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Book Review of Administrative Law Treatise

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Book Review

ADMINISTRATIVE LAW TREATISE, Second Edition, Vol. 1. By Kenneth Culp Davis. San Diego: K.C. Davis, 1978. Pp. 634. \$40.00.

Reviewed by Charles H. Koch, Jr. †

I.

Professor Davis has guided administrative law through its evolution into one of the most important areas of legal study. The first edition of his four-volume *Administrative Law Treatise (First Edition)*,¹ published in 1958, has provided the conceptual base for the ascendancy of administrative law. He has now endeavored a second edition of this treatise, *Administrative Law Treatise (Second Edition)*,² and has recently released the first volume. So great has been the change since 1958 that the *Second Edition* will be almost an entirely new work. The topics covered in the first volume of the *Second Edition* are some of the most dynamic in administrative law: investigation, access to information, and rulemaking.³ The speed of change in these areas makes even Professor Davis' 1976 supplement to the *First Edition*, entitled *Administrative Law of the Seventies*,⁴ somewhat obsolete.

II.

In the *First Edition*, Professor Davis constructed a systematic approach to the study of administrative procedure around sound practical thinking. He carries forward this approach in the *Second Edition*: "[T]he point of view from which the treatise is written . . . is that administrative law should be designed to carry out *all* enacted programs fairly and effectively irrespective of belief or disbelief in their desirability."⁵ Professor Davis suggests ways

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1. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1st ed. 1958).

2. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed. 1978) [hereinafter cited as *SECOND EDITION*].

3. The *Second Edition* is primarily a treatment of federal law because state administrative law development remains somewhat antiquated and follows rather than leads federal law. The *Second Edition* nonetheless does contain a thorough analysis of, as well as constructive proposals to amend, the REVISED MODEL STATE PROCEDURE ACT (1961), *reprinted in* 9C UNIFORM LAWS ANN. 136 (Supp. 1967). Using superior statutes of states which have developed their own versions of procedural acts as his point of departure, Professor Davis criticizes this act for, among other things, failing to except interpretative rules and general statements of policy from notice and comment procedures, omitting to state the type of evidence that may be relied upon, requiring that parties be notified as to all officially noticed facts, and failing to confront the sovereign immunity and informal administrative action problems.

4. K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* (1978). In itself a noteworthy treatise, most of this supplement to the *First Edition* has been incorporated into the *Second Edition*.

5. *Preface* to *SECOND EDITION*, *supra* note 2, at x (emphasis in original). Professor Davis declines to analyze the weaknesses and strengths of positive government, the concept that gov-

to make the government work for the benefit of all its citizens. He has always exalted the individual over society. Nonetheless, he recognizes that if government does not function as effectively as possible, it cannot fulfill its obligations to each citizen. Implicit in his work is an understanding that if government does not deliver the services assigned to it, then the system fails regardless of the accomplishment of any abstract procedural perfection. Particularly in the area of "mass justice," fairness and efficiency are often inextricably intertwined. In a broad sense, they are concurrent values.⁶ A process which comports with the niceties of abstract procedural thinking is unacceptable if it does not serve the mass of individuals who need the government to work. Government may break down because it misrepresents society in the way society deals with a particular citizen, but it also may break down when it fails to serve all of its citizens.

The key to a fair and effective administrative system lies in the appropriate utilization of administrative discretion. Professor Davis notes that "[p]erhaps the most significant twentieth century change in the fundamentals of the legal system has been the tremendous growth of discretionary power."⁷ His analysis revolves around the study of the proper scope of the exercise of discretion and the forms that exercise should take in order to provide a fair and workable administrative system.

It is little wonder that Professor Davis continues to remind us of the weaknesses of the artificial theoretical issues of separation of power, rule of law, and the nondelegation doctrine. His impatience with these useless, but resilient, notions pervades his analysis of them. According to Professor Davis, these concepts cloud the real issues of controlling and confining discretion. He notes that because the language and history of the Constitution are unclear as to whether or not separation of powers is in fact a constitutional mandate, the Supreme Court has felt free to fashion the theory to achieve the desired result.⁸ The various formulations of the rule of law are presently too vague to have any utility. The traditional formulation of the

ernment should play an active role in our society. He does, however, adequately meet the arguments of the opponents of positive government by pointing out that those who criticize the value of positive government for interfering in their lives are often the same people who demand greater governmental protection to resolve society's most difficult problems.

6. Although fairness and efficiency are often concurrent values, a factor underlying Professor Davis' conceptualization of many administrative law problems, administrative law must in many instances also balance fairness and efficiency as divergent values. For an expansive treatment of this traditional administrative law concept, see Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978).

7. SECOND EDITION, *supra* note 2, § 2:12, at 114.

8. Professor Davis notes that, in reality, "[t]he United States government does not operate and never has operated under a theory that legislative, executive, and judicial powers must be kept separate and can never be mixed up together." *Id.*, § 2:2, at 63. He posits, however, "that the *main* judicial power is in the courts, the *main* executive power is in the President and in those under him, and the *main* legislative power is in Congress." *Id.*, § 2:2, at 64 (emphasis added). Professor Davis acknowledges the fact that "each branch commonly interferes in the affairs of each of the other two branches." *Id.* Such interference is, nonetheless in his view, a desirable result of the separation of powers theory and in conformity with the theory of checks and balances.

nondelegation doctrine, which provides either that delegation of "legislative" authority is illegal or that delegation of "legislative" authority without standards is illegal, has also proven to be worthless.⁹

The real questions presented by these doctrines are the amount of discretion a legislature should confer upon an agency in different contexts and the extent to which the courts should interfere with the legislative decision. Professor Davis concludes that the appropriate means for achieving a fair and effective governmental mechanism is to ignore theoretical analysis and to concentrate on practical methods for confining, structuring, and checking discretionary power. For example, in his discussion of the nondelegation doctrine, Professor Davis offers "required rulemaking" as a truer method for obtaining the protection theorists have been attempting to wrest from the traditional nondelegation doctrine. In Professor Davis' view, discretion can be managed more effectively by requiring agencies, rather than legislatures, to set standards for its exercise. In addition to the reformulation of the nondelegation doctrine, Professor Davis provides two other "tools" for mandating required rulemaking: the use of the void for vagueness doctrine and due process. Due process may require agencies to define the law through rulemaking. Vague statutes need not be invalidated but rather may be corrected by administrative standards providing sufficient concreteness. As Professor Davis convincingly argued in *Discretionary Justice: A Preliminary Inquiry*,¹⁰ administrative standards may, in certain circumstances, be superior to legislative standards.¹¹

Practitioners should recognize the practical value of Professor Davis' thinking. It is much more difficult to convince a court to invalidate a statute for a violation of due process, vagueness, or an improper delegation of legislative authority than it is to convince courts to invalidate *administrative action* for want of an administrative rule by using these doctrines in the manner suggested by Professor Davis. Although courts are uncomfortable when striking down a statute, they are not reluctant to question administrative action.

Practical thinking about controlling discretion also pervades Professor Davis' analysis of the proper scope of an agency's power to inspect premises and gain access to private information during the investigatory process. The law presently permits an inspector to obtain a warrant with few procedural limitations.¹²

Professor Davis questions the utility of injecting the magistrate procedure into the investigatory process where a warrant may be obtained with so

9. The Supreme Court continues to uphold delegations of all varieties, including those with no standards. See *FPC v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring in part and dissenting in part).

10. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

11. *Id.* at 45-50.

12. To obtain a warrant, an inspector need not show probable cause to believe that a violation has occurred, but need only show probable cause to conduct an investigation. See *Camara v. Municipal Court*, 387 U.S. 525, 535 (1967). Moreover, an inspector need not set forth with specificity the property to be searched in order to obtain an area search warrant. *Id.* at 538-39.

few limitations. The question is thereby raised whether real protection from improper inspection will be found in the warrant machinery or in some other techniques for controlling and confining discretion. Where individual privacy is at issue, the magistrate can question the search and perform a valuable function in protecting individual privacy, but where business interests are sought to be protected, the need for a magistrate is less apparent. Professor Davis suggests that "[a]n individual has interests in privacy that a corporation does not have A corporation's principal privacy interest is in its papers" ¹³ Consequently, a commercial building, such as a warehouse, should not be protected by any privacy interest as against a public inspector. As Professor Davis states: "With respect to premises, the strongest privacy has to do with the home, not commercial establishments." ¹⁴ A basic defect in administrative law may be that the same doctrines are applied to the rights of individuals and the rights of business enterprises. In a free market society, business enterprises are somewhat public, performing functions which in another economic system would be performed by publicly owned entities. Theoretically, there is thus no reason why they could not be treated more like government institutions. This is particularly true with respect to the disclosure of information both to investigating authorities and to the public.

Professor Davis continues to provide the most reliable guide to the imprecise and poorly conceived statutory structure comprising the present public information system, especially the Freedom of Information Act (FOIA). ¹⁵ His discussion of FOIA and its statutory companions in the public information system is meticulous, complete, and full of authority. He adds a great deal of rationality and detail to the basic statutes.

Nonetheless, the chapter on FOIA is the one area in which Professor Davis seems to have abandoned practical thinking. The most curious statement in the book introduces the chapter on the FOIA: "The Act as amended and interpreted has become a highly successful piece of basic legislation." ¹⁶ Many of the serious difficulties with the public information system are discussed or alluded to in the chapter. ¹⁷ The system neither provides useful

13. SECOND EDITION, *supra* note 2, § 4:9, at 251.

14. *Id.*

15. 5 U.S.C. § 552 (1976).

16. SECOND EDITION, *supra* note 2, § 5:1, at 309.

17. For example, Professor Davis finds "solid and sound in all respects" an opinion which required "the district court . . . [to] hold an evidentiary hearing to determine what information was confidential." *Id.*, § 5:8, at 330, *citing* Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975). Such a requirement would be extremely burdensome to courts and, if applied to agency determinations, would result in thousands of evidentiary hearings on confidentiality claims.

The costs of the present system are enormous and increasing. In their 1977 annual reports, four agencies reported costs of over \$5 million, with the Justice Department leading with costs of almost \$13 million. 4 ACCESS REP. 11 (May 2, 1978). My experience suggests that such reported costs greatly understate the real costs. Moreover, the costs are not recaptured through fees. In a 1976 annual report, for example, the Department of Health, Education, and Welfare reported costs exceeding \$5 million and fees collected equalling \$135,661. 3 ACCESS REP. 8 (May 4, 1977). Fees, of course, go to the general treasury and not back to the agencies.

information to the public nor avoids unnecessary interference with the operations of government. If Professor Davis were to speak with the people who attempt to comply with FOIA, he would discover the useless waste of public funds which could be spent on other important government services and the disruption of vital government functions. The solutions to these problems are as much in the public interest as is the disclosure of information.¹⁸ A system of public access to government information is desirable, and also essential to our form of government, but should not be the present wasteful, debilitating system.

On the other hand, Professor Davis' practical thinking is most evident in his development of concepts surrounding administrative rulemaking. In the *First Edition*, he drew rulemaking to its proper place at the forefront of the administrative process by demonstrating that rulemaking is often not only an efficient decisioning process, but also is the fairest way for an agency to proceed. The *Second Edition* adds greatly to this development.¹⁹

In recent years the law of administrative rulemaking has developed rapidly and the speed of its evolution has left a natural disorientation. No one is better able to mold this development into a logical system than Professor Davis, as demonstrated in the *Second Edition*. More importantly, he opens new areas for further development and offers new concepts which may be utilized.

The procedural questions rest initially on a distinction between rulemaking "on the record" and rulemaking on a "rulemaking record." Professor Davis' discussion of this problem is important and cannot be summarized. The nature of the rulemaking record is a difficult and subtle question which Professor Davis probes from various perspectives. The rulemaking record is not the same immutable compilation as that of a trial. It may include information obtained outside the specific rulemaking proceeding and it may even include information obtained after the rule has been promulgated. Typically, Professor Davis cautions against relying "unduly on habits of thought concerning formal adjudication, habits of thought that are not necessarily transferable to rulemaking."²⁰

18. Koch & Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1.

19. Unfortunately, Professor Davis merely outlines the major provisions of Improving Government Regulations, Exec. Order No. 12044, 43 Fed. Reg. 12,661 (1978) (Order), and does not express any opinions regarding its efficacy. With all due respect to the Order's naive enthusiasm, the Order is overly simplistic. Its drafters were clearly ignorant of the manner in which things actually work. The drafting of regulations could be improved, for example, by requiring that no regulation pass through more than two levels of bureaucratic review, and that before the regulation becomes final it must be returned to the initiating staff for final rewrite. Poorly drafted regulations are often the result of review through a multitude of superfluous administrative levels by persons who are neither informed of the subtleties of the subject matter nor concerned with in-depth analysis.

20. SECOND EDITION, *supra* note 2, § 6:5, at 464.

After Professor Davis' long campaign, the movement away from trial procedures in making rules of general applicability "has been strong and pervasive."²¹ There has been, however, considerable creativity by Congress, the courts, and the agencies in improving the basic notice and comment rulemaking.²² Professor Davis discusses, for example, six efforts by Congress to innovate and finds a slight trend away from cross-examination.

Cross-examination has been the procedural focal point for most of the analysis relating to the usage of the methods of trial in rulemaking proceedings. Other trial processes, such as written interrogatories and other pre-hearing practices, may be more appropriate to informal rulemaking but practitioners have focused attention on cross-examination. Professor Davis finds that cross-examination rarely withstands cost-benefit analysis,²³ and Professor Davis convinced the Administrative Conference that cross-examination should only be used for issues of specific facts. This distinction between issues of general and specific facts is, however, more easily stated and defended in the abstract than applied.²⁴ My interviews with rulemaking presiding officers at the Federal Trade Commission (FTC) indicate that they could not utilize a limitation based on distinguishing types of issues. It simply is not possible to discern from a question during cross-examination the issues that the cross-examiner is exploring.²⁵ For this reason, the

21. *Id.*, § 6:8, at 475.

22. Because his commitment to practical analysis demands common law type evolution utilizing the full creative potential of the courts as well as Congress and the agencies, Professor Davis strongly disagrees with the Supreme Court's pronouncements in *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc.*, 435 U.S. 519 (1978). In essence, *Vermont Yankee* indicates that the courts are not generally permitted to impose rulemaking procedural requirements upon agencies in addition to statutory procedural requirements. *Id.* at 523-25. The power to formulate procedural requirements is instead reserved to Congress and the agencies. *Id.* Professor Davis severely criticizes this decision. Clearly, the excesses and errors in experimentation of some courts cannot justify removing from the developmental process opinions by such distinguished judges as Friendly, McGowan, and Leventhal. For example, Judge Leventhal's opinion in *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), provided the foundation for recent congressional innovation in rulemaking procedures. Necessity suggests that Professor Davis will be proven correct in his prediction that the *Vermont Yankee* opinion is of limited and temporary vitality.

23. The benefits of cross-examination even in formal administrative adjudication have been questioned. For example, Judge Prettyman, in the second of his three Henry L. Doherty Lectures on administrative hearings, stated that "[t]he necessity for cross examination has been greatly exaggerated. . . . [C]ross examination has very limited usefulness in administrative cases." Prettyman, *How To Try a Dispute Under Adjudication by an Administrative Agency*, 45 VA. L. REV. 179, 190 (1959).

24. The Environmental Protection Agency (EPA), however, may have made the issue designation approach work by using a "two-tiered" procedure. The first tier is basically used for notice and comment rulemaking, while the second tier is used for issues requiring trial procedures, particularly cross-examination. Procedures for Rulemaking under Section 6 of the Toxic Substances Control Act, 40 C.F.R. §§ 750.1-9 (1978) (adopted by FTC). See Notice of Proposed Rulemaking for Children's Advertising, 43 Fed. Reg. 17,967, 17,968 (1978). Apparently, the EPA rarely, if ever, utilizes the second tier.

25. For a discussion of the practical problems which arise with respect to the issue designation approach of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified in scattered sections of 15 U.S.C.), see Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679 (1976).

Magnuson-Moss Warranty—Federal Trade Commission Improvement Act²⁶ rulemaking procedure at the FTC has been criticized and efforts are being made to modify it.²⁷ The only way to inject cross-examination into notice and comment rulemaking is to require those who petition for it to demonstrate with specificity that certain facts, whether general or specific, cannot be developed in any other way.²⁸

Professor Davis has always been the strongest advocate of rulemaking and he has continually found new areas where its use would result in improved decisionmaking. In attacking the age-old argument for the primacy of the judicial process over rulemaking, he observes how poorly equipped courts are to formulate policy in this era of judicial government: "Among all courts and all agencies, the one that makes the most major policy with insufficient procedural protection is the Supreme Court of the United States."²⁹ He asserts that although courts are innovative in the procedures they impose upon agency policymaking, they do not impose on themselves any procedures designed for their own general policymaking activities. For example, the record in cases involving judicial policymaking rarely contains legislative facts, comments from affected nonparties, and findings or reasons for the general policy.

In his most startling assertion in the *Second Edition*, Professor Davis predicts that "[t]he time will come when the legal profession will focus strongly on the neglected subject of *lawmaking procedure* in all its forms," including the procedures of courts.³⁰ Although I do not share his confidence in the flexibility of the legal profession's collective thinking, Professor Davis does highlight a major defect in the judicial branch. Hopefully, his prediction will prove to be correct. Where the need was great enough to overcome the obstinate status quo in the past, Professor Davis has correctly prophesized the improbable.

III.

Perhaps the primary function of a treatise is to report and organize the law. Professor Davis not only succeeds in this task with meticulous care, but also accomplishes much more by attempting to create a system through which generalizations can be made about administrative procedure. He constantly strives to convey an understanding of the role discretionary power

26. Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified in scattered sections of 15 U.S.C.).

27. SENATE COMM. ON GOVERNMENT AFFAIRS, 95th Cong., 1st Sess., STUDY ON FEDERAL REGULATION VOLUME IV: DELAY IN REGULATORY PROCESS 42 (Comm. Print 1977).

28. See generally *Friends of the Earth v. AEC*, 485 F.2d 1031 (D.C. Cir. 1973); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966). For example, in *American Airlines*, Judge Leventhal noted that a request for cross-examination may be granted where there is a "specific proffer as to particular lines of cross-examination" at an oral hearing. 359 F.2d at 633 (dictum) (emphasis added). It should be noted that Professor Davis does not appear opposed to this idea.

29. SECOND EDITION, *supra* note 2, § 6:38, at 618.

30. *Id.*, § 6:38, at 626 (emphasis in original).

has within our governmental system and to achieve the proper balance between rules and necessary discretion in order to insure overall fairness and efficiency. Fairness and efficiency are interrelated in the administrative process: Fairness can only be achieved by a system which performs for all who are affected both directly or indirectly by government activities. Overall fairness demands that we consider practical solutions to administrative procedural problems while rejecting abstract doctrinaire concepts.

For this reason, one of the strengths of Professor Davis' approach lies in the precision with which he supports real, rather than abstract, protection for the individual. Realizing that the abstract concepts comprising the dogma of the legal profession can often inhibit the real protection for individual rights, Professor Davis tries to focus our attention on ascertaining the way in which a citizen can best be served by the process. Anyone who understands this approach will know how important it is to the vitality of administrative law.

Unfortunately, the *First Edition* has never been appreciated for its usefulness in everyday lawyering. One commentator, for example, suggested that the *First Edition* is not useful to practitioners because it does not tell them how to practice before agencies.³¹ Undoubtedly, he would criticize the *Second Edition* on the same basis. The volume, however, is important to practitioners because it not only recites what the law is, but also suggests what the law should be. An understanding of the latter could form the foundation for strong legal arguments. Not only has general ignorance of these notions caused practitioners to represent their clients less effectively, but the failure to use advanced administrative procedural concepts has also substantially hindered the growth of the law. For example, if advocates avoided utilizing the classic nondelegation argument and relied instead upon Davis' required rulemaking concepts, they might increase their chances of success in litigation with an agency, thereby forcing the creation of better law on that subject. Since administrative law is still emerging, its development is more malleable than mature legal subjects. Practitioners are therefore in the best position to establish and use the new ideas set forth in the *Second Edition*.

A practical work on administrative procedure cannot be merely a guide to the best techniques for operating within an established system. Practitioners need a tool which will help them to frame arguments for innovative and theoretically sound procedures, especially in an area where the concepts are so amorphous. The *Second Edition* provides such a tool by helping practitioners understand and present conceptual arguments which can be utilized to secure favorable procedures in their individual cases as well as to establish better procedures in future cases.

The first volume promises that the entire *Second Edition* will be at least as important as the *First Edition*. Professor Davis does not need anyone to

31. Westwood, Book Review, 43 MINN. L. REV. 607 (1959).

promote his work; his own reputation does it sufficiently. I can only recommend that serious attention focus on the author's concepts and analyses. Consideration of his ideas is essential in light of the need for practical logic in the rapid evolution of administrative law.