

## BOOK REVIEWS

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**The Federal Administrative Agencies.** By HENRY J. FRIENDLY. Cambridge: Harvard University Press, 1962. Pp. 180. \$4.25.

Pearl fishing must be somewhat akin to the effort to keep abreast of the plethora of material now being produced with respect to the operations of the administrative process. Pearl fishing, I assume, survives because now and then, among the myriad oysters that are dredged up, there can be found a gem of "purest ray serene." These lectures, delivered in February 1962 at the Harvard Law School, and now somewhat expanded in this volume, but still penned to a readable length, are such a gem.

Instead of roaming the length and breadth of the complex problems of administrative law, Judge Friendly confines himself to a basic problem, namely the capacity of our prime federal administrative tribunals to fashion articulate, workable and predictable standards for the determination of issues that they are called upon to resolve. Given the fact that the Congress has failed through statutory language to enunciate standards for administration with any real degree of precision, how have the tribunals succeeded in formulating guides sufficiently precise to be predictable and, more important, to assure parties before them that the results will be free of those pressures that even today affect them? For these pressures arise not only from individuals or lobbying operations, but, because of the scope of the issues, from predilections generated years ago out of the experiences of the professional and business life of the agency members.

Judge Friendly considers this problem of the articulation of standards as it affects four commissions—the Interstate Commerce Commission, the National Labor Relations Board, the Federal Communications Commission and the Civil Aeronautics Board. With reference to the latter he confines himself understandably to the Board's handling of domestic route problems since for years as general counsel to Pan American World Airways he tilted, and most effectively, in many international route matters with that Board.

He contrasts the administration of the long- and short-haul clause by the Interstate Commerce Commission with its handling of its minimum rate powers, particularly as those have been confused by the adoption in 1940 by the Congress of a pious but meaningless "National Transportation Policy," and further confused by the political bargaining that led the Congress to add a postscript to section 15a of the Transportation Act of 1958,<sup>1</sup> which granted the right to the railroads to meet competition by reducing their rates and then

<sup>1</sup> 72 Stat. 572 (1958), 49 U.S.C. § 15a(3) (1958).

said: "We didn't really mean what we said before—well, not quite." The contrast is a good one. It sets forth the degree of certainty that Judge Cooley achieved by his powerful and comprehensive decision in *In re Southern Ry. & S.S. Ass'n*,<sup>2</sup> which, although its wisdom in all respects was queried by later Congresses, had sufficient specificity to enable the Congress to amend those features of the Cooley doctrine with which it disagreed.

Judge Friendly contrasts this mode of handling the problem of articulating standards with the manner in which the Interstate Commerce Commission has interpreted its minimum rate powers first granted in 1920. His review of the decisions in this area reveals what the *cognoscenti* have long known, that the decisions produce no discernible pattern, no basic transportation philosophy, and cannot be rationally reconciled. Unfortunately neither the Congress nor the Supreme Court has been helpful in guiding the Commission out of this morass.<sup>3</sup> In behalf of the Commission it can be said that the formulation of standards in this area, as contrasted with the long-and-short haul clause, is not an easy matter. There is first the evaluation of so-called costs, as esoteric a subject as can be imagined, and the true answers to which are rarely found except when bankruptcy or receivership makes clear their consequences. Also, since 1920 the problem has been magnified by the rise of inter-modal competition—the truck, the barge, and coastal and intercoastal carriage by sea—as well as the development of container and piggy-back operations. Which of these, and in what form, to use the language of the "National Transportation Policy," has those "inherent advantages, whether they be of cost or service," that truly deserve protection in the broad public interest? It must also be observed that the railroads, due to their age and their former monopoly of mass transportation, possess a financial stamina generally absent with respect to newer forms of carriage. The railroads can endure financial strain, based on so-called legitimate out-of-pocket costs, that can drive their competitors to the wall. Finally, we have to carry, like a monkey on our back, the age-old policy of rate-making based on value-of-service, which has made for unnumbered tomes of tariff regulations, and in essence dates back to Robin Hood and his Sherwood Forest.

Judge Friendly's analysis of the work of the National Labor Relations Board is less critical. This Board, except with respect to the right to solicit union membership on the employer's premises, has not only vacillated less but has sought to set definitive standards of allowable conduct in areas such as the duration of certification of a bargaining unit, the duration of a collective

<sup>2</sup> 1 I.C.C. 278 (1887).

<sup>3</sup> The Supreme Court has an unusual chance now to do so in *Sea-Land Service, Inc. v. New York, N.H. & H. R.R. Co.*, appeal docketed, 31 U.S.L. WEEK 3018 (U.S. May 8, 1962) (No. 110), but the Court's traditional hesitancy to enunciate policy and tendency to decide only the narrow issue before it makes it doubtful that it will seize this opportunity. Cf. *Texas & Pac. Ry. v. United States*, 289 U.S. 627 (1933); *Scandrett v. United States*, 312 U.S. 661 (1940), affirming *per curiam* 32 F. Supp. 995 (D. Ore. 1940).

bargaining agreement fairly arrived at, activities that demonstrate the lack of good faith in bargaining, qualifications that must attend union hiring halls, and other areas. A survey of the operative consequences of these reasonably definitive standards set forth by the Board unfortunately indicates that many of them have been upset either by the Courts of Appeals or by the Supreme Court of the United States. Few judges, like few laymen, recognize that there is a degree of expertise in the control of labor relations and in the evaluation of art.

In dealing with the licensing of radio and television broadcasting, Judge Friendly has firm ground upon which to make his point. Not only was the Federal Communications Commission given no standard by the Congress to solve the problems with which it would be faced other than that of the "public interest"—which means the public interest as you or I or Chairman Minow (provided he can command a majority of his colleagues) see it—but every criterion that that Commission has evolved better to articulate the public interest has been breached as often as it has seemingly been observed. The reasons for this are not hard to discover. Many of the criteria are stupid, as for example the insistence on local ownership and local control as against experienced management from the outside. Obviously we are not only a gypsy nation, but an integrated one. The second reason is, of course, the monopoly achieved by the networks over the broadcasting stations. This was, perhaps, inevitable. If our economy is based on the belief that a cigarette, a dentrifice or a girdle is as equally adapted to San Diego as to Maine, mass communication is essential and for mass communication to succeed it must be controlled. Also, venality has characterized the Federal Communications Commission and this may be in part responsible for the development of variable criteria under the umbrella of one of which a favorite could be placed. But the basic fault, if any, must be placed on the Congress, which refused to face the problem of establishing standards, and on the courts who have accepted that a standard such as the "public interest" is enough to override their former decisions against the unconstitutional delegation of legislative power.

In dealing with competitive air route certifications by the Civil Aeronautics Board, Judge Friendly argues that the legislative standard given to the Board by the Federal Aviation Act of 1958, to the effect that competition should be allowed by the Board "to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;"<sup>4</sup> has become a standard of allowing competition wherever the belief exists that the traffic will in time justify competition and, even in cases where the belief has no substance, thus allowing the Board's theory to authorize and to permit a poor carrier to steal some traffic from a

<sup>4</sup> 72 Stat. 740 (1958), 49 U.S.C. § 1302(d) (1958).

carrier that in its judgment could afford such a larcenous intrusion. Judge Friendly is completely right in his analysis of the trend that administrative decision has taken in this field. The Civil Aeronautics Board to an extent, however, in re-interpreting the congressional mandate, has given a force to the competitive will in our society that Congress in 1938, perhaps under the pressure of powerful interests, was led to recognize but also to minimize. It may be that the Board's theory has had value. It was, for example, the grant of the Miami-New York route to National Airlines that forced Eastern Airlines, then the sole carrier, to fly the ocean as distinguished from the land route from Florida to New York. The conveniences offered by Eastern by its time-saving shuttle service between New York and Washington and New York and Boston has made Eastern the prime carrier on these routes when theretofore it was only a poor second. Other instances, primarily the competition that has moved us in equipment within a scant thirty years from the Ford tri-motor plane to the jets and is threatening now to plunge us into supersonic flight, could readily be cited. True, the general complaint of the airlines today is that too much competition has been certificated for the available traffic; but a rejoinder could also be made that too much capacity, over the production of which the Civil Aeronautics Board has no control, has been created for the available traffic. But one thing is true. We have today domestically and internationally, perhaps due to the Board and perhaps despite the Board, the finest and safest system of air transportation in the world. Compared with other nations, whether in terms of subsidy provided or recent financial losses, the subsidies we grant and the losses we incur are minimal.

Judge Friendly concludes his volume with a chapter dealing with the road to improvement. He examines what can be done within the agencies themselves, by the Executive and by the Congress. All three areas evidence neglect of the basic problems, particularly that of the Congress and until recently that of the Executive. The first area is likely to be somewhat alleviated by the establishment in 1961 by the President of the Administrative Conference of the United States, whose work Judge Friendly naturally had no opportunity to appraise and whose future is unfortunately in doubt. But Judge Friendly's analysis of the relationships that could and should exist between the Congress, the Executive and the administrative agencies is penetrating.

My evaluation of Judge Friendly's volume was made in my opening remarks. With masterful scholarship and profound experience he illuminates one important phase of administrative law. If I disagree with some of his comments, my disagreement is more from an emphasis on administration as distinguished from administrative law. Law can promote but it can also impede. The ultimate answers to our besetting problems in transportation, in communications, in the production of energy or in the field of labor relations, are not to be found in judicial utterances, for they are essentially the problems of laymen in fields calling for more than what mere law has to offer.

But Judge Friendly, however, is right—terribly right—in his insistence that the administrative agencies should make a better demonstration of their much vaunted expertise in these areas. The courts, the bar and the public might then tender them the respect that they were intended to deserve.

JAMES M. LANDIS\*

\* Member of New York and District of Columbia Bars; Member of Administrative Council of the Administrative Conference of the United States; Dean, Harvard Law School 1937–1946.

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**Securities Regulation: Cases and Materials.** By RICHARD W. JENNINGS and HAROLD MARSH, JR. New York: The Foundation Press, Inc., 1963. Pp. 992. \$13.00.

This volume is the first published collection of cases and materials for use in the teaching of securities regulation; the only alternative teaching tool for this subject is the three volume text by Professor Loss entitled *Securities Regulation*<sup>1</sup> or the one volume abridged student's edition of the longer text. The field of regulation of securities is relatively new and is rapidly expanding. It has generally been considered as a somewhat esoteric and narrow specialty by the bar; as the extent of such regulation increases and as it reaches more and more into areas that traditionally have been regarded as within the realm of corporation law, its significance will become greater and more apparent. The availability of this book for opening up the area of securities regulation for students recognizes and fills a very definite need.

This volume, which the authors refer to as a "coursebook," contains a comprehensive and useful collection of cases and materials, prepared by editors who are obviously sophisticated and knowledgeable, both academically and practically. It speaks as of September 1, 1962, and contains many very recent materials. The fact that the authors find it necessary to indicate a cut-off date (in a manner analogous to a prospectus for a new issue of securities) is indicative of the fluidity and rapid change occurring in this field. This book will probably require rather frequent supplements (either by the authors or by any teacher using it) so that the course material will remain current.

The book is divided into three major sections: Part One deals with regulation of the distribution of securities under both federal and state securities laws; Part Two deals with regulation of trading in securities; and Part Three deals with investment companies. The most meaty, extensive and helpful collection of materials is contained in the part devoted to federal regulation of the distribution of securities. This federal material is current and well selected and contains not only significant cases but important SEC rulings and releases; it also draws heavily upon significant comment by leading securities

<sup>1</sup> LOSS, *SECURITIES REGULATION* (2d ed. 1961).