

BOOK REVIEW

CASES AND MATERIALS ON ADMINISTRATIVE LAW. By Milton Katz.¹
American Casebook Series. St. Paul: West Publishing Co. 1947.
Pp. xiii, 1108. \$8.00.

The meteoric development of administrative law, unparalleled in scope and intensity over the last decade and a half, seems now to have reached a point of relative equilibrium. The two major factors accounting for the growth of the administrative process — New Deal legislation and World War II — have spent their force. By and large, the judiciary has adjusted itself to the situation. As the implications of the movement began to emerge with startling clarity in the early 1930's, the courts — largely under the leadership of Chief Justice Hughes — tended to fumble and resist.² More recently, these false starts have been wiped out or quietly forgotten, and the judiciary has settled down to an acceptance of the inevitable role of its sister institution. Last year, many of the techniques worked out by the administrative agencies were codified and rigidified in the Administrative Procedure Act. And so, ten years after the peak of the New Deal and two years after the termination of the war, we seem to have reached a temporary halt in the movement and perhaps even face a temporary retrogression.³

It is opportune, therefore, to reconsider where this lusty body of administrative law fits into the law school curriculum and how it can best be imparted to the law school student. Professor Katz's new casebook undertakes an answer to these questions.

The initial difficulty arises out of the tremendous scope and ramifications of the subject. Administrative law covers nothing less than the growth, structure, and functioning of the executive branch of government — that area of government upon which has fallen the overwhelming burden of expansion, in the transition from a nineteenth-century laissez-faire to a twentieth-century service state. The administrative process involves operations at federal, state, and local levels. It is basically procedural in nature, but it can be understood only in relation to the manifold substantive problems of modern government.

So broad is the field that doubt at once arises whether administrative law should be taught as a single course. The procedure of our judicial system, far less varied and dynamic, occupies four or five courses in the normal law school curriculum. My own feeling is, however, that a broad, introductory course, surveying the entire administrative process, serves

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² *E.g.*, *Morgan v. United States*, 304 U. S. 1 (1938); *Morgan v. United States*, 298 U. S. 468 (1936); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936); *Crowell v. Benson*, 285 U. S. 22 (1932).

³ Particularly evidenced by the reactionary administrative features of the Labor Management Relations Act, Pub. L. No. 101, 80th Cong., 1st Sess., 29 U. S. C. A. § 141 *et seq.* (Supp. July, 1947).

a valuable purpose. Such a course obviously must be co-ordinated with the courses offered in constitutional law (which should probably be taught as a general introduction to public law), in judicial process, and in legislative process. It should lead into those courses which deal with specific governmental problems from both substantive and procedural aspects, such as the various courses in public control of business, labor law, taxation, and the like. And it should be supplemented, by those particularly interested in problems of government, through advanced courses in such areas as enforcement, government administration, and the legal aspects of community living.

What should the objectives of such a survey course be? Roughly, I would say that the effort should be to give the student a broad grasp of the development and trends of the executive branch of government — its roots, its aims, its limitations, its relation to the other organs of government and to non-governmental institutions. The course should convey an understanding of the structure, organization, and factual functioning of typical government agencies; the practical tools and methods of government operations; and the techniques of working effectively through and with a government agency. This should embrace not only the formal procedures of governmental agencies, but, equally important, the informal procedures and political dynamics. There should be sufficient inquiry into the problems of government administration to afford the student a general background and specific orientation when faced with a concrete question; to give an understanding of the basic principles of the administrative process as realistically applied to concrete issues; and to develop a modicum of skill in using materials, legal and non-legal, in dealing with an administrative agency. All of the foregoing should be developed in light of the basic values of an industrialized democratic society and in integration with the political, social, and economic factors that underlie and control the legal principles.

To what extent does Professor Katz's book meet these ideal requirements? The book consists primarily of cases, statutes, and regulations, with a fair sprinkling of legislative reports, agency reports, and similar material. It is starkly a casebook. There is virtual absence of digests, extracts, comments, questions, references to other cases or to law journal material — none of the lushness of a Llewellyn or Gellhorn product. With the exception of three cases from the New Hampshire and Massachusetts courts, the material relates entirely to federal cases and materials.

The book makes an interesting, and on the whole successful, effort to combine a general and a specific approach. Professor Katz concentrates his material on four federal agencies: the Interstate Commerce Commission and the Securities Exchange Commission, examples of an old and a newer agency responsible for the regulation of a particular industry; and the Federal Trade Commission and the National Labor Relations Board, examples of an old and newer agency dealing with particular economic practices cutting across various industries. Thus, the material giving the statutory framework for agency action, examples of regulations

and interpretations, and illustrations of agency procedure relate to these four agencies. The case selection gives preference to decisions involving the four designated agencies, but includes many others from the general field as well.

By and large, the material is organized along functional lines. After a very brief introductory chapter the book proceeds to the material on formulation of the statutory scheme and the organization of the administrative agency. There follows a chapter on "The Determination of the Administrative Program," which takes up problems of statutory interpretation and the acquisition of information. The next chapter, "Promulgation of the Administrative Program," deals with rule-making powers and procedures, dividing regulations and orders into those of "general applicability prescribing future conduct" and "particular applicability prescribing future conduct." This chapter includes problems of delegation, control through rules adopted by private organizations, and the effect of rules in binding the agency. A chapter entitled "The Enforcement of the Administrative Program" takes up procedures preliminary to formal proceedings, adjudicatory powers and procedures, enforcement proceedings in the courts, and the problem of who may initiate enforcement proceedings. A final chapter, embracing nearly half the book, deals with judicial review. This covers problems of when and by whom judicial intervention may be invoked, the scope of review, and the methods of invoking it.

As a teaching instrument the book has a number of commendable features. The selection of cases seems to me, by and large, a good one. The use of statutes and regulations is most effective. The centering of material on four agencies, while preserving the broad scope of the subject, is an excellent innovation and well worked out. The organization is realistic and enlightening, whatever anguish it may have cost the author to have squeezed certain isolated sections into the basic pattern. The attention given to the role of administrative agencies in enforcement — an area considerably neglected up to now — is well deserved.

It will perhaps be pardoned, however, if I succumb to the temptation to point out certain respects in which, it seems to me, the book fails as a medium for achieving some of the ideal objectives sketched above.

In the first place, Professor Katz has put undue emphasis on case and statutory law to the neglect of other materials which would throw considerable light upon the significance and actual operation of the administrative process. There is no material revealing the historical development of the administrative process, or showing its present place and function in the structure of modern government. Similarly, there is a scarcity of material dealing with actual agency practices, informal procedures, and disposition of the great bulk of matters which never receive full formal treatment. Within recent years, there have been two comprehensive studies of the realistic functioning of administrative agencies — one by the Attorney General's Committee on Administrative Procedure and the other by Robert Benjamin as Moreland Commissioner

in New York. It is unfortunate that the material in these studies and from other sources has not been utilized to give a more graphic account of administrative law in action.

Secondly, Professor Katz devotes 500 pages of his book to judicial review. I would not want to underestimate the significance of what the courts do, or could do, to administrative agencies. But all the pressures which have forced the administrative process into its present expanded shape have tended equally to sap the influence of the judiciary. Certainly today the mass of administrative action takes place quite outside the sphere of judicial review — in the informal dispositions, in the findings of fact, in the various pressures which foreclose effective resort to court action. It is conceded that disproportionate importance attaches to the few cases which reach the court stage; nevertheless, the significance of judicial review to the average practitioner before an administrative agency is greatly exaggerated by a division of space which allocates nearly half of the book to that problem.⁴ Furthermore, on the purely pedagogical side, the problem of judicial review arises in virtually every case considered in the course, as well as in numerous cases dealt with in other courses. Consequently, the need for prolonged study of the subject as a special topic of administrative law is very substantially reduced.

As a corollary to his emphasis on judicial review, Professor Katz has been forced to limit drastically his treatment of other aspects of the administrative process. Thus, his discussion of organization is limited to cases on the removal power and some material on appropriations; it fails to deal with such matters as subdelegation, decentralization, field offices, use of the corporate device, or an over-all picture of the administrative organization of the Federal Government. The material on the investigatory powers of administrative agencies is inadequate, neglecting or treating only partially such matters as record-keeping and reporting devices, self-incrimination, searches and seizures, and the rights of persons under investigation. The omission of any reference to the *Oklahoma Press*⁵ case is particularly startling. Again, there seems to me a serious under-emphasis upon material dealing with the hearing process before administrative agencies, including evidence and methods of proof, and with the process of decision.

The material on enforcement methods of administrative agencies likewise suffers from the emphasis on what are, in my opinion at least, less important phases of the administrative process. The book contains little or no material on such important aspects of enforcement as voluntary compliance, informal methods of obtaining compliance, settlement policies, the use and relative value of the various sanctions, co-operation of federal and state authorities, contempt, or public-relations policy in enforcement. There is also confusion, which tends to muddle the picture,

⁴ For an interesting article on this matter, see Dulles, *Administrative Law: A Practical Attitude for Lawyers*, 25 A. B. A. J. 275 (1939).

⁵ *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946).

between enforcement in the sense of preventing or punishing violations of law and in the broader sense of administering the statute.

The absence of extracts, digests, and references to other cases and to law journal material also seems to me unfortunate and a retrogression in casebook making. Such material is invaluable to the student in opening wider vistas of the subject than are afforded by a single factual situation embodied in a single case. For the same reason I think the limitation to federal materials narrows and impoverishes the course. Concededly, the introduction of state materials would greatly extend the scope of the book. But, as I have indicated above, the course must necessarily be in the nature of a general survey, devoted not to a simple transmission of factual material but to the development of an insight into problems and into methods of handling them. I believe that a more careful editing of cases, and the use of more digests and extracts, would allow space for the introduction of material on state problems which would substantially enlarge and enrich the course.⁶

Finally, I would take issue with Professor Katz's treatment of the Administrative Procedure Act. However much that statute merely codified existing practice, the fact is that it was intended to be a comprehensive code governing the administrative process and that all federal agencies are being substantially influenced by its provisions. Professor Katz has confined himself to printing applicable segments of the Act at appropriate places. I fear the student will find the Act even more unintelligible than it actually is when he attempts to approach it on this piecemeal and isolated basis. It can be understood, if at all, only if printed in complete form, accompanied by the committee reports and, preferably, by some of the legislative debates.

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⁶ For instance, in a section on "non-reviewable" orders, Professor Katz prints at length four cases, occupying 30 pages, dealing with the problem of review of certification of collective bargaining representatives. To my mind it would be preferable to print one of these cases, *e.g.*, *Switchman's Union v. National Mediation Board*, 320 U. S. 297 (1943), and digest the others. Such treatment would save a good deal of space and would permit a broader grasp of the field through inclusion of materials from state courts as well as important federal cases dealing with other aspects of the problem, such as *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940).

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BOOK NOTE

WILLIAM RUFUS DAY: SUPREME COURT JUSTICE FROM OHIO. By Joseph E. McLean. Baltimore: The Johns Hopkins Press. 1946. Pp. 172. \$2.00.

Originally written as a doctoral thesis, this book is an attempt to give a better understanding of the Supreme Court by interpreting the role and decisions of one of its less well-known justices. Mr. Justice Day is por-