Administrative LAW

The Sources and Limits of Government Agency Power

DANIEL L. FELDMAN

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PREFACE

I started teaching administrative law to Master of Public Administration (MPA) students in 1977, taught the course to law students for several years, and now once more teach MPA students. No one, including myself, has ever been satisfied with the available textbooks. Each has very good qualities, but almost all overwhelm the students with much too much material and tedious prose.

I wanted a book that my students would really like; a book that was deep, but short, accessible, and conversational. So I wrote it.

Standard administrative law casebooks include too much material for any student to absorb in a one-semester course, or even in a yearlong course. This text presents information that a student can understand and absorb within a semester. Of course, as the author, it reflects my preferences and priorities as to what to include. Each chapter presents a problem and asks the reader to assume the role of a government official faced with that problem. Administrative law provides guidance, and walks the reader through the kind of logic necessary to apply in that situation, regardless of whether or not the official has a law degree. Each chapter also includes practice problems, generally taken from real-life examples with no answers provided so that instructors have ready-made assignments for their students. The book's extensive index and tables of cases and statutes also help instructors and students to locate key points quickly and easily.

Most administrative law texts include in an appendix either the whole of the very lengthy federal Administrative Procedure Act, or much of it, or force the reader to go to some other source to find it. The present book conveniently provides short but relevant excerpts wherever the reader would otherwise need to search for them, and also on necessary occasions provides excerpts from the Model State Administrative Procedure Act, the Code of Federal Regulations, and sample state administrative procedure acts and regulation codes.

Administrative law presents some daunting challenges to its students, but repays the effort needed to master it with a much clearer understanding of the logic of American government. Probably the major difficulty is psychological: people tend to resist rather than assimilate material that generates ambiguity and reflects clashes between equally legitimate values. For example, it may be hard to accept that the interests of taxpayers in the aggregate justify denying

relief to a citizen who relied to his or her detriment on bad advice from a government employee; or that some procedural guarantees of fairness to individuals in agency hearings may cost too much in terms of efficiency or even fairness to a larger group of beneficiaries, or to other groups. It is not merely a failure of implementation that stands between us and a system of perfect justice: even in principle, such a system exceeds our reach. People dislike this reality, and try to resist internalizing it.

Another difficulty is intellectual: issues of administrative law transcend particular agencies and particular topics of substantive law, but necessarily arise and the issues are couched in such agencies and their topics. Therefore, students learn about *Chevron* deference (the concept that judges should not second-guess interpretations of unclear statutes by agencies that administer those statutes) in the context of a case about pollution control; or learn why due process sometimes requires agencies to give joint hearings to pairs of applicants seeking government licenses, in the context of a case about the assignment of radio frequencies to broadcasters. So, students must penetrate some of the substantive law of environmental protection and of communications regulation in order to understand the underlying administrative law principles. These are merely two examples: a thorough review of administrative law draws on examples from virtually every one of the enormous range of substantive law areas administered by agencies.

Perhaps instead of responding to these challenges with enthusiasm, some students of administrative law have just skimmed the surface. If they never really engaged with the deeper issues, issues that challenge the heart as well as the mind, they may have experienced the field as boring. It has long been my goal to show that administrative law, on the contrary, is *interesting*. I must confess that I have not always succeeded, but at least some of the blame goes to the existing textbooks. A few years ago, a student lingered after the first administrative law class of the semester to ask me a question. As she did so, a student who had taken the course from me in a previous semester happened to pass by. Recognizing the student as a friend, he came into the classroom and proceeded to tell her that I was a very good teacher. While naturally I was grateful for the compliment, the precise way he offered it disappointed me: he said that I had taken very boring material and made it interesting. My goal, of course, had been to persuade students that the material itself is interesting.

That night, I gave my wife, a former federal prosecutor, a brief description of the encounter. At first she tried to reassure me, noting that so long as the student thought that I had made the material interesting, I should be satisfied. Then she stopped herself and asked me to remind her again which course I was talking about. "Administrative law," I said. "Oh," she responded, "but that *is* boring."

As noted, I have not always succeeded in persuading those I encounter that administrative law is interesting. I do believe, however, that I have succeeded with the majority of my students, although not with my wife.

This book reflects those efforts.

Chapter 1 first establishes the overwhelming primacy of agencies, as opposed to legislatures or courts, in the daily lives of citizens, and thus introduces the central role of administrative law. Then, setting out the troubled evolution of the non-delegation doctrine, it gives the "big picture" view of the sources and boundaries of government agency power. Chapter 2 delves somewhat deeper into "sources and boundaries," but more theoretically so that readers who wish to devote more attention to practical issues may choose to skip it. Further, it presents an opinionated and possibly controversial defense of administrative legitimacy, accusing the two most recent presidential administrations—those of George W. Bush and Barack Obama—of insufficient regard for the constitutional role of Congress in policies they pursued through their agencies.

Chapter 3 recounts struggles for power over agencies between Congress and the presidency, mostly fought in the courts, for example focusing on the legislative veto, special prosecutors, and executive orders. Chapter 4 introduces the Administrative Procedure Act, the model State version of the Act, and the modern organizing vehicles of regulatory law, the *Federal Register* and state registers, and the *Code of Federal Regulations* and state codes. It also reviews some of the major issues that emerge from discretionary and informal agency action, including street-level decision-making, investigations, and interpretive rulemaking. Chapter 5 explains the process of rulemaking, the role of bias and *ex parte* contacts in that context, and the painful refusal of courts to allow estoppel against government agencies. Chapter 6 reviews federal regulatory preemption and *Chevron* deference, but includes a section at least as controversial as Chapter 2 in taking sharp issue with Justices Scalia and Thomas's argument that courts should defer to agency interpretations of ambiguous statutory provisions even to the point of vast expansions of the agency's own jurisdictional boundaries. Although for most part I believe this book reflects an effort to be objective, other aspects of the book reflect my idiosyncrasies and biases as well. Readers will find more value if they look for and identify statements that merely reflect my opinions, and challenge and test those opinions. Very respectable scholars disagree on many issues; readers should feel free to do so as well.

Chapters 7, 8, and 9 all address aspects of adjudication. Chapter 7 explains the justification for adjudication by agencies, and sets forth the legal evolution from "privilege" to "entitlement," eventually constrained by the *Matthews* balancing test. Chapter 8 surveys the range of entitlements that grew out of the *Kelly v. Goldberg* "rights revolution," and some of the costs thereof. Chapter 9 gives readers a taste of agency adjudication in one example of an administrative hearing process concerning state pension appeals.

Why and how some agencies (notably the Securities Exchange Commission and the National Labor Relations Board) try to use rulemaking to avoid adjudication; how some states have responded to their own agencies' similar efforts; how sometimes private parties feel oppressed by the opposite choice as well—an agency's choice of adjudication instead of rulemaking; and the courts'

reactions to all of these interactions ground the discussion in Chapter 10. Chapter 11 covers the technical, but important, issues that determine whether a private party gets the chance to challenge an agency's decision in a regular Article III court with a discussion of standing, ripeness, exhaustion of administrative remedies, and so forth. Chapter 12 offers the history, justification, and evolution of sovereign immunity and officer tort liability in the United States. Chapter 13 expands on Chapter 8 in providing a fuller discussion of rights of government employees against adverse agency action, since that topic is of special interest to government employees and their managers. Chapter 14 covers the Freedom of Information Act, Open Meetings Law, and related state and federal statutes, along with other issues in transparency, such as the role of electronic rulemaking.

Please tell me you found it interesting.

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It is a pleasure to acknowledge those whose advice and inspiration contributed to this book. Several such debts go back a long way; some are to those now gone. The legendary Clark Byse taught my Administrative Law class; the equally legendary Louis Jaffe, another great architect of American administrative law, taught another class I took, but I had the pleasure of seeing his mind at work. Lance Liebman, the former dean of Columbia Law School, was my boss in John Lindsay's mayoral administration in 1969 to 1970. Both of us young men then, we moved on to Harvard Law School the following year—I as a student, he as a professor—and have stayed friends since. He was kind enough to recruit Peter Strauss, a living giant of administrative law and Lance's colleague at Columbia Law School, to provide immensely valuable responses to an earlier draft. My good friend Rose Mary Bailly, an adviser to the drafters of the 2010 Model State Administrative Procedure Act and a distinguished professor of administrative law at Albany Law School, generously gave my manuscript a line-by-line edit and vastly improved it. I hope I have adequately reflected the thoughts of Professors Bailly and Strauss in this book. The book's faults will correspond to my failure to do so.

My dear friend Louis Bochette introduced me to Eli Silverman, then chair of the government department at John Jay College, who hired me to teach my first administrative law class in the MPA program there starting in 1977. After a few years there, I taught that subject and other courses at various other universities. Louis, then, started me on my administrative law teaching path. Sadly, he passed away during the fall of 2014. Some years later, my good friend David Trager, then dean of Brooklyn Law School, invited me to teach the course there, which I did throughout the early 1990s. David later become a highly respected federal district court judge in Brooklyn, but left us far too soon in 2011. John Feerick, then dean of Fordham Law School and a perennial generous servant to the people of New York as unpaid chair of various ethics bodies, invited me to teach at Fordham. Although I taught other law courses throughout most of the first decade of the current millennium that experience nonetheless helped inform my thoughts on administrative law. When I switched my full-time occupation from government service to teaching in 2010 and returned to John Jay College, my friend and Public Management Department chair Ned Benton allowed me to persuade him to revive the Department's administrative law class, which I now teach every semester.

Alison J. Hankey, a fine editor at a different publishing house, suggested the "What am I supposed to do?" feature. Suzanne Flinchbaugh, my former editor, recommended the use of excerpts from the APA and other documents, and provided much enthusiastic support, and my current editors at SAGE/CQ Press, Sarah Calabi, Bennie Clark Allen, Janet Ford, and Katie Lowry, have been equally and wonderfully helpful.

I dedicate this book to all of the aforementioned, whether still with us or sadly now gone.

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Daniel L. Feldman teaches for the City University of New York in the Master of Public Administration (MPA) program at John Jay College of Criminal Justice as Professor of Public Management. His fifth book, *The Art of the Watchdog*, coauthored with David R. Eichenthal (SUNY Press, Albany, New York), was released early in 2014. A state legislator for eighteen years, he wrote more than 140 laws, including New York's Organized Crime Control Act and Megan's Law; and as chair of the Assembly Committee on Corrections, led the effort to repeal the Rockefeller drug laws. Both prior and subsequent to his career in elective office, he conducted major investigations during sixteen years in high-level appointed offices. He holds degrees from Columbia College and Harvard Law School.

GLOSSARY

Note: This glossary does not include definitions of words or phrases explained at length in the text, except for those frequently used words whose meaning might not become clear early on in the book.

Adjudication: 1. The process of hearing and resolving a dispute when the parties to it subject its outcome to resolution by a judge or judges or a person or persons acting in a judge-like capacity, used here primarily in the context of government agency personnel acting in a judge-like capacity. 2. The result or resolution of such a dispute.

Attractive nuisance: A term from tort law referring to hazards such as swimming pools without fences or other barriers, or deserted open mine shafts, that might entice vulnerable persons, generally children, to enter and suffer injury in consequence.

Color of law: Used in the phrase "acting under the color of law": acting with the appearance of official power, although, for example, the government employee does not have legal authority to take the action in question; or the individual appears to be a government employee, but is not.

Deference: Used here to mean the stance of a court when instead of relying on its own best judgment as to the meaning of an unclear statute or regulation, it accepts the interpretation of an agency responsible for carrying out the mandate of that statute or regulation.

Delegation: Used here to mean a transfer of power, sometimes understood as the transfer of lawmaking power, sometimes as the transfer of policymaking power; often as part of the phrase "non-delegation doctrine."

Dicta: Comments in a judicial ruling not necessary to the decision of the precise issue in controversy.

Discretionary: 1. Action by a government agency or its personnel when its enabling statute gives the agency a choice of approaches to carry out its responsibilities. 2. Agency action undertaken to carry out mission responsibilities other than rulemaking or adjudication.

Estoppel/"equitable estoppel": The principle that a party to a dispute may be barred by the decision-maker from asserting a claim when such party had previously made an inconsistent claim on which the opposing party had relied; more generally, the principle that a court will refuse to enforce a claim based on unfair behavior.

Ex parte: On or from one side only; communications between a decision-maker and one participant in a dispute without notice to an opposing participant or participants.

Expressio unius est exclusio alterius: A statute's inclusion of certain items in a list implies the exclusion of other items.

Habeas corpus: Literally, that you have the body; the power of federal courts to compel the attendance of a prisoner to judge whether that prisoner has been justly incarcerated.

Hearsay: A statement, not his or her own or substantiated, but heard from another and quoted by a witness.

Immunity: Used here to mean protection of government officials from liability, whether the party claiming injury seeks a remedy against the government ("sovereign immunity") or seeks a remedy personally against the official (usually "qualified immunity," where the official must show that he or she did not violate a clearly established right) rather than "absolute immunity."

Judicialization: Used here to mean the tendency to import standard courtroom trial procedures into agency adjudications.

Legal positivism: In its dominant modern form, a variety of legal philosophy or jurisprudence holding that to be legitimate, law must emanate from a body or institution generally recognized as authoritative in the society in which it functions.

Legislation: 1. A statute. 2. Statutes.

Legislature: An elected representative body of persons that enacts laws in the form of statutes.

Managerialism: Pursuit of efficiency; in extreme forms, also the pursuit of market goals, such as increased market share and profit.

Non-delegation doctrine: That a legislative body like Congress cannot transfer its lawmaking power or policymaking power to some other entity.

Overbroad: A term applied to a statute that lacks sufficient standards, guiding principles, or constraints to channel the actions of the agency charged with its implementation.

Preemption: Used here to mean that the law of the superior jurisdiction prevails, e.g. federal law prevails over state law, state law prevails over local law.

Pro se: Literally, for oneself; a person who represents himself or herself in court, without an attorney.

"Regime" values: 1. The dominant aspirational values in a political culture. 2. The values for which the political entity was established to pursue.

Regulation: 1. A law not enacted by a legislature, nor the outcome of a dispute resolved by adjudication judge or judges or a person or persons acting in a judge-like capacity, but issued by a government agency so authorized by a statute enacted by an elected representative body. 2. Any statement issued by a government agency clarifying the meaning or guiding the implementation of a statute enacted by a legislature.

Respondeat superior: Literally, "let the master answer," the principle under which the employer is held legally responsible for the actions of the employee.

Rule/"regulation": Used interchangeably with the second definition. Usage varies, however. For example, the Michigan Civil Service Commission distinguishes rules as having "the force and effect of law," from regulations, which "implement the rules issued by the commission." [http://www.michigan.gov/mdcs/0%2C1607%2C7-147-6877---%2C00.html, 2015]

Statute: A law enacted by a legislature (see "legislation").

Tort: Other than in the context of a contract, a wrongful act or violation of rights for which a civil remedy, usually money damages, may be had, whether or not the act or violation may also engender criminal liability.

Ultra vires: Literally, beyond strength, power, or force; used here to mean outside or beyond the legal power of a particular agency or agent (generally, of government).

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