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SOME CURRENT DEVELOPMENTS IN ADMINISTRATIVE LAW: A COMMENT ON DAVIS, ADMINISTRATIVE LAW TEXT.*

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The administrative process exists in a fitful cycle of attack and acquiescence. The ten or eleven year era of relative good feeling ushered in by the Administrative Procedure Act of 1946 has now given way to challenges as serious as any confronting the administrative process since the late thirties when its distinctive character narrowly escaped almost complete distortion by rash Congressional action.[1] Professor Davis' *Text,* like all of his prolific work in the field, is in part the product of these earlier pressures on the administrative agencies, for he has been America's most zealous proponent of the administrative process ever since his famous dispute with Dean Pound in 1942.[2] Few works have high survival potential in this sphere of constant change and sharp controversy. Davis' writings do, however, and his *Text,*—which essentially is an abridgment of his longer, more comprehensive, and much more expensive four-volume *Treatise*[3]—strengthens his continuing claim as one of our two or three greatest administrative law thinkers. Such a grasp of the field, shared by Davis with Harvard's Professor Jaffe, and

*Davis, Administrative Law Text. St. Paul, Minnesota: West Publishing Co., 1959. Pp. xxiv, 617. $10.00. Mr. Davis is Professor of Law, University of Minnesota.

This comment had its origin in what was intended as a conventional book review, but because it seemed useful to consider some of Davis' propositions against the background of several important recent developments in the field, the review expanded on its own into a study of unanticipated length. There is, however, no occasion to apologize, for Davis' contribution to administrative law fully merits the attention which it has received here and elsewhere.

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1. Davis briefly retells the story in the TEXT, § 1.04. See also LANDIS, *Crucial Issues in Administrative Law,* 53 HARV. L. REV. 1077 (1940).

2. DAVIS, *Dean Pound and Administrative Law,* 42 COLUM. L. REV. 89 (1942), replying to POUND, *For the 'Minority Report',* 27 A.B.A.J. 664 (1941); DAVIS, *Dean Pound's Errors About Administrative Agencies,* 42 COLUM. L. REV. 804 (1942), replying to BAILEY, *Dean Pound and Administrative Law,* 42 COLUM. L. REV. 781 (1942).

3. DAVIS, *Administrative Law Treatise,* 4 vols., St. Paul, Minn.; West Publishing Co. (1958, with annual supplements), $70.00 [hereinafter cited as *Treatise*]. Both the *Text* and *Treatise* were preceded by a 1951 "hornbook" type study of Administrative Law, which for many years was the only adequate analysis of the subject.

with former Dean Landis, now a special assistant to President Kennedy, is essential in resolving the renewed controversy. This controversy includes the disturbing disclosures, by the House Oversight Subcommittee hearings, of improper and corrupting pressures upon the federal agencies;[4] the sweeping proposals of former CAB Commissioner Hector for structually reorganizing all federal agencies;[5] the constructively critical and concrete administrative reform proposals offered by Dean Landis in his report to President Kennedy,[6] and most recently the President's Special Message to Congress on the Regulatory Agencies, recommending many of the Landis proposals.[6a] Meantime, quiet and thoughtful work has been accomplished by Congressman Dawson's comprehensive enquiries into the organization and working of the agencies;[7] and by the Department of Justice's Office of Administrative Procedure, whose useful annual summary of agency business scarcely reflects the effective work, much of it informal and thus unheralded, which the office accomplishes on a continuing basis.[8]

Because of these important developments occurring since Davis' 1959 *Text* was completed, it is instructive in this relatively late review to assess some of Davis' central propositions in the light of these new happenings. This focusing upon several points of great current interest is necessarily selective among the many areas which Davis treats so thoroughly in the *Text* (and the *Treatise*), and it is not intended to detract from the significance and scope of his penetrating study and analysis of the administrative "record considered as a whole."

4. See especially H. R. REP. NOS. 1258 and 2238, 86th Cong., 2nd Sess. (1960), which are respectively an interim and the final report of the House Subcommittee on Legislative Oversight (the "Harris Subcommittee").

5. HECTOR, *Memorandum to the President*, submitted September 10, 1959. Published as *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L. J. 931 (1960) [hereinafter cited as *Memorandum*].

6. LANDIS, *Report on Regulatory Agencies to the President-elect* (1960) [hereinafter cited as *Landis Report*]. This has recently appeared as a Committee Print for the Senate Judiciary Committee, 86th Cong., 2d Sess. (1960), and citations are to this print.

6a. See N. Y. Times, Apr. 14, 1961, p. 1, col. 8. For the text of the message, see *Id.* at 12.

7. A number of materials have appeared as Committee Prints in HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT OPERATIONS, *Survey and Study of Administration organization, Procedure, and Practice in the Federal Agencies*, 85th Cong., 1st Sess. (1957).

8. See U. S. Dept. Justice Ann. Reps., Off. Adm. Proc.

— I —

First of all, a few observations on the *Text* itself. It is said to be "exclusively for law students", although in "depth" it is "substantially the same" as the *Treatise*. It employs the *Treatise's* section headings to facilitate easy passage to the larger work, and it achieves condensation by selective rather than exhaustive discussion of authorities and by drastic limitation of footnote material.[9] Thus the *Treatise* remains the indispensable tool of research. But precisely because it lacks much of the detail of the larger work, the *Text* stands forth as a concise and highly persuasive statement of Davis' concept of administrative law. For this reason alone, it is a first-rate introduction to administrative law for anyone who is interested.

The thirty chapters, with their numerous subsections of convenient length and with a short summary closing each chapter, are arranged approximately in the sequence of events in a typical administrative hearing. They embrace investigation and informal proceedings, rulemaking, adjudication and all of its problems, and the forms of, right to, and scope of judicial review. The prime focus is federal administrative law, and properly so because of its unity and relatively higher level of development, the greater number of precedents, the partial codification through the APA, and the resultant influence which the federal law exerts upon the line of growth of state administrative law. The APA is, of course, the subject of constant exposition and evaluation. However, instructive contrasts with state practice frequently appear, especially in Chapters 24 and 25.[10] A conspicuous feature of Davis' work is the presence of strong and forthright positions on controversial matters, which is, indeed, one of the most characteristic and attractive aspects of Davis' work, although occasionally his vigor may be better suited to a straight polemic.[10a] Within its limits and purposes, the Davis *Text* (and the *Treatise*) are masterly productions, both as to organization, style, completeness, and content.

9. TEXT, Preface, ix.
10. See also, *e.g.*, TEXT, §§ 2.07, 2.09-11, 2.15 (the "delegation doctrine" in the states); § 6.11 (rule-making); Chapter 14, *passim* (evidence); § 15.13 official notice; § 20.09 exhaustion; § 21.09 ripeness; etc.
10a. *E.g.*, TEXT, §§ 11.09, 24.01.

Finally, the mere fact of writing a sustained and comprehensive treatise on Administrative Law is of itself an accomplishment of the highest order. Few areas of the law are so intractable, so incapable of reduction to the pat formulas and rules that too many equate with legal certainty. Davis has, however, written with clarity and precision, and yet, for the most part, he has given due attention to "the implicit, the imponderable, and the unknown"[11] which are present in administrative law, as everywhere.

—II—

Evaluation of Davis' study requires an examination of the limits within which the *Text,* like practically all other works on administrative law, operates. Initially, the *Text* approaches administrative law through judicial decision, with comparatively little reference to administrative determinations even on the immediately relevant point.[12] Although the comparison can be overdone, this is somewhat comparable to federal tax law without Internal Revenue Rulings or other IRS determinations. Thus, one comes out feeling that he has not glimpsed the administrative process directly, but indirectly through the lens of judicial review. While such a perspective is not necessarily a distortion, it is nevertheless an abstraction, although a useful abstraction. Unfortunately, it cannot be offset by reference to works which do approach the administrative process on the level of agency ruling. A thorough analysis of the Oppenheimer hearing, such as Harry Kalven's masterly study,[13] is far more revealing of the character and status of administrative hearing rights than a dozen judicial decisions and their pendant dicta. Similarly, exclusive concentration on the judicial review of administration has tended to obscure the actual functioning of the agencies. Hence, to take an unfortunate illustration, the disclosures of corruption—and more specifically the disclosures that many administrative decisions have been the product of extra-record considerations rather than the theories so laboriously developed on the record—have come as a profound

11. OPPENHEIMER, THE OPEN MIND, 54 (1955, paperback ed.).
12. There are, of course, exceptions. See, *e.g.* TEXT, § 15.11, drawing revealing examples of official notice from ICC decisions.
13. KALVEN, *The Case of J. Robert Oppenheimer Before the AEC,* 10 BULLETIN OF THE ATOMIC SCIENTISTS 259 (1954). This issue of the *Bulletin* also reprints texts of the opinions in that case by the Gray Board and then, on "appeal", by the Commission itself.

shock to persons both in and out of the field of administrative law. Apart from the fact that we are rightly outraged by official misconduct, the fact is that such practices must have long been known, if only by hearsay, at least to anyone with a substantial administrative practice. Yet these activities, which have apparently dominated the work of several agencies, were scarcely considered at all prior to the disclosures by the House Oversight Subcommittee, for they seem not to have found their way into judicial review of administrative determinations, except for an occasional decision on "bias".[14] The general failure to recognize and canvass these problems at an earlier date, and to propose effective reforms, is, at least in part, attributable to a too exclusive concentration, not upon administrative practice as such, but upon administrative practice seen through judicial review. The implicit premise was that the only real administrative problems were those that courts dealt with.

The major role of informal administrative proceedings is now increasingly recognized, and Davis has contributed a felicitous but all too brief chapter on "Supervising, Prosecuting, Advising, Declaring and Informally Adjudicating."[15] Particularly informative is his discussion of banking regulation,[16] accomplished almost entirely through supervision and negotiation and only rarely invoking the processes which are the usual grist of the administrative law mill.[17] Many of the subjects considered, especially advisory opinions, aspects of res judicata and estoppel growing out of dealings with agencies, and consent orders and stipulations, are comprehensively examined in the *Treatise;* all deserve more intensive study and evaluation than has been accorded them so far. This is so because informal proceedings are exceedingly important to the administrative process,[18] in some re-

14. On the question of administrative bias, see TEXT, Chapter 12.
15. TEXT, Chapter 4.
16. TEXT, § 4.04.
17. Although mentioned briefly in connection with delegation of power to private parties (TEXT, § 2.14), the joint regulation of many activities of securities dealers and brokers by the Securities and Exchange Commission and the National Association of Securities Dealers has proved to be such an unusually effective procedure that it deserves full consideration for its implications for administrative regulation generally. See 1 TREATISE, § 2.14 for a fuller statement by Davis. See also 46 VA. L. REV. 1586 (1960) for a discussion of further aspects of this relation.
18. Davis quotes (TEXT, § 4.11) the statement from ATT'Y GEN. COMM. ON ADMINISTRATIVE PROCEDURE FINAL REP. 35 that "even where formal proceedings are fully available, informal procedures constitute the vast

spects its most vital and characteristic expression. The quantity and accessibility of specialized studies on this phase, however, leaves much to be desired, and until further material has become available and has been studied, it is difficult to make fruitful generalizations on these matters which are vital, not just to political science and public administration, but to the law itself. Hence, the lawyer's understandable disposition to concentrate primarily on administrative problems which have been the subject of litigation.[19]

In the necessary task of drawing lines, Davis confines most of his analysis of federal agencies to those affected by the APA—again reflecting an orientation towards the court view of the administrative process—with only occasional attention to non-APA agencies, and then primarily because they have gotten themselves into court, *e.g.* the Immigration and Naturalization Service whose tradition of studied unfairness evoked *Wong Yang Sung v. McGrath*,[20] and Defense Department activities resulting in *Harmon v. Brucker*,[21] and *Greene v. McElroy*.[22] The stirrings of discontent with "non-reviewable"

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bulk of administrative adjudication and are truly the life-blood of the administrative process." Davis follows this up with some very revealing statistics as to the volume of informal adjudication. TEXT, § 4.11.

19. Another limit applied both in the TEXT and other administrative law studies is exclusion, as far as possible, of the substantive law made by agencies. Howard Westwood's review of the TREATISE criticizes this limitation. (WESTWOOD, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607, 607-08 (1959), but if for no other reason, it is a practical necessity. Tieing in quantities of the substantive law would merely becloud the administrative law point, and serve little useful purpose as an exposition of the substantive law which is appropriately left to specialized studies and to the "services."

On a deeper level, Westwood's reproach rests on the nominalist assumption that there is a plurality of administrative laws corresponding to as many agencies making law, and that therefore there can be few useful general principles governing the field. Mr. Justice Frankfurter has declared that "[a]part from the text and texture of a particular law in relation to which judicial review is sought, 'judicial review' is a mischievous abstraction . . . [and] a common law of judicial review in the federal courts" is non-existent. Stark v. Wickard, 321 U.S. 288, 312 (1944) (dissenting opinion). Thus, Westwood believes that court decisions have little influence outside of the agency directly involved (except in a "relatively rare case" like Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1946). 43 MINN. L. REV. at 609. A convincing showing that such is the case seems unlikely, and in any event it has not been forthcoming. It denies a basic tenet of courts and agencies and lawyers who assume that fruitful analogies, if not square precedents, apply from agency to agency. The intrinsic unity of administrative law, over and above varying practices of individual agencies, is not at all disproved by the fact that basic concepts work themselves out in different ways in different situations.

20. 339 U.S. 33 (1950).

21. 355 U.S. 579 (1958).

22. 360 U.S. 474 (1959).

and "discretionary" agency action, and the expansion of the right to review[23] remind us of the fallacy of concentrating upon the well-known "independent" agencies, their functions and procedures. Again, thorough study from the administrative law standpoint of these other areas of government is desperately needed; but until material on such agencies is gathered, sifted and analyzed, its presently amorphous condition and its scattered location make it altogether defensible for an author to minimize it in a treatise for lawyers.

Assuming the appropriateness of these limitations, it is regrettable that the *Text* does not offer a really penetrating explanation of the distinctive character of the administrative process. Davis' first chapter (both in the *Text* and the *Treatise*) is a helpful survey. Despite the listing of reasons for the growth of and opposition to the administrative process, one feels that it is not commensurate with the importance of the question.[24] The Davis work does not yield a current interpretation of the administrative process comparable to that in Dean Landis' still viable 1938 study of the subject[25] or, more currently, in some of Professor Jaffe's work. Davis assumes without question the virtues of the administrative process; his criticisms are altogether within these assumptions, and significantly directed for the most part to judicial limitations in this area. Thus, his work does not attempt to develop lines of inquiry so brilliantly laid out in Jaffe's study of the possible inherent limitations within our political economy upon the effectiveness of the administrative process.[26] It is precisely some further probing on this level, by men with Davis' depth of knowledge of and predisposition towards administration, that would indicate sounder bases for correcting administrative difficulties than many proposals now current.

To take an example, former CAB Commissioner Hector would solve current problems by radically restructuring the administrative agencies, more particularly by separating agency activities along the lines of enforcement, decision, and

23. See Part 5(A), *infra*.
24. Although admittedly a minor matter, I find irritating Davis' rather homespun talk about "Mr. Practitioner" and his convictions and gripes, in TEXT §§ 1.06-1.07, a bit of trivia out of keeping with the rest of the work.
25. LANDIS, THE ADMINISTRATIVE PROCESS (1938).
26. JAFFE, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954).

planning.[27] Apparently, the planning function would survive with an executive versus an independent "agency" which would, in turn, be run on analogy to military organization, evidently to obtain on a continuing basis the spectacular efficiency of which the military is occasionally capable. At the other pole, Davis' restiveness with judicial limitations indicates that he would give the administrative process a much freer hand. Thus, he deeply opposes further judicialization of administration; indeed it seems quite clear that such a development would be disruptive of an indiginous governmental development, and that instances where it has been used (notably the fragmentation of national labor policy between the National Labor Relations Board and an independent General Counsel) have been less than successful. Yet each of these points of view must be reassessed, both generally and as to specific proposals, against Jaffe's suggestions that the need for continuing public confidence in the administrative process is a perennial limitation upon its efficiency, and that we may have to sacrifice speed and streamlining to capture and hold public regard.[28] Hence, the delicate problem arises of selecting reforms which will both restore public confidence and not impinge too far on the administrative agency's distinctive character. Thus, the NLRB revision of its own rules of practice,[29] responsive to its particular organization and problems, is far preferable to recent bills which would impose across-the-board uniform rules of procedure on all or almost all agencies,[29a] something which would seem as ill considered as uniform rules for federal, civil, criminal, admiralty, and bankruptcy proceedings. Like considerations come into play in proposals to substitute studies and inquiries, for investigations in which some agen-

27. *Memorandum*, 931 at 932, 960-61 (1960).

28. JAFFE, *supra* note 26, especially at 1129-33. Compare Chief Justice Vanderbilt in Mazza v. Cavicchia, 15 N. J. 499, 105 A. 2d 545 (1954): "It is as much to the advantage of the [agency] as to private parties before it that the public have confidence in the fairness of its procedure. Whatever inconvenience the agency may suffer in modifying its practice [to comply with the court's requirement that the hearing officer's report be made available to the parties for their exceptions] . . . will be more than offset by the increased trust which the public will have in the justness of its procedure."

29. Drafts of the rules have been published, but seem not to have been widely distributed. They are noted, however, in 28 U. S. LAW WEEK 2332 (Jan. 12, 1960) and 29 U. S. LAW WEEK (July 19, 1960). Apparently, they have not as yet been adopted (or rejected) by the Board.

29a. *E.g.*, § 2849 FEDERAL CODE OF ADMINISTRATIVE PRACTICE, 86th Cong., 2d Sess. (1960).

cies have developed too many and too elaborate formalities.[30]

Again, it may be suggested that the Davis *Text* does not take sufficient account of the complex and subtle problems of what has been invidiously termed "industry domination." This is a phenomenon at once necessary to the administrative process, because agency and industry are often in a cooperative enterprise where constant exchange and contact is essential; at the same time dangerous to its integrity, because of the likelihood of corrupt practice and resulting ineffectiveness; and also dangerous to the industry, because the limited point of view of either agency or industry may inhibit important lines of growth. Davis fully grasps these considerations, although an occasional disposition to see only black and white may obscure perception and analysis of gray, in-between situations. Thus, Davis does not sufficiently explain the growing opposition in highly responsible quarters to administrative agencies—a deficiency which seemingly stems from a tacit assumption that the administrative process has an intrinsic orientation towards the liberal and the good. This is, of course, not so, and various ills of the agencies are well recognized. Many of these are the product of "industry domination" and of the often intensive efforts of the industry and the agencies to preserve the status quo. To note one of Jaffe's examples, the CAB has never certified a new trunkline air carrier, and only the pressure of competition from the non-Skeds, operating on the periphery of regulation, brought about the development of relatively inexpensive airline service.[31] The cartelization of the ocean-going carrier industry, sanctioned by the Federal Maritime Board,[32] reflects this same evil, as does the Federal Power Commission in the jurisdiction it exercises (and refuses to exercise).[33]

30. See the *Landis Report*, p. 41-42. See also an article with broader significance than its title suggests: LANDIS, *Air Routes under the Civil Aeronautics Act*, 15 J. AIR LAW & COMM. 295 (1948).

31. See JAFFE, *The Effective Limits of the Administrative Process: A Re-evaluation*, 67 HARV. L. REV. 1105, 1110-11 (1954).

32. This is thrown into high relief in the administrative proceedings culminating in Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1957).

33. See, *e.g.*, the regulatory problem of which Phillips Pet. Co. v. Wisconsin, 347 U.S. 672 (1954) is the focal point. Landis observes "the unwillingness of the Commission to assume its responsibilities under the Natural Gas Act and its attitude, substantially contemptuous, of refusing in substance to obey the mandates of the Supreme Court of the United States and other federal courts." *Landis Report*, 55.

To anyone who is convinced of the genuine vitality of the administrative process, such symptoms are profoundly troubling. They inevitably raise the question of how successful is the administrative process which was the object of too sanguine hopes in the thirties, and they prompt a sort of new "liberalism" which sees administrative agencies as inhibiting the optimum functioning of the "regulated" industries. Finally, their presence, if uncorrected, may eventually destroy or seriously cripple these quite remarkable institutions which developed as an almost unexpected response to the growing complexity of economic life and the quest for a better accommodation of society's inconsistent interests. The *raison d'ètre* of the administrative process is a field in which first-rate thinkers have worked too little, and their potential contribution to the subject would be immeasurable. Fortunately, Dean Landis is bringing to bear his deep and sympathetic understanding of the administrative process in his reform proposals which may well inject new vigor into the agencies. Under the sting of his report, already some changes, admittedly minor,[34] have been made. The significant fact is the conviction that new thinking is needed; at the moment, this seems the best hope for making the administrative process both respected and effective.

For purposes of evaluating Davis' offering, these considerations, which receive too little attention in the *Text*, are extremely relevant to a comprehensive picture of a dynamic though highly imperfect institution, both for the student and the general reader. The problems which go to the very nature and being of the administrative process as a way of government, must be exposed for realistic criticism and eventual correction. A prime difficulty with the *Text* is that it inadequately deals with these basic problems.

III. *Davis' Approach to the Delegation Doctrine: The Requirement of Standards.*

In Chapter 2 of the *Text*, Davis offers a full and thoughtful summary of the law on delegation of legislative authority to administrative agencies. The problem has been a perennial one, and the case law has sought some criterion to distinguish

34. These are the decisions of several agencies to abandon the substitute opinions written by individual commissioners for opinions prepared by a professional staff. See the discussion of this point in Part 4, *infra*.

lawful and unlawful grants of legislative power, since the declaration that legislative power cannot be delegated is now recognized as only a pious fiction, at least in application if not always in words. Many efforts to state a workable criterion have been made, but the contemporary law has settled upon the concept of "standards". It is a judicial question, then, whether the legislature has enunciated sufficiently precise standards for the exercise of the delegated authority, and if it has not the court will set aside the attempted delegation, and the administrative program will fail.

Davis is highly critical of the "standards" test, and perhaps, although this is not at all clear, of judicial control through any device which purports to declare when the legislature may not grant the authority it wishes. Thus, his approach to the question seemingly assumes that standards are ineffective and unnecessary, that insistence upon them implies that "wisdom [is] to be found . . . entirely concentrated in the legislative body",[35] and that "unrealistic verbiage" in older (and many recent) opinions "should not now be taken seriously" since arguments based on them "almost invariably do more harm than good to . . . clients' interests."[36] Davis thinks that what good standards do can better be done by requiring fair procedures,[37] although some indication of the purpose and objectives of administrative power unquestionably makes its contribution to the fairness of the administrative hearing and the adequacy and precision of the limited review which courts rightly afford.

Davis' position has much to commend it. Voiding delegation for want of standards is a crude weapon, its application often turning upon hairbreadth differences in the statutory language. It is especially crude in a period when administrative law is in measurable prospect of achieving maturity. Moreover, it is not unreasonable to suppose that agencies can be trusted with a good deal of legislative power, and that legislatures are in as good, if not a better, position as the courts to judge what authority they wish to delegate.

Allowing for all of this, Davis' strictures upon the requirement of standards seems somewhat overstated. Although it is often true, to paraphrase his statement, that "wisdom [is] largely concentrated" in administrative bodies determining

35. TEXT, § 2.05 at 37.
36. *Id.*, § 2.01, at 31.
37. See *Id.*, § 2.05, at 38; § 2.08, at 40.

their own policies, nevertheless the standards requirement serves a most important function, *viz.*, to exert pressure upon Congress and especially state legislatures to make statutes as specific as the subject matter reasonably admits. Thus the requirement can serve as a brake on any tendency towards too frequent and uncontrolled delegation of authority, either because the legislative branch is engrossed in other matters, or, as is sometimes the case,[38] because its members are unable to resolve a dispute as to a provision of the statute and therefore leave it vague and undefined. All of this points to the ultimate reason for standards: that the legislature is closer to the electorate than administrative agencies, and too pronounced a drift of power into fully competent, although *unrepresentative,* bodies is not to be encouraged.

Moreover, the standards requirement in the states—although often irritatingly applied by courts with little grasp of administrative law subleties—is unquestionably an important check upon legislative sloppiness, administrative arbitrariness, and abuse of interests too small to justify as a practical matter the expense of review proceedings in the courts. Thus, it may often be cheaper to comply with unreasonable or otherwise arbitrary demands of health inspectors and police chiefs with petty administrative powers than to challenge their acts. Davis apparently recognizes such considerations in approving the majority of the holdings of the state cases while deploring, and properly so, the sterile conceptual bases for many of the opinions.[39]

38. This was apparently the situation with the statute construed in Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944). There the Administrator of the Wage and Hour Division had specific delegated authority from Congress to define the "area of production" which was the key to the scope of an exemption from the regulatory scheme for workers engaged in canning agricultural commodities for market. Apparently Congress had been unable to agree on a definition of "area of production"; since the differences in the two bills "were not settled on the floor of either house," the conference committee disposed of the problem "by changing the flat exemptions into discretionary ones to be defined by the Administrator." 322 U.S. at 633-35 (dissenting opinion).

39. South Carolina attorneys will note Davis' sharp criticism (TEXT, § 2.11 at 45-46) of South Carolina Highway Department v. Harbin, 226 S.C. 585, 86 S.E. 2d 466 (1955), which struck down the automobile driver point system in the form which the Highway Department had established it by rule pursuant to its rule-making authority under CODE OF LAWS OF SOUTH CAROLINA § 46.187 (1952) (which now appears in slightly altered form as CODE OF LAWS OF SOUTH CAROLINA § 46.152 (1960 Supp.)). Davis believes that the "general purpose of the legislature was clear, [and that] the rules were reasonable", with a suitable administrative and judicial procedure afforded to violators; "[y]et the court struck down the system without even inquiring whether any good purpose was served

Although standards are of decreasing value with increased administrative responsibility[40]—as is true, relatively speaking, of the federal system where standards are so loose as to be almost formal[41]—nevertheless, the requirement remains in the background as a potent weapon in reserve, to be seldom used, but always at hand when needed. The surprising revival of the delegation doctrine in the passport cases[42] and in *Greene v. McElroy*,[43] involving the Defense Department's industrial security clearance program, are dramatic proof of the force of this weapon.[44] Unfortunately, as far as appears,

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by its decision." The case, says Davis, illustrates the "general legal doctrine that some mumbo-jumbo must go with each delegation of legislative power, and that the courts will refuse to supply the mumbo-jumbo."

Even on the standards doctrine which the court clearly accepted, the *Harbin* decision seems incorrect. As a matter of obvious statutory reading, CODE OF LAWS OF SOUTH CAROLINA § 46-174(3) (1952) (suspending the permit of a "habitual, reckless, negligent, or incompetent driver") limits CODE OF LAWS OF SOUTH CAROLINA § 46-172 (1952), which authorizes suspension or revocation of a driver's license "for cause satisfactory" to the Highway Department, and which, in the Court's view, was an unconstitutional delegation of legislative authority. But the provisions of CODE OF LAWS OF SOUTH CAROLINA § 46-174(3) seem as precise as the subject matter allows, they are directly related to the point system which is plainly designed to catch habitual or repeating offenders, and they afford an "intelligible guide". Although this was pointed out, the Court merely said that "we are not at liberty to add such a limitation [that of § 46-174(3)] to the clear and unambiguous language of Section 46-172." 226 S.C. at 596, 86 S.E. 2d at 471. Such "reasoning" is not persuasive that the standards requirement was properly invoked in this case to strike down the administrative regulation.

40. Viewing administrative agencies over the long haul, and assuming that the present difficulties are not intrinsic but can be corrected by better agency personnel, I think it is fair to say that the agencies have become increasingly responsible and competent.

41. In England, delegation of "legislative" authority to subordinate tribunals is very wide-spread. The control which American courts obtain through the judicial doctrine of "standards" is achieved by Parliament itself, partly through the system by which various categories of regulations and orders issued by the tribunals are "laid on the table" for consideration by the legislature. The orders and regulations take effect when issued by the tribunal and remain in force unless Parliament takes action within a specified time period to overrule, modify, or otherwise act on the administrative determination.

42. Kent v. Dulles, 357 U.S. 116 (1958); Dayton v. Dulles, 357 U.S. 144 (1958).

43. 360 U.S. 474 (1959).

44. In *Greene v. McElroy*, the Court thought that endorsing the standards requirement would compel Congress to give definite and concrete study to the questions whether and how far it would be necessary to restrict traditional constitutional rights (those of confrontation and cross-examination) in the interests of a security clearance program for industries with defense contracts. The Court's technique was to refuse to imply standards (as it would admittedly have done where governmental regulatory power is unclouded), but to demand that they be stated with precision and in detail. See especially 360 U.S. at 506-08. Indeed, so finely chiseled is the Court's decision in the passport cases (*supra*, note 42) that it did not even have to determine whether in fact the powers to restrict

neither Davis' *Text* nor *Treatise* (including the latter's supplements) consider these two cases from the standpoint of the delegation doctrine. The role of that doctrine in such situations undoubtedly calls for a reassessment of the attitude towards standards expressed in Chapter 2 of the *Text*, and perhaps a recognition that the doctrine is by rights still viable, at least in the states.

It would also seem that the welter of state decisions involving standards and improper delegation of "legislative" powers would be susceptible to empirical classification with respect to the type of interests for which the courts have required careful definition of standards in statutes, and those interests which have been left largely to administrative discretion. Unquestionably, this would be illuminating, for the cases do group themselves into such categories—the most obvious instance being the sharply varying federal views of delegation in civil liberties cases and in economic regulation. This would give fullness and content to Davis' point that "from the standpoint of both justice and efficient government, the holdings of state courts are usually sound. . . ."[45] The *Treatise*, fortunately, comes closer to such a classification and analysis.[46]

IV. *Institutional Decisions:*

Davis' treatment of the so-called "Institutional Decision" is exceedingly thorough and thoughtful[47] and is especially timely today. In a real sense, institutional and judicial decisions stand at opposite poles from one another. In its purest form, the institutional decision is one which can fairly be said to be made by the agency as a whole. It is the work-product of many persons in the agency performing various functions—and it is, therefore, characteristically anonymous and impersonal, with responsibility for its quality or lack

travel could be delegated (whatever the standards for exercising those powers), and, of course, it did not reach any constitutional issue. Justice Douglas' opinion rather strikingly refutes charges of undue haste in reaching constitutional issues for premature determination.

45. TEXT, § 2.15 at 49.

46. Professor Jaffe has also attempted this to some extent in his two-part study, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947), but he has not gone much beyond naming a few broad and self-evident classes into which the decisions distribute themselves.

47. So, too, are the related discussions of the Examiner, Bias, and Separations of Functions (Chapters 10, 12 and 13, respectively).

of it falling upon the agency as a unit, rather than being focused upon a particular individual. In contrast, the true judicial decision is normally an intensely personal piece of work for which a named judge is responsible, and upon which his reputation is staked if the matter is important or controversial. Pressures to judicialize administrative agencies are keenly felt here, to the extent that the institutional decisions remain.

The fact of the matter is that in American administrative law, institutional action is substantially inhibited. Inhibitions flow, *inter alia*, from the *Morgan* case requirement, with its constitutional overtones, that hearing and deciding must at some point coalesce,[48] and from the "separation of functions" provisions of the APA;[49] particular agencies labor under extreme handicaps, such as the Taft-Hartley provision[50] making the General Counsel wholly independent of the National Labor Relations Board; and the Communications Act,[51] effecting a greater degree of isolation of the examiner than that which would satisfy the APA. Thus, for the major "independent" agencies, institutional action, at least in the area of adjudication, is significantly qualified.

Unquestionably, there is much to be said both for and against institutional action, and Davis has adequately set forth, at the beginning of Chapter 11, many of the alleged advantages and disadvantages. But whatever may be said against it, it is more likely to reflect a coherent and organized application of the statute which the agency is expected

48. Morgan v. United States, 298 U.S. 468 (1936), as modified in Morgan v. United States, 313 U.S. 409 (1941).

49. See Administrative Procedures Act § 5(c), 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1960). The inhibition is not total, since the separation of functions provision does not govern applications for initial licenses or proceedings involving "rates, facilities or practices of public utilities or carriers"; nor does it apply "in any manner" to the agency members. The Taft-Hartley Act provides that "no trial examiner shall advise or consult with the Board with respect to exceptions taken in his findings, rulings, or recommendations." § 154, 61 Stat. 140 (1947), 29 U.S.C. § 154(a) (1960). See TEXT, § 11.13.

50. See 61 Stat. 139 (1947), 29 U.S.C. § 153(d) (1960).

51. These provisions subject initial licensing to separation of function provisions; preclude the examiner from consulting with any one or any fact or question of law from consulting with the Commission or any of its staff "with respect to the initial decision"; bars anyone in the prosecuting or investigating branch from advising, consulting, or participating in any adjudication case; and extends the separation of functions concept to the FCC itself so as to confine it, in consultation, only to a "review staff", thereby cutting the agency off from all other agency personnel. 66 Stat. 711, *et. seq.* (1952). Davis discusses these provisions in the TEXT, § 11.14.

to enforce, and agencies are undoubtedly supposed to be proponents of the regulation with which they are entrusted. Outside of the APA, there has been occasion for the institutional decision to flourish in those agencies handling vast volumes of necessary work, such as the Social Security Administration and the Veterans' Administration, to cite two of Davis' examples.[52] Because of the immense quantity of intra-agency adjudication, unqualified application of the *Morgan* rules would be absurd. There is a wider significance here, for if non-APA agencies can produce good administration of statutes which vitally affect important interests of untold numbers of people, there is no inherent reason why similarly good administration cannot be effected through institutional action by some of the independent agencies now subject to APA separation-of-function requirements.

Indeed, fragmentation of agency work through these requirements may, in a subtle way, be related to the degree of dominance which the regulated industries are able to exert over some of the agencies. Perhaps more institutionalization, reflected through closer contact of commissioners and their subordinates (including even the much-shunned prosecuting and investigating branches) might prove a bulwark against industry domination which all too often has been adverse to the public interest. It is rather revealing that the FCC whose commissioners are almost completely isolated from the commission personnel[53] has unquestionably the worst record of *ex parte* contacts with industry, hobnobbing of a suspicious character, and actual corruption. Current proposals for more judicialization would only go further in atomizing agency functions and isolating the commissioners from the staff who are the prime repositories of "expertise"—that greatly abused though still vital concept which includes both knowledge and know-how, and occasionally real wisdom, coupled with an orientation toward the regulatory function and sometimes a welcome element of zeal. Far from further judicialization, the most needed movement is towards less, in the direction of the institutionalized decision and increased contact and exchange within the agency. British experience under the flexible standards of the *Arlidge*[54] case seems to support this. "The principle behind [this] decision is that the administra-

52. See TEXT, § 11.07, at 194.
53. See the statutory provisions noted *supra*, note 51.
54. Local Gov't Bd. v. Arlidge [1915] A.C. 120 (1914).

tive tribunals should not be required to observe court procedures but should be free to work out their own rules subject to the provision of certain minimum safeguards,"[55] *viz.* the requirement of absence of bias and of affording each party an opportunity to be heard, referred to collectively in England as "rules of natural justice."[56]

Much American legislation in this field, enacted after the great creative period of federal administrative development, seems to have been haunted by the spectre of the commissioner captured by overzealous subordinates. It is arguable that the efforts intended to prevent this have paved the way for a different sort of capture—by the regulated industry. To the unhealthy degree that this phenomenon exists in some agencies like the FPC,[57] it is a far greater perversion than domination by a regulation-minded staff, for it deflects the agency away from regulation for the wider public interest and towards a narrowly based accommodation of the industry.

V. *Staff v. Individually Written Opinions:*

One aspect of the institutional decision is a very live issue, and that is the fact that in some federal agencies the one who decides does not write the opinion explaining and rationalizing the decision. Because this question is touched upon by Davis and has therefore evoked critical comment in recent reviews of the Davis books, it is perhaps worth adding some additional thoughts, chiefly in support of Davis' position on the question.

The problem arises in this context. When the examiner hears and decides a case, he follows it up with his own opinion. But in some agencies it is the practice in reviewing the examiner's decision to assign the writing of the opinion in the case to a professional opinion-writing staff, responsible to the agency as a body and not to particular commissioners. This technique is contrasted, always unfavorably, with the practice of judges who write their opinions in splendid isolation with the aid of their personal law clerks. The administrative practice has been sharply criticized by

55. GRIFFITH & STREET, *Principles of Administrative Law* 155 (2d ed. 1959).

56. Local Gov't Bd. v. Arlidge [1915] A.C. 120, at 138, 150 (1914).

57. *Landis Report* at 54-58 and 71 (referring to the "common criticism" of the "industry orientation" of agency members, Dean Landis observes that "the actions of the Federal Power Commission speak for themselves.").

many responsible scholars,[58] and its abandonment has been recommended in Dean Landis' Report to President Kennedy,[59] and in the President's message to Congress on the agencies.[59a] The Davis *Text* takes note of the problem and of the criticisms of the practice. Davis himself evidently dislikes and distrusts the procedure; in his view, it "destroys the safeguard of requiring the man who decides to set down in detail the reason for his decision." The "safeguard" apparently resides in the fact that the personal effort of writing ones' own decision may induce one to abandon a position adopted on "superficial examination" or "general impressions rather than that tightness that derives from the articulation of reasons."[60] However, he urges toleration of it on the ground that the assignment of opinion writing to persons other than those who actually make the decision is "inevitable" in the press of administrative business, although he later declares that the use of individual assistants by agency members responsible for writing their own opinions is probably the "best solution."[61] Recently, the ICC, the SEC,[62] and the CAB[62a] abandoned "anonymous" opinion writing, apparently as a consequence of Dean Landis' recommendations.

The matter calls for more extensive analysis than has been forthcoming in any quarter. This is especially desirable, since a great deal of pressure is being brought to bear upon the federal administrative agencies to abandon staff opinion writing, if they have not already done so. The position taken here is that the staff opinion is not a sacred or indispensable aspect of the administrative process, but that its use, in lieu

58. Former CAB Commissioner Hector has been especially vocal on the subject. See Hector *Memorandum*, 69 YALE L. J. 931, 959; HECTOR, *Government by Anonymity: Who Writes Our Regulatory Opinions?*, 45 A.B.A.J. 1260 (1959). See also WESTWOOD, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607 (1959). The Davis TEXT cites (§ 11.11) Dean Acheson's statement on the matter in hearings on the amendments to the Communications Act.

59. See *Landis Report* 39, 47. Previously Landis had taken the position that "[d]elegation of opinion writing has the danger of forcing a cavalier treatment of the record in order to support a conclusion reached only upon a superficial examination of that record". LANDIS, THE ADMINISTRATIVE PROCESS 105-106 (1938).

59a. See N. Y. Times, Apr. 14, 1961, p. 12, cols. 4-5.

60. DAVIS, TEXT § 11.11 at 203, quoting Landis, *supra* note 59.

61. *Ibid.*

62. SEC Announcement, January 10, 1961, 29 U.S. LAW WEEK 2322. ICC Announcement, February 15, 1961, 29 U.S. LAW WEEK 2384.

62a. N. Y. Times, Apr. 8, 1961, p. 32, col. 3.

of individually drafted opinions, is merely one of the permissible ways for agencies to do this phase of their business, and that it should therefore be left to the choice of the individual commission or board. Individually written opinions should not be made mandatory by statute or executive directive or otherwise.

First of all, staff opinion writing is incorrectly and unfairly linked to agency misconduct. Seemingly it is assumed that a staff opinion is a merely formal recital of grounds which were never considered when the agency made its decision and which are intended only to sustain the result if reviewed in court, and that therefore it is just a cover-up for a determination made for extra-record (and perhaps reprehensible) reasons. Thus, former Commissioner Hector rhetorically asks what occurs "behind this slightly sinister facade of anonymous opinion writing", a system which he finds "rather frightening"[63] and not "in line with American democratic traditions."[64] Indeed, Hector goes so far as to say that litigants and attorneys, "faced with this impassive impersonal process" of anonymous opinion writing "sometimes feel that they must resort to more personal approaches and appeals to do justice to their cause."[65] Apart from the fact that the "personal approaches and appeals" normally occur before the agency decision is made rather than in the interval between the decision and the drafting of the opinion rationalizing the decision,[66] it is improbable that *ex parte* contacts are prompted by confrontation with an "impersonal process". Rather they occur because litigants want to get something of value, because they and their agents are unethical, and because many administrators have not been above accepting such approaches. The truth is that one who is willing to decide on extra-record grounds can plausibly justify it whether

63. HECTOR, *Government By Anonymity*, 45 A.B.A.J. 1260, 1263 (1959).
64. *Id.* at 1261.
65. *Id.* at 1263. In his *Memorandum*, he states that "the system is actually so inviting to improper influence, that it will inevitably occur from time to time." *Memorandum* 931, 958.
66. In the *Memorandum*, he observes, with proper disapproval, that "in some agencies, such as the CAB, the decision is publicly announced in a press release and parties begin to act in reliance thereon, before the opinion-writers even start their work." 69 YALE L. J. at 959. See Eastern Air Lines, Inc. v. CAB, 271 F.2d 752 (10th Cir. 1959). Obviously, whatever *ex parte* contacts are to be made must, to be effective, occur before decision, and would serve no purpose during the opinion-writing period, except in the probably rare instance when a decision already made might be thereafter changed.

he writes the opinion himself or through his legal assistant or has it written by a professional staff. One need only point to the opinions of Judge Martin Manton, presumably his own work-product.[67] Anonymous opinions and unethical conduct are not logically connected; there is no convincing showing that they are in fact related. Therefore, it is imperative to judge the anonymous opinion on its merits, apart from the agency misconduct, unless unreasoned clichés are to carry the day.

Again, it is thought objectionable that a person or staff having no part in the actual decision can write an opinion supporting whatever result they are directed to support. Thus, one has before him the caricature of a Janus-like being who can select one or another set of facts or standards or rules, depending upon the result which is to be sustained. In contrast, the personally written opinion is supposed to guarantee analysis of the record and assure a reasoned decision and result based upon that analysis. There are several points to be considered here.

In any multi-person court or agency, the writing of the opinion invariably and perhaps necessarily follows upon the decision, which we may define as the determination of the result which the written opinion is intended to explain and support. Assuming *arguendo* that mandatory personally written opinions will guarantee a thorough analysis of the record and reasoned discussion and application of legal principles, it is clear that such discipline does not come to bear upon the making of the decision, as we have defined that term. No one supposes that either a court or agency can canvass the record and arguments in every case before the conference at which the decision is made. This would be especially true when commissioners are required to make a decision on a complex case with thousands of pages of transcript and exhibits, and long briefs. Agency business could not be accomplished if the ideal were a comprehensive analysis of record and briefs *before decision,* and if this ideal were put into practice. Similar considerations undoubtedly apply when appellate courts are confronted with massive records in cases

67. The conviction of Judge Martin Manton of the United States Circuit Court of Appeals for the Second Circuit on an indictment for conspiring to obstruct the administration of justice was sustained in Manton v. United States, 107 F.2d 834 (2d Cir. 1939), *cert. denied,* 309 U.S. 664 (1940). See also Root Ref. Co. v. Universal Oil Products Co., 169 F. 2d 514 (3d Cir. 1948).

before them. Thus, clearly the discipline of personal opinion writing comes into play *after* the decision is made, not before.

The question then, is what will guarantee good decisions; and the answer will depend upon many factors, most importantly, the calibre of the men who are entrusted with decision. For the agencies, the current question is whether or not extra-record considerations will determine the decision. And it should be remembered that the extra-record pressures—the private phone calls and conferences with the parties, the representations from politically prominent individuals, the suggestions that comfortable positions await commissioners on expiration of their office terms—all logically and as a matter of fact come before the decision, not during the interval between decision and the writing of the opinion. Such contacts are designed to influence the decision, as defined above, and not the opinion.

Hence, the personally written opinion is actually irrelevant both to the question of securing a good decision, and to preventing improper extra-record contact with commissioners. There is no reason to suppose that good decisions cannot be made by competent and honest commissioners, like their judicial brothers, upon the oral argument to which they listen, the briefs into which the more industrious will dip before the conference at which the decision is made, and, most important of all, the findings and opinion of the hearing examiner. In fact, we could be highly satisfied with the state of regulatory agencies if we were assured that commissioners made their decisions only after they had become this familiar with the case.[68] Thus, the argument that the personally written opinion assures familiarity with the record and arguments has no application to the making of the decision. If commissioners are not above entertaining and acting upon extra-record representations, no amount of familiarity with the record and briefs will assure a good decision, *i.e.*, a result determined by men of integrity acting fairly and honestly upon the public record which has been made available to all parties.

68. Mr. Hector faintly implies scandal when he says that "[e]veryone knows that commissioners usually cast their votes with only the examiner's opinion, the briefs and oral argument to guide them" (*Memorandum*, 69 YALE L. J. at 959). As already suggested, this seems like an excellent basis for making a decision, especially considering the care the examiner normally gives to his report, and the fact that presumably the briefs and oral argument have sharply focused the points at issue.

Even when the opinion is written anonymously—that is, by a special staff responsible to the agency as a whole—there is nothing to show that commissioners may not consult the staff while it is preparing the opinion; certainly there is nothing to bar commissioners from changing portions of the draft opinion, once it is written, or even being persuaded to a different point of view once the supporting arguments and facts have been marshalled. Frankly, it seems improbable that commissioners will altogether ignore the rationale underlying their decision, and that the reasons given for it will never concern them once the ruling is made. Although Mr. Hector says that opinion-drafting proceeds with "little or no guidance or correction by the commissioners who sign it,"[69] the CAB reply contradicts his assertion and declares that "such drafts are then reviewed by the Board members, changes made as necessary, and the final product signed by each member."[70]

There are a number of other objections, mostly with little merit, offered to the staff-written opinion. (1) The quality of the "anonymous" opinion is often assailed, although there is no inherent reason why it cannot be persuasive and well-written. It need not be "grubby, uninspired, and sometimes incoherent"[71] (as in fact many agency and also court opinions are), nor need it be the dismal product ascribed by Landis to the ICC.[72] In fact, many admittedly "anonymous" opinions, *e.g.* those of the SEC[73] and the CAB, are of a quality

69. *Memorandum*, 959.

70. See CIVIL AERONAUTICS BOARD *Detailed Analysis and Evaluation of the Hector Memorandum to the President* 57 (mimeographed), reproduced in Hearings, March 15-April 8, 1960, House Comm. on Interstate and Foreign Commerce, Independent Regulatory Agencies Regulation 447 at 505 (1960) [hereinafter cited as CAB REPLY, and paginated to the mimeographed document and to the House Hearings]. SEC Commissioner Orricks says that "the style, reasoning and conclusions are carefully studied by the Commissioners. Changes in form and substance may be made to accord with their composite views. . . ." ORRICK, *Organization, Procedures and Practices of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 50, 59 (1959).

71. WESTWOOD, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607 at 608 (1959).

72. *Landis Report* 39 (ICC opinions are "in the poorest category of all administrative agency opinions"; they are characterized by "parsimony in discussing the applicable law"; and "[l]engthy recitals of the contentions of the various parties are made as a prelude to a succinct conclusion devoid of real rationalization").

73. *Id.* at 39, 47 (SEC opinion writing section's "quality is high, if not the highest among the agencies").

superior to many court productions, and even Mr. Hector obliquely admits this, at least as to the CAB.[74]

(2) Again, much of an agency opinion almost necessarily consists of suitably detailed findings of fact, and the propriety of a staff preparation of this phase at least seems unquestionable. After all, judges often adopt wholesale the proposed findings of fact offered by one side or the other.[75] Thus, a great part of the agency opinion does not call for the style that a Hand or Holmes or Cardozo brings to bear on a court decision. In short, the fact of a "bland style" or a "dead level of uniformity" as opposed to a "lively unevenness," to use Mr. Hector's phrases,[76] is irrelevant, both in itself or as a symptom.

(3) Moreover, the fact that the staff, at least in theory, writes for all the members of the agency—thus representing "the composite views of the Members who sign it, and not just the personal views of any one Member"[77]—is really no objection at all. The implication is that this yields a watered-down opinion which neither satisfies nor informs anyone and does not seriously offend anyone. Wherever an opinion represents the views of a group, there is necessarily some give-and-take in the statement of views; and, even in the courts, this is so, for a unanimous or near-unanimous group may be willing to agree only on generalities and unwilling to assent to the strong personal views of any one judge or commissioner.[78] Thus, we deal with an inevitable feature in any statement purporting to represent the views of a body. If individual views are the *sine qua non*, they are best ob-

74. HECTOR, *Government by Anonymity*, 45 A.B.A.J. 1260 at 1333 (1959) (opinion writing section, if abolished, would be a "good pool from which to select not only new top staff officers and new hearing examiners for the agencies, but also new members of the regulatory agencies" since they have the "ability to write their own opinions").

75. For example, many of the crucial fact findings of the district court in United States v. International Boxing Club, 150 F.Supp. 397 (S.D.N.Y. 1957), *aff'd*, 358 U.S. 242 (1959), were adopted verbatim from the Government's proposed findings. See Record on Appeal, Vol. 1, pp. 480-507. Other findings were taken from those proposed by the defendants. *Id.* at 507-49. Yet no one would question the integrity of the judicial process in employing such an expediting procedure, and it is in fact done all the time. It is certainly not objectionable that a district court "accept defendants' evidence and sustain defendants' view of the facts." United States v. Yellow Cab Co., 338 U.S. 338, 340 (1949).

76. HECTOR, *Government by Anonymity*, 45 A.B.A.J. 1260 at 1264 (1959).

77. CAB REPLY 58; House Hearings 506.

78. See BICKEL & WELLINGTON, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

tained through individual opinions of each participant, *e.g.*, the opinions of the judges of the English Court of Appeal or of the House of Lords, or statements by each group, as by the several "wings" of the United States Supreme Court. The truth of the matter is that, whether or not opinions are individually or anonymously written, it is always open to anyone to dissent or concur in a specially written opinion,[79] as the case may be.

(4) Again, Hector suggests that the opinion-writing staff must draft a decision which will be "proof against appeal,"[80] because "every loophole" has been "plugged . . . on an ex post facto basis after the decision was made . . . ."[81] The implication that it is improper to draft a proposed decision so as to withstand judicial review is wrong, for the fact is that anyone who fails to prepare the best opinion of which he is capable has defaulted on his obligation. Agencies, no less than judges, prefer to have their judgments vindicated.

(5) Another point is the fact that it is not an inherent and exclusive characteristic of a staff-written opinion that it merely rehearses agency-devised "rules and standards" which can be trotted out to sustain any result at all.[82] Some, but not all, agency opinions do just this; but so do many personally written judicial opinions. The use of rules of statutory construction and legislative history is a notorious example of rationalizing a decision based on perfectly legitimate although unarticulated policy grounds.[83]

(6) Related to this is the current charge that administrative agencies such as the CAB have failed to carry out their planning functions. This is unquestionably true, as Dean Landis' report makes clear, both as to the CAB and the FCC; in the case of the former it is due largely to the burden of petty adjudicatory work,[84] whereas unduly complex procedures and more importantly the "quality of its top personnel" seem largely responsible for the FCC's like failure to plan

79. See the notable dissent by Commissioner Lee from the CAB's approval of participation by American air-carriers in the International Air Transport Association, an international traffic conference which sets agreed-upon tariffs, rates, schedules, etc. *IATA Traffic Conference Resolution*, 6 CAB 639 (1946) (dissenting opinion).

80. HECTOR, *Government by Anonymity*, 45 A.B.A.J. 1260 at 1263.

81. *Id.* at 1332 (original in italics).

82. *Id.* at 1263-64.

83. Note the Supreme Court's disparaging comment on the use of rules of statutory construction. SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943).

84. *Landis Report* 44.

ahead.[85] Mr. Hector implies that the absence of broad guiding principles in the CAB opinions at least is attributable to a desire of the opinion-writing staffs to "leave themselves enough flexibility to justify a possible contrary decision in the near future."[86] Assuming this to be so, it is doubtful that this in any way contributes to the failure of planning, and Dean Landis, who dislikes the anonymous opinion, certainly has not suggested that it does. Rather the absence of satisfactory guide-lines in the agency opinions is a reflection of the failure on a higher level to develop those principles which would be determinative of individual cases, whoever writes the opinions.[87]

Undoubtedly, the most persuasive support for the individually written opinion is the exposure to the tough intellectual discipline of stating and defending concepts and ideas which would otherwise remain vague, and the probability that directly grappling with the problems will yield new insights and the germs of new policy. Anyone who has become immersed in the formulation and attempted solution of a problem will recognize the extent to which new ideas crystallize out of the experience and thinking that is brought to bear on a difficulty. In the course of such work, a commissioner may become so thoroughly persuaded of his personal views and understanding of the matter, with all of the tributary factors of pride of new ideas and authorship, that he may be able to persuade his colleagues to like views. Surprisingly enough, this very fact has been a ground for defending the "anonymous" staff opinion. Thus, the CAB, without ques-

85. *Id.* at 53-54.

86. HECTOR, *Government by Anonymity*, 45 A.B.A.J. 1260, 1264.

87. Professor Blum has made a comprehensive survey of each of the ICC decisions to date on the modification of railroad securities under Section 20b of the Interstate Commerce Act, 71 Stat. 369 (1957), 49 U.S.C. § 20b (1958), and concludes that the ICC has "deliberately proceeded with each proposal in as much isolation as possible" instead of "attempting to provide general rules as guides". BLUM, *The Interstate Commerce Commission as Lawmaker: The Development of Standards for Modification of Railroad Securities*, 27 U. CHI. L. REV. 603, 656 (1960). The ICC's practice is contrasted with that of the SEC which "at least seems to have made a major effort to develop doctrines which are to be carried over from one case to another." *Id.* at 656, n. 277. For our purposes, the significant point is that while both the SEC and ICC have long used opinion writing staffs, the consequences for good administrative lawmaking have been quite divergent. This certainly suggests that the development of policy by agencies can be achieved on a case-to-case basis through opinions produced by a professional staff. Hence, if the SEC has succeeded, the causes of failure on the ICC's part must be sought elsewhere. See *Id.* at 654-660.

tioning its premises, declares that "by its very nature an opinion of the Board must represent the composite views of the Members who sign it, and not just the personal views of any one Member," and the "integrated opinion writing staff" can instead "obtain a blending of individual views to obtain what is truly an opinion of 'the Board.' "[88] The short answer to this is that Court opinions (good, bad, and indifferent) are written by individuals, and except where judges separately concur or dissent, these opinions are the "opinions of the Court." They represent, to use the CAB's language, "the personal views" of the justice who writes the opinion, but he has gained concurrence, primarily through persuasion, from his colleagues.

Thus, the strongest reason favoring individually written opinions is not, as Hector suggests,[89] that the opinion writing staff produces a bland pablum of mixed views; unfortunately, too many commissioners in the past have had no individual views to contribute to the blend. Rather, it is the contact with "irreducible and stubborn facts" in working on an opinion.[90] The probability of creative response to such activity, of course, depends upon the presence of commissioners who can profit from such discipline — a characteristic not invariably conspicuous in recent years. After all, some men benefit not at all from grappling with intellectual problems. Expressed otherwise, reliance upon the individual opinion is less a cause, more often a symptom, of the intellectual vitality of the "men at the top." The fact is that the active commissioner in any agency may, if he wishes and has the time to do so, write his own opinions. There is no reason to suppose that the presence of an opinion staff in an agency is any bar to such freedom of expression.

Although this author's preference is for the individually written opinion, this choice is not so firmly grounded in the necessities of good administration that it is considered the sole method for everyone else. From the objective standpoint of good administration, the staff opinion should be viewed for what it is, one of the several ways in which the work of a given agency may be effectively accomplished. The choice of staff versus individually written opinions should

88. CAB REPLY at 58; HOUSE HEARINGS at 506.
89. HECTOR, *Government by Anonymity*, 45 A.B.A.J. 1260 at 1263-64 (1959).
90. Whitehead, SCIENCE AND THE MODERN WORLD 2-3 (Mentor ed), quoting from a letter of William to Henry James.

be for the agency, more particularly for individual commissioners. The arguments offered against the staff opinion are, dispassionately viewed, unpersuasive of the position they are designed to establish: that personally written opinions should be mandatory. While it is therefore clear that staff opinions do not represent the ultimate perfection in the administrative process, neither do they betoken a degradation. The arguments favoring both staff and personally written opinions are strong; balancing them off one against the other, the question is neutral, and being neutral it should be left to the agency to decide for itself.

In conclusion, it is worth noting that "anonymous" opinions may simply be the result—"inevitable," says Davis—of the agency's volume of business, the commissioners' lack of time for study and thinking, and the presence of tasks of peripheral concern. Elimination of these drags on the administrative process is important in itself; but if it also frees the commissioners for study and thought which eventuate in individually written opinions, this is excellent. Thus, if such a practice is to be encouraged, it should be the by-product of a much needed streamlining of agencies to give them broader power to subdelegate various functions. Hence, individually written opinions should not be mandatory by statute, but should be left to the particular agency as a matter of internal housekeeping. The abandonment of staff opinions by several agencies is an appropriate measure for them to take; continued use of the anonymous opinion by others would likewise be defensible as a sound method for doing their business as they see fit.[91]

VI. *Judicial Review of Administrative Action*

Davis' treatment of the right to and scope of judicial review is one of the two most comprehensive surveys presently available of that crucial point of intersection between the administrative and the judicial processes.[92] His analysis of

91. At this writing, the FPC and FCC are the only major regulatory agencies still using the staff opinion. The FTC has long assigned opinions to individuals; as already pointed out, *supra* notes 62-62A, the ICC, SEC, and CAB have substituted individual for staff opinions. See also note 123, *infra*.

92. The other is a series of five articles by Prof. Jaffe: *The Right to Judicial Review*, 71 HARV. L. REV. 401, 769 (1958) (two parts); *Judicial Review: Questions of Law*, 69 HARV. L. REV. 239 (1955), *Questions of Fact*, 69 HARV. L. REV. 1020 (1956), and *Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957). It would be extremely helpful if these five articles were collected and published in a single volume.

the cases happily stands unimpaired, since the recent conflicts in administrative law, unlike earlier controversies, seemingly accept the present state of the law on judicial review. Speaking very generally, the availability of review seems gradually to be expanding, and the scope of review of evidence, defined in *Universal Camera* ten years ago, has proved a workable accommodation of agency and court.[93]

A. *Right to Judicial Review.* The Davis analysis of the right to judicial review[94] is of especially high quality. It rests squarely on the sound thesis that the right should be broadly available, that judicial review appropriately limited "does not weaken the administrative process but strengthens it," and that excluding judicial review "cut[s] off what the courts have to offer to a governmental program," namely judicial "expertise" in problems of statutory interpretation, fair procedure, and the like.[95] Unfortunately, there is insufficient attention focused upon the broader implications of what may prove two landmark decisions in the field—*Leedom v. Kyne*[96] and *Harmon v. Brucker*.[97] The latter is referred to only once in the *Text* for its specific holding that "a discharge from the army is reviewable for excess of jurisdiction."[98] *Leedom v. Kyne,* although decided in December 1958 (sometime prior to the publication of the *Text*) is not mentioned.[99] That case holds the NLRB's determination of a

93. Two other Davis chapters dealing with important aspects of court-agency relations should be especially noted for their great merit. Chapters 19 and 20 on Primary Jurisdiction and Exhaustion of Administrative Remedies clarify the distinction between these two oft-confused concepts, and also provide an excellent guide to the subtleties in these two subjects. Both are areas of great importance in effecting a workable accommodation between the integrity of the administrative agencies (which should have a first crack at many cases which its organic statute covers, and whose remedies should be first exhausted before judicial review is sought) and on the other hand, the demand for speedy action, which is often made impossible by the requirement that the remedies of both courts and agencies be run through.

94. This appears principally in Chapter 28, but should be supplemented by reference to Chapters 23-24 (State and Federal Forms of Proceedings for Review) and Chapters 21-22 (Ripeness for Review and Standing to Secure Review, respectively).

95. TEXT, § 28.21 at 519.

96. 358 U.S. 184, decided December 15, 1958.

97. 355 U.S. 579, decided March 3, 1958.

98. TEXT, § 28.13 at 511, n. 68. The Treatise likewise gives the case but slight attention. 4 TREATISE § 28.13 at n. 10; § 28.19 at n. 15.

99. This may well be due to the exigencies of publication. Leedom v. Kyne was decided in December 1958, and the Preface to the TEXT is dated July 1959. It is, however, briefly noted in 4 TREATISE § 28.20 (1960 Supp.). This is perhaps the occasion to suggest that text materials designed primarily for student use can also stand updating through supple-

bargaining unit reviewable at an early stage in the administrative proceeding, by way of an action for a district court injunction against the Board-conducted election, rather than deferring review to a much later stage, *viz.*, review of a cease-and-desist order against the employer who has refused to bargain with the union representing the designated bargaining unit. The striking factor in the decision is the willingness of the Court to override strong legislative history and labor policy considerations in favor of awarding a prompt right to judicial review at a clearly preliminary stage of the proceedings.[100] Despite the majority's careful effort to confine the holding, its philosophy, expressed also in *Harmon v. Brucker*, is the best evidence that the Supreme Court is increasingly cognizant of the very proposition that Davis so strongly asserts—the appropriateness of a judicial review right.[101] These cases mark a far departure from the philoso-

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ments or pocket parts; certainly it would not seem unduly difficult to make available each year a cumulative supplement in areas such as Administrative Law where the field is in flux. It is hoped that publishers of textbooks will give this suggestion consideration.

100. However, a recent second circuit decision has taken the Supreme Court at its word and has confined *Leedom v. Kyne* to "an order of the [National Labor Relations] Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." Local 1545, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Vincent, 286 F. 2d 127 (2d Cir. 1960), quoting Leedom v. Kyne, 358 U.S. 184, 188 (1958). Here the Board refused to respect its "contract bar rule", because the "in" union had negotiated a collective bargaining agreement containing a "hot-cargo" clause, unlawful under a Landrum-Griffin amendment of the National Labor Relations Act, 29 U.S.C., § 158(e); the Second Circuit sustained the district court's dismissal of an action by the "in" union to enjoin the election. Dissenting Judge Moore urged that "the *Leedom v. Kyne* exception could safely be broadened to include situations where the Board has entirely misconstrued the import of a clear statutory provision in exercising its admittedly broad discretion." 286 F.2d at 124.

If one is persuaded by Mr. Justice Brennan's dissent in *Leedom v. Kyne*, demonstrating the undesirability of affording injunctive relief in any of these situations at this particular stage of the proceeding, the decision in the *Vincent* case is to be applauded. Judicial review of the problem is not denied, but rather it is postponed to the stage of a "refusal to bargain" by the employer.

101. Hopes that these two cases were the forerunners of a general principle of broadly available judicial review were somewhat dampened by Schilling v. Rogers, 363 U.S. 666 (1960). There, the Court, over a strong dissent, construed provisions of the Trading with the Enemy Act, 60 Stat. 50, 50 U.S.C., § 32(a) (1958), as precluding judicial review of an administrative determination that the former enemy national was not entitled to an exemption which, if available, would have enabled him to recover property vested during the Second World War in the Alien Property Custodian. The Court concluded that, within the meaning of Section 10 of the Administrative Procedure Act, the administrative action was unreviewable under the statute and that in any event it had been "committed to agency discretion."

phy of *Switchman's Union*,[102] and should be central to any discussion of the right to review. Apart from the easily remedied lack of emphasis upon these two decisions, the survey of the problem is masterly.

B. *Review of Questions of Fact.* Chapter 29, "Scope of Review of Evidence," is a sound presentation of principles which, at least in statement if not always in application,[103] have become more or less settled. The concept of "substantial evidence on the record considered as a whole" has had pervasive influence, even upon statutes which apparently suggest a different scope of review, either broader or narrower.[104]

102. Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943), which is increasingly an isolated precedent of slight influence outside of its own sphere, although there it continues to be steadily applied. See *e.g.*, Rutas Aereas Nacionales v. Edwards, 244 F.2d 784 (D.C. Cir. 1957); Decker v. Linea Aeropostal Venezolana, 258 F.2d 153 (D.C. Cir. 1958), and cases there cited. In his dissent in Union Pac. R.R. v. Price, 360 U.S. 601 (1959), even Justice Douglas, the author of the *Switchmen's Union* decision, noted that "[t]olerance of judicial review has been more and more the rule as against the claim of administrative finality" (*Id.* at 619), and distinguished *Switchmen's Union* as "involv[ing] mediation, not adjudication—mediation being 'the antithesis of justicability'" (*Id.* at 619, n. 1). This is, however, probably too narrow a ground for distinguishing *Switchmen's Union* from other decisions.

103. Note the striking percentage figures for administrative cases reversed or affirmed in COOPER, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A.J. 95, 948 (1958), where the author points out that for the period 1951-1956 the second circuit found substantial evidence in 26 of 29 cases (89%) while the fifth circuit found similar support in only 15 of 33 (45%). For verification that the fifth circuit's approach continues much the same, see NLRB v. Walton Mfg. Co., 286 F. 2d 16 (5th Cir. 1961), applying the court's own doctrine that "[t]he burden of proof rests upon the Board's General Counsel to establish by acceptable substantial evidence on the record as a whole that discharge [of an employee] came from the forbidden motive of interference in the exercise of the statutory rights of the employees" (*Id.* at 22); the opinion proceeds with a painstaking analysis of the evidence, avowedly to determine the presence *vel non* of substantial evidence, but coming much closer to a reassessment of the evidence in the record. (*Id.* at 22-25). The court thought such "closer scrutiny of the record than might otherwise be required" to be necessary because of "questionable inferences" from the evidence and the examiner's "credit[ing] all of the General Counsel's evidence and generally disbeliev[ing] all of the employer's evidence" (*Id.* at 21). But cf. United States v. Yellow Cab Co., 338 U.S. 338, 340 (1949), apparently rejecting a government argument that the trial court "seems to reflect uncritical acceptance of defendants' evidence and defendants' views as to the facts to be given consideration in passing upon the legal issues before the court."

104. See TEXT, § 29.07 at 531: "Efforts to work out a scope of review of evidence that is narrower than the substantial-evidence rule have failed," TEXT, § 29.07 at 531, since "[r]eview of evidence . . . probably cannot be feasibly reduced to something less than what is customary under the substantial-evidence rule". 4 TREATISE, § 29.07 at 149. Note the application of the substantial evidence rule to a vaguely defined, although arguably broad, grant of judicial review of evidence in Thomason v. Board of Bank Control, 236 S.C. 158, 113 S.E. 2d 544 (1960), discussed 13 S.C.L.Q. 34-37 (1960).

It has proven very difficult to stabilize any concept, other than the substantial evidence rule, intermediate between total unreviewability and *de novo* review; and the growing tendency has been towards harmonizing variant tests with the substantial evidence rule. This is, of course, desirable from the viewpoint of simplicity, as well as of good court-administration relations, and of fairness to parties aggrieved (or satisfied) as the case may be. Davis gives the doctrines of "jurisdictional facts" and "constitutional facts" approximately the attention which they deserve—that is slight, for these antiquated concepts have little vigor or appropriateness in administrative law generally, whatever may be the vitality of analogous concepts applied by courts in reviewing cases with civil liberties overtones.[105]

C. *Review of Questions of Law.* In the final chapter, "Scope of Review of Application of Legal Concepts to Facts," Davis treats the judicial approach to administrative determinations both of "pure" questions of law and of "mixed questions of law and fact," to borrow some cloudy though traditional terminology.[106]

Davis' effort is, as he says, a "practical" one—that is to discover when and under what circumstances the courts (usually the Supreme Court) will either substitute judgment, *i.e.*, decide on its own the legal issue or apply the law to facts, or will sustain the agency's construction of the statute or application of law to fact, *i.e.*, invoke the test of "warrant in the record" and "rational basis."[107] To him, the "analytical" approach of distinguishing between "law" and "fact" for purposes of review is merely a semantic tool employed

105. See the discussion of Grove Press, Inc. v. Christenberry, 175 F.Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960), in SCHWARTZ, *Administrative Law*, in the Annual Survey of American Law, 36 N. Y. U. L. REV. 88, 108-110 (1961). "What the court [of Appeals for the Second Circuit] is doing here is to follow the doctrine of so-called 'constitutional fact,'—*i.e.* that there must be full review of facts upon which a constitutional right turns." *Id.* at 109.

106. Purely for convenience and not because of any intrinsic virtue, I shall use the word "determination" to denote both administrative decisions on "pure" questions of law and the application of law to fact, unless otherwise noted.

107. DAVIS, TEXT § 30.02 at 541; *id.* § 30.14 at 560-62. The scope of review thus denoted is commonly opposed to substitution of judgment. The "rational basis" test appears in many Supreme Court opinions, *e.g.*, Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939). Another technique used to avoid substituting judgment is to call an application of law to fact merely a finding of fact subject to the "substantial evidence" rule. See O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), noted only for a different point in DAVIS, TEXT, § 29.04, at 527, n. 33.

by the Supreme Court to sustain a disposition of the case upon other grounds.[108] Davis analyzes in detail what he regards as the considerations which "motivate the Court to review some questions of application more broadly than others," including "inarticulate" considerations, as well as the "three major factors"—all of them interrelated—the comparative qualification of court and agency on a given issue ("by far the most important"), the extent to which a given problem is committed by the legislature to agency or court determination, and the attractiveness to the Court of substituting judgment on a "broad generalization."[109] No one can begin to question the soundness and utility of such an empirical study of the decisions, and Davis has quite successfully isolated many of the probable factors prompting courts to substitute judgment or allow the agency determination to stand if "rational."

But one leaves this vitally important chapter with a feeling of discomfort. Implicit in the discussion is the conclusion that the courts (and especially the Supreme Court) have behaved arbitrarily and capriciously in the cases in which they have reviewed agency applications of law to fact and agency rulings on "pure" questions of law. This conclusion comes to the surface at one point when Davis declares that the "plain fact" is that "for better or for worse" there are "two lines of cases, not a single line of cases" on review of these determinations and that "we have no authoritative judicial explanation of what motivates the Supreme Court in choosing between the two lines of cases in deciding any particular case." Yet Davis immediately lists a number of situations where he believes judicial substitution of judgment is "rather clearly desirable" and concludes that the Court would find it a "not especially difficult" task to offer some guide lines when judgment will be substituted or agency determinations sustained on a limited review.[110] Although he does not further elaborate this point, one cannot but wonder whether he is not, in this recommendation, counseling the Court to write a "general essay" contrary to one of his own "five

108. *Id.*, § 30.14 at 561. See also *Id.* at §§ 30.09-11 at 553-57.
109. TEXT, § 30.07 at 550.
110. *Ibid.*

constructive suggestions" set forth in the Preface to the *Treatise*.[111]

This point of view rests not upon a misunderstanding (something one would most reluctantly charge to Professor Davis), but upon a disinclination to accept the full implications of the proposition to which he obviously subscribes, that the scope of review of agency determinations is peculiarly within a judicial discretion not easily captured within metes and bounds. Nearly sixty years ago the Court candidly declared this discretion in a proposition which should be the touchstone of this segment of administrative law:

> That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power, and will occasionally exercise the right of so doing.[112]

This single sentence splendidly summarizes the essentials—judicial discretion in the scope of review of agency determinations, administrative discretion in making those determinations, the deference of court to agency, and the recognition that the reviewing court has an indefeasible right to the final say on the determination, whether the question is one "of law alone" or of applying law to fact.

It may be suggested that Davis' recommended delineation of standards is inappropriate for several reasons. First, the question when the courts will or will not substitute judgment or sustain "rational" agency determinations is peculiarly inappropriate for a judicially stated generalization which would inevitably have the effect of binding the courts. This is not to deny the value of generalizations offered by Professor Davis and other writers from their study of the decisions. But were the Court to set forth criteria, however much hedged, for probably substituting judgment on an agency determination, the result would simply be constant deviations from those criteria, with consequent unpredictability as to

111. *Treatise*, Preface at v ("The Court should write fewer general essays in its opinions, and it should give more meticulous care to the ones it does write.").
112. Bates & Guild Co. v. Payne, 194 U.S. 106, 109-10 (1904).

the occasions for substituting judgment. Hence, the uncertainty would continue, only at a different point. Indeed, to tie the courts down to standards for the exercise of this peculiarly private and intramural type of judicial discretion would likely create more frustration than presently exists, for variance from the standards would inescapably carry the flavor of judicial arbitrariness. Of course, the present indeterminancy of the question does not reflect arbitrariness, but rather the complex interplay of countless factors which cannot and should not be balanced off in advance, even if all of them could be identified.

One or two further observations bear upon the undesirability of a judicial statement—wholly apart from the uncertainty which it would create. First of all, there is rarely a "pure" administrative law case; *Universal Camera* is perhaps the nearest instance. Instead, "administrative law" problems come up through agency and court deeply enmeshed in a welter of substantive law and fact issues, all of which exert pressure upon the decision the court is called upon to make.[113] Without implying the view[114] that there is no common administrative law but instead a number of laws corresponding to particular agencies, it is still important to remember that the substantive law context drastically differs from case to case, and if only because of judicial psychology, the administrative law point is likely to be differently treated in different cases. Repugnant as the thought is to administrative lawyers, the "administrative law" issue in the case may often have little or no significance to the real problem as the court sees it; and it is for that reason often impractical for busy judges to apprise themselves of the exact state of law on a given administrative law question and assure themselves of consistency.

Returning to the question of substituting judgment versus affirming "rational" agency determinations, it may be seen

113. A fine instance of the distortion which the substantive law context exerts on the decision appears in Bridges v. Wixon, 326 U.S. 135 (1945). Davis recognizes this case as resting upon "unique considerations" and having "little or no value as an authority for future cases". TEXT § 14.11 at n. 67. I would agree, but I think it is significant to consider the reasons why the Supreme Court decided the case as it did, and to recognize that the pressure of the "other problems" in a case may, in many instances, produce precisely the sort of deviation which Davis, in his final chapter, laments as inconsistency remediable by advance declarations on scope of review.

114. *Supra* at n. 19.

that in almost every administrative law case the reviewing court has the choice, even if it does not recognize it as such, of substituting judgment on a "pure" law question or law-fact determination, or upholding the agency action if "rational." Indeed, every time a court disposes of an administrative case on review, of necessity it takes some position—affirmative or negative, express or by implication—on the application of law to fact; and additionally, in many instances, it has to take a position on a "pure" question of law (typically a problem of statutory construction). Because the problem is so pervasive, it is hardly surprising that consistency reducible to formulae does not exist. Since unquestionably courts should substitute judgment on many occasions, it should be satisfying if the results considered as a whole achieve substantial justice, as it seems they do. Predictions as to probable results are helpful and useful, but it is doubtful that it is presently the time to embody them in judicial statements, whatever may be the situation when the administrative law field becomes more stable.

A related point worth noting—and Davis notes it[115]—is the presence of both substituted judgment and limited review within the same opinion. Thus, in *Hearst*,[116] the Court interpreted the definition of "employee"[117] in the National Labor Relations Act as not limited to the common law concept of a "servant" as against an "independent contractor"—a clear substituted judgment, even if a negative ruling. In the same opinion, it applied the "rational basis" test to the Board's determination that newsboys are not "employees." Again in *Brown-Pacific-Maxon*,[118] the Court similarly declared that the statutory phrase "arising out of and in the course of employment"[119] is not confined to the common law limits of a servant's "course of employment"; yet the agency's application of law to the fact situation at hand was, somewhat perversely, treated as a "question of fact" governed as to scope of review by the *Universal Camera* test. Even though these support Davis' accurate generalization that the courts are more likely to assume their right to the final say on a broad law proposition enunciated by an agency, it

115. TEXT, § 30.11 at 556; see also *id.* at § 30.05, at 548.
116. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).
117. 49 Stat. 450 (1935), 29 U.S.C. § 152(3) (1960).
118. O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951).
119. LONGSHOREMEN'S AND HARBOR WORKERS' Act, § 2(2) 44 Stat. 1425, (1927), 33 U.S.C. § 902(2) (1960).

would be impractical for the Court to declare that the susceptibility to generalization will be deemed a reason for substituting judgment. This is so for a very important reason. The time may be altogether inappropriate for a court to state its position on a law proposition decided as such by the agency. For the court to accept it as its own, or to declare a different proposition as the law, would have the effect of freezing a situation which perhaps should remain fluid somewhat longer. The obvious way out is for the Court not to take a position, and that is best accomplished by applying the "rational basis" test, which leaves the agency free to change its position in the future. It is impossible to say in advance when a court will or should make a generalized law proposition its own, reject it, or let it stand for the time being without either imprimatur or anathema.[120] Standards here would offer only illusory certainty; the welter of problems would soon outrun confinement in categories, unless stated so broadly as to be meaningless.

Since this is not the best of all possible worlds, the varying results of judicial review of agency determinations are probably inescapable. Although it is arguable that there is too much inconsistency here—and Davis appears to believe this—yet it is, in the last analysis, not seriously disturbing, especially when one is able, as Davis has done, to derive a calculus for predicting probable substitution of judgment or affirmance of "rationally based" determinations. It is much like the Court's discretion in granting and denying certiorari. Even though the Rules state some measures of the Court's discretion,[121] it is impossible to account for all of the certiorari denials in terms of the factors noted there, even if all certiorari grants could be so explained, as they cannot be.[122] The degree of uncertainty here is tolerable; the combination of rigidity and uncertainty from a stricter standard or rule would be unacceptable. So it is also with the unquestionably sound discretion of the courts to use their prerogative of saying what the law is, whether they agree or disagree with the agency, or let the agency's determination stand if "rational".

120. See JAFFE, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 249-57 (1955).
121. S. CT. REV. RULES, Rule 19(1) (1954).
122. For instance, the frequent Court participation in FELA cases which seldom present issues other than the question of the sufficiency of evidence of the carrier's negligence for jury consideration.

In conclusion, Davis' analysis of the application of law to fact is seemingly discolored by his attitude that he is here dealing with arbitrary behavior, and that his role is to pick out some patterns from the arbitrariness. Although his empirical results are exceptionally helpful, his point of view—at one and the same time both premise and conclusion—is not wholly fair to the courts, it does not take account of many of the problems, and it is not a wholly accurate appraisal of what is happening in this area.[123]

123. Since this article went to press, the FPC has announced that "its decisions in the more important cases will be issued in the name of the individual Commissioner who prepared the opinion," *viz.*, cases "deem[ed] to be of particular importance to the parties, the industry involved, or to the public at large . . . " FPC News Release No. 11,437 (May 1, 1961). Also the reorganization plan for the FCC submitted by the President to Congress to take effect in sixty days unless a majority of either house disapproves, abolishes the FCC's opinion writing staff with a view to compelling the commissioners to write their own opinions. N. Y. Times, Apr. 28, 1961, p. 1, col. 3.