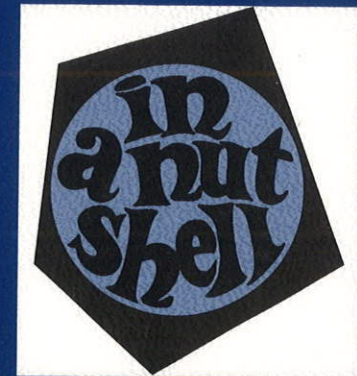


Administrative Law and Process



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INTRODUCTION

Administrative agencies usually are created to deal with current crises or to redress serious social problems. Throughout the modern era of administrative regulation, which began in the late nineteenth century, the government's response to a public demand for action has often been to establish a new agency, or to grant new powers to an existing bureaucracy. Near the turn of the century, agencies like the Interstate Commerce Commission and the Federal Trade Commission were created in an attempt to control the anticompetitive conduct of monopolies and powerful corporations. The economic depression of the 1930s was followed by a proliferation of agencies during the New Deal which were designed to stabilize the economy, temper the excesses of unregulated markets, and provide some financial security for individuals. Agencies were also established or enlarged in wartime to mobilize manpower and production, and to administer price controls and rationing. The development of new technologies, ranging from radio broadcasting to air transportation to nuclear energy, often led to creation of new government bureaus to promote and supervise these emerging industries. In the 1960s, when the injustices of poverty and racial discrimination became an urgent national concern, the development of programs designed to redress these

grievances expanded the scope of government administration. More recently, increased public concern about risks to human health and safety and threats to the natural environment have resulted in new agencies and new regulatory programs.

The primary reason why administrative agencies have so frequently been called upon to deal with such diverse social problems is the great flexibility of the regulatory process. In comparison to courts or legislatures or elected executive officials, administrative agencies have several institutional strengths that equip them to deal with complex problems. Perhaps the most important of these strengths is specialized staffing: an agency is authorized to hire people with whatever mix of talents, skills and experience it needs to get the job done. Moreover, because the agency has responsibility for a limited area of public policy, it can develop the expertise that comes from continued exposure to a problem area. An agency's regulatory techniques and decisionmaking procedures can also be tailored to meet the problem at hand. Agencies can control entry into a field by requiring a license to undertake specified activities; they can set standards, adjudicate violations, and impose penalties; they can dispense grants, subsidies or other incentives; they can set maximum or minimum rates; and they can influence conduct through a wide variety of informal methods.

However, these potential strengths of the administrative process can also be viewed as a threat to other important values. Administrative "flexibility"

may simply be a mask for unchecked power, and in our society unrestrained government power has traditionally been viewed with great and justifiable suspicion. Thus, the fundamental policy problem of the administrative process is how to design a system of checks which will minimize the risks of bureaucratic arbitrariness and overreaching, while preserving for the agencies the flexibility they need to act effectively. Administrative law concerns the legal checks that are used to control and limit the powers of government agencies.

Moreover, continued exposure to the same issues may lead not only to agency expertise but also to rigidity and ineffectiveness. Indeed, scholars and other critics have identified a wide variety of causes for regulatory failure: the basic theory of the regulatory program may be wrong, or the state of knowledge not adequate to support wise decisions; there may be a mismatch between the regulatory objective and the technique chosen to achieve it; the agency may be unduly influenced or "captured" by a powerful constituency group; agency officials may be incompetent or corrupt or lack incentives to produce quality work; and regulatory programs may simply be politically unacceptable in a particular time and place.

These substantive problems of administrative regulation are important and interesting, but they are largely beyond the scope of this text. This explanation of the administrative process will concentrate on how it operates, on "the rules of the game." There is admittedly artificiality and oversimplifica-

tion in this approach. Administrative law as applied by the agencies and the courts cannot be separated from the particular mix of factors that make each agency unique—factors such as the nature of the agency's legislative mandate, its structure and traditions, the values and personalities of the people who work in the agency or deal with it regularly, and, most importantly, its substantive law. Even the procedural uniformity imposed on the federal agencies by the Administrative Procedure Act, 5 U.S.C.A. §§ 551-706 (see statutory appendix), seems to have weakened, as the Congress has at times been willing to prescribe detailed codes of procedure in enabling legislation. Thus, it is an open question whether the differences among agencies are more important than the similarities.

Still, there is something useful to be gained from the effort to view the administrative process as a whole. The student, the lawyer, or the citizen who is trying to penetrate the workings of an unfamiliar bureaucracy needs a general framework of principles and doctrines in order to understand—let alone to criticize or try to change—a given agency decisionmaking process. It is also important to remember that, despite their many differences, agencies also share several broad challenges. One is to design procedures that will strike a workable compromise among important and potentially conflicting public values. These values can be grouped into four categories.

(1) *Fairness*. Concern with the fairness of government decisionmaking procedures is a primary fea-

ture of Anglo-American legal systems. The basic elements of fairness, embodied in the concept of due process, are assurances that the individual will receive adequate notice and a meaningful opportunity to be heard before an official tribunal makes a decision that may substantially affect her interests.

(2) *Accuracy*. The administrative decisionmaking process should also attempt to minimize the risk of wrong decisions. The real difficulty, however, is in defining and measuring accuracy. Since the goals of many regulatory programs are not simple or clearly stated, and the consequences of agency decisions may be difficult to identify, there will often be differences of opinion as to whether a particular decision was accurate or wise—and how the procedures may have influenced the result. Nevertheless, there is widespread agreement that different procedures are more suitable for some kinds of decisions than for others. For example, trial procedures are generally considered most useful for resolving disputes over specific facts concerning past events, and least useful for making general predictions or policy judgments about the future.

(3) *Efficiency*. Efforts to increase the fairness of an administrative decision by expanding opportunities to participate, or to improve accuracy by gathering and evaluating additional information, can be very costly in time, money and missed opportunities. Since agency resources are always limited and usually insufficient to accomplish the full range of duties imposed by statute, it becomes necessary to consider the efficiency of decision-making proce-

dures. Typically, this takes the form of an inquiry into whether additional procedural safeguards are likely to increase the fairness or accuracy of decisions enough to warrant the costs and delays they will create.

(4) *Acceptability*. Because the legitimate exercise of official power ultimately depends upon the consent of the governed, it is necessary to consider the attitudes of constituency groups and the general public toward the regulatory process. That is, administrative procedures should be judged not only on their actual effects, but also on the ways they will be perceived by affected interest groups. There are probably few situations in which public attitudes toward agency procedures play a determinative role in shaping beliefs about the basic legitimacy of the regulatory decision or program. Still, it seems clear that a widespread feeling that a government bureaucracy makes decisions arbitrarily or unfairly can undermine the public's confidence in the agency and the regulated industry's willingness to comply with its decisions.

The administrative law system does not rely solely on procedural controls to ensure that officials will perform their functions satisfactorily. It also expects the legislative, executive, and judicial branches to supervise the substance of what agencies do. For example, the President appoints officeholders and chooses the overall goals of his Administration; Congress conducts oversight hearings and, when necessary, rewrites enabling statutes; courts enforce

legal requirements and place outer limits on agencies' use of discretion.

The primary focus of this text is on federal administrative agencies, although some discussions of state administrative practice are included. As a practical matter, the numerous variations in state law make it impossible to cover the subject adequately in a brief survey. In any case, the basic objective of this book is to help the student of the administrative process develop a framework of general principles, policy considerations and methods of analysis that will be useful in understanding a wide variety of administrative agency procedures, regardless of whether they are found at the federal, state or local level.