

UNDERSTANDING ADMINISTRATIVE LAW

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SIXTH EDITION

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PREFACE

Students react in various ways to the study of administrative law. Some elect the course because they anticipate employment in a federal or state administrative agency; some choose the course merely because it is a subject tested on the bar examination; others have some abstract interest in a course that deals with the manner in which agencies make policy and decide individual cases. Often it is not until a student graduates and begins the practice of law that the pervasiveness of various administrative decision-making models becomes apparent. These models are not limited to the federal government, but may be found at the state and regional level, in municipal governments and even in many private entities such as corporations and educational institutions. For that reason this text includes a certain amount of state-based material. Students who go into a state administrative practice will encounter concepts and terminology nearly identical with federal practice.

Law professors also approach the subject from different angles: some emphasize the administrative system of a single state; others focus exclusively on the federal system; still others explore only one or two specific administrative agencies, in the belief that the administrative *process* can be understood best in the context of a specific agency carrying out a specific assigned mission.

This book will help the reader grasp the fundamental concepts of administrative law regardless of the approach taken by an instructor and regardless of the reader's personal motivation for electing the course. By and large the book concentrates on the *process* of administrative decision-making in contrast to the substantive law of a particular agency. But as a student moves through the course and later enters practice, he or she will find that substance and procedure become more and more intertwined and, in many instances, become almost inextricable. An awareness that there is no bright line between substance and procedure, particularly in an administrative agency context, is especially helpful for a thorough understanding of the subject.

Students should also realize that the practicing bar has serious reservations as to the utility of the typical administrative law course. One prominent Washington, D.C. lawyer commented that if he ever got to the point in handling a case before an administrative agency that he needed to use or refer to anything he had been taught in his administrative law course in law school, he probably would have failed his client.¹ For this reason, this book contains a number of attempts to sensitize law students to the lawyering operations involved in administrative law — *i.e.*, to the manner in which a client's problem moves through a typical agency and the manner in which a lawyer copes with the various problems and issues encountered in representing clients before administrative agencies. The relative informality of the administrative process and the fact that agencies exercise both adjudicative and legislative powers means that an administrative lawyer must often be far more creative and adaptable in dealing with an agency dispute than in handling a piece of civil litigation. Moreover, many agencies are beginning to experiment with alternative dispute resolution techniques so a well-trained lawyer needs to know something about regulatory negotiation, arbitration and mediation.

¹ Comments of Peter Barton Hutt, as quoted in Peter L. Strauss, *Teaching Administrative Law: The Wonder of the Unknown*, 33 J. LEGAL EDUC. 1 (1983).

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In addition, the book contains a significant amount of material on trends in administrative law such as deregulation and regulatory reform. Many governmental entities, including a number of federal agencies, have begun to move away from traditional models for exercising governmental power (the so-called “command and control” regulatory techniques) toward concepts of policymaking and decisional processes that take full advantage of the marketplace as regulator. Students anticipating thirty to forty more years of practice must realize that many areas of practice involving deregulation and regulatory reform are in fact fertile fields for a legal practice. In many cases these trends have enhanced, rather than diminished, the lawyer’s role.

A good deal of the material in this book consists of suggestions on ways to identify administrative problems and ways to organize the reader’s thinking after the problem is identified. The book does not, of course, ignore the statutory and case law basis of administrative law; but often, whether the reader is a student or practitioner, a guide on how to think through a problem is more helpful than a mere paraphrase of a statute or recitation of a case holding. Since one of the assumptions of the author is that most readers will be using this book as an adjunct to a course in administrative law and thus will have access to a casebook, lengthy verbatim quotations from cases are kept to an absolute minimum.

This book should also prove helpful to practitioners who either missed the course in law school or find themselves dealing with topics not covered in their course. In those instances, a practicing lawyer might profitably read at least a bit of the full text of any case discussed.

Hopefully, most readers will concur that there are no insoluble mysteries in administrative law, although as in all areas of law, there are many schools of thought, a large number of differing (and often conflicting) viewpoints and a great deal controversy. But there should not be very much mystery as you dig through the issues and concepts. As the author has often remarked: students are just as bright and capable as teachers, it’s just that a teacher has usually covered the same ground before; and it’s always easier to walk through a maze with someone who has already been there than to attempt the journey on your own.

This book may be used with any of the existing commercially-published casebooks on administrative law. While this Book’s tables of contents and chapter headings may not correspond directly with some of the headings used in the casebooks, there is a generally accepted core of administrative law topics that virtually every casebook covers and for which there is a standard vocabulary. There are two ways for a reader to use this book without reading it from cover to cover. First, if an outline heading in this book corresponds to a similar heading in a casebook (for example, the topic of “delegation”), the reader may move immediately to that topic. If there seems to be no correspondence between this book’s outline headings and those headings used in the casebook, the most efficient mechanism for finding relevant discussion is to match the case in the casebook against the table of cases in this book.

My thinking on administrative law has been shaped by all those who have walked the ground before me. I am especially grateful to the many students at my former academic home, The Catholic University of America, who took my course, who challenged me in class, and who sent me scurrying back to the library and to practice for answers to their questions. My current students at Penn State-Dickinson School of Law keep me busy and engaged with all of their questions, comments and insights. I have been enriched by an

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association with the many lawyers I encounter in Washington practice. I owe a great debt to a number of other people who helped me grow as a lawyer and law professor: Professors Clinton Bamberger, Albert J. Broderick, and Harvey Zuckman, Judge Benigno C. Hernandez, Counselors William T. Simmons, and Theodore Voorhees, Sr. A number of research assistants, now all practicing law, were indispensable. They include: Andrew Palmieri, Scott Squillace, B. Erin Sullivan, and Roman Majtan. My most recent research assistant, Madison Cassels, was enormously helpful in preparing the manuscript for the sixth edition.

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