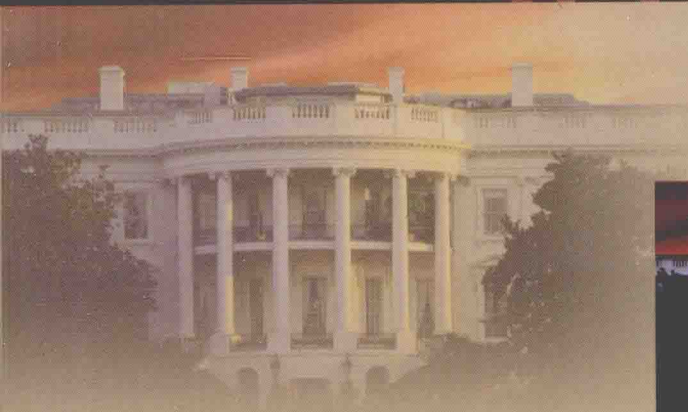


Inside



Administrative Law

What Matters and Why

Jack M. Beermann



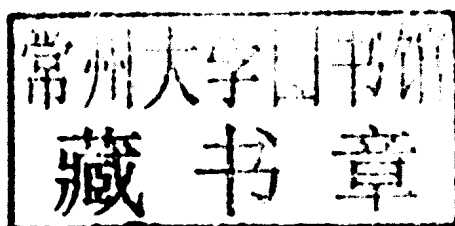
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Inside Administrative Law

What Matters and Why

Jack M. Beermann

*Professor of Law and Harry Elwood Warren Scholar
Boston University School of Law*



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Preface and Acknowledgments

Administrative law is everywhere in the American legal system, from the smallest local dispute about whether a town should cut down a potentially dangerous tree to the great national controversy over whether the U.S. Environmental Protection Agency should regulate the gases that cause global warming. Administrative law cuts across multiple areas of the law, and is also relevant to the study of political science, public policy, and numerous other subjects.

This book was written primarily for use by law students taking a law school course in Administrative Law. As an experienced teacher of Administrative Law, my aim is to explain the subject clearly and succinctly, but without compromising the depth that the subject demands. The course in Administrative Law is rewarding, but it can also be challenging and demanding. Any effort to dumb down the presentation in this book would render it useless. What I have tried to do in this book is to communicate the material at the level I would use if the reader were one of my students asking for an explanation of an area that was giving him or her trouble in class.

This book should prove helpful to non-law students as well. It would serve as a useful overview of administrative law in the United States for undergraduate and graduate students studying political science. This book would also serve as a useful reference for lawyers and public servants who encounter administrative law in their day-to-day professional activities.

To enhance the utility of the book, each chapter contains the following features:

- An **Overview** that briefly introduces the topics discussed in the chapter.
- **FAQs** (Frequently Asked Questions) that give readers clear and cogent answers to issues that commonly pop up in an Administrative Law course.
- **Sidebars** that add some color to the coverage of administrative law, offering readers some parenthetical insights.
- **Key terms** in boldface that will help the reader learn the language of administrative law.
- A **Summary** near the end of each chapter that offers a quick and easy guide to the most basic points covered in that chapter.
- A **Connections** feature at the very end of each chapter that helps fit the points made in that chapter with the other chapters in the book and the complete subject of administrative law.

Finally, I would like to thank numerous people who helped make this book possible, including my casebook co-authors Ron Cass and Colin Diver, Dean Maureen O'Rourke of the Boston University School of Law for material and moral support, my colleague Gary Lawson for always being available to talk through the latest (or earliest) issue in administrative law, the ten anonymous reviewers who

provided valuable suggestions for improving the manuscript, research assistants Ben Narodick, Crystal Callahan, Mark Cianci, Alex Freundlich, Aaron Shue, Phillipa Skow, and Daniel Suraci, and all of the students in my Administrative Law courses over the years at Boston University School of Law, DePaul College of Law, and Harvard Law School.

Jack M. Beermann
Boston, Massachusetts
December 2010

P.S. It is always helpful to have comments from readers. Please contact me at *beermann@bu.edu* with any comments or suggestions for improving future editions of this book.

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Introduction to Administrative Law

What exactly is administrative law? Part of the plan for this chapter is to answer that question, and to explore a few important general issues

surrounding administrative law, including where administrative law comes from, and what theoretical perspective or perspectives might expand the horizons of our insights into administrative law.

O V E R V I E W

Administrative law regulates the exercise of authority by executive officials, including officials of agencies that are formally independent of the executive branch. It includes constitutional law, statutory law including the Administrative Procedure Act (APA), and common law principles predating the APA. Administrative law is everywhere in our legal and political system, ranging from monumental decisions by the President of the United States to determinations by local officials in their daily interactions with private citizens. It is thus vital for every lawyer to have a solid understanding of the principles of administrative law.

Administrative law encompasses a fantastically wide range of subjects. Topics covered in administrative law include constitutional law subjects such as separation of powers and procedural due process; statutes governing agencies in areas as varied as environmental law, labor law, occupational safety, and motor vehicle safety; the structure and workings of the various agencies; procedural requirements for adjudication and rulemaking; enforcement discretion; methods of enforcement; government tort liability; and freedom of information.

When studying administrative law, our focus is usually on the sources of agency power, the constitutional limits on that power, the procedural requirements for the exercise of agency power, and the availability and scope of judicial review of agency

action. A fuller understanding of administrative law can be achieved by analyzing agency structure and agency action under the public interest and public choice theories of regulation. Public interest theory analyzes administrative law with reference to the public policy goals of the government. Public choice theory analyzes administrative law with reference to the political environment and realities of the administrative system.

A. WHAT IS ADMINISTRATIVE LAW?

1. The Sources of Administrative Law
2. Administrative Law's Recurring Issues

B. THE ORIGINS AND ROLES OF ADMINISTRATIVE AGENCIES

1. The Origins of the "Administrative State"
2. Agencies in the Governmental Structure
3. Explanations for the Growth of the Administrative State
4. The Functions of Administrative Agencies
5. Judicial Review of Agency Action

C. PUBLIC INTEREST AND PUBLIC CHOICE EXPLANATIONS OF REGULATION AND THE STRUCTURE OF ADMINISTRATIVE AGENCIES

1. Public Interest Theory of Regulation
2. Public Interest Theory of Agency Structure
3. Public Choice Theory of Regulation
4. Public Choice and Agency Structure
5. Judicial Power and Administrative Law

A. What Is Administrative Law?

Administrative law is the branch of law that regulates the exercise of authority by officials and agencies executing the law under authority granted by the legislature. The scope of administrative law is as great as the scope of the government itself. To name but a few administrative functions, federal agencies administer environmental laws, provide subsidies to farmers, regulate drugs and medical devices, distribute welfare and social security benefits, police the borders and airports, and administer transportation and worker safety programs. Administrative law comprises the substantive and procedural doctrines that enable and control the officials and agencies in the administrative system.

It is vital for every lawyer to have a solid understanding of the principles of administrative law. The breadth and depth of government regulation has grown exponentially in the last one hundred years. Administrative law is everywhere in our legal and political system, ranging from monumental decisions by the President of the United States, for example on whether to regulate pollutants believed to cause global warming to determinations by local officials in their daily interactions with private citizens, for example on whether a business can advertise with a sign on the sidewalk. Administrative law touches nearly every transaction or controversy in