FEDERAL ADMINISTRATIVE LAW

Fourth Edition

Gary Lawson

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West's Law School Advisory Board

To Patty, Nathaniel, and Noah

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Preface

When I wrote the first edition of this book in 1998, I perceived a need for a casebook that concentrated on the doctrinal fundamentals and historical development of federal administrative law. Three editions later, I am even more smugly confident of the value of that approach. The doctrinal and historical emphasis of this book has not changed, and it never will.

This edition contains the usual amount of updating, revising, and organizational tweaking, but I have not altered the philosophy, structure, or primary materials from the previous editions. The "vision thing" that drove this book remains constant.

That "vision thing" is a deliberate set of choices about Administrative Law pedagogy that reflects a distinct and (I hope) coherent approach to a difficult subject—and Administrative Law is widely and justly regarded as one of the most difficult subjects in the law school curriculum. It is a hard course to take and a hard course to teach.

The good news is that there is widespread agreement about which features of American administrative law are primarily responsible for these difficulties: (1) the sheer scope of the subject, (2) the technical complexity of many of the doctrines (and of the factual contexts in which the doctrines are often applied), (3) the difficulties of drawing useful generalizations across agencies that have different statutory authorizations, histories, and relationships with other legal actors, (4) the uneasy coexistence of doctrines that were developed at different periods of time under different assumptions about the legal and political status of agencies, and (5) the intimate connections among many aspects of administrative law that make it impossible fully to understand individual branches of doctrine without a grasp of the larger picture. The bad news is that there is far less agreement about the appropriate solutions to these problems. This casebook reflects one set of integrated solutions—a set that I hope will allow both students and teachers to realize the enormous potential offered by a course on administrative law.

(1) The first problem facing any student or teacher of administrative law is the seemingly limitless scope of the subject matter. In principle, administrative law encompasses virtually everything that today goes under the banner of public law. Although the primary focus of administrative law is the operation of the executive arm of government (which itself encompasses everything from policymaking on the frontiers of science to the management of prisons to the administration of benefits programs to the regulation of public utilities), a study of administrative law very quickly shades into a study of the legislative process, with additional rapid detours into constitutional law, civil procedure, federal jurisdiction, jurisprudence, and a host of more specialized subjects such as labor law,

securities regulation, food and drug law, environmental law, and health law. That way lies madness.

This book adopts three strategies to reduce the Administrative Law course to a manageable set of materials. First, and most importantly, the book deliberately concentrates on *federal* administrative law, to the near-total exclusion of *state* administrative law (except to the extent that procedural due process implicates state agencies). This is a controversial strategy. Most real-world administrative law problems arise at the state or local level. It is therefore not surprising that many people believe, with Professor Arthur Bonfield, that by "failing to integrate state law into their administrative law courses, law schools are * * * remiss in their intellectual obligations to students and in their duties to the bar and the public at large." Arthur Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 Tex. L. Rev. 95, 95-96 (1982). To which one can only respond, "Yes, but . . . ."

There is no such thing as "state administrative law." There are fifty systems of state administrative law, plus some much larger number of local variations. There are *commonalities* among those systems, but those commonalities are in large measure shared by the federal system and can be taught effectively through a focused examination of federal administrative law. In order to learn and understand the *differences* among the various state systems, one must first establish a doctrinal baseline against which comparisons can be made—and that is a task that quickly consumes the entire course.

If one knows that most of one's students will practice in a specific state, then there is good reason to include material on that state's administrative law in a basic course. But that is something that a nationally-marketed casebook must leave to the discretion of individual instructors. Accordingly, this book's straightforward organization readily invites supplementation with comparisons between federal administrative law and individual state systems. The book itself, however, is true to its name: it is a tool for the study of federal administrative law and the unique forces that have shaped it.

Moreover, the consequences of a federal focus are not as dire as Professor Bonfield fears. Although the federal and state systems often provide different answers to many of the questions posed by administrative law, the questions are largely the same. Once one understands the questions, it is not that difficult to translate from federal law to the law of any specific jurisdiction.

Second, this book concentrates on administrative *law*. There is much to be said for a course that focuses instead on techniques of administrative policymaking and the role of the lawyer in shaping agency decisions outside of formal legal channels. I believe, however, that this material is best handled through advanced courses or seminars, presumably with smaller enrollments and more opportunities to engage in role-playing, problem-solving, and negotiating exercises. If one tries to give significant coverage to the "nonlegal" world of administrative law in an introductory course, it

must come at the expense of basic elements of doctrine. Such a tradeoff is defensible, but I think ultimately unwise. Thus, this casebook is self-consciously *doctrinal*, focusing on the formal legal doctrines that establish the framework within which policymakers, lobbyists, and lawyers can ply their trades.

Third, this book deliberately sacrifices breadth for depth. Even if one limits oneself to a doctrinal study of federal administrative law, the volume of material is overwhelming. Accordingly, this book strongly emphasizes what I regard as the four fundamental branches of administrative law: the constitutional foundations of the administrative state, the law (both constitutional and statutory) governing agency rulemaking and adjudicatory procedures, the law governing the scope of judicial review of agency action, and the law governing the timing and availability of judicial review. Each of these topics is treated with some attention to detail in order to promote a deep *understanding* of administrative law. But to pursue these topics in depth, others must be left behind. Thus, this book does not cover such important subjects as agency collection and disclosure of information, public participation in and initiation of agency proceedings, or the law governing private rights of action. These subjects can usefully be taught in advanced courses, but there simply isn't room for them in the basic course.

(2) & (3) Administrative law is difficult in large measure because it is difficult. Much of the doctrine is very complex. Moreover, the factual settings that one encounters in a study of administrative law range over a wide variety of specialized subjects. A fair degree of technical competence in these subjects is often required in order to place material in its proper context. Students and teachers—and even casebook editors—cannot be expected to rise to the challenge in all circumstances.

My answer to the problem of doctrinal complexity is: don't hide the ball. The organization of this book is straightforward and even mechanistic; this is not a course in which it pays to be fancy or clever. Furthermore, the book is uncommonly didactic in tone. The book consists almost entirely of principal cases and textual notes. There are very few "note cases" that are not woven into a textual elaboration and even fewer (nonrhetorical) questions for which the book does not at least suggest an answer. In my experience, it is impossible to be too explicit with students about the meaning or relevance of the material in this course. Socrates never had to teach Administrative Law.

The problem of technical complexity is much trickier to handle. One popular solution is to focus the course on a detailed study of one or two agencies. Not only does this make it easier for the students and teachers to have an adequate mastery of the underlying substantive law, it also avoids the problems that come from attempts to generalize across a large number of agencies. One can argue that just as there is no "state administrative law," but instead fifty different state systems, so there is no "federal administrative law," but instead a materially different body of law that governs every (or at least every major) federal agency.

I respectfully but firmly reject this approach—and some of the major premises on which it is founded. First, as an empirical matter, it is easy to overstate the problems of generalizing doctrine across federal agencies. I suspect that skepticism about the existence of a unitary "federal administrative law" partially, or even largely, reflects a deeper skepticism about the possibility and value of traditional doctrinal analysis. (One encounters this skepticism most frequently in connection with scope-of-review doctrine.) As an unrepentant traditional doctrinalist, I do not share this skepticism: there *really is* a federal administrative law, in the sense of a robust set of principles and doctrines that have general application in a wide range of settings. In my judgment, an introductory course in administrative law should focus on this general doctrine, leaving it to specialized courses to work out how these principles get adapted to the circumstances of individual agencies. Second, a book that focuses on general principles makes it possible to supplement the basic course with additional material, either state or federal, that is of special interest to the instructor. It is much harder to supplement a book that focuses on a small number of agencies. Third, an agency-specific focus is better suited to courses that emphasize the "nonlegal" aspects of agency decisionmaking. If one wants to learn about the day-to-day functioning of agencies in the real world, there is much to be said for the case-study approach. It is a less useful approach, however, for a course with a doctrinal focus.

There still remains, however, the problem of acquiring an adequate grasp of the many specialized subjects that are encountered in a "generalist" administrative law course. To my mind, there is simply no solution to this problem that is not worse than the problem itself. Technical complexity is a real feature of modern administrative law, and one simply needs to ride it out. Hopefully, this book's straightforward organization and style will minimize the problem—if only by not muddying the waters any further.

(4) Administrative law has gone through several identifiable stages of development—most notably the formative Progressive era, the New Deal era, the "capture theory" era from the mid-1960s to the early 1980s, and the as-yet-unnamed period from the early 1980s to the present. Each era was driven by distinctive understandings of the roles and functions of agencies, courts, administrative lawyers, and government in general, and those different understandings often lead to very different doctrinal conclusions. Modern administrative law consists of doctrine drawn from all four eras. In order to understand the structure of modern doctrine, one must understand the mix of forces that spawned it.

This book therefore places very heavy emphasis on tracing the historical evolution of modern doctrine. Even when "old" cases are no longer "good law," it is often necessary to study the old cases in order to understand contemporary law. Administrative law makes a great deal of sense if one knows the context from which particular elements of doctrine emerged; it makes very little sense if one simply takes a slice-of-time look at a series of statutes and court decisions. How, for example, can one teach

Vermont Yankee or the hard look doctrine without giving students a clear understanding of the legal developments—and the myriad reasons for those developments—in the D.C. Circuit in the decade preceding 1978? (Indeed, a major impetus for the production of this book was my dissatisfaction with the treatment of history in contemporary casebooks.)

(5) In many respects, administrative law presents students with a Catch-22 situation: in order to understand the procedural law governing agencies, one must understand scope-of-review and timing doctrines, but in order to understand scope-of-review and timing doctrines, one must first understand the basic procedural categories of action and their legal consequences. When all of the pieces are in place, the story of modern federal administrative law is remarkably coherent and understandable. Until all of the pieces are in place, however, one often experiences the frustrations that accompany any uncompleted puzzle. There is, unfortunately, no way to begin at the end.

This feature of administrative law is inescapable. I have tried to mitigate its effects through frequent references to prior—and, where feasible, subsequent—materials. I have also tried to maintain a sense of "flow" throughout the book, so that students can see how the material builds over the course of the year. The underlying (though often nonobvious) coherence of administrative law doctrine contributes to the subject's difficulty, but it also accounts for a good measure of the subject's ultimate intellectual satisfaction.

Learning administrative law is like reading a story; each chapter reveals a bit more about the plot. This book is designed to tell the story of modern federal administrative law in a straightforward yet sophisticated fashion. I will be deeply gratified if I can help users of this book find that story as rewarding and enjoyable as I have.

A note on form: Textual omissions from quoted materials are indicated by three asterisks, but citations and footnotes are generally omitted from quoted material without indication. I have also, on some occasions, omitted subheadings from quoted material without indication. Where I have retained footnotes from quoted material, I have also retained the original numbering. Editor's footnotes, including editor's footnotes inserted into quoted material, are numbered consecutively in each chapter. Editor's footnotes that appear in quoted material are clearly identified and are marked in brackets.

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