ADMINISTRATIVE LAW

SCHWARTZ

ADMINISTRATIVE LAW

SECOND EDITION

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PREFACE TO THE SECOND EDITION

According to Judge Friendly, "There seems to be a kind of spontaneous generation about the federal constitution; the more questions about it are answered, the more there are to be answered." The same is true about administrative law. The more administrative law questions that are answered, the more come up to be answered. This is even the case with regard to basic questions concerning the very nature of the administrative agency and its powers — questions that, we would think, had been answered long before. And the answers given raise new questions that will doubtless themselves be in the courts before long.

What has been said is illustrated by this second edition of my textbook. Though only seven years old, the book has been dated by the important decisions and other developments since its publication in 1976.

A brief survey of the important changes made in the text for this new edition demonstrates more dramatically than any commentary how the administrative-law rate of acceleration has been taking a quantum leap forward. As such, it is an appropriate introduction to this edition, since it summarizes the key administrative-law developments since the first edition was published.

In the first place, there is the renewed emphasis upon the nature of the administrative agency and its powers — subjects that are at the very foundation of administrative law itself. The Supreme Court has dealt in detail with the nature of agency adjudicatory authority (p. 67). It has also confirmed the Presidential primacy in the agency appointing process (p. 7). At the same time, it has refused to invalidate the composition of agencies whose members are chosen from the ranks of those regulated (p. 8).

Yet, if the law thus refuses to strike down what some see as a built-in bias in agencies, there are indications that the courts are beginning to reflect the growing malaise in their construction of administrative powers. Most significant in its potential is the revival by members of the Supreme Court of the delegation doctrine that appeared not long ago to be only an antiquarian vestige from an earlier day — of interest only to unreconstructed

academics. Justice Rehnquist, as well as Chief Justice Burger, has voted to invalidate the Occupational Safety and Health Act delegation of authority to promulgate standards governing toxic materials on the ground that it did not contain an adequate standard (p. 51). At first glance, the Rehnquist opinion sounds like an echo from the past in its reliance upon seemingly dead delegation doctrine. But it does state a view that may be used to check the trend toward ever broader delegations.

There have been significant recent developments on rulemaking, which have necessitated extensive rewriting of Chapter 4. The courts have continued to expand the body of case law that favors the use of rulemaking over adjudication, and the volume of rules has continued to increase. The size of the Federal Register almost doubled from 1974 to 1980, and the cases reaffirm the agency power to issue substantive rules (p. 152).

On the other hand, the Supreme Court has refused to require cost-benefit analysis before OSHA standards governing toxic materials may be issued (p. 155). But the decision may not prove the last word on the matter. The Court leaves it open to Congress to enact legislation requiring cost-benefit analysis, and the Senate passed a bill in 1982 that would require such analysis before the issuance of major regulations.

Perhaps the most important rulemaking development has been the holding that courts may not impose procedural requirements on rulemaking beyond those specified in the APA. The *Vermont Yankee* decision (p. 181) to that effect aborted a line of jurisprudence, which had developed the concept of so-called hybrid rulemaking, under which rulemaking was held to some of the essential requirements that govern adjudications. Despite the reluctance of some commentators to accept the fact, the Court meant exactly what it said in *Vermont Yankee*. This means that there is no place for hybrid proceedings, in which the tasks of rulemaking are carried out with adaptations of adjudicative forms, unless a statute requires them.

In administrative procedure, the most important development was the Supreme Court's partial retreat from *Goldberg v. Kelly* (p. 235) in *Mathews v. Eldridge* (p. 254). If the "*Goldberg* revolution" appeared to have reached its apogee in *Goss v. Lopez* (p. 244), decided just before the first edition was published, it may have met its Thermidor in *Mathews*. *Mathews* held that due process did not mandate a hearing before disability payments could be terminated. In such a case, due process was satisfied by a posttermination evidentiary hearing. This holding, in the writer's view, applies to all cases involving *monetary* entitlements, except for the welfare payments at issue in *Goldberg* itself (p. 256).

In addition, despite its rejection of the cost-benefit requirement for OSHA rulemaking, the Court has itself adopted "a simple cost-benefit test of general applicability for deciding when due process requires notice and hearing. The . . . test requires comparing the benefit of the procedural

safeguard sought . . . with the cost of the safeguard." (p. 267). Under this approach (which I have labeled "flexible due process"), even where due process demands a hearing, fully judicialized procedure should not be required where the cost of such procedure is out of proportion to the benefits to be derived. Such is the case, for example, with regard to a decision to inflict reasonable corporal punishment upon a public school pupil (p. 268).

Other procedural developments can be briefly summarized. The judicialization of federal hearing officers reached its culmination with a 1978 statute expressly conferring the title of "administrative law judge" on APA hearing examiners (p. 306). Their number has continued to increase. At the end of 1974, there were 804 ALJs in federal agencies; in 1982 there were 1,133. The number of non-APA hearing officers has also grown. Thus, there were thirty INS special inquiry officers in 1974; in 1982 there were forty; and the number will soon be increased to forty-nine.

The Supreme Court has confirmed the virtually unlimited agency discretion to begin proceedings; in fact, it holds that agency issuance of a complaint does not constitute reviewable action (p. 280). The Court has also rejected lower court attempts to hold agencies to a "clear and convincing" standard of proof. In proceedings governed by the APA, agencies are held only to a preponderance of the evidence standard (p. 361). Both decisions extend the procedural autonomy of agencies and may appear a throwback to an earlier period of deference to administrative expertise.

An issue that has divided students of administrative law has been that of the secrecy of hearing officer reports (p. 405). A 1979 state decision follows this writer's view that, where such reports are prepared, they must be served on the parties; fairness demands that reports that play such a crucial part in the decision process be made part of the record (ibid.).

Mention should also be made of the adoption in 1981 by the National Conference of Commissioners on Uniform State Laws of a new Model State APA. The act may stimulate a new movement to improve administrative procedure in the states.

As far as judicial review is concerned, the past six years have seen important extensions of the availability of review. In the text, reference was made to what was termed the blatant provision precluding review in the statute governing the Veterans Administration (p. 453). More recently, other statutes containing comparable preclusive provisions have been held not to bar review. According to the Court of Appeals for the District of Columbia, indeed, to frustrate the ability to obtain judicial redress would be to call into question the seriousness of the American devotion to human rights and fundamental freedoms (pp. 445-446).

On the other hand, an important issue that was open when the first edition was published has been resolved against the availability of review.

The Supreme Court has held that the APA is not an independent grant of review jurisdiction. This means that unless review is available under the general grant of federal question jurisdiction, the given review action may not be entertained (p. 540). To help fill the jurisdictional gap here, Congress has eliminated the $10,000 jurisdictional amount requirement — first in administrative law cases and then for federal questions generally (ibid.).

As far as the scope of review has been concerned, the Supreme Court has continued to assert the rule of deference to agencies (p. 602). But other courts have started to reflect the disillusionment with administrative expertise that increasingly characterizes our era. Reviewing courts, the cases are now insisting, may not simply renounce their responsibility by mumbling an indiscriminate litany of deference to expertise. Due deference to the agency does not mean abdication of the duty of judicial review and rubber-stamping of agency action: "we must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further." (p. 586).

More important than the cases, however, has been the growing dissatisfaction with the limited scope of judicial review. On Capitol Hill, the dissatisfaction has been reflected in growing support for the so-called Bumpers Amendment. Its broadening of the scope of review has now received the support of the Senate. S. 1080, passed by the upper House in 1982, contains a modified version of the Bumpers Amendment. Under it, the reviewing court "shall *independently* decide all relevant questions of law" and reach "its *independent judgment* concerning an agency's interpretation of a statutory provision." This is intended to eliminate what some consider the undue deference to agency findings on mixed questions, especially those on which agency jurisdiction depends. The latter aspect is dealt with in a provision that "in making determinations concerning statutory jurisdiction or authority . . . the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute." In addition, in making determinations on other questions of law, "the court shall not accord any presumption in favor of or against agency action." Though S. 1080 was not voted on by the House in the 97th Congress, its Senate passage indicates that all may not be well with the prevailing scope of review.

The Preface to the first edition quoted Judge Bazelon's reference to the "new era" of administrative law that was starting to emerge. Even the synoptic survey contained in this Preface shows that the evolving law will continue to be marked by its rapidly changing character. Many of the administrative law areas in which changes have occurred during the past few years, all of which have necessitated alterations in this new edition, would not even have been covered in a text written a quarter century ago.

I conclude then as I did in the Preface to the first edition. The entire

field of administrative law is going through a period of unpredecented change. The paramount character of our administrative law continues to be what we may term its Heraclitean nature: the subject is one that is in a continual state of flux. To one working in administrative law, it may be truly said, "The world's a scene of changes, and to be Constant, in [such a field] were inconstant."

Bernard Schwartz

June 1983

PREFACE TO THE FIRST EDITION

As a teacher of administrative law I have long intended to write a textbook for students of the subject. A resolve of many years to prepare such a text was kept unfulfilled by the pressure of other commitments. Now at last the necessary time has been found. The present volume is the result. It is based upon almost thirty years' experience in teaching administrative law. The book follows the approach of the law school course in administrative law and is intended as a textbook for students taking such a course. It covers all the topics dealt with in the administrative law course in what the author hopes is a clear and readable style. It is designed as a supplement to the leading casebooks in the field and can be used by students in conjunction with any of them.

The approach is twofold: not only are the basic principles and doctrines analyzed and discussed; effort is also made to include the most recent developments in one of the most rapidly changing branches of American law. Judge Bazelon has recently declared that "We stand on the threshold of a new era in the history of [administrative law]." We are, indeed, in the midst of a virtual administrative law explosion, particularly in the fields of agency procedure and judicial review. Just this year, Judge Friendly could assert that "we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution." If students must learn fundamental concepts, they must also be made aware of the fact that the subject is in the midst of a period of unprecedented change. These changes are a major part of the book's theme. The very fluidity of the subject makes a usable text more necessary than ever. Otherwise the student is left adrift on an uncharted sea, unable to find his way through the burgeoning mass of altering doctrine.

Bernard Schwartz

September 1975

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