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## Welcome to the Constantly Evolving Field of Administrative Law

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## WELCOME TO THE CONSTANTLY EVOLVING FIELD OF ADMINISTRATIVE LAW

Paul R. Verkuil\*

Those of us who practice, teach and decide within that amorphous field called administrative law are advantaged in at least one respect—we are rarely bored. Our subject is never at rest. It is constantly renewing or redefining itself. In the last twenty years or so numerous events have combined virtually to reorganize the field. As a result, administrative law is often in the position of having to justify its place in the curriculum and by extension in the world of practice and decisionmaking.

But this challenge is our source of intellectual strength as well. As a subject constantly in search of an organizing principle, we are able to welcome new adherents even as we stymie our established supporters. This may be the best way to explain why the ABA Section of Administrative Law changed its name last year to the Section of Administrative Law and Regulatory Practice. This new title suggests that no practitioner or academician in the regulatory state is beyond our ambit of concern. Moreover, in the law schools our subject has become quite aggressive. It reaches out to constitutional law, law and economics, environmental law and international trade, among others.

The primary organizing vehicle of what might be called traditional administrative law was the Administrative Procedure Act (“APA”) and the independent agency. In the 1960s it was possible to teach a relevant course (and to run the ABA Administrative Law Section) by focusing on the New Deal agencies, their procedures, and the role of the courts on judicial review. One can get a good picture of the subject’s limited scope simply by reviewing articles in the issues of the *Administrative Law Review* during that period. They focused on agencies like the Federal Trade Commission and on applications of the APA to the formal hearing process. It was the era of the substantial evidence test and relative stability in judicial oversight. Looking back on it now, the whole

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period suggests a confidence in the content of the field that was able to be captured in a few volumes of Kenneth Culp Davis's fine treatise.

Since then much has happened. With regard to the agencies studied, events of the 1970s and 1980s pushed most of the independent agencies to the margin of regulatory activity. Articles in the *Review* began to appear on Social Security, Occupational Health and Safety Administration, Nuclear Regulatory Commission, and on subjects like the informal process and regulatory reform. The deregulation movement, a powerful force in law and economics, challenged much of the work of the traditional agencies and even led to the demise of one, the Civil Aeronautics Board. The end of price regulation by the 1980s reduced the significance of the Federal Energy Regulatory Commission and terminated the short life of the Council on Wage and Price Stability.

The critical agencies today are "executive" in nature, such as Health and Human Services, the Environmental Protection Agency ("EPA"), Labor, the Social Security and Veterans Administrations, and the Immigration and Naturalization Service. And the most significant aspect of the APA is the Freedom of Information Act ("FOIA"), whose provisions consume a remarkable amount of administrative and judicial time. But even these developments underestimate the magnitude of the shift in regulatory focus. The leading regulatory policymaker today may not even be considered an administrative agency at all. The importance of the rulemaking evaluation and paperwork reduction roles of the Office of Information and Regulatory Analysis or the Office of Management and Budget ("OMB") is difficult to overstate. As a practical matter, OMB now largely determines the regulatory agenda and by extension the President's legislative program.

This shift to central political control under OMB is the administrative law story of the decade. It has not come easily because of congressional and interest group pressures at the agency level, but now it has been accepted and the presence of OMB also has affected the role of judicial review. In the 1970s the courts on judicial review, led by the D.C. Circuit and such judges as Bazelon, Leventhal and Wright, talked of a "partnership" between agencies and courts in administering the new regulatory initiatives surrounding the environment, safety and health and social welfare. Today the partnership analogy is difficult to accept in those terms. The primary partnership now seems to be the relationship between the agencies and the White House (OMB). In this context the courts are increasingly being asked to play a backup role rather than a shared responsibility for policy outcomes. That is certainly the message of *Vermont Yankee*, delivered in 1978. If one accepts the proposition that OMB, at least with respect to policy matters, is doing some of the coordination that the courts felt the need to do at the beginning with agencies such as EPA, then this becomes an appropriate reallocation of judicial and administrative responsibility. That is the message sent by the Supreme Court's *Chevron* decision, which

emphasized that policymaking is for the political branches, not the judicial branch. That regulatory choices, within broad boundaries set by Congress, are to be made by politically accountable, and therefore electorally correctable, branches is not an uncontroversial proposition, but it reflects a level of political sophistication that most distinguishes the administrative law of the present from its counterpart of twenty years ago.

If I've done my assignment correctly, the reader may not agree with much of what has been said already. That should serve as a fitting predicate to the next question: Where will the field be in the future? A few tentative suggestions can be ventured even for this dynamic field that practically defies prediction.

First, the practitioner, teacher and judge must continue to be concerned about the informal process, especially in mass justice situations. Disability, medical and health programs are big GNP items that will become more prominent and complex. The field of immigration is also a new regulatory field of massive proportions that only recently has been subjected to the rule of law. Certainly the recent Veterans Disability Court will be a new regulatory regime that will attract much lawyer (and nonlawyer) interest. Each of these fields is outside the ambit of traditional administrative law as it was handed to us in the 1960s.

Second, the field of administrative law will become more international. Trade with the Pacific rim, the European Community and Canada make many regulatory decisions on economic matters global in nature. This will require a regulatory focus on international trade decisions in the United States (including, in addition to the International Trade Commission, agencies like Agriculture and the Food and Drug Administration), but it will require also that American administrative lawyers be familiar with the administrative apparatus of our trading partners in those foreign countries. Administrative law will become increasingly an exercise in comparative law.

Third, the political side of regulation will continue to be critical. So long as we have party divided branches of government, there will be tensions between the branches that can become regulatory opportunities by politically astute practitioners.

Fourth, as a corollary, the courts will continue to be asked to resolve conflicts between the political branches. Even if the courts on judicial review eschew the making of political choices for the agencies, they must oversee the kinds of decisions that are made and define the constitutional relationship between the political branches. We have not seen the end of separation of powers decisions. So long as the Congress and the President pursue conflicting agendas, the courts will have plenty of work to do. Therefore, judicial review of administrative action will further encroach upon the field of constitutional law.

Fifth, state regulation will become more interesting and relevant,

simply because Gramm-Rudman and limited resources for new federal initiatives will force more public decisions upon state treasuries and regulatory mechanisms. The new thinking on administrative procedures is coming from the states, as Arthur Bonfield continues to remind us, and as California, for one, is in the process of demonstrating.

Sixth, it is unlikely that Congress will make any significant changes to the APA, with the exception of the FOIA which must deal with the problem of technology and the information explosion. Given the emphasis on executive agencies and OMB there may be a greater tendency to utilize the executive order process to achieve regulatory control.

Seventh, as a corollary, the APA as an organizing mechanism will be forced increasingly to the margin. As formal adjudications by old line independent agencies diminish in numbers, the unifying function served by the APA on the formulation of agency procedures will be reduced. New informal processes will continue to crop up in a variety of agencies and "procedural leadership" from organizations like the Administrative Conference of the United States and this Section will be increasingly important to the agencies, Congress and the courts.

Eighth and last, this is a fascinating time to be an administrative lawyer, however defined. Few subjects offer as many opportunities, challenges and pitfalls. What else could you want?