

ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT

ROBERT L. GLICKSMAN

RICHARD E. LEVY

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To Emily, Bertie, and my co-author, Rick, for his vision
R.L.G.

To my parents
R.E.L.

PREFACE

We understand the field of “administrative law” to be concerned with the legal context of agency action. Actions by administrative agencies to implement statutory mandates are at the core of administrative law, even if administrative law is not concerned with the substantive content of the law administered and created by any particular agency or agencies. Administrative law encompasses the legal constraints on agency action, including the structure and authority of agencies, the procedures for agency action, and judicial review of agency decisions.

This book grows out of our experience teaching administrative law over the years. We have found that students encounter a number of special difficulties in understanding administrative law, which in turn present special challenges for administrative law teachers. Although administrative law is conceived of as a unified field, its principles apply in the context of countless agencies and varieties of agency action, each governed not only by general administrative law, but also by the distinctive statute(s) being implemented. The need to sort out new agencies, new programs, and new organic statutes for each judicial decision in order to understand the administrative law issue in any given case complicates the learning and teaching process. In addition, students often come to the subject with only a general sense of what agencies look like or how they operate, and the presentation of administrative law principles using a haphazard variety of agencies does little to provide a more complete picture of how any given agency implements its statutory mandate or what legal constraints it faces in its efforts to do so. We address these difficulties through two distinctive features of the book.

First, we use five important and representative administrative agencies of the federal government as a medium for teaching and learning administrative law principles:

- The Environmental Protection Agency (EPA)
- The National Labor Relations Board (NLRB)
- The Social Security Administration (SSA)
- The Internal Revenue Service (IRS)
- The Federal Communications Commission (FCC)

By concentrating on these agencies as a representative sample of different types of agencies and the functions and authority they exercise, we hope to reduce the need to teach and learn about a multitude of agencies and to foster a more comprehensive and organic understanding of how a few representative agencies operate. Our focus in this book is on federal administrative law to facilitate coherence of presentation, because state administrative law varies considerably from state to state and is often less developed than federal law.

With few exceptions, the principal cases and problems in the book all involve one of these five agencies. In Chapter 1 (The Administrative State)

and Chapter 2 (Judicial Review), we use all five agencies to develop foundational and overarching principles concerning the legal context in which agencies operate. Chapters 3 through 7 all focus on a particular mode of agency action and use a single agency to illustrate the legal issues raised by the agency's use of that mode of action. Finally, Chapter 8 (Availability of Review) also draws on cases and uses problems that involve all five agencies. We treat landmark Supreme Court or Court of Appeals decisions involving other agencies in the expository materials or through principal cases that discuss and apply those decisions.

We organize Chapters 3 through 7 around five "modes of agency action" and use a single agency to illustrate each mode of agency action so as to provide students with a more comprehensive understanding of how agencies use their authority to implement their statutory mandates, as well as the legal constraints they face in doing so. Each mode of agency action reflects an important kind of administrative authority that raises distinctive legal issues. Although each of the five agencies uses all five modes of action, we have selected a single agency that makes extensive use of a given mode of agency action to illustrate that mode. In Chapter 3, we use EPA to illustrate the issues raised by the adoption of binding regulations, commonly referred to as "legislative" rules, that have much the same appearance and effect as statutes. In Chapter 4, we use the NLRB to illustrate policy-making by adjudication; *i.e.*, the development of policy by deciding cases that interpret and apply statutes and regulations and have a kind of precedential effect in later agency decisions, thus creating an agency common law. In Chapter 5, the materials relating to the SSA illustrate the problems confronting many agencies, especially those administering benefits and claims systems, which engage in mass adjudication to determine hundreds of thousands or even millions of cases promptly, fairly, and accurately. In Chapter 6, we use the IRS to illustrate the variety and significance of informal actions taken by agencies to resolve legal issues, provide guidance to the public, or otherwise implement public policy. In Chapter 7, our coverage of the FCC explores legal problems relating to agency enforcement initiatives, including the implementation of regulatory methods to enhance enforcement and specific enforcement actions such as investigations and prosecutions.

Second, we present the information in a consistent format designed to facilitate understanding. Each chapter is divided into units addressing particular topics and each unit follows a consistent format. Units begin with expository material that provides general background, highlights important issues, and summarizes the basic legal doctrine that has developed to govern resolution of the issues presented in the unit. This material is then followed by a principal case or cases (involving one of the five agencies) to illustrate the application of the doctrine, identify key questions, and expose students to cutting edge issues relating to the topic. Questions connected with the principal cases are intended to focus on key issues in the case. After the principal cases, a shorter expository section discusses related matters, such as further exploration of particular problems, discussion of other issues that overlap with the issues in the unit, or

additional information on matters raised in the principal cases. Finally, each unit concludes with a problem that requires application of the substantive material covered in the unit. This format is intended to aid students in their learning by presenting basic concepts as clearly and directly as possible, providing concrete examples of how that doctrine applies in practice, and then asking students to apply the doctrine themselves in a realistic scenario.

The format of the book should also aid teachers by laying a solid foundation for student understanding and providing flexibility to adapt the book to various teaching methods, coverage choices, and organizational preferences. For example, most of the chapters include clusters of two to four units addressing important topics. By choosing to teach only the introductory unit of the cluster, multiple units, or the entire cluster, teachers may provide basic coverage of the topic, more extended treatment of particular issues, or in depth, comprehensive coverage. In addition, teachers may choose to omit coverage of some of the related matters in areas in which they choose not to engage in extended treatment. Similarly, depending on the preferred teaching method, the problems that appear at the end of each unit may be used as a capstone to tie together and test comprehension of the materials in a unit, used as the focal point for discussion that requires students to draw on the materials (without direct, in-class coverage of those materials), or omitted altogether from coverage or class discussion.

In presenting the material and editing the cases, we have followed some general practices of which students and teachers should be aware. Bracketed material has been inserted to simplify the facts and procedure of some of the cases, to summarize omitted portions of case excerpts and quotations, or to adjust quoted material grammatically. When substantive material is omitted from case excerpts and quotations without the insertion of bracketed material, we have used ellipses to so indicate. We do not differentiate in our use of ellipses between deleted materials that constitute part of a sentence or paragraph and deletions comprising multiple paragraphs. We have omitted most footnotes and many citations in the principal cases, including citations to the administrative record, without indicating these omissions through the use of ellipses. We also have omitted some internal quotations without so indicating. We often provide one or two representative citations within the principal cases, especially to Supreme Court or notable appellate court cases, rather than a long string of essentially repetitive references. Cross references to other material in the book refer to the units in which the material is found, allowing teachers and students to find related material easily.

We could not have completed the book we envisioned (and that we think we have provided) without the help of many people. We gratefully acknowledge the assistance of John Glicksman and Stephen Mazza, who reviewed and provided very helpful comments on draft chapters in which we lack substantive expertise. We are also grateful to Kathleen Levy, who provided valuable editorial suggestions and proof-reading help, and to Michelle Rutledge, who provided word processing support in finalizing the

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ROBERT L. GLICKSMAN
Washington, D.C.

RICHARD E. LEVY
Lawrence, Kansas

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