

Michigan Law Review

Volume 80 | Issue 4

1982

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United States Court of Appeals for the District of Columbia Circuit

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Recommended Citation

Abner J. Mikva, *A New View of the Legislative and Administrative Process*, 80 MICH. L. REV. 573 (1982).

Available at: <https://repository.law.umich.edu/mlr/vol80/iss4/3>

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A NEW VIEW OF THE LEGISLATIVE AND ADMINISTRATIVE PROCESS

*Abner J. Mikva**

LEGISLATIVE AND ADMINISTRATIVE PROCESSES. 2d ed. By *Hans A. Linde, George Bunn, Fredericka Paff, and W. Lawrence Church*. Mineola, N.Y.: Foundation Press. 1981. Pp. lxxvii, 887. \$24.

There is something formidable about the blue buckram of a law school casebook. Perhaps it is the color that, in context, can only bring back haunting memories of the bluebooks that law student and law teacher alike learned to dread. Perhaps it is the size or the absence of adornment that make a casebook an unlikely source for interesting reading. And yet for all that, Justice Linde and Professor Bunn have, not once but twice — this time with the assistance of Professors Fredericka Paff and W. Lawrence Church — produced a law textbook that reads well.

Part of the credit must go to the subject matter. The legislative process is, after all, politics. Compared with the effort demanded in mastering the Rule in *Shelly's Case* or the doctrine of *res ipsa loquitur*, learning about the political processes in law school is a pleasant change of pace. Even when the legislative process is combined with the more arcane administrative processes, the subject matter is still choice. The need for teaching materials on how laws are made has been one of the chief reasons for the dearth of law school courses on the subject. This edition certainly fills a large portion of that gap.

I taught the legislative process in law school shortly before the first edition came out, and would have used it had the authors been a little less dilatory in getting it on the market. The second edition is improved, and even a little leaner, notwithstanding four additional years' worth of legislative history and administrative precedent. The reasons for the leanness are mostly good — a sifting and winnowing of some of the materials from the first edition that had gone too deeply into subjects of interest only to the more specialized student of politics. For example, how Congress or the state legislatures control their own membership and proceedings is covered by the in-

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depth discussion of *Powell v. McCormack*,¹ thus allowing for a reduction of the discussion of other cases in point. (Justice Linde even cut down the extent of the quotations from his law review article on the case, an act of authorial self-abnegation not frequently encountered.)² As a result, the quantum of material is just right for the teaching of the course contemplated by the authors — three credit hours in a good law school.

Having so easily and favorably disposed of the physical dimensions of the second edition, the dissection becomes more problematical, and its results are less likely to please the authors. First, I have trouble with the combination of the legislative and administrative processes in one book. True, such a combination does distinguish this casebook from all of the competitors that continue to separate Congress and the state legislatures from their administrative progeny.³ The distinctiveness of such an organization, however, comes at the expense of blurring the boundary between articles I and II of the United States Constitution and their counterparts in most of the states. Sometimes the blurring is quite mischievous, as when the investigative power of Congress and that of the federal agencies are meshed into a single chapter that leaves the reader and student somewhat bewildered about whether the fourth amendment precludes the Congress from conducting unreasonable searches and seizures or whether the fifth amendment protects a corporation from having to incriminate itself before the Securities and Exchange Commission. Sometimes the combination leads to an area that needs more detailed discussion than can be provided in a book that covers both kinds of processes, as, for instance, in the handling of the due process owed by administrative agencies to claimants appearing before them.⁴ Sometimes the format merely makes it more difficult

1. 395 U.S. 486 (1969). It is difficult to talk about the *Powell* case without getting into a myriad of related subjects, as the 89 pages of Supreme Court opinions in the case attest. The authors do raise some of the other questions of congressional self-discipline, but they resist the temptation to write a book-within-a-book about the fascinating case involving the fascinating Adam Clayton Powell and his fascination for going to exotic places at the taxpayer's expense.

2. The article, *Comment on Powell v. McCormack*, 17 UCLA L. REV. 174 (1969), is one of the best of the innumerable pieces about the *Powell* case.

3. There is no end to the "logic" of carrying through the legislative process to the "next step." From the administrative agencies, one gets to the courts, which review agency decisions, to the executive branch, which appoints the administrators, to the private sector, which has to cope with the legislative, administrative, and legal decisions that are promulgated. All government and all law are intertwined, and the divisions for teaching purposes are somewhat arbitrary. But the alternative is one big law school course on "The Law." I am reminded that the late Professor William Winslow Crosskey set out to do a law review article on the constitutional antecedents of the commerce clause. He ended up with a two-volume work on the Constitution, with a third volume put together posthumously by one of his assistants.

4. *Goldberg v. Kelly*, 397 U.S. 254 (1970), for instance, remains one of those enigmatic

to understand how Congress (and the state legislatures) have themselves blurred the distinction — for example, with respect to the delineation between the independent regulatory agencies and those in the executive branch. After several courses in law school, nineteen years in the legislative branch, and several years on the bench, I still am never quite sure about all that turns on that distinction. Considering the extent of the literature on the topic, it probably asks too much of a casebook to cover the area while it is being used to teach the budding lawyer all that he or she needs to know about the legislative and administrative processes of federal and state governments.⁵

This brings me to my second concern about the overbreadth of the book. I am not sure that one can cover the federal and state processes in the same casebook and in the same course. The authors acknowledge the difficulty by stressing the need for more localized materials to supplement their coverage of the state processes. Even with such supplementation, I think the task is unmanageable. A book could be written about the distinctions between federal processes and those of any one state. Any number of books could be written on the distinctive processes of the various states. When one considers the history of the uniform law commissions, for example, and the difficulties that they have encountered in trying to hold the fifty states to a set of norms even after a consensus has been reached, it is obviously very difficult to talk generically about how state legislative bodies and administrative agencies function. It should not come as a surprise, therefore, to see most of the state examples coming from Oregon (where Justice Linde holds forth) and Wisconsin (where Professor Bunn and the two new collaborators abide and teach). Aside from the obvious parochialism, those two states probably reflect the cream of orderly process. Woe betide the lawyer who walks into the Illinois General Assembly at Springfield expecting to

precedents from which all interested parties draw comfort or concern about what procedures protect a government beneficiary from withdrawal of benefits. The case gets only indirect coverage in the text, which could lead an unwary teacher or student to underestimate its importance and difficulties.

5. Should Congress or the executive branch exercise the same degree of oversight over independent regulatory agencies and executive branch agencies? Should the various congressional veto mechanisms over rules and regulations be coterminous for both kinds of agencies? These are particularly timely questions given the zeal for regulatory reform being shown on Capitol Hill. The book only grazes the general area of the legislative veto, and does even less about the "Bumpers" Amendment conundrum, concerning how much the judges should do by way of watching over the rule-making process. My criticism goes not to the omission of these questions, because inclusion of all the missing material could double the size of the book; rather, it faults the authors' creation of the dilemma in the first place by combining legislative and administrative processes in one casebook.

see a replication of the Wisconsin Legislature.⁶ Woe unto the New York lawyer who expects his state's regulatory agencies to be as articulate and even-handed as an Oregon Commission.

Notwithstanding my complaints, I am aware that many law schools give such short shrift to the legislative process (and even to administrative law) that the practical choice is between a combination textbook such as this one and a few footnotes in a book on constitutional law. Considering how much of a practicing lawyer's time will be spent reading and using statutes and regulations, it is distressing that so little time is spent in law schools telling students how those statutes and regulations are made. It is almost as if our educators take too literally the old adage that legislation is like sausage: if one wants to enjoy the consumption, one should never watch the product being made.

As long as law continues to be taught largely by the case method, an important measure of a teaching tool is how it handles cases. The authors get high marks on that score. The acknowledged difficulty with using cases to teach the fundamentals of law stems from the fact that large portions of legal opinions have nothing to do with the doctrinal fundamentals: much writing is devoted to a recitation of the facts of the case, to handling of the make-weight arguments advanced by the parties, and to the procedural problems endemic to every case. A concomitant problem is the general length of legal opinions, about which I dare not cast the first stone.⁷ It becomes a real specialty for teachers and textbook writers to try to cut an opinion to manageable size without also cutting out much of what makes it worth annotating. Nowhere do the authors show their art better than in their encapsulation of *Youngstown Sheet & Tube Co. v. Sawyer*.⁸ In ten pages they capture the meat and the conclusions that took the Supreme Court 132 pages to deliver in the first place. (Justice Linde had an advantage on that case, however: he was Justice Douglas's law clerk at the time.)

Justice Linde enjoys other privileges not normally given to textbook authors. After many years of distinguished teaching at the University of Oregon, Professor Linde became Justice Linde — a

6. There is a volume, not much shorter than *Legislative and Administrative Processes*, that deals only with some efforts at reform of the legislative process in one state, Illinois. See ILLINOIS COMMISSION ON THE ORGANIZATION OF THE GENERAL ASSEMBLY, IMPROVING THE STATE LEGISLATURE (1967).

7. There is a recent article pleading for a reduction in the length of judicial opinions; I regard it as required reading, both for me and for my clerks. Gardner, *Toward Shorter Opinions*, 55 CAL. ST. B.J. 240 (1980).

8. 343 U.S. 579 (1952).

member of the Supreme Court of Oregon. One of the Oregon cases covered in the first edition was *Board of Medical Examiners v. Mintz*.⁹ In *Mintz*, the Oregon Supreme Court said that the State Board of Medical Examiners did not need to establish rules and regulations before revoking the medical license of a doctor charged with performing an abortion. The authors asked some piercing questions about the *ratio decidendi* of the *Mintz* decision, indicating a minimum of enthusiasm for the holding.

Mintz was covered in the second edition as well, but lo and behold! — after the discussion of *Mintz*, there appears the précis of another case before the Oregon Supreme Court. In *Megdal v. Oregon State Board of Dental Examiners*,¹⁰ “Linde J.” ruled that the dental board *did* have to establish some rules and definitions before it could revoke the petitioner’s license. What a glaring case of academic activism!

Dispassionate history seldom is written by its actors. Because I was a member of Congress during the relevant periods, the following comments must be taken with several grains of salt. I think that the congressional reforms and changes that occurred in the 1970s will have a substantial and lasting impact on the institution. Everything from the anti-impoundment statute, to the statute setting up the House and Senate budget committees, to the House rule changes making it easier to get rid of committee chairmen, to the recordation of votes on amendments and, perhaps most importantly, to the various sunshine proposals that opened up committee hearings and markups to the press and public — all of these significantly altered how legislation is made.¹¹ While *Legislative and Administrative Processes* does contain references to specific changes in the budgeting process, there is not very much about the rest of the reforms. Even more notable is the absence of discussion of the political and social forces that bring about changes in the legislative process, either the ones that occurred in the 1970s or any of the earlier reform movements in the Congress or the state legislatures. Parochial involvement aside, I think the substance of those changes, and the political and social ferment that caused them, are very much a part of understanding the process. No one can expect a single casebook or a single course to provide an adequate explanation of the legisla-

9. 233 Or. 441, 378 P.2d 945 (1963).

10. 288 Or. 293, 605 P.2d 273 (1980).

11. Internal reform efforts in Congress have been the subject of numerous articles. See, e.g., Hopkins & Oleszek, *Ninety-Fifth Congress: Legislative Reform in 1977*, 64 A.B.A.J. 341 (1978). See generally LEGISLATIVE REFORM (L. Rieselbach ed. 1978).

tive process to budding lawyers, but they should at least be taught to suspect that there is an interaction between the process and national moods, that elections do change the way things get done, and that one cannot even find out where they sell legislative scorecards or where the game is played if there is no awareness of the complex interactions between the people and their representatives.

The above is not a pep talk designed to lead all law students to contemplate a political career, although that is not such a bad idea. Nor is it an argument for teaching more political science in the law schools. Rather, it is an enlargement of the plea made above for law schools to teach lawyers how to think about the legislative process.

The range of my comments about the book should make it clear that I really wish the authors had written three or four books — separating out the legislative and administrative processes as well as the federal and state forums. It should be equally obvious that the complaint starts from the premise that the authors possess the requisite skill to produce books worth teaching with and reading. When all is said and done, law book writers do not create their material. Their genius is in finding (and shortening) the right cases to stimulate discussion and thought about the broad principles of the law, in excerpting the apt comments from the vast literature about those cases and the law in general, in studding the text with pertinent and impertinent questions and comments about the materials being presented. Casebook writers are really collectors first and annotators second — and the test is whether the collection and annotations can tantalize lawyers-to-be so that they embark on a lifelong search for answers to the hard questions.

It is on this account that Justice Linde, Professor Bunn, and their collaborators deserve high praise for the second edition of their casebook on *Legislative and Administrative Processes*. If there is to be any adjustment in the present imbalance between the teaching of how the common law *was* made and how the everyday, here-and-now statutory law *is* made, it will be accomplished through books such as this one.