

ADMINISTRATIVE LAW

Bureaucracy in a Democracy

FIFTH EDITION



DANIEL E. HALL

Administrative Law

BUREAUCRACY IN A DEMOCRACY

FIFTH EDITION

Daniel E. Hall, J.D., Ed.D.

Miami University Hamilton



Prentice Hall

Boston Columbus Indianapolis New York San Francisco Upper Saddle River
Amsterdam Cape Town Dubai London Madrid Milan Munich Paris Montreal Toronto
Delhi Mexico City Sao Paulo Sydney Hong Kong Seoul Singapore Taipei Tokyo

Editorial Director: Vernon Anthony
Acquisitions Editor: Gary Bauer
Editorial Assistant: Tanika Henderson
Director of Marketing: David Gesell
Marketing Manager: Stacey Martinez
Marketing Assistant: Les Roberts
Senior Managing Editor: JoEllen Gohr
Senior Production Editor: Rex Davidson
Project Manager: Susan Hannahs
Art Director: Jayne Conte

Cover Designer: Suzanne Duda
Cover Art: GettyImages
Full-Service Project Management: Antima Gupta,
Aptara®, Inc.
Composition: Aptara®, Inc.
Printer/Binder: Edwards Brothers
Cover Printer: Lehigh-Phoenix Color
Text Font: Minion

Credits and acknowledgments borrowed from other sources and reproduced, with permission, in this textbook appear on the appropriate page within the text.

Photo Credits: Chapter opener photo, Shutterstock; Corbis, pp. 55, 75, 112, 267.

Copyright © 2012, 2009, 2006 Pearson Education, Inc., publishing as Prentice Hall, 1 Lake Street, Upper Saddle River, New Jersey, 07458. All rights reserved. Manufactured in the United States of America. This publication is protected by Copyright, and permission should be obtained from the publisher prior to any prohibited reproduction, storage in a retrieval system, or transmission in any form or by any means, electronic, mechanical, photocopying, recording, or likewise. To obtain permission(s) to use material from this work, please submit a written request to Pearson Education, Inc., Permissions Department, 1 Lake Street, Upper Saddle River, New Jersey 07458.

Many of the designations by manufacturers and seller to distinguish their products are claimed as trademarks. Where those designations appear in this book, and the publisher was aware of a trademark claim, the designations have been printed in initial caps or all caps.

Library of Congress Cataloging-in-Publication Data

Hall, Daniel (Daniel E.)

Administrative law : bureaucracy in a democracy / Daniel E. Hall.—5th ed.

p. cm.

ISBN-13: 978-0-13-510949-6

ISBN-10: 0-13-510949-3

1. Administrative law—United States. I. Title.

KF5402.H35 2012

342.73'06—dc22

2011000767

10 9 8 7 6 5 4 3 2 1

Prentice Hall
is an imprint of



www.pearsonhighered.com

ISBN 10: 0-13-510949-3
ISBN 13: 978-0-13-510949-6

Administrative Law

Dedication

*To Grace Kathryn Hall and Eva Joan Hall, the two most precious
children any man could wish to father*

Preface

INTRODUCTION

The administrative state, both federal and state, continues to expand. Presidents who are committed to small, limited government have had little impact on the size of the United States bureaucracy. Now, under the leadership of President Barack Obama, the United States is embarking on the largest federal policy program since President Franklin D. Roosevelt championed the creation of social security in 1935, health care reform. Add to this the growth in the federal government resulting from the War on Terror, the increased regulatory activity of the federal government in response to the nation's banking, financial, and accounting industries crises, and the federal government's stimulus activities to re-energize the economy, and the result is a growing federal government, in size and policy reach. The continued growth of agencies and the authorities they possess often stress existing notions of the role of government, federalism, accountability, democracy, and governmental structure. These realities are the best evidence of the need for the study of administrative law and for a book that challenges students to think about the administrative state in logical, critical, and analytical ways. It is imperative for professionals in the field to understand the authorities that administrative agencies processes, how agencies are kept accountable, and the existing, and potential, constitutional and other constraints on agency authority that are exist. It is my hope that this text does this.

The challenge is to remember what the framers feared and to remain steadfast in preserving what they designed, even in the wake of social, economic, and technological change. This text is devoted to the idea that government is to remain accountable, and that tyranny can be averted by having an informed and engaged population and through a thoughtfully built administrative enterprise. The simple division of power into federal and state and into three branches is no longer realistic, but the principle is the right one, and with some molding it can continue to be an effective structural constraint on agency authority. The reader will learn in this text that most constitutional rules and doctrines that apply to administrative law are intended to keep government accountable.

This text has three objectives:

1. Examine administrative law in the context of accountability and the prevention of abuse
2. Assist students in critical thinking and case analysis by including case excerpts
3. Provide students with some practical knowledge of administrative agencies and the laws that govern their behavior

ORGANIZATION OF TOPICS

Chapter 1 introduces the student to administrative agencies and administrative law. A discussion of the size of the American bureaucracy and how it affects the daily lives of those living in the United States is intended to pique the reader's interest.

Chapter 2 sets the tone for the remainder of the book. It discusses the concept of free government, how the framers of the Constitution intended to protect freedom, and the contemporary challenges administrative law faces today.

Chapter 3 examines agency discretion and provides many practical examples of discretionary agency authority. The idea of abuse of discretion is a segue to Chapter 4's discussion of due process and fairness.

Chapter 4 explores due process and equal protection in the administrative context. Practical problems are discussed, as is the conceptual aspect of protecting against governmental abuses.

Chapter 5 discusses legislative delegations of authority to agencies.

Chapter 6 continues this discussion by examining the delegation of rulemaking power. Delegations to private parties are included, as privatization is becoming increasingly popular. Delegations of criminal law authority are also discussed because there appears to be an increase in the penal authority of many agencies.

Chapter 7 is concerned with agency investigations and data collection. Fourth Amendment search-and-seizure and Fifth Amendment self-incrimination issues are discussed in detail. Drug and AIDS testing are given special attention.

Chapter 8 is devoted to agency adjudications. The right to participate, adjudicatory procedures, administrative law judges' selection and bias, and other concepts are covered. This leads into the discussion of judicial review found in Chapter 9.

Chapter 9 looks at judicial review of agency action. Limiting doctrines, such as exhaustion and primary jurisdiction, are discussed. Standards of review, scope of review, and sources of common law review are also part of this chapter.

Chapter 10, entitled "Accountability through Accessibility," addresses open government. The federal Freedom of Information Act, Privacy Act, Open Meetings Act, Federal Advisory Committee Act, and Trade Secrets Act are detailed.

Chapter 11 looks at a form of judicial review different from that in Chapter 9. This chapter is concerned with the civil liability of governments and government officials in the performance of their duties. This chapter examines both federal and state common law remedies and immunities.

Finally, **Appendix D**, written and contributed by Dr. Deborah Howard of the University of Evansville, provides students with the analytical framework and practical knowledge necessary to research administrative law issues. Dr. Howard has updated this material with more information on Internet and computerized research. Any legal researcher will find this discussion helpful.

TEXT FEATURES

The writing style and language of this book are intended for the undergraduate student in law, justice, or political science or the graduate student in nonlaw fields. When used, legalese is explained.

As mentioned, I have included **case excerpts** throughout the text. Cases were selected on the basis of the following criteria: importance and impact, currency, clarity of writing, and ability to be edited successfully. The book has been written so that the text can stand alone. The cases are used to illustrate or more fully develop ideas that are discussed in the text.

To keep the cases to an appropriate length, considerable text has been excised from most of them. The guiding principle in the editing process was to reduce the size of each case without jeopardizing its legal and educative integrity. Some internal citations have been retained, others removed. In some instances, especially a long string of citations, the removal of a citation is denoted with an ellipsis. In others, the citations have been removed without notation.

Each chapter opens with a set of **learning objectives** that are sequentially designed around Bloom's taxonomy.

Many **illustrations, graphs, and figures** are used to assist students in conceptualizing the subjects discussed. These include conceptual mapping diagrams as well as data charts.

Sidebars on topics related to the discussion in the text have been included to increase student interest in the subject.

Legal terms appear in boldface in the text and are defined in the margins.

At the close of each chapter, a legal Web site is featured in **Lawlinks**. In addition, a list of Web sites can be found in Appendix D.

Review questions and **review problems** can be found at the close of each chapter. Review questions are designed to test the reader's retention of the content of the chapter. The review problems are designed to test the reader's ability to apply the concepts of the chapter to a set of facts or to engage in critical analysis.

Appendices include excerpts from the federal Constitution, the Administrative Procedure Act, selected presidential executive orders, and an appendix describing how to perform administrative law research.

CHANGES IN THE FIFTH EDITION

It is difficult for me to believe that this text is in its fifth edition, representing more than fifteen years of publication. I am honored that so many instructors continue to rely on this text to assist their students in learning this subject. It has changed over time, in part due to the comments and suggestions of reviewers, adopters, and students. Please, share your content suggestions and please don't hesitate to point out typographical and other errors with me at the email address below.

I don't believe in fixing things that are not broken. Accordingly, as true in prior revisions, the basic architecture of this book has not been changed. The reviewers made outstanding suggestions that I incorporated nearly in toto. These included excellent content additions and legal elaborations, better placement of cases and figures, typographical errors and corrections, and harmonizing discrepancies between previous editions.

At the time of the writing of this edition, summer 2010, the full import of the health care reform law was yet to be realized. Trumpeted as the largest federal social service initiative since the creation of social security during the New Deal, it will undoubtedly result in many challenges to its very existence and there will be even more when the various programs begin to be implemented. Indeed, the litigation has already begun. On the day the health care bill was signed by President Barack Obama, several states, as well as individuals, challenged its constitutionality in federal Court. Subsequent to this initial litigation, assuming the reform is found constitutional, a large administrative infrastructure will be created, spawning additional litigation, and then, like the social security system, a system to hear and resolve disputes both administratively and judicially will be developed. Although it is too early to fully discuss these issues, three sidebars have been included that identify the constitutional challenges that will be addressed in the upcoming years.

Of course, the law has been updated through 2010 and indeed, the Supreme Court of the United States issued several decisions concerning preemption, official and sovereign immunity, Bivens actions, standing, and the commerce clause since the last edition. Five new cases have been added and one removed. *Motor Vehicles v. State Farm* was removed and replaced with *F.C.C. v. Fox* in Chapter Nine, a more timely and interesting example of the application of the arbitrary and capricious standard to agency rulemaking. This edition contains new photos and graphics as well, reinforcing the content and making the subject more visually interesting.

I hope this text assists you in teaching or learning this subject. Your comments or questions are welcomed. Please direct these to either Prentice Hall editors or me.

Daniel E. Hall

Please share your comments with me at hallslaw@yahoo.com.

INSTRUCTOR SUPPLEMENTS

An **Instructor's Manual**, **PowerPoint Lecture Package**, and **Test Generator** are available for download from the Instructor's Resource Center. To access supplementary materials online, instructors need to request an instructor access code. Go to www.pearsonhighered.com/irc, where you can register for an instructor access code. Within 48 hours of registering you will receive a confirming e-mail including an instructor access code. Once you have received your code, locate your text in the online catalog and click on the Instructor Resources button on the left side of the catalog product page. Select a supplement and a log-in page will appear. Once you have logged in, you can access instructor material for all Prentice Hall textbooks.

COMPANION WEB SITE

A companion Web site accompanies this textbook, containing chapter summaries, chapter objectives, links to Internet resources, and practice tests. Go to www.pearsonhighered.com/hall.

Acknowledgments

I again thank Professor Deborah Howard of the University of Evansville for her researching administrative law appendix. I have heard that instructors and students appreciate this well-written, practical guide. The reviewers for this edition made valuable suggestions. To them, I extend many thanks:

Anne E. Kastle, *Edmonds Community College, Paralegal Program;*

G. Coleman Lee, *McNeese State University; and*

Kathleen M. Simon, Ph.D., *Appalachian State University.*

As always, I extend appreciation to the Pearson/Prentice Hall staff of Gary Bauer, Senior Acquisitions Editor and Rex Davidson, Senior Production Editor who are courteous, professional and understanding of authors who don't always make deadlines. Many thanks to Susan Gilbert, Copyeditor and Antima Gupta, Project Manager, Aptara Inc., for their guidance, support, and attention to detail that has made this book a better read.

About the Author

Daniel E. Hall, a native of Indiana, earned his bachelor's degree at Indiana University, Juris Doctor at Washburn University, and Doctor of Education (higher education curriculum and instruction) at the University of Central Florida. Before joining the academy full time, he practiced law in both the United States and the Federated States of Micronesia (FSM), where he clerked for the Supreme Court of the FSM and served as Assistant Attorney General of the FSM. He also clerked for Gene E. Brooks, Chief Judge, United States District Court for the Southern District of Indiana and interned for Congressman Frank McCloskey and Robert Katzmann, J.D., Ph.D., at the Brookings Institution. Subsequent to leaving law practice he has been on the faculties of the Department of Criminal Justice and Legal Studies at the University of Central Florida and the Department of Criminal Justice at the University of Toledo, where he was chair and associate professor. He has also taught as adjunct instructor at the University of Evansville, College of Micronesia, and Barry University School of Law.

Daniel was Campus Dean of Miami Hamilton from 2003–2010 where he was, and continues to be, professor of political science and criminal justice. He is also visiting professor of law at Sun Yat-sen University School of Law from 2010–2013. Daniel is the author or co-author of eighteen textbooks (first and subsequent editions) and more than a dozen journal articles on public law and related subjects. Daniel's greatest joy is being father to Grace and Eva, ages 9 and 5 at the time of publication, who, in spite of continuous efforts by their father, have not yet acquired an appreciation for the constitutional aspects of the modern administrative state. They live in Ohio. For more information on the author go to www.danielhall.org/. He may be reached at hallslaw@yahoo.com.

Administrative Law

Brief Contents

CHAPTER 1	Introduction	1
CHAPTER 2	Bureaucracy and Democracy	15
CHAPTER 3	Agency Discretion	44
CHAPTER 4	The Requirement of Fairness	61
CHAPTER 5	Delegation	105
CHAPTER 6	Agency Rulemaking	132
CHAPTER 7	Agency Investigations and Information Collection	163
CHAPTER 8	Formal Adjudications	196
CHAPTER 9	Accountability through Reviewability	230
CHAPTER 10	Accountability through Accessibility	281
CHAPTER 11	Accountability through Liability	315
Appendix A Constitution of the United States of America		354
Appendix B Administrative Procedure Act (5 U.S.C. §551 <i>et seq.</i>) Excerpts		370
Appendix C Selected Executive Orders		399
Appendix D Researching Administrative Law Issues		432
Index		441

Contents

Preface xvii
Acknowledgments xxi
About the Author xxiii

CHAPTER 1 Introduction 1

- 1.1 Administrative Law Defined 2
- 1.2 Sources of Administrative Law 2
 - 1.2(a) Constitution 2
 - 1.2(b) Enabling Laws 2
 - 1.2(c) Administrative Procedure Act 2
 - 1.2(d) Executive Orders and Signing Statements 3
- 1.3 Administrative Agencies 4
 - 1.3(a) The Need for Agencies 6
 - 1.3(b) Types of Agencies 6
 - 1.3(c) The History and Size of the Bureaucracy 8
 - 1.3(d) The Impact of Agencies on Daily Life 12
- 1.4 Conclusion 13

CHAPTER 2 Bureaucracy and Democracy 15

- 2.1 Democracy and Accountability 16
 - 2.1(a) Democracy Defined 16
 - 2.1(b) Federalism 17
 - ▶ *United States v. Morrison* 21
 - ▶ *Gonzales v. Oregon* 23
 - ▶ *Preston v. Ferrer* 26
 - ▶ *American Trucking Associations, Inc. v. Michigan Public Service Comm'n* 27
 - 2.1(c) Separation of Powers 30
- 2.2 Controlling the Bureaucracy 32
 - 2.2(a) Bureaucracy Defined 32
 - 2.2(b) Presidential Control 32
 - ▶ *Free Enterprise Fund v. Public Corporation Accounting Oversight Board* 35
 - ▶ *Clinton v. City of New York* 38
 - 2.2(c) Congressional Control 39
 - ▶ *INS v. Chadha* 40
 - 2.2(d) Judicial Control 42
- 2.3 Conclusion 42

CHAPTER 3 Agency Discretion 44

- 3.1 Introduction 45
- 3.2 Detriments and Benefits of Discretion 45
- 3.3 Limits on Agency Discretion 47

3.4	Examples of Agency Discretion	47
3.4(a)	Prosecutorial Discretion	47
▶	<i>General Motors v. Federal Energy Regulatory Commission</i>	48
3.4(b)	Rulemaking and Policy Discretion	49
▶	<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i>	49
3.4(c)	Claims and Applications Decisions	51
3.4(d)	Protective Action	51
▶	<i>Gonzalez v. Reno</i>	52
▶	<i>Brock v. Roadway Express, Inc.</i>	56
3.4(e)	Tests and Inspections Generally	57
3.4(f)	Advisory Opinions and Declaratory Orders	57
3.4(g)	Mediation and Arbitration	59
3.4(h)	Other Action	59
3.5	Conclusion	59

CHAPTER 4 The Requirement of Fairness 61

4.1	Due Process in General	62
4.2	Protected Interests	63
4.2(a)	Life	63
4.2(b)	Liberty	64
4.2(c)	Property	64
▶	<i>Perry v. Sindermann</i>	65
▶	<i>Garcetti v. Ceballos</i>	66
▶	<i>Goss v. Lopez</i>	72
4.3	Cost-Benefit Analysis	74
4.4	Notice	76
4.5	Hearings	76
4.5(a)	Where	76
4.5(b)	What	77
4.5(c)	When	78
▶	<i>Goldberg v. Kelly</i>	78
▶	<i>Gilbert v. Homar</i>	81
▶	<i>Ingraham v. Wright</i>	84
4.5(d)	Counsel	85
4.6	Equal Protection	86
▶	<i>Dixon v. Love</i>	86
4.6(a)	The Tests	87
▶	<i>FSK Drug Corp. v. Perales</i>	89
4.6(b)	Affirmative Action and Diversity	90
▶	<i>Grutter v. Bollinger</i>	91
▶	<i>Gratz v. Bollinger</i>	95
4.6(c)	Fifteenth Amendment	98
▶	<i>Rice v. Cayetano</i>	98
4.7	Conclusion	101

CHAPTER 5 Delegation 105

- 5.1 What Is Delegation? 106
- 5.2 Delegating Legislative Authority 106
 - ▶ *United States v. Grimaud* 107
 - ▶ *Panama Refining Co. v. Ryan* 108
- 5.3 The Delegation Doctrine Today 112
 - ▶ *Touby v. United States* 113
 - ▶ *Whitman v. American Trucking Associations* 116
- 5.4 Delegating Judicial Authority 119
 - ▶ *South Dakota v. Department of Interior* 120
- 5.5 Delegating to Private Agencies 124
 - ▶ *Foley v. Osborne Court Condominium* 125
- 5.6 Delegation and Criminal Law 128
- 5.7 Arrest and Detention 129
- 5.8 Conclusion 129

CHAPTER 6 Agency Rulemaking 132

- 6.1 In General 133
- 6.2 Rulemaking and Adjudication Defined 142
- 6.3 The Volume of Rules 143
- 6.4 Types of Rules 144
- 6.5 Rulemaking Procedure 145
 - 6.5(a) Formal Rulemaking 145
 - ▶ *United States v. Florida East Coast Railroad* 146
 - 6.5(b) Informal Rulemaking 148
 - 6.5(c) Beyond the APA's Requirements: Hybrid Rulemaking 150
 - 6.5(d) Exempted Rulemaking 154
 - 6.5(e) Negotiated Rulemaking 155
 - ▶ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* 156
 - 6.5(f) Advisory Committees 157
- 6.6 Ratemaking 157
- 6.7 Taxation and Revenues 157
- 6.8 Controlling Rulemaking Authority 158
 - ▶ *FDA v. Brown & Williamson* 158
- 6.9 Conclusion 161

CHAPTER 7 Agency Investigations and Information Collection 163

- 7.1 Acquiring Information 164
- 7.2 Recordkeeping and Reporting 164
 - ▶ *United States v. Morton Salt Co.* 165
 - 7.2(a) Fifth Amendment Aspects 166
 - 7.2(b) Immunity 167
- 7.3 Inspections, Tests, and Searches 168
 - 7.3(a) Fourth Amendment Aspects 169
 - ▶ *Camera v. Municipal Court* 171

- 7.3(b) Drug, Alcohol, and AIDS Testing 173
 - ▶ *Skinner v. Railway Labor Executive Ass'n* 174
 - ▶ *Vernonia School District v. Acton* 182
- 7.3(c) Closely Regulated Businesses 187
 - ▶ *Donovan v. Dewey* 187
- 7.4 Subpoenas 190
 - 7.4(a) Enforcement of Subpoenas 192
- 7.5 Parallel Proceedings 193
- 7.6 Paperwork Reduction Act 193
- 7.7 Conclusion 194

CHAPTER 8 Formal Adjudications 196

- 8.1 In General 197
- 8.2 Notice 197
- 8.3 Parties and Participation 199
 - 8.3(a) Parties in Interest and Intervention 199
 - ▶ *Ashbacker Radio Corp. v. Federal Communications Commission* 200
 - 8.3(b) Other Methods of Participation 202
- 8.4 Discovery 202
- 8.5 Prehearing Conference 204
- 8.6 Prehearing Settlement and Alternative Dispute Resolution 205
- 8.7 The Hearing 205
 - 8.7(a) Evidence Admissibility 205
 - ▶ *Richardson v. Perales* 207
 - ▶ *Immigration & Naturalization Service v. Lopez-Mendoza* 209
 - 8.7(b) Burdens 212
 - 8.7(c) Standards 212
 - 8.7(d) Administrative Law Judges 213
 - ▶ *Steadman v. United States* 214
 - ▶ *Woodby v. Immigration & Naturalization Service* 215
 - ▶ *Stephens v. Merit Systems Protection Board* 216
 - ▶ *Gibson v. Berryhill* 218
 - 8.7(e) Counsel and Attorney Fees 221
 - 8.7(f) The Decision 222
 - 8.7(g) Observing an Administrative Hearing 226
 - ▶ *Administrative Hearing Record* 226
- 8.8 License Cases 227
- 8.9 Conclusion 228

CHAPTER 9 Accountability through Reviewability 230

- 9.1 In General 231
- 9.2 Sources of Review Authority 231
 - 9.2(a) Statutory 231
 - 9.2(b) Nonstatutory 233
- 9.3 Agency Discretion 233
 - ▶ *Heckler v. Chaney* 234
 - ▶ *Lincoln v. Vigil* 236