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David Dudley Field, Codification of Statutes, and Administrative Law*

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Some twenty years ago I began the study of law in a far western state which had not only adopted all of the domestic law codes proposed by Mr. Field but had hardly known any other system of statutory law.[1] When we came to the bar there, it was no mere academic foray which led us to consult the dingy volumes of Mr. Field's original proposals in order to discover the origins of some provision or other. And now, for the first time in many years, I am back with my old friend Mr. Field again, this time on his own ground.

Like great New Yorkers before and since, Mr. Field was welcomed abroad and criticized at home. His predecessor, Edward Livingston, came to the bar here in New York before Mr. Field was born but, though hailed by Sir Henry Maine as "the first legal genius of modern times," Livingston's work for penal reform and codification was done elsewhere.[2] Much the

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**L.L.B., Montana 1930; S.J.D., Harvard 1932; Former Asst. Atty. Gen. of U. S.; Winner of the first Ross Essay Award, A.B.A., 1934, and of the 1946 A.B.A. gold medallion for distinguished service in connection with the adoption of the new Federal Administrative Procedure Act; Author: Federal Justice (with Homer Cummings); Cases on Administrative Law (with Arthur Vanderbilt); numerous articles in legal periodicals.

[1]Compare the REVISED CODES OF MONTANA, 1935 (Anderson and McFarland ed.) with the original Field political, civil, civil procedure, penal, and criminal procedure codes. Montana became a state in 1889 and by 1895 had adopted all of them.

[2]Cummings and McFarland, FEDERAL JUSTICE (1937), pp. 468-469.

same was true of Elihu Root's work in the New York Constitutional Convention of 1915, which was rejected here in New York at the time but set a pattern among many of the states.[3] Like them, Mr. Field not only had an idea but developed it and made it so much to be desired that other jurisdictions accepted it as their own. Livingston, Field, and Root typify the thoroughly American phenomenon of lawyer-statesmen who not only think but act on their thoughts, and find a world to receive their contributions.

In the history of American administrative law, the work of David Dudley Field is a primary contribution. His proposals also demonstrate that administrative law is not altogether new with us, that it is an historical part of our legal institutions, and that it is peculiarly the child and the responsibility of the legislature.[4] Perhaps we shall understand his contribution better if we consider the subject briefly in three phases—(I) the codification idea and its relation to what we call administrative law, (II) the specific treatment of the subject in the codes prepared by Mr. Field and his associates, and (III) the interrupted train of development from his day to ours.

I. THE NEED FOR CODIFICATION

We lawyers like to ignore the fact that colonial revolutionists on this continent widely outlawed England's common law and that there is no federal common law.[5] In addition, the very existence of our governments of separated powers inevitably means that our legislatures make statutory law with a regularity comparable to nature's round of seasons. Our constitutions require legislatures to meet regularly and, even if otherwise advised, it is the nature of legislators to legislate. At the same time our courts, high and low, produce a daily grist of interpretations and applications since it is the nature of man to litigate so long as he is forbidden to make private war. When both legislatures and courts (and now administrative agencies) so operate for more than half a generation,

[3]Jessup, ELIHU ROOT (1938), chapter xl and page 467 of the second volume. For the model thus furnished compare AN APPRAISAL OF THE CONSTITUTION AND GOVERNMENT OF THE STATE OF NEW YORK (1915) with ILLINOIS CONSTITUTIONAL CONVENTION BULLETINS (1920) and REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937).

[4]Compare McFarland and Vanderbilt, CASES AND MATERIALS ON ADMINISTRATIVE LAW (1947), pp. 390-391.

[5]Op. cit. note 2 supra, pp. 2-3, 464; and op. cit. note 4, supra, p. 419.

confusion mounts insufferably in the over-all state of the law.[6] Such a situation is as real as arithmetic, and the only surprising thing about it is that we as a nation came so late to the realization that a periodic check-up and restatement of our statutory law is the best remedy.[7]

Yet, with respect to law generally in Mr. Field's day and with regard particularly to administrative law in ours, many there were and are who still decry legislative restatements and reforms. Why? Because codification inevitably means something more than merely arranging or digesting the existing statements of law.[8] It means the writing down of the law to the extent that it may be deemed writeable and, so far as it may be thus written, the law becomes fixed until changed by subsequent legislative action. Since the legislature creates administrative agencies, why should it not so fix and change them? Because, runs the counter argument, your codification will either be futile because the code must itself be interpreted[9] or it will be harmful because the law should be flexible.[10] We may lay aside the argument respecting futility, since opponents cannot seriously fear that which they dub futile.

But the argument respecting the need for flexibility is one that has a plausible ring and should be squarely faced. There are two answers. In the first place, there is a realm for fixation and a realm for flexibility, just as most written statements of the law both contain rules and confer discre-

[6]Of course in simpler days it took longer to reach that stage. In 1870 Mr. Field wrote the California Bar: "Our law is in a state of chaos." Sprague ed., SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD (1884), i, p. 350.

[7]See op. cit. supra note 2, p. 469. One may suspect that a good share of the reluctance is attributable to the legal profession which, trained to this day in the tradition and methods of Blackstone, consciously or unconsciously finds legislation so distasteful that intelligent dealing with it comes hard indeed.

[8]Op. cit. note 6 supra, i, pp. 351-352, 376-377.

[9]Such was an argument against the Field codes. See op. cit. supra note 6, i, pp. 353-354, 379.

[10]Such was the main argument against adoption of the Field codes. Op. cit. note 6 supra, i, pp. 354, 379-380; id., iii, pp. 241-242. So too, in 1941, it was argued that, "if the provisions [of a Code of Standards of Fair Administrative Procedure] are to retain the necessary flexibility, they become merely hortatory." FINAL REPORT, ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, Senate Document No. 8, 77th Congress, p. 191.

tion.[11] The legislative problem is to state the rule in those situations where it is deemed unwise to leave room for discretion. That problem is no different in general law than in administrative law.[12] In the second place, the plea for "flexibility" is often at bottom designed to cut agencies loose from all legislative control in both substantive and procedural matters.[13] So far as that is the design, it amounts simply to a desire to dispense with legislatures and thus to depart in word and deed from our theory of representative government of divided and separated functions.[14] Since a change of form of government is not the subject for discussion here, presumably we may pass it without further comment.

[11]Compare section 5(d) of the new federal Administrative Procedure Act, 5 U.S.C. 1004(d), which provides that in certain kinds of cases "the agency is authorized in its sound discretion * * * to issue a declaratory order." It was necessary to authorize, by statutory rule, the issuance of declaratory orders; but discretion was also written in to preclude the issuance of improvement orders of that character on the facts of a particular case. LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, Senate Document No. 248, 79th Congress, pp. 204, 263.

[12]In the field of domestic relations, for example, powers are conferred upon courts or withheld from them in a variety of situations respecting marriage, divorce, children, and so on but discretion, express or tacit, is also conferred in various familiar factual situations.

[13]"We are, then, confronted by a question whether we are to be governed by law, as we have been since the Revolution and the setting up of constitutions and bills of rights thereafter. * * * If, as recent realists tell us, a government is in fact simply the office holders of the moment, and so the rule of men is the rule of human beings, who may act from the greatest variety of motives, political expediency, prejudice, spite, mistaken zeal, and may be at times fair and at others ruthless and unreasonable, it is obvious what a theory of law as whatever is done officially may lead to. * * * There has come to be a cult of force throughout the world. A give-it-up philosophy of law and government is being widely taught. We are told that law is to disappear in the society of the future. We are told of a society in which an omnicompetent and benevolent government will provide for the satisfaction of the material wants to every one and there will be no need of adjusting relations or ordering conduct by law since every one will be satisfied. Thus there will be no rights. There will only be a general duty of passive obedience." Pound, THE CHALLENGE OF THE ADMINISTRATIVE PROCESS (1944), 30 A.B.A.J. 121, 125. See also Ronald, THE ADMINISTRATIVE STATE (1948), particularly chapter 6 entitled "Who Should Rule?"

[14]See op. cit. note 4 supra, pp. 275-276, 390-391. Two distinguished public servants of New York have put it thus: "If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude, and imperfect." Elihu Root, 1916, 41 A.B.A. Rep. 355, 368-369. See also the somewhat similar remarks of Charles Evans Hughes, 1925, 50 A.B.A. Rep. 183, 189.

But rejection of the counter arguments is not enough for intelligent people. We must also consider and evaluate the positive arguments in favor of definitive statement and periodic revision of the law. For law generally, as well as for so-called administrative law, the arguments favoring such statement and revision are the same. There are three of them:

First, the law should be reduced to writing so that it may be as definite as circumstances will permit until changed by similar writing. That was Mr. Field's main argument.[15] It had been a historical argument in republics at least as far back as Rome of the Twelve Tables. It was the reason for recent opposition to a federal statute governing administrative operations generally.[16] It was the sole general reason given by Congress for adopting the new federal Administrative Procedure Act,[17] of which the Senate Judiciary Committee said:

> There is a widespread demand for legislation to settle and regulate the field of Federal administration law and procedure. The subject is not expressly mentioned in the Constitution, and there is no recognizable body of such law, as there is for the courts in the Judicial Code. There are no clearly recognized legal guides for either the public or the administrators. Even the ordinary operations of administrative agencies are often difficult to know. The Committee on the Judiciary is convinced that, at least in essentials, there should be some simple and standard plan of administrative procedure.

To which the House Judiciary Committee added:

> It is a beginning. * * * Changes may be made in the light of further experience; and additions should be made.

These arguments and conclusions are plainly echoes of the debate which began a hundred years ago over Mr. Field's idea, except that the spirit of Mr. Field was more successful at Washington in 1946 than in mid-nineteenth century Al-

[15] Op. cit. note 6 supra, i, p. 321; id., iii, 239, 241.

[16] "The second result of a code, in the absence of exhaustive study, is to catch far more than is intended whenever the sections do more than exhort, and lay down specific requirements. Their impact thus may be harmful and surely is unpredictable." Op. cit. note 10 supra, p. 192.

[17] Op. cit. note 11 supra, pp. 187, 282.

bany. In current legislation respecting administrative operations, his great spirit has been equally successful in many of the states of the Union.[18]

Second, only by reducing our law to codified form may legislatures practicably and intelligently exercise their constitutional function of directing, amplifying, and building it to the new needs of each generation. In the absence of such codification, Mr. Field argued, law making was not really left to those to whom the function is conferred by our constitutions.[19] The same thought was expressed by the distinguished chairman of the Senate Judiciary Committee with respect to the federal Administrative Procedure Act:[20]

> It is sometimes said that * * * the substantive and procedural law applicable to an administrative agency should be prescribed piecemeal, for that agency alone. In other fields, however, we instinctively and diligently seek uniformity and conformity in matters of procedure. Diversity merely feeds confusion, which is a great vice in any form of government and operates to defeat the very purposes of good government. Moreover, when administrative agencies are created or when additional powers are given to them, it is because there is some immediate and important public issue to be settled. The question is whether to regulate or not to regulate, and if so to what extent, rather than how to regulate. It is utterly impractical to expect Congress, at such a time, to enact a complete procedural law for one agency or one function. Under such circumstances, it is not surprising that procedural provisions respecting particular administrative agencies are often fragmentary, usually hastily improvised, and sometimes unwisely imitative.

Of course the same thing has been assumed in the several states which have adopted similar legislation.[21] It was

[18]See op. cit. note 4 supra, pp. 1009-1010 and note 36 infra.
[19]Op. cit. note 6 supra, iii, p. 239.
[20]Pat McCarran, IMPROVING ADMINISTRATIVE JUSTICE. Cong. Rec., Jan. 13, 1947, also to be found in 32 A.B.A.J. 827, 829, and 14 I.C.C. Pract. J. 303, 305-306. But what seems so obvious a virtue is undoubtedly cause for alarm on the part of those who fear legislative prescription of administrative law (op. cit. supra note 9, pp. 191-192) for, once legislatures learn how to deal with the subject in codified form, it is a fair assumption that they will act more often than they would otherwise attempt to do.
[21]See the reference in note 18 supra.

the basis upon which federal legislation of this character was recommended:[22]

> Modern legislation, by which the most initimate and vital interests of society are governed, is cast for the better part in similar terms. To say that man can be so governed, but that the agents of the state cannot or should not be so governed, is a recognition of rejected forms of government. To govern the courts by weighty tradition, a bulky "Judicial Code," and uniform rules of practice, but to give administrators only slight statutory attention is at least questionable in a democracy.

Thus again Mr .Field's concept has found acceptance in a newly expanded and esoteric subject of our law.

Third, only by thus writing the law in a form which may be readily grasped may the body of the law, as a practical matter, be made understandable in the minds of beings who are only human. Mr. Field argued for his codes on the ground that, by simplicity of statement and content, they were necessary to make legal proceedings more intelligible and less of a mystery.[23] Reform, uniformity, and simplification were, indeed, the essential words of the brief memorial he drew in 1847 for the signature of representatives of the bar successfully seeking authority from the legislature to begin his great work.[24] The more recent pros and cons have been similar respecting legislation on administrative law.[25] As heretofore stated, the federal Administrative Procedure Act was adopted upon the sole general ground that "there should be some simple and standard plan of administrative procedure."[26]

Indeed, the reasons for a written, workable, and simplified body of statutory law on administrative operations are intensified. The relations governed are not merely those of private parties, but of the people and their government. A few simple words in a federal statute for the regulation of wages, securities, or farm commodities immediately bring into operation a nation-wide program of regulation. The novelty and magni-

[22]Minority statement of Messrs. Vanderbilt, Stason, and McFarland, op. cit. note 10 supra, pp. 214-215.
[23]Op. cit. note 6 supra, i, pp. 291-292; id. iii, p. 240. Compare: "We can take the mystery out of the system." McFarland, ADMINISTRATIVE LAW AND THE FUTURE (1944), 18 Tenn. L. Rev. 157, 170 and note 31 thereof.
[24]Op. cit. note 6 supra, i, p. 261.
[25]Op. cit. note 10 supra, pp. 191-192, 213-216.
[26]See the quotation in the text at note 17 supra.

tude of these endeavors require care and concern for the citizen upon whom, or for whom, they operate. Moreover, they can succeed only to the extent that those subject to them properly understand what they are and how they operate. Vast programs of this character become discredited at least as much because they are confused as because some people dislike to be regulated. If any proof be needed, our recent history of wartime regulation will supply it in many particulars. Hence, Mr. Field's idea is here not merely desirable for the benefit of the individual but is an essential for the success of public policy.

II. ADMINISTRATIVE LAW IN THE ORIGINAL FIELD CODES

What has been said so far relates to the steady march of Mr. Field's concept beyond his state, beyond his century, and beyond the law with which he dealt. It would be reasonable to suppose that he codified the administrative law of his century. His codes would naturally include administrative law if there was any in his day, and his later efforts to secure a codification of international law indicate that he believed in applying law even to and among sovereigns.

As a matter of fact, the Field codes contain some interesting administrative law. His code of procedure of 1948 related only to courts and judicial institutions. But in the Political Code of 1860 he restates the rule of law:[27]

> Every person within this state has the following legal rights, among others:
>
> 1. Exemption from all authority over his person or property but such as is derived from the people of this state through their grant to the United States, by the Constitution of the United States or through their own constitution and laws;
>
> 2. The right to do any act not forbidden by law.

Compare section 9(a) of the federal Administrative Procedure Act which provides:[28]

> In the exercise of any power or authority no sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

[27]Part I, section 12.
[28]5 U.S.C. 1008(a).

Mr. Field's Political Code also contains extensive provisions for the regulation of such subjects as transportation (Part III, title III). But of course much actual governance was still left to cities, towns, and counties (Part IV). The taxpayers suit was available to contest official action (section 959), thereby illustrating the debt of American administrative law to the law of municipal corporations as is true also of English public law.[29]

By Mr. Field's Civil Code of 1865 the definition of law included, in addition to the Constitution and statutes, "the ordinances of other and subordinate legislative bodies" (section 3). The present federal Administrative Procedure Act, for example, differs only in its greater verbiage and the substitution of the word "rule" for "ordinance".[30] Again, public officers and agencies are not exempt from the operation of the code, for the word "person" is defined to include "not only human beings, but bodies politic or corporate" (section 2014). In Mr. Field's day, of course, substantive "civil" law was still regarded as essentially the law applied by courts alone and hence there was no occasion for him to attempt to develop there what we now call administrative law.

In the Penal Code of the same year we find more real administrative law because criminal law is the ancient form of public regulation. There are crimes against the executive power of the state (Title VI) and crimes against public justice (Title VIII). And here we also find the first reference to "administrative officers" (section 112):

> The provisions of this chapter which relate to executive officers apply in relation to administrative officers, in the same manner as if administrative and executive officers were both mentioned.

One wonders that the term should then have been common enough to require such a precaution.

The Code of Evidence (1889) contains extensive provisions relating to the admission of public records in evidence (sections 97 to 106), including copies of rules and regulations of the superintendent of public works (section 98), and the certification thereof (sections 1 to 130). No presumption was

[29]See Holdsworth, HISTORY OF ENGLISH LAW, x, pp. 35-36, 126-128, 155-157, 238-256, 366-368, 414-417, 514-515, 648-651 (1938).
[30]Section 2(c), 5 U.S.C. 1001(c); and see also op. cit. note 11 supra, pp. 193, 251.

to be indisputable unless so declared by statute (section 188) and among the disputable presumptions were (section 190):

> 11. That a person acting in a public office had the proper authority.
>
> 12. That official duty has been performed as required by law.

These will sound familiar to any practitioner in the field of administrative law today.

In addition to his grand concept of a codified law as a means of order and growth, Mr. Field was certainly aware of administrative law as we know it more fulsomely these days. So far as it faced him in his time he included it in his codes.

III. FROM HIS DAY TO OURS

Thus far we have examined (I) Mr. Field's idea in its relation to the problem of administrative law today as well as (II) his specific treatment of the same subject in the codes he prepared. In discussing those aspects of our subject, comparisons have been made with recent state and federal legislation on administrative law. Perhaps it will fittingly conclude the subject if we now connect up his times and ours with a very brief look at the pertinent chain of legal history.

Mr. Field's lifetime (1805-1894) covered almost the whole of the nineteenth century. In the development of our law and legal institutions, it was our first and formative century as an independent nation. For the greater part of it, his influence was undoubtedly direct and powerful. The year 1900 marked not only a new century but the approximate end of an era. The previous decade saw the first flowering of American legal literature in administrative law,[31] and, surprisingly, the first years of the new century saw the last of it for a generation.[32] Administrative law as a legal subject was pushed

[31]Mechem, PUBLIC OFFICES (1890). Goodnow, from the political scientist's point of view, in 1893 published his important COMPARATIVE ADMINISTRATIVE LAW.

[32]Wyman, ADMINISTRATIVE LAW (1903); and Goodnow, PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905). Books which followed were mere compilations or descriptions such as Gauss, AMERICAN GOVERNMENT—ORGANIZATIONS AND OFFICIALS WITH THE DUTIES AND POWERS OF FEDERAL OFFICE HOLDERS (1908); Lapp, FEDERAL RULES AND REGULATIONS (1918); and Thorpe, FEDERAL DEPARTMENTAL ORGANIZATION AND PRACTICE (1925). There was, of course, a rich and increasing production of monographs and articles from

aside in the fierce debate over the political question whether states and nation should or should not regulate, administratively or otherwise, many things which have since come to be regulated.[33]

The first World War, and its preceding years of emergency, prevented much attention being given to perfecting legal institutions. In the 1920's the issue became one not of developing administrative justice but of dispute over the control which courts should exercise over administration.[34] Of course the 1930's were years of the Great Depression, then of pell-mell creation of new agencies at the national level, and finally of international emergency. But somehow, despite rumors of war and war itself, a series of important studies were launched and recommendations made which turned attention, from preoccupation with "judicial review" alone, back to administrative operations and procedure.[35] It was thus not until our present 1940's, fifty years after Mr. Field's death, that legislation respecting real administrative law has been permitted to be a live subject.[36]

1910 to date. Not until 1942 was there another publication of the law-book type of Mechem and Wyman (see notes 31 and 32 supra) in vom Baur, FEDERAL ADMINISTRATIVE LAW (1942). For lawyers all of these works have now been supplemented, if not superseded, by official studies or documents such as those cited at notes 9 and 11 or by loose-leaf services containing procedural or substantive administrative law generally or of particular federal agencies. Casebooks are numerous and often consulted. See Nutting, 1 Journal of Legal Education 147 (1948); Jaffe, 96 U. Pa. Law Rev. 923 (1948).

[33]See McFarland, THE FALSE STANDARD IN ADMINISTRATIVE ORGANIZATION AND PROCEDURE (1942), 27 Cornell L. Q. 433, 435-436. See also op. cit. note 23 supra, p. 161 and note 13 thereof.

[34]See the discussion and authorities in McFarland, ADMINISTRATIVE AGENCIES IN GOVERNMENT AND THE EFFECT THEREON OF CONSTITUTIONAL LIMITATAIONS (1934), 59 A.B.A. Rep. 326. See also op. cit. note 23 supra, p. 161 and note 14 thereof.

[35]The best resume for the ten years preceding the adoption of the federal Administrative Procedure Act in 1946 is to be found in the Report of the House Judiciary Committee thereon. Op. cit. note 11 supra, pp. 241-250. See also op. cit. note 4 supra, pp. vi-viii. For the history and position of the organized bar, see the Report and Supplemental Report of the Special Committee on Administrative Law, American Bar Association, in 1943 in 68 A.B.A. Rep. 249, 254.

[36]The federal Administrative Procedure Act was adopted June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001 *et seq.* At about the same time, a model form of statute had been drawn for use in preparing state legislation. Meanwhile the preceding years of the current decade had seen the drafting and adoption of a number of similar statutes in the states. Op. cit. note 4 supra, pp. 1009-1010. "But the Administrative Procedure Act, like the very evil which it sought to correct, requires administration itself, interpretation and implementation. In fact, there are four basic steps involved in this process: (1) The proper interpretation and *enforcement* of the Administrative Procedure Act; (2)

Had it not been for Mr. Field, who can deny that American administrative law would be off on some other course? His great idea has won acceptance in other legal subjects. Administrative law is the last, or at least latest, battleground. The words and arguments of his century are now heard again. Little doubt should exist as to the outcome of these current struggles so long as our form of government endures. And there perhaps, for administrative as well as other law, you have the essential contribution of Mr. Field. *He filled in the concept of a government of, and under, law.* To administrative law it is a contribution beyond price. Mr. Field departed our mundane society long ago—yet his mighty spirit is here, not on the sidelines but in the midst of the fray.

The appointment of "qualified and competent *examiners*" to hold hearings and make or recommend decisions in formal administrative cases; (3) The adoption of an adequate statute regulating *admissions* to administrative practice, fixing or providing a means for fixing the standards and ethics of administrative practice, and providing disciplinary machinery; and (4) The formulation and adoption of *uniform rules* of administrative procedure for federal agencies." Alexander Wiley (Chairman, Judiciary Committee, United States Senate), FURTHER IMPROVEMENTS IN AGENCY PROCEDURE, 34 A.B.A.J. 877, 878-879 (1948).