

REVIEW

Administrative Law of the Seventies. KENNETH CULP DAVIS. The Lawyers Cooperative Publishing Company, Rochester, New York, 1976. Pp. xvii, 702. \$34.50.

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Kenneth Culp Davis has graced the occasion of his retirement from the University of Chicago this year with a volume in administrative law that is useful and yeasty. Although 700 pages long, it reads faster than law books by others generally do. It functions partly as a 1976 Supplement updating the 1970 Supplement to Davis's multivolume *Administrative Law Treatise*.¹ It will also be incorporated into a new edition of the *Treatise* which is slated to issue, starting in mid-1977, at the rate of one volume per year, with annual pocket-part supplements. But it stands independently, and is rightly given its own title—*Administrative Law of the Seventies*²—because it is a stocktaking that captures the developments of a demidecade, a time of flux and fast-paced reexamination.

First, some personal disclaimers. Unlike Samuel Johnson, who said he would rather praise the works of Carlyle than read them, I readily accepted the invitation to review Davis's book because I wanted to ensure that I would read it before it was cited in a brief—or before I needed help on a particular matter. But I had not anticipated that the book would be so complimentary of the judicial efforts of this reviewer and of the court he serves. I would surely specify recusal if this were a litigated case. But I resist the temptation to lean over backwards: this is a fine book despite the fact that Professor Davis finds many of our opinions rewarding. On the other hand, I will insert some “on the other hands.”

I

Perhaps the most notable feature of this Supplement is that it can profitably be read as a book. This is a rare and difficult accom-

† Judge, United States Court of Appeals for the District of Columbia Circuit.

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

² Hereinafter cited as 1976 SUPPLEMENT.

plishment in the case of treatises. One can read the book straight through and gain a reasonably faithful portrait of today's administrative law, warts and all. To be sure, it helps to have had at least modest previous exposure. But if the corpus of the law in general is substantially restated every twenty years, as Justice Holmes observed, then this is a field where five years of restatement tells a lot.

Because this is a Supplement, Professor Davis is able to focus on the most quickly evolving and hence the most interesting topics in administrative law. His prose is usually clear. He deftly summarizes and quotes from the leading cases without obstructing the flow of the text. And as we have come to expect, Professor Davis constantly stimulates the reader with his vivid opinions, his exuberant delight with effective innovation, and his tutorial rebuke of what he considers judicial mistakes.³

The book should prove especially useful to one beginning research or thinking about a particular problem. Although it is sometimes lacking in the close analysis typical of the better law review articles, the book does call attention to the leading articles, as well as the major developments outside the courts, such as those in legislation and in actions of the Administrative Conference.⁴ On virtually every topic, the book provides a ready synthesis of recent opinions together with predictions about the course of the law. Davis does an excellent job of identifying the major trends.

II

While Professor Davis stretches a wide canvas for his landscape of administrative law, his main focus in the Supplement is on such fundamentals as undue delegation of power to agencies, adjudication, and most of all rulemaking.

The traditional rule of "undue" delegation of power has been that delegation of legislative power is unconstitutional. That doctrine is near death. I share with Professor Davis the approach that tolerates broad delegations by the legislature yet seeks to avoid bureaucratic despotism and caprice by stressing the rule of administrative law that requires the executive to develop standards to guide administrative action. In support of this approach, Professor Davis kindly calls attention to, and approves of, my analysis of precedents and doctrines,⁵ notably in my 1971 *Amalgamated Meat Cutters*

³ See, e.g., 1976 SUPPLEMENT at viii.

⁴ Unfortunately, these developments are not collected in a table, as are the cases.

⁵ 1976 SUPPLEMENT § 2.00, at 22.

opinion⁶ and a law review gloss.⁷ *Amalgamated* also stressed the requirement of fair procedures and included an indication—apparently overlooked by Davis⁸—that the President is an “agency” under the Administrative Procedure Act (APA)⁹ and is governed, unless exempted, by its notice-and-comment procedural requirements for rulemaking.

Although the nondelegation doctrine has faded, it reemerged in new garb in a 1974 Supreme Court decision¹⁰ that construed the scope of a law’s delegation narrowly in order, it seems, to avoid the nondelegation question.¹¹ And I find significant and pregnant the recent post-Supplement decision holding a Civil Service Commis-

⁶ *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758 (D.D.C. 1971) (upholding the delegation to the President, in the Economic Stabilization Act of 1970, of broad authority to fix prices, rents, wages, and salaries).

⁷ Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66 (1974).

⁸ Davis states that “if the President or his office is exempt from the APA,” it will have to be for some reason other than the “literal words” of the Act. He notes that the issue was avoided in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). 1976 SUPPLEMENT § 1.01-2, at 1. In *Amalgamated*, the court made its view reasonably clear. See 337 F. Supp. at 761: “The leading students of the APA, whose analyses are often cited by the Supreme Court, and who on some matters are in conflict with each other, seem to be in agreement that the term ‘agency’ in the APA includes the President—a conclusion fortified by the care taken to make express exclusion of ‘Congress’ and ‘the courts.’” The opinion went on to say that it need not consider whether an action could be brought against the President *eo nomine*—for it could be brought against the official to whom the President delegated the power vested by Congress in the President.

A subsequent opinion bit the bullet of declaring that an action would lie, and indeed a writ of mandamus would issue, against the President *eo nomine*, when the President himself took responsibility for the action, and there was no delegee. It chose to confine itself to a declaratory judgment “at this time” but remanded to the district court for further proceedings after a reasonable time. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

⁹ 5 U.S.C. § 551 (1970).

¹⁰ *National Cable Television Ass’n v. United States*, 415 U.S. 336 (1974). The Court held that the fees to be imposed on CATV companies should be measured only by the “value to the recipient” even though the language of the general statute allowing fee setting by federal agencies permits consideration not only of “value to the recipient” but also of “public policy or interest served, and other pertinent facts.” 31 U.S.C. § 483(a) (1970). In *Federal Energy Administration v. Algonquin SNG, Inc.*, 96 S. Ct. 2295 (1976), a case involving license fees imposed by the President on oil importers, respondents relied on *National Cable Television* to support an undue delegation argument. *Id.* at 2302 n.10. The Court distinguished *National Cable Television* on the ground that the statute in that case was less specific in its instruction than the instant statute, which gave power to the President to adjust the import of any article he deems necessary “so that such imports will not threaten to impair the national security.” 19 U.S.C. § 1862(b) (Supp. IV, 1974). A better rationale for distinguishing *National Cable Television* would stress the need for greater flexibility in empowering the President to deal with such matters as national security and foreign relations. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹¹ 415 U.S. at 342.

sion regulation against hiring aliens invalid, on the ground that, while the federal government had authority to pursue a national policy toward aliens, this authority could be exercised only by specific action of Congress or the President, and is not within the grant of power to the Commission to maintain an efficient service.¹²

If the nondelegation doctrine is a dim though still flickering star in the firmament of administrative law, the requirement of reasoned decision making is a brilliant sun. Under that requirement an agency must develop standards and adhere to them without discrimination; it may reserve the latitude to change standards deliberately, but not to ignore them casually or haphazardly. This theme pervades Professor Davis's 1976 volume, as it has dominated his teaching and thinking. Our views are entirely congruent, and I appreciate his numerous passages¹³ approving the short course in administrative law inserted in my *Greater Boston* opinion.¹⁴ That was an agonizing decision, in which I followed the doctrine that requires a judge to uphold an agency's action that he disapproves, so long as, in accordance with reasoned decision making, there was no violation of law or abuse of discretion.

The topic of reasoned decision making is too broad for extensive commentary here. But it is entirely appropriate to point out Professor Davis's influential and humane insistence, on becoming appalled during the 1960s by the laxity of the United States Board of Parole, that the Board be governed by such elements of administrative law as open standards and statements of reasons for parole denials.¹⁵ Following Davis's lead, the Administrative Conference issued a resolution to the same effect following its investigation and debate.¹⁶ The courts soon provided relief, a state court having led the way on the ground of fundamental fairness.¹⁷ In its 1974 *Childs* opinion,¹⁸ our circuit required reasons for parole denial, overhauling a 1964 decision.¹⁹ Davis scores me one point over the majority, which

¹² *Hampton v. Mow Sun Wong*, 96 S. Ct. 1895 (1976).

¹³ 1976 SUPPLEMENT §§ 6.13-1, 10.04, 11.00, 17.07-4.

¹⁴ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

¹⁵ K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969). The requirement of reasons was also called for by the U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON CORRECTIONS (1967).

¹⁶ *Administrative Conference Recommendations 72-3: Procedures of the United States Board of Parole*, 25 AD. L. REV. 531, 534 (1973).

¹⁷ *Monks v. New Jersey State Parole Bd.*, 58 N.J. 230, 277 A.2d 193 (1971). This decision is striking because, according to Davis, state courts generally lag behind the federal courts in the evolution of administrative law. 1976 SUPPLEMENT at iv.

¹⁸ *Childs v. Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974).

¹⁹ *Richardson v. Rivers*, 335 F.2d 966 (D.C. Cir. 1974).

relied on constitutional grounds, for having rested my concurrence on the APA as sufficient. But he thinks I may have gone too far in saying that reasons are a fundamental requirement, essential to the integrity of the administrative process. He notes that certain functions may not require reasons. Still, my perhaps cryptic notation that "agencies are not fungible" was meant to suggest both that agencies cannot all be put under the same procedures and that no one agency need have the same procedure for all its functions.

One quarter of this book deals with the "flood of law about rulemaking."

The foremost fact about 1970-75 administrative law development is the huge new body of law dealing with rulemaking procedure and review of rulemaking. . . . Most of that material is not merely new law on old problems. Much of it involves groping by perceptive judges on problems that reach into the fundamentals of law and government. . . .

Even though the law of rulemaking procedure and of judicial review of rulemaking is less settled now than it was five years ago, the reasons are that the courts are inquiring more deeply and laying the foundations for inventing better legal machinery.²⁰

"Groping" is the right word. As a judge I often feel like the Stephen Leacock knight who mounted his horse and rode off in all directions.

Avoiding any temptation to travel all the trails of the Supplement in this review, I shall confine my observations on rulemaking to "hybrid" hearings, a path already well trodden by others and generally handled with good judgment by Professor Davis.

The notice-and-comment procedure of informal rulemaking prescribed by the APA is, in Professor Davis's view, "one of the greatest inventions of modern government."²¹ It is at least extremely useful, and typically much to be preferred to adjudicatory trial-type procedures. But when should the latter be used? In my *American Airlines* opinion²² in 1966, the court en banc, confronted with a vexing question involving the impact of a rule on the authority conferred by outstanding licenses, concluded that doubtful cases should be classified as rulemaking. The court also observed, however, that oral procedures, either legislative or with cross-

²⁰ 1976 SUPPLEMENT at ix, xvii.

²¹ *Id.* at 168.

²² *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.) (en banc), cert. denied, 385 U.S. 843 (1966).

examination, might be required if shown to be necessary in particular cases. Various subsequent decisions have also suggested that oral procedures, although not necessary in the instant situation, might be necessary in some situations.²³ Professor Davis remarks that the decisions do not fairly indicate when cross-examination might be necessary, beyond vague references to "critical issues" and "specifics."²⁴ Fair enough, except perhaps that judges proceeding cautiously in an unmarked field are not faithless to principles of judicial administration, and will fill in the gaps of generalities as specific cases provide occasion.

My 1971 opinion in *Holm v. Hardin*²⁵ is the single instance of a decision requiring an opportunity for oral presentation, though possibly only a legislative-type hearing, before an agency. What concerned the court was that the Secretary of Agriculture's order adopted, with regard to a technical question, a recommendation that was unfavorable to importers and had been fashioned by a committee composed solely of domestic producers. The court suspected that a procedure that permitted no opportunity for oral presentation to agriculture officials "is a seed bed for the weed of industry domination."²⁶ Professor Davis expresses doubt that oral presentation is always a more effective protection than written presentation.²⁷ But a recent article by Professor Stephen Williams, who was commissioned by the Administrative Conference to study hybrid procedures, convinces me that the oral hearing was instrumental in discrediting the recommendation of the domestic producers committee.²⁸

In any event, Professor Davis is quite right in saying that cross-examination is granted as the rare exception rather than the rule.²⁹ He is probably also right in saying that the danger to administrative proceedings is too much rather than too little of such trial-type procedure. Indeed, he has been a leading spirit in the Administrative Conference against any rigid doctrinal requirement of oral pres-

²³ See 1976 SUPPLEMENT § 6.01-5, at 183-84. The Supplement cites, *inter alia*, *Long Island R.R. v. United States*, 318 F. Supp. 490 (E.D.N.Y. 1970) (Friendly, J.); *Virgin Islands Hotel Ass'n v. Virgin Islands Water & Power Auth.*, 476 F.2d 1263 (3d Cir.), *cert. denied*, 414 U.S. 1067 (1973); *O'Donnell v. Shaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974); *American Public Gas Ass'n v. FPC*, 498 F.2d 718, 723 (D.C. Cir. 1974).

²⁴ 1976 SUPPLEMENT 190.

²⁵ 449 F.2d 1009 (D.C. Cir. 1971).

²⁶ *Id.* at 1016.

²⁷ 1976 SUPPLEMENT 180.

²⁸ Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975).

²⁹ 1976 SUPPLEMENT § 6.01-5.

entation in rulemaking. On the other hand, in its 1976 spring meeting the Conference acted upon Professor Williams's submission by passing a recommendation that first, acknowledged that the courts had identified instances when procedures beyond notice and comment were salutary and, second, outlined procedures to be considered by agencies involved in the problems of hybrid hearings.³⁰ Furthermore, when Congress recently enacted a law on the power of the Federal Trade Commission to issue substantive rules, it provided for cross-examination whenever the Commission considered it requisite for a full and true disclosure of "disputed issues of material fact."³¹

III

Apart from his full treatment of traditional administrative law, Professor Davis devotes much time and effort in the Supplement to the nature of police and prosecutorial discretion and to the goal of preserving an open society by regularizing the exercise of that discretion.³²

Professor Davis knows that his approach is unusual. In an early chapter, on search and seizure and self-incrimination under the fourth and fifth amendments, he acknowledges that the decisions in the 1970s on the governmental investigating power tend to deal with police, grand juries, and legislative inquiries and judicial proceedings that are "outside of what is traditionally administrative law."³³ But his concern is a serious one, for he discerns a trend "from constitutional prohibition of governmental snooping into business records to constitutional protection of such snooping."³⁴ And since, as he puts it, "[t]he legal limits on investigating are the same whoever the public investigator is," he offers by way of compromise an "admittedly brief or skimpy treatment of investigation law developed to govern other investigators."³⁵ Thus, for example, he ushers in cases like *Wyman v. James*,³⁶ upholding the requirement that welfare recipients consent to "home visitation" by caseworkers.

While I share Professor Davis's concern over a number of developments in fourth amendment law, the Supreme Court seems will-

³⁰ Administrative Conference Recommendation 76-3: Procedures in Addition to Notice and Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654 (1976).

³¹ 15 U.S.C. § 57a(b) (Supp. IV, 1974), discussed in 1976 SUPPLEMENT § 6.01-6, at 191.

³² See K. DAVIS, POLICE DISCRETION (1975), reviewed in Friendly, Book Review, 44 U. CHI. L. REV. 255 (1976).

³³ 1976 SUPPLEMENT 40.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 400 U.S. 309 (1971).

ing to avoid treating all inspectors and inspections as fungible. The most far-reaching decisions are those tolerating warrantless searches lacking particular factual predicates, such as inspections of businesses conducted under relatively strict and special licenses.³⁷ Meanwhile, however, the Court has preserved and perhaps extended the principle of *Camara*,³⁸ in which it overruled prior law that fire, health, and housing inspection programs could be conducted without a warrant.³⁹

In administrative law terms, what may be required is a "regulatory view" of the fourth amendment. The Supplement calls attention, for example, to Judge Oakes's opinion in *Barbera*,⁴⁰ which invalidates groundless immigration searches and develops the idea of deliberative rulemaking by central administrative authority. The opinion naturally draws on Professor Davis's own approaches⁴¹ and Professor Amsterdam's more fleshed-out proposals.⁴² A related thesis, stressing the need that fourth amendment objectives be incorporated into the basic value system of law enforcement policies, has surfaced in the recent opinion in *Stone v. Powell*.⁴³

Speaking broadly to the problem of police and prosecutors, Professor Davis advances a general argument⁴⁴ that while the conduct of these officials must necessarily be rooted in the exercise of discretion—including intuition and experience—it can, through rulemaking, be removed from the domain of blank-check preroga-

³⁷ These searches were approved by Justice Douglas, no less, in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), involving control of the liquor industry, and in *United States v. Biswell*, 406 U.S. 311 (1972), extending that control to firearms.

³⁸ *Camara v. Municipal Court*, 387 U.S. 523 (1967).

³⁹ The Court here, balancing the necessities of regulation with security against arbitrary invasions of privacy, permitted area warrants based on appraisal of conditions in the area. See also *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

⁴⁰ *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975).

⁴¹ See K. DAVIS, *DISCRETIONARY JUSTICE* 94-95 (1969).

⁴² See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423-29 (1974).

⁴³ 96 S. Ct. 3037 (1976). *Stone* has been analyzed primarily in terms of its ruling forbidding the raising of fourth amendment claims on collateral attack of state convictions. But the Court states explicitly that it is not, at least now, abandoning the exclusionary rule on direct appeal. Justice Powell has been a notable skeptic of the view that the exclusionary rule deters individual police officers from those fourth amendment violations that they believe are a part of reasonable police work. In *Stone*, Justice Powell not only indicates familiarity with Professor Amsterdam's views, he casts the "more important" justification of the exclusionary rule in terms of encouraging "those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Id.* at 3051. I read this as relating to the kind of generalized advance thinking that is served by rulemaking.

⁴⁴ See, e.g., 1976 SUPPLEMENT §§ 4.00-.20.

tives of individual officials and kept within channels informed by the experience of superiors.⁴⁵

Professor Davis has made us all think more pointedly about these matters, and some of the best pages of this book are summaries of observations made in his books on the nature of police discretion and its exercise,⁴⁶ and on the development abroad, particularly in Germany, of controls on prosecutorial discretion.⁴⁷

My own view is that Professor Davis's ideas will be useful but cannot be invoked broadside, and must be examined for feasibility in incremental steps. An interesting example is my opinion in *United States v. Ammidown*,⁴⁸ holding that a prosecutor's discretion to plea bargain is judicially reviewable for abuse. As the Supplement fairly comments, my opinion uses conventional administrative law concepts in allowing a judge to disapprove the prosecutor's action only if the judge states reasons for his finding of abuse.⁴⁹

* * *

Administrative law continues in flux, and in some confusion. Professor Davis does a great deal to shed light—and also, I fear, some heat, for I acknowledge concern that this taskmaster has been overdemanding of court opinions⁵⁰ and that some of his harsh grades may weaken his influence. A lack of precision in opinion writing, though hardly praiseworthy, should be judged not only in view of time pressures but also by the salutary rule that general expressions must be appraised in their contexts. Courts welcome but cannot match the precision of professors.

We rightly fear the bureaucratic elite, the unleashed administrative monster. But the legal doctrines that would avoid these evils cannot clog the wheels of government.

The figure of speech, however, that has led me to refer to agen-

⁴⁵ I commend an effective presentation in this vein by my colleague Judge McGowan, for the thesis that police rulemaking should be considered as an alternative to the exclusionary rule. McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

⁴⁶ K. DAVIS, *POLICE DISCRETION* (1975).

⁴⁷ K. DAVIS, *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA* (1976).

⁴⁸ 497 F.2d 615 (D.C. Cir. 1973).

⁴⁹ The Supplement presents this case as staking out the power of a judge to review the prosecutor's discretion, but actually the holding reflects the applicable federal rules of criminal procedure that qualified the absolute power of a prosecutor and specified the need for the trial judge's approval of a nolle prosequi.

⁵⁰ This is particularly true of his extreme condemnations of *Morton v. Ruiz*, 415 U.S. 149 (1974), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). 1976 SUPPLEMENT at viii, §§ 5.03-4, 6.13-1, 11.00, 16.00-1, 28.16, 29.01-3.

cies and courts as a partnership⁵¹ may properly be broadened to identify a pluralistic collaboration that embraces the commentary of professors. To the ongoing dialogue Professor Davis has consistently made a valued contribution. His 1976 volume gives a handhold to old-timers and newcomers alike.

⁵¹ *E.g.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

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