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A Treatise on Administrative Law

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addition to the small number of copyright treatises in print today. Although the preface protests that the book is not for "copyright lawyers or even law students who plan to specialize in copyright law", this leaves a large segment of the legal profession to whom the book will be useful. Outside of New York and Hollywood, it is doubtful that there are many specialists in copyright law. A large part of copyright practice rests with the general practitioner. Since, in turn, a large part of this practice deals with matters covered by Nicholson's book, it definitely has a place in the law office. For those who plan to become specialists in this field, there is no better primer! for those who are already specialists, there is no handier desk-book.

Member of the Chicago Bar. Allen D. Choka

A TREATISE ON ADMINISTRATIVE LAW. By Morris D. Forkosch, Indianapolis, Indiana: The Bobbs-Merrill Company, Inc. 1956. Pp. xiv, 856. Regular edition: $17.50. Student edition: $12.00.

Over the past century American society has grown infinitely more complicated. Complexity has helped generate expansion of the role of government in our lives. Increased governmental activity is manifested in part through administrative agencies—bodies which, under the traditional tri-partite division of sovereign powers, are neither fish nor fowl. Because the activities of local, state, and federal bureaucrats affect a great many private interests, lawyers and other citizens have become increasingly aware of, and interested in, the procedures followed by them. Interest in administrative government has generated fierce court battles;[1] it has resulted in legislation, such as the *Administrative Procedure Act;*[2] it has been reflected in law schools by admission of Administrative Law to the

[1] The *Chenery* cases, decided under the Public Utility Holding Company Act of 1935, 49 STAT. 803, 15 U.S.C. § 79 (1952), went three rounds in the courts. Twice the controversy reached the Supreme Court, SEC v. Chenery Corporation, 318 U.S. 80 (1943); SEC v. Chenery Corporation, 332 U.S. 194 (1947), and in the third round the litigants made an effort to get that far. *In re* Federal Water and Gas Corporation, 87 F. Supp. 289 (D. Del. 1949), *affirmed,* 188 F.2d 100 (3d Cir. 1951), *cert. denied,* 341 U.S. 953 (1951).

The *Morgan* litigation made four trips to the Supreme Court. Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1938); United States v. Morgan, 307 U.S. 183 (1939); United States v. Morgan, 313 U.S. 409 (1941). It lasted through nearly a dozen years of administrative and court action.

[2] 60 STAT. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).

"pantheon of the curriculum;"[3] and it has spawned an offspring of legal literature.

When professional attention was first directed to administrative procedure, the vital issues concerned transfer of sovereign powers to non-legislative and non-judicial bodies and limitation of agency effectiveness through judicial review. Later, however, questions relating to operation of the administrative mechanism came to constitute the core of administrative law.[4] Following passage of the *Administrative Procedure Act* in 1946, attention has been even more sharply focused on the process itself.[5] Since then several notable books have dissected administrative government, seeking to explain its anatomy and physiology;[6] but their usefulness has begun to wane with the passage of time. In a fluid and fast-moving field such as administrative law, currency is an important consideration. Consequently, it is a noteworthy event when an up-to-date guide to the wilderness of administrative law is published.

Professor Forkosch's new work covers the same general areas dealt with by other writers in the field. He examines the issues surrounding the establishment of administrative bodies; he continues by showing the operation of those groups; and, finally, he deals with review of their actions by agencies higher in the governmental structure and by courts. His emphasis is on the procedural law governing agencies, rather than on the law produced by them. Only procedure illustrating the administrative process in general is studied. It is impossible to make a detailed study of the specific procedures of each of the myriad of agencies. This limitation has quite naturally led the author to a very heavy emphasis on materials from federal, rather than from state, sources. But inasmuch as federal law is further advanced than the law of the states and their subdivisions, and

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[3] An examination of the latest announcements of a hundred representative American law schools indicates that Administrative Law is a graduation requirement in a third of them and an optional course in the remainder. Approximately half of the law schools offer it as a three hour course; a third allocate only two hours to it; the remainder of the schools allow four hours. About two-thirds of the schools permit second year students to take Administrative Law. Most of the rest offer it only to third year students.

[4] For a history of the teaching of Administrative Law see Byse, Book Review, 25 IOWA L. REV. 839 (1940); Jaffe, Book Review, 54 HARV. L. REV. 367 (1940).

[5] Current casebooks follow the lead of GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS (1940).

[6] See, *e.g.*, SWENSON, FEDERAL ADMINISTRATIVE LAW (1952); PARKER, ADMINISTRATIVE LAW (1952); DAVIS, ADMINISTRATIVE LAW (1951).

since these often look to federal sources for guidance,[7] this emphasis is quite logical. However, it is probably overdone; in fact it is carried so far that this work might be more appropriately called: "A Treatise on *Federal* Administrative Law."

Lawyers evoke an interest in the operations of administrative groups only when the activities of those bodies affect clients in such fashion as to require legal assistance. Generally it is the control agencies of government that create the need for expert legal help. The political, executive, service, and benefactory activities of governmental agencies do not come within the range of a lawyer's work. Therefore, this book is pointed toward the activities of the great control agencies, such as the NLRB, SEC, FTC, ICC, FCC, FPC, etc. Furthermore, the emphasis is on legal problems as contrasted with practical questions on the one hand and political science considerations on the other.

By his method of presentation of the materials covered by this book, Professor Forkosch has rendered a distinct service to the legal teaching profession. The pedagogical procedure adopted in the book is its distinguishing feature and primary contribution to the field of administrative law.

As a law teacher I have often sought through diagrams to portray relationships within and between cases. Professor Forkosch, who has adopted this technique previously,[8] here goes beyond anything I have ever imagined. He presents a series of diagrams on the administrative process which show the ingenuity of Rube Goldberg[9] and demonstrate animating tendencies similar to Artzybasheff covers on Time Magazine.[10] The series of diagrams begins innocently enough with one composed merely of a single line and four arrows connecting four words.[11] But later diagrams, through some amoeba-like process, quickly spread in all directions.[12] At times when they get out of hand "simplified" versions are added[13]

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[7] Sometimes, though, the guidance of federal cases is refused. See, *e.g.*, Nolan v. Fitzpatrick, 9 N.J. 477, 89 A.2d 13 (1952); Ward v. Keenan, 3 N.J. 298, 70 A.2d 77 (1949), which declined to follow Myers v. Bethlehem Steel Shipbuilding Corp., 303 U.S. 41 (1938).

[8] See, *e.g.*, FORKOSCH, LABOR LAW (1953).

[9] See, *e.g.*, § 240.

[10] See *e.g.*, § 316.

[11] Section 26.

[12] Section 264.

[13] Section 31.

which are in turn permitted to grow. Each diagram is tied to the text and each important topic has its place in the diagraming system. By the end of the book Professor Forkosch triumphantly presents a single page diagram which charts the entire outline of the administrative process and of his treatise.[14] The tremendous effort involved in contriving these diagrams often seems quite unnecessary;[15] readers can comprehend the subject matter without quite so many crutches. At other points they tend to obscure, rather than illuminate, the material in the book.[16] They also can become dangerous instruments of over-simplification in spite of the warnings that they are intended only as indicia of generalities about the administrative process. Nevertheless, diagraming has enhanced this book.

As a part of his charts, the author includes numbered "PAT's" or points of attack. He has listed for benefit of the practitioner and the student those vulnerable Achilles' heels in the administrative process where the actions of control agencies might be thwarted. They are a check list of the weak links in the administrative chain which might be broken. This inclusion is a practical aspect of the book which is quite rare in legal writings on administrative procedure. Lists[17] and illustrations of agency and judicial forms and orders[18] give the book the air of a practice manual.

Along with the diagrams and the "PAT's," there are constant cross-references to materials previously covered, or dealt with later in the work. These cross-references, which seem at times to have gotten out of hand, tie the book together. They help unite it into an integrated, interrelated whole, instead of leaving it as a patchwork of articles.

The close interrelation of the book, however, has its drawbacks. It is hard to follow one part of the book without checking portions connected to it by diagrams, "PAT's" or cross-references. The long introductory part of the book and the very short concluding chapter in part mitigate this. Wider use could be made of introductions to chapters and sections (in the style of the black-letter law device

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[14] Section 351.

[15] Section 26.

[16] Section 316.

[17] Section 317 has a fourteen and a half page list relating to judicial review.

[18] Chapter XV has verbatim illustrations of several types of administrative orders.

of the hornbook series) and of summaries (like those employed in some other books on administrative law).[19] Legal writers would be well advised to follow the admonition of speech teachers: tell them what you are going to say, say it, and then tell them what you have said.

In part because of the method of presentation and partly because of the lack of space in a single volume, this book has a very heavy emphasis on the descriptive. Text, diagrams, charts, examples, and lists explain graphically the results of given situations. The book is, however, quite short on analysis. The reasons for the results are sometimes not given, and, when they are given, they are all to often not closely examined to see whether they hold up. Rules are propounded but are not dissected to inspect their utility or validity.[20]

A further deficiency found in this book cannot be ascribed to space limitations. Once certain relationships have been labeled, Professor Forkosch points the way toward handling them; but in several important instances he does not outline how the labelling process was achieved. Thus, for example, he shows how courts treat legislative regulations[21] and how their treatment of interpretative regulations differs,[22] but he gives little assistance to one seeking a means of distinguishing legislative regulations from interpretative ones. Similarly, the means of distinguishing quasi-judicial, quasi-legislative, and quasi-executive powers from each other,[23] the manner in which courts draw the line between questions of law and questions of application of facts to the law for purposes of judicial review,[24] and the way in which it is determined whether or not constitutional considerations require a "fair hearing"[25] are not brought out. These issues are vital ones which should be discussed in any text on administrative law.

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[19] PARKER ADMINISTRATIVE LAW (1952); DAVIS, ADMINISTRATIVE LAW (1951).

[20] See, *e.g.*, the discussion of primary jurisdiction, § 302.

[21] Section 135.

[22] Section 137.

[23] Section 58 provides a chart on whether notice and hearing are constitutionally required in different types of delegation, but neither in that section nor elsewhere is the basis of distinction between the various powers made clear.

[24] Section 339 and other sections in chapter XVIII on the scope of review do not make clear the means of arriving at this distinction.

[25] Sections 155-159 do not clear this up.

While this book has only limited utility as a reference work for information about specific cases or areas of administrative law, it has some potential as an aid to lawyers, students, and teachers. Students can benefit from it by reading it in conjunction with an Administrative Law course. Lawyers can use the "PAT's" as points of departure for working up their cases. Teachers are relieved of some of the burden of exercising their ingenuity in conjuring up diagrams and other mechanical aids to legal pedagogy.

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