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Administrative Law

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Richard J. Pierce, Jr.

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ADMINISTRATIVE LAW

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PREFACE

This book is written primarily to help law students understand the basics of federal administrative law. It emphasizes the powers of agencies, the ways in which they exercise those powers, the procedures they use to take actions of various types, and the relationships between agencies and the three branches of government-executive, legislative, and judicial. It does not discuss state or local administrative law. The legal systems and doctrines applicable to state and local agencies are too vast and variable to be susceptible to a treatment that is both accurate and concise.

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TABLE OF CONTENTS

Chapter One

Introductory Overview

Administrative law is the study of the roles of government agencies in the U.S. legal system, including the relationships between agencies and the other institutions of government—Congress, the Judiciary, and the President. Administrative law is important at every level of government—national, state, and local. With one exception, however, this book will discuss only federal administrative law. The exception is the discussion of due process in Chapter 3. Since the Due Process Clause of the U.S. Constitution applies to actions taken by agencies at all levels of government, the discussion of the influence of due process on agency decision-making procedures in Chapter 3 applies equally to agencies at every level of government. The discussion of administrative law in the rest of the book applies directly only to federal agencies. Knowledge of federal administrative law can be helpful to an understanding of state and local administrative law because state and local government institutions often borrow rules and doctrines from federal administrative law. There is so much variation among state and local administrative law systems, however, that it is dangerous to assume that a doctrine that is well entrenched in one jurisdiction exists in a similar form in another jurisdiction.

Congress has created hundreds of agencies over the two hundred and twenty years since the nation was founded. Some agencies have only limited powers. Thus, for instance, the powers of the Civil Rights Commission are limited to investigation, reporting, and publicizing. In some periods of time, the Civil Rights Commission has had a powerful influence on public opinion by investigating and exposing systematic racial discrimination, but it has never had the power to create or to change legal rights or to adjudicate disputes involving the rights of individuals.

In most contexts, however, when Congress creates an agency, it gives the agency a wide array of powers in its assigned area of responsibility, including the power to issue rules that have the same legally-binding effect as statutes and the power to issue final decisions in adjudicatory disputes that have effects indistinguishable from the effects of judicial decisions. In each of those cases, Congress concluded that an agency staffed by people with expertise in some specialized field would be able to do a better job than Congress in issuing rules of conduct in the agency's area of exper-

tise and that the agency also would be able to do a better job than generalist judges in adjudicating disputes in its area of expertise. Some agencies, like the Federal Communications Commission (FCC) and the Environmental Protection Agency (EPA), have missions that are primarily regulatory in nature. Others, like the Social Security Administration (SSA) and the Center for Medicare and Medicaid Services (CMS), are primarily involved in implementation of benefit programs.

Most agencies perform myriad functions, including investigating, enforcing, reporting, record-keeping, and publicizing. The two most important agency functions are adjudicating and rulemaking. Agencies dominate both fields. Agencies adjudicate far more disputes involving the rights of individuals than all of the courts combined. Agencies also issue far more legally-binding general rules of conduct than Congress. Both of those functions have long taken place under a cloud of constitutional doubt, however.

The Supreme Court interprets Article I of the Constitution to confer on Congress the non-delegable power to make policy decisions that have legally-binding effects. From time-to-time, the Court has suggested that it might apply this non-delegation doctrine as the basis to hold unconstitutional a high proportion of the statutes that delegate rulemaking power to agencies. So far, however, the Court has only applied the non-delegation doctrine as the basis to hold invalid one extreme statute in 1935.

The Supreme Court also interprets Article III and the Seventh Amendment in ways that threaten the continued viability of much of the adjudicatory power of agencies. The Court sometimes interprets Article III to prohibit any institution except a court from adjudicating any dispute that involves what the Court calls "private rights," and the Court interprets the Seventh Amendment to prohibit any institution except a jury from resolving a factual dispute that arises in any controversy that was potentially the subject of a common law action in 1789. Taken to their logical extremes, those constitutional law doctrines have the potential to support holdings that a high proportion of the adjudicatory power now exercised by agencies is unconstitutional. So far, however, the Court has used those doctrines to invalidate only one adjudicatory system that was implemented by an institution other than an Article III court and/or a jury.

The history of the constitutional challenges to the rulemaking and adjudicatory powers of agencies is discussed in detail in Chapter 2. For now, it is sufficient to note that the challenges have been largely unsuccessful. There are three reasons to expect that they

will continue to be largely unsuccessful. First, agency rulemaking and adjudication have long pedigrees. In 1789, the first Congress created the first agencies with the power to issue legally binding rules and the power to issue legally binding decisions in adjudicatory disputes. Second, agencies staffed by individuals with specialized expertise in their areas of responsibility and free to use relatively informal decision-making procedures are far better equipped than either overburdened legislative bodies or generalist judges to address problems that arise in implementing most regulatory or benefit programs. Third, it would simply be impossible for government to continue to perform the myriad functions it performs today without agencies that have the power to issue rules and to resolve adjudicatory disputes in their areas of expertise and statutory responsibility.

The Administrative Procedure Act[1] (APA) is to administrative law what the Constitution is to constitutional law. Congress enacted the APA in 1946, after over a decade of sharp debate,[2] in an effort to achieve uniformity with respect to agency decision-making procedures and the standards courts apply in reviewing agency actions. The APA has increased the degree of uniformity among agencies in both respects, but considerable variation still exists among agencies for two reasons.

First, some of the most important procedures required by the APA apply to an agency action only when the statute that authorizes the agency to take the action requires the agency to act "on the record after opportunity for agency hearing." Most agency-administered statutes do not include that requirement. Thus, an agency that is acting under a statute with an "on the record" requirement must use elaborate decision-making procedures—referred to as formal adjudication and formal rulemaking—while an agency that is acting under a statute that does not include those words need not use such elaborate formal procedures. Most agencies that conduct adjudicatory proceedings act under statutes that do not have an "on the record" requirement. Such an agency is free to use a procedure called informal adjudication. The APA requires an agency to provide few procedural safeguards when it engages in informal adjudication, so agencies adopt a wide variety of decision-making procedures that are tailored to the perceived needs of the type of adjudicatory disputes at issue. Second, Congress often adds mandatory procedures to the procedures required by the APA when

1. 5 U.S.C. §§ 551–706.

2. For an excellent discussion of the debates that led to passage of APA, see George Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557 (1996).

Congress authorizes an agency to take specific types of actions to implement specific agency-administered statutes. Thus, for instance, the APA requires an agency to use a simple three-step procedure when it issues a rule using the process referred to as informal rulemaking, but Congress has added several mandatory additional procedures when EPA issues a rule to implement the Clean Air Act. The differences between formal and informal adjudication are discussed in detail in chapter 3. The differences between formal and informal rulemaking are discussed in detail in chapter 4.

A lawyer who is called upon to answer an administrative law question should begin by reading the relevant provisions of the APA. The lawyer's task can not end with that step, however, for two reasons. First, some APA provisions apply to a class of agency actions only if the statute that authorizes the agency to act contains specific language, e.g., the "on the record" phrase discussed above, and some agency-administered statutes add to or modify the APA requirements otherwise applicable to a class of agency actions. Thus, the lawyer must read the statute that authorizes the agency action at issue simultaneously with the APA to understand the ways in which the statutes interact. Second, many APA provisions can bear several meanings, so the lawyer must read the opinions in the cases in which courts have interpreted each APA provision that appears to be relevant to the question.

When statutes do not provide clear answers to administrative law questions, courts often use an analogical reasoning process as an aid to decision-making. Thus, for instance, a court that is asked to determine what procedures an agency is required to use in a class of disputes or whether a relationship between an agency and another institution of government is permissible may characterize the class of agency actions at issue as "quasi judicial." The court will then refer to the procedures used by courts and the law governing the permissible relationships between courts, Congress, and the President to aid the court in its effort to identify the procedures the agency is required to use or the permissible relationships between the agency, Congress, and the President. Alternatively, a court might characterize a class of agency proceedings as "quasi-legislative," and then refer to the procedures Congress uses to enact a statute or the law governing the permissible relationships between Congress, the President, and the courts to assist the court in answering analogous questions about the procedures the agency must use or the permissibility of some relationship between the agency and another institution of government.

Courts use the analogical reasoning process with some frequency, and it is potentially useful for some purposes, but it also can lead a court astray. The analogy is never perfect. Agencies differ from both courts and legislative bodies in important ways even when they perform functions that are similar to those performed by courts or legislatures. In addition, the judicial and legislative functions are not the only potential sources of paradigms a court might use as an aid in deciding whether an agency decision-making process or an agency relationship with another government institution is acceptable. Over the last few decades, courts have begun to recognize that agencies are bureaucracies, and that there is a rich literature on bureaucracy that often can be valuable to a court in deciding whether an agency practice is permissible. As discussed in chapter 3, the norms and goals of bureaucratic decision-making differ in important ways from the norms and goals of judicial decision-making. Modern courts often borrow from the literature on bureaucratic justice, rather than the judicial model of justice, when they are called upon to decide whether an agency practice, procedure, or relationship with another institution of government is permissible.

When I describe the relationships between agencies and other government institutions, I often begin with a chart in which I place the three constitutionally-recognized branches of government—the President, the Congress, and the Courts—parallel to each other at the top, and then place agencies below the three branches, with a dotted line connecting each of the three branches with the agencies below them. The hierarchical relationship depicted on the chart reflects the fact that agencies are subservient to each of the three constitutionally-recognized branches. The dotted lines reflect the uncertain and variable relationships between agencies and the President, Congress, and the courts. The relationships are uncertain because the courts have not yet definitively resolved many of the questions concerning the constitutionally-permissible relationships between agencies and the three branches of government. The relationships are variable for two reasons. First, an institution may choose to create, or not to create, a particular relationship between it and an agency when the relationship is constitutionally permissible. Thus, for instance, it has always been permissible for the President to authorize an institution within the Executive Office of the President to review agency rules before they are issued in a final form, but no President created such a relationship until 1981. Second, some types of relationships are permissible in some contexts and not in others. Thus, for instance, the President can take an active role in attempting to persuade an agency to issue a rule

that is consistent with the President's policy preferences, but an attempt by a President to influence an agency decision in an adjudication would be inconsistent with Due Process in many circumstances.

Courts can rely on three sources of authority as their bases to require an agency to use a particular decision-making procedure—the Constitution, statutes, and the agency's own rules. (Of course, an agency can choose its own procedural rules within boundaries established by statutes and the Constitution, so an agency is bound by its own rules of procedure only until it chooses to amend those rules.) At one time, some courts believed that they also could rely on their inherent common law powers to justify a judicial decision that requires an agency to use procedures that the court considers necessary or desirable. In a landmark unanimous 1978 opinion, however, the Supreme Court held that a court cannot require an agency to use a procedure that is not required by the Constitution, a statute or an agency rule.[3] The Supreme Court made it clear that an agency has discretion to choose the procedures it wishes to use for various purposes as long as the agency remains within the sometimes broad range of procedural options made permissible by the Constitution and applicable statutes. That 1978 judicial decision was part of a general trend in the late 1970s and 1980s in which the Supreme Court instructed the lower courts to confer deference on many agency decisions.

3. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

Chapter Two

Delegation of Power to Agencies

Most agencies have many powers, including the power to investigate, to prosecute, to require record-keeping and reporting, and to publicize. The most important agency powers, however, are the power to adjudicate disputes involving the rights of individuals and the power to issue legally-binding rules of conduct. Both of those agency powers have long existed under a cloud of constitutional doubt.

A. Constitutional Limits on the Power to Delegate Policymaking

Article I of the Constitution provides that "[a]ll legislative powers shall be vested in a Congress of the United States." For almost 200 years, the Court has interpreted that provision to prohibit Congress from delegating its legislative power and has equated legislative power with policymaking.[1] Thus, the non-delegation doctrine purports to prohibit Congress from delegating to agencies the power to make legally-binding policy decisions. The doctrine fits awkwardly in a legal system in which agencies make far more legally-binding policy decisions than Congress.

The non-delegation doctrine does not follow inevitably from the language of Article I. By its terms, the Constitution neither equates legislative power with policymaking nor prohibits Congress from delegating legislative power. Moreover, the first Congress enacted two statutes that delegated the power to make legally-binding policy decisions to other branches of government.[2] It seems unlikely that a Congress dominated by Framers of the Constitution would immediately act in a manner inconsistent with the Constitution. No Justice questioned the validity of the non-delegation doctrine until 2001, however, and a majority of the Court continues to reaffirm the doctrine.

The Court's application of the non-delegation doctrine has never coincided with its description of the doctrine. The Court has applied the doctrine to invalidate only one statute, and it has upheld many statutes that delegate to agencies the power to make

1. Brig Aurora, 11 U.S. 382 (1813); Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

2. I Stat. 83 (1789); I Stat. 137 (1789).

legally-binding policy decisions. Shortly after the Court announced the non-delegation doctrine, it rejected constitutional challenges to statutes that appeared to violate the doctrine by describing the statutes as merely authorizing an agency to find the existence of a factual contingency that triggered application of a policy previously announced by Congress.[3] When that reasoning was no longer sufficient to allow the Court to uphold some statutes, the Court began to uphold statutes on the basis that Congress had made the important policy decisions and had authorized an agency only to "fill up the details."[4] When that reasoning was no longer sufficient to allow the Court to uphold some statutes, the Court began to uphold statutes that delegated policymaking power to an agency if the statute contained an "intelligible principle" that could limit an agency's policymaking discretion.[5] The Court has used that formulation of the non-delegation doctrine as the basis to uphold the validity of statutes that delegate policymaking power to agencies limited only by statutory standards that are devoid of substantive content, like "just and reasonable" and "public convenience and necessity."[6]

The one statute that the Court invalidated through application of the non-delegation doctrine was the National Industrial Recovery Act (NIRA). The Court issued two opinions in 1935 in which it held the critical provisions of NIRA unconstitutional.[7] NIRA was an extraordinary statute in which Congress delegated the power to determine the permissible output and pricing of virtually all goods to Boards that consisted of private parties who were major participants in the markets they were authorized to regulate. Many scholars and at least three Justices have since explained the Court's opinions that invalidated NIRA as based not on the principle that Congress cannot delegate policymaking power to a government agency but on the quite different principle that Congress cannot delegate broad regulatory power to private market participants with clear conflicts of interest.[8]

For decades after the Court held NIRA unconstitutional, the Court refused to apply the non-delegation doctrine to invalidate numerous statutes that delegated power as broadly as NIRA, and

3. Brig Aurora, 11 U.S. 382 (1813).

4. United States v. Grimaud, 220 U.S. 506, 517 (1911).

5. J.W. Hampton v. United States, 276 U.S. 394, 409 (1928).

6. E.g., Intermountain Rate Cases, 234 U.S. 476 (1914); St. Louis I.M. & S.R. Co. v. Taylor, 210 U.S. 281 (1908).

7. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

8. Clinton v. New York, 524 U.S. 417, 485 (1998) (Breyer, J., dissenting on behalf of three Justices).