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BOOK REVIEWS

The Federal Administrative Procedure Act and the Administrative Agencies. Proceedings of an Institute Conducted by the New York University School of Law on February 1-8, 1947. Edited by George Warren. New York. New York University School of Law. 1947. Pp. viii, 630. \$7.50.

The Federal Administrative Procedure Act, approved on June 11, 1946, became effective in different regards on September 11 and December 11, 1946, and June 11, 1947. The papers here assembled analyze the Act as of February, 1947. Necessarily, therefore, the analysis reflects official and unofficial interpretations of the Act's provisions at this early stage. The analysis does not reveal in significant degree either what the courts will make of the Act or what effect the Act will have in practice on the efficiency of individual administrative agencies.

The score of papers in this volume approach the Act from three standpoints. First is a group of three general statements on the Act and its history, by Arthur T. Vanderbilt, Carl McFarland, and Frederick F. Blachly. Fourteen papers review in detail the effect of the Act on individual regulatory agencies—half of them commissions and boards, and half of them departments and bureaus. Some of these detailed reports are presented by officials of the agencies; some by practitioners before the agencies. The volume concludes with three papers on rule-making, adjudication, and judicial review under the Act. This section, contributed by David Reich, Ashley Sellers, and John Dickinson, is the most valuable set of papers in the book. All lawyers who have occasion to represent clients before Federal administrative agencies will need to know thoroughly the Federal Administrative Procedure Act, and will find this volume a useful commentary. The Act itself appears conveniently in the appendix.

Several conclusions emerge from a reading of this book. The controversy over the basic wisdom of the Act continues. A reading of the interchange between Dr. Blachly and Mr. McFarland, which is not entirely good-tempered, adequately reveals this. It seems clear, too, that the zeal with which the administrative agencies were attacked and defended in the years preceding the passage of the Act exceeded the bounds of good judgment. There are grounds neither for the surprisingly bold charges by Dean Pound and others of "administrative absolutism," nor for the charge that the American Bar Association was activated solely by a desire to increase the share of lawyers in the busi-

ness of Federal agencies and destroy effective execution of New Deal legislation.

There appears no likelihood that the Administrative Procedure Act will cause such a breakdown in administrative procedures as to force a repeal or drastic revision of the Act. The Federal agencies almost universally report that the Act has necessitated no major changes in the procedures they were following before passage of the Act—which reinforces the fact that the charges of administrative absolutism were exaggerated and suggests alternatively that the Bar Association may have gotten much less than it was bargaining for. Nonetheless, the administrative agencies are concerned about the loss in efficiency and economy that will be occasioned by the Act. In its 1947 annual report, for example, the Interstate Commerce Commission states that “the division of our force of examiners is a distinct impediment in the full and efficient use we made of the corps, according to the changing needs of our dockets, and bearing in mind the special capabilities and experience of particular examiners.”

The principal changes of significance result from the Act's provisions requiring greater publication of information in the *Federal Register*, requiring segregation of hearings officers from the rest of an agency's staff, and requiring the hearings officer to make a report on the basis of which the parties can file responsive pleadings.

There are a few suggestions that the awkwardness of adapting procedures to the requirements of the Administrative Procedure Act may actually encourage resort to less adequate procedures than those that would have prevailed in the absence of the Act. The Immigration and Naturalization Service, for instance, “has been giving some thought to the advisability of foreign examination of a prospective immigrant because of the fact that the judicial protection which would come to him if he were here and were being detained would be denied him.” (p. 301.) The Securities and Exchange Commission plans to determine procedure for each case as it comes up, by agreement with the parties. It “seeks to afford the maximum opportunity to the parties to its proceedings to agree upon the appropriate procedures for the individual case and to postpone until some difference of opinion may arise any determination of whether in the absence of agreement either the letter or spirit of the Administrative Procedure Act may require the following of a particular procedural routine in connection with any particular statutory procedure.” (p. 221.) Let it be quickly said that these are isolated instances, and that the other agencies have been wrestling earnestly with the fitting of their procedures to the requirements of the Act.

Perhaps the most startling conclusion from the volume relates to the quality of draftsmanship that is reflected in the Act. Here is an

Act drawn by lawyers, lobbied for by lawyers, and discussed by lawyers at a School of Law Institute. Yet the prime defect of the Act is poor draftsmanship. The Act redefines such terms as "rules" and "rule-making" in utterly unfamiliar ways. With Humpty Dumpty, the drafters have insisted that words mean what the drafters say they mean, not what everybody else has understood them to mean for generations.

As a result of poor draftsmanship, the legal divisions of administrative agencies have strong reservations about whether they have conformed to the Act or not, because each legal division has had extensive internal debates over what the Act means. Even the Act's defenders stress the need for consulting legislative committee reports and legislative debates to understand the Act. The Attorney General of the United States endorsed the Act, assuming that its judicial review sections merely codified existing law on the subject. John Dickinson argues that the Act has significantly broadened the scope of judicial review. We are clearly in for an era of uncertainty until the courts shall have had an opportunity to attach clear meanings to the obfuscations of the draftsmen. This means, of course, a period of litigation, overrulings of substantively sound administrative decisions on procedural grounds, and delays in the achievement of justice in individual cases.

A number of typographical errors mar a handsomely bound, well-printed volume. A detailed index facilitates the running down of information on specific agencies, topics, and provisions of the Act.

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Discrimination by Railroads and Other Public Utilities. By Isaac Beverly Lake. Raleigh, N. C.: Edwards & Broughton Company, 1947. Pp. xii, 346. \$5.00.

Rate discrimination by common carriers and public utilities is an intractable problem, and often it is of serious consequence. It long has claimed the attention of business men, economists, political leaders and members of the bar.

This study will be of interest primarily to lawyers. It takes up, in turn, over a score of situations distinguished by jurists. For each there is set forth the pertinent statutes and the accepted interpretation of them, and following this frequently are the author's comments on the wisdom of the rule. Most of the situations are important only in railroading, and with respect to these the text is confined to the application of the Interstate Commerce Act. The comments are tolerant and urbane,

and show a familiarity with difficulties that shippers and carriers experience as sweeping provisions of the statutes are translated into practice. Mr. Lake professes to have "approached the problem through weighing of the utility's reason for giving a preference against the consequences to the disfavored patron." Yet his purview generally embraces more than the interests of the immediate parties to a controversy.

In treating the administrative aspects of rate discrimination Mr. Lake is at his best. Particularly, I applaud his recommendation that a prosperous carrier be barred from attacking an isolated rate as confiscatory. On one minor point I disagree with his views. This is the suggestion that a carrier be allowed to pay in kind for services received, and to make rate concessions in settlement of damage claims. To be sure under the present rules, which require cash transactions, it is no more difficult to accomplish an unauthorized rate concession. But it is more certain that such a concession would be apprehended, and so less likely that it would be made.

So far as the discussion touches upon the economics of rate discrimination, the observations generally are sound. Yet the reader must guard against occasional inadvertences. For example, it is stated without qualification that "The utility will tend to establish differentials so as to get the greatest possible volume of business." Again, there is the assertion that a steam laundry would drive a dry cleaning establishment out of business were the latter to be charged an electric rate sufficiently higher to affect its prices. I think also that most economists will be surprised to learn that the "planned economy" for which "there has been an increasing enthusiasm" would be promoted by the selection for each competitor of transportation rates that compensated for his ability, or lack of it, so that the continued competition might not be jeopardized. I cannot accede to the statement, which appears early in the book, that "Had the railroads been impartial in their treatment of these new manufactures and farmers" (of the eighteen seventies) "many of the modern problems of public utility regulation would not have arisen." Given the preponderance of fixed costs and the uneven impact of competition, unsatisfactory forms of rate discrimination were inevitable.

Mr. Lake sees the slowness and the restricted viewpoint of the regulatory process, and he would prefer according railroad management wider discretion that more rates might be determined in carrier competition. Yet he concedes that competition of the type required very largely has disappeared, and that no proposals now before the public would accomplish its return.

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