Administrative Law and Process

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FOURTH EDITION

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To my wife, Carol.

—Alfred Aman

To my wife, Judy, and my children, Lauren and Jake, who supported me over my career, and to the lawyers and clients who helped me to learn how to practice law.

—William Penniman

To Judge Dinsmore and Chief Judge Magnus-Stinson, for whom I had the greatest honor of clerking; my mentors and professors at Indiana University Maurer School of Law; my brilliant co-authors; Trevor and Mallori Waliszewski; and my spouse, Courtney.

—Landyn Wm. Rookard

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Online Materials

In several chapters of this edition of *Administrative Law and Process*, we have included references to an online supplement containing chapter appendices. The online materials can be accessed at caplaw.com/sites/adminlaw4e.

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ALFRED C. AMAN, JR.

NOTE:

We have edited cases liberally to keep the casebook as reasonable in length as possible, while also showcasing the judges' rationale to allow students to see for themselves how jurists at all levels of the judicial system approach administrative law. To that end, however, citations and footnotes are generally omitted without notation. Note numbers within cases are continuous with chapter notes. We encourage instructors and students interested in the cases to peruse the full cases, including those provided in the online supplement.

Introduction

A. Administrative Law

Administrative law provides the broad legal framework that structures and controls the exercise of administrative agency power. It also includes legislative, executive, and judicial oversight of agency discretion. It thus connects the implementation of governmental authority to procedural and constitutional principles. In so doing, it facilitates agency actions while also regulating the regulators to ensure that they act within legal boundaries set by the Constitution, applicable statutes, and their own regulations.

Administrative agencies consist of almost any governmental body that exercises regulatory power over individuals or entities, dispenses benefits to individuals or entities according to their legal entitlements, and otherwise implements laws enacted by lawmakers. *Lawmakers* include not only members of Congress and state assemblies, but also local zoning boards, state welfare agencies, federal cabinet level agencies (such as the Department of Labor), free-standing executive agencies (such as the Environmental Protection Agency), and multimember independent commissions (such as the Federal Communications Commission and the Federal Energy Regulatory Commission). The power that administrative agencies exercise is derived from the Constitution and federal, state, or municipal legislation. This book will focus primarily on the powers and actions of federal agencies, but will do so in a manner that is applicable, in principle at least, to state and local agencies as well.

Administrative law is distinct from other areas of law. Not only do agency statutes, structures, and responsibilities vary widely, but agencies are expected to develop and utilize subject-matter expertise in order to best achieve both broad and specific statutory objectives. Legislators and judges are generalists with limited time and expertise; however, industries and subjects have unique technological and business characteristics, risks, and potential public impacts, all of which need to be understood in order to implement regulation effectively. By creating expert agencies, legislatures can balance general principles and specific needs—the basis for intelligent laws that establish standards, policies and administrative structures, while empowering administrators to define and adjust regulatory details, based on evolving facts and knowledge, in order to implement those statutory policies. Because an agency's actions will often affect the public at large or entire industries, the processes for gathering and evaluating evidence and for making decisions follow

administrative rules and norms. These administrative processes often differ from the judiciary's litigation model.

The delegation to expert agencies of responsibility for implementing and, in many cases, filling out details of broadly worded statutory provisions, presents one of the key issues for congressional and judicial review. Neither a traditional majoritarian legislative body nor the judiciary is designed to act with the flexibility and expertise that is required to respond to rapid advancement in science, sudden shifts in market behavior, or public health crises, to name just a few examples. At the same time, both the legislature and the courts must oversee the actions of administrative agencies to ensure that their actions remain within the boundaries of their authorizations, both procedurally and substantively. Legislators can correct erroneous actions by oversight and, if necessary, by amending or repealing applicable laws.

Lacking both technical expertise and law-making responsibilities, judges face a different situation. The central challenges in judicial review are how to review an agency's actions in light of applicable statutes, the agency's record and explanations for its actions, and how much deference to pay to those judgments. Notwithstanding a judge's personal opinions, it is the agency to which the legislature delegated the decisional authority. Deference is due to the agency provided that its actions are authorized by law, *i.e.*, provided that its actions advance statutory goals consistent with the terms of applicable statutes and the facts available to it, and provided that the agency follows proper procedures and reasoned decision making in reaching its decisions. As we shall see, judicial approaches to review and deference have changed and fluctuated over time in response to such factors as technological change and shifts in social norms, including norms of executive power. Administrative agencies are part of the executive branch and that branch may seek to influence their policies through executive orders, the appointments process or less formal ways of furthering an administration's policies and goals.

In a country with a large population and complex economic and social relationships, administration of national and state laws is a complicated undertaking. In practice, the agencies rely heavily on their professional staff to provide the expertise upon which their policies and decisions are made. Herein lies one of the most important differences between administrative law and traditional judicial litigation, important in both theory and practice. Administrative decisions are the product of multi-faceted agencies—bureaucracies. In civil or criminal litigation, both the record and the decision makers are clearly identified and visible to the litigants. Although some administrative adjudications are conducted before an administrative law judge ("ALJ"), as we study in Chapter 3, and therefore closely resemble judicial litigation, others are far more complex. Agency decisions are often the products of teams of individuals who provide data, analysis, drafting, and policy and legal recommendations to the administrator or commission. The staff contributing to the decision will usually be divided into offices based upon substantive responsibilities (*e.g.*, legal, industry, technology, environmental, economic, and enforcement), which may in turn be divided into areas of expertise (addressing distinct environmental

issues, such as water, air, land, species, mitigation technology, etc.). To those levels of bureaucracy, one must add the personal advisory staff to the administrator or the commissioners who bear ultimate responsibility for an agency's decisions. In addition, an agency may have a trial staff, an investigatory staff, its own solicitor's office (to handle judicial review proceedings), a secretary's office to process and maintain records, and a public relations office. If the agency is headed by a commission, the chair will be particularly important in setting priorities and overseeing the staff.

But what happens when agencies lack some of these important pieces? For example, imagine the Environmental Protection Agency with no biology experts or with a depleted enforcement staff. Or suppose instead that these agencies were nominally staffed, but rather than carrying out their statutory mandate, the staffers were forced to reverse positions supported by science and research and instead defend theories or policies supported mainly by campaign promises. Statutes themselves may drift away from solid foundations in research-based evidence as lawmakers find themselves navigating strong political currents. Over the course of a career in administrative law, you may encounter agencies which are running at less than full capacity or whose new leadership is determined to shift the agency's direction, possibly counter to statutory policies with which it disagrees. Judicial review can be made more complex and more important by such circumstances.

B. Organization of This Book

This section provides a brief overview of the book that will also be useful as guidance to the rest of this chapter.

Part One (Chapters 1 to 4) reviews how agencies operate, how they obtain and process information important to their decisions, and how they implement statutory policies in light of relevant factual and policy considerations.

As laid out in Part One of this book, administrative agencies exercise their powers in a variety of ways. They may issue orders, rules, interpretations, policies, rulings, exceptions, and licenses to name but a few. For example, agencies may do this in the context of adjudicating disputes arising from the application of their regulatory powers to those within their jurisdiction; those adjudications may be formal pursuant to the Administrative Procedures Act (APA) or informal, pursuant to the APA, the agency's enabling statute, or other statutes that may apply. Adjudications must also accord with the Due Process Clause of the U.S. Constitution. Agencies may also, for example, make rules and create policies to carry out their statutory goals. Those rules may be made pursuant to rulemaking proceedings open to the public in general or they might be the result of guidance documents and interpretations of agency statutes or regulations already in place and subject, at that point, to less public involvement. We shall examine rulemaking and its many exceptions in Chapter 4, *infra*. In short, an important first question for us is whether the agency in question exercised its power legally. When we look at how an agency operates within its own

walls, what is procedurally required for that agency to exercise its power in a legitimate way? How much public participation is allowed or required so as to protect the interests of those most directly affected by agency decisions?

Part Two of this book (Chapters 5 to 8) looks to structural and constitutional issues, including the sources of agency powers and how agencies are subject to outside review and influence by the legislative, executive, and judicial branches of government. It examines the means by which legislative, executive, and judicial powers are exercised over and through administrative agencies. The principles underlying federal administrative law are fundamental to the structure of federal government in the United States, particularly regarding the separation of powers and the relative authority of the three branches of government vis-a-vis each other. Those principles have generated extensive debate, since administrative agencies by definition involve intersecting grants of authority (*e.g.*, as executive agencies governed by Congressional statute) and, inevitably, those intersections yield gray zones when it comes to constitutional coverage. Moreover, the role of these branches of government vis-à-vis federal administrative agencies has changed over time, as has the nature of agency regulation. The second half of this book thus looks outside the walls of the agency as it examines legislative, executive, and judicial powers over these entities.

While questions of legal theory and application are addressed throughout this book, Part Three (Chapter 9) focuses directly on how lawyers actually practice administrative law.[1] Agencies often have flexibility to revise their interpretations of laws and their manner of implementing them in order to better achieve a statute's objectives in light of new facts, understandings, and forecasts of how policies will function in the future. The variety of fields subject to regulation presents a wide array of opportunities to join policy analysis with more traditional skills of legal practice. With that in mind, Part Three offers insights and practical exercises designed to give students a feel for how lawyers approach regulatory and judicial review proceedings. In some instances, it highlights the different vantage points of serving as a lawyer for the agency or one for a private client. Whether or not particular exercises are assigned, you will benefit from reviewing relevant portions of Part Three as you are reviewing the underlying doctrinal issues found in Parts One and Two. The combination can help you to better understand how administrative law plays out in practice. As explained in Part Three, some of the materials relevant to the exercises in this section are compiled in an online supplement. There also are online supplements for some of the chapters in Parts I and II as well.

1. An earlier version of the problems and exercises in Part 3, Chapter 9, appeared in *Administrative Law: Skills and Values* (Lexis Nexis 2012). Carolina Academic Press acquired the rights to both this Administrative Law casebook and the Skills and Values book in 2015.

C. Facing Forward by Looking Back

The first two editions of this book followed the change and controversies arising from the deregulatory and anti-regulatory trends of the 1970s and 1980s, and the neoliberalism of the 1990s and 21st century. Those debates continue. The third edition reflected the then-emerging trend towards privatization and marketization of governmental services. That trend is now well established, and public/private partnerships, outsourcing, and various forms of deregulation are now pervasive. A purely state-centric approach to administrative law is insufficient, as administrative law today must mediate public and private power in novel ways, the implications of which can be far reaching, debilitating democracy and increasing transparency deficits. These new arrangements of power and authority across the lines between government and the private sector are reflected throughout this edition, particularly in Chapter 5, §§ 5.07 through 5.08.

You will notice that many of the cases we use have been precedents and guideposts in administrative law for many, many years. This is deliberate, as there is a method in such turning to the past. Most of these cases remain good law, and we think it especially important to show how they apply today. But they also show how law has evolved — sometimes changing dramatically. Progress is not at all inevitable, but change is. Looking to the past as we move toward the future teaches us how change can and does occur through the professional work of legislators, administrators, staffers, advocates and other actors. It also brings us into contact with approaches and doctrines that may no longer be prominent but remain available, sometimes just below the surface, ready to reemerge in new contexts. For example, the rights/privileges distinction we analyze in Chapter 2 is one of those doctrines that has a way of reinventing itself — and not always in a manner that advances the public interest. If one qualifies for a welfare payment today, can it be taken away by imposing a work requirement that may not be possible to meet? At what point does the right to a benefits payment turn into a "mere privilege"? Lawyers are like archeologists in that they often must dig down several layers of historical case law to find parallels in old arguments, available for reuse in new doctrinal debates.

There is another way we can learn from older cases that came into being at different moments in history. At least since the mid and late 1970s, administrative law and regulation in general have taken a distinct turn toward cost-benefit analysis. Efficiency has emerged as an important norm, sometimes to the extent that it seems to outweigh all other considerations — especially those that do not lend themselves to quantifiable analysis. The need for certainty and the appearance of objectivity, even in areas fraught with judgment and discretionary choices, can render some judgments almost too personal when compared with a desire for hard-nosed cost data and objective metrics. In Chapter 2, for example, there is quite a change in the reasoning and language of due process as expressed first in *Goldberg v. Kelly* and later in the landmark case of *Matthews v. Eldridge*. Both cases involve benefits payments to individuals in need — "brutal need" in the case of welfare recipients

and more varied financial circumstances in the case of disability benefits. *Goldberg* talks about how procedure can provide individuals with dignity. *Matthews* dwells more on procedural efficiency, especially where issues of mass justice are involved. Read together, the cases allow us to see values, choices, and trade-offs that would not otherwise be visible. We think it is important both to realize that decisions can always have been otherwise and to ask what might have been left behind that remains doctrinally available for future use—a kernel of a dignity argument, in this example, remaining alive within an efficiency argument. Indeed, it is important to realize that administrative law is not just about the administration of technical details, it often involves fundamental conflicts of value and fundamentally different understandings of legitimate governmental power. Administrative law, for better or for worse, serves as a battleground for these considerations.

D. Administrative Law Values

Administrative law is a dynamic field of law. It has long functioned as the canary in the coal mine in relation to democratic and social values. Democracy is not limited to electoral voting alone. Participation, transparency, and access to information at the agency level all greatly enhance the accountability of agencies and government generally. Administrative procedures facilitate both the citizen participation and flows of information necessary for this effectively to occur. They are also designed to keep bureaucrats within legal boundaries as established by lawmakers. Still another fundamental value of administrative law is fairness—in terms of how these processes operate in individual cases as well as the outcomes they help deliver.

These procedures are not just for solving technical problems. They provide the means and the forum for important disputes to be resolved in a way that involves multiple forms of expertise—including ethical judgment. Recent examples include the cumulative health risks and risk of death to children exposed to air pollution in American cities, and, along the southwestern border, in migrant detention camps with inadequate medical attention. In such cases, the procedures used to resolve policy disputes involve conflicts over fundamental values concerning justice and the common good. Acknowledging such conflicts and providing for informed deliberation are commitments of administrative law that are central to democratic life.

In U.S. democratic traditions, accountability flows from the state-centric nature of administrative law and agencies as well as from constitutional law. The Constitution and critical "quasi-constitutional" legislation, such as the Administrative Procedures Act, are written to apply to state actors and government agencies. But—looking forward—as policy decisions increasingly inivolve the private sector, this may not be enough.

There has been a dramatic expansion of the role of private actors in carrying out governmental functions, largely through deregulation, outsourcing, and marketized approaches to regulation. Business norms and market values have become

central even to non-economic institutions such as welfare, prisons, and safety net regulation generally. Many administrative agencies now regularly form contracts with private parties, specifying terms at the outset, and maintaining a certain degree of supervisory authority. We shall explore these and related issues in Chapter 5, § 5.08(A)-(E).

Another aspect of modern administrative law is its increasingly transnational character. Not only is the substance of regulation affected by activities in other countries, but the private actors involved are increasingly transnational too. This affects both public/private partnerships and the constitutional posture of agencies. Many of the private providers contracted to perform administrative agency functions, such as the construction and management of prisons or the administration of welfare, are transnational corporations. The expansion of the transnational sector in relation to government effectively makes transnationalism an integral part of domestic administrative law, even as the legal structures have often been slow to acknowledge and adapt to the unique challenges of transnationalism. The economic interests of these entities may drive their desire for uniform market approaches in the various jurisdictions in which they operate globally. There is an international aspect to administrative law as well, especially when the executive and often the legislative branches of government choose to pool their powers at the international level in the form of a treaty, such as that which binds the U.S. to the World Trade Organization (WTO), the Montreal Protocol, or the Paris Accords on climate change. When we look at what the transnational and the international levels of regulation involve, we see, in effect, two delegations of power: a horizontal delegation of governmental power to the private sector, and a vertical delegation of power to what has been called the "international branch" of government in the form of binding treaties. These delegations and the administrative law issues they trigger are discussed in Chapter 5, § 5.09.

Several fundamental premises of administrative law are showing signs of tension, and our discussion of practical problems of application underscore the possibilities for extending, and perhaps reimagining, aspects of administrative law particularly where the public interest is vested in private providers and international organizations. The stakes are especially clear in several key areas where traditional premises are challenged by modern circumstances, *e.g.*: (1) the state-centric nature of administrative law, as if there were always a bright line distinguishing public and private power—that is, as if states and markets were two separate structures; (2) the long-standing assumption that that there is a bright line between transnational law and domestic law, neglecting the extent to which domestic administrative law is increasingly the domestic face of globalization; and (3) the assumption that cost-benefit analysis is universally applicable.

This book develops approaches to these problems in a way that highlights the fundamental values of administrative law, though they now may need new structures and rationales to thrive. These changes in perspective also enable us to focus on the practical aspects of such change and, specifically, on the people on the ground who

are directly affected by agency action or inaction. To that end, we offer a hands-on approach for preparing students for the practice of administrative law. By taking such a ground-up, practice-oriented approach, we demonstrate that practice and theory are two sides of the same coin.

E. Context and the Limits of Binary Thinking

In addition to considering the underlying theoretical bases of the administrative processes we discuss, we must also consider the context in which these processes occur. Context can mean many things, from the substance of the statutes being administered and the values and goals those laws embody to the overall political economy in which these statutes are administered. In determining the kinds of procedures appropriate to the substance of the regulation involved, consider the words of the artist Ben Shahn, in The Shape of Content 62 (Harvard Univ. Press 1957). To what extent do form and content in art correspond to procedure and substance in law?

> I would not ordinarily undertake a discussion of form in art, nor would I undertake a discussion of content. To me, they are inseparable. Form is formulation — the turning of content into a material entity, rendering a content accessible to others, giving it permanence, willing it to the race. . . .
>
> It is the visible shape of all man's growth; it is the living picture of his tribe at its most primitive, and of his civilization at its most sophisticated state. Form is the many faces of the legend — bardic, epic, sculptural, musical, pictorial, architectural; it is the infinite images of religion; it is the expression and the remnant of self. Form is the very shape of content.

Form and content, procedure and substance go hand in hand. Similarly, the means and ends of regulation are often indistinguishable from each other. The regulatory means by which substantive statutory goals are carried out have much to do with what those goals are and how successfully they are achieved. For example, some regulatory approaches may try to directly specify how a company should ensure a safe working place or a clean environment. Other regulatory approaches, however, may try to rely on market forces to provide incentives for the kinds of behavior regulators seek to encourage. The choice of regulatory means often affects not only how well the regulatory ends are achieved, but what these regulatory ends will be. In some contexts, it is important to ask when the market can function effectively as a regulatory tool or when the use of market means is, in fact, an attempt to alter the regulatory ends of the statute involved.

Perhaps among the most significant factors affecting not only the substance of regulation, but also the way we view the entire enterprise, are the changes that have occurred and continue to occur in the overall global context in which domestic regulation now takes place. We are now in a new era of our regulatory history, a global era. In this era, we are witnessing not only the globalization of politics and markets,

but law as well. Changes in the political economy at the global level can encourage profound contextual changes at the domestic level. How should we view agency deregulation from the 1980s and 1990s? Does the substitution of market approaches for regulation signify a return to a red light conception of administrative law, or does it simply reflect the use of a new, more efficient regulatory means in an effort to achieve long-standing regulatory goals in a more global context? Can the market be used as a regulatory tool? Does it allow us to do more with less when it comes to regulation in times of budgetary crises, or do these new regulatory means introduce new regulatory ends as well? Consider the following:

> Global competition drives deregulatory forces more vigorously than regional or national markets can. It places the costs of domestic regulation in stark relief, whether or not new competition-encouraging technologies are involved or true market failure, in fact, persists. A global perspective on domestic regulation encourages a more cost conscious regulatory perspective and often reinforces the increasingly global, market oriented perspective of the regulated. Moreover, whether a regulation deals primarily with economic conflicts of interest rather than fundamental conflicts of value is of less importance when a global perspective is involved. The inability of regulators to impose regulation on producers worldwide emphasizes the domestic impact of regulatory costs. . . .
>
> Global competition creates pressure for a least common denominator regulatory approach. Such pressure is similar to the political forces that affected state and local regulation before the regulatory nationalism of the New Deal. National regulation came about, in part, because certain problems were beyond the jurisdiction of individual states. In addition, states often had significant incentives to avoid regulation that would increase manufacturing costs and put local industry at a competitive disadvantage. Moreover, it was perhaps easier for opponents to block regulatory attempts at the state or local level than at the national level. Global pressures favoring a more economical, cost-conscious form of regulation need not necessarily translate into a return to laissez faire, but they can encourage an identification of deregulation with "the public interest."

Alfred C. Aman, Jr., Administrative Law in a Global Era, 78-79 (Cornell University Press 1992).

As we proceed with this course and examine various kinds of regulation, including deregulation and privatization and especially the procedures used to achieve these ends, it is important to ask what role market approaches are now playing. For an analysis of some of those issues, see Alfred C. Aman, Jr., *Politics, Policy and Outsourcing in the United States: The Role of Administrative Law, in* Administrative Law in a Changing State 205, 207–08, 218 (Linda Pearson, Carol Harlow & Michael Taggart eds., Hart Publishing 2008).