomplish the legislative purpose of fair play and at the same time not impose crippling procedures upon the agencies.

Mr. Parker, by virtue of the organization of his book, treats the subject of separation of functions and the institutional decision under two widely separated major topics, first under a sub-part devoted to the organization of the agencies and second under a sub-part devoted to the procedural requirements of a valid administrative decision. I think the result is that the subjects do not get

a fully satisfying analysis in either place although it is tantalizingly clear that Mr. Parker could readily supply such analysis had he time to stop and do so. For example, he notes that "there is certainly no federal agency whose hearing officers would not indulge in the practice of consulting with their assistants" despite the implications of the proscription in Section 5(c) of the APA that "no such officer shall consult any person or party on any fact in issue unless upon notice. . . ." Yet he is content to let the matter rest with a reference to the Attorney General's commentary on the act which "boldly asserts" that permitting the hearing officer to engage with appropriate agency personnel in an analytical discussion of the record is thoroughly consistent with the purposes of the act. In Davis, on the other hand, you find a carefully worked out interpretation of the statutory language supporting the notion that such consultation was intended by Congress, annotated with a full array of references to legislative sources and other comment. Parenthetically, the immeasurable damage which would be done to the quality of agency adjudication at the examiner level by a contrary interpretation is a measure of the irresponsibility of the 1944 proposal of the American Bar Association which would have categorically prohibited any consultation—even with the examiner's own law clerk—if the proposal had been literally interpreted.

Vom Baur is of little help in understanding the ebb and flow of the contest over limiting the administrative process which culminated in the enactment of the APA. Since the objective of his treatise is, as has been noted, primarily to present an orderly treatment of the judge-made principles of administrative law and particularly the law of judicial review, the work provides a Procrustean bed into which the crucial provisions of the APA can be fitted only painfully at best. Nonetheless, his work has continuing value for the practitioner, for it contains all that hoary body of principle which would endow the administrative agency with a status in some respects more limited than that of the jury. In both the federal and state judiciaries these principles, presented with sufficient eloquence, still win occasional cases at the district court level and sometimes in the higher echelons as well. Vom Baur has included a convenient collection of statutory provisions for judicial review of administrative action and requisite forms in connection therewith.

But for genuine understanding of the legislative and judicial developments which comprise current administrative law, there

is as yet no collection and commentary approaching that which Professor Davis has supplied. Developments in the field of fact finding, particularly problems as to the use of the common-law rules of evidence and judicial and official notice are well presented. There is also a very useful section on the judicial difficulties with the development of new law by case to case adjudication as exemplified in the *Chenery* litigation.⁴ A highly critical treatment of Justice Jackson's dissent in the last round of the litigation loses some of its effectiveness, however, by reason of a failure to get the issue clearly joined—Professor Davis overlooked the fact that the Securities and Exchange Commission withdrew the opinion containing the *ad hoc* general principle with which he confounded Justice Jackson and thereafter issued an opinion containing, in effect, only a statutory finding of unfairness and inequitableness founded on "undispelled doubts."⁵ Justice Jackson might more accurately have been criticized for failing to follow the then undisturbed principle of non-review of mixed questions of law and fact which he had hewed out in the *Dobson* case.⁶

Parker's swiftly-moving commentary contains much penetrating insight but suffers from either publisher or author impatience to "get on with the job." Perhaps the explanation for the sparseness which characterizes much of Parker's treatment lies in the extent to which there is reliance upon Hans Kelsen for the theoretical background of the subject and a preoccupation with the limitations which Kelsen has imposed upon the legal scientist against attempting to influence the law-making process by recommending a particular meaning of a legal norm.⁷

"Recommending to the legal authority one of the different meanings of a legal norm," however characterized as to its polit-

4. S.E.C. v. *Chenery* Corporation, 318 U.S. 80 (1943); 332 U.S. 194 (1947).

5. In the Matter of Federal Water Service Corporation, 18 S.E.C. 231 (1945) replacing In the Matter of Federal Water Service Corporation, 15 S.E.C. 849 (1944).

6. *Dobson v. Commissioner*, 320 U.S. 489 (1943).

7. "... the task of a legal scientist interpreting a legal instrument is to show its possible meanings and to leave it to the competent legal authority to choose in accordance with political principles the one which this authority thinks the most appropriate. In showing the possibilities which the law to be applied opens to the legal authority, the legal scientist scientifically serves the law-applying function; and in revealing the ambiguity, and thus the necessity for improving the wording, he serves the law-creating function in a scientific way. If the legal scientist recommends to the legal authority one of the different meanings of a legal norm, he tries to influence the law-making process and exercises a political, not a scientific function. . . ." Kelsen, *Science and Politics*, 45 Am. Pol. Sci. Rev. 641 (1951).

ical or scientific function, is, on the other hand, a task which Professor Davis welcomes and vigorously performs—to the great enrichment of his treatise.

Addendum

Special legal studies in the recent past include one from the press of the University of Michigan entitled *Administrative Agencies and the Courts*, by Frank E. Cooper, 1951, pp. 470, \$5.00, and one published in London by Sir Isaac Pitman & Sons, Ltd., entitled *American Administrative Law*, by Bernard Schwartz, 1950, pp. 144, \$4.75. The subject also has been treated generally from the political scientist's point of view in *Federal Administrative Law*, by Rinehart John Swenson, The Ronald Press Company, New York, 1952, pp. 376, \$6.00, and specially in *Administration of National Economic Control*, by Emette S. Redford, The Macmillan Company, New York, 1952, pp. 403.

West Publishing Company has now published its second current treatise in the field, *Federal Administrative Law*, by Urban A. Lavery, 1952, pp. 518. Sampling it leads me to hazard the view that it contains a great deal more "damnation of the darkness" and much less "lighting of candles" in this troubled field than the work of either Professor Davis or Mr. Parker.

Melvin G. Dakin*

* Professor of Law, Louisiana State University.