

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

Professor Kenneth Culp Davis's seminal book, *Discretionary Justice*, is subtitled "A Preliminary Inquiry."<sup>1</sup> Viewing this as an invitation for others to apply themselves to exploring the ramifications of administrative discretion, the editors of *Law and Contemporary Problems* have procured the papers in this symposium as expressions either of the authors' general views on discretion problems or of their observations on discretion issues in specific agencies or governmental activities. The articles were for the most part meant to examine, apply, and extend Davis's approach. The symposium on *Police Practices* contained in the last issue of *Law and Contemporary Problems* also addressed problems which Davis examines in his book.

Although addressing areas of intense concern to lawyers in his book, Professor Davis is seldom strictly lawyerlike in dealing with the issues which he raises. Often he suggests no means of rectifying by legal action the failure of agencies to correct the abuses which concern him, and he frequently appears instead merely to be appealing to administrators' better instincts. As an illustration of how he skimps on legalistics, what is perhaps the most important substantive legal point in the book, namely that the courts could compel much more extensive agency rule making by employing a variant of the nondelegation doctrine,<sup>2</sup> is made so briefly that Judge J. Skelly Wright, in a review, wrote as if it had been omitted altogether, criticizing Davis for not suggesting such a role for the courts.<sup>3</sup>

Although often omitting to clear legal pathways to achievement of the reforms he advocates, Davis nevertheless has given others some useful tools for breaking through the underbrush. The best agencies and conscientious commissioners have now been advised that there is more to good administration than the wise exercise of discretion and that it is also incumbent on them to establish procedures and practices which strengthen the guarantees of justice even in their informal, discretionary activities. Administrators can now be taxed by scholars, congressmen, litigants, and other critics—and occasionally, where a legal handle can be found, by judges—for failing to adopt the Davis prescriptions for "confining," "structuring," and "checking" discretion. The Administrative Conference of the United States, which stim-

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<sup>1</sup> K.C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

<sup>2</sup> *Id.* at 57-59, 220-21. See also Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

<sup>3</sup> Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

ulated some of the work reflected in articles in this symposium, has recently pushed several agencies in the direction of reform in discretion-related areas. Davis's work provided much of the impetus for these efforts.

Although Davis's book was concerned as much with public administration as with legal doctrine, legal developments calculated to advance the cause of confining, structuring, or checking discretion are beginning to pick up as courts begin to respond to the concerns which Davis voiced. In *Environmental Defense Fund, Inc. v. Ruckelshaus*,<sup>4</sup> the Court of Appeals for the District of Columbia required the Agriculture Department (and subsequently the EPA) to explain why they had failed to act to ban DDT widely in response to the documented demands of environmental groups. In another case establishing accountability for the exercise of previously unreviewable prosecutorial discretion, a U.S. district judge in Washington, D.C., recently ordered the Department of Health, Education, and Welfare to correct its nonenforcement of the Civil Rights Act.<sup>5</sup> Other decisions have also begun to reflect judicial scrutiny of prosecutorial decisions,<sup>6</sup> and many signs in the daily press point to further and even more fundamental courtroom confrontations between citizens and the federal executive. Impoundment of funds, which is dealt with in Dr. Fisher's article herein, is just one area of probable conflict.

Among other things, Davis succeeds dramatically, though perhaps inadvertently, in demonstrating the difficulty of bringing government under meaningful control. Many judges, like Judge Wright, would confidently expand the judiciary's oversight of administrative activities, but Davis's basic instinct that law alone, imposed from outside the agency, cannot right all wrongs, remains correct. Whether stronger traditions of openness, supervision and review, adherence to rules, and so forth can be established among civil servants remains to be seen, but bureaucrats as a species are probably no less likely than the rest of mankind to pursue self-interest more consistently than other goals.<sup>7</sup> Although implementation of Davis's reforms would often succeed in changing bureaucrats' perceptions of where their interests in fact lie, the inherent limitations of political institutions are so many that complete coincidence of interests between bureaucrats and the public is seldom likely. By facilitating more thoughtful consideration of the effectiveness of remedies involving large doses of governmental control, however, Davis's work should contribute to the devising of more nearly optimal forms of intervention. Students of the newly popular "policy sciences" should study *Discretionary Justice* with care.

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<sup>4</sup> 439 F.2d 584 (D.C. Cir. 1971).

<sup>5</sup> Washington Post, Nov. 17, 1972, p. 1.

<sup>6</sup> E.g., *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *American Public Health Ass'n v. Veneman, CCH FOOD, DRUG, & COSM. L. REP.* paras. 40,723, 40,749 (D.C. Cir. 1972); *Medical Committee on Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970). See also K.C. DAVIS, *ADMINISTRATIVE LAW TEXT* § 28.06 (1972).

<sup>7</sup> Cf. W.A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36-42 (1971).