

Administrative Law

Fifth Edition

William F. Funk

Richard H. Seamon

The Government of the United States

The Constitution

Legislative Branch Executive Branch Judicial Branch

The Department of Agriculture

The Department of Commerce

The Department of Defense

The Department of Education

The Department of Energy

The Department of Health and Human Services

The Department of Housing and Urban Development

The Department of Interior

The Department of Justice

The Department of Labor

The Department of State

The Department of Transportation

The Department of the Treasury

The Department of Veterans Affairs



Wolters Kluwer

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For our wives and best friends, for putting up with us while we write,

Renate Funk

Holly V. Dawkins

— W.F.F. & R.H.S.

Preface to Fifth Edition

If you are like us when we were law students, you enrolled in a course on administrative law without knowing exactly what the course would be about or understanding what an *administrative agency* is. The mysteriousness is understandable. Administrative law is like the air we breathe: invisible yet pervasive. Administrative agencies affect so many areas of our lives that we take them for granted. They are part of the atmosphere of modern life, and, like the physical atmosphere, they are necessary (at least in some form) to sustain modern life, but they get little attention from most people. Nonetheless, law students need to learn about them because most lawyers must deal with them.

The near-invisibility and pervasiveness of administrative agencies make administrative law an exciting and challenging subject to learn. Just as students of science learn that the air is made up of many different elements that serve various life-sustaining functions, students of administrative law learn that “the bureaucracy” is made up of many different administrative agencies that serve various governmental functions. Nonetheless, just as all types of physical matter are subject to laws of science (such as the law of gravity), administrative agencies are governed by principles of administrative law. Unfortunately, just as seemingly simple laws of science have hidden complexities, seemingly straightforward principles of administrative law can be difficult to apply in particular situations.

Indeed, administrative law is an especially challenging subject because you must learn both the similarities, as well as differences, in the way government agencies operate. All agencies, for example, must obey the U.S. Constitution, as well as the statutes that create them. The Constitution stays the same, of course, regardless of the agency, but the statute that creates one agency will differ from the statute that creates another agency. In a course on administrative law, you will learn legal principles that are broadly applicable to many or most government agencies. To do so, however, you will study material, including judicial opinions, statutes, and regulations that deal with particular agencies. It can be difficult—but it is critically important—to distinguish the broadly applicable principles from the principles that just apply to a particular agency. For that reason, in a course on administrative law, even more so than in other law school courses, you must be able to see the forest as well as the trees.

This book will help you do that. In the 14 years since the first edition, thousands of law students have used this book. The need for a fifth edition is

Preface to Fifth Edition

a result of student demand. The first two chapters give you a lay of the land by providing an overview of (1) what the subject of administrative law is all about, (2) what administrative agencies are, and (3) how they fit into the government structure. Later chapters go into detail about the two major activities in which administrative agencies engage: rulemaking and adjudication. Following the chapters on rulemaking and adjudication are two chapters that will give you a detailed and carefully organized picture of a subject that is near and dear to the hearts of administrative law professors: judicial review of agency action. Finally, we discuss two additional agency activities that are covered in some courses on administrative law: information gathering and information disclosure. We have organized the book as a whole, as well as each chapter, to supply you with a detailed map of the administrative law terrain that should be useful in virtually every administrative law course that uses one of the national casebooks.

In addition to helping you see the big picture, this book is designed to help you understand the details. In every chapter, we discuss each topic in enough depth to facilitate a sophisticated understanding of the topic. These discussions include descriptions of all of the major, relevant decisions of the U.S. Supreme Court (through June 2015), as well as descriptions of the major doctrinal approaches taken by lower federal courts. Our discussion of each topic is followed by examples that enable you to test your understanding of the topic, and by explanations of the examples that, we hope, will deepen your understanding of the topic. Many of these examples are based on actual cases that have been decided by federal courts. This format will bring the sometimes abstract principles of administrative law down to earth.

You can use this book either to prepare for class or to prepare for exams, or for both purposes. The chapters are self-contained, and each chapter is carefully organized to enable you to quickly and easily to locate the topics that you cover in your course. Thus, you do not need to read the book from cover to cover, nor do you need to read the chapters in the order in which they are presented. In particular, you can read our general discussion of a topic to clear up things that remain unclear from class or your casebook, or to review topics at the end of the semester. You can also, during or at the end of the semester, consult the examples and explanations for the topics covered in your course to make sure that you have a handle on that topic or to get additional, concrete illustrations of topics. We hope you find this book helpful. We welcome your comments and suggestions for improvement.

William F. Funk
Richard H. Seamon

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Introduction to Administrative Law

Administrative law, though often dreary, can be of huge importance to the day-to-day lives of Americans.

—Washington Post editorial, June 23, 2001

I. ADMINISTRATIVE LAW — THE COURSE

Administrative law is largely about procedure — the procedure that government agencies must follow in order to take action that affects private parties. Administrative law as taught in American law schools is a basic course that, despite the approximately 19 different casebooks in the field, does not differ greatly among schools or teachers. All the courses focus on federal administrative law, although some may touch on state administrative law in the particular state in which the course is given. All focus on the federal Administrative Procedure Act (APA), rather than on the myriad other federal statutes that govern the various agencies' activities. Moreover, despite the focus on the APA, administrative law courses are invariably taught through the case method, relying almost exclusively on judicial opinions to explicate the law. All cover the procedural requirements agencies must follow in taking various actions; all include the relationships among the branches of government, making administrative law sort of an advanced political science or constitutional law course; and all address how courts review agency action. Government regulation of private conduct and constitutional due process also figures heavily in all administrative law courses.

I. Introduction to Administrative Law

Professors, depending upon their background and point of view, may stress one of these areas more than others, and the order in which they are addressed may differ, but ultimately the courses have more in common than they differ.

As the introductory quotation from the *Washington Post* suggests, the subject of administrative law has rarely been considered intrinsically interesting. Unlike torts, for instance, its subject matter does not often relate to everyday life. At the same time, Executive Branch agencies make rules on matters as diverse as environmental protection, workplace safety, wholesale electricity price caps, and agricultural price supports. Federal student aid requirements are another example of agency regulations. In addition, federal agencies make individualized decisions affecting some of the most important aspects of people's lives, from health care coverage decisions to decisions on deportation. State agencies make decisions governing who will be admitted to the bar and who will be disbarred, as just one example. In other words, administrative law actually affects you in real life. Moreover, if you care at all about how your government functions, you should care deeply about administrative law, because it governs most of what government does. It is all about power and how to control it.

Also, administrative law is really not all that difficult; it is not tax law. While there are statutory provisions, most administrative law is determined from judicial opinions. Like most areas of the law that are largely driven by judicial decisions—as opposed to statutory or regulatory text—some administrative law is clear-cut, black-letter material, whereas other parts of it involve clear principles, usually easily stated (often with multipart tests), but the application of which is fraught with fuzziness. Finally, some administrative law is still up for grabs; the courts have not yet worked it out, or legislatures pass new laws that confuse the issues.

This book can help sort out what is clear from what is fuzzy in the law, and through examples and explanations help to reduce the fuzziness in the areas that are not so clear-cut but which rely on a contextual application of a general principle. This book also can identify those areas that are not yet worked out and, in those areas at least, identify the issues that are unclear and the likely range in which an ultimate answer is likely to occur.

II. OVERVIEW OF THE HISTORY OF ADMINISTRATIVE LAW

How the law has developed over time often helps to illuminate how judges are likely to rule today. This may be particularly true of administrative law.

The subject matter of administrative law itself is relatively recent in the law. Professor Felix Frankfurter of Harvard Law School, later Supreme Court

I. Introduction to Administrative Law

Justice, is credited with authoring in 1932 one of the first casebooks on administrative law. Prior to the Great Depression, which began with the stock market crash in 1929, the prevailing wisdom reflected in both courts and legislatures was laissez-faire economic theory. This theory is characterized by the absence of government regulation of business with the exception of public utilities (e.g., gas, water, electricity, and telephone companies), so-called natural monopolies. What “administrative” law existed consisted of the constitutional law doctrine of “separation of powers,” which you may already have studied in constitutional law, but which administrative law courses revisit with a particular focus. For example, two-thirds of Frankfurter’s casebook covered separation of powers, with the remaining one-third dedicated to particular types of administrative functions — utility regulation, taxation, immigration, and “miscellaneous.” Compare that to your casebook.

The Great Depression, however, spawned the New Deal, with its belief in the ability of government regulation of business to cure the excesses of laissez-faire capitalism. To implement this regulation, Congress created agencies that were supposed to be apolitical and have the necessary technical expertise to manage industries in a scientific manner. This led to an explosive growth in business regulation, which, because the agencies in reality were more political and less expert than their ideal conception, in turn led to an explosive growth in litigation in which businesses challenged their regulation. After an initial period in which, on the basis of various constitutional provisions, the Supreme Court resisted wide-scale government regulation of business, the Court acceded to the constitutionality of most of the New Deal agencies and regulations. Instead, the Court now developed a common law to control these agencies. This common law emphasized procedural regularity in agency decision making, often mirroring the procedures of courts, and applied a degree of judicial oversight of the substantive adequacy of the agency’s decisions. Business interests, not satisfied with this judicially created regime, lobbied Congress for more protective legislation. In 1946, the Administrative Procedure Act (get used to calling it the APA) was passed as a compromise between business interests and the Executive Branch. At the same time, the American Bar Association and the National Conference of Commissioners on Uniform State Laws approved a Model State APA, which slowly but surely provided the basis for the adoption of administrative procedure acts in almost every state.

The APA in 1946 was hardly a revolutionary law. Rather, it largely codified the developing common law. It has remained largely unamended since that time, but it has been subject to substantial judicial interpretation over the years that has taken the APA well beyond its literal text. In particular, this occurred during the 1970s, the second great wave of government regulation after the New Deal. During the New Deal, most of the government regulation was regulation of particular industries in their economic activities. For example, the Federal Communications Commission (FCC)