CHAPTER 1

INTRODUCTION

A. THE STUDY OF ADMINISTRATIVE LAW

Many students of administrative law enroll in the course with no real conception of what it is about. They hear that it is a good course to take, but they may not know why. In fact, it is difficult to avoid administrative law in modern legal practice. Why is this so?

1. WHAT IS ADMINISTRATIVE LAW?

The high school civics model of American government recognizes three branches as outlined in the United States Constitution: the legislative, i.e., Congress; the executive, i.e., the President; and the judicial, i.e., the Supreme Court and lower federal courts. Many students do not really appreciate that, in fact, this model only barely scratches the surface of contemporary American government.

In addition to Congress, the President, and the courts, the federal government encompasses fifteen Cabinet-level departments and dozens of other agencies, boards, commissions, bureaus, and departmental divisions that commonly fall under the heading of administrative agencies and that often seem to operate both in conjunction with and independently of Congress, the President, and the courts. Administrative agencies are responsible for administering thousands of pages of federal statutes, including promulgating and implementing regulations and adjudicating individual cases as well as prosecuting enforcement actions. In fact, administrative agencies create many more legally-binding rules than Congress and adjudicate far more individual disputes than the courts. It seems fair, then, to assume that the field of administrative law relates to administrative agencies; but how?

Indeed, a precise definition of administrative law has proven elusive for many decades. Twenty-five years ago, Henry Friendly provided the following sweeping description:

Administrative law includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law and those left to private civil litigation where the government’s participation is in furnishing an impartial tribunal with the power of enforcement.1

A quarter century earlier, Frank Cooper offered a similarly broad conception, that

administrative law may be defined as including all those branches of public law which relate to the organization of government administration . . . cover[ing] many of the principles and doctrines comprising the fields usually described as constitutional law, legislation, public

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corporations, public officers, civil service, and taxation, and includes, in fact, all branches of the law affecting the executive activities of the government.²

These descriptions certainly capture the scope of the administrative law enterprise, which along with the size of the federal government has only grown larger and more complicated since.

Given the breadth of these definitions, however, it is perhaps not too surprising that other scholars have wondered whether there really is or can be a coherent definition of administrative law as a subject for legal study. In 1936, J.F. Davison observed,

[t]o many lawyers and laymen, however, the phrase “administrative law” suggests the rules and principles by which administrative agencies formulate their decisions. In so far as such rules and principles exist, they should and could be included in a complete study of administrative law. However, the decisions by these various administrative bodies are, as Mr. Justice Holmes expressed it, based on, “an intuition of experience which outruns analysis.” Hence, it must be seriously questioned as to whether it is possible to find rules and principles comparable to those said to exist in the common law and statute law as it is studied at the present time. ** ** When courts or legislatures approve of administrative action based upon intuitive judgments, it may be considered that they have enunciated a principle of law to the effect that an intuitive judgment is the proper one. It is such principles and the field for their use that constitute the principles of administrative law as we know them at the present time.³

Forty years later, Ernest Gellhorn and Glen Robinson picked up on Davison’s point and also asked whether a definition of administrative law was possible, noting the “changing conception of administrative law . . . which in turn reflects developments in the nature and scope of administrative government.” Nevertheless, Gellhorn and Robinson also conceded that, “for all this evolution, perhaps the more noteworthy thing is not how much but how little has actually changed in the basic conception of administrative law.”⁴ In other words, plus ça change, plus c’est la même chose; the more things change, the more they stay the same.

Whatever the merits of this debate in the abstract, such conceptions offer little guidance for discerning what a student of administrative law should, in fact, study. Scholarly approaches to the study of administrative law resolve this question with different, though of course related and overlapping, emphases. Some scholars focus their inquiry on the constitutional relationships between administrative agencies and the other three traditional branches of government: what are the sources of and limitations upon agency authority in our system

of separated and shared powers? Chapters 2 and 3 of this casebook are particularly dedicated to these issues.

Other scholars consider more closely the actions of the agencies themselves: what they do and how they do it. More specifically, agencies adopt rules and adjudicate claims, and some scholars fairly describe administrative law as the study of the processes and procedures by which agencies pursue those activities. Perhaps it is this perspective that prompted Adrian Vermeule to observe that “[o]ne of the main functions of administrative law is to regulate the powers and duties of administrative agencies and the processes by which they act.”\(^5\) Consistent with the observations of Gellhorn and Byse, what agencies do and how they do it often varies tremendously. This is perhaps not surprising, as individual agencies are responsible for administering federal statutes covering everything from immigration, environment, workplace safety, and employment discrimination to patents, securities, taxes, and pension benefits. Nevertheless, agency processes and procedures are also governed by a set of common statutes and legal requirements, including but by no means limited to the Administrative Procedure Act. Chapters 4 and 5 focus especially on these commonalities of agency practice and procedure.

Finally, whatever agencies may do, they are all subject to judicial oversight. Thus, some scholarly conceptions of administrative law place greater emphasis upon judicial oversight of agency action and the standards and doctrines that courts apply in such cases. As Kenneth Culp Davis once offered, “Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action.”\(^6\) Chapters 6 and 7 address primarily topics fitting this description.

In sum, administrative law is a field of great breadth, encompassing the efforts of dozens of administrative agencies and impacting virtually everyone. Every agency and substantive area of government regulation possesses its own unique statutes, practices, customs, and understandings, such that generalization is often difficult. Yet, these myriad areas of law and regulation do share in common statutes, principles, standards, and doctrines that influence both agency behavior and judicial evaluation thereof. Those statutes, principles, standards, and doctrines have evolved over time and continue to do so, yet remain a source of commonality among administrative agencies. The purpose of this casebook is to explore those sources of commonality.

2. **WHY STUDY ADMINISTRATIVE LAW?**

It is virtually impossible to practice law in the United States today without encountering federal government agencies and administrative law issues. To highlight merely a few of the agencies with which different types of lawyers work routinely:

- Environmental lawyers must work with the Environmental Protection Agency and the Department of the Interior;

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6 1 Kenneth Culp Davis, *Administrative Law Treatise* § 1.01 (1958).
• Energy lawyers with the Department of Energy and the Federal Energy Regulatory Commission;
• Immigration lawyers with the Department of Homeland Security and its subsidiary agencies, U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement;
• Tax lawyers with the Treasury Department and the Internal Revenue Service;
• Labor and employment lawyers with the Department of Labor, the National Labor Relations Board, the Occupational Safety and Health Administration, and the Equal Employment Opportunity Commission;
• Patent lawyers with the U.S. Patent Office;
• Securities lawyers with the Treasury Department and the Securities and Exchange Commission; and
• Banking lawyers with the Treasury Department’s Office of the Comptroller of the Currency and Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Federal Reserve Board.

Federal regulatory regimes, and the agencies that administer them, intrude into virtually every sphere of American life. Agencies like the Environmental Protection Agency, the Food and Drug Administration, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration administer regulatory programs that protect public health, safety, and the environment, imposing private costs that exceed the total annual expenditures of the federal government. Agencies like the Social Security Administration and the Center for Medicare and Medicaid Services implement benefit systems that account for a substantial and growing percentage of federal government expenditures. The Internal Revenue Service collects taxes from a few hundred million individuals and entities every year.

Other courses address the particular statutes, regulations, and practices of individual agencies and areas of legal practice. By contrast, the materials in this casebook are designed to introduce you to the procedures that many if not most federal agencies use to issue rules and to adjudicate disputes, the standards that judges apply in reviewing those rules and adjudications, and the doctrines that generally govern the relationships between federal government agencies and the three branches of government recognized in the Constitution. Although this casebook is dedicated to federal administrative law practices and doctrines, because state and local agencies, legislatures, and courts borrow liberally from their federal analogues, this introduction to federal administrative law will also help you to understand state and local administrative law systems as well.7

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7 State and local administrative law systems are too vast and variable to be susceptible to easy generalization. Each state and local administrative law system differs from the federal system in important respects. With the exception of materials concerning due process in Section A of Chapter Four, the materials in this textbook are not directly applicable to the administrative law systems of any state or locality unless explicitly adopted by state or local governments and courts.
B. WHAT IS AN AGENCY?

As noted, administrative agencies are central to the study of administrative law. Yet, just as scholars have struggled to define administrative law, bright lines for characterizing government offices or entities as agencies and for explaining their role in American government have proven similarly elusive. Kenneth Culp Davis offered that “[a]n administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.”8 James Freedman, meanwhile, suggested that agencies represent “centers of gravity of the exercise of administrative power . . . where substantial ‘powers to act’ . . . are vested.”9 Do these explanations help you understand what an agency is and does?

1. STATUTORY DEFINITIONS

Distinguishing agencies from other government offices and entities is often essential for establishing the applicability of various statutes that govern federal agency action. Hence, some of these statutes explicitly define agency for their purposes, although not necessarily in the same way. Why do you think different statutes might define agency differently?

The Administrative Procedure Act, 5 U.S.C. § 551 et seq., which imposes procedural rules for agency actions and standards for judicial review thereof, offers a broad definition that serves for most, though not all, administrative law purposes:

[Agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or in occupied territory; or
(H) functions conferred by [various provisions of the U.S. Code]. . . .10

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8 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 1.01 (1958).
As you can see, rather than offering a particular description of what constitutes an agency, the APA definition is most clear in its identification of particular government entities that are not agencies. Notably, while the APA expressly excludes Congress and the courts from its definition of agency, the APA does not address the status of the President and members of his Executive Office. Despite this omission, the Supreme Court in *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), declared that the President of the United States is most definitely not an agency for purposes of the APA:

The President is not explicitly excluded from the APA’s purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion. As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements.

Further, the courts have interpreted the APA’s exclusion of Congress and the courts from its definition of agency broadly to encompass other government offices in the legislative and judicial branches, respectively. Thus, the United States Judicial Conference,¹¹ the United States Probation Service,¹² and the United States Sentencing Commission¹³ are not agencies for purposes of the APA because they are part of the judicial branch; likewise, the Library of Congress is not an agency subject to APA requirements because it is part of the legislative branch.¹⁴

Another notable feature of the APA definition of agency is its division of listed non-agency entities into two groups: those authorities listed in (A)–(D) that are exempt from APA governance entirely, including § 552; and those authorities listed in (E)–(H) that are not exempt from § 552. Section 552 of Title 5 of the U.S. Code, more commonly called the Freedom of Information Act, or FOIA, requires agencies to make various government documents and information available to the public. FOIA § 552(e) offers its own definition of agency that is based upon but deviates from APA § 551(1):

> [F]or purposes of this section, the term “agency” as defined in section 551(1) of this title includes any executive department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.


SECTION B

WHAT IS AN AGENCY?

Legislative history reflects that Congress intended the definition of agency in FOIA to be broader than the APA definition. Why do you think this might be so?

Other statutes that regulate agency conduct both track and deviate from the APA and FOIA definitions of agency. The Privacy Act, 5 U.S.C. § 552a, which limits the types of information agencies may disclose, uses the same definition of agency as FOIA. The Government in the Sunshine Act, 5 U.S.C. § 552b, which requires that covered agencies hold many of their meetings open to the public, limits its scope to those agencies as defined by FOIA that are “headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency.” Only a narrow subset of agencies subject to either the APA or FOIA satisfies the Sunshine Act definition. Meanwhile, the Federal Advisory Committee Act (FACA), 5 U.S.C. App.1, which similarly requires government advisory committees to open many of their meetings and records to the public, simply utilizes the APA definition of agency.

In summary, for all of these statutes, whether or not a particular government office or entity is an agency begins with the definition of § 551(1), with or without modification. For a government office or entity that is not explicitly excluded by the APA definition, the question may arise whether that office or entity represents an “authority” of the United States Government and, thus, an agency. The following case offers a nice summary of the courts’ reasoning in cases concerning this issue.

Citizens for Responsibility and Ethics in Washington v. Office of Administration

566 F.3d 219 (D.C. Cir. 2009).

GRiffith, Circuit Judge:

Citizens for Responsibility and Ethics in Washington (CREW) alleges that the Office of Administration (OA) discovered in October 2005 that entities in the Executive Office of the President (EOP) had lost millions of White House e-mails. In April 2007, CREW made a FOIA request of OA asking for information about the missing e-mails. CREW sought records about the EOP’s e-mail management system, reports analyzing potential problems with the system, records of retained e-mails and possibly missing ones, documents discussing plans to find the missing e-mails, and proposals to institute a new e-mail record system.***

In June 2007, the parties agreed to a timeline for producing the records, but within weeks OA changed course and told CREW, for the first time in this dispute, that it is not covered by FOIA because it provides administrative support and services directly to the President and the staff in the EOP, putting it outside FOIA’s definition of “agency.” *** OA refused to turn over the bulk of the potentially responsive records-more than 3000 pages.

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Congress enacted the Freedom of Information Act in 1966 to provide public access to certain categories of government records. The Act strives “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dept of Air Force v. Rose, 425 U.S. 352, 361 (1976).* Described in its most general terms, FOIA requires covered federal entities to disclose information to the public upon reasonable request, *see 5 U.S.C. § 552(a)*, unless the information falls within the statute’s exemptions, *see id. § 552(b)*.

By its terms, FOIA applies only to an “agency,” and the key inquiry of this appeal is whether the Office of Administration is an agency under the Act. In the original statute, “agency” was defined broadly as any “authority of the Government of the United States....” Administrative Procedure Act, Pub.L. No. 89–554, § 551(1), 80 Stat. 378, 381 (1966) (codified as amended at 5 U.S.C. § 551(1)). In 1974, Congress amended the definition of “agency” to include, more specifically, “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 5 U.S.C. § 552(f)(1). Although the 1974 amendments expressly include the EOP within the definition of “agency,” the Supreme Court relied upon their legislative history to hold that FOIA does not extend to “the President’s immediate personal staff or units in the Executive Office [of the President] whose sole function is to advise and assist the President,” *Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).* The Supreme Court’s use of FOIA’s legislative history as an interpretive tool has given rise to several tests for determining whether an EOP unit is subject to FOIA. These tests have asked, variously, “whether the entity exercises substantial independent authority,” *Armstrong v. Executive Office of the President, 90 F.3d 553, 558 (D.C.Cir.1996)*, “whether ... the entity’s sole function is to advise and assist the President,” *id.*, and in an effort to harmonize these tests, “how close operationally the group is to the President,” “whether it has a self-contained structure,” and “the nature of its delegated authority,” *Meyer v. Bush, 981 F.2d 1288, 1293 (D.C.Cir.1993).*

However the test has been stated, common to every case in which we have held that an EOP unit is subject to FOIA has been a finding that the entity in question “wielded substantial authority independently of the President.” *Sweetland v. Walters, 60 F.3d 852, 854 (D.C.Cir.1995)* (per curiam). In *Soucie v. David*, we concluded that the Office of Science and Technology (OST) is an agency covered by FOIA because it has independent authority to evaluate federal scientific research programs, initiate and fund research projects, and award scholarships. 448 F.2d 1067, 1073–75 (D.C.Cir.1971). Similarly, we determined that the Office of Management and Budget (OMB) exercises substantial independent authority because it has a statutory duty to prepare the annual federal budget, which aids both Congress and the President. *See Sierra Club v. Andrus, 581 F.2d 895, 902 (D.C.Cir.1978).* We noted that “Congress signified the importance of OMB’s power and function, over and above its role as presidential advisor, when it provided ... for Senate confirmation of the Director and Deputy Director of OMB.” *Id.*
By the same token, we have consistently refused to extend FOIA to an EOP unit that lacks substantial independent authority. We held that the Council of Economic Advisors (CEA) was not covered by FOIA because it “has no independent authority such as that enjoyed either by CEQ or OST.” Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1042 (D.C.Cir.1985). Specifically, we noted that CEA “has no regulatory power under [its] statute. It cannot fund projects based on [its] appraisal, as OST might, nor can it issue regulations for procedures based on the appraisals, as CEQ might.” Id. at 1043. And although President Ronald Reagan’s Task Force on Regulatory Relief comprised senior White House staffers and cabinet officers whose agencies fall under FOIA, we concluded that the Task Force was not a FOIA agency because it lacked substantial authority independent of the President “to direct executive branch officials.” Meyer, 981 F.2d at 1297. The Task Force reviewed agency rules and proposed regulatory revisions to the President, but it could not issue guidelines or other types of directives. Nor is the National Security Council (NSC) covered by FOIA because it plays no “substantive role apart from that of the President, as opposed to a coordinating role on behalf of the President.” Armstrong, 90 F.3d at 565.

And in Sweetland, we held that members of the Executive Residence staff do not exercise substantial authority independent of the President because they only “assist[ ] the President in maintaining his home and carrying out his various ceremonial duties.” 60 F.3d at 854. Specifically, they “provide[ ] for the operation of the [residence]” by preparing meals, greeting visitors, making repairs, improving the rooms’ mechanical systems, and providing needed services for official functions. Id. Sweetland’s analysis and disposition have special force in this matter because it involved an EOP unit that, like OA, provided to the President only operational and administrative support. Where that is the purpose and function of the unit, it lacks the substantial independent authority we have required to find an agency covered by FOIA.

OA’s charter documents created an office within the EOP to perform tasks that are entirely operational and administrative in nature. President Jimmy Carter proposed OA as the “base for an effective EOP budget/planning system through which the President can manage an integrated EOP rather than a collection of disparate units.” OA “shall provide components of the [EOP] with such administrative services as the President shall from time to time direct.” President Carter ordered OA to “provide common administrative support and services to all units within [the EOP], except for such services provided [by the White House] primarily in direct support of the President.” However, OA “shall, upon request, assist the White House Office in performing its role of providing those administrative services which are primarily in direct support of the President.” OA continues to exercise these same functions and duties today. Significantly, OA’s director is “not accountable for the program and management responsibilities of units within the [EOP]”; instead, “the head of each unit . . . remain[s] responsible for those functions.”

As its name suggests, everything the Office of Administration does is directly related to the operational and administrative support of the
work of the President and his EOP staff. OA’s services include personnel management; financial management; data processing; library, records, and information services; and “office services and operations, including: mail, messenger, printing and duplication, graphics, word processing, procurement, and supply services.” CREW contends that OA’s support of non-EOP entities—including the Navy, the Secret Service, and the General Services Administration—undermines the government’s argument. But those units only receive OA support if they work at the White House complex in support of the President and his staff. Assisting these entities in these activities is consistent with OA’s mission. Because nothing in the record indicates that OA performs or is authorized to perform tasks other than operational and administrative support for the President and his staff, we conclude that OA lacks substantial independent authority and is therefore not an agency under FOIA.

NOTES AND QUESTIONS

1. In Citizens for Responsibility and Ethics, the D.C. Circuit applied what is known as the substantial independent authority standard for assessing whether the Office of Administration was an “authority of the Government of the United States” under the APA’s definition of agency, 5 U.S.C. § 551(1), for purposes of FOIA. The D.C. Circuit has applied the same standard in interpreting 5 U.S.C. § 551(1) for Privacy Act purposes as well. See, e.g., Dong v. Smithsonian Inst., 125 F.3d 877, 881 (D.C. Cir. 1997). Other circuits have concurred in this interpretation of the APA’s definition of agency. See, e.g., O’Rourke v. Smithsonian Inst. Press, 399 F.3d 113, 120 (2d Cir. 2005); Irwin Mem’l Blood Bank of San Francisco Med. Soc. v. American Nat’l Red Cross, 640 F.2d 1051, 1053 (9th Cir. 1981). In other words, even if statutes like FOIA and the Privacy Act, for their own purposes, add or subtract from the APA’s definition of agency, in all such contexts, the courts have consistently applied the substantial independent authority standard in identifying whether a particular entity is an authority of the Government of the United States under 5 U.S.C. § 551(1). Given that these statutes serve different purposes and define agency somewhat differently, does the courts’ use of the substantial independent authority standard to interpret 5 U.S.C. § 551(1) seem sensible to you? Why or why not?

2. If, as the D.C. Circuit maintains, the goal of FOIA is “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny,” and FOIA explicitly recognizes the Executive Office of the President as an agency, why do you think the courts have excluded the President and his immediate staff from FOIA’s document disclosure requirements?

2. EXECUTIVE BRANCH AND INDEPENDENT AGENCIES

Government entities that do qualify as agencies under one or more of the above definitions come in many sizes and configurations. Two categories of agencies are particularly relevant for some of the materials in this text: traditional or executive branch agencies, and independent agencies. Again, no single definition captures either category completely, but certain characteristics are more typical than not.
Traditional agencies include and/or are sited in one of the Cabinet-level departments. Presently, the President’s Cabinet includes representatives from fifteen executive branch departments; they are the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans’ Affairs, and Homeland Security. Although each of these Departments employs many, many officers and employees, each is also headed by an individual Secretary or, in the case of the Justice Department, the Attorney General. As we will discuss further in Chapter 3, these individual Department heads are appointed by the President with the advice and consent of the Senate, and they are removable at will by the President as well within certain political constraints.

Somewhat confusingly, the organizational structures of these Departments also contain other agencies—i.e., agencies within agencies. For example,

- the Occupational Safety and Health Administration and the Mine Safety and Health Administration are agencies that are part of the Department of Labor;
- the Food and Drug Administration, the National Institutes of Health, and the Indian Health Service are all part of the Department of Health and Human Services; and
- the Bureau of Indian Affairs, National Park Service, and Bureau of Land Management are part of the Department of the Interior.

Like the Departments themselves, each of these agencies within agencies typically is headed by a single person, although these individuals carry various titles—e.g., Commissioner, Administrator, or Director. These individual agency heads are also appointed by the President with the advice and consent of the Senate. That said, it is not always easy to distinguish an agency within an agency from a subgroup within a single agency.

Independent agencies, by contrast, exist and function outside the control of the traditional executive branch departments. They also tend to be structured differently from traditional executive agencies, with the goal of insulating them from political pressure and direct control by either Congress or the President. Although there is no precise set of features that designates an agency as independent, these agencies tend to be headed by multi-member commissions, boards, or councils rather than by single individuals. The President appoints the heads of independent agencies with the advice and consent of the Senate, but the statutes that create these agencies often establish staggered, fixed-year terms of office for their members, provide that the President may only remove those members from office for cause, and/or specify that only a certain number of the members may belong to the same political party.

In the Paperwork Reduction Act of 1980, Congress provided a nonexclusive list of agencies it considered to be independent, including

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15 The Administrator of the Environmental Protection Agency and the United States Trade Representative are accorded cabinet-level status, but the Environmental Protection Agency and the Office of the United States Trade Representative are not themselves cabinet departments.
the Federal Communications Commission, the National Labor Relations Board, the Consumer Products Safety Commission, and the Securities and Exchange Commission, all of which resemble the above description.

Federal government agencies reflect a wide variety of institutional arrangements that do not fit either of these two categories precisely. For example:

- The Federal Energy Regulatory Commission (FERC) possesses all of the typical characteristics of an independent agency; it is headed by a collegial body, the members of which serve staggered terms of years and cannot be removed except for cause, with the qualification that no more than a bare majority may be from the same political party. Yet, unlike many independent agencies, according to its organic statute, FERC is an agency “within the Department” of Energy. 42 U.S.C. § 7134. Thus, for example, the Inspector General for the Department of Energy also has investigatory powers with respect to FERC.

- The Social Security Administration (SSA) is headed by an individual Administrator rather than a multi-member body. Yet, the head of the Social Security Administration serves for a fixed term of years and cannot be removed from office except for cause. The statute creating the SSA describes it as “an independent agency in the executive branch of the Government.” 42 U.S.C. § 901.

- The Internal Revenue Service (IRS) is also headed by a single Commissioner who is removable at will by the President. The IRS is an agency within the Treasury Department. As of 1997, however, the Commissioner is appointed for a fixed, five-year term. 26 U.S.C. § 7803(a).

3. AGENCIES AND THE THREE BRANCHES

The standard categorization of agencies as between executive branch agencies and independent agencies belies the broader relationships between agencies and all three traditional branches of government. In fact, in important respects, the relationship between agencies, whether traditional or independent, and the other parts of government can be depicted most accurately by the following organization chart.
The dotted lines we have drawn between each of the three branches of government reflect the jurisprudential uncertainty with respect to the details of the relationships between the agencies and each of the three branches. To some extent, this uncertainty derives from the Constitution’s relative silence regarding the role of agencies in its otherwise tripartite scheme. The Constitution clearly contemplates the existence of agencies, but it offers no vision of what they might do or how they might do it.

It is clear that agencies are accountable to Congress, the President, and the courts in many important contexts and respects. It is also clear that the constitutionally-permissible relationships between and among the four institutions varies with context. Remarkably, however, some of the most important characteristics of the relationships remain uncertain even in the third century of our constitutional republic. Thus, for instance, as recently as 1991, the Justices engaged in a lively and inconclusive debate about the characteristics of an institution that cause it to be a court of law or an executive department.16 For that matter, the Justices still have not resolved definitively the controversy that led to the impeachment of President Andrew Johnson in 1868—to what extent and in what circumstances can Congress insulate an agency official from the otherwise plenary power of the President to remove an officer or inferior officer of the United States?

Some things, however, are known and accepted. Whether traditional or independent, agency power begins with Congress, with a presidential assist. With the President’s signature (and thus acquiescence), Congress enacts legislation that assigns an agency the responsibility, and thus the authority and a fair amount of discretion, to administer a statute by enforcing its requirements and/or pursuing its goals. Congress may endeavor to control how an agency exercises that authority and discretion. Congress may narrow the parameters of the delegation substantively, for example by explicitly removing particular questions from the agency’s jurisdiction or requiring judicial approval before an agency’s orders are enforceable as a matter of law. Congress can, and often does, enact other legislation imposing procedural hurdles that agencies must surmount before they can act. Yet, that initial

delegation of authority to administer, regulate, and adjudicate gives an agency the power to act in the first instance.

Furthermore, there is little doubt that a congressional delegation of authority to an agency serves to shift power not only to the agency but also to the President and the courts. Presidents have the power to appoint top agency officials, albeit with the advice and consent of the Senate. Presidents often seek appointees who share their policy goals and preferences. Presidents may also enjoy the power to remove from office many top agency officials should they decline to pursue the President’s agenda. Presidents commonly utilize a variety of less formal mechanisms to influence agency action. In sum, Presidents enjoy a fair amount of control or at least influence over agency actions, so legislation that grants power to agency officials ultimately empowers the President as well. The courts meanwhile exercise the power of judicial review over the substance, procedure, and process of agency action. While standards of judicial review often counsel deference to agencies, courts ultimately have tremendous power to derail agency actions of which they disapprove. The materials in this casebook examine all of these issues at some length.

4. QUASI-JUDICIAL AND QUASI-LEGISLATIVE VERSUS BUREAUCRATIC ACTIONS

Because neither the Constitution nor statutes provide definitive answers to most important administrative law questions, courts have long attempted to draw analogies to two institutions whose characteristics and functions are better known and more settled than those of agencies—legislatures and courts. In other words, when a court is called upon to decide whether a decision-making procedure used by an agency is lawful or whether a relationship between an agency and another institution of government is permissible, that reviewing court may attempt to analogize to some legislative or judicial function. Thus, many judicial opinions addressing administrative law disputes have passages reasoning that a particular decision-making procedure or relationship with another institution is or is not permissible because the agency is performing a function that is “quasi-legislative” or “quasi-judicial.”

It is important to recognize that, while this analogical reasoning process may be quite useful for some purposes, in other cases it may be of limited utility and may produce bad reasoning and bad results. In some contexts, agencies behave similarly to legislatures, and in other contexts they bear some resemblance to courts, but of course they are neither. Legal scholars have recognized that, as institutions, agencies possess their own unique characteristics and norms. Arguably, therefore, assessments of agency actions should recognize and take into account agencies’ institutional uniqueness.

For example, Jerry Mashaw has recognized that agencies follow their own particular bureaucratic norms that are not law per se but that nevertheless operate to direct and constrain agency behavior toward desirable ends; Mashaw also contends that, in many contexts, bureaucratic justice is superior—i.e., provides more accurate results—
when compared to the justice that courts provide.\textsuperscript{17} Perhaps, therefore, administrative disputes are better resolved by considering agencies’ institutional context rather than by evaluating agency actions through the prism of legislative or judicial conventions. In fact, in the last few decades, courts have shown increased awareness of and consideration for agencies’ institutional distinctiveness in adjudicating some administrative law cases.

\textbf{C. THE HISTORY OF ADMINISTRATIVE LAW}

It is difficult to appreciate many administrative law doctrines fully without knowing at least some of their history. Agencies have grown dramatically over the nation’s history in number, size, and scope. Scholarly and popular perceptions of agencies’ essential nature have changed quite a bit as well.

Many legal scholars think of administrative law as largely a twentieth century development. A typical summary of the history of federal administrative law begins with the creation of the Interstate Commerce Commission in 1887, followed by the proliferation of agencies regulating economic activity and administering government benefits during the New Deal, and subsequently the addition of numerous health, safety, and environmental regulatory agencies in the 1960s and 1970s. Indeed, lawyers really only began to think of administrative law as a separate legal field in the late nineteenth century. Yet, federal administrative activity in the United States extends back at least to the founding, and debates and decisions of that era remain part of the administrative law discussion today.

Unsurprisingly, as the administrative state has expanded, and as administrative law doctrine has evolved, different theories of the administrative state have emerged. Although certain theoretical models are often associated with particular time periods, none of the various theories has ever been completely dropped or discredited. Rather, each continues to exist alongside others that have developed subsequently.

\textbf{1. THE EARLY REPUBLIC}

The principal architect of the United States Constitution, James Madison, cautioned that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”\textsuperscript{18} The United States Constitution provides for a federal government of limited authority that is both divided and shared among three co-equal branches. In theory, consistent with the Constitution’s structure, the primary function of the President and other executive branch officers is to execute the laws that Congress enacts, although of course the President, with his veto power, often enjoys tremendous influence in shaping legislation.

Nevertheless, legal scholars have long recognized that the Constitution contemplates the creation of executive branch departments for the purpose of implementing congressionally-enacted

\textsuperscript{17} JERRY MASHAW, BUREAUCRATIC JUSTICE, 213–27 (1983).

\textsuperscript{18} THE FEDERALIST NO. 47, at 266 (James Madison) (Scott, ed. 1898).
s. The First Congress and President George Washington established Departments of War, Treasury, and Foreign Affairs to assist the President in performing the executive function. The First Congress also authorized the President to create regulations to implement the provision of military pensions for Revolutionary War veterans; and delegated administrative power over statutorily-created programs to other executive branch officials, for example by assigning responsibility for “estimat[ing] the duties payable” on imported goods to appointed district tax collectors. Subsequent Congresses followed suit, creating agencies and delegating administrative authority to address problems as diverse as implementing embargos against hostile countries, allocating and regulating most of the nation’s land, and establishing and regulating a national banking system. Congress placed most of these agencies directly within cabinet departments like the Treasury Department. Others were more “independent”; for example, the Patent Office, created in 1790, was headed collectively by the Secretaries of State and War and the Attorney General, rather than falling solely within the sphere of any one department.

Moreover, while federal regulation of economic activity did not at all approximate contemporary norms, it did exist. Even beyond the discretion granted to tax collectors to administer the revenue laws, consider Jerry Mashaw’s account of the Steamship Safety Act of 1852. In the mid-nineteenth century, steamship explosions were commonplace, with large resulting losses of lives. Congress responded by creating a Board of Supervising Inspectors and empowering it to issue licenses to operate steamships, to issue legally-binding rules, and to adjudicate disputes involving steamship safety. Congress did not impose any procedural safeguards upon the agency for when it issued rules or adjudicated disputes, except for the requirement that the agency state its reasons for issuing a rule or for resolving a dispute in a particular manner. Within three years, the Commission was able to reduce the incidence of steamship explosions by roughly eighty per cent.

While performing important functions and exercising substantial power, nineteenth century agencies operated largely unchecked by the courts. A court could not review an agency action that was considered discretionary, and discretion was defined to include any agency action in which an agency had some degree of choice—a broad definition that arguably served to eliminate judicial review of all but a handful of federal agency actions. In that early era, the sole means by which any court could exercise power over an agency was through a suit at common law against an agency employee. Individuals who were injured by conduct that they believed to be ultra vires could file a common law action for trespass or conversion in state court against the federal official who took the action. The federal official would defend on the basis of his claim that he was performing a lawful function on behalf of

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19 Ch. 24, § 1, 1 Stat. 95 (1789).
20 Ch. 5, § 5, 1 Stat. 29, 36 (1789).
the federal government, and his fate would depend on whether a state judge and/or jury agreed with that claim.

Still, although agencies were perhaps more prevalent in these early years than typically realized, and notwithstanding the discretion those agencies exercised, common assumptions regarding administration during this era resemble what Richard Stewart has described as the “transmission belt” theory of agency action. Agencies merely apply legislative commands to individual facts and circumstances. The courts, meanwhile, ensure that agencies follow congressional orders. Stewart rightly associates the transmission belt model of administration with the first half of the twentieth century rather than the nineteenth. While judicial opinions during the latter time period continued to reflect this theory, many theorists had already moved on.

2. THE PROGRESSIVE ERA AND THE NEW DEAL

Any account of federal administrative law recognizes 1887 as a pivotal moment. In that year, responding to complaints by Western farmers and others about the economic power and discriminatory rate practices of the railroads, Congress established the Interstate Commerce Commission (ICC). Congress empowered the ICC to determine “reasonable and just” rates for railroad services and to enforce various anti-discriminatory provisions it adopted simultaneously. Legal scholars herald the creation of the ICC as the beginning of a new era of federal regulation for a few reasons. Scholars sometimes describe the statute creating the ICC as the first time that Congress enacted a broad legislative scheme to regulate a single industry considered vitally important to the national economy. Also, the ICC is often thought to be the first independent agency and an initial effort toward a more technocratic form of governance.

A hallmark of both the Progressive and New Deal eras was a broadly-shared faith in administrative agencies as neutral bodies of experts, untainted by political considerations, dedicated to the essentially technocratic business of regulating key economic sectors, acting in the public interest. Hence, both of the “firsts” attributed to the ICC and its organic statute were repeated numerous times throughout this extended time period. Among the avalanche of economic and social legislation:

- Congress expanded the size, power, and jurisdiction of the ICC with the Hepburn Act in 1906;
- Congress enacted the Sherman Act in 1890, followed by the Clayton Act in 1914 and the Robinson-Patman Act in 1936, and created the Federal Trade Commission as an independent agency in 1914, all for the purposes of preventing monopolization and preserving competition in the marketplace;
- Congress adopted the Pure Food and Drug Act in 1906 to protect the public from adulterated and misbranded food and drugs, assigned responsibility for its administration first to the Bureau of Chemistry in the U.S. Department of Agriculture and

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subsequently to a new Food and Drug Administration in 1927, and then expanded the FDA’s authority with the Federal Food, Drug and Cosmetics Act in 1938;

- After the Sixteenth Amendment was ratified in 1913, Congress adopted an initial series of revenue acts that established corporate and individual income taxes and formed the statutory basis for the modern Internal Revenue Code;
- Congress established the Federal Power Commission in 1920, restructured it as an independent agency in 1930, and tasked it with regulating electricity, natural gas and oil pipelines, and hydroelectric projects;
- Congress enacted the Securities Act of 1933, the Securities and Exchange Act of 1934, and created the Securities and Exchange Commission in 1934 to administer both these and related future statutes and to oversee the securities markets;
- Congress passed the Social Security Act in 1935, dramatically expanding the provision of government benefits to the poor, the unemployed, and the elderly, and created the Social Security Board to administer its programs.

Other prominent Progressive and New Deal era agencies, both executive branch and other independent, include the Federal Communications Commission, the National Labor Relations Board, the Federal Deposit Insurance Corporation, the Federal Reserve System, and the Civil Aeronautics Administration (now the Federal Aviation Administration).

According to one account, by 1941, the United States Government Manual listed more than 200 agencies, boards, commissions, bureaus, and departmental divisions, 111 of which had published rules and regulations in the Code of Federal Regulations, and at least 51 of which conducted rulemakings or adjudications that substantially affected persons outside the government. Of those 51 particularly significant agencies, Congress created 6 agencies, including the ICC, between 1865 and 1900; 9 agencies between 1900 and 1918; another 9 agencies between 1918 and 1929; and 17 agencies between 1930 and 1940. Fully 22 of those agencies fell outside the traditional executive branch departments.

3. THE ADMINISTRATIVE PROCEDURE ACT

It is perhaps not surprising that dramatic proliferation of federal government agencies during the Progressive and New Deal eras prompted calls for some coordinated effort to study and improve upon agency practices and procedures. The result, after several years, was the Administrative Procedure Act.

First enacted in 1946, the Administrative Procedure Act (APA), which is contained in Appendix A to this book, is to administrative law what the Constitution is to constitutional law. Agencies, courts, and practitioners invariably refer to it as an authoritative source for purposes of resolving all major federal administrative law disputes.

George Shepherd’s account of the decade-long congressional debate that preceded enactment of the APA helps to gain an understanding of both the function of the APA and its limitations. The APA was originally proposed in the early days of the New Deal as a means of obtaining greater uniformity with respect to the procedures used by the plethora of new agencies Congress was creating to make various types of decisions and with respect to the relationships between those agencies and the courts. For several years prior to World War II, Congress engaged in bitter debates about the basic contours of the APA. Some members saw agencies as the answer to all of the nation’s problems. They urged enactment of a statute that would create powerful agencies that were largely unconstrained by either mandatory procedures or potentially intrusive judicial review. Other members were skeptical that the new agencies would engage in socially-beneficial actions and were concerned that they would overreach, abuse their vast powers, and interfere with the smooth-functioning of the economy. They urged passage of a statute that would limit agency power, require agencies to use elaborate procedures to make all decisions, and subject agency actions to de novo judicial review. By the time that World War II interrupted that debate, Congress had made no discernable progress in resolving the differences between those two groups.

After the War, Congress returned to the APA debate with an increased emphasis on compromise. After considerable painstaking work, committees of Congress produced a proposed statute that bridged the gap among the members so successfully that it was enacted in 1946 by unanimous votes in both the House and the Senate. Not surprisingly, however, the drafters of the APA were able to please all members of Congress only by using language that is susceptible to many meanings. Agencies and courts have struggled in their efforts to give the flexible words of the statute sensible meanings for over half a century, with mixed and highly incomplete results.

The APA alone resolves few administrative law disputes. In many cases, the APA describes dramatically different procedures for issuing rules or for adjudicating disputes and refers to the provisions of other statutes to indicate which procedure an agency must follow. Thus, the APA must be read in conjunction with the organic acts that authorize each agency to take particular types of actions. In addition, the APA is drafted in much the same manner as a constitution—its language is sufficiently malleable to support many different interpretations. As a result, the APA must be read along with the many judicial decisions in which courts have given meaning to its protean provisions.

Although the story of the APA as legislative compromise demonstrates that not everyone agreed, in the years that followed, most legal scholars generally continued to view administrative agencies as working diligently to resolve complex social and economic problems in the public interest. Nevertheless, some scholars in the 1950s began to question the public interest theory of administrative agencies. One scholar, Samuel Huntington, set off a small uproar when he asserted that the quality of the ICC’s personnel had deteriorated and that political support for its activities had shifted from the farm groups that

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prompted its creation to the railroads that it was supposed to regulate. Huntington did not altogether repudiate the public interest theory of agencies. Rather, Huntington merely suggested reorganizing and combining the ICC with other agencies responsible for various transportation issues to broaden their collective base of political support and better enable them to act in the public interest.


While one might consider the 1940s and 1950s as a period of consolidation and reflection regarding the administrative expansion that had gone before, the 1960s and 1970s were a time of substantial upheaval in administrative law. Beginning with the Great Society program under President Lyndon Baines Johnson and continuing through the administrations of Presidents Richard Nixon and Gerald Ford,

- Congress adopted the Social Security Act of 1965, establishing the Medicare and Medicaid programs to fund medical care for the elderly and the poor;
- Congress enacted statutes like the Federal Coal Mine Safety and Health Act in 1969 and the Occupational Safety and Health Act in 1970 to promote workplace safety, and established agencies like the Mine Safety and Health Administration, the Occupational Safety and Health Administration, and the Occupational Safety and Health Commission to administer those statutes;
- Congress established the Environmental Agency and adopted dozens of environmental statutes, including the National Environmental Policy Act of 1969, the Clean Air Act of 1970, and the Clean Water Act of 1972;
- Congress enacted the Consumer Product Safety Act of 1972 and established the Consumer Product Safety Commission to protect consumers from unsafe products;
- Congress passed the Endangered Species Act of 1973 and several related statutes to protect wildlife; and
- Congress passed the Employee Retirement Income Security Act of 1974 to protect workers’ pensions and created the Pension Benefit Guarantee Corporation as an independent agency to facilitate the continuation and maintenance of private pension plans.

These are just a few examples of the regulatory and administrative expansion that characterized this time period.

This explosive growth of administrative laws and agencies was accompanied by significant developments in agency practices and administrative law doctrine. Interestingly, at the same time that

Congress was again dramatically expanding the administrative state, skepticism of agency action was growing. Building on the observations of Samuel Huntington and others, scholars and courts routinely saw agencies as aligned with and captured by the very agencies they were supposed to regulate. Hence, administrative law doctrine shifted substantially to allow for broader plaintiff standing, a presumption in favor of judicial review, and expanded due process requirements for agency adjudications. Also, new statutes and revised interpretations of old ones prompted many agencies to begin pursuing their policy agendas by promulgating extensive regulations rather than case-by-case enforcement actions. Finally, Congress enacted statutes like the Freedom of Information Act (1966), the Privacy Act (1974), and the Government in the Sunshine Act (1976), which prompted agencies to alter many of their practices to accommodate new process and procedure requirements.

5. The Modern Era

Characterizing more recent years in the context of history is often a difficult and dicey proposition. Nevertheless, it seems at least fair to say that the past thirty years have been an exciting period of change in administrative law.

The Supreme Court has considered a number of key structural issues that this casebook addresses: Does Congress have the power to delegate to agencies the authority to resolve policy through legally-binding regulations? Can Congress establish agencies that are independent of the President? Can agencies perform adjudicatory functions that are traditionally reserved for the Article III courts? These questions are all addressed in Chapters 2 and 3 of this casebook.

The Supreme Court has also developed new standards for judicial review that have had profound effects on agency actions and interactions with the courts. For example, in *Motor Vehicle Manufacturers Ass’n v. State Farm Automobile Insurance Co.*, 463 U.S. 29 (1983), the Court held that agencies must engage in reasoned decisionmaking and consider obvious alternatives to their policies in order to avoid judicial reversal of their policy choices as arbitrary and capricious. The following year, in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), the Court established a new two-step standard for judicial review of agency legal interpretations that requires courts to defer to agencies’ reasonable interpretations of the statutes that they administer. These doctrines are addressed by Chapters 5 and 6, respectively.

Meanwhile, the courts have adopted new interpretations of the Administrative Procedure Act that have significantly altered agency behavior, for good and for ill, leading to complaints that the APA no longer works and that reform is needed. Scholarly and judicial debates have raged over the merits and significance of all of these developments. As Thomas Merrill has observed, “law schools have become a veritable cornucopia—or perhaps cacophony is a better word—of ‘theory,’” complicating assessments of administrative law.

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doctrine and making it difficult to identify a dominant theory of administration, but enriching the discussion.

Finally, as globalization, modern telecommunication and transportation systems, and other technological developments have made life more complex, and as the federal government has sought to address ever more problems and issues, government agencies (and sometimes Congress directly) have turned increasingly to private actors to perform a variety of government functions. As a result, modern governance is a complex web of public and private relationships, with an array of command and cooperative structures, wielding hard rules and soft guidance with real legal consequences. The academic literature assigns different labels to this approach: privatization, public/private partnerships, and new governance, to name just a few. The cooperation of the public and private sectors to achieve public goals is not new. At the height of the New Deal, Louis Jaffe lauded the longstanding and substantial involvement of private groups in the regulatory sphere. But as the scope, range, and legal significance of public/private relationships have expanded, at least some legal scholars have begun to question the legitimacy of the results. Old arguments are new again, clear answers are often elusive, and the administrative law doctrines covered by this case book continue to evolve.

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