this may be[8]—in Illinois I am sure that it is not. Here relationships between Chicago and its environs and the agricultural areas of the state often hang in precarious balance, based upon uneasy bargains. In California, too, north and south may have very different interests to preserve, not likely to be resolved by counting heads. In such situations it is often necessary to throw obstacles in the way of poll counting, to withdraw such subjects from state-wide action until some higher degree of unanimity can be demonstrated by a campaign for constitutional amendment, or to provide for a representational scheme which makes minority consent a requirement for action. I see no indication that geographic factionalism has disappeared, and I think that it is important that the states and localities continue to experiment with ways in which factional competition over the good to be achieved through government can be resolved. I think that brakes on action, inertia points, vetoes, and the mechanics for determining the limits of the voting public in particular areas of decision are important subjects for such experimentation.

The pills which Fordham prescribes will make the general assembly brawnier and beefier; of that I am certain. As a nostrum I suspect them. Above all, I warn that they are compounded of prescription drugs and should be taken only on the advice of the family physician.

JO DESHA LUCAS*

[8] Though even here the reaction to the unicameral legislature has been mixed, the feeling being generally that it hasn't been as bad as its critics thought it would be, nor as good as its proponents had hoped. See Rodgers, *One House for Twenty Years*, 46 NAT'L. MUNIC. REV. 338 (1957); Lancaster, *Nebraska's Experience With a One-House Legislature*, 11 U. KAN. CITY L. REV. 24 (1942).

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Administrative Law Treatise. By Kenneth Culp Davis. St. Paul, Minnesota: West Publishing Co., 1958. 4 vv. $70.00.

Administrative Law Text. By Kenneth Culp Davis. St. Paul, Minnesota: West Publishing Co., 1959. Pp. xxiv, 617. $10.00.

For many years Professor Kenneth Culp Davis has labored in the vineyard of administrative law with sustained brilliance and industry. Fortunately, he has been productive as well as energetic, and the fruits of his efforts have been made available to the profession, first in a series of articles, then in a one-volume text,[1] and now in a four-volume treatise and its one-volume abridgement.[2] Judged by any standard, these writings are a major accomplishment of legal scholarship for which Professor Davis is justly celebrated. Teachers of adminis-

[1] DAVIS, ADMINISTRATIVE LAW (1951) (hereafter referred to as the 1951 text).

[2] The 617 pages of the text contain nearly all of the analysis of the 2,154-page treatise (not counting indices and forms). This is made possible by smaller print, double columns, and the omission of the detailed discussion and citation of authorities. The text will prove most useful to the law student and the treatise to the practitioner or scholar.

trative law have profited from, and have been greatly influenced by, his work, and practitioners and judges have been molding the law along the lines of his bold architecture.

The ingredients of Professor Davis's magnificent achievement are threefold: an enthusiasm for the administrative process, a passion for fair procedure, and a seemingly unquenchable thirst for enlightenment. The administrative process is not approached with a negative attitude of "it's here to stay," but with the firm conviction that it is an unsurpassed instrument for the achievement of legislatively-determined social goals, especially in times of rapid social change. But Professor Davis does not couple his belief in the utility of the administrative process with a sanguine hope that its power and flexibility as a governmental instrument will be employed inevitably in a beneficient manner. While wide use of discretionary grants of power, he feels, is desirable and necessary, procedural safeguards and judicial controls are also necessary to protect individuals from official oppression and mistake. The major task he has set for himself is nothing less than to demonstrate that powerful and effective government can also be fair government. To this task he has devoted prodigious energy and large abilities, not the least of which is an extraordinary capacity to remain open-minded while presenting his own (tentatively-held) views in a vigorous and provocative manner. The result is a work which is likely to rank with *Moore's Federal Practice* or *Corbin on Contracts* in its impact on the law.

While the major outlines of Professor Davis's approach to administrative law have remained unchanged over the last twenty years, substantial shifts in emphasis have taken place. His 1951 text radiated a chip-on-the-shoulder manner which sometimes conveyed the impressions that constitutional limitations on agency powers were passé, that the institution of judicial review was properly distrusted, and that the administrative agency was the hope and promise of the future. In addition, some chapters of the text were so devoted to establishing the point that the Administrative Procedure Act had not changed the law that broader issues failed to emerge.[3] The greater perspective of the 1958 treatise has partially remedied these deficiencies. Davis is now more critical concerning the weaknesses of the administrative process and more willing that courts should exercise broad reviewing powers. Several examples of significant shifts in view may be cited: the rule of necessity as an escape from the inability of a biased tribunal to take action is no longer unquestioned;[4] some skeptical passages with respect to the existence and extent of agency expertise are included;[5] and the possible use of the institutional decision as a device to deny effective judicial review of agency action is more clearly presented.[6]

[3] This was particularly true of the chapter on non-reviewable administrative action (ch. 19 of the 1951 text), although other chapters, such as that on separation of functions (ch. 10 of the 1951 text), suffered to a lesser extent from the same deficiency.

[4] 2 TREATISE § 12.04.

[5] See 4 TREATISE, ch. 30. *Cf.* 3 TREATISE § 19.06.

[6] 2 TREATISE, ch. 11.

The greatest contributions of the 1951 text were the chapters dealing with the powers and procedures of administrative agencies in gathering and evaluating information, and these remain in an expanded and improved form. The vanishing limitations on the power of agencies to compel the disclosure of information are summarized and contrasted with earlier contrary views; the problems created by institutional utilization of the fact-gathering potential of a large staff of experts, specialists and clerks are brilliantly explored in the chapters dealing with separation of functions, institutional decisions and official notice; and the wisdom of applying evidentiary rules to the administrative tribunal is ably criticized. Each of these chapters is concerned with the central problem of providing fair procedures without abandoning the special virtues of the administrative process. Although these chapters remain much the same in approach and content as in the 1951 text, some significant additions should be mentioned: further critical treatment of the residuum rule in the chapter on evidence;[7] criticism of the rule of necessity in the chapter on bias;[8] expansion of the official notice chapter to include a general discussion of judicial notice;[9] and considerable elaboration of the chapters dealing with institutional decisions and separation of functions.[10]

The major contributions of the new treatise, other than the universal improvement of the chapters on administrative procedure, lie in the area of judicial control of agency action. There is a fine treatment, largely new, of sovereign immunity, government liability and suits against officers.[11] The discussion of exhaustion of remedies, ripeness and standing has been immeasurably broadened and improved. An excellent treatment of mandatory relief has been added to the chapter on forms of judicial review in the federal system.[12] Outside of the area of judicial review, the chapter which has shown the most extensive development is that concerned with the requirement of a trial-type hearing.

Professor Davis's basic hypothesis is that there are—or should be—general principles of "administrative law" applicable to a wide range of governmental conduct and capable of systematic statement. These principles, according to Davis, are largely formulated by courts, particularly the Supreme Court—an outlook that seems somewhat narrow to this reviewer.[13] In any event, one of the distinctive features of the treatise is Davis' criticism of the Court for failing to enunciate these principles with the clarity and consistency which he thinks desirable and possible.[14] Certainly there are some matters, such as the application of the doctrine that administrative remedies must be exhausted

[7] 2 TREATISE §§ 14.10–14.12.

[8] 2 TREATISE § 12.04.

[9] Chapter 15.

[10] Chs. 11 and 13.

[11] Chs. 25–27.

[12] 3 TREATISE §§ 23.09–23.12.

[13] Davis states at one point that "the great bulk of administrative law that is worth discussing is, from a realistic standpoint, judge-made law." 1 Treatise § 1.01 n.8. This statement is effectively criticized in Newman, *The Literature of Administrative Law and the New Davis Treatise*, 43 MINN. L. REV. 637 (1959).

[14] See particularly the preface to the treatise, 1 TREATISE at iv–x.

before seeking judicial review, where a more forthright statement of the reasons for departing from the "general rule" would be of great assistance to lawyers, litigants and law teachers. On other matters, such as primary jurisdiction, the issues before the Court may be so dependent upon the interpretation of particular legislation, or involve so many imponderables of historical practice, discrete agency function, and the like, that a general principle purporting to be applicable to a wide range of governmental conduct may be misleading if over-particular or essentially meaningless if over-general. Although Professor Davis makes a brave effort, he does not altogether avoid the horns of this dilemma.

Davis' principles of administrative law relate to three matters: the powers which agencies may exercise, the procedures by which these powers are exercised, and the availability, timing and scope of judicial scrutiny of administrative action. Concerning the first, Davis concludes that the only limitations on the exercise of power by administrative officers are those which may be grouped under the rubric of procedural "due process." He appears to contemplate with equanimity the administrative seizure of property, enforcement of subpoenas, and detention of individuals (except to the extent that he believes that procedural due process, usually in terms of a fair hearing, has not been given). Behind some of these attitudes is Davis' abhorrence of the doctrine of separation of powers, which he repeatedly caricatures and ridicules. It is easy for Davis to score polemic hits on a distorted doctrine, but I remain unsatisfied that the basic notion—that governmental powers should be diffused and interdependent—should be so completely discarded. The existence of separate institutions of government, epitomized by the classic tripartite division of powers, presupposes not only that there are polar characteristics of judging or legislating which are assisted by separate performance, but also that it is desirable, under some circumstances, that the rule maker be required to call upon another arm of the government for the enforcement of his rule.

The second group of principles, those relating to fair administrative procedure, represent a balancing of the needs of effective government against the contribution which particular procedural requirements will make to the protection of the individual from oppressive or mistaken governmental action. This balancing of efficiency and fairness is developed most explicitly in the chapter on the right to hearing, but is a pervasive theme throughout. Davis is surely correct in weighing the social cost of any procedural requirement against the benefits it provides. It is obvious that a procedure may be so cumbersome and costly in terms of the value of the typical claims adjudicated that it will be rarely used. But striking the balance is a task of great complexity, in part because one side of the equation (the needs of effective government) varies with the scope of governmental programs and the felt desire for quick, thorough action.

The basic notion in the chapters dealing with the availability, timing and

scope of judicial review is that courts and agencies each have advantageous qualities, and their relationship in the process of review should maximize their advantages while minimizing disadvantages and possibilities of conflict. Certainly this is a sound notion, and the execution is for the most part admirable. Many of the chapters go well beyond administrative law. For example, the chapters on standing and ripeness deal thoroughly and ably with review of legislative as well as administrative action.

On the whole, Davis has done a brilliant job of formulating and expounding these general principles of administrative law, each in the detailed setting of the relevant decisions and statutes. The major reservation I have arises from a doubt that uniform principles of broad applicability and great generality will prove very helpful in deciding concrete cases. I also regret the lack of richness which might have been provided by a more historical treatment of some subjects. Traditional functions of tax authorities, immigration officials and the like are not excepted on the basis of historic practice from the rigor and logic of the Davis approach. This may be in large part a wise choice, but it deprives the treatise of the fuller setting it might have had.

But the question of the extent to which a systematic statement of general principles of administrative law is capable of meaningful elaboration or application has another dimension, that of the relationship of these principles to the nature and scope of the substantive power which the legislature has seen fit to confer upon the administrative body. Procedural issues may be so divorced from context that they become abstract conceptual issues. Professor Davis, who shuns the crucial issue of the legal limits of administrative discretion, occasionally runs this risk. Perhaps his discussion of *Bailey v. Richardson*[15] will illustrate the point. Miss Bailey sought judicial review after an administrative hearing, in which she was not allowed to confront the witnesses against her, resulted in her discharge from federal employment. The general principle which is applicable to Miss Bailey's case is stated by Davis as follows: a party with a substantial stake in governmental action should be entitled to an opportunity for a trial-type hearing with respect to any unfavorable evidence involving "adjudicative" facts (which are facts relating to the particular person or event), except when some pressing governmental interest overrides the principle of a fair hearing.[16] Since Miss Bailey did not have a "sensitive" government job, Professor Davis concludes that Miss Bailey's rights were infringed. I believe there is a certain anomaly in resting the existence of rights to a full hearing upon a judgment concerning the "sensitivity" of the particular employment, since that judgment goes only to the reasonableness of the legislative or executive action and not to any difference in effect upon the individual involved. But

[15] 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951) (per curiam).

[16] 1 TREATISE § 7.13, especially pp. 470–71.

the central issue I would pose is whether the procedural issue is not dwarfed by the difficulties created by the vagueness of the substantive standard.

The question I would pose is this: Would the problem in the *Bailey* case be cured if she had had a full jury trial on the loyalty issue in a constitutional court, with the government required to produce witnesses against her? The answer, I believe, is no. The fact of the matter is that what Miss Bailey was largely objecting to was the stigma of disloyalty which the government's action had attached to her. She claimed that a determination of reasonable doubt as to loyalty was to some extent a determination of status, which had direct effects on her and collateral effects on free speech and free association in the community. A trial-type hearing or a right of confrontation will not solve these difficulties. On the contrary, in the usual situation it will only aggravate them since the proceeding will have wider publicity and command greater community respect as a more formal and deliberate adjudication. At the heart of the problem is the vagueness of the loyalty standard and the inevitable difficulties in its application.

Professor Davis often gives the impression that procedural safeguards are constitutionally required, or desirable as a practical matter, even in situations where the standards for administrative action are so broad or vague that meaningful judicial control is not possible. It is true that there may be some cases in which the procedural safeguards, even given a broad scope of administrative discretion, will turn up facts which lead the administrator to a different result. It is also reasonable to urge the application of procedural safeguards to cases such as Miss Bailey's on the ground that the cost of producing witnesses to establish possible grounds for disloyalty may prove so high that the government will not be inclined to institute proceedings. But this somewhat disingenuous position can be taken only at the risk that the government, prevented from discharging employees it does not trust after an administrative hearing, may revert to the older practice of arbitrary and summary discharge.

My point is not that procedural safeguards are unimportant, but only that discussion of them should not be divorced from the substantive issues involved in the particular type of proceeding. While it is fashionable in the United States to think of procedural safeguards as the chief foundation of our liberty, they can operate to only limited advantage if the decision is based on rules created *ad hoc* by administrative officers possessing broad discretion, rather than on general rules of law drawn from pre-existing sources. In emphasizing the possibilities of control by means of formal procedures, Professor Davis does not give adequate consideration to the overriding impact of the extent of substantive power lodged in the officialdom.[17] If a decision is based upon rela-

[17] A similar argument turning on the interdependence of administrative procedure and the substantive law is developed in greater detail by Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607 (1959).

tively untrammeled administrative discretion, procedural forms are waste motion for the most part and judicial review is almost entirely ineffective. Here as elsewhere, form and substance cannot be neatly divorced from one another. Perhaps Professor Davis, now that he has thoroughly dealt with the possibilities of procedural ingenuity, will turn his attention to the central task of determining in concrete contexts the appropriate limits of administrative discretion.

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The Elements of Law. By Thomas E. Davitt, S.J., Associate Professor of Jurisprudence, School of Law, Marquette University. Boston: Little, Brown & Co., 1959. Pp. xxl, 370. $9.00.

The author's purpose is "to make the student aware of the relation between problems in law and their non-legal assumptions" (p. ix). Knowledgeable and percipient analyst and teacher that he is, he succeeds. No student can read this book and fail to grasp that state law presupposes a concept of its own purpose, and elementary guides for making just rules, so that governmental action in accordance therewith serves the end desired.

The student's thoughts will also be clarified in many particulars: the state is not the government nor a person over and above the human beings who compose it; the people are human beings; the common good is the good of human beings eventually enjoyed by individuals; the maker and applier of state laws —the government—is composed of human beings who make these laws for, and apply them to, human beings, and whose decisions are at best only the best judgment of human reason; *mala in se* are not *mala* aside from circumstances, and *mala prohibita* are not *mala* because *prohibita* but *prohibita* because *mala;* criminal law is grounded on the right of self-protection of human beings politically organized; capital punishment is justified if it serves a needed protective function, which is a question of fact not easily answered, requiring more research than has been given it; and even contract and title to property involve moral considerations.

The main theme of the book establishes the elementary guides, about which the author is very clear. There is, of course, the moral law, which is a succession of principles. Aquinas said that there is but one first principle (as did Hillel) from which all the others derive. There are derivative principles, called by the author "pattern demands" (p. 122), which all normal men "perceive without reasoning" (p. 122). These elementary guides are, however, "few in number . . . broad in scope" (p. 152); and "more particular and incisive directives are needed," (p. 123, n.7) which, though "drawn from . . . unchangeable premises . . . may change" (p. 126). These necessary, more particular, and incisive direc-