Administrative Law and Regulatory Policy

Problems, Text, and Cases

Third Edition

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Little, Brown and Company
Boston Toronto London

Library of Congress Catalog Card No. 91-61647
ISBN 0-316-10777-8

Third Edition

Fourth Printing

MV-NY

Published simultaneously in Canada
by Little, Brown & Company (Canada) Limited

Printed in the United States of America

Administrative Law and Regulatory Policy

Editorial Advisory Board
Little, Brown and Company
Law Book Division

To Louis L. Jaffe
Teacher, Scholar, Colleague, Friend

Preface to the Third Edition

In this Third Edition, we have revised the Casebook to take account of new cases, changing doctrine, and new problems facing those who administer the federal government. We call attention here to three major ways in which we have changed the materials.

First, we have changed, and deepened, the discussion of classical administrative law in light of new cases that affect preexisting doctrine. A host of recent Supreme Court cases, discussing "separation of powers" doctrine (and underscoring the importance of Crowell v. Benson) has led us, for example, to rework and to emphasize our "separation of powers" materials in Chapter Two. Similarly, we have expanded our discussion of "review of law" in Chapter Four to encompass the current debate about the significance of the *Chevron* doctrine — just what it means and the extent to which it changes prior law. We have added throughout Supreme Court cases that summarize existing law (particularly in the "due process" area), that may foreshadow change, and that provoke thought and discussion.

Second, we have modified and enhanced our discussion of substantive health and safety regulation, such as the problem of regulating risk. We have also asked how the Executive Branch can coordinate and control its many agencies when they engage in regulation of this sort, and we point to its efforts to do so through the Office of Management and Budget.

Third, we have changed the organization of our discussion of rulemaking and adjudication. We have placed the materials related to this subject in an expanded Chapter Six — which begins with the constitutional distinction between rulemaking and adjudication, then discusses the relevant statutes and case law, and ends with a discussion of the Constitution's "due process" requirements. We have reorganized in order to achieve additional clarity of presentation. For example, we believe that current "informal rulemaking" law can best be understood by considering in order (a) the limitation of formal rulemaking stemming from *Florida East Coast*, (b) the subsequent "formalization" of informal rulemaking, (c) the current "disenchantment" with time consuming procedure, and (d) the search for "exceptions." Our primary objective in revising this chapter, as in making numerous other organizational changes, is clear, coherent presentation of the subject matter for teaching purposes.

Our general aim in this edition, of course, remains the same as in our two previous editions. We wish the student to understand Administrative Law, classically conceived as involving questions of procedure and of relations among the courts and other branches of government. We believe, however, that such an understanding is possible only if the student also understands the relation between such questions and substantive regulation. Thus, we continue to use substantive regulatory examples to enrich a basically procedural course. These examples have proved useful in the courses that we teach, and we hope they will work for others as well.

We gratefully acknowledge the research assistance of Norman Eisen, Margaret Stock, Paul Smith, Derrick Watson, Richard Barrera, Jeffrey Baskies, and Sean Colligan.

November 1991

Preface to the Second Edition

In writing this new edition, we have tried to increase the clarity of our presentation, to deepen the discussion of certain issues, and, of course, to update the materials throughout the book. Here, we wish to call attention to three major changes.

First, we have reorganized certain sections in order to promote conceptual clarity and pedagogical effectiveness. We have expanded and reorganized Chapter 4 in order to focus greater attention on the general problem of substantive judicial review of agency decisions. We explore the traditional nature of "review of fact," "review of law," and "review of discretion," contrasting older and more recent cases in part to flag some of the difficulties arising out of current judicial attitudes towards "review." We have also restructured the materials at the end of Chapter 7 to emphasize some of the principal issues raised by the effort to apply hearing rights to different program areas without attempting to provide a detailed account of all the case law. Finally, we have reorganized the first part of Chapter 9 in an effort to clarify historical and contemporary problems of jurisdiction and remedies.

Second, we have sought to develop further materials designed to acquaint students with the policy and institutional background of the most important types of administrative programs. We have added discussions of two additional basic types of regulation: "standard setting" (in connection with *State Farm*, the "air bags" case) and "screening" (in connection with the "Benzene" and "Cotton Dust" cases). With the addition of these examples the book contains a fairly complete typology of regulation, which can be taught in some depth by the interested teacher.[1] We have also rewritten Chapter 7 to provide a more complete account of the social security disability program as an example of "mass justice."[2]

Third, we take account of "deregulation" and, where appropriate, raise policy problems related to the "regulatory reform" that has taken place or has been proposed since the first edition. We have expanded, for example, the discussion of television regulation in Chapter 5 to take account of "deregulatory" developments.

Our general aim remains the same as in the first edition. We ask the student both to understand administrative law and to think about its

1. The typology follows that of Breyer, Regulation and Its Reform (1982), which can be used as a supplement.

2. See J. Mashaw, Bureaucratic Justice (1983).

strengths and weaknesses in an age of regulatory reform. We have organized the book to facilitate the teaching of a traditional procedural course in administrative law. The discussions of substantive regulation and mass justice administration can be used to enrich that course or to survey the field of classical regulation, depending on the teacher's interests and emphasis. The problems included throughout are specifically designed to facilitate classroom discussion and review of the principles and material in the particular subsection preceding the problem. We have successfully used these problems as a basis for written assignments and class presentation. Our teachers' manual shows how we use the problems to teach our class.

We gratefully acknowledge the research assistance of David Diebold, Peter Menell, Jane Kaufman, Nanette Crist, Derek Jones, Elizabeth Birnbaum, and David Price, and the secretarial assistance of Sally Marshall and Marilyn Devore in the preparation of this edition.

February 1985

Preface to the First Edition

The traditional course on Administrative Law primarily concerns the delegation of power to administrative agencies, the procedures that the law requires them to follow, the legal requirements for obtaining judicial review of agency decisions, and the standards applied during that review. Critics of this course persistently and increasingly raise two important objections:

First, isn't such a course too abstract? Too remote from the substantive essence of agency decisionmaking? Aren't efforts to generalize across decisions arising out of many different agencies and substantive fields misleading? Don't those decisions often reflect no more than court efforts to deal with distasteful agency action on a case-by-case basis, perhaps masked by appeals to procedural principle? In a word, is it possible to understand these court decisions without understanding the substantive work of the agency?

Second, doesn't concentration on appellate court decisions mislead the student about what agencies do? The impact of judicial decisions on agency work may often be slight; and court review may constitute only a small part of the work of the lawyers who practice before the agency. Should future lawyers not be given a broader understanding of the many other factors that affect the impact that agency action has upon the world?[1]

This casebook represents an effort to preserve the essential virtues of the traditional course while adapting it to meet these objections. The materials are organized along traditional procedural lines, as updated to reflect the vast change that has overtaken this body of law in recent years. At the same time the book uses notes and problems systematically to survey regulation, as broadly conceived to deal not only with prices and entry, but also with health, safety, and the environment. It shows the interaction between substance and procedure; and (particularly in Chapter 8) it describes some of the bureaucratic and political factors at work.

Thus, this casebook might be used in two different ways. The teacher who wishes to emphasize the "administrative process" rather than "administrative procedure" might use this book to do so. It will introduce the future practitioner to the substance of much regulation, its interplay with procedural rules, the agency seen as a bureaucratic institu-

1. See R. Rabin, Perspectives on the Administrative Process 7-14 (1978).

tion, and the basic steps for obtaining court review. The teacher of the traditional course might teach that course from this book as well, using the substantive notes and comments as supplementary aids.

We recommend that those emphasizing the substantive regulatory aspects of the book in their courses refer to the Teachers Manual, which is based on our teaching notes. The book's cases, questions, and problems are deliberately organized to elicit in class discussion the points and issues that the Manual contains.

The book provides sufficient material for a four-hour course. Those wishing to teach a three-hour course are advised to forgo selected substantive areas of regulation (such as utility rate regulation, food and drug regulation, FTC regulation of false advertising) or procedural topics (such as application of due process, privacy jurisdiction, Freedom of Information Act) or a combination thereof.

We wish to acknowledge the great debt we owe our predecessors, and we mention specifically Professors Clark Byse, Kenneth Culp Davis, Walter Gellhorn, and Louis Jaffe. Our work is obviously based upon their achievement. We particularly acknowledge our debt to Louis Jaffe, who, in mastering the intellectual problems of judicial review, laid the foundation on which we erect our own view of administrative law. We also acknowledge our use of the work of many others too numerous to mention, though we wish to point out that the discussion of the Federal Trade Commission in Chapter 8 draws upon that in G. Robinson & E. Gellhorn, The Administrative Process (1974), though we put that discussion to somewhat different use.

We have dealt with the perennial problem of footnoting in casebooks as follows: All footnotes in a chapter are numbered consecutively from its beginning to its end. Thus footnotes belonging to cases within the chapter will not bear their original footnote numbers. The footnotes attached to cases are those written by the court unless the note itself specifically indicates that it was written by the editors.

We gratefully acknowledge the research assistance of Linda Agerter, Dee Carlson, Kenneth Kettering, Kenneth Kleinman, Diane Millman, Joseph Post, Richard Rose, Cass Sunstein, Victor Thuronyi, Jeffrey Wohl, and Michael Young. Alan Morrison and Robert Pitovsky were generous in providing helpful comment and criticism. The unstinting work of our secretaries, Sue Campbell, Astrid Dodds, Cindy Dodge, Sarah Johnson, Karen Lee, Gayle McKeen, Angela O'Neill, and Shane Snowdon, was indispensable and very much appreciated.

April 1979

Acknowledgments

We wish to express our appreciation to the following authors, periodicals, and publishers for their permission to reproduce in this or earlier editions material from their publications:

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