

BOOK REVIEW

LEGISLATIVE AND ADMINISTRATIVE PROCESSES. By Hans A. Linde and George Bunn. Foundation Press, 1976. Pp. lxi, 987. \$20.50.

INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS. By Jerry L. Mashaw and Richard A. Merrill. West Publishing Company, 1975. Pp. xli, 1095. \$18.95.

*Reviewed by William H. Allen**

When I was new in the practice of law, a question arose in our office concerning the proper forum for review of a Civil Aeronautics Board order entered on pleadings alone, with no evidentiary record. The partner in charge indicated without elaboration that a clue to the answer might be found in the *Arrow Airways* case.¹

Though I was only a couple of years away from my administrative law course, I bore the name of no such case in mind. No such case appeared in the index to cases of the 1954 edition of *Gellhorn & Byse*² that I had used in the course and had kept with me. Indeed, as it turned out, the case was not even a decision of the United States Supreme Court, as I had naively assumed that any case so familiarly referred to must be. And, among decisions of the Court of Appeals for the District of Columbia Circuit, the *Arrow* opinion was unusually hard to find.³

Once it was found, the opinion offered a clue, to be sure, but to have pursued it would have been a mistake. In *Arrow Airways* and its predecessor, *United Gas Pipe Line*,⁴ the Court of Appeals for the District of Columbia Circuit had held that rules of general applicability promulgated by, respectively, the CAB and the Federal Power Commission were not directly reviewable in that court but, if at all, only in a district court in the first instance. The language of the opinions was broad enough to suggest

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THE FOLLOWING CITATIONS WILL BE USED IN THIS BOOK REVIEW:

H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES (1976) [hereinafter cited as LINDE & BUNN];

J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS (1975) [hereinafter cited as MASHAW & MERRILL].

1. *Arrow Airways, Inc. v. CAB*, 182 F.2d 705 (D.C. Cir.), *cert. denied*, 340 U.S. 828 (1950).

2. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS (1954).

3. The West editor had not known what to make of the short opinion in *Arrow Airways* and had assigned it no key number. Thus it cannot be found through the West index.

4. *United Gas Pipe Line Co. v. FPC*, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950).

that the judicial review provisions of the Civil Aeronautics Act and the Natural Gas Act did not contemplate direct court-of-appeals review even of the most specifically focused order unless it was entered on an evidentiary record.⁵ That was the clue my senior had in mind. By the time of my research, however, the cases seemed to have been limited to the narrower proposition. I thus learned early a simple lesson in judicial review: orders in the court of appeals, rules in the district court. Over the years that lesson has had to be unlearned.

There are no references to *Arrow Airways* and *United Gas Pipe Line* in the casebooks under review, any more than there were in my *Gellhorn & Byse*. Nor is there mention of the subsequent opinions that have laid them to rest.⁶ (For reasons that should be made clear in this review, one could not reasonably expect to find such mention in one of the two books under review, the *Linde & Bunn* volume).

It is annoying to the practitioner not to know where to seek review of an agency's action. It is therefore tempting to a practitioner/reviewer to say that *Mashaw & Merrill* (if not *Linde & Bunn*) is flawed because the fledgling

5. The question arises when a statute provides for review of agency "orders" in a court of appeals on the "record" of agency proceedings and provides that agency findings of fact are conclusive if supported by substantial evidence. In *United Gas Pipe Line*, the judicial review provision of the Natural Gas Act was taken to mean that the Act "contemplates review of a decision based on evidence presented in a quasi-judicial proceeding before the Commission." 181 F.2d at 798. Therefore, the petitioner seeking review of a new FPC tariff-filing regulation was remitted to a non-statutory action in the district court. A petitioner seeking review of CAB regulations was dealt with the same way in *Arrow Airways*, decided subsequently, because the judicial review provision of the Civil Aeronautics Act did not differ significantly from that of the Natural Gas Act. Within months of the *Arrow Airways* and *United Gas Pipe Line* decisions, the Court of Appeals for the District of Columbia had itself reviewed a non-record CAB order granting an individual exemption. *Eastern Airlines, Inc. v. CAB*, 185 F.2d 426 (D.C. Cir. 1950), *vacated with directions to dismiss as moot*, 341 U.S. 901 (1951). *See also* *Phillips Petroleum Co. v. FPC*, 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); *Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954) (both reviewing non-record individualized orders). The broader proposition that court of appeals review is restricted to orders entered on an evidentiary record was still thought to require express disavowal as late as 1970. *See* *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098-99 & nn.25-27 (D.C. Cir. 1970).

6. Even as authority for the limited proposition that rules of general applicability are subject to direct court of appeals review, *United Gas Pipe Line* and *Arrow Airways* have been allowed to expire and have been buried several times by the court that gave them birth, most recently by Judge McGowan in a most illuminating discussion of the not-altogether-satisfactory state of the law (at least in the District of Columbia Circuit) respecting the choice of reviewing court. *Investment Company Inst. v. Board of Governors*, 551 F.2d 1270 (D.C. Cir. 1977). Earlier interments took place in *Deutsche Lufthansa A.G. v. CAB*, 479 F.2d 912, 915-16 (D.C. Cir. 1973); *Mobil Oil Corp. v. FPC*, 469 F.2d 130, 140 (D.C. Cir.), *cert. denied*, 412 U.S. 936 (1973); *City of Chicago v. FPC*, 458 F.2d 731, 741 n.45 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). As Judge McGowan has noted, not all circuits agree. *See* *Investment Company Inst. v. Board of Governors*, *supra*, at 1276, citing *PBW Stock Exchange, Inc. v. SEC*, 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); *see also* *Magnolia Petroleum Co. v. FPC*, 236 F.2d 785, 791 (5th Cir. 1956), *cert. denied*, 352 U.S. 968 (1957).

lawyer who has studied from it will not even know that the matter is subject to question. But to succumb to the temptation would be precisely to reverse the point I had in mind in beginning this review with my anecdote.

The point is that there is much of the practitioner's day-to-day administrative law—even apart from the substantive law administered by the agencies with which he deals—that is not to be found in the best of casebooks, whether my *Gellhorn & Byse* (ragged, but still on my shelves, and pulled down occasionally) or these new volumes.⁷ And the practitioner should not expect anything else. The book that covered all of his idiosyncratic interests would be impossibly long or impossibly trivial or both.

Neither of these books is unduly long or overly detailed, nor does either deal in trivia. Each is an earnest effort to help a teacher impart to aspiring lawyers, especially those whose practice will involve them with public law, a sense of what public law is about. Their purpose is to convey something far more fundamental than the administrative law practitioner's equivalent of knowledge of the location of the courthouse—which, following my example, must be which clerk to file with once you are there. As Professors Mashaw and Merrill put it in the context of the law of judicial review, "A sense of history and a feel for nuance will still distinguish the artisan from the apprentice."⁸ Inculcation of the qualities of artisanship is an object of both books.

In twenty-five years, *Arrow Airways* has gone from its initial ambiguous holding through its limitation by subsequent decisions to its rest. That is a short time in the development of legal doctrine. But administrative law is a new discipline. Professors Mashaw and Merrill credit its systematization to the *Gellhorn & Byse* casebook, the first edition of which appeared in 1942. For my senior in the *Arrow Airways* incident, much of the stuff of history and the basis for perceiving nuances had been acquired in personal experience or, at worst, first-hand from those who had experienced it. Off-hand acquaintanceship with an obscure case was the least mark of his artisanship.

We of later generations are not so fortunate. We have to get our sense of history and our feel for nuances solely from books. That is a harder task. Those who teach from the two books under review will themselves have learned much of what they know about the administrative process from

7. A subsidiary point illustrated by the *Arrow Airways* incident is that a great deal of the practitioner's administrative law is not found in Supreme Court opinions. The last Supreme Court pronouncement on the precise *Arrow Airways* question dates from 1937 and is hopelessly misleading as a statement of the law today. The Court said of the judicial review provision of the Federal Power Act (comparable to the Natural Gas Act and the Civil Aeronautics Act), that it "relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938).

8. MASHAW & MERRILL 785.

books. How well will they be able to impart a sense of history, to give a sense of nuance, to begin with the assistance of these books to make artisans of law students?

I

With respect to their book, Justice Linde⁹ and Professor Bunn could say that the question is a fair one only if the qualities of artisanship that they are held accountable for instilling are not merely those associated with the administrative law practitioner. Theirs is not an administrative law casebook. They disclaim any intention to cover the whole of administrative law. They omit altogether any materials dealing with judicial review. Their book is in part a descendant of an earlier casebook on legislation that concentrated on process rather than product.¹⁰ They have added materials on administration because of their realization of the close relationship between the legislative and administrative processes. Their book is designed for a first-year course. They believe that, before law students are too thoroughly imbued with the notion that the only "law" worth knowing is the legal doctrine to be found in appellate opinions, they should have a course that teaches them that what they probably thought of as "law" prior to their enrollment is indeed a part of law school "law" and worth serious and systematic attention. Linde and Bunn believe that students should be introduced to the processes by which policy is translated into law and applied by political bodies, and to how the processes are themselves governed by law.¹¹

The book begins with a provocative chapter on making and applying law, concentrating on materials that approach the line between the two theoretically distinct processes.¹² The lesson is that you cannot always tell a legislature from an executive or administrative agency by its product. Questions that recur throughout are first suggested here; for example, what is it that makes us impose upon one entity but not another requirements as to such things as representativeness, conflicts of interest and fact-finding procedures? The theme is reinforced at the end of the chapter with two old favorites, *Londoner v. Denver*¹³ and *Bi-Metallic Investment Co. v. State*

9. Hans A. Linde, formerly Professor of Law at the University of Oregon School of Law is now a Justice of the Supreme Court of Oregon.

10. F. NEWMAN & S. SURREY, *LEGISLATION* (1955).

11. LINDE & BUNN xvii-xix. How the processes themselves are governed by law is an important point that Professors Linde and Bunn emphasize often. There is a law of process, they say, and it imposes legal requirements even though a court may decline to enforce one or more of the requirements. *E.g., id.* at 63; LINDE & BUNN *Teacher's Manual* 4. I find the emphasis admirable.

12. LINDE & BUNN 1-65.

13. 210 U.S. 373 (1908).

Board of Equalization.¹⁴ Among other things (according to the editors' teacher's manual), these famous cases can be used to illustrate a point that was obvious to me only after the editors made it: "the apparent anomaly that procedural guarantees may assure a hearing when it no longer matters, when the decisive issues have been determined without opportunity for a hearing and when those that remain to be heard are not in dispute."¹⁵

The chapters that follow are rich in the variety of their subject matter and the materials used to develop and illustrate it. I believe that, if I were a teacher and were any good at it, I could use the materials to give students a better idea of the lawmaking and law-applying processes than they had when they entered my class—an idea better in ways that would be important to them as private practitioners or government lawyers, administrators or legislators, and, indeed, as citizens. I would have the chance to run the students through problems of legislative apportionment and the disciplinary powers of legislatures, the committee system and legislative hearings, lobbying and its regulation, the making and administration of budgets, legislative history and its manufacture, open meeting and open records requirements, conflicts of interest, delegation of authority and legislative oversight, executive control over administration of different sorts, legislative and administrative investigations, and, finally, some traditional administrative law matters—notably, who decides, how does he learn the facts that are the basis of his decision, and from whom?

Just from this list it is obvious that, even if they had restricted themselves to traditional casebook material, Linde and Bunn would have outlined issues sufficient to provoke and interest students—the reapportionment cases; *Powell v. McCormack*;¹⁶ the federal lobby control law and whatever it was that the Supreme Court did to it in *United States v. Harriss*;¹⁷ the freedom of information statutes and cases; and Judge Leventhal's revival, when the rudimentary 1970 price and wage control statute was challenged, of the delegation issue.¹⁸

Linde and Bunn do not stop with materials such as these. Watergate tape transcripts are used to show President Nixon, on the one hand, exercising control (though in a most unorthodox way) over executive branch subordinates and, on the other, threatening the extraordinary use of presidential powers to influence decisions of the Federal Communications Commission. As this example may suggest, there is a far more comprehensive

14. 239 U.S. 441 (1915).

15. LINDE & BUNN Teacher's Manual 4.

16. 395 U.S. 486 (1969).

17. 347 U.S. 612 (1954).

18. *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

treatment of the Executive's role in lawmaking and law-applying than there would be in a book that concentrated exclusively on appellate opinions. *Humphrey's Executor*,¹⁹ *Waterman*²⁰ and the *Steel Seizure* case²¹ are interesting episodes and they are all duly noted or excerpted here, but there is much more. I doubt that any law school book gives the extended treatment that this one does to the budget, appropriation and spending processes.²² The impoundment dispute of recent memory is but one aspect of the editors' tracing of this most significant set of processes.

The section on the manufacture of legislative history²³ contains some fascinating material, previously unknown to me, that should make some of us who regularly use this history blush. At most points, state sources (with which I was thoroughly unfamiliar) are also brought in; these add to the interest and mitigate the federal parochialism that infects most of our administrative law studies.

These materials or something like them should be taught to first-year law students. They would improve the artisanship of any of those students who will be concerned at all in their practice with public law—which must be a vast majority of them. Any others will be better citizens for their study.

Having said that, I would add that I also hope that any students studying these materials in the first year would go on to take a course in administrative law. I was less taken with Linde and Bunn's administrative law materials (except for one fine section entitled "What Issues May Be Removed from Adjudication by Prior Determination Through Rule-Making?"²⁴ which deals with the blocked-space case²⁵ and the FTC's attempted cigarette health warning rule) than with the rest of the book. Perhaps my discontent derives from the fact that these materials are presented in an unfamiliar sequence and with an unfamiliar emphasis. In any event, Justice Linde and Professor Bunn would not disagree that they have left something to other casebook editors, such as Professors Mashaw and Merrill.

II

It is the injustice of easy oversimplification to say that *Linde & Bunn* is a legislation casebook with some administrative law material thrown in. The same injustice is done by saying that *Mashaw & Merrill* is an administrative law casebook with some legislative material thrown in.

19. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

20. *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

21. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

22. See LINDE & BUNN 247-362.

23. *Id.* at 363-66.

24. *Id.* at 905-52.

25. *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966) (en banc), cert. denied, 385 U.S. 843 (1967).

Professors Mashaw and Merrill describe the core of the materials they have collected as a course-book on administrative law. But they also try, in their words, "to integrate analysis of the administrative process with ways of thinking about the legislative process," because it is artificial to separate the two and because the lawyer who does not see the administrative process as an extension of the process of legislation, or "recognize the constraints placed upon legislative action by the necessity of devising methods of implementation that comport with governing principles of administrative law, has only a partial understanding of either subject."²⁶

The first chapter of the book is a case study of the legislative, judicial and administrative development of the law of discharges into waterways under the Refuse Act of 1899.²⁷ The editors make the most of this classic example of the interplay of legislation, judicial construction and administration in the making and effectuation of policy. If nothing else, their discussion is a wonderful lesson in the reading of statutes, and nothing is likely to be quite so important for the public law lawyer.

From that beginning, the book moves to a brief but explicit consideration of some aspects of the legislative process.²⁸ Apportionment and legislative procedures are touched on, but for the most part the materials emphasize judicial control of the legislature. They differ from what one finds in the Linde and Bunn book. Here the subjects are judicial control of legislative motive, the rationality of legislative judgment, substantive due process and the like. I am a little puzzled by this section, and I guess that most teachers will skip it.

Most of the rest of the book falls under traditional administrative law headings: delegation, rulemaking, the right to a trial-type hearing, the adjudicatory process, agencies' choices of modes of action (for example, the NLRB's penchant for adjudication and the FDA's efforts to conclude as many matters as possible by informal rulemaking), suits against government officials and judicial review. Interspersed are slightly less traditional, but nonetheless timely and worthwhile chapters on the compelled disclosure of data and documents pursuant to agency subpoenas, inspections and searches, and, on the other side, the Freedom of Information Act.²⁹

I found the organization of all this material sensible and the editors'

26. MASHAW & MERRILL xviii. The editors also claim as a "second organizing idea" for their materials—the concept "that the public law system . . . shares important points of connection, reinforcement, and tension with the private law system." *Id.* at xx. This notion is developed in the last chapter of the book, which concerns the impact of public regulation on private remedies and contains some interesting material; however, I really did not find much evidence of this "organizing idea" elsewhere in the book.

27. 33 U.S.C. §§ 401 *et. seq.* (1970). See MASHAW & MERRILL 3.

28. MASHAW & MERRILL 102-90.

29. 5 U.S.C. § 552 (Supp. 1976).

treatment of the issues raised sound, sure-footed and useful. Mashaw and Merrill have somehow acquired, and their book should impart, a feel for nuance, and (though they deliberately emphasize the contemporary because they think it more likely than the dated to capture interest, and just as instructive) a sense of history, too.

I was most impressed—more so than in the case of Linde and Bunn—with their grasp of some administrative law basics. For example, though Linde and Bunn dance around the question, I think a student would get the impression from their book that the Administrative Procedure Act definitions of “rule” and “order” are important in determining what kind of procedure an agency must afford, *i.e.*, formal or informal.³⁰ Mashaw and Merrill correctly point out, after discussing the “definitional difficulties” in these APA terms, that the difficulties “do not matter much in deciding which procedures an agency should follow in a given case”; to make that decision, one looks to the statute creating the agency, the Constitution “or, in case of ambiguity, . . . common sense.”³¹

I studied the chapter on judicial review³² with particular care because the subject is of special interest to me. Were I a casebook editor, I might do it a little differently. I would try to find room for some of my current concerns: the “which court” question with which I began this review,³³ the question of how far *Camp v. Pitts*³⁴ really goes in the direction of ruling that in all circumstances review is to be restricted to an “administrative record,” however informally created or collected; and the problems that remain after 15 years of the liberalized venue provision for suits against government officials and agencies.³⁵ I would not stop with *Abbott Laboratories*³⁶ and

30. LINDE & BUNN 814-15, 855-61, 875-77.

31. MASHAW & MERRILL 281. The statement that the “definitional difficulties do not matter much in deciding which procedures an agency should follow in a given case” is correct if it is understood that the decision is whether the procedures are to be formal or informal. In any broader context it is an overstatement. Linde and Bunn cite with emphasis an estimate that “as high as 90% of federal agency action” is taken outside the formal procedures of the APA. LINDE & BUNN 855. I should think that the true figure is higher than 90%. If any of these vastly preponderant informal actions is rulemaking not within one of the section 4 exceptions, then at least there must be notice and opportunity for comment. See 5 U.S.C. § 553 (1970). If an action is an informal adjudication, on the other hand, the APA requires almost nothing by way of procedure.

32. MASHAW & MERRILL 773-932.

33. This issue, though probably fairly regarded as just one of those things that vex praetitioners, has been taken note of by a few scholars. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 358, 419-22 (1965); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 39-41 (1975); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 200-04 (1974).

34. 411 U.S. 138 (1973).

35. Under 28 U.S.C. § 1391(e) (1970), as amended by Pub. L. No. 94-574, 90 Stat. 2721 (1976), the 15-year-old liberalized venue provision for suits against federal officers and agencies, a suit may be brought in a district where (1) a defendant resides, (2) the cause of action arose, (3) any real property involved is located or (4) the plaintiff resides if no real property is

*Toilet Goods Ass'n*³⁷ but would go into the rich array of lower court opinions on pre-enforcement review of regulations. If my book were published late enough to allow it (as *Mashaw & Merrill* was not), I would add to Mashaw and Merrill's treatment of "[t]he Dichotomy Between *Hearst* and *Overton Park*"³⁸ Judge Wright's effort in the *Ethyl* case to explain away the extravagances of the *Overton Park* opinion.³⁹ Finally, if only for old time's sake, recognizing that no one fights over the meaning of "substantial evidence" any more, I would excerpt *Universal Camera*⁴⁰ for its elucidation of the phrase "substantial evidence on the record considered as a whole," which I have always thought of as *the Universal Camera* proposition, and not just for its secondary proposition, concerning the weight to be given a hearing examiner's findings, for which alone the case is excerpted here.⁴¹

However, this is just musing. I do not think that I could improve the editors' scheme for the treatment of judicial review. And the fact that I might put some other and additional materials into the judicial review chapter does not detract from my admiration for this book in all its chapters. To the extent that the qualities of artisanship can be imparted in a classroom, the teacher using this book should be able to do it.

Indeed, as I hope is evident from this review, I believe that both of the books are susceptible to such use. From my own standpoint, it was good for me to be made to look at the materials the two sets of editors have collected. Casebooks, I discovered, are a little less formidable 20 years later. The editors' comments and questions left me embarrassingly in the dark less often than in school days. That was comforting.

involved. If a corporation claiming to be aggrieved by some agency action wishes to sue elsewhere than in the District of Columbia, the fourth alternative is the important one. The question whether a plaintiff corporation resides wherever it does business or only in the state of its incorporation, left undecided in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 156 n.20 (1967), is still undecided.

36. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

37. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967).

38. *MASHAW & MERRILL* 804. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

39. *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-37 & n. 74 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976).

40. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

41. See *MASHAW & MERRILL* 426-27.

