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Administrative Agencies and the Courts (Frank E. Cooper, 1951)

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BOOK REVIEWS

ADMINISTRATIVE AGENCIES AND THE COURTS. By Frank E. Cooper. Ann Arbor: University of Michigan Law School. 1951. Pp. xxv, 390, appendix, bibliography, table of cases, and index. \$5.00.

Thirteen years ago the attorney general of the United States appointed a committee "to investigate the need for procedural reform in various administrative tribunals and to suggest improvements therein." In part as a result of the work of that committee, six years ago Congress passed the Administrative Procedure Act to "improve the administration of justice by prescribing fair administrative procedure." Similar efforts at procedural reform have been made in a few of the states. *Administrative Agencies and the Courts* is in harmony with the recent emphasis on improving administrative procedure. It is an able and current exposition of the rules governing action by administrative agencies as interpreted, developed, and in some instances created by the courts.

This work is not confined to the nature and scope of judicial review of administrative action, as is perhaps suggested by the title. Part V, about one quarter of the book, is devoted to these questions, but the book runs the entire gamut of administrative law as it has developed under our system, which emphasizes judicial control. Part I traces the development of administrative agencies and describes briefly their utility and their relationship to other governmental institutions. Part II deals with basic constitutional questions, primarily the validity of the statutory delegation of authority and the requirement of an opportunity for notice and hearing prior to administrative action. In Part III the author discusses and appraises the constitutional, statutory, and other procedural rules and practices applicable to administrative adjudication; and Part IV includes a similar, but appropriately more brief, discussion of administrative rule-making, practice, and procedure, together with a consideration of the legal effect and validity of administrative rules.

Two things about the book seem to stand out. In the first place, it is a remarkably brief and readable, yet scholarly and accurate, treatment of the subject of administrative law. From the standpoint of an instructor teaching a basic course in administrative law in a political science department or in a law school, the book may serve much the same purpose as is served in the field of federal income taxation by the excellent brief book by Stanley and Kilcullen entitled *The*

Federal Income Tax. The book or portions of it may properly be assigned or recommended for reading to develop perspective for the more detailed classroom consideration of administrative law cases and concepts. At least in recent years there has been a real need for such a book, which need has not been fully met by similar, but now outdated, earlier efforts or by the scattered scholarly works in the legal periodicals.¹

In writing *Administrative Agencies and the Courts* Mr. Cooper has made full and proper use of books, articles, and notes of others bearing on his subject, and he has included in his book a selective, rather than exhaustive, bibliography which will be useful to many readers. But the book is not a mere reader's digest or rehash of the works and thoughts of others. In many instances Mr. Cooper has viewed administrative law problems with a new perspective. For example, in Part II of the book, the author reviews the general problem of notice and hearing in administrative proceedings, featuring the traditional consideration of due process requirements, the dreary quasi-legislative, quasi-judicial dichotomy and its limitations, and exceptions to the general rules. At page 88 he concludes in a way that is not new: "The essential problem in every case is that of weighing the relative merits of a public interest in prompt action against the respondent's private interest that the hand of the law be stayed until he has fully argued the equities of his particular position." If the matter were dropped there, the principal merit in this portion of the book would be Mr. Cooper's brevity and style. But he follows that discussion with a fresh consideration of policy factors which, although unstated in judicial opinions, clearly have a constant and important bearing on the solution of the essential problem.

The second principal comment to be made about the book concerns the author's emphasis upon judicial control over administrative agencies. This emphasis is foreshadowed by Dean Stason's remark in the foreword: "The British rely upon Parliamentary control of the ministerial departments. We rely upon the courts." Through its power to amend or repeal legislation, its power to appropriate or refuse to appropriate money, and its investigatory powers, and subject only to constitutional qualifications, Congress has, of course, every

¹But see DAVIS, *ADMINISTRATIVE LAW* (1951). This admirable and extensive treatise is in part a collection and revision of articles previously published by the author.

bit as much control over federal administrative agencies as is enjoyed by Parliament over their British counterparts. However, in recent years as a result of Congressional indifference, preoccupation with other matters, deference to administrators, reliance on the judiciary, or for other reasons, and despite the enactment of the Administrative Procedure Act, Congress has by no means undertaken to exercise the full measure of its power to control administrative action. In this light, Dean Stason's remark is entirely accurate, and, furthermore, Mr. Cooper's emphasis on the relationship between administrative agencies and the courts is an appropriate recognition of present practices.

It is, however, as the author expressly states at page 7, "with the courts *and the legislatures* that there rests the sole power to correct widely noted defects of administrative action." In several places in the book the author refers to administrative abuses which the courts are unable to eliminate. For example, at page 117, Mr. Cooper calls attention to the unequal bargaining position of a private party negotiating with some administrative agencies: "A private party has no desire to be in the bad graces of the agency which administers a law affecting his business." Mr. Cooper refers to some existing and proposed improvements in this situation but concedes too complacently at page 118, that "it is impossible to eliminate this possibility of abuse." This possibility of abuse, among others, it is submitted, calls for further critical analysis of the administrative process by Congress and the state legislatures on a policy basis generally denied to the courts. The author himself suggests, at page 47, the opportunities which experience may afford for legislative redefinition of standards to guide administrative action. The development of drafting techniques seems to have taken the question of standards away from the judiciary, but utilization of legally adequate but otherwise vague standards calls for more frequent and more responsible legislative review of administratively adopted policies. Another question that is not for the courts, but which requires full consideration by the legislatures, is the cumulative effect on business and the private individual of multiple and sometimes conflicting investigatory powers vested in administrative agencies.

The foregoing comments on the question of legislative control of administrative action are not meant to be adversely critical of *Administrative Agencies and the Courts*. In it the author has ably accomplished his objective of describing "the standards which courts

impose upon administrative agencies, thereby controlling and limiting their powers" (p. xiii). The book is a very useful one. But perhaps the time has come for the legal profession and others to shift their emphasis from administrative procedure as directed largely by the courts to a fuller appraisal of the utilization of administrative agencies with a view to eliminating some of the more fundamental defects with which the courts cannot cope.

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SELECTED ESSAYS ON FAMILY LAW. Compiled and Edited by a Committee of the Association of American Law Schools. Brooklyn: The Foundation Press, Inc. 1950. Pp. xv, 1122. \$9.50.

A collection of essays of any sort by a first-rate author would undoubtedly be held together by a common theme, thread, or approach. A collection of essays selected from many first-rate authors might or might not be so held together, depending on the selector or selectors. A single selector's choices would tend to be bound together by the unity of his unconscious attitude or his expressed objective for the collation. But essays selected by a relatively large group can be expected to have little or no cohesiveness unless the group is bound together by a common background predispositionally speaking, or by an intellectually spartan agreement kept on course by strong helmsmen. *Selected Essays on Family Law* is a compilation edited by a varying group of law professors. Such a body, unless it be consciously loaded, is, in the year 1952, rarely distinguished by complete homogeneity of approach. But law professors are usually gentlemen and not dynamos, and this state of affairs is conducive to sweet compromise. Quite in keeping, we have in *Selected Essays* a little of everything, and so nobody ought to be genuinely perturbed.

In addition to the "straight legal" essays the natural law lawyers should be happy with an entire chapter devoted to "Religion and the Family," which consists of the Church of England's form for the solemnization of matrimony, a view of marriage by the Federal Council of Churches of Christ in America, and an encyclical on the subject