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Book Reviews

Ralph F. Fuchs

Will A. Wilkerson

Walter C. Lindley

Robert S. Lancaster

Vincent V. Thursby

BOOK REVIEWS

ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES. By Ferrell Heady. Ann Arbor: University of Michigan Press, 1952. Pp. 137. $1.00.

In this modest but incisive study Professor Heady, who teaches political science at the University of Michigan and is Assistant Director of its Institute of Public Administration, makes an informative and valuable contribution to the literature of administrative procedure. His monograph in pamphlet form embodies not only the results of careful study of statutory texts, judicial decisions and official regulations, but also data gathered at first-hand in an on-the-scene survey of five representative states possessing administrative procedure legislation and one state, Oklahoma, in which determined efforts to secure the passage of such legislation are continuing. The other states are California, Michigan, Missouri, North Dakota, and Wisconsin.

Professor Heady begins his study with a brief account of the movement toward state administrative procedure legislation. He emphasizes especially the Model Act of the National Conference of Commissioners on Uniform State Laws, to which he refers for comparison throughout his text. In his final chapter he states his conclusions as to the advantages and difficulties of the legislation he has investigated and the merit, or lack of it, of certain proposals for additional enactments which he has encountered. He is aware of passing judgment to a large extent on the efforts of lawyers to deal with matters of professional importance, as to which they have taken the initiative. He rightly asserts the justifiability of such an appraisal "with a questioning and critical eye" by one who looks at the issues from the standpoint of maintaining effective regulatory administration.

The author's objectivity and ability to analyze the questions presented are admirable.[1] "Administrative procedure," he emphasizes, "must strike a balance between the objective of protecting individuals from arbitrary action by administrative agencies and the equally important goal of expeditious execution of public policy. . . . The problem is of equal concern to the lawyer and the public administrator. . . ."[2] One question has been whether general administrative procedure legislation is wise or whether the regulation of procedure should be by

1. Professor Heady's previous inquiries into administrative procedure and allied problems include his article, *Administrative Rule-Making Under Section 701(e) of the Food, Drug, and Cosmetic Act*, 10 GEO. WASH. L. REV. 406 (1942), and studies as a member of the staff of the Commission on the Organization of the Executive Branch of the Government (Hoover Commission). See his Comment, *The Operation of a Mixed Commission*, 43 AM. POL. SCI. REV. 940 (1949).
2. P. 3.

separate statutes in the several fields of administration. As to this, Professor Heady concludes that "the comprehensive procedural statutes enacted in the four states of North Dakota, California, Wisconsin, and Missouri . . . have had in the balance a beneficial effect in each state"[3] but he also believes "there is a point of diminishing returns in imposing uniform procedural requirements," which there is danger of passing if pending proposals for additional legislation in Missouri and Michigan should be adopted.[4]

In the body of his study Professor Heady treats successively, with reference to each of the states covered, the various aspects of rule making, adjudication and judicial review which are dealt with in the statutes. He sets forth comparatively the provisions of the various enactments and of the Model Act, states the practice under the existing provisions as it is revealed in published sources or was disclosed in the course of his personal inquiries and brings out the successes and the unsolved problems that have emerged in the several jurisdictions. The result is a panorama of the whole which, like an infra-red aerial photograph, also supplies a wealth of detail. No similar body of information is available elsewhere.[5]

The most noteworthy development reviewed by Heady is the establishment of the California Division of Administrative Procedure and that Division's maintenance of a panel of hearing officers for voluntary use by state agencies in formal proceedings and its publication of a loose-leaf California Administrative Code and supplemental Administrative Register. By these measures California has led the way in attempts to make administrative regulations genuinely available to those concerned with them and in efforts to provide effectively for the orderly, responsible conduct of administrative hearings. Professor Heady reports that the publication system is beneficial despite its elaborateness and somewhat high cost, since it not only distributes over three hundred full sets of regulations throughout the state but results in the economical distribution of larger numbers of subject-matter portions and reprints of the regulations. The panel of hearing officers has won its way to increasing use despite the discouragement, usual in less spectacular efforts at improving administration, of inadequate salaries. The success that has been achieved has resulted in large part from the existence of an over-all Division and the work of its able director. The Division watches over the whole of adminis-

3. P. 121. The Michigan legislation which was studied was not of the "comprehensive" variety, but included only provisions for the preparation and publication of regulations.

4. P. 122.

5. Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 IOWA L. REV. 252 (1948), is an excellent summary and commentary with respect to the state statutes in existence at its date, embracing those covered by Heady and others as well; but it does not purport to deal with actual experience under these laws.

trative procedure in the state and fends for its needs in periodical reports and in the efforts to bring about improvement, which it makes. Even though the example of this experience is applicable specifically to the Federal Government and the minority of big states,[6] more largely than to the states as a whole, its lesson that continuous, informed attention to the problems of administrative procedure by an official charged with responsibility brings good results, is applicable everywhere.

Requirements for the filing and publication of regulations are frequently a problem, Professor Heady finds. Interest in securing notice of the regulations and access to them is far less widespread than might be supposed. The result is that poorly maintained files go unchallenged and evasion of statutory waiting periods before regulations are to become effective is often practiced. The principal means of evasion is the device of branding regulations as "emergency" measures, which are exempted by statute from the waiting period requirement. The success of methods of publication is largely a matter of economics. In addition to California, only Michigan and Wisconsin, among the states studied, are carrying out publication requirements. In execution the publication plans have left a good deal to be desired; but in both states improvements, which seem possible within the limits of available resources, are contemplated.

Unlike Indiana and Ohio which require hearings in connection with the adoption of regulations, the states studied follow the Model Act by omitting mandatory rule-making procedures, except California. There notice and an opportunity for interested persons to submit statements in writing or orally, with an exception for emergency regulations, are prescribed.

As to adjudication, procedural requirements similar to those of the Model Act are included in the statutes of California, Missouri, North Dakota and Wisconsin. Those of the California act apply to designated agencies, while those in the other states apply to "contested cases" or "formal proceedings," as defined, occurring in all agencies. Only one serious problem appears to have arisen with respect to the application of these requirements, and that relates to the always-troublesome question of the methods of decision by agency heads in a case where not they but a hearing officer has heard the evidence and has rendered a report or made an initial decision. A tendency has arisen in Cali-

6. The federal Attorney General's Committee on Administrative Procedure recommended unanimously in 1941 that an Office of Federal Administrative Procedure be established and be given research and advisory functions, together with the duty of appointing hearing examiners upon nomination by the agencies and of passing upon their removal for cause if a hearing by the Office should be demanded. FINAL REPORT 193-94, 196-97, 221-23, 237-39 (1941). Although other recommendations of the Committee, including many emanating from its "minority," have been accepted, this central one has never been adopted or, it would seem, seriously considered.

fornia to require the agency heads to consider the whole record if the proposed decision of the hearing officer is not accepted in its entirety, even where the only disputed question is whether that decision recommends an adequate period of suspension of a licensee for violations of law. Professor Heady soundly suggests that the provision of the Model Act placing the burden on the parties to point to the portions of the record that bear on the problem before the agency heads offers a sound solution. He also endorses Professor Nathanson's suggestion that, as has been done in California, the practice be adopted of not requiring the hearing officer's proposed decision to be submitted to the parties in advance if the agency is accepting it as its own. Heady goes along with the requirement that decisions adverse to a private party be in writing and accompanied by findings of fact and conclusions of law, although this requirement may at times be burdensome and goes beyond judicial practice in most trial courts. As this requirement indicates, there is a tendency of administrative procedure legislation to expand the necessity for written documents; and it is significant that, as Heady notes, the Wisconsin motor vehicle transportation act was amended in 1947 at the behest of the regulated interests to dispense with the administrative procedure act's requirement of written reports by hearing officers in licensing cases and to compel decisions within sixty days in such cases. Obviously the line between methods which tend to insure open, precise administrative reasoning and those adapted to the efficient dispatch of business is difficult to draw.

As respects judicial review, Heady notes the inadequacy of some of the new state legislation to establish a uniform, simple form of review proceeding, such as has been forcefully advocated.[7] In California the reasons are constitutional; elsewhere they reside in reluctance to supersede familiar methods or to dispense with a broader scope of review in some existing proceedings than would prevail in a new, over-all form of review. In North Dakota and Wisconsin, however, uniformity has been achieved. In the former state the legislation has been construed in accordance with prior practice to provide a broader scope of review than the familiar "substantial evidence" formula produces. In Wisconsin the scope of review has been extended by the administrative procedure act in accordance with that formula, as compared to a more restricted scope previously in effect with respect to at least some classes of administrative decisions.

At various points in his discussion Professor Heady takes note of proposals which would impose stricter procedural requirements upon administrative agencies than at present, or would otherwise limit their authority. In Missouri a bill to "judicialize" the hearings in formal

7. DAVIS, ADMINISTRATIVE LAW 718-19 (1951).

proceedings by detailed provisions for pleadings, evidence and other elements of procedure was vetoed by the governor in 1950. In California and Michigan proposals have been made to give considerable finality to the decisions of hearing officers who would be on central panels, as against agency revision. Such proposals would in effect elevate hearing officers to the status of independent tribunals and would require the agencies to submit to the determinations of officers who would not be answerable to them or be especially versed in the matters with which the agencies are concerned. The advantages of agency initiative and specialization, which are among the principal reasons for resorting to administrative processes, would thus be lost to a large extent. There seems to be no justification for such a development, except possibly in situations, which are rare or nonexistent in state administration, where financial sanctions are to be imposed for defined misconduct. As Heady points out, such proposals have less to recommend them than those to establish specialized quasi-judicial tribunals, split off from regulatory agencies, with decision-making powers. The President's Committee on Administrative Management made such a proposal in 1937; but the Attorney General's Committee on Administrative Procedure and the Hoover Commission later rejected it.

Professor Heady also deplores a peculiar type of legislative-committee review of administrative regulations which has arisen in Michigan. Under statutory interpretations by the attorney general, this review creates the possibility of a paralysis of rule-making — a possibility which has been realized in at least one instance, despite agency efforts to cooperate. The review committee proceedings, moreover, take on the aspect of a judicial trial, with pleadings and issues. This particular form of supervision of agency action has boomeranged, since there is evidence that the agencies, in order to avoid it, have tended to refrain from announcing their policies in filed regulations, thus depriving the public of the guidance to which it is entitled.[8]

The real or threatened extremes to which administrative procedure legislation can go may justly be charged to an excess of zeal on the part of lawyers eager to protect the interests of private parties who are subject to administrative regulation. The possible baneful effects of such zeal must be overcome. So far they have been largely avoided; for the activities of the bar as they have emerged in the measures Professor Heady reviews have on the whole produced good results. This record is encouraging, for it gives promise that the jungle of state administrative processes will actually be tamed. Professor Heady's

8. At its last session the Michigan legislature adopted an administrative procedure act patterned after the Model Act. It omits the stricter requirements as to hearing officers' decisions previously advocated and leaves the previous form of review of administrative regulations undisturbed. Mich. Pub. Acts (1952) No. 197.

study contains an effective account of the effort so far made, accompanied by significant suggestions for the future. It is definitely worthy of attention by all who have an interest in its subject.

RALPH F. FUCHS*

BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR. Prepared by Committee on Bar Examinations and Requirements for Admission to the Bar for the Survey of the Legal Profession. Colorado Springs: Shepard's Citations. 1952. Pp. xvii, 498. $5.00.

This book is a part of The Survey of the Legal Profession which is being conducted under the auspices of the American Bar Association. It consists of 12 articles written by experts in the field of bar examinations and admission to the bar. These articles have been published previously as they were completed in the *Bar Examiner* and in the *American Bar Association Journal.* There has been added a report of the consultant which summarizes the articles and culminates in 32 specific recommendations.

This work is a valuable contribution to the administration of justice. For, by and large, our system of justice will be no better than those whose duty it is to administer it. These are the lawyers and judges who have been admitted to the practice of law.

All the articles are carefully prepared, thoroughly documented and ably presented. All features of bar examinations and requirements for admission to the bar are thoroughly covered. The practices and requirements of the various states are set out and there is made available information of what other states are doing. This is valuable for purposes of study and comparison and should result in the best practices being adopted by all the states and in the discard of practices which have proven inadequate. All of those directly concerned with the education, examination and admission to practice of applicants for law licenses will profit by a careful study and analysis of the material presented in this book.

A brief study of the system used in Tennessee and comparison with practices in other states will be made. The 32 recommendations of the consultant serve as a good focal point for this approach.

Five of the recommendations are not applicable to state practices. Of the remaining 27, Tennessee complies with ten. Tennessee does require three years of pre-legal education before permitting students to begin the study of law, and does not accept private study, correspondence school, law office training or recognize the "diploma privilege." Tennessee does stress character qualification and uses the

* Professor of Law, Indiana University.

services of the National Conference of Bar Examiners in checking the character of out-of-state attorneys. The Knoxville bar is to be highly commended on its practice of personal interviews with all applicants referred to it for investigation. Tennessee does use the essay type of questions, without labeling as to subject matter; re-grades papers in borderline cases; and, limits to three the number of times an applicant may take the examination.

Room for considerable study and analysis lies in the 17 recommendations with which Tennessee is not in compliance. Some of these will be discussed briefly. On the matter of selection of bar examiners, these are appointed by the Supreme Court. The statutory term is three years, but in practice this is disregarded and the term actually is for life, unless an examiner resigns. The three-year term is satisfactory, and a reappointment for another term would be proper. But for best results, and in order to provide new ideas and enthusiasm, there should be rotation in office. The list of subjects for the examinations should be revised. At least such subjects as taxation, trade regulations, administrative law and labor law should be added. This would make it feasible for the examiners to include optional questions on the examination.

The bar examination, its form and content, is the cornerstone of the entire admissions system. The questions should test the applicants ability to reason logically, to make an accurate legal analysis and to demonstrate a thorough knowledge of the fundamental principles of law and their application. This is much easier to say than it is to do. Preparation of good bar examination questions is a science, or perhaps an art. Each question and answer should be thoroughly briefed and analyzed before it is accepted. This takes time, and, on the average, it requires a minimum of 24 hours work to prepare a good question. This is a work for experts and for those trained in the preparation of questions. Several states have solved the problem by employing experts to prepare the questions, or by obtaining the services of out-of-state law professors to prepare the questions. And, it has been suggested that a standard bar examination be made available for use on a nation-wide basis. Questions prepared by practicing lawyers are apt to test only the information, memory or experience of the applicant. Lack of time alone prevents the practicing attorney from being able to prepare suitable questions.

A thorough statistical study should be made after each examination and the results published. This is valuable in checking errors and in assisting law schools in making changes where weak spots develop. There should be close cooperation between the bar examiners and the law schools of the state, with regular meetings between the examiners and the deans of the law schools. This would permit each group to appreciate the problems of the other group and would prevent the

unhappy situation of the law schools teaching the students one thing and the examiners examining them on something else.

Serious study should be given to the problem of requiring an apprenticeship after the applicant passes the bar examination and before being granted a license. Some states do require this period of practical training. The difficulties are many, but the objectives to be achieved are most desirable. The plain truth is that on admission to practice law the neophyte lawyer is not qualified to represent his clients. Practical experience cannot be provided in the law schools, and a period of apprenticeship seems to be the best solution to the problem.

All of the suggestions and recommendations found in this volume are the result of long and careful study made by persons familiar with the problems and qualified to undertake the task. They deserve consideration by all who are interested in the processes and practices concerned with the examination and admission of persons to the practice of law.

WILL ALLEN WILKERSON*

TRIAL JUDGE. By Bernard Botein. New York: Simon and Schuster, 1952. Pp. 337 $5.00.

Trial Judge is the graphic story of one whose training for the judiciary had its beginning in an incident of his boyhood, when, because of a broken wrist, he became the umpire in a baseball game, instead of a player on one of the two participating teams. On a close play, he had to decide, in a tied game, whether a batter on his team was out at first base, making the third out and thus nullifying a run by a baserunner from third to home plate. After a moment's hesitation, of which the author says neither umpire nor judge should ever be guilty, he ruled the batter out, much to the resentment of his own teammates. This experience, coupled with further umpiring that summer, taught him the rudiments of his duty later as a judge "to don that aspect of neutrality and incuriosity shared in common by umpires and judges," and to decide close questions of fact objectively, so that he may leave the courthouse "with his self-respect unimpaired."

As a judge he soon fortified his earlier conviction that the dominant concern in the trial of cases is that the jury receive a full, neutral, objective presentation of the facts and an intelligent, understandable and uncomplicated exposition of the law in the judge's charge and be protected from extraneous evidence tending to obscure the issues. Upon his first trial, he agonized painfully in preparing his charge,

* Member of the Chattanooga bar; Vice-President, Board of Law Examiners of Tennessee.

which he found later to be "too precise, too legalistic" and lacking in simplicity. He learned "the hard way, to avoid turgidity and formidable terms."

He demonstrates that the court process is a "highly sophisticated and disciplined enterprise," having for its purpose the reconstruction of the true factual situation existing within a prior fixed period of time, under governing applicable procedural rules, presenting "endless vistas of epistemological and metaphysical problems." He compares former trials by ordeals with the present day system under which trials are, in their essence, searches for the truth, and comments that, though the result of the quest may not always be all that we could wish, we have at least achieved "resolution of conflict without resorting to force." He believes that, in grappling for verity, the judge, with a keen eye on propriety, may himself put to a witness questions designed to lead to the truth, remembering always that a judge must first search the facts, then the law, and lastly his soul.

He delineates the frailties of observation, perception and memory of all witnesses, including trained scientists, the treacherous uncertainty of the vicious or hostile witness and the lack of reliability inherent in the accomplice's story, and enlivens his comments with appropriate stories illustrating his points. He advises the reader of the reasons for such rules as the exclusion of hearsay, speculative and opinion evidence and conclusions of witnesses, explaining that they are designed to the end that he who hears the trial may learn the truth. He has no quarrel with Wigmore's appraisal of cross-examination as "the great and permanent contribution of the Anglo-American System of law to improved methods of trial procedure," or as "the greatest legal engine ever invented for the discovery of truth," but would add the qualification, "within the limiting boundaries of a judicial trial." He hails the lessening of outbursts by lawyers in cross-examination and their vicious browbeating of witnesses and welcomes the tendency toward "less flowery" presentation as well as less "Olympian," "Mid-Victorian" rhetoric, not only in trial lawyers' courtroom conduct but also in judges' opinions.

The author believes that, though the tenor of trials has changed, "there is still a great deal of grandeur about the good trial lawyer," which, however, arises no longer from thunderous harangnes but is largely of the sort "that clothes the person of a good surgeon." This, he believes, is because it has come to be recognized that success at trial results almost entirely from "thorough, painstaking preparation" rather than from "brilliant coups in the courtroom."

The Justice has confidence in trials by jury and high respect for the collective "shrewdness of a jury." He recognizes that some believe that a "trained and experienced judge, unlike most jurors, will hew to the line of the relevant and not be led astray by the extraneous," but

observes that a busy judge who reviews steadily a passing parade of varied causes may become "grooved" and fail to "bring to each case the eager, fresh consideration of a jury." He thinks it not unlikely that any judge may involuntarily store up in his mind subconscious impressions of certain expert witnesses, certain lawyers or certain prevalent practices, thus unintentionally bringing to bear upon his decision matters not in evidence, a procedure which a jury must be told that it may not employ. If our attitudes have frozen hard, he insists, "we may be unfair to an honest claimant." All in all, he finds it somewhat difficult to choose between "the initial skepticism of judges and the initial gullibility of jurors." Though he recognizes certain infirmities of the jury system, he has found that it retains vigor. On the other hand, he believes that the trial too often "operates as a bottleneck and too often throttles production of the facts." In other words, the methods for and rules governing production of facts are, in his opinion, far inferior to the substantive law defining rights and liabilities. In this respect he follows the postulate of Gellhorn: "Procedural forms are not fetishes. They are means to ends."[1]

He avers that a high percent of reversals is not decisive of a judge's capacity, citing as an example the unusually large proportion of reversals of one of New York's ablest judges, to whom, because of his ability, more than his share of difficult involved cases were assigned, and who "did not fear to pioneer in thoughtful decisions." "High batting averages," therefore, he considers unsafe yardsticks.

He reflects a nice sense of discrimination in his discussion of a lawyer's duty to his client and that to the court and argues convincingly that any doubt as to a client's guilt is not for the advocate to resolve but for the court or jury, but warns that conscious contribution on the part of the lawyer to the commission of perjury can never be condoned.

He reiterates that a judge must avoid partisanship, keep his temper and refrain from being goaded by a boorish lawyer into explosive sputtering rage. Impartiality and honesty, desirable in everyone, are absolutely essential in judges. The public may justly expect differences in their abilities and temperments but not in their characters. Though polls have indicated that some 76 percent of those participating believe judges honest, the author finds no solace in the figures but considers it disturbing that "so substantial a minority" distrusts the integrity of the judiciary. He himself is convinced that the percentage of judges inspired by corrupt motives, is an extreme minimum. He recognizes, however, that occasionally venal characters will show their faces, some of whom will attempt to intervene with the judge and to influence him. He sadly observes that even some otherwise upright citizens are not above employing a lawyer who, they think, "enjoys the good will

1. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 51 (1941).

of the judge," but contends that, by and large, these attempts to influence decisions will prove futile, for a judge of integrity, if he has an inkling of what is going on, will transfer the case to another.

To inquiring laymen who are puzzled by the formalities of the courtroom and desirous of a better understanding of the intricacies of a trial, without being bored, and to judges and lawyers who have the well-being of the profession at heart, this autobiographical contribution by Justin Botein will prove both entertaining and instructive. The author has addressed himself to the task of surveying trial procedure, functions of jurors, trial conduct of lawyers, necessary qualifications of competent judges, the relationship between bench and bar and the many overlapping phases of such subject matter.

He makes no parade of erudition but speaks simply and convincingly, exhibiting keen perception and technical skill without over-simplication. His style is matter-of-fact, lawyer-like, impressing the reader with his genuineness and sincerity. His story is not only true, it is illuminated by his pertinent comments.

All in all the book is a striking, refreshing story of a judge's life from his boyhood, telling briefly of his practice and more fully of his experience as a trial judge. No startling novelty of style meets the reader's eye, but there is evident a skill in relating specific incidents to underlying principles. The recommendations made are thought-provoking and for the most part convincing. The author offers little with which to quarrel, for his conclusions are reflections upon important themes by a gifted lawyer and an experienced judge, exhibiting a talent for capable judicial work. He deals in a diverting manner, comprehensively but concisely, with his various theses. His factual material is chosen for its human interest; thus, his beguiling stories of lawyers and of incidents in tense trials enable the reader to envision well defined portraits of such types as the "snarling old warrior," the "bull-throated battler" and the "smart-quipping witness."

He essays the difficult task of a vivid presentation of the infinite facets of life which confront the trial judge, facing his undertaking with an obviously earnest purpose and flavoring his factual statements with that redeeming sense of humor which has saved many a soul on the bench and at the bar. He uses a big word now and then, but, in the main, his presentation is simple and direct, assuring one of his sincerity, his capacity, his understanding of the important job of an American trial judge, in such a manner as to repay well the reader, whether lawyer or layman.

WALTER C. LINDLEY*

* Judge, United States Court of Appeals for the Seventh Circuit, since 1949; Judge, Eastern District of Illinois, 1922-1949.

THE SPIRIT OF LIBERTY — PAPERS AND ADDRESSES OF LEARNED HAND. Collected and with Introduction and Notes by Irving Dilliard. New York: Alfred A. Knopf, 1952. Pp. xxx, 262. $3.50.

Irving Dilliard of the *St. Louis Post-Dispatch* has earned the admiration of lawyers, laymen and students alike by making available within the confines of a slender volume the addresses and papers of Judge Learned Hand. For many years lawyers and judges have read Judge Hand's judicial opinions with respect for the incisive mind that cuts so cleanly to the heart of a legal problem and admiration for the magnificently clear and precise style that elevates his judicial pronouncements into the realm of *belles lettres*. Now lawyer and layman alike may read the unofficial thoughts of one of the most balanced and civilized minds of the age on such grave subjects as the proper limits of judicial discretion, the bases and meaning of liberty, the presumptions and realities of democracy and the preservation of personality.

Learned Hand stands among the great judges of the Anglo-American legal tradition. He is preeminently the judge's judge, the lawyer's lawyer. His long judicial career spanning one of the crucial periods in the development of American law and his long service on the bench in a circuit where some of the most vexing and complex legal issues come into final focus peculiarly fit him for the task of explaining the judge's function in the American system of law and the court's place in our jural order. Judge Hand has explained his view of the proper limits of judicial discretion in a few brief essays and speeches which Mr. Irving Dilliard has happily brought together in his volume.

It is Judge Hand's view that the judge should be, in the words of Sir Frederick Pollock, both "valorous" and "cautious" — valorous in dispensing with technical difficulties and in overriding what is merely a show of authority on the part of current opinion and cautious in making advances which have not become generally acceptable. He would rather strictly limit the judicial function although he recognizes the necessity for a degree of judicial legislation. To Learned Hand the price the judiciary must pay for independence and continued prestige today is abstention from engaging in the policy struggles that are better solved by an assembly of the people where the competing interests may reach delicate but mutually acceptable compromises. He feels that the judge is at his creative best in the realm of the common law where he may gently mould the law to conform to emerging social needs by compromising inconsistencies, unravelling confusions and making, in Holmes' phrase, "interstitial advances." In interpreting statutes he is no member of the "Dictionary School" but rather believes that the judge should seek to realize in the application of the law its underlying purpose or objective. With this in mind he advocates a judicious use of legislative history.

In the realm of constitutional law Judge Hand enunciates an interesting and only partially accepted technique of interpretation. Since constitutions deal in generalities and only roughly map the terrain, he feels that an independent judiciary is justified in adapting the instrument to the needs of a dynamic social order, witness, for instance, the judicial development of the commerce clause. With the Bill of Rights, however, the same judicial freedom can not be admitted; for Hand considers the Bill of Rights to be not law in the strict sense but rather as precautionary warnings against the spirit of faction and intemperance; not eternal verities but rather the historical monuments of a victorious struggle. Since in this area interpretation necessarily involves a choice between competing value judgments, he thinks that courts should be extremely chary of overturning legislative interpretations. How can a judge be sure that his own calculus of values is superior to that dictated by the only general or common will that exists.

The book would be valuable for the abbreviated but acute discussion of the judicial function alone. Happily, it contains other essays as penetrating as they are polished and poised. In addition it offers short judicial character sketches of men like Holmes, Brandeis, Cardozo and Stone. Brief though they are, they light up the subject completely. They are like the split-second revelations of a powerful searchlight and as such are more revealing than a thousand grubby candles.

The book should be required reading for law students. Many judges could spend time to better advantage on this little book than on the more ponderous but far less provocative and penetrating commentaries on the law. I do not predict that it will become bedside reading for college coeds. I can almost wish it *were* so.

Robert S. Lancaster*

AMERICAN FEDERAL GOVERNMENT, A GENERAL VIEW. By Herman Clarence Nixon. New York: Charles Scribner's Sons, 1952. Pp. x, 476. $4.00.

Professor Nixon writes that government "has been the cause and subject of much work, fighting, talk and writing. It still is." In the past Professor Nixon has been responsible for a goodly share of the "work, fighting, talk and writing." And he still is. Students of American government would be extremely fortunate if all the writing were done as lucidly, cogently and carefully as is Professor Nixon's. The essentials of government in general and of American government in particular are clearly and accurately portrayed in *American Federal Government.* Moreover, Professor Nixon in his own inimitable style evades the

*Professor of Political Science, University of the South.

ponderousness characteristic of so much textbook writing. Knowing Professor Nixon, a reader might wish that he had been less careful to delete himself from the text. Yet typical "Nixonisms" are discernible throughout and spice his "general view" of American federal government.

The George Price cartoon (reproduced from *The New Yorker*) depicting an occupied voting booth with a coin being flipped into the air above it tells as much about voting in these United States as could be told in pages and in a fashion calculated to catch the interest of the beginning student. The observation that " 'tweedledum and tweedledee' in the main is what the public wants" in its political parties is a way of making a point which will enhance the chances for its recall. "A majority of the voters of America display middle-class leanings and find regular or irregular accommodations in the adaptable households of the two large middle-ground parties." Much sound political analysis is packed into the brief compass of sentences such as this one.

Astute capitalization of our American sporting turn is evident in statements such as the following. The general election "is the climax in the 'great game of politics,' and it requires an extensive system of rules, refereeing, and score-keeping." "New York state, with one-tenth of the nation's population, has no more voice in the upper house [of Congress]than Nevada's population, which could be almost crowded into the Rose Bowl."

The twist which prompted selection of such titles as *Possum Trot* and *Forty Acres and Steel Mules* for earlier books is recurrent. "The substantial use of money," says Professor Nixon, "seems as necessary in national elections under modern conditions as in the purchase of groceries." Again, "The bench and bar are associated as vital parts of one system like bacon and eggs in a breakfast meal." Somewhat similar is the statement that "An able President mixes and times application of these different influences [over legislative policy-making] with the skill of a competent chef reaching for ingredients to execute a good recipe."

Professor Nixon uses the "pictures in our minds" to good advantage in well-chosen figures which might be exemplified by the term "grist for the mills of politics" or the comment that "our national house of government could not be cited as a good example of functional architecture." Congressional investigative powers are justified simply by the homely observation that "Congress can not pull laws and policies out of a hat without regard to facts." Some of our Congressmen would do well, incidentally, to read Professor Nixon's mildly chiding comment that congressional investigations "sometimes partake of rank partisanship and publicity-seeking, causing embarrassment to citizens without cause or necessity."

One of the great strengths of this book is the constructively critical approach of Professor Nixon. He observes that "there is point to the wise-crack that we fought World War II 'in triplicate.' " Yet, "one might say of government that eternal vigilance is the price of efficiency as well as of liberty." He makes the point that if Congressmen and the public fully realized the difference between the present and initial roles of Congress, executive-legislative relations would be more improved than they would by any "reform in the organization or procedure of the House and Senate." Again, he says that "if able experts are to 'be on tap, not on top' in a political democracy, there must be an educated and articulate citizenry." If all read and followed the sage counsel embodied in Professor Nixon's concluding chapter, "You and Your Government," we would be a better educated and more articulate citizenry.

Professor Nixon's appraisal of congressional party machinery is realistically critical. He recognizes that "there must be leadership . . . in the House of 435 Representatives, who cannot lead themselves, except perhaps into chaos" and avers that the "answer to the imperfections of party roles in the national legislature lies not so much in abolishing those roles as in increasing the sense of responsibility and democratic control within the parties themselves." In answering his question of how and how well Congress, "as an organized representative body," exercises its powers, fulfills its functions, and meets its problems, Professor Nixon takes a "critical look" at Congress at work. The pattern of that "critical look" is set by observations which characterize his approach to American government in general. It is noteworthy. "The critical look should be tempered," says Professor Nixon, "with a realistic caution against expecting perfection of a human institution which is inherently and inevitably political. Congress must be appraised as a part of, not apart from, American society."

When the writer recounts reform accomplishments, he points to distances yet to be travelled. Commenting upon the changed nature of our Foreign Service personnel, for example, he notes nonetheless that "there is still occasional criticism of elite 'cookie pushers' in the diplomatic service abroad and complaints of their being more sophisticated in the ways of foreign high society than in the realities of American foreign policy." Professor Nixon perceives a tendency on the part of the processes of government "to attain essential unity at the point of contact with citizens," a blurring of public consciousness of three branches of government and the "border lines between state and national government."

Professor Nixon recognizes the inappropriateness of some of our favorite and most "seductive" cliches. One modification is the statement that "we have a government both of laws and of men." Lest this

quotation out of context do injustice to Professor Nixon, it may be balanced by another: "American government changes and expands through change and expansion of law. The idea of law endures."

The author takes cognizance of the ambiguity inherent in our use of one term in several senses and several terms in the same sense. An illustration is the word "federal" which we use in more than one sense, one being a designation of the central government. It vies in that capacity with "national" and "United States." We have a National Bureau of Standards, a United States Civil Service Commission and a Federal Bureau of Investigation. He warns that one "must not look for logical consistency in the use of these descriptive terms, either in official publications or in this text." Lest the word "federal" in the title of his book be misinterpreted, it might be noted that four chapters in *American Federal Government* are devoted to state and local government. Moreover, Professor Nixon throughout his text has interrelated the three levels of national, state and local government in a fashion admirably suited to furnish the reader with a sound understanding of the "essential unity" in the processes of government with which he comes in contact.

All in all, *American Federal Government* is a sound, factual treatment with emphasis upon the functional approach to government but due attention accorded also to structure. It is short enough to be easily manageable for a one-quarter or one-semester course. Yet, it can be supplemented with collateral documentary and illustrative materials for use in a one-year course. The author has achieved his aim in writing a text which "lends itself to a flexibility of usage for courses differing in number of weeks or credit hours." Yet, it embraces all the essentials of American government. The format is pleasant, the marginal paragraph headings helpful, the print of an easily legible type and printing errors at a minimum.

In conclusion we might adapt to his book a statement made by Professor Nixon with respect to the United States Constitution: "It is easy to read. Read it."

VINCENT V. THURSBY*

* Associate Professor of Political Science, The Florida State University.