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## Book Review

Walter H.E. Jaeger

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## BOOK REVIEW

OUTLINE OF ADMINISTRATIVE LAW. By Paul R. Conway. Washington, D.C.: Lerner Law Publishing Company, Inc. 1973. Pp. xv, 195.

By WALTER H. E. JAEGER\*

In format, the *Outline of Administrative Law*<sup>1</sup> greatly resembles the author's earlier *Outline of Contracts*.<sup>2</sup> Thus, in the contracts outline Professor Conway keys his material to the two major treatises on contract law, *Williston on Contracts*<sup>3</sup> and *Corbin on Contracts*,<sup>4</sup> and in the *Outline of Administrative Law*, the cases digested are keyed to the three most frequently used works on administrative law.<sup>5</sup> The keys or symbols employed are the initials of the author-editors of the three administrative law texts.

The *Outline* is divided into sixteen chapters. The Table of Contents is a model of clarity since it shows the sections and subsections which comprise each chapter, thus taking the place of a formal index. After a short introduction, in separate chapters the author examines the delegation of legislative powers and compulsory process to obtain information. The next five chapters deal with judicial review of administrative decisions.<sup>6</sup>

In his discussion of the statutory methods of obtaining judicial review,<sup>7</sup> Professor Conway examines the declaratory judgment. This statutory remedy, as is generally known, affords a person the right to petition a court to declare any rights he may have in a given matter. Aside from its use in contracts such as insurance policies,<sup>8</sup> the declaratory judgment is commonly used in cases where the petitioner's legal status as an alien or a citizen is an essential fact,

\* M.S., LL.B., S.J.D., Ph.D., Georgetown University; Diploma, Faculty of Law, University of Paris; Diploma, *Ecole libre des Sciences politiques* (Paris); Diploma, Academy of International Law, The Hague. Member: Bars of District of Columbia and Supreme Court of the United States.

Professor of Law, and formerly Director of Graduate Research, Georgetown University Law Center; Distinguished Visiting Professor of Law, IIT Chicago-Kent College of Law; author-editor of *WILLISTON ON CONTRACTS*, third edition, of which seventeen volumes have been published to date.

1. P. CONWAY, *OUTLINE OF ADMINISTRATIVE LAW* (1973) [hereinafter cited as CONWAY].
2. P. CONWAY, *OUTLINE OF THE LAW OF CONTRACTS* (3d ed. 1968), *reviewed*, Jaeger, 49 CHI.-KENT L. REV. 244 (1972).
3. S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* (3d ed. Jaeger 1957-1975) (17 volumes) [hereinafter cited as WILLISTON ON CONTRACTS, JAEGER ED.].
4. A. CORBIN, *LAW OF CONTRACTS* (1962).
5. K. DAVIS, *ADMINISTRATIVE LAW* (1972); W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* (1970); L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* (1968).
6. CONWAY, *supra* note 1, chs. IV-VIII.
7. *Id.* at 31-33.
8. 7 WILLISTON ON CONTRACTS, JAEGER ED., *supra* note 3, ch. 31, "Contracts of Insurance" (1963).

vital in the administrative determination of the validity of a deportation proceeding or order. Declaratory relief can also be used to great advantage to test whether an order is interlocutory or final.<sup>9</sup> Further, injunctive relief is often sought when a federal question is involved and the amount in controversy is \$10,000 or more.<sup>10</sup>

As pointed out by the author, general judicial review is provided by statute, specifically the federal Administrative Procedure Act<sup>11</sup> which is quoted in pertinent part:

Scope of Review. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.<sup>12</sup>

Professor Conway's comment is noteworthy: "Despite our uncertainty as to whether the Supreme Court will uphold the wide availability of the Administrative Procedure Act's review provisions, as obviously intended by its draftsmen, we can nevertheless conclude as a minimum, at this writing, that the A.P.A. does at least three things: (a) It codifies and thereby strengthens the presumption of the reviewability of administrative action. (b) It provides an additional remedy. (c) It provides a more flexible remedy."<sup>13</sup>

In accordance with a long established rule, initially formulated by the Supreme Court of the United States in *Smyth v. Ames*,<sup>14</sup> the courts have

9. See 28 U.S.C. §§ 2201-02 (1970).

10. See 28 U.S.C. § 1331 (1970).

11. 5 U.S.C. §§ 551 *et. seq.* (1970).

12. 5 U.S.C. § 706 (1970).

13. CONWAY, *supra* note 1, at 33.

14. 169 U.S. 466 (1898), *modified*, 171 U.S. 362 (1898)

adopted a "self-denying" attitude towards the finding of facts of administrative agencies when they are predicated upon substantial evidence of a probative character. *Smyth* dealt with an administrative determination by the "grandfather" of administrative agencies, the Interstate Commerce Commission.<sup>15</sup> The gist of the Court's opinion is, simply, that where the Congress has entrusted the regulatory body with the ascertainment of facts, i.e., the investigative function, there is no occasion for judicial review of such facts.<sup>16</sup>

In this connection, and of special interest is Chapter VII, "Scope of Judicial Review of Questions of Fact," wherein Professor Conway discusses the substantial evidence rule and carefully digests the leading cases. It is reassuring to find a classic precedent, *Universal Camera Corp. v. National Labor Relations Board*.<sup>17</sup> Here we are told that the standard of probative evidence required to support an administrative decision must be more than a mere scintilla—it must be substantial. This, the Supreme Court of the United States had decided insofar as the National Labor Relations Board is concerned, as far back as *National Labor Relations Board v. Consolidated Edison Company of New York*.<sup>18</sup>

The administrative agency's factual determination "of course, is subject to review, but when supported by evidence is accepted as final; not that its decision . . . can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."<sup>19</sup>

In *Universal Camera*,<sup>20</sup> the National Labor Relations Board had declined to be bound by its hearing examiner's findings and rejected his recommendation. The court of appeals deemed itself bound by the Board's rejection since the Supreme Court had previously held that the Board was not bound by the findings of its own hearing examiner.<sup>21</sup> On appeal, the Supreme Court of the

15. Established by The Interstate Commerce Act of Feb. 4; 1887, ch. 104, 24 Stat. 379. See 10 WILLISTON ON CONTRACTS, JAEGER ED., *supra* note 3, ch. 36A (1967).

16. *Smyth v. Ames*, 169 U.S. 466 (1898).

17. 340 U.S. 474 (1951), *rev'g* 179 F.2d 749 (2d Cir. 1950).

18. 305 U.S. 197 (1938). See JAEGER, CASES AND STATUTES ON LABOR LAW 803 (1941).

19. *ICC v. Union Pacific R.R.*, 222 U.S. 541, 547-48 (1912). In *United States v. Carlo Bianchi & Co.*, the Supreme Court said:

Moreover, the standard of review adopted in the Wunderlich Act—"arbitrary," "capricious," and "not supported by substantial evidence"—have frequently been used by Congress and have consistently been associated with a review limited to the administrative record. The term "substantial evidence" in particular has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court. This standard goes to the reasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body.

373 U.S. 709, 715 (1963).

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

21. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). As Professor Conway digested the case, "The hearing examiner found that the testimony of employee X at an NLRB hearing on Union representation was not a cause of X's subsequent discharge, and found

United States concluded: 1. The standard of proof required of the National Labor Relations Board by the Labor-Management Relations (Taft-Hartley) Act<sup>22</sup> is the *same* as that to be exacted by courts reviewing every other administrative action that may be subject to the Administrative Procedure Act; 2. The concept of substantial evidence must be considered against whatever in the record fairly *detracts* from its weight, particularly including an adverse report and findings by a hearing examiner. In holding that it was barred from taking into account the report of the hearing examiner on questions of fact, the court of appeals was in error; 3. The Labor-Management Relations Act, the Administrative Procedure Act, and subsequent amendments, all evince a Congressional purpose to increase the role of the hearing examiner in the administrative process.<sup>23</sup>

On remand to the court of appeals,<sup>24</sup> Judge Learned Hand observed: "Just where the Board's specialized experience ends it may no doubt be hard to say; but we are to find the boundary and beyond it to deem ourselves as competent as the Board to pass upon issues of fact. We hold that all the issues at bar are beyond the boundary and for that reason we cannot accept

that X had said he intended to resign soon. The Board refused to accept these findings of its own hearing examiner, made contrary findings of fact, and issued an order to Universal to reinstate X with back pay. It sought enforcement of its order in the federal circuit court of appeal, which ordered enforcement of the order. Certiorari to the Supreme Court, 1951, 340 U.S. 474, which reversed the Court of Appeal." CONWAY *supra* note 1, at 74-5.

22. 29 U.S.C. §§ 141 *et. seq.* (1970). This statute is extensively discussed in 9 WILLISTON ON CONTRACTS, JAEGER ED., *supra* note 3, at 345-60 (1967).

23. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Conway summarizes the Supreme Court's holding: "The Board is not bound by, but it must at least read and consider, along with all other material evidence, the findings and recommendations of its examiner; it may not ignore them." CONWAY, *supra* note 1, at 162. In the language of the Court:

The Taft-Hartley Act provides that 'The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.' . . . [S]urely an examiner's report is as much a part of the record as the complaint of the testimony. According to the Administrative Procedure Act, 'All decisions (including initial, recommended or tentative decisions) shall become a part of the record . . .'

It is therefore difficult to escape the conclusion that the plain language of the statute directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. . . .

In remanding the case, the Court wrote that '[o]n reconsideration of the record it [the court of appeals] should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial.'

Universal Camera Corp. v. NLRB, *supra* at 493, 497.

24. In NLRB v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951), the court of appeals upheld Universal Camera's appeal and dismissed the NLRB's complaint. Conway's treatment of the case posits two grounds for the holding and includes excerpts from the opinion:

(i) The Congressional amendment of the National Labor Relations Act as a result of public dissatisfaction with the hostility toward employers displayed by a majority of the members of the Board during the immediately preceding years, required reviewing courts to take a view '*less complaisant toward the Board's findings* than had been proper before.' (p. 430, italics supplied). Courts were instructed by the amendment to be '*less ready to yield their personal judgment on the facts*' not resting upon specialized knowledge.

'Just where the Board's specialized experience ends it may no doubt be hard to say; but we are to find the boundary and beyond it to deem ourselves as competent as the

the Board's argument that we are not in as good a position as itself to decide what witnesses were more likely to be telling the truth in this labor dispute."<sup>25</sup>

The National Labor Relations Act provides that in determining the appropriate bargaining unit "the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional and [non-professional] employees."<sup>26</sup> Nevertheless the Board did just that, and insisted that under the Act its determination was not subject to judicial review. An issue in *Leedom v. Kyne* was whether the federal district courts have jurisdiction of an original suit to vacate an *ultra vires* determination made by the National Labor Relations Board.<sup>27</sup> Holding in the affirmative, the Supreme Court commented: "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."<sup>28</sup> The Court also stated: "This is a suit, not to 'review' an order of the NLRB acting within its statutory powers, but instead is one 'to strike down an order of the Board made *in excess of its delegated powers* and contrary to a specific prohibition in the Act."<sup>29</sup>

In his chapters on judicial review,<sup>30</sup> Conway has discussed the safeguards that exist to prevent what would otherwise easily become—and sometimes does—the tyranny of an increasingly articulate bureaucracy. In this age of atomic energy and ecological awareness, an enormous proliferation of administrative agencies has become acutely apparent. With the advent of the bicentennial anniversary celebration, one is tempted to ask: What would the founding fathers and the framers of the Constitution have thought of the administrative juggernaut with which we live today?

Professor Conway fully explores the requirement that an appellant must have exhausted his administrative remedies and become subject to a *final* order before judicial review will be granted.<sup>31</sup> He points out that there are

Board to pass upon questions of fact. We hold that all the issues at bar are beyond the boundary and for that reason we cannot accept the Board's argument that we are not in as good a position as itself to decide what witnesses were more likely to be telling the truth in this labor dispute.' (p. 430).

(ii) The Board need not adopt and follow its hearing examiner's findings, but it must at least consider such findings and state why it believes them to be unsupported by a preponderance of the evidence.

Perhaps as good a way as any to state the change affected by the amendment is to say that we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial predominance in the testimony as recorded.' (p. 430, italics supplied).

CONWAY, *supra* note 1, at 162.

25. NLRB v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951).

26. 29 U.S.C. §§ 151-168 (1970).

27. 358 U.S. 184 (1958).

28. *Id.* at 190.

29. *Id.* at 188.

30. CONWAY, *supra* note 1, chs. IV-VIII.

31. CONWAY, *supra* note 1, at 62-70, discussing *inter alia*, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938), where the Supreme Court stated the general rule that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954), the Court observed: "We have

three apparent exceptions: 1. When the jurisdiction of the proper administrative body is *prima facie* lacking, or can be challenged on persuasive grounds;<sup>32</sup> 2. When the jurisdiction of the agency is apparently present, but the asserted: charges or allegations are so palpably defective that jurisdiction is merely colorable;<sup>33</sup> or, 3. When the only question is one of law.<sup>34</sup> Here, there is no occasion for submission to an administrative tribunal since there are no facts to be found and interpretation or construction of statutes, (as in the case of any other written instruments), is basically a function of the judiciary.<sup>35</sup> Until the agency has issued a *final* order, there is ordinarily no basis for judicial review and the cases adduced support this rule.<sup>36</sup>

The doctrine of primary jurisdiction is given a fair share of attention. As between courts, the first one properly to assume jurisdiction will keep it to the exclusion of all others. And similarly, where both a court and an administrative tribunal have concurrent jurisdiction, the court will usually defer to the administrative agency by staying or dismissing the judicial proceeding.<sup>37</sup> This doctrine may even be used to preclude anti-trust actions.<sup>38</sup>

Procedural due process in administrative proceedings pursuant to the fifth and fourteenth amendments to the Constitution of the United States are covered in some detail in the *Outline*.<sup>39</sup> Notice and a fair hearing are essential ingredients of due process. Thus, the Supreme Court of Virginia has said: "Appellant is entitled to a fair hearing upon the fundamental facts."<sup>40</sup> In an early case, *Montgomery Ward & Company v. National Labor Relations Board*,<sup>41</sup> the court of appeals emphasized the fact that a hearing requires an opportunity to be heard. In that case, when the attorneys for Montgomery Ward attempted to speak, the trial examiner told them to "Shut up." The

noted the other arguments submitted by appellee concerning the interpretation and constitutionality of the statute but it would be premature action on our part to rule upon these until after the required administrative procedures have been exhausted."

32. On this point, Professor Conway discusses *Public Util. Comm'n. v. United Fuel Gas Co.*, 317 U.S. 456 (1943) and *Ward v. Keenan*, 3 N.J. 298, 70 A.2d 77 (1949).

33. Conway digests *Mowery v. Camden*, 49 N.J.L. 106 (Sup. Ct. 1886).

34. *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922); *Nolan v. Fitzpatrick*, 9 N.J. 477, 89 A.2d 13 (1952); *cf. Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967); *Roadway Express, Inc., v. Kingsley*, 37 N.J. 136, 179 A.2d 729 (1962).

35. 4 WILLISTON ON CONTRACTS, JAEGER ED., *supra* note 3, ch. 22, §§ 600 *et. seq.* (1961); *cf. United States v. Kansas Gas & Electric Co.*, 215 F. Supp. 532 (D. Kan. 1963), quoting WILLISTON ON CONTRACTS, *supra*.

36. *Erving v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950). In *Chastain v. Spartan Mills*, 228 S.C. 61, 66, 88 S.E.2d 836, 838 (1955), the court noted, "The Commission's order . . . is not a final one . . . it is, therefore not appealable." *Cf. American Tobacco Co. v. SEC*, 93 F.2d 236 (D.C. Cir. 1937).

37. *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922); *Texas & Pacific R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

38. *Far East Conference v. United States*, 342 U.S. 570 (1950), quoting *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932).

39. CONWAY, *supra* note 1, ch. IX.

40. *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

41. 103 F.2d 147 (8th Cir. 1939). See JAEGER, CASES AND STATUTES ON LABOR LAW 839 (1941).

court declined to enforce the Board's order on the ground that there had been no opportunity for the respondent to be heard, thus illustrating the established rule: that an opportunity for oral argument need not be provided by an administrative agency, yet, if granted, there must be an opportunity to be heard.

In his remaining chapters,<sup>42</sup> Professor Conway discusses: licensing; administrative discretion; proof in administrative proceedings; bias and prejudice; separation of functions, i.e., investigative and quasi-judicial; who decides the case; and the enforcement of agency orders. In the two hundred pages containing 306 case digests, Paul Conway has done an admirable job. He has furnished us with a practical guide to the most significant aspects of administrative law. His *Outline* will be most useful to law students, students of the law and practitioners as well.

42. CONWAY, *supra* note 1, chs. X-XVI.