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Foundations of the Administrative Law

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Synonyms

Administrative process(es)

Definition

Generally speaking, administrative law is the amalgamation of public laws (i.e., constitutional provisions, legislative statutes, judicial opinions, executive directives) that addresses the democratic legitimacy, control, and performance of administrative authority and discretion by specifying the legal structures, procedures, and standards utilized by government agencies with an emphasis on the role of institutional oversight by the courts.

Introduction

American administrative law stretches back to the beginnings of the nation when in 1789 the First Congress of the United States drafted legislation that established the War Department, the Treasury Department, and the Department of Foreign Affairs and delegated to government officials the authority to undertake a wide variety of tasks including the determination of duties on imported goods, pensions for Revolutionary War soldiers, and the award of licenses to trade with indigenous people (see, e.g., Beermann 2011; Bertelli and Lynn 2006; Pierce 2008). In other words, it was the earliest laws of the land that breathed life into the inchoate administrative state by creating the country's original executive agencies and empowering the first handful of civil servants to implement its public policy. As such, the history of public management in the United States has been inextricably interwoven with the laws that have shaped the scope and structure as well as the principles and processes of government bureaucracy.

However, despite the deep-seated connection between the two fields, in both theory and practice, the subject of administrative law has fallen victim to the near-universal "anti-legal temper" (Waldo 1984, p. 80) among academics and practitioners of public administration. For example, despite the early work of luminaries such as Ernst Freund, W.F. Willoughby, and Frank Goodnow – widely acclaimed as the "father of public administration" (see, e.g., Bertelli and Lynn 2006; Waldo 1984) – whose work championed the importance of administrative law or the contemporary interest of a small cadre of scholars (see, e.g., Barry and Whitcomb 2005; Beckett and Koenig 2005; Cooper 2007; Lynn

© Springer International Publishing Switzerland 2016
A. Farazmand (ed.), *Global Encyclopedia of Public Administration, Public Policy, and Governance*,
DOI 10.1007/978-3-319-31816-5_1027-1

2009; Moe and Gilmour 1995; Rosenbloom and O'Leary 1997), the discipline has largely hewed to the view espoused in 1926 by Leonard White in his seminal treatise *Introduction to the Study of Public Administration* that "the study of administration should start from the base of management rather than the foundation of law" (p. vii).

Given the general neglect of administrative law within the public administration literature, the goal of this brief entry is to provide an introductory overview of the field. Because a full and fair explication of the nature and importance of administrative law is beyond the scope of this endeavor, the discussion that follows will be limited to (1) an attempt to define the subject matter of administrative law, (2) a description of the sources of administrative law, and (3) an explanation of the continued and vital importance of administrative law for the study and practice of public administration. However, before proceeding one final note with regard to the scope of this entry is in order. Although administrative law exists at all levels of American government (i.e., local, state, and federal) and much of the substance is applicable regardless of the governmental setting, the context for the ensuing discussion is administrative law from the perspective of the national level of government.

What Is Administrative Law?

At the outset, it must be noted that there are several factors that make a definitive summation of administrative law an impractical endeavor. First, although administrative law has been part of the American legal landscape from the outset, it is still a field very much in development (see Warren 2011). For example, because "administrative law today deals with central issues in our political landscape" (Breger 1991, pp. 349–350), the underlying assumptions which guide its course have been subject to regular alteration by all three branches of government (see, e.g., Kerwin 1994; Schiller 2000). Put simply, administrative law is malleable in many respects and subject to the caprice of judges, attorneys, and politicians. Second, as will be discussed below in greater detail, administrative law is a broad and eclectic field cobbled together from a variety of sources such as the Constitution, statutory law, judicial decisions, and Executive Orders issued by the president. In turn, administrative law spans myriad substantive areas such as air and water quality, immigration, labor, taxation, housing, occupational safety, and the regulation of food and drugs. In short, the "scope of administrative law is impossible to determine" (Warren 2011, p. 17). Third, because administrative law reaches across the realms of political science, public administration, and legal studies, its interpretation will also vary depending upon who is asked to define the field – an attorney is likely to give a far different answer than a public administrator (see Dimock 1980). With the above caveats in mind, it is perhaps useful to first offer a brief survey of the variety of descriptions that have been offered over the years before positing a working definition that will be relied upon for the remainder of this entry.

The original definition of American administrative law offered by Frank Goodnow in 1893 portrayed the field as "that part of the law that governs the relations of the executive and administrative authorities of government" (p. 7). In addition to the definitional hurdles described above, the vagary of Goodnow's description helped pave the way for the proliferation of competing (and at times conflicting) definitions that have ranged from narrow to broad, complex to simple, and concrete to abstract. For example, Diver (1981) posits a figurative description of administrative law as "in essence, a search for a theory of how public policy should be made" (p. 393), whereas Schuck (2004) initially offers a more concrete framing of administrative law as "the legal doctrines . . . that govern the structure, decision processes, and behavior of administrative agencies" (p. 5). Pierce (2008) supplies a middle-of-the-road institutional view of administrative law as "the study of the roles of government agencies in the U.S. legal system, including the relationships between agencies and the other institutions of government—Congress, the Judiciary, and the President" (p. 1), whereas Simon (2015) notes that legal scholarship in the area of administrative law is "largely concerned with the role of the

courts" (p. 62; see also Shapiro (1988)), and Cooper (2007) offers a more expansive networked view of modern administrative law as "the law of connections . . . connections among organizations at the same level and between units at different levels . . . and the connections between domestic actions and those of regional or global international bodies" (p. 573). Others, such as Barry and Whitcomb (2005), have conceptualized administrative law in terms of the balance between "an administrator's exercise of governmental authority on the one hand, and a private party's rights in relation to governmental authority on the other" (p. 3). In its broadest terms, Breyer et al. (2011) summarize administrative law as "the legal control of government" (p. 2) while, on the opposite end of the spectrum, Rosenbloom (2015, p. 1) offers perhaps the most comprehensive, if not somewhat cumbersome, definition of administrative law as:

> the body of constitutional provisions, statutes, court decisions, executive orders, and other official directives that, first, (a) regulate the procedures agencies use in adjudicating, rulemaking, and adopting policies, (b) control the exercise of their authority to enforce laws and regulations, and (c) govern the extent to which administration is open to public scrutiny (i.e. transparent); and second, provide for review of agency decisions, rules, orders, policies, actions, and other aspects of their operations.

Taking into account Warren's (2011, p. 20) admonition that definitions of administrative law "always seem to lack something," a synthesis of the various interpretations of administrative law surveyed above, yields the following proposal for a working definition: Generally speaking, administrative law is the amalgamation of public laws concerned with the democratic legitimacy, control, and performance of administrative authority and discretion through the specification of the legal structures, procedures, and standards utilized by government agencies with an emphasis on the role of institutional oversight by the judiciary.

The Sources of Administrative Law

Overall, there are four primary legal sources that comprise American administrative law: the US Constitution, legislative statutes, case law (i.e., the cumulative body of decisions rendered by the judiciary), and Executive Orders. This section will provide a brief explanation of each of these areas of law beginning with the largest, the Administrative Procedure Act (APA).

Signed into law in 1946 after nearly a decade of debate, the APA is the principal source of administrative law and serves as the embodiment of the core principles and processes that govern discretionary agency action (Rosenbloom and O'Leary 1997). More so than any other component of administrative law, the APA serves as the legal foundation for public administration and has drawn analogies to the US Constitution and the Magna Carta inasmuch as it creates a generalized legal framework for the modern administrative state (see Barry and Whitcomb 2005; Beermann 2011; Shapiro 1988). In brief, the APA sets forth the procedures and criteria for agency rulemaking and adjudication; it prescribes the necessity and nature of public notice and participation; and it establishes the standards for judicial review of agency action. However, unlike other fundamental documents that establish legal regimes, the APA is not the final word on administrative law.

For instance, Rosenbloom (2015) discusses a variety of other statutes which augment, and at times supersede, the mandates of the APA. Such laws include the Freedom of Information Act, the Government in the Sunshine Act, the Federal Advisory Committee Act, and the Openness Promotes Effectiveness in our National Government Act, all of which greatly expanded the degree of governmental transparency provided for in the APA. In addition to these statutes of general applicability, the organic statutes drafted by Congress that establish agencies and outline their mission may contain supplementary rulemaking or adjudicatory requirements beyond what is prescribed in the APA. For example, several agencies, such as the Consumer Product Safety Commission, must in accordance with their enabling statutes provide additional opportunities for public participation above and beyond what is required from the APA under certain circumstances.

In addition to the statutory law described above, the president has the ability to create

administrative law by imposing additional requirements upon agencies through the use of Executive Orders. As an example, in 1981 President Reagan mandated the process of centralized review for administrative regulations by the Office of Management and Budget through Executive Order 12,291. President Clinton issued Executive Order 12,866 in 1993 which outlined 12 principles for agency rulemaking including the need to assess the cost-effectiveness and cost-benefit of regulations, identify alternatives to the proposed regulation, and seek input from state, local, and tribal governments. Considering that a majority of administrations have issued hundreds (occasionally thousands) of Executive Orders, the presidency continues to exert a strong influence over the direction of the administrative state, especially in times of congressional inaction.

The US Constitution also contributes to the body of administrative law in several important respects. First, and foremost, the constitutional separation of powers allows for each branch of government to exercise authority over agencies by contributing to the development of administrative law – Congress develops legislation, the president issues Executive Orders, and the judiciary interprets the foregoing and imposes its own values on agencies through its oversight role. Second, the Constitution continues to offer doctrinal guidance through its various provisions. For example, when all other forms of law are silent, the Due Process Clause of the Fifth Amendment and the Equal Protection of the Fourteenth Amendment provide a baseline degree of protection for individuals against procedural or substantive discrimination on the part of government agencies.

Lastly, as noted above, much of administrative law focuses on the oversight of agencies by the courts (see, e.g., Shapiro 1988; Simon 2015). This special relationship was contemplated by the APA which explicitly empowers courts to review agency actions. According to APA § 706, courts are able to "hold unlawful and set aside" any informal act that is determined to be "arbitrary, capricious, an abuse of discretion or otherwise contrary to law." In so doing, courts consider the full range of public laws previously described as well as principles found within the common law – the cumulative body of law built upon past judicial decisions. Additionally, courts regularly engage in the "judicialization of administration, a process by which courts tend to shape administrative agencies in their own image and likeness" (Rohr 2002, p. 80). For instance, courts have supplemented administrative law by ruling that in order for public participation in administrative rulemaking to be meaningful, agencies must allow interested persons the opportunity to respond to opposing comments submitted by other parties, reflecting the norm of adversarial legalism inherent to the American judicial process.

Conclusion: The Importance of Administrative Law for Public Administration

As noted in the introduction, American public administration has for much of its history largely ignored its foundation in administrative law. Although there are multiple accounts of the divorce of administrative law and public administration (see, e.g., Bertelli and Lynn 2006; Dimock 1980; Roberts 2008; Warren 2011), the divergence of these fields is perhaps most easily understood given their underlying differences in philosophy. For instance, the "entire point of standard legal scholarship is to explore and contrast the pragmatic implications of conflicting normative positions. . . . Normative conflict not only constitutes the discourse of legal scholarship, but also reflects the field's subject matter" (Rubin 1988, p. 1893). In the area of administrative law, this normative preoccupation has resulted in an emphasis on constitutional values as expressed through judicial safeguards of individual liberty and the separation of powers (see Rosenbloom and O'Leary 1997). This focus on constitutional contractarianism within administrative law has been viewed as incompatible with a mainstream public management approach that favors administrative utilitarianism, efficiency, and performance (see, e.g., Lynn 2009). Or, as explained by Rohr (2002), "participation, transparency, and accountability . . . set a tone quite different from efficiency, effectiveness, and economy, the

traditional hallmarks of administrative orthodoxy" (p. 83). While the root of their separation is understandable, the neglect of administrative law has had severe consequences for public administration.

To begin with, a small but sonorous chorus of academics has observed that by ignoring its roots in administrative law and the values attendant thereto, public administration has forfeited much of its claim to democratic legitimacy and theoretical substance (see, e.g., Cooper 2007; Lynn 2009; Moe and Gilmour 1995; Reed 2009; Rohr 2002; Rosenbloom and O'Leary 1997; Szypszak 2011). As argued forcibly by Bertelli and Lynn (2006), in abandoning the foundation of administrative law during the early half of the twentieth century, "mainstream public administration was not only setting the stage for its permanent state of crisis but also conceding the power to define the scope and legitimacy of public administration to, ironically, the bar and the courts" (pp. 101–102). Moreover, the effects of neglecting administrative law are not simply pedagogical or abstract.

In practice, public administrators face a variety of legal issues on a daily basis involving matters such as personnel decisions; contract management; the proper handling of data privacy; responding to requests under the Freedom of Information Act; determining the issuance of benefits, permits, and licenses; or interpreting the applicability of statutes and court decisions (see, e.g., Roberts 2008; Szypszak 2011). Put differently, administrative agencies "exist to administer the law, and every element of their being—their structure, staffing, budget, and purpose – is the product of legal authority" (Kettl and Fesler 2005, p. 10). As such, by neglecting the reality that law permeates public administration in both theory and practice, current scholarship in the field has missed a grand opportunity to develop what Marshall Dimock deemed "a more realistic, a more complete development of public administration" (1933, p. 35).

Cross-References

▶ Future of Public Administration and Law
▶ History of Public Law
▶ Impact of Law on Public Administration
▶ Law as a Source of Democratic Principles and Public Administration
▶ Law Constraints on Public Administration

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