ADMINISTRATIVE LAW AND PROCESS
Third Edition

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Third Edition

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MATTHEW BENDER

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Dedication

To my students

Preface to the Third Edition

Administrative law is about legal processes that relate power to principles. It governs the legal means by which executive, legislative, and judicial powers are exercised over and through administrative agencies. The principles underlying federal administrative law are fundamental to the structure of federal government in the United States, particularly regarding the separation of powers and the authority of the three branches vis-à-vis each other. Those principles have generated extensive debate, since administrative agencies by definition involve intersecting authorities (*e.g.*, as executive agencies governed by Congressional statute) and, inevitably, those intersections yield gray zones. The previous editions of this book have followed those controversies as the deregulatory and anti-regulatory trends of the 1970s and 1980s yielded the neoliberalism of the 1990s and 21st century. Those debates continue. The second edition reflected what was then the emergent trend towards privatization and marketization of governmental services. That trend is now well established, and public/private partnerships are pervasive, including partnerships between governmental entities and transnational corporations. The expansion of the transnational private sector in relation to government, as well as in other respects, effectively makes transnationalism integral to domestic administrative law in a variety of ways. A purely state centric approach to administrative law is insufficient, as administrative law today mediates public and private power in novel ways, the implications of which can be far reaching. This third edition will reflect at least some of the challenges of those mediations.

This edition foregrounds areas of administrative law that have given rise to new debates, or have brought new intensity to controversies of long standing. This is particularly the case with regard to judicial review, which has become a major site of contention over intra-governmental powers, including the powers of the Supreme Court itself. In some areas, including the judicial review of agency interpretations of statutes, settled doctrine has become unsettled, yielding important and often new interpretive questions for administrative law teachers and their students. The sharply partisan divides between the national political parties will undoubtedly be in the minds of many readers as they study recent cases; however, it is important to avoid too cynical a reading of the relevance of politics to the development of administrative law over the past decade. Administrative law is itself political in the classical sense of establishing and distributing powers; looking too quickly for partisan effects risks missing the rich institutional complexity of contemporary democracy — as well as its fragility. Our focus on powers and the principles behind their distribution is thus designed to help readers focus analytically on sites of conceptual tension and ambiguity in administrative law that are likely to become important arenas of advocacy in the future.

As in previous editions, the book is divided into two parts. An introductory Chapter 1 provides students with an overview of such key administrative law concepts as rules and orders as well as some of the various ways they might conceptualize administrative processes generally. Part I (Chapters 2 to 5) deals with the procedures agencies use to exercise their adjudicatory and rulemaking powers. It focuses on the exercise of power within the walls of administrative agencies. Chapters 2 and 3 explore the constitutional and statutory issues that arise when agencies adjudicate. More specifically, Chapter 2 is concerned with the constitutional law that governs the law-applying functions of

agencies. It focuses on the constitutional requirements of the Due Process Clause of the Fifth and Fourteenth Amendments as applied to agency adjudication. Chapter 3 examines in detail the Administrative Procedure Act's requirements for formal adjudication. Chapter 4 addresses informal agency actions and various alternative dispute resolution approaches. Chapter 5 then focuses on rules and rulemaking processes under the Administrative Procedure Act. These institutional arrangements, introduced in Part I, are then set into motion in Part II.

Part II (Chapters 6 to 10) examines how various actors outside of agencies attempt to influence and control the exercise of agency discretion. Chapter 6 deals with the constitutional issues that arise when Congress seeks to delegate legislative power to unelected agency administrators. It also examines delegation in relationship to international agencies and the outsourcing of agency responsibilities to private contractors as well. Chapter 7 involves executive controls over agency discretion as well as various legislative or political attempts to influence agency behavior. Some new issues regarding recess appointments as well as new statutory arrangements governing the ability of the President to remove agency officials are also included. Chapter 8 examines judicial controls over agency discretion and the scope of judicial review provided when a case is properly before a court. The *Chevron* case and the administrative law battleground that it has helped create will be covered in some detail, Chapter 9 addresses the question of which litigants can bring a lawsuit to challenge agency discretion, as well as when and where they can do so. Chapter 10 then examines other means of controlling agency discretion. In particular, Chapter 10 focuses on agencies' and citizens' power to obtain and withhold information.[1]

As a starting point for our discussion of the pragmatics of administrative law, one could usefully view each agency as a culture, as the distinguished practitioner Howard Westwood argued over 45 years ago — each agency being "a law unto itself, with its own way of doing things."[2] There is utility to this kind of appreciation of each agency's character as a social system, as agencies were established by individual statutes, at different times, to meet different needs, and an astute lawyer will know these differences and the different opportunities or constraints they entail for successful advocacy. A more detailed knowledge of agency law in action would greatly advance our overall understanding of bureaucracies in general, and administrative law in particular. Increasingly, this is an area of fruitful exchange between legal scholarship and the social sciences. Indeed, alertness to social and historical context is an asset in case analysis. Administrative law has always been subject to wider societal and political pressures that affect the legal system as a whole, particularly in contexts where a shift in the public's needs, expectations, or attitude generates political energy for reform, and, accordingly, new demands for legal action. Thus, this casebook offers an approach to administrative law that integrates cases and context, and — if this author's experience in the classroom is any guide — this is especially instructive for students encountering the basic principles of this field of law for the first time.

Contextual analysis, however, should not be limited to individual agencies; indeed — to pursue the cultural analogy just this much further — modern cultural analysis does not look for boundaries between cultures, but rather for cultural interconnections. Most

[1] Throughout this book, citations are often omitted from the cases and articles excerpted.

[2] Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607, 611 (1959).

agencies, despite their significant differences, perform a number of common administrative functions. They gather information, formulate policy and then seek to implement and enforce that policy. Moreover, as already pointed out, they carry out these functions in the context of general historical and political forces that affect all institutions. As we shall see, especially in the chapter on judicial review, administrative law is a lively arena at the moment, as judges and law makers wrestle with the question of what may be particular to an agency and its expertise, and what should be general to the system as a whole, requiring close judicial scrutiny.

Thus, while acknowledging the importance of particular substantive agency differences, this book focuses primarily on procedural issues that transcend individual agencies. It focuses on the more general legal context — including various social, political, and historical factors, as relevant — in which the key cases have arisen and been resolved. Indeed, administrative law must be historically sensitive, given the law's emphasis on longstanding interpretations of statutes as central to the conceptual and practical foundation of an agency's independence. Different historical eras are typified by different regulatory problems, different attitudes vis-à-vis the role government should play in dealing with these problems, and, consequently, different approaches to substantive regulation and procedure. For these same reasons, readers should not expect the lines of doctrinal development to be straightforward (or straight, for that matter), as administration law frequently finds its routes around doctrinal impasse (such as may emerge from unexpected circumstances) by tacking back or sideways to doctrinal sources some readers may have imagined to be no longer relevant.

Individual agencies have unique histories and ongoing developing characters that are significantly affected by a number of contextual factors. Primary among these is the historical background that gave rise to the creation of the particular agency in the first place. Second, context includes the regulatory politics generated by an agency's ongoing attempts to carry out its statutory mandates in ever-changing political and economic contexts. Closely related to these broad contextual factors, and perhaps most important of all, is the nature of the agency's particular substantive task. As Professors Gellhorn and Robinson long ago noted, "administrative procedures and the administrative process are ultimately related to the substance of administrative regulation."[3] Or, to paraphrase the artist Ben Shahn, "form is the shape of content."[4]

Shahn states an ideal. But in striving for that ideal, we cannot ignore the complex political realities of which administrative law is but a part. The administrative process and the law that it generates are very much products of a dialectical tension between timeless constitutional doctrines and rational administrative principles, on the one hand, and the demands for pragmatic governmental action constrained by politics in the historic context of the moment, on the other. It is a complex mixture of rational political theories and raw political hopes and fears. It reflects various attempts to deal collectively with a wide range of societal problems, some of which may or may not be capable of resolution by market processes or other non-state processes. Administrative law is often a bundle of contradictions — in part reflecting the substantive and procedural contests involved in its making. In this book, several key contradictions are in play: the value we place on political process and yet our seeming inability to accept any finality when it comes to

[3] Gellhorn & Robinson, *Perspectives in Administrative Law*, 75 COLUM. L. REV. 771, 787 (1975).

[4] BEN SHAHN, THE SHAPE OF CONTENT 62 (Harv. Univ. Press 1957).

results; our respect for the market but, at the same time, our continuing belief in the efficacy of collective, pragmatic legal approaches to societal problems; our concern that the common good of the group be achieved, but not at the expense of basic individual rights.

Again, I emphasize that readers should not look to administrative law to resolve these contradictions. Its primary role has been to give vent to their expression, and — accordingly — the primary effect of the administrative system has been more obviously procedural than substantive. However, procedure often encodes substantive values and agendas, and debates over administrative procedures are a means by which substantive conflicts are played out within agencies and in courts long after a law passes Congress and has been signed by the president.

Understanding the subtleties of the interplay between substance and procedure is crucial to understanding the role administrative law plays today. Privatization, deregulation, regulatory cost efficiency, and regulatory forbearance — introduced as key policy values with the national elections of the 1980s and the 90s — will be with us, in one form or another, for the foreseeable future. Privatization (especially outsourcing) and deregulation are fueled increasingly by global competition and a deepening global regulatory discourse centered on efficiency (and, today, in some quarters, austerity). Regulatory ends are now traded off against cost efficiency, and cost-consciousness pervades the implementation of most regulatory programs today, particularly those administered by the president and subject to Office of Management and Budget review. In practice, this means that the government relies increasingly upon private actors to carry out public functions. From welfare to prisons, from snow removal to garbage collection, from military services to social services, from government sponsored health insurance exchanges to private web designers, private providers now play a much greater role than ever before. What is and what should be the role of administrative law in these contexts? Do we need a new administrative law? These are among the central questions this book is designed to help students answer for themselves.

Given the major changes occurring in our political global economy, administrative law today is a key site for evidence of the adaptive capacity of government under the rule of law. As we adapt to changing times, creative and imaginative approaches towards law and policy will be evermore necessary. Understanding the basic principles set forth in this book will help students build the intellectual foundation for their own future innovations as legal professionals, thereby devising a new public law appropriate for sustaining democratic government in a global era and whatever is coming next.

Bloomington, Indiana

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