

UNDERSTANDING ADMINISTRATIVE LAW

FOURTH EDITION

By

William F. Fox, Jr.

Professor of Law

The Catholic University of America

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are trademarks of Reed Elsevier Properties Inc, used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright © 2000 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 10¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

ISBN#:

Library of Congress Cataloging-in-Publication Data

Fox, William F.

Understanding Administrative Law/William F. Fox, Jr.—4th ed.

p. cm.— (Legal text series)

Includes bibliographical references and index.

ISBN 0-8205-4727-1

1. Administrative law—United States. 2. Administrative procedure—United States. I. Title. II. Series.

KF5402.F68 2000

342.73'06—dc21

00-056429

Editorial Offices

744 Broad Street, Newark, NJ 07102 (973) 820-2000

201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200

701 East Water Street, Charlottesville, VA 22902-7587 (804) 972-7600

www.lexis.com

(Pub.878)

Chapter 1, Introduction, is reproduced from *Understanding Administrative Law*, Fourth Edition, by William F. Fox, Jr., Professor of Law, The Catholic University of America. Copyright © 2000 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

A user is hereby granted the right to view, print or download any portion of this sample chapter, so long as it is for the User's sole use. No part of this sample chapter may be sold or distributed by the User to any person in any form, through any medium or by any means.

Introduction

[A]—Overview of Administrative Law

In the broadest sense, administrative law involves the study of how those parts of our system of government that are neither legislatures nor courts make decisions. These entities, referred to as administrative agencies, are normally located in the executive branch of government and are usually charged with the day-to-day details of governing. Agencies are created and assigned specific tasks by the legislature. The agencies carry out these tasks by making decisions of various sorts and supervising the procedures by which the decisions are carried out. For example, Congress has charged the federal Social Security Administration (SSA) with the administration of the nation's social security program. Under that mandate, SSA does two things: (1) it makes general social security policy (within the terms of the statute, of course) and (2) it processes individual applications for, and terminations of, social security benefits. Affected persons who disagree with the agency's decisions on either the substance of the social security program or the procedures under which that program is implemented—and whose grievances are not resolved within the agency—are permitted to take their dispute into federal court for resolution. Occasionally, aggrieved persons return to the legislative branch in an attempt to persuade Congress to alter the statute under which the social security program functions.

This brief outline is the basic model for the American administrative process; and whether you are studying federal administrative law, a state administrative system, or even a single administrative agency, the process of decision-making is likely to be similar, even when the missions of the agencies differ. It is the unifying force of the administrative *process*—in dramatic contrast to the wide variety of substantive problems with which

agencies deal—that has persuaded most administrative law professors to concentrate on agency procedure rather than agency substance. Accordingly, most contemporary administrative law courses analyze the manner in which matters move through an agency, rather than the wisdom of the matters themselves. In other words, the manner in which the federal Department of Transportation decided to impose a passive–restraint system on automobile manufacturers is a fascinating case history of the administrative process, irrespective of anyone’s personal position on the wisdom of air bags versus seat belts. Recognizing that the focus of most administrative law courses is on how decisions are made (rather than what those decisions are) should help you more readily understand the themes of the typical course in administrative law.¹

[B]—Approaches to the Study and Practice of Administrative Law

Administrative law can be approached in much the same fashion as many other law school courses. If you regard the field merely as a collection of discrete legal doctrines, it may make a great deal of sense simply to memorize various general principles, to apply those principles to a final examination or a bar examination, and then forget about the topic. This book can be used in that fashion. A more profitable approach, however, to truly understanding administrative law—and for practicing administrative law after your admission to the bar—is to keep two questions in mind from the beginning: (1) What are the rules of the game, both substantive and procedural? and (2) How may I best represent my client before an administrative agency? Thinking through the twin issues of doctrine and the application of that doctrine through the lawyering process will make you a much better lawyer, even if it doesn’t necessarily have an immediate payoff in your law school course or on the bar examination.²

The administrative law course will become less fuzzy if you keep in mind a few more fundamentals. First, under our constitutional system, agencies are creatures of the legislature. They do not spring up on their own, and they cannot be created by courts. Agencies function only insofar as a legislature has given them the authority to function. That authority may be exceptionally broad (*e.g.*, telling an agency to regulate railroads by applying

¹ One respected casebook disagrees with this approach and postulates that administrative law can be properly understood only if one studies an individual agency in depth, both substantively and procedurally. Glen O. Robinson, Ernest Gellhorn, & Harold H. Bruff, *THE ADMINISTRATIVE PROCESS* (4th ed. 1993).

² Administrative law questions on the bar examination tend to be very much like law school examination questions. Practitioners will find additional hints on practicing before federal agencies in William Fox, *Some Considerations in Representing Clients Before Federal Agencies*, *Law Practice Notes* (Barrister Magazine, ABA) 21–26 (Summer, 1981).

the standard of “public convenience and necessity”) or incredibly narrow (e.g., when Congress sets the specific income levels and other criteria for those persons who qualify for certain government benefits; or when Congress passes a Coal Mine Safety and Health Act, containing provisions that tell mine operators what size of mine roofing bolts to install).

Federal administrative agencies are typically endowed with broad, general powers. By contrast, state legislatures often enact far more detailed agency statutes because of a lingering reluctance to give state agencies unfettered power. For example, the Nebraska legislature once enacted a statute prescribing the thickness of the metal walls in milk cans, presumably because the legislature did not trust the relevant administrative agency to make a sound decision on this issue. This kind of statutory detail frequently signals a legislature’s distrust with one agency in particular, or, possibly, with the administrative process in general. It is much less common for the United States Congress to get bogged down in the minutiae of administering a particular federal regulatory program because Congress tends to have more confidence in the federal agencies.

Whatever form a new administrative agency takes, the legislature must enact a statute creating the agency. This statute, sometimes called an agency’s *organic act* but more frequently referred to as an agency’s *enabling act*, is the fundamental source of an agency’s power. This principle—that the legislature creates agencies and sets limits on their authority—should be regarded as cardinal rule number one of administrative law. Far too many people in law school and, on occasion, even experienced practitioners, lose sight of this fundamental principal. A misunderstanding of this basic concept can lead to erroneous assumptions about an agency’s ability to deal with a particular issue or problem.

Some enabling acts contain specific provisions establishing agency procedures; but more often than not, when the legislature creates an agency, that agency acquires a specific substantive mission but derives its procedures from a more general statute setting out procedural requirements for all agencies sharing its jurisdiction. The governing procedural statute at the federal level is the Administrative Procedure Act (APA),³ in place since 1946 and normally the thread that holds most law school administrative law courses together. While state administrative procedure statutes differ considerably, a prototype statute, the Model State Administrative Procedure Act,⁴ has been promulgated; and many states either have adopted the Model Act *in toto* or incorporated substantial portions of it into their existing administrative procedure statutes. Thus, you are likely to find at least some

³ 5 U.S.C. §§ 551 to 808. See Appendix A.

⁴ See Appendix B.

procedural uniformity among the states. Those students whose courses emphasize a single state's administrative system would do well to make constant reference to that state's administrative procedure act as they work through their course and this book. They will probably see many similarities between the state act and the federal APA.⁵

Some law professors understandably disagree with a purely federal approach to understanding administrative law. Professor Arthur Bonfield of the University of Iowa College of Law believes that a proper study of the state administrative process would pay large dividends for both students and professors. He believes, among other things, that administrative law is best appreciated through a comparative approach to the topic, that there is a great deal of creativity (what he calls "state solutions") in state administrative systems that are never implemented by the stodgier, less innovative federal agencies, and, perhaps most importantly:

State administrative processes operate under different circumstances than does the federal administrative process; consequently, some of the problems presented [in the states] differ either in degree or kind from those presented in the federal process. Many of the feasible or effective solutions to federal administrative law problems are not feasible or effective in the state context. Therefore, a study of problems and solutions in the federal administrative process cannot be an adequate vehicle to prepare students for dealing with all of the major problems presented in the state administrative process.⁶

No matter how a legislature chooses to deal with an agency, your first task is simple: *Read the agency's enabling act and that jurisdiction's administrative procedure act.* One way to create a lot of trouble for yourself, even at the beginning of the course, is to be casual about reading the applicable statutes. Reading and trying to understand the statutes should be regarded as cardinal rule 1–A for understanding administrative law.

Agencies make a great deal of policy within the boundaries of their enabling acts. Within the boundaries of their administrative procedure act,

⁵ See, e.g., William Fox & Leonard Carson, *A Comparison of the Florida and Federal Administrative Procedure Acts*, 11 Florida Bar Journal 699 (1980). Florida has more recently engaged in a great deal of administrative reform. Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 Fla. St. U. L. Rev. 283 (1997).

⁶ Arthur E. Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 Tex. L. Rev. 95, 103–04 (1982). More recently, Professor Peter Strauss has suggested that administrative law is one of the "hidden" comparative law courses in law school because it combines and requires comparisons between a large number of other law school courses. Peter L. Strauss, *Administrative Law: The Hidden Comparative Law Course*, 46 J. Legal Educ. 478 (1996).

they also establish procedures for efficient and fair decision-making. Remember that enabling acts and administrative procedure acts often establish only *minimum* standards and requirements for individual agencies. These statutes are often so broadly phrased that agencies have enormous leeway to fill in the gaps—both procedural and substantive—of the legislation so long as they keep within the terms of the governing statutes. The areas in which many agencies are free to set their own policies and procedures are quite extensive. We refer to this freedom of action as *agency discretion*. Agency discretion is a second fundamental to keep constantly in mind.

Unfortunately, the concept of agency discretion is one of the least studied and most poorly understood aspects of administrative law. It is so little analyzed that it is frequently referred to as “the hidden component” of administrative law. Nevertheless, it is a phenomenon that both students and practitioner need to appreciate if they are to have a complete understanding of an agency. The first step is realizing that the vast majority of agency decisions are never reviewed by either the courts or the legislature. Other parts of the executive branch, such as the president, governor or attorney general, occasionally get involved with agency action, but for the most part agencies function on their own, often with only sporadic outside scrutiny and accountability.

A third fundamental that should never be forgotten is that courts have a relatively limited role in supervising agency conduct. These days, the federal courts, and many state courts, are required to take what amounts to a “hands off” attitude toward the agencies. The days when a free-wheeling court could substitute its judgment in a dispute for that of the agency are largely over, irrespective of whether the issue before the court is substantive or procedural. The United States Supreme Court has been hammering this message home to the lower federal courts for years.⁷ Many state courts are beginning to adopt a similar posture.

This is not to say that judicial review of agency action is unimportant. As we will see, in many cases it is the tail that wags the dog. But the mere fact that a case might be taken to court is no excuse for sloppy lawyering at the agency level. Too many lawyers make the fatal mistake of thinking that a reviewing court will correct any and all mistakes in the proceedings below, or, indeed, that a court has plenary review powers over agency action. That is simply not the case. The ability of a court to change an agency decision is so limited these days that the second cardinal rule for agency practice is: *A lawyer must win a case at the agency or likely will*

⁷ See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (NRDC), 435 U.S. 519 (1978) discussed in Chapter 7, § 7.03.

*not win it at all.*⁸ A legislative solution for your client's problem may be theoretically possible, but you should remain realistic about actually achieving a favorable result. Try to avoid too much wishful thinking.

[A]—Addressing Legal Disputes

There is hardly any function of modern government that does not involve, in some way, an administrative agency. The reason for this is really very simple: agencies are the only government entities equipped to deal with the day-to-day minutiae of governing. It is one thing for Congress to decide to regulate trucking companies, but the last thing that Congress wants to decide is how much Company X may charge to carry a package from New York to Chicago. Rigorous protection of the environment is now a matter of national consensus, but a court is unlikely to have the technical expertise necessary to decide precisely which specific air pollution control equipment is best suited for coal-fired power plants. Two themes which continually repeat in administrative law in regard to the purpose for the establishment of agencies are: (1) oversight of the detail of regulation and (2) development of expertise in a particular area of regulation.

Understanding the nature of administrative agencies first requires an analysis of the way in which disputes are typically addressed by our legal system. Consider, for example, the case of a creative business executive who sees a need for privately-owned rocketships serving various industrial and commercial purposes.⁹ One option for the business executive under our system of government is simply to start building and flying rockets without worrying about the consequences of accidents and without seeking anyone's permission to do so. It is possible, but hardly likely, that only

⁸ The author recognizes that this statement really goes out on a limb. Many readers, both lawyers and students, will throw back all sorts of instances when courts overturned agency action. That's true, but whether one addresses this issue by analyzing the doctrinal limitations placed on judicial review or merely looks at the statistics (*i.e.*, the number of all agency decisions overturned by courts), he or she will find that the vast bulk of agency decisions are either never taken to court or are simply affirmed when they get there. Thus, the message of cardinal rule number two should not be forgotten: cases are normally won or lost *at the agency*. Courts usually are not the answer nor is the legislature. However, lawyers should not ignore the possibility of a legislative solution. If agencies are creatures of statute, one of the most effective places to turn for relief—at least on a prospective basis—is the legislature. But here again, a wise practitioner will consider whether the legislature will pay any attention to the grievance. Most legislatures are far too busy with more generic issues such as budget and taxes. They are often reluctant to involve themselves in the detail of government.

⁹ This hypothetical was suggested by a problem on rainmaking contained in Walter Gellhorn, Clark Byse and Paul Verkuil, *ADMINISTRATIVE LAW PROBLEMS* (1974).

good things will occur and nothing bad will ever happen. However, a wise entrepreneur always considers the potential liability of a business undertaking.

In a legal system such as ours and given no specific regulatory controls on this type of business, if some incident does occur, and if there is nothing specific in the law books governing rocket accidents, the common law can grapple with any disputes that arise through the application of general principles of tort or contract liability. For example, the nineteenth century British courts had no trouble dealing with a water storage tank that broke and flooded some nearby property, even though Parliament had never spoken on the issue, and even though no previous court had addressed the problem. Principles drawn from tort law, because injury to a property interest was involved, enabled the court to dispose of both the issue of liability and the issue of remedy, even though it was a case of first impression.¹⁰ Common law dispute resolution is triggered by any injured person who feels strongly enough about his or her injury to file a formal action in court and who has a strong enough case to convince the court that liability exists and that some type of monetary relief ought to be granted. Applying the common law solution to our hypothetical indicates that the cumulative effect of reported decisions will eventually establish a body of legal rules for the construction and operation of private rockets without any other government action. Of course, these rules may be overly–narrow or too sketchy to give comprehensive guidance on how an entrepreneur ought to proceed. Still, many problems in our society are handled precisely in this fashion, and it is not necessarily a bad way to handle disputes. The common law solution is flexible enough to react to changing circumstances and predictable enough to give people at least a little warning before they get into trouble.

Looking at the problem realistically, however, a business executive will likely want more predictability and stability than the common law system offers. It is highly doubtful, for example, whether a bank would lend our executive any money for a wholly–untried activity such as this without more in the nature of protection from liability. One option would be to go to a legislature for assistance. Armed with enough political clout, the executive might persuade the legislature simply to authorize the activity. In other words, the legislature could pass a statute saying: “Private corporations may build and operate rocketships.” If this did not satisfy the executive, she might persuade the legislature to expressly permit the activity and to set a cap on possible liability stemming from any accidents involving the private rockets.¹¹ But a legislature’s reaction is frequently unpredictable.

¹⁰ *Rylands v. Fletcher*, 3 Eng. Rep. (H.L.) 330 (1823).

¹¹ For example, the Price–Anderson Act, 42 U.S.C. § 2210(c), sets a cap of \$560 million on any accident occurring in a civilian nuclear powerplant.

Rather than approving private rocketry, the legislature could decide that the activity is so fraught with danger and with hidden social and economic costs that it flatly prohibits private rocket development. The legislature might even go so far as to impose criminal penalties on anyone who attempts to operate a private rocket. Legislative prohibitions of this type don't occur all that often, but readers may recall that cocaine was once sold to the American public on an over-the-counter basis and once was a primary ingredient in a still-popular soft drink.

[B]—Legislative Choices

The legislature has even more alternatives in dealing with the rocketship builder. It might decide that the problem should be dealt with by setting up some kind of government agency. Here, the choices range over a broad spectrum. In making these choices, a legislature will typically analyze:

1. The task to be assigned to the agency (often referred to as the agency's "mission"). There are two factors that are usually considered in this analysis:
 - a. what is the nature of the specific business or industry to be regulated (*e.g.*, firms manufacturing drugs, firearms or rockets); and
 - b. in what manner should the regulation be carried out (by licensing, monitoring, or performing the actual work at issue);
2. The way the agency should be structured (whether, for example, it is to be headed by a single administrator or by a multi-person commission and what its internal organization will be); and
3. The placement of the agency within the existing system of government (*e.g.*, whether it is to be a separate cabinet-level agency, a component of an existing agency or an independent regulatory commission).

The choices are plentiful. The legislature could decide to prohibit any private sector activity whatsoever and to establish a government agency to perform the entire task. Although not a common reaction, Congress has taken this approach with the National Aeronautics and Space Administration (for many years in the United States private rocketry was unlawful; the only governmental entity, outside of the Department of Defense, that had the authority to launch rockets was NASA) and to a certain extent with the Tennessee Valley Authority (TVA actually generates electricity). This constitutes one of the tightest forms of government control because the private sector is flatly forbidden to engage in the activity in question. In

contrast, if the legislature decided that only mild control was necessary, it could impose an administrative control model on the other end of the spectrum, requiring only that those persons wishing to conduct private space flights identify themselves, register with some governmental entity and report periodically on their space flight activities. The Lobbying Disclosure Act of 1995¹² is a typical registration–and–reporting statute.

The legislature might decide that it wants more public control over the activity in question than is permitted by a registration–and–reporting statute, but not the sort of exclusive responsibility formerly given to NASA. As it investigates the phenomenon of private rocketry, it might conclude that the only aspect of private sector space flight that requires some control is the credentialing of rocket engineers. In other words, the legislature could decide that this was an activity suitable for the private sector, but was still complicated enough and dangerous enough that only a select group of professionals should be permitted to engage in the activity. Based on this assumption, the legislature could establish a professional licensing process for rocket engineers. All other persons would be expressly forbidden from participating. A certified rocket engineer who committed an error, could be sued for professional malpractice. Everything else could be left to the mercies of the market. Law students should recognize this model instantly and should be particularly sensitive to regulation in the form of professional licensing.

[C]—“Command–and–Control Regulation”

Another alternative is the administrative model that is characteristic of a great deal of the current regulatory activity of both state and federal governments and whose analysis often constitutes the major portion of the traditional course in administrative law. This type of agency is given powers to regulate a particular industry under a broad statutory mandate (*i.e.*, “in the public interest,” “consistent with public health and safety”) by authorizing individual private-sector firms to perform the activity in question and

¹² 2 U.S.C. §§ 1601 to 1612. The 1995 act has repealed the older Federal Lobbyist Registration Act. Readers should understand that one of the principal reasons for the relaxed controls on lobbyists springs from the First Amendment right to petition the government. Indeed, the 1995 act expressly provides: “Nothing in this Act shall be construed to prohibit or interfere with—(1) the right to petition the Government for the redress of grievances; (2) the right to express a personal opinion; or (3) the right of association, protected by the first amendment to the Constitution.” Most other forms of private sector activity, particularly business activity, are not protected nearly as much by the Constitution. There are relatively few registration and reporting statutes on either the federal or state level that pertain to businesses. One of the few such examples is a registration and reporting activity under the Federal Pesticide Act, 7 U.S.C. § 136(2) for farmers who intend to administer pesticides on their own lands.

by policing the day-to-day operations of that industry. We frequently refer to this type of mechanism as *command-and-control regulation*. Some agencies, for example, the Environmental Protection Agency (EPA), are given regulatory powers that involve both policing various industries and setting standards for pollution control. However, the EPA generally has no overriding licensing powers. It cannot, for example, forbid the construction and operation of a steel mill even though it has the power, speaking very generally, to control that plant's air emissions. The EPA does have the power to issue certain discharge permits for individual firms, but this permitting process does not extend to deciding whether or not that particular firm may exist and do business. The National Labor Relations Board and the Federal Trade Commission perform similar tasks in policing unfair labor and trade practices.

[D]—Licensing Agencies

Typical licensing agencies on the federal level are the Federal Communications Commission (broadcast licenses) and the Federal Energy Regulatory Commission (hydroelectric facility licenses, among other things). The grand-daddy regulatory agency, the Interstate Commerce Commission, a body that had authority to issue freight transportation licenses has been abolished by Congress. Licensing agencies frequently also regulate many of the day-to-day activities of individual companies, such as rates that licensed companies may charge their customers. On the state level, licensing agencies such as state public utility commissions are sometimes given regulatory powers involving health and safety issues as well as economic issues.

[E]—Structure of Agency

But the legislature cannot stop with a delineation of agency powers. It must also decide on the agency's structure and its position within the government. For example, in setting up a new administrative agency, Congress will decide whether to make the agency one of the cabinet-level departments or merely a component of one of the existing departments. The newest federal cabinet-level department is the Department of Veterans Affairs, an agency that had existed prior to 1988 as the sub-cabinet administrative agency known as the Veterans Administration. On the federal level, a Secretary presides over a cabinet. Cabinets typically have a large bureaucracy administering a large number of different programs. On occasion Congress will create a free-standing agency—the EPA is perhaps the best-known example—that is within the executive branch, but not part of any cabinet department.

The President as the chief executive has almost plenary control over executive branch agencies. He can normally appoint and fire the department's highest officials. He has almost total control over departmental policy, and considerable control over the department's budget. However, there are occasions when Congress may wish the new agency to have some independence from presidential control. In that case, it can create an independent regulatory commission such as the Federal Maritime Commission or the Securities and Exchange Commission. On a few occasions, Congress will establish an agency as an independent regulatory commission but place it within an existing cabinet department. On the federal level, independent regulatory commissions are headed by a multiple-person commission and staffed by a bureaucracy that is usually much smaller than a cabinet agency.

An agency's status as independent regulatory commission restricts some of the President's prerogatives in controlling the agency. While the President may appoint commissioners, they typically serve for fixed terms and may not be removed other than on the specific grounds set out in the agency's enabling act. Many federal commissions, by statute, must have a mixture of Republicans and Democrats, so the President may not be free to appoint commissioners solely from within his own political party. These constraints on the appointment and removal process in theory make the commissions "independent" of the President, but over time a President, simply by filling vacancies on the commission, can have a substantial effect on that agency's policymaking.

On occasion, Congress blends two different types of agency. For example, the Federal Energy Regulatory Commission (FERC) is an independent regulatory commission *within* the Department of Energy, a cabinet-level agency. FERC has exclusive responsibility for certain areas of regulation, such as wholesale electric ratemaking. In other matters, the enabling act permits FERC to issue orders that constitute final agency action for the Department of Energy.¹³ In other matters, different components of the Department of Energy function completely independently from FERC.

As mentioned earlier, Congress will occasionally set up agencies within the President's control, such as the Environmental Protection Agency, but for various reasons decide not to place that agency inside a cabinet-level department. Students will encounter many similar examples elsewhere in the federal government and in state and local government. There is no single type of structure or control that characterizes an administrative agency, be it on the federal, state or municipal level.

¹³ See the Department of Energy Organization Act, 42 U.S.C. § 7101.

[A]—Economic Justification

Free markets are one of the fundamental premises of the American economy. Thus, a decision to create an administrative agency to regulate a particular business activity implies a failure on the part of the marketplace to deal adequately with the problem. One way to develop a better understanding of any particular administrative agency is in terms of why the legislature created it. Typically, an agency's regulatory mission, its reason for being, will be explained in the early portions of its enabling act or in its legislative history. For example, when Congress initiated price regulation of the petroleum industry following the Arab oil embargo in 1973–1974, it explained as one of its goals (or justifications) the necessity of protecting U.S. consumers from unconscionable price gouging on the part of the oil companies. This justification was spelled out in the underlying statute, the Emergency Petroleum Allocation Act,¹⁴ but was only one of several goals stated in the first section of the statute. On occasion, a legislature will not state its justifications expressly, but on close examination of an agency's enabling act and the Act's legislative history, justifications can almost always be discerned. This analysis is important to a practicing lawyer because an understanding of an agency's reason for being is often helpful in understanding how the agency functions.

In his now classic work on regulation, Justice Stephen Breyer created a list of possible justifications for regulation.¹⁵ These include, among others:

- a. to control monopoly power;
- b. to control excess profits;
- c. to compensate for externalities;
- d. to compensate for inadequate information;
- e. to inhibit excessive competition; and
- f. to compensate for unequal bargaining power.¹⁶

A statute need not be based solely on one of these justifications, but can be a blend of two or more. Many of Breyer's justifications are self-explanatory, but a few examples may make the others a little clearer. "Externalities," occasionally referred to as "spillovers," occur when the cost

¹⁴ 15 U.S.C. §§ 751 (the regulatory programs authorized by this statute were cancelled by Executive Order in 1981; the statute is no longer operative).

¹⁵ Stephen Breyer, *REGULATION AND ITS REFORM* (1982).

¹⁶ *Id.* at 12–35.

of producing something does not reflect the true cost to society for producing the good. One example is a manufacturing process that creates air pollution—for which society pays the clean up costs. A single firm, however high-minded, cannot take it upon itself to install costly pollution control equipment, if no other firm invests in the equipment, because to do so will drive up that firm's costs to the point where it cannot compete successfully with lower cost goods manufactured by firms that continue to pollute. Some entity, usually the government, must require all firms to make these investments in order to spread the costs of pollution control over the entire industry. The attempt under the Clean Air Act to establish certain national standards for air and water pollution applicable to all firms within particular industries is a recognition of the concept of spillover.

Compensating for inadequate information is a justification for a great deal of current consumer protection legislation. Laypersons do not have the wherewithal to analyze children's sleepwear for flammability. Purchasers of food cannot analyze the nutritional content or the health hazards of various food products. Buyers of major appliances cannot themselves calculate the energy efficiency of a particular model of refrigerator. The Food and Drug Administration's product approval requirements and the Consumer Product Safety Commission's and Department of Energy's labeling regulations reflect this justification. Similarly, compensating for unequal bargaining power is the justification for many of the "truth in lending" regulations issued by the federal banking regulation agencies.

[B]—Political Justifications

There are also political explanations for regulation that are conceptually distinct from economic justifications. One political justification for regulation is that certain matters within our society ought to be subject to the control of persons who are under some obligation of political accountability. It is doubtful, for example, that we would turn over the voting process to a private-sector company. In theory, the most politically accountable branch of government is the legislature, but even the executive branch and the judiciary reflect various concepts of political accountability. Agencies derive their political accountability from the actions of the legislature (in establishing and monitoring the agency) and the executive (through the appointment power). Political accountability helps insure that the agencies function in the public interest, rather than in the interest of narrow single-issue groups. While there is a lot of debate as to whether agencies, in truth, represent the public interest, this concept, lies at the heart of the theory of the administrative process. An elaborate inquiry along these lines is usually outside the scope of the typical law school course in administrative law, but only the bitterest cynics will assert that the concept of the public

interest is meaningless. Moreover, there are occasions when terms such as *public interest* become important as a matter of statutory interpretation. For that reason alone, law students should not disregard the more theoretical aspects of the administrative process.¹⁷

[C]—Evolution of Regulatory Philosophy

In recent years, the American public seems to have developed a renewed faith in the market mechanism as a proper control device and simultaneously seems to have abandoned the idea that command-and-control economic regulation by government agencies is the best way to deal with many problems. This movement, often referred to as *deregulation*, began in the mid-1970s during the Ford and Carter administrations and reached full flower during the Reagan years. That same spirit continued into the Clinton administration as President Clinton declared that the era of big government is over. The push toward deregulation in the late 1970s and early 1980s has raised doubts about the wisdom and rationale of many of Justice Breyer's justifications for regulation. A number of prominent failures of the regulatory process (for example, in the area of regulation of the interstate transportation of natural gas—a program that for years actually created

¹⁷ The first edition of this book was both praised and criticized for taking a highly practical approach to understanding administrative law. While that approach clearly reflects the author's bias and predilections, the more enthusiastic students of administrative law should not disregard some of the fine writing that has been published on the more theoretical and conceptual issues of administrative law. Some book-length writings on the theory of our administrative system that a careful student might wish to read are: James Landis, *THE ADMINISTRATIVE PROCESS* (1938); Kenneth Culp Davis, *DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY* (1969); Robert L. Rabin, *PERSPECTIVES ON THE ADMINISTRATIVE PROCESS* (1979); Jerry L. Mashaw, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); Jerry L. Mashaw, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985); James Wilson, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989); Peter L. Strauss, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* (1989); Cass R. Sunstein, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990); Christopher F. Edley, Jr., *ADMINISTRATIVE LAW: RE-THINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990); Glen O. Robinson, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* (1991); Susan Rose-Ackerman, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* (1992); Peter H. Schuck, *FOUNDATIONS OF ADMINISTRATIVE LAW* (1994). Some frequently cited law review articles on broad themes of administrative law are: Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189 (1986); Gerald E. Frug, *Administrative Democracy*, 40 U. Toronto L.J. 559 (1990); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511 (1992); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1 (1995); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a complex World*, 72 Chi-Kent L. Rev. 987 (1997); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 91 Colum. L. Rev. 1 (1998).

natural gas shortages) have weakened public interest in traditional regulatory mechanisms. In the late 1980s and early 1990s there has been much discussion of taking regulatory powers away from the federal government and giving those powers to the states through the process that has become known as “devolution.”

At the same time, it is clear that the American public has not given up its consensus on such matters as clean air and water and employee and consumer safety. The tensions between a perceived need for some control and monitoring and the tight, often irrational and economically-inhibiting forms of traditional economic regulation have provoked a search for different types of controls and new administrative mechanisms.¹⁸

There are some discernible trends toward new methods of regulation on both the state and federal levels. Interest in economic regulation—such as railroad freight rates or the price natural gas pipelines charge to transport natural gas—has greatly diminished. One agency, the Interstate Commerce Commission (ICC), which regulates railroads and trucks, has been abolished. Another agency, the Federal Energy Regulatory Commission (FERC), (which regulates natural gas and electricity) spends most of its time these days developing regulatory programs that promote market entry and competition and enhance market mechanisms, rather than focusing on price controls and limitations on entry as its basic regulatory philosophy. Congress has occasionally entered this fray. Prior to the demise of the ICC, deregulation had been prompted by two important Congressional enactments, the Motor Carrier Act of 1980¹⁹ and the Staggers Rail Act of 1980.²⁰ In contrast, FERC has attempted many of its reforms by changing its rules without an earlier change in the agency’s enabling acts.²¹

There are many bills introduced in every session of Congress to do away with most federal economic regulation. On occasion, one or another of these bills will succeed. In 1980, Congress abolished an entire major regulatory agency charged with economic regulation of the airline industry. Originally established in the heyday of the New Deal, the Civil Aeronautics Board (CAB) went completely out of business in January, 1985 following an elaborate phase-out timetable mandated by Congress. The CAB does not seem to be a grievous loss. Many of the consumer protection programs established by the CAB simply were transferred to the Department of

¹⁸ See, e.g., Symposium, *Regulatory Reform*, 31 Wake Forest L. Rev. 581 (1996); Larry N. Gerston, et al., *THE DEREGULATED SOCIETY* (1988); Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 Md. L. Rev. 253 (1986).

¹⁹ 49 U.S.C. §§ 10101–11917.

²⁰ Pub. L. No. 210, 90 Stat. 31 (codified in various sections of 49 U.S.C.).

²¹ See, e.g., William Fox, *Transforming an Industry by Agency Rule: Regulation of Natural Gas by the Federal Energy Regulatory Commission*, 23 Land & Water L. Rev. 113 (1988).

Transportation. Safety regulation of airlines is still enforced by the Federal Aviation Administration. While we remain in the midst of a continuing debate as to the impact of deregulation on aviation safety, there seems to be virtually no interest in reviving the CAB. The abolition of the ICC did not engender any large-scale public outcry.²² A small number of ICC functions were transferred to the Department of Transportation.

The debate continues.²³ In the first edition of this book the author surmised: “The lessons learned from the CAB experience (that deregulation may enhance rather than destroy an industry) suggest that it is entirely possible that other federal agencies that engage in economic regulation such as the ICC and the Federal Maritime Commission may be abolished in the near future.”²⁴ The Federal Maritime Commission remains intact—albeit a target of deregulators—as of mid-2000. President Reagan’s attempts to abolish the Departments of Education and Energy, echoed more recently by a Republican-controlled Congress in 1994, have not yet borne fruit and even if passed by Congress would likely be vetoed by President Clinton. As we move through the final year of the Clinton administration, the two major-party presidential candidates appear not to have too much to say about abolishing federal agencies. In the past several years, we have seen more than a little public and legislative interest in what has been called *reregulation*.²⁵ In a small number of instances, such as nuclear power, food and drug products, banking and savings and loan institutions, and hazardous waste sites, public interest in some type of continuing regulation has persisted. There seem, however, to be few cheerleaders for any renewal of economic controls. As we move toward the end of the century, many

²² President Clinton signed the Interstate Commerce Commission Termination Act, 109 Stat. 803 (1995), codified in 49 U.S.C., on December 29, 1995.

²³ See, e.g., Frank B. Cross, *The Judiciary and Public Choice*, 50 *Hastings L.J.* 355 (1999) (Public choice theory has assumed nearly preeminent importance in legal analysis and often has been employed to justify an expansive role for the judiciary and litigation in law interpretation.); Ian Ayres & John Braithwaite, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); Peter Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 *Cornell L. Rev.* 280 (1990).

²⁴ William Fox, *UNDERSTANDING ADMINISTRATIVE LAW* (1st ed. 1986), at p. 9.

²⁵ Killing the CAB was symbolically important because the agency was established in that flurry of New Deal legislation that helped create many of the federal agencies referred to as the “Big Seven”—the CAB, Federal Communications Commission, Federal Power Commission (now Federal Energy Regulatory Commission), Federal Trade Commission (established in 1914), Interstate Commerce Commission (established in 1887 and now abolished), National Labor Relations Board and Securities and Exchange Commission. This does not mean that U.S. airlines are totally unregulated. They remain subject to all other forms of government control (*i.e.*, safety requirements, labor and equal employment laws, antitrust statutes, and the like). Thus, the term *deregulation* frequently refers solely to termination of economic regulation: It does not mean the total absence of regulation.

commentators have expressed interest not in abolishing, but merely in “fixing” government regulation, possibly by developing concepts of “regulatory flexibility.”²⁶ There is much discussion on the issue of moving a substantial amount of regulatory effort from the federal level to the state and local government levels through a process that has become known as “devolution.”²⁷

No matter what form these new developments take, they are healthy because they force everyone to re-examine some of the fundamental assumptions of the administrative system of government. Putting agencies’ specific regulatory programs and conventional administrative procedures under the microscope will help us develop more creative and effective solutions for the problems of twenty-first century America.²⁸

There are some other currents of scholarship that both students and practitioners should appreciate. In 1997, two distinguished administrative law scholars announced, provocatively, that “[a]dministrative law scholarship has reached the end of the questions it may pose and answer.”^{28a}

The authors go on to point out that basic administrative law instruction concentrates on the process of administrative agencies to the detriment of studying “the substantive scope and nature of regulatory government.”^{28b}

[A]—Generally

Much of the discussion in the first three sections of this chapter has focused on matters that involve the substance of administrative law. The substance of regulation is always the primary concern of clients and of the American public. Limits on the amount of social security benefits, changes in water quality standards for the lead smelting industry, and prohibitions

²⁶ See, e.g., Symposium on Regulatory Reform, *above* note 18; Marshall Breger, *Regulatory Flexibility and the Administrative State*, 32 *Tulsa L.J.* 325 (1997); Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 *Yale J. on Reg.* 535, 541 (1996) (“The government would rely on the regulated entities to develop specific and individual implementation plans, and would thus restrict its role to assisting in and providing incentives for self-implementation programs, and to maintaining a credible residual program of detection, surveillance and enforcement.”).

²⁷ There is considerable debate as to the meaning of devolution and whether or not it has already occurred. See, e.g., Mary A. Gade, *The Devolution Revolution Has Already Occurred*, *State Env'tl. Monitor*, Mar. 4, 1996.

²⁸ Many of these innovations are discussed in more detail in Chapter 15.

^{28a} Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 *Admin. L. Rev.* 377, 380 (1997)

^{28b} *Id.*

on the use of flammable fabrics in children's sleepwear are the things that most directly interest companies and individuals. However, lawyers who practice before agencies are always equally concerned with the way an agency decides these matters. You will be surprised as you begin to practice administrative law how often the manner in which an agency decision is made affects the substance of that decision.

The administrative process is governed mainly by the language of an agency's enabling act, the relevant administrative procedure act (APA)²⁹ and the procedural rules adopted by the agency. Many agencies use specific procedures for individual matters, so it is dangerous to over-generalize on a particular agency's process of decisionmaking. In some instances, courts have required that agencies follow certain specified procedures.³⁰

There are essentially three components to agency decisionmaking: *rulemaking*, *adjudication* and *informal action* (frequently referred to as informal *adjudication*). Agency procedures normally vary depending on the type of decisionmaking in which the agency is engaged.

[B]—Rulemaking

When an agency exercises its legislative functions by making rules, the process normally used is a relatively simple system known as *notice and comment* or *informal rulemaking*.³¹ This process requires the agency (1) to give the general public notification that a rule is being contemplated and the language or a general description of the proposed rule, and (2) to invite any interested person to submit comments on the proposed rule. The agency considers the comments and then promulgates a final rule. There are some limited instances on the federal level when rules may be promulgated only after an agency follows the adjudication procedures described in the next paragraph (so-called *formal rulemaking*), as well as instances when an agency's enabling act requires procedures somewhere between informal and formal rulemaking. This in-between procedure is usually referred to as *hybrid rulemaking*.

²⁹ Students concentrating on the administrative law of a particular state should take care to determine the scope of their state's act. Many state administrative procedure acts apply to specific agencies only if the legislature expressly provides, in the enabling act, that the state APA governs. Other states follow the model of the Federal APA and make the APA applicable to all agencies unless a specific agency is expressly exempted from the terms of the APA.

³⁰ The Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), required that state agencies wishing to terminate certain welfare benefits—aid to families with dependent children—adopt an elaborate hearing procedure for termination disputes. See the discussion of constitutional due process in Chapter 5.

³¹ Rulemaking is discussed extensively in Chapter 7.

[C]—Adjudication

When the agency exercises its judicial function by engaging in what is sometimes called formal adjudication, it uses a process that is very much like a civil bench trial in court. These proceedings—while subject to some variation depending on whether the agency is at the federal or state level and on the precise identity of the agency and the matter being adjudicated—typically permit an oral hearing with direct—and cross—examination, testimony under oath, the development of a complete and exclusive record on which the decision is to be based, and the presence of a neutral presiding officer (known on the federal level as an *administrative law judge*). However, court and agency procedures are not identical. Unlike civil courts, most agencies do not use formal rules of evidence or permit the comprehensive discovery allowed under, for example, the Federal Rules of Civil Procedure. Elaborate pre-trial and post-trial procedures are rare, and juries are unheard of. Nonetheless, the similarities between agency adjudication and civil litigation are still far greater than the differences.

[D]—Informal Agency Action

Procedures used when an agency engages in informal action (sometimes referred to as informal *adjudication* because most of these decisions involve the deciding of individual cases rather than generic policymaking) vary considerably. Minimal procedures include merely giving reasons for a decision — as, for example, when a federal agency denies certain applications for benefits. Other actions can require the giving of notice and some opportunity to comment in writing, or providing an oral hearing for aggrieved persons. Although procedures for rulemaking and formal adjudication are often tightly controlled by either an enabling act or the relevant APA, procedures governing informal agency action are often established by the procedural rules of the agency.

[E]—Alternative Dispute Resolution

Much like the current ferment in the substantive law of administrative agencies, traditional agency procedures are under serious re-examination. For some time a number of agencies such as the Environmental Protection Agency and the Federal Aviation Administration have experimented with a new process known as *regulatory negotiation* to make rules. This procedure, in essence, brings representatives of all the major groups affected by a rulemaking around a table for face-to-face negotiation on the terms of the proposed rule, prior to its being published in the *Federal Register*.³²

³² See, e.g., Neil Eisner, *Regulatory Negotiation: A Real World Experience*, 31 Fed. B. News & Journal 371 (1984) and the more elaborate description of regulatory negotiation in Chapter 7.

In 1990, Congress codified regulatory negotiation by adding the Negotiated Rulemaking Act to the Administrative Procedure Act (APA).³³ In the next several years, agency practitioners will have even more procedural devices at their disposal. After a number of proposals to adapt alternative dispute resolution (ADR) techniques to agency decisionmaking surfaced during the 1980s,³⁴ Congress acknowledged that ADR could become an important part of agency process by enacting, in 1990, and substantially amending in 1996, the Administrative Dispute Resolution Act.³⁵ In appropriate circumstances, such techniques as arbitration, mediation and mini-trial may now be used as part of the agency dispute resolution process.

[A]—Effect of Judicial Review

Lawyers should never lose sight of the important role that courts play in the development of administrative law. The creation of a new agency by the legislature almost always triggers an attack on the constitutionality of the agency, a dispute that can only be resolved with finality by the courts. The validity of each new regulatory program and many individual agency decisions can be challenged by persons affected by the action who are dissatisfied with the agency decision. Indeed, in most administrative systems there are very few agency decisions that are exempt from judicial review. It is almost unheard of for Congress to enact a new administrative statute without also providing for some type of judicial review. Reflecting the standard federal practice, state administrative systems also favor judicial review.

For law students and lawyers alike, it is possible to make both too much and too little of judicial review. Some of the traditional teaching in administrative law over-emphasized judicial review to the point that many students and practitioners were deceived into thinking that the only truly important component in an administrative law system is the judiciary. Even now, students may get the wrong idea that courts review everything and correct all errors, because so many of the administrative law casebooks use large numbers of written appellate judicial decisions as the primary materials for the course. In actual agency practice, nothing could be further

³³ 5 U.S.C. §§ 581 to 570. The Negotiated Rulemaking Act was permanently reauthorized in late 1996. Pub. L. No. 104-320.

³⁴ See, e.g., Philip Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 Vill. L. Rev 1393 (1984) and the discussion of alternative dispute resolution techniques in Chapter 8.

³⁵ 5 U.S.C. §§ 571-583. The ADR Act was permanently reauthorized in late 1996. Pub. L. No. 104-320.

from the truth. The vast majority of agency decisions are never taken to court and those that are usually result in an affirmance of the agency's action. The United States Supreme Court has recently sent some extraordinarily strong signals to the lower federal courts (and in particular, to the United States Court of Appeals for the District of Columbia Circuit, the court that reviews a disproportionate number of federal agency appeals) to leave agency decisions alone, absent an clear showing that the agency acted erroneously.³⁶ State courts have not taken quite the hands-off attitude of the Supreme Court, but a quick review of a number of recent state court decisions suggests that a number of state supreme courts are tightening standards for reversing state agency action.

When analyzing judicial review of agency action, a lawyer typically confronts three types of issues: (1) whether judicial review is available at all for a particular case, (2) the timing of judicial review (*i.e.*, when judicial review may take place), and (3) if judicial review is both permissible and timely, what standard of review a court will apply to the merits of the case. Since most enabling acts provide for some type of judicial review and since both the federal APA and most state APAs provide for judicial review even if the enabling act is silent, the question of whether or not a court may take a case is almost always answered in the affirmative. On the federal level, because federal courts are courts of limited jurisdiction, you must always identify and cite a specific grant of subject matter jurisdiction. Doing so is rarely difficult.

[B]—Preclusion from Judicial Review

However, finding a jurisdictional statute is not the end of this inquiry. There are instances when an agency decision may be precluded from judicial review because the legislature has specifically prohibited judicial review or because a matter is deemed totally within the agency's discretion. On occasion, a person seeking judicial review of a particular agency determination may not be able to prove that she is sufficiently affected by the agency's action to have the requisite standing to bring the action on her own behalf. The normal test applied in the federal courts is whether a person can show "personal injury in fact, economic or otherwise" stemming from the agency's action.³⁷

³⁶ With regard to judicial review of the substance of agency action, see *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983) (the courts have no business substituting their judgments for the scientific and technical decisions of the agencies) and *Vermont Yankee Nuclear Pwr. Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (reviewing an earlier stage of the *Baltimore Gas* case, the Court instructed lower federal courts that they were not to impose, by judicial fiat, more rulemaking procedures on agencies than those established under the federal APA "absent extraordinary circumstances").

³⁷ These matters are extensively discussed in Chapter 10.

[C]—Other Barriers to Judicial Review

[1] Statutory and Common Law Barriers

Even if jurisdiction and standing exist and the decision is not precluded from review, a court may not be permitted to act at the time judicial review is sought. The doctrine of primary jurisdiction requires that most disputes within an agency’s jurisdiction first go to the agency and not directly into court. If a party starts with the agency, the dispute will have to stay in the agency until the agency has taken final agency action. Two doctrines apply here. First, the litigant must exhaust the decisional possibilities within the agency. If there remains a decisional step within the agency not yet taken, a court will often stay its hand pending further agency action. Second, the doctrine of ripeness, a concept related to but not identical with exhaustion, prohibits judicial review if a dispute is not yet a legal (as opposed to a scientific or technical) issue.³⁸

The litigant who survives these threshold barriers still has few prospects of getting the agency action reversed. Both statutes and case law significantly curb a court’s authority to reverse agency action on the merits. In a limited number of cases, judicial review is virtually unfettered and a court may review agency action *de novo*. However, *de novo* review is normally permitted only when a statute expressly allows it. The vast majority of agency decisions are not reviewed *de novo*. For those cases, the federal APA permits a court to overturn agency action on the following grounds:³⁹

1. the action violates a statute (including statutes establishing the agency’s jurisdiction and authority), the Constitution, or some procedure established by law;
2. the action is unsupported by substantial evidence;
3. the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

This list may seem comprehensive, but there are comparatively few agency actions that give rise to statutory, procedural, or constitutional violations. Accordingly, in practice, judicial review is largely limited to either “substantial evidence” review (undertaken if the agency has made the decision after conducting a formal rulemaking or adjudication) or “arbitrary/capricious” review. Both of these grounds are highly deferential to the determinations of the agency and generally require a court to uphold

³⁸ These doctrines are discussed in Chapter 11.

³⁹ For convenience, these grounds paraphrase the principal grounds available under 5 U.S.C. § 706. These issues are discussed in much greater length in Chapter 12.

the agency's decision if the decision is one that a reasonable person could have made, irrespective of whether the court itself would have made the same decision.⁴⁰

[2] Odds of Judicial Reversal of Agency Decision

There are few meaningful statistics available on the proportion of agency decisions reversed by courts on either the substantial evidence or arbitrary/capricious ground. The author's personal experience, both as a practitioner and an academic, suggests that less than 10 percent of agency decisions are reversed on these grounds. The threshold barriers to judicial review sometimes make it difficult even to get into court; once there, a party is hard-pressed to get a reversal on the merits. If this statistical estimate is even close to being correct, judicial review should never be seen as a safety valve in planning a case strategy. The prospects of winning in court, having lost before the agency, are far too slim. As you read the remainder of this book, you should constantly remember cardinal rule number two of agency practice: You win your case at the agency or probably not at all.

There is yet a third cardinal rule for practicing before administrative agencies that needs to be set out here even though it is probably obvious to any one who has read this far in this chapter. There is no substitute for having a thorough understanding of the manner in which the agency handling your case functions. Many practitioners obtain this knowledge over time; but even if this case marks your first experience with a particular agency, you are not excused from getting a good grip on that agency's behavior. As the following section explains, proper research is vital, and, quite frankly, not all that difficult. Always keep in mind the third cardinal rule: "Know your agency."

[A]—Lack of Student Orientation to Administrative Materials

Most teachers of administrative law are surprised by the lack of attention to administrative materials in most first year legal writing and research courses. Many students come into their first administrative law course knowing virtually nothing about the primary materials of the course and absolutely nothing of the secondary materials. The following is a brief guide to federal materials available for those who are not already familiar with the sources.

⁴⁰ The constantly cited Supreme Court decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) contains a good review of each of these grounds. See also Chapter 12.

[B]—Official Materials

[1] The United States Code

The essence of administrative law is to be found primarily in government documents. First and foremost of these is the compilation of federal statutes, the United States Code (U.S.C.) and its various sources of legislative history such as committee reports. Floor debates transcribed in the Congressional Record are sometimes useful. These materials contain the language of the agency's enabling act and the pre-enactment comments on that act by members of Congress and other persons.

The primary federal procedural statute, the Administrative Procedure Act (APA), was first enacted in 1946, but had been discussed for almost ten years prior to enactment as lawyers, agency officials and members of Congress adjusted to many of the procedural lessons learned during the New Deal. One central feature of this debate, on which there was virtually a consensus, was the need for a uniform procedure applicable to most if not all federal agencies. At the same time, the APA does not control every aspect of every agency process. Nowadays an agency's enabling act will contain many specific procedures directly applicable to that agency. Some of the enabling act requirements may not be consistent with the APA. For example, practice before some highly proceduralized agencies such as the National Labor Relations Board almost never requires reference to the APA, because the agency's statutes and internal procedural rules are so detailed and sophisticated. For most agencies, however, the APA has a strong bearing on the process by which the agency makes decisions.

The APA is contained in 5 U.S.C. §§ 551 *et seq.*, and its legislative history may be found in Administrative Procedure Act — Legislative History 1944–46, S. Doc. No. 248, 79th Cong., 2d Sess. (1946). A crucial executive branch committee report is also widely regarded as part of the APA's legislative history: Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941). Both the House and Senate reports on the APA will be found in the Attorney General's report, all of which are reprinted in a basic looseleaf service, Pike & Fischer, Administrative Law (Desk Book).

[2] The Federal Register

Agencies announce proposed and final rules and various other information on their day-to-day functioning in the Federal Register. This document was established by Congress during the New Deal because at the time there was no central repository of important agency pronouncements. Indeed, many agency rules could only be found in the desk drawers of agency employees. The Federal Register is published five days each week.

[3] The Code of Federal Regulations

The Code of Federal Regulations (CFR) is published annually and contains the agency's current rules in force. Rules and certain other documents such as agency interpretations and rulings published initially in the Federal Register eventually find their way into CFR. For agencies whose rules change only infrequently, CFR is often the primary research tool used by practitioners; however, readers should be warned that there often are substantial delays between publication of a final rule in the Federal Register and codification of that rule in CFR. Because of this delay, most agency practitioners subscribe to various commercial publications that track rule and policy changes on a day-to-day basis, such as the Bureau of National Affairs' *Environment Reporter* or Commerce Clearinghouse's labor reporters.

[4] Agency Decisions

Most federal agencies publish some kind of official reporter that includes the reports of agency adjudications. These compilations look much like court reporters and carry titles such as "I.C.C. Reports," "FCC 2d" and the like. Again, most practitioners subscribe to the official agency reporter but depend on proprietary looseleaf services (*see* § [2] *above*) for up-to-the-minute information. In many circumstances, the value of using reported agency adjudications as controlling authority is questionable, because most agencies do not consider themselves wholly bound by judicially-developed doctrines such as *stare decisis*. Nonetheless, careful lawyers pay close attention to these decisions to determine the current trend of agency thinking.

[5] Other Agency Publications

Agencies always publish a great deal of information outside the Federal Register or CFR that can be enormously helpful. Documents such as internal agency newsletters, annual reports, and statistical summaries are useful in developing a comprehensive understanding of the entire agency. The Government Printing Office publishes a *Monthly Catalog of United States Government Publications* that lists many of these documents. The GPO also publishes THE UNITED STATES GOVERNMENT ORGANIZATION MANUAL, a single volume compilation of basic information on virtually all government agencies.

These days there is a great deal of agency information available over the Internet. Virtually every federal agency has a Web site that may be mined for a great deal of basic information on that particular agency. A good basic source for links to the various agencies is provided by the Library

of Congress: <http://lcweb.loc.gov/global/executive/fed.html>. Two private sector Internet sources for similar information are a site maintained by Louisiana State University (www.lib.lsu.edu/gov/fedgov) and Villanova University (www.cilp.org/Fed-Agency/fedwebloc.htm).

[6] Presidential Documents

The President figures importantly in the work of administrative agencies. Accordingly, executive orders and presidential proclamations along with reorganization plans and executive agreements must often be closely analyzed. These documents may occasionally be found in the Federal Register, but more likely are to be found in the *Weekly Compilation of Presidential Documents*, published by the Government Printing Office.

[7] Opinions of the Attorney General

The Attorney General of the United States is often asked to provide interpretations of treaties, statutes, presidential documents and other official material as well as to advise on other matters of agency functioning. While the precise legal impact of an attorney general's opinion never has been conclusively determined, the Attorney General's pronouncements carry great weight both inside and outside the executive branch. Most opinions are published in a compilation called the *Opinions of the Attorneys General of the United States*.

[C]—Unofficial Commercial Services

By definition, government documents are the official source of information on administrative agencies; but there is at least one privately-published service available for virtually every major federal regulatory agency. Most practitioners regard these services as indispensable because they are not subject to many of the publication delays associated with government publications. Published by such companies as Bureau of National Affairs and Commerce Clearing House, they are gold mines of information on the agencies, containing a wide range of documents and information from proposed and final rules, to adjudications, to agency gossip.

A vast amount of additional information on administrative law in general and on specific agencies may be found in the casebooks and treatises listed in the preface and in law journal articles. Serious students of administrative law never disregard these sources.