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# *The Federal Administrative Procedure Act and the Administrative Agencies* (1947)

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# BOOK REVIEWS

THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES, New York: New York University School of Law. 1947.

This book is a record of the proceedings of an institute held at the New York University School of Law in February, 1947 for the purpose of considering changes made in federal administrative processes by the Administrative Procedure Act of 1946.[1] From this record it appears that the plan for the institute envisages (1) a general appraisal of the Act, followed by (2) consideration of its specific effects on the operations of some of the more important federal agencies, and (3) an analysis of its requirements for "rule-making," "adjudication," and judicial review.

Dean Vanderbilt initiates the first phase of this inquiry with a fairly dispassionate summary of events leading up to enactment which serves to place the credit for the Act where it belongs—with the American Bar Association. Unfortunately, the balance of this part of the proceedings is not carried off with the same degree of competence. The "analysis" by Carl McFarland, Chairman of the A.B.A. Committee on Administrative Law,[2] and the "critique" by Professor Frederick Blachly, most vocal critic of the Act,[3] degenerates into a name-calling debate which may have added spice to the proceedings, but which adds little else.

The second phase of the institute—consideration of changes made in the proceedings of specific agencies by the provisions of the Act—is conducted with more decorum, but with little more profit. In large part this is probably due to the magnitude of the task assigned the various speakers. To be called upon to explain, in approximately two hours, what effect the nebulous provisions of the Administrative Procedure Act have had upon the many and varied functions of an agency like the Department of Agriculture, for example—and this to an audience which is unfamiliar with those functions—is an assignment which would baffle anyone.

Reactions to this herculean charge are varied. The Labor Department's Assistant Solicitor is demoralized to the point of assuring his audience that since the only sanctions which the Department imposes under the Walsh-Healy Act are those authorized by that Act, "there would appear to be full compliance" with the hortatory provision of § 9(a) of the Administrative Procedure Act that "no sanction shall be imposed except as authorized by law."[4] And the Assistant Chief Counsel from the Bureau of Internal Revenue becomes so entangled in the intricacies of the Act's requirements for "rule-making" that he seems to treat the requirement in § 4(c) that substantive rules be published 30 days prior to their effective date as a requirement that the agency give 30 days notice of proposed rule-making.[5] Other speakers avoid such pitfalls by devoting their time to readings from or paraphrasings of the Act, interspersed with assurances that their agency will comply, or to

[1] U.S.C.A. (1946 supp.) § 1001 *et seq.*

[2] And, according to a statement on the jacket of this book, "draftsman of the Act."

[3] See Blachly and Oatman, *The Federal Administrative Procedure Act* (1946) 34 GEO. L. J. 407, Blachly and Oatman, *Sabotage of the Administrative Process* (1946), 6 PUB. ADMIN. REV. 213.

[4] pp. 455-456.

[5] pp. 164-167.

recitations of the Rules of Practice which the agency has adopted to conform with the Act.

Such contributions are of no more value than Mr. Louis Caldwell's tirade against the manner in which the Federal Communications Commission and the courts have interpreted the substantive provisions of the Communications Act,[6] or Mr. C. A. Miller's invective against the Interstate Commerce Commission,[7] although the latter's performance, since he was also a member of the A.B.A. Committee on Administrative Law, may be taken as further evidence that the Act was conceived more in malice than in wisdom.[8]

But what students of the administrative process want from an institute of this sort is not reiteration of all the old familiar charges against administrative agencies, nor readings from the agencies' new Rules of Practice (which are available elsewhere),[9] but a discussion of how the agency, in formulating its Rules of Practice, has fit its various functions into the Act's categories of "rule-making," "adjudication," "licensing," etc., and what effect the requirements of the Act may be expected to have upon the discharge of those functions.

To the limited extent that such matters are considered by the speakers, there is not much to indicate that the Act will bring about simplification and standardization, although Mr. McFarland tells us that was intended.[10] We learn, for example, that the Civil Aeronautics Board treats merger proceedings under the Aeronautics Act as "licensing" and hence subject to the formal requirements of § 5, § 7, and § 8 of the Administrative Procedure Act,[11] while the Federal Power Commission treats its merger proceedings as "rule-making" subject only to the procedure prescribed in § 4,[12] and the Securities Exchange Commission similarly classifies its action on corporate simplification under the Public Utility Holding Company Act[13] Again, because the formal procedures of § 7 and § 8 apply only when agency action is "required by statute to be made on the record after opportunity for an agency hearing," those procedures must be followed by the Wage and Hour Division in promulgating wage orders under the Fair Labor Standards Act, which specifically requires a hearing,[14] but are not followed by the Immigration Service in deportation proceedings because hearing is required by administrative rule rather than by express statutory provision.[15]

Passing the perplexing problems inherent in the conceptualistic basis of the Administrative Procedure Act, Solicitor Hunter's description of the Department of Agriculture's difficulties in following the formal procedures required by the Act

[6] pp. 72-90.
[7] pp. 305-343.
[8] For other evidence to the same effect, see Henderson, *Making Secure "The Blessings of Liberty"* (1944) 69 A.B.A. REPT. 325, Sumners, *American Capacity for Self-Government Is Being Destroyed by Bureaucracy* (1944) 30 A.B.A. J. 3, McCarran, *Improving "Administrative Justice"* (1946) 32 A.B.A. J. 827, and Congressional debates on the Administrative Procedure Act at 92 CONG. REC. 2148-2164, 5647-5668 (1946).
[9] The September 11, 1946 issue of the Federal Register, containing all of the changes made in federal administrative Rules of Practice to comply with the Act, can be obtained from the Government Printing Office for forty cents. The price of this book is $7.50.
[10] p. 22.
[11] pp. 123-124, 135-136.
[12] p. 181.
[13] pp. 245-246.
[14] p. 447
[15] p. 296.

for the promulgation of milk orders under the Agricultural Marketing Agreement Act,[16] as well as Solicitor Foster's entire discussion of the problems confronted by the Securities Exchange Commission in attempting to perform its varied duties in compliance with the new statute,[17] are sufficient to illustrate the invalidity of the notion that one uniform system of procedure can be successfully imposed upon all administrative bodies regardless of the nature of their functions.

Because procedural devices cannot be divorced from the functions to which they apply, the abstract analysis of the requirements for "rule-making" and "adjudication" in the third phase of the institute sheds little light on how the Act will work. David Reich's lucid synthesis of the scattered "rule-making" requirements indicates that some improvement could have been effected by submitting the statute to him for re-drafting before enactment, but the best he can do with the statutory definition of "rule" to include agency statements "of general *or particular* applicability and future effect" is to suggest that statements of "particular applicability" are included in order to bring within the definition such matters as rate-making, price-fixing, and approval of corporate or financial structures[18]—which are specifically included anyway.[19]

John Dickinson's discussion of the Act's provisions for judicial review, which concludes the institute, is deserving of special mention. Mr. Dickinson favors a greater scope of judicial review for all administrative agencies, particularly on the agencies' findings of fact. And he finds that § 10, directing the court to "review the whole record or such portions thereof as may be cited by any party" and to set aside agency findings and conclusions "unsupported by substantial evidence," does require the reviewing court to go beyond the limits now generally recognized under the so-called "substantial evidence rule." True, § 10 does not require the court "to weigh evidence and substitute its own judgment for that of the administrative agency," but it does require the court "at least to look at the evidence on both sides and see whether the evidence in support of the administrative conclusion can fairly be regarded as substantial in the face of evidence on the other side."[20] To some, this explanation may not be clear—the precise function of a reviewing court which does not weigh evidence, yet must test the administrative finding by comparing the evidence in support of the finding with evidence against it, may be too subtle for their comprehension. Fortunately for all such persons, one of their number was in attendance and pressed Mr. Dickinson for further explanation. This is the answer he received.

> I do not think that a great deal of difficulty is involved there. In other words, the word 'substantial' is a word which has an element of the comparative about it; something that is very small may be substantial as compared with nothing at all on the other side. On the other hand, something that is two inches long may not be very substantial compared with something that is one hundred inches long on the other side. I do not think that the whole record formula requires the court to balance

[16] pp. 355-359. The Wage and Hour Division is confronted with the same problem in issuing wage orders under the Fair Labor Standards Act. See p. 447

[17] pp. 213-252.

[18] pp. 493, 512.

[19] Sec. 2(c) of the Administrative Procedure Act provides. "'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing."

[20] p. 487

the evidence where it begins to get close. Then, if there is a lot of evidence on one side and a lot of evidence on the other side, then the appropriate and sound application of the substantial evidence rule is to uphold the administrative body. But if the administrative body has only a little bit of evidence compared with a good deal of evidence on the other side, then you can argue that that is not substantial and I think that is the way the argument would have to run.[21]

In other words, in reviewing administrative action Justice lays aside her scales and takes up a yardstick.

In sum, then, there is little in this volume which will contribute to the understanding of either the Administrative Procedure Act or the administrative process to which it applies. And there is even less in it to support Dean Vanderbilt's thesis that "it is decidedly possible since the passage of the Administrative Procedure Act for any competent lawyer to comprehend federal administrative law."[22]

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DISCRIMINATION BY RAILROADS AND OTHER PUBLIC UTILITIES, by I. Beverly Lake. Raleigh. Edwards & Broughton Co. 1947 Pp. vii + 316.

Interregional conflicts, such as those involved in the reclamation program and freight rates, are producing numerous studies. One of these is a doctoral thesis on discrimination, in its invidious sense, in connection with railroad and other utility rates and services.

Prefaced by a chapter summarizing with admirable clarity and conciseness the history of politico-legal justifications for governmental interference with business, the conclusion drawn by Professor Lake is that it is a function of government to intervene whenever a business by discrimination inflicts serious injury which jeopardizes the economic freedom of a large number of individuals. Economic freedom is defined as "near-equality of bargaining power," in this connection (p. 59).

Although adjustment of prices and services to redress an imbalance more extreme than near-equality of bargaining power, subject to the requirement of a fair return, seems to be the standard of governmental planning advocated by Professor Lake, he would recognize other specific policies as legitimate. For example, though cost and demand factors are equivalent, the policy against governmental interference should prevail when the adjustment contended for is so slight as to be difficult to work out in proportion to the injury caused by the discrimination, or when the disfavored patron cannot show that the discrimination disturbs his competitive position or imposes on him an unfair burden of the costs, unless the favors are in the nature of corruption of government officials or result in impairment of the utility's ability to serve (pp. 112-115).

Where the cost-demand complex is variable, the policy in favor of inter-utility competition gives the edge to "governmental policing of private planning" over "governmental planning" (p. 156), but the utility must not be allowed to "smuggle in a planned economy of its own" (p. 186). These generalities demonstrate the difficulty of adjusting policy to a base of economic speculation. Some economists would say that when Professor Lake discusses joint costs he also means "alternative" and "common" costs. Furthermore, economists disagree among themselves on the selection of a time-span for consideration, and the emphasis to be given to

[21] p. 594.
[22] p. 4.