

to any society. But it becomes a matter of most critical importance in periods of crisis when the very life of the community depends upon the apprehension of wrongdoers and the prevention of their depredations. The state trials of sixteenth- and seventeenth-century England demonstrate that a system of criminal justice which is incapable of separating the innocent from the guilty not only produces human tragedy, but is itself a threat to the state's security. The enormity of the incidents surrounding the so-called Popish Plot of the 1670's lies not alone in the fact that the perjured testimony of Titus Oates sent a dozen or more innocent men to their doom. It also lies in the fact that the weaknesses of the system prevented the detection of the very real peril to the state which, in fact, existed. Judge Frank's book is thus not simply an exercise in humanitarian sentiment. It deals with problems which in enlightened self-interest we had better solve.

FRANCIS A. ALLEN\*

\* Professor of Law, University of Chicago.

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**Administrative Law.** By Morris D. Forkosch. Indianapolis: Bobbs-Merrill Co., 1956. Pp. xiv, 856. \$17.50.

There was a time when the teacher of administrative law could warn his students that there were no systematic treatises on administrative law and that salvation lay in close attention to the case-book and the instructor, plus the saving grace of a few law review articles. Early works by Goodnow and Freund drew upon comparative law to suggest there was such a thing as administrative law in the United States.<sup>1</sup> Subsequent writers turned their attention to a "vertical" study of individual administrative agencies,<sup>2</sup> which culminated in the monographic studies of the federal agencies by the Attorney General's Committee on Administrative Procedure.<sup>3</sup> None of these were of great use to the beleaguered student. Influenced perhaps by the organization of the conventional administrative law case-books and the form taken by the Administrative Procedure Act, administrative law scholars have in recent years produced a number of "horizontal" studies of administrative law, which attempt

<sup>1</sup> E.g., Goodnow, *Comparative Administrative Law* (1893); Freund, *Administrative Powers Over Persons and Property* (1928). Goodnow, *Principles of Administrative Law* (1905), contained material on "Officers" and "Local Administration" no longer considered as part of Administrative Law.

<sup>2</sup> E.g., Sharfman, *The Interstate Commerce Commission* (1931); Henderson, *The Federal Trade Commission* (1924); Patterson, *The Insurance Commissioner* (1927); Dodd, *Administration of Workmen's Compensation* (1936).

<sup>3</sup> The twenty-seven monographs were prepared for the Attorney General's Committee in 1939 and 1940 by an investigating staff working under the direction of Walter Gellhorn and including Kenneth C. Davis, both of whom have since made exceptional contributions to administrative law.

to make some generalizations about administrative law problems applicable to all administrative agencies—or at least to the regulatory agencies.

These treatises are generally organized on a single pattern: creation—history and delegation of power; procedure—notice, hearing, evidence, orders; judicial review—timing, methods, scope. Emphasis varies in Parker,<sup>4</sup> Davis,<sup>5</sup> Vom Baur,<sup>6</sup> Schwartz,<sup>7</sup> and Cooper,<sup>8</sup> but their central purpose is the same—to make a systematic statement of principles in an unruly field of law. Forkosch's treatise is the latest effort of this kind.

The substance of the Forkosch treatise is divided into five parts. The first part is a preliminary outline, covering in one hundred pages the origin of agencies, a brief survey of judicial review, separation and delegation, and notice and hearing, and an extended statement of the author's purpose and method. Part II is on "Delegation of Powers: Limitations on and Types of." It includes the conventional materials on standards and the like, and in addition some notes on subpoenas, licensing and summary powers usually classified in the investigation and hearing sections of other treatises. A brief section on the "Non-Adjudicatory Functioning of Administrative Agencies" makes up Part III. Part IV deals at greater length with "Adjudicatory Functioning" including notice, hearing, and the substantial evidence rule. The treatise concludes with Part V, a discussion of review—agency and judicial—including method and scope.

Professor Forkosch sets himself to a slightly different task than his predecessors in the field. His book is aimed at the "uninitiated"—student or practitioner—and its purpose is to furnish a "tool for teaching" for the former and a "documented source book" for the latter (P. vi). Two novel devices emphasize this approach. One is the series of "flow charts," graphically illustrating the administrative process, which are finally consolidated and refined into a one-sheet outline of the administrative process on page 783.<sup>9</sup> The other device is a series of "points of attack" upon the administrative process (called PATs by the author), a "few of the many possible Achilles' heels," made available, he are told, "[t]o inoculate in the student the 'feel' of his future professional life,

<sup>4</sup> Parker, *Administrative Law* (1952).

<sup>5</sup> Davis, *Administrative Law* (1951). Davis is particularly, but not solely, concerned with federal law.

<sup>6</sup> Vom Baur, *Federal Administrative Law* (1942).

<sup>7</sup> Schwartz, *American Administrative Law* (1950), is directed toward an English audience.

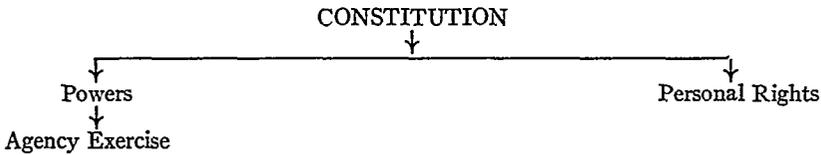
<sup>8</sup> Cooper, *Administrative Agencies and the Courts* (1951). Cooper's emphasis is upon the case-law-created standards.

<sup>9</sup> The first "flow chart" appears on p. 20, but a full explanation of the technique appears in sections 72-74. Thereafter each chapter has a concluding section "Charting the Administrative Process."

and to suggest to the practitioner the bases for his attacks upon the administrative proceeding" (P. vi).<sup>10</sup>

The charts are, indeed, an interesting device to help the student see certain relationships, but I have two grave reservations: first, most legal ideas do not lend themselves to handling as physical quantities; and second, there is an inevitable tendency to make everything seem so much simpler than it is. Students of administrative law in my experience have had a natural tendency to want administrative law to be simpler than it is. They want to over-simplify the questions, and they want a single answer. Half the work and not a little of the excitement in teaching administrative law is in persuading students to see how many and how difficult the questions are, how unsatisfactory many of our approaches and solutions have been, and how tentative and uncertain our answers are even now.

One of the first and simplest charts in the book illustrates judicial review under the Constitution as follows (p. 22):



The author comments as follows:

A delegatee of legislative powers obviously is on a *lower plane* than either the delegator or the rights of persons, both of which stem *directly* from the Constitution itself. If the agency were permitted to override personal (constitutional) rights then it would be able to exercise powers greater than its superior power, the delegator, has; in effect, therefore, the *lesser* would be *greater* than the *superior* [P. 22]. (Italics added.)

This illustration strikes me as not only labored and unnecessary, but somewhat unfortunate. It completely fails to suggest the interplay between "personal rights" and "agency exercise" which causes one to shape the other. Despite the "superiority" and "directness" of personal rights, recognition of an interest of the administrator limits the personal right—however we describe the decision. Beyond that, isn't the illustration too pat in its reliance upon physical geography in putting one power on a "lower plane" while making a right "stem directly"?

Perhaps the idea of points of attack is a more useful one—at least for the uninitiated practitioner entering an administrative proceeding late in the day

<sup>10</sup> "The twelve-question analysis of an administrative proceeding" in section 65 is the basis of, but not identical with, the twenty PATs which begin in section 77 and end with section 351 and the one-sheet outline.

and looking for a check-list (p. 99).<sup>11</sup> The terminology unfortunately suggests a limited concept of the lawyer's function in administrative proceedings and has overtones of hostility to the administrative process—matched by other word pictures of the author in which boards “run amok” (P. 6) and agencies are analogized to “vicious dogs” (P. 104)—but the PATs can serve this limited purpose.

The author is quite aware of the dangers of his flow charts and PATs and issues a caveat against them (P. 86).<sup>12</sup> Again, in connection with his sections pointing up “the very great similarities between a judicial case and an administrative proceeding,” he warns in a footnote of the impossibility of doing what he is attempting to do (P. 12 n. 29). But then he always goes ahead and does it anyhow—in the name of “pedagogical technique.”

Another basic approach of the book is its concern with something called “logical analysis” in an area where experience and not logic has been the basis for the development of the law.<sup>13</sup> This leads, for example, to a rather remarkable excursion in the sections on delegation. The author first supposes a rigid rule of separation of powers and then searches for “logical” devices to avoid it. The possibility of each of the three branches delegating power to a single agency is explored and discarded as a “*cul de sac*” (Secs. 36–38). The possibility of delegating the judicial “process” without delegating the judicial “power” is likewise discussed at length (Secs. 45–50). Ultimately the author concludes that the “logical corollaries and conclusions are too disastrous to be accepted,” and necessary delegations will be sustained (P. 46). This leads him to turn to a separate inquiry: “What are the *limitations* upon the actual Congressional delegation of power, assuming that power to delegate a conceded power is present?” (P. 103). Isn't it more sensible to ask merely: “What powers may Congress lawfully confer upon an administrative agency?”

The demands of “logical analysis” crop up again in the discussion of the constitutional-fact doctrine. “The application of this constitutional fact doctrine to specific situations discloses the formulation of the theory, the logical consequences of its use, and the resulting retreat from such consequences” (P. 750). The author's conclusion? “While of no great federal consequence as a practical matter, therefore, this does not mean that the Ben Avon doctrine is

<sup>11</sup> The author depicts a lawyer who enters a proceeding, desires to overturn the determination, and searches the record for weak spots. An analogy is drawn to a mechanic and a stalled car: “by starting his examination with the first of his points of attack the mechanic hopes to uncover all errors and reverse the stalling of the car” (P. 99).

<sup>12</sup> “All of these pedagogical tactics must suffer, to a degree, from the curse of all such efforts, namely, inability to set forth numerous exceptions, their fundamental assumptions, and the downright errors which are knowingly incorporated, albeit *caveats* are given, because a larger measure of understanding is thereby achieved than otherwise is obtainable” (P. 86). May I respectfully doubt the justification?

<sup>13</sup> The author is perfectly aware of this in his preface (P. v) and introduction (P. 8), but seems driven to make “logical analyses” constantly thereafter.

dead or that other jurisdictions cannot adopt it, for its strength lies in its logical and deductive analysis, beginning with a constitutional limitation" (P. 755).<sup>14</sup> Occasionally, the author is more pragmatic. For example, when discussing the problem of judicial review versus no judicial review he observes: "This dichotomy is deceptive in that while superficially rational it is, in practice, not useful" (Pp. 584-85). So also for many other dichotomies and logical analyses, explored at length in this book.

One final reaction: the treatise lacks unity and consistency of purpose. An appropriate subtitle would be "A Ramble Through Administrative Law for Various Purposes at Various Times." Within the boundaries of his five part organization, the author has felt remarkably free to present his material at various levels. Some difficult areas of administrative law are given the most cursory treatment: for example, the sections on exhaustion of administrative remedies<sup>15</sup> and on the subpoena power.<sup>16</sup> In contrast are the sections on methods of judicial review, where ten pages are given to a New York case (P. 680),<sup>17</sup> and an extended table and a number of forms for judicial review are thrown into the text.<sup>18</sup> Surely too much space is given to separation and delegation if the treatise is to be directed toward the modern student and practitioner.

Perhaps Professor Forkosch's book is not a treatise at all, despite its title. It should be judged as a sort of course-book, faithfully reflecting the author's special interests, emphases, and methods. Its greatest usefulness will be to his students. New teachers of administrative law will find it a useful source-book, and veterans will enjoy comparing his methods with theirs. It may not help the average law student. The flow charts can be misleading without the instructor at hand issuing caveats. The simplified treatment of some matters and the detailed treatment of others may be regarded as distorted by another teacher. In

<sup>14</sup> Does the author mean that the Ben Avon doctrine, which has undesirable consequences for sound administrative procedure, nonetheless has validity because of its "logical and deductive analysis"?

<sup>15</sup> For instance the cursory treatment of the exceptions to the rule of exhaustion on pages 558-59 are not even an adequate summary in comparison with Davis, *Administrative Remedies Often Need Not Be Exhausted*, 19 F.R.D. 437-92 (1957).

<sup>16</sup> The sections on the subpoena power at pages 130 to 140 seem to lack any historical perspective. Surely the cases reflect changing times, but the author manages, at pages 133-34, to sandwich a citation to *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298 (1924), between citations to *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), and *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943), in a single sentence of text. The cases are a world apart.

<sup>17</sup> *Marburg v. Cole*, 286 N.Y. 202, 36 N.E.2d 113 (1941).

<sup>18</sup> The objection here goes to fitness and proportion, not to the merit of the table and forms themselves. The updated Blachly and Oatman table on methods of review of various orders of various federal agencies is interesting raw material, but I doubt whether this extended listing is useful enough in a short treatise to justify the fifteen pages needed to reproduce it.

the end the book may find its largest use in serving as a check-list for the legal mechanic faced with a "stalled car."

Looking back over administrative law writing in the post-war period I wonder if we are not neglecting investigation of the administrative process. For instance, the Hoover Commission Staff might have taken up where the staff of the Attorney General's Committee left off in 1940, but it did not.<sup>19</sup> The state and local agencies, in particular, could be studied and described.<sup>20</sup> The pre-war materials have been digested, analyzed, codified to some extent, and discussed along with the case materials in a number of treatises. Before we launch into Act II of the administrative law drama, called for by the American Bar Association National Committee on Legislative Matters,<sup>21</sup> perhaps we should investigate agency by agency to see how things are working and what is needed.

PAUL OBERST\*

<sup>19</sup> Consult Davis, *Evidence*, 30 N.Y.U.L. Rev. 1309, 1341 (1955): "Satisfactory solutions are more likely to come from systematic description and analysis of experience."

<sup>20</sup> Land planning is daily becoming more important, but we know little enough about the administrative procedures in this area.

<sup>21</sup> Report of the National Committee on Legislative Matters, 9 Admin. L. Bull. 22, 27-28 (1957): "With the filing of this report the curtain is brought down on the first decade under the Administrative Procedure Act. . . . What is past is prologue. Those things which have been obtained mark only the beginning of a continuing struggle for fair and orderly procedures and a greater integrity in agency proceedings. This year will mark the opening of Act II which will unveil the Association's legislative program for a new Federal Administrative Code and related improvements in administrative law. . . ."

\* Professor of Law, University of Kentucky.

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*Trade Association Law and Practice*. By George P. Lamb and Sumner S. Kittelle, assisted by Carrington Shields. Boston, Mass.: Little Brown, 1956. Pp. 284. \$10.00.

*Trade Association Law and Practice* is the first volume of a series designed "to provide legal handbooks containing systematic statements of legal principles applicable to typical problems in specific segments of this field of law," i.e., trade regulation (P. vii). In the words of the editor, Professor Oppenheim, the purpose is to provide "a guide for the general practitioner who has little experience in this field, for the economist or business executive who wants to be quickly oriented in one of the areas covered, and for the specialist who desires a ready reference tool" (P. viii).

Lawyers with special claim to expertise in trade association law collaborated to write this hornbook-like treatise, one of them serving as general counsel for fourteen national trade associations. The authors have succeeded in compressing into relatively few pages a great deal of information on a complex subject. Despite the brevity of treatment unavoidable in a book of this size,