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Administrative Law Treatise (2d ed. Volumes 1 & 2). By Kenneth Culp Davis

Henry J. Friendly

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BOOK REVIEW

ADMINISTRATIVE LAW TREATISE (2d ed. Volumes 1 & 2). By KENNETH CULP DAVIS.* San Diego: K.C. Davis Pub. Co., 1978, 1979. Vol. 1, pp. xiv, 634; Vol. 2, pp. xviii, 522. \$43.00 per volume.

*By Henry J. Friendly***

Administrative law in the United States has been fortunate in its expounders. In the beginning there were Goodnow, Ernst Freund, and Frankfurter. Then came those that helped to create the New Deal administrative agencies and defend them against attack. One thinks admiringly of James Landis, of Walter Gelhorn, reporter for the Attorney General's Committee on Administrative Procedure, whose 1941 report became the basis for the Administrative Procedure Act enacted in 1946,¹ and of Louis Jaffe. Administrative law attracted the interest and efforts of other important scholars during the 1950's and 1960's, including Auerbach, Byse, Fuchs, Nathanson, Rosenblum, Cramton, Schwartz, Jerre Williams, and Shapiro. Now a new generation of younger professors is adding to our understanding of this rapidly developing area of law—Freedman, Scalia, Stewart, Mashaw, Verkuil, Ernest Gelhorn, Boyer, Hamilton, Robinson, Stephen Williams, Breyer, and many others.² But since the publication of the first edition of his *Administrative Law Treatise* in 1958,³ properly characterized by a contemporary reviewer as "one of the truly monumental

* Professor of Law, University of San Diego; Professor Emeritus of Law, University of Chicago.

** Senior Judge, United States Court of Appeals for the Second Circuit; Presiding Judge, Special Court under the Regional Rail Reorganization Act.

1. Ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-559, 701-706 (1976 & Supp. II 1978)).

2. My apologies to those academics whom I have inadvertently omitted from these lists. I also have not mentioned the many contributions by judges and practitioners or influential studies in public policy and economics that bear on agency decisionmaking procedures. For a selected bibliography of such studies, see De Long, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 321 n.320 (1979).

3. K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958). The Treatise was published in four volumes and was kept up to date with pocket parts—now an imperative, however laborious, if even the best legal treatise is not to become a menace. These pocket parts were superseded by a 1970 supplement of 1154 pages. K. DAVIS,

events of this generation of legal writing,"⁴ the unquestioned leader of this flashing troop of scholars has been Kenneth Culp Davis. For the last twenty years he has been spurring, urging, flogging, praising, and blaming in an untiring effort to maximize fairness and effectiveness in dealings between the state and its citizens. If Professor Davis were to succeed in achieving a new Administrative Procedure Act that met his every desire of the moment, I predict he would awaken the next morning with a half-dozen ideas for improvement. Such is this man's passion for justice within a framework that is feasible as well as fair! I would think little of anyone experienced in administrative law who did not disagree with some of Professor Davis' observations. But I would think immensely less of someone who did not admire his zeal for obtaining the right result, his sharp analysis, his cogent criticisms, and his power of persuasion.

A reviewer of Volume I of the second edition of this treatise has found it suffering "from too much subjectivity, a troublesome quality in a work so widely regarded as 'the' treatise on administrative law."⁵ Professor Davis anticipated this charge, writing in his preface: "The thinking [in] this treatise is unashamedly subjective."⁶ Even less than the first edition do these volumes aspire to be a treatise that helps lawyers "win administrative law cases"⁷—unless, of course, their positions correspond to Davis' own. Anyone seeking a treatise that merely collects cases on each issue of administrative law and endeavors to make head or tail out of them should look elsewhere.⁸ No one will agree with everything said in

ADMINISTRATIVE LAW TREATISE (Supp. 1970). Believing the supplement device to be inadequate to take account of all that was going on, Professor Davis published his work, K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* (1976), which has itself been kept up to date by pocket parts—the most recent of 331 pages, K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (Supp. 1980).

4. Kintner, *A Government Lawyer Comments on the Davis Treatise*, 43 MINN. L. REV. 620, 620 (1959).

5. Hamilton, Book Review, 127 U. PA. L. REV. 855, 857 (1979).

6. Vol. 1, at x.

7. See Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607 (1959).

8. Professor Davis details his exact goals in the first paragraph of his preface: (1) To make each segment of the law understandable, (2) to state persuasively the pros and cons when the law is unclear or conflicting, (3) to bring to bear on law development a longterm specialization in the hope that perspective may be broadened and penetration may be deepened, (4) to originate ideas for law improvement, (5) to offer both constructive and negative criticism of significant ideas about the law whether they stem from judges, legislators, administrators, practitioners, commentators, or others, (6) to call

these volumes but even the most bitter opponent will be stimulated by the author's ideas.

Although the most important subjects treated in these books are the distinctions created by the Administrative Procedure Act (APA)⁹ between informal rulemaking, rulemaking on the record, and adjudication, and the procedures required for each by statute, administrative "common" law,¹⁰ and due process, I find it useful to approach these subjects indirectly. A considerable part of Volume II is devoted to a paean of praise, somewhat unusual for Professor Davis, for two Supreme Court decisions, *Goss v. Lopez*¹¹ and *Mathews v. Eldridge*.¹² *Goss* is said to stand for the principle that "[b]efore an agency makes a decision of any kind against any person, it should, in absence of a good reason why not, inform that person of the facts and reasons and listen to or read what he has to say."¹³ Once this hearing requirement is triggered, the *Eldridge* principle determines what kind of hearing is appropriate by balancing the costs and benefits for each element of a trial-type hearing¹⁴ in the particular decisionmaking context at issue. The *Goss* principle thus is not burdensome, since when the consequences of the decision are small, the hearing procedure may be extremely truncated.¹⁵ In the case of a high school student's ten-day suspen-

attention to problems or areas that need rethinking, research, or other action, (7) to introduce into the stream of law development facts and ideas gleaned through interviews with administrators, and (8) to reduce complexities to the simplest terms that are consistent with avoiding oversimplification.

Vol. 1, at x.

9. 5 U.S.C. §§ 551-559, 701-706 (1976 & Supp. II 1978).

10. That such a body of law exists and remains alive and well despite Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524 (1978), is repeatedly asserted. See, e.g., Vol. 1, §§ 6.11, .13; Vol. 2, § 7.19.

11. 419 U.S. 565 (1975).

12. 424 U.S. 319 (1976).

13. Vol. 2, § 13.5, at 487.

14. Professor Davis lists 10 such elements:

(1) "timely and adequate notice detailing the reasons for a proposed termination," (2) "an effective opportunity to defend by confronting any adverse witnesses," (3) oral presentation of arguments, (4) oral presentation of evidence, (5) cross-examination of adverse witnesses, (6) disclosure to the claimant of opposing evidence, (7) the right to retain an attorney, (8) a determination resting "solely on the legal rules and evidence adduced at the hearing," (9) "the decision maker should state the reasons for his determination and indicate the evidence he relied on," and (10) "an impartial decision maker is essential."

Id. § 10.6, at 327 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 271 (1970)). See 397 U.S. at 266-71.

15. I was too hard on the then-recent *Goss* decision in Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1316 (1975), and am grateful that Professor Davis set me right in private correspondence.

sion, for example, the necessary procedure was merely "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."¹⁶

With these "two great cases"¹⁷ on the books, Professor Davis believes the Supreme Court need not indulge in what have often seemed unsatisfactory efforts to delimit the liberty and property interests falling within the protection of the due process clauses;¹⁸ instead it "should adopt a unifying principle that when officers impose a grievous loss on any person, due process requires not less than whatever procedural protection is justified by a cost-benefit analysis."¹⁹ Putting aside such questions as whether "imposing a grievous loss" is a fair reading of "deprive of liberty or property," which I doubt, and whether some minimal legal protection should be given even to a person denied a pardon or to a cabinet officer who has been discharged,²⁰ which I also doubt, there is much to be said for the proposition that the *Goss-Eldridge* synthesis should be applied outside the due process area and become a basis for a comprehensive revision of the APA, for which Professor Davis believes "the time has come."²¹ Such application would lead to an ap-

16. 419 U.S. at 581.

17. Vol. 2, § 13.2, at 474.

18. Professor Davis is especially critical of the spanking case, *Ingraham v. Wright*, 430 U.S. 651 (1977), which he regards as basically inconsistent with *Goss*. Vol. 2, § 13.3, at 478-82.

19. Vol. 2, § 11.14, at 399 (emphasis omitted). The "grievous loss" phrase stems from Justice Frankfurter's opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), which was quoted in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Professor Davis claims it "was quoted in such a way as to make it part of the Court's opinion." Vol. 2, § 11.14, at 399. I doubt this: The Government did not dispute that *Eldridge* had a legally protected interest. 424 U.S. at 332.

20. *But see* Vol. 2, § 11.4, at 351.

21. Vol. 1, § 5.45, at 443. There is room for reasonable disagreement about this. Analytically the case for revision is almost unanswerable. The APA contained many "natal defects," *see* Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 SUP. CT. REV. 345, 382, 382-86; the underlying administrative law has significantly changed, with rulemaking assuming an ever-greater role and adjudication an ever-smaller one, *id.* at 376; and new agencies have pushed the old ones from the center of the stage, *see* Vol. 1, § 1.3. Two sets of considerations weigh on the other side. One is the tendency of Congress during the 1970's to include differing procedural provisions in new substantive statutes, *see* text accompanying notes 69-71 *infra*, which Congress is unlikely to repeal in favor of a new APA. Another is that we might well emerge with something worse rather than better. One cogent example is the recent overwhelming vote of the Senate rejecting a motion to table and subsequently adopting the Bumpers Amendment. 125 CONG. REC. S12,165-66, S12,171 (daily ed. Sept. 7, 1979). This amendment, supported by the House of Dele-

proach considerably more flexible than the tripartite division of informal rulemaking, rulemaking on the record, and adjudication.

The APA's definition of "adjudication" is one of the most unsatisfactory features of the statute.²² It begins with a broad definition of a "rule"²³ and a statement that "'rule making' means agency process for formulating, amending, or repealing a rule."²⁴ The reader then learns that "order" means any final disposition "in a matter other than rule making but including licensing"²⁵ and that "adjudication" means "agency process for the formulation of an order."²⁶ This backhanded method of definition throws little light on what the framers meant by "adjudication." About the only thing into which one can sink one's teeth is that rulemaking must relate only to the future.²⁷

The difficulty, however, is not merely one of draftsmanship. The distinction assumes as a matter of principle that if the administrative action falls under the rubric of "adjudication," trial-type

gates of the American Bar Association, would not only eliminate any presumption favoring the validity of agency rules on judicial review, but would require agencies to establish such validity by "a preponderance of the evidence shown." *Id.* at S12,145. For a critical analysis of the Bumpers Amendment, see Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329 (1979).

At another point Professor Davis suggests that revision of § 553 of the APA should be postponed "until the rapid development of [the new rulemaking of the 1970's] has slowed down." Vol. 1, § 6.39, at 634. If his reference is to judicially created procedures, perhaps it has. *See* text accompanying notes 57-64 *infra*.

22. *See* Scalia, *supra* note 21, at 382-83.

23. § 2(c), 5 U.S.C. § 551(4) (1976) which defines "rule" as [any] agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

24. *Id.* § 2(c), 5 U.S.C. § 551(5).

25. *Id.* § 2(d), 5 U.S.C. § 551(6).

26. *Id.* § 2(d), 5 U.S.C. § 551(7).

27. Another difficulty is that, as a philosophical matter, the administrative law world almost certainly includes things that are not termed either rulemaking or adjudication in ordinary English speech. Also, it is unclear why "licensing" in all the breadth stated in § 551(8)-(9) necessarily constitutes adjudication when at least some forms fit the description of a "rule." Ambivalence toward licensing is further demonstrated by its exclusion from the separation of functions provision of § 554(d)(A) "in determining applications for initial licenses," the applicability of the last sentence of § 556(d) (permitting a "paper case") to "applications for initial licenses," and the dispensation of § 557(b) of initial licensing from the requirement of an initial decision by the employee who presided at the hearing. *Id.* §§ 2(e), 5(c), 7(c), 8(a), 5 U.S.C. §§ 551(8)-(9), 554(d)(A), 556(d), 557(b).

procedures should be required.²⁸ Thus, if the APA had been applicable, such procedures would have been required in both *Goss* and *Eldridge* since the agency was applying law to past actions. But this would be inconsistent with the whole thrust of the *Goss-Eldridge* synthesis, namely that procedures should be tailored to the particular administrative action under challenge, not frozen in abstract categories.²⁹ As Professor Davis sensibly says, "the longterm movement is away from letting the choice of procedure depend upon characterization of a proceeding as either adjudication or rulemaking and toward requirement of procedure that properly reflects each such item as finding adjudicative facts, finding legislative facts, interpreting law, making policy, and exercising discretion."³⁰

Under this modern view the foundation stone of the "adjudication" doctrine, *Londoner v. Denver*,³¹ was wrongly decided, as Professor Davis, a longtime apostle of the decision,³² now strongly implies.³³ The issues with respect to *Londoner's* tax liability for the cost of paving a street were not of the sort for which oral presentation and cross-examination offered any significant advantage over written statements and answers. Moreover, not only is the familiar limitation erected by *Bi-Metallic Investment Co. v. State Board of Equalization*,³⁴ which restricts the reach of *Londoner* to decisions involving a small number of parties, trivial and unworkable, but, as Professor Nathanson has shown,³⁵ *Bi-Metallic* also was wrongly decided on its facts. Justice Holmes failed to appreciate that what Denver's taxpayers wanted was not a "town meeting or an assembly of the whole"³⁶ but an opportunity to show that a forty percent increase in the valuation of all Denver property could not be

28. This is subject to the exception in the last sentence of § 556(d), which allows an agency to "adopt procedures for the submission of all or part of the evidence in written form" not only in rulemaking but also in "determining claims for money or benefits or applications for initial licenses . . . when a party will not be prejudiced thereby." *Id.* § 7(c), 5 U.S.C. § 556(d). See also note 27 *supra*.

29. See Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 42 (1975).

30. Vol. 2, § 12.16, at 466.

31. 210 U.S. 373 (1908).

32. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.04, at 420-21 (1958).

33. See Vol. 1, § 6.22, at 557.

34. 239 U.S. 441, 445-46 (1915).

35. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and other Federal Statutes*, 75 COLUM. L. REV. 721, 724-25 (1975).

36. 239 U.S. at 445.

justified by the only rationale possible, namely, that the city's property had previously been valued on a lower basis than property elsewhere in Colorado. They should have been given that opportunity—not by an oral hearing with cross-examination but by presentation of written proof, which was all that the taxpayers in *Londoner* should have had. The repeated incantation of the *Londoner-Bi-Metallic* dichotomy as Holy Writ thus can no longer serve as a proxy for hard thought about proper procedure, since, by modern standards, *Londoner* accorded too many procedural safeguards and *Bi-Metallic* too few. Naturally it is difficult for Professor Davis to abandon two old friends that have figured so prominently in his writing,³⁷ but, heretical though it may seem, the time has come to recognize that *Londoner* and *Bi-Metallic* no longer teach any useful lessons.

Further evidence of the breakdown of the rulemaking-adjudication distinction is illustrated by applying the holding of *United States v. Florida East Coast Railway*³⁸ to the following hypothetical. A shipper asks the Interstate Commerce Commission to award reparations for excessive rates on potatoes from Aroostook County to Boston and to fix fair and reasonable rates for the future. Insofar as the reparation claim seeks to remedy past ratemaking, it is indubitably adjudication requiring the trial-type procedures provided for this by the APA.³⁹ On the other hand, although no court has yet gone so far, a strong argument can be made that under the basic principle of *Florida East Coast*, the request for the fixing of future rates, even though only for a single combination of carriers and one commodity, is rulemaking not on the record.⁴⁰ Whether

37. And in those of many others! E.g., *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-45 (1973) (Rehnquist, J.).

38. *Id.*

39. § 7(c), 5 U.S.C. § 556(d) (1976). It may, however, fall within the exception of the final sentence of § 556(d).

40. See Friendly, *supra* note 15, at 1307-10. While language in the *Florida East Coast* opinion suggests a distinction between a rate order affecting a large number of persons and one affecting a small number of persons, 410 U.S. at 244-46; see Vol. 2, § 12.4, at 417, this rested on the fallacious *Londoner-Bi-Metallic* dichotomy, see text accompanying notes 31-37 *supra*, and was an effort to distinguish rather than avowedly to overrule *ICC v. Louisville & Nash. R.R.*, 227 U.S. 88 (1913)—a course for which, it may be guessed, the necessary votes were not yet attainable. If the procedure should be tailored to the nature of the inquiry, as Professor Davis maintains, Vol. 2, § 12.16, at 466, there is no real reason for the small-large distinction, *contra*, Scalia, *supra* note 21, at 383, at least unless large means “exceedingly large,” and I predict that the future will see it abolished. For a review of the developments since *Florida East Coast*, see Vol. 1, § 6.24, at 563-70; Nathanson, *supra* note 35, at 734-36.

the agency is dealing with past or future rates and whether with one railroad or many, oral presentation of direct testimony and lengthy cross-examination are not likely to be any more helpful than they were with respect to the incentive per diem charges on freightcars in *Florida East Coast*. The testimony will deal with such subjects as the relation of the challenged rate to the carrier's costs, to rates on other products, and to rates charged for the same commodity by other carriers. Today much of it will come from computer printouts. Why not permit such a proceeding, whether characterized as rulemaking or adjudication, to take the form of a "paper case," save in the rare instances where need for oral testimony and cross-examination on a particular point can be demonstrated?⁴¹ And if this may be done for the future, why not for the past as well? Indeed, although insisting on the importance of the past-future distinction, the Court sensibly observed long ago that "testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order."⁴²

A new Administrative Procedure Act thus should take as its norm, as it should have done from the start,⁴³ what has come to be recognized as the normal mode of *administrative* procedure,⁴⁴ *i.e.*, a notice and comment procedure like that of section 553, supplemented by whatever further safeguards may be necessary either across the board or in particular types of proceedings.⁴⁵ Requirement of trial-type procedures⁴⁶ would be limited to situations, dis-

41. A revised APA should include a requirement that an expert fully reveal, either by written testimony or by placement in a depository, his or her qualifications and experience (including reference to testimony in other cases) as well as the data and methodology on which his or her views are based. The adversary should not be obliged to resort to discovery to obtain this. When armed with this material, the adversary can almost always do at least as well by testimony showing defects and inconsistencies, and by other rebuttal testimony as by cross-examination.

42. *Baer Bros. Mercantile Co. v. Denver & Rio Grande R.R.*, 233 U.S. 479, 486 (1914). It may be that the last sentence of § 556(d) would permit a "paper case," even on a reparations claim, since this is one "for money or benefits." See § 7(c), 5 U.S.C. § 556(d) (1976).

43. See Friendly, *supra* note 15, at 1270-72.

44. For a suggestion along these lines, see Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 322-24 (1978).

45. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1976 REPORT 43-47 (1977) (recommendation of procedures in addition to notice and opportunity for comment in informal rulemaking), reprinted in 1 C.F.R. § 305.76-3 (1977) [hereinafter cited as ADMINISTRATIVE CONFERENCE REPORT].

46. My emphasis has been on eliminating or curtailing oral presentation and

cussed below, where nothing less would be appropriate. This would bring almost all cases under an "informal"⁴⁷ procedure tailored to the nature of the case.

However, constitutional constraints apart,⁴⁸ there would be a broad consensus that some types of losses are so "grievous" that oral statement and cross-examination must be allowed if the interested person surmounts a rather low threshold of demonstrating need. Typically these are cases of "individual" rights, with a relatively high content of disputed specific facts. The cases include deportation, revocation or suspension of a license to practice a profession, denial of such a license on grounds of character, and the finding of an unfair labor practice. The crucial factor is not so much the number of persons involved as the severity of the sanction and the nature of the issue. Oral proceedings are required in such cases not only because they will significantly enhance the probability of an accurate determination in a situation where accuracy should usually be attainable and is of supreme importance,⁴⁹ but also because anything less does not satisfy the requirement that the procedure should not only be fair but be perceived to be fair.⁵⁰

cross-examination. In drafting a revised APA one would need to consider how far this change should carry with it other requirements that have been loosely tied to the adjudication-rulemaking distinction—separation of functions, the presiding services of an administrative law judge, and the need for some form of preliminary decision. The last has proved to be extremely time-consuming.

47. Something should be done about this adjective in any event. It is an abuse of language to characterize as "informal" a procedure that has come to include publication of a detailed proposal in the *Federal Register*, hearings producing a transcript of thousands of pages, and the promulgation of a rule prefaced by an elaborate preamble explaining the reasons for agency action and answering objections. See, e.g., *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70 (2d Cir. 1979), dealing with a standard promulgated by the Secretary of Labor under the Occupational Safety and Health Act, 29 U.S.C. § 655(b) (1976).

48. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

49. Such cases typically involve Davis' "adjudicative facts" in pure form. See Vol. 1, § 6.19, at 538. They require a close look at past actions and present qualifications of individuals. Moreover, witness credibility is often at issue. Yet even in instances in which oral proceedings are clearly appropriate, attention to the organizational incentives and managerial practices of an agency may do as much to foster fair and accurate determinations as the provision of formal hearings. See Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

50. Oral proceedings provide both the parties and the public with tangible reassurance that the decisionmaker has "heard" the parties' cases. Such reassurance is more important in proceedings against individuals than in the rulemaking dialogue between agencies and regulated industries where the decision is generally institutional in character.

The drafting of such an exception would not lie beyond the capabilities of experienced lawyers. While most instances could be covered expressly, there would doubtless be need for a catch-all provision. Here the touchstone would be the contribution of orality to a correct determination, the grievousness of the loss (including stigma), and the need to preserve the appearance of complete fairness when government inflicts a crushing blow upon the citizen, all weighed against the burden of orality, which generally would be slight in cases of the sort described.

This brings us to the question whether, if the sphere of rulemaking procedures is to be expanded, the required procedures themselves need to be somewhat stiffened. More simply, what should be done about *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*?⁵¹

Although regarding the procedure outlined by section 553 as "unquestionably one of the greatest inventions of modern government,"⁵² Professor Davis considers that "after more than three decades, § 553 is deficient and the courts are importantly improving on it by what may be called either creative interpretation or common law."⁵³ Accordingly, he admires the efforts of federal courts, particularly the Court of Appeals for the District of Columbia, to impose additional procedural requirements in some cases governed by section 553,⁵⁴ and the interchange that this has produced with Congress, which has enlarged on section 553 procedures in varying degrees in recent statutes dealing with specific agencies.⁵⁵ Insofar as *Vermont Yankee*, with its sharp rebuke to the District of Columbia Circuit, can be read as having put a stop to judicial innovation in informal rulemaking procedures, Professor Davis unreservedly

51. 435 U.S. 519 (1978). A good statement of the holding of *Vermont Yankee* can be found in De Long, *supra* note 2, at 316: "The case denies the courts of appeals the power to define specifically what procedures for dealing with outside parties are nonarbitrary or to determine that although the methods used produced an adequate record, other methods would have been better and should have been used."

52. Vol. 1, at xiii.

53. *Id.*

54. *Id.* §§ 6.19-20.

55. See, e.g., Magnuson-Moss Warranty—Federal Trade Commission Improvement Act § 202(a), 15 U.S.C. § 57a (1976) (provision for cross-examination at oral hearings); Consumer Product Safety Act § 9, 15 U.S.C. § 2058 (1976 & Supp. II 1978) (provision for "an opportunity for the oral presentation of data, views, or arguments"); Toxic Substances Control Act § 6, 15 U.S.C. § 2605 (1976) (provision for cross-examination at oral hearings); Occupational Safety and Health Act of 1970, § 6, 29 U.S.C. § 655 (1976) (provision for public hearings upon request); Department of Energy Organization Act § 501, 42 U.S.C. § 7191 (Supp. II 1978) (provision for "an opportunity for oral presentation of views, data, and arguments").

condemns it.⁵⁶ However, he thinks its effect may be less than was first anticipated since *Vermont Yankee* did not specifically address many procedural questions that have arisen.⁵⁷ It left open the possibility that when procedures have produced an inadequate record, a reviewing court may set aside agency action because it is arbitrary, capricious, or unsupported by substantial evidence. Still the effect of *Vermont Yankee* is large enough to raise the question of what, if anything, a revised APA should do about it.⁵⁸

Whatever one may think of *Vermont Yankee*, the country has been fortunate that so large a proportion of the difficult questions of administrative procedure have come up for decision before the exceptionally able, articulate, and industrious judges of the Court of Appeals for the District of Columbia.⁵⁹ Yet, as I observed five years ago,⁶⁰ these very qualities, along with a high degree of exposure to what it considered sloppy administrative performance in dealing with highly controversial and esoteric subjects, may have led the court to become overly enthusiastic⁶¹ and to engage in internecine theoretical quarrels that opened gaping holes in its ranks.⁶² Choice of the term "hybrid rulemaking" by supporters of

56. Vol. 1 § 6.37, at 611-16.

57. *Id.* § 6.36, at 609-10; *accord*, De Long, *supra* note 2, at 316: "Essentially, then, *Vermont Yankee* is a narrow ruling, despite its stinging language."

58. *Vermont Yankee* has already given rise to a considerable volume of comment. In addition to Professor Davis' discussion, Vol. 1, §§ 6.35-37; Vol. 2, § 7.19, and the De Long article, *supra* note 2, volume 91 of the *Harvard Law Review* contains a three-article symposium concerning the case: Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978), which asserts that the decision was wrong; Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978), which asserts that the decision was right; and Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978), which asserts that the decision was right in what it condemned but wrong in what it allowed, namely, a remand whereby the court of appeals might find the agency action "substantially" defective. One provocative article, Scalia, *supra* note 21, applauded the decision as a matter of interpretation of the APA and application of precedents. Other commentary of merit includes Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183 (1979); Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L. J. 699 (1979).

59. While this review was being written, administrative law suffered a serious blow in the untimely death of Judge Harold Leventhal of the District of Columbia Circuit, who had made notable contributions, many of which are discussed in the volumes here under review.

60. Friendly, *supra* note 15, at 1310-15.

61. Even Professor Davis finds it hard to support *Mobil Oil Corp. v. FTC*, 483 F.2d 1238 (D.C. Cir. 1973), *see* Vol. 1, § 6.19, at 538-41, and *National Welfare Rights Org. v. Mathews*, 533 F.2d 637 (D.C. Cir. 1976). *See* Vol. 1, § 6.14, at 513-17.

62. *See* Vol. 1, § 6.35, at 607. Professor Scalia takes a decidedly more adverse view of the circuit court's performance. *See* Scalia, *supra* note 21, at 348-56, 361-75.

the court of appeals' requirement of cross-examination on certain factual issues, a term later adopted by the court itself, may have been unfortunate. We learn that while the immediate derivation of "hybrid" is from the Latin "hybrida," meaning the offspring of a wild boar and a domestic sow, a more distant origin is the Greek "hubris."⁶³ While Justice Rehnquist may not have been conscious of this etymology when he wrote *Vermont Yankee*, the overtones of his opinion echo the Supreme Court's resentment of the hubris of the District of Columbia Circuit's imposing procedural requirements on informal rulemaking beyond those specified in the APA.⁶⁴

Before considering whether the precise holding of *Vermont Yankee* should be legislatively overruled and, if so, how, one must take account of congressional decisions in recent statutes creating new agencies or giving new powers to old ones to impose added procedural safeguards or strengthen the standard of judicial review on many types of section 553 rulemaking.⁶⁵ Professor Davis applauds this development⁶⁶ as a fruitful interplay between the judiciary and Congress. Indeed, he advocates that courts should apply ideas expressed in such statutes to rulemaking by other agencies⁶⁷—a proposal seemingly now outlawed by *Vermont Yankee*. In contrast, Professor Scalia deplores this congressional activism, regarding it as derogating from the intended position of the APA "as the Magna Carta of administrative procedure"⁶⁸ and as representing not a series of considered congressional decisions about proper rulemaking procedure but rather a collection of procedural sops granted to those whose real objective was to prevent the legislation but who instead settled for procedural devices that they hope will blunt or delay its impact.⁶⁹ While one would need to make a detailed examination of the development of each of these statutes before reaching a definitive conclusion, my own observations lead me to believe Professor Scalia is largely right. I can find

63. L. THOMAS, *THE MEDUSA AND THE SNAIL* 63 (1979).

64. As Professor Scalia has written, "What is most impressive is that all seven of the Justices who sat in the case . . . not only agreed with the judgment but joined in the extremely sharp opinion. There were no separate concurrences. One suspects that the Court felt, as an institution, that its authority had been flouted." Scalia, *supra* note 21, at 370.

65. See Vol. 1, § 6.10.

66. *Id.* §§ 6.9-10.

67. *Id.* § 6.11.

68. Scalia, *supra* note 21, at 401.

69. *Id.* at 368-88, 400-09.

no rhyme or reason in the procedural provisions of these statutes; indeed, as I wrote some years ago, "one would almost think there had been a conscious effort never to use the same phraseology twice."⁷⁰ Still, if these statutes represent deals between proponents and opponents of the legislation rather than serious congressional thought on desirable procedure, there is little likelihood that Congress could be convinced to supersede them, at least in the near future. Moreover, if Professor Scalia is right in fearing that this legislative course will continue,⁷¹ one wonders how much value there would be in attempting to overrule *Vermont Yankee* in the areas that remain ruled only by section 553.

Another argument against overruling *Vermont Yankee* in rulemaking governed solely by section 553 is that it is difficult to see what should be put in its place. Congress could legislate Recommendation 76-3 of the Administrative Conference,⁷² which urges agencies to consider supplementing the barebones requirements of section 553 in certain cases, but agencies are free to do this now. Congress could follow the course suggested by Professor Scalia, of including in the APA "not merely three but ten or fifteen basic procedural formats—an inventory large enough to provide the basis for a whole spectrum of legislative compromises without the necessity for shopping elsewhere."⁷³ This would provide a means of avoiding the current "balkanization of administrative law"⁷⁴ which he deplors. One can hardly pass on this proposal until it is worked out in detail. All things considered, the path of wisdom would seem to lie in awaiting the Supreme Court's responses to at least some of what Professor Davis considers the unanswered questions concerning the scope of *Vermont Yankee*,⁷⁵ its elucidation of the *caveat* "[a]bsent constitutional constraints or extremely compelling circumstances,"⁷⁶ and actions taken by the agencies

70. *Associated Indus. v. United States Dep't of Labor*, 487 F.2d 342, 345 n.2 (2d Cir. 1973).

71. "What is not in the stars, however, is any congressional willingness to stop tinkering with administrative procedures in every major regulatory statute that is passed." Scalia, *supra* note 21, at 401. One might answer that a stiffened § 553 would help stop the "tinkering." See § 4, 5 U.S.C. § 553 (1976).

72. ADMINISTRATIVE CONFERENCE REPORT, *supra* note 45, at 43-47.

73. Scalia, *supra* note 21, at 408.

74. Scalia, *Foreword to ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1973-1974 REPORT 2* (1974).

75. Vol. 1, § 6.36, at 609-10.

76. 435 U.S. at 543. *Vermont Yankee* announced further *caveats* concerning rulemaking where "an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individ-

themselves. The process of adopting a new APA surely will be sufficiently time-consuming for Congress to take account of such developments and make a wiser decision than it now can.

To turn finally to a very different subject, Professor Davis' second edition contains a fascinating discussion of enforcement discretion that has no counterpart in the first edition.⁷⁷ The crucial question, considered in section 9.7, is how far a criminal defendant or the object of an administrative proceeding is entitled to have the proceedings quashed because other persons alleged to be similarly situated have not been subjected to the same treatment. Granted the desirability that prosecutors and enforcing agencies should formulate standards to guide enforcement direction,⁷⁸ how far should the courts go in recognizing selective prosecution or enforcement as a defense? Would not this recognition, which Professor Davis advocates, inevitably lead to a wide opening of prosecutorial files, to the assertion of a new defense unrelated to the merits—of which we already have quite enough—and to the courts' taking on a new role properly left to other branches of government?⁷⁹ *Yick Wo v. Hopkins*⁸⁰ remains a cornerstone of our law, but we should not put more weight on it than it can fairly bear. To take a recent example, should the courts review the decision of the executive branch to initiate deportation proceedings against Iranians illegally in the United States at a time of crisis between the two nations while largely closing its eyes with respect to similarly situated Mexicans?⁸¹ Enthusiasts of judicial review of administrative action ought to think occasionally of the remark made by Justice Stone in another context: "Courts are not the only agency of government that must be assumed to have capacity to govern."⁸²

No review, even one as long as this, can begin to do justice to these two volumes. There is only one solution: Read them.

ual grounds," " *id.* at 542 (quoting *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 242, 245 (1973), which quoted *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 441 (1915)), or where there has been "a totally unjustified departure from well-settled agency procedures of long standing." *Id.*

77. Vol. 2, §§ 9.1-22. This discussion amplifies prior commentary by Professor Davis on enforcement discretion. See, e.g., K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* §§ 4.00-20, 28.00-00-5 (1976); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 4.01-22 (Supp. 1970); K. DAVIS, *DISCRETIONARY JUSTICE* 188-214 (1969).

78. Vol. 1, § 9.8.

79. *Id.* §§ 9.12-13.

80. 118 U.S. 356 (1886).

81. See *Narenji v. Civiletti*, 481 F. Supp. 1132 (D.D.C. 1979), *rev'd*, No. 79-2460 (D.C. Cir., filed Dec. 27, 1979), *rehearing denied en banc*, No. 79-2460 (D.C. Cir., filed Jan. 31, 1980), *cert. denied*, 48 U.S.L.W. 3746 (U.S. May 20, 1980).

82. *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).