

法精要 · 影印本

West Nutshell Series

行政法

第4版

Administrative Law and Process



【美】恩斯特·盖尔霍恩 / 著
【美】罗纳德·M·莱文

ERNEST GELLHORN
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总 序

许传玺*

在美国法律教育界与律师实务界,这套“美国法精要”是颇具特色的一套小书。这套书最突出的特点当推它们的简捷明快、深入浅出。每种书均由富有教学经验的法学院教授执笔,在三、四百页的篇幅内集中介绍某一法律部门的基本原理、主要法规和重点案例。

由于这些特点,这套丛书受到了无数美国读者的欢迎和喜爱。众多法学院的学生将这套书作为课外的辅助教材,由此掌握美国各主要部门法的精义。执业律师也经常借助这套书,以迅速了解自己尚未熟习的某些部门法,或者温习过去曾经学过的某些课程。

相信这套书也能赢得国内读者的欢迎。无论是法律专业的本科生、研究生,还是执业律师或其他人士,都能从这套丛书中获得有关美国法律的大量知识,对自己的学习和工作有所助益。此外,通过阅读原汁原味的英文来学习美国法律也应能提高读者的法律英语水平,促进与美国同行的对话和交流。

应原出版者的要求,这套丛书的国内版增加了中文前

* 哈佛大学法博士(J.D.),耶鲁大学社会人类学博士。

言,以介绍美国各部门法的概况、每种书的内容及原书作者。这些前言作者都是在美国受过专业教育或从事专门研究的中国法律学者甚或专家。相信他们的介绍会对读者有所帮助。

Happy reading!

1999 年 4 月
于哈佛法学院

前言

臧东升*

《行政法精要》是一本概括介绍美国联邦行政法的小册子。这本书结构紧凑,内容精干,通俗易懂,对于希望在短时间内了解美国联邦行政法的读者来说,是再合适不过了。

美国联邦行政法是以普通法为基础,在联邦宪法的框架之内建立起来的一套法规体系。该体系有四个组成部分:第一部分,国会制定的法律,包括1946年由美国律师协会起草,由国会全体议员通过的《行政程序法》,以及其他部门法(例如环境法、劳动法、移民法、银行法等)中的行政程序规定;第二部分,联邦法院对宪法及上述国会立法所作的解释或界定,读者可以在本书的大量案例中发现联邦法院在塑造联邦行政法过程中的巨大作用;第三部分,总统发布的行政命令(executive order);以及第四部分,各行政机构,包括总统直接领导下的各个部、局和联邦独立委员会所颁布的规章。

大家知道,美国是一个联邦制国家,其法律制度采取“双轨制”,各个州拥有自己的宪法和行政法及其他法律制

* 哈佛大学法学院博士生。

度。从 30 年代“新政”以来,联邦政府的权力日益扩大,许多在传统上被认为属于州立法调整的社会关系逐渐转由联邦立法调整,许多法律部门经历了(或正在经历)“联邦化”的过程。因此,相对而言,联邦行政法在学界受到更多的关注。本书介绍的也属于联邦行政法。

纵观美国联邦行政法的发展历史,我们可以发现两个因素对联邦行政法的法律原则的确立起了十分关键的作用:一是联邦宪法所确立的自由主义和法治原则(三权分立、正当程序原则等),另一个是 30 年代“新政”及其带来的法律原则的革命。前者强调法律保护个人的基本权利(自由、财产权等)不受行政机关任意的剥夺和侵害;后者强调行政机关代表公众利益,具有专业知识和能力,应当有充分的自由裁量权。在司法审查的过程中,前者强调法院严格监督行政部门的行政行为;后者强调法院不能过多干涉行政机构的决策或判断,只要不明显违反法律或不合情理,法院都应当尊重行政机构的意见。读者在本书中将会看到大量生动的案例和分析,了解到这两个因素如何相互平衡、冲突。固然,这两个因素在其他普通法国家或地区(包括我国的香港)、欧洲大陆乃至东亚各国都不同程度并以不同方式存在,美国联邦行政法所确立的制度和原则,在很大程度上是美国本土的产物,反映了其独特的法律文化和法律思维方式。在这个意义上,很难用“代表西方”或“代表普通法国家”来描述联邦行政法在世界各国行政法当中的特色。

法律文化的差异可以反映到一些术语的不同涵义上。读者如果翻阅一下本书的目录就会发现,第五章的标题,《非正式(informal)行政程序》,以及第七章的标题,《正式(formal)审判》可能感到并不陌生。在中国、日本及其他东亚国家和地区,“正式”与“非正式”往往与法律约束力联系

在一起,“正式”往往可以与“官方”相互混用,“非正式”往往可以与“非官方”混用。在日本,大藏省向企业发布“行政指导”,这些“行政指导”通常被认为是“非正式”的或“非官方”的,即不具有法律约束力。但是,在美国,联邦行政法中的“正式”与“非正式”是以司法审判的程序作为基准来判断的,它和法律约束力完全没有关系。读者可以在阅读上述两章时仔细体会一下“正式”、“非正式”的具体涵义,相信读者会在克服语言和文化上可能的障碍的过程中,享受到许多的乐趣。

了解和学习美国联邦行政法还有很现实的意义。在21世纪后半期,经济的全球化发展正在带动世界各国政府在政治、法律上的进一步交流与合作,国与国之间法律制度的协调日益成为国际间贸易、投资活动中的重要因素。行政法已成为国际贸易与投资法律制度中重要的组成部分。在世界贸易组织(WTO)的一系列协议当中,行政法性质的规范占有重要比例,世贸组织纠纷解决机构也在审查成员国政府行政行为方面作出了许多重要决定。90年代,在中美、日美之间的系列贸易双边协议中也含有重要的行政法内容,日本政府甚至承诺修改其行政诉讼法。从这个意义上讲,行政法早已跨越了本国的界限。一个国家某个行政机构的行为,很可能成为大洋彼岸政府或投资者关注的焦点,也可能会成为日内瓦世贸组织所审议的话题。在这样一个“全球化”的背景下,中国不只是需要用法律保护自己的合法权益,为了自身利益积极监督其他国家行政机构的行政行为,而且应当为改革和完善未来的国际经济新秩序作出自己的贡献。

本书将会为读者在了解和研究美国联邦行政法方面提供很好的资料,作者盖尔霍恩(Ernest Gellhorn)和莱文

(Ronald levin)教授都是出色的美国行政法专家。本书自1972年初版以来一版再版,到目前已是第4版,反映了美国联邦行政法的现状。本书在体例上类似于教科书的安排,全书分为十章:第一章,行政机构的权力授予;第二章,行政行为的政治控制;第三章,司法审查的范围;第四章,信息的获得与披露;第五章,非正式行政程序;第六章,正当程序;第七章,正式的行政审判;第八章,简易程序;第九章,规章及其制定;第十章,司法审查的获得。本书还附有联邦宪法、行政程序法的部分条款。

1999年5月9日于剑桥

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