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# CHAPTER I

## AN INTRODUCTION TO ADMINISTRATIVE LAW

*Sec. 1. An Introductory Example*

*Sec. 2. The Basics*

*Sec. 3. The Tasks of Administrative  
Law*

*Sec. 4. Teaching and Studying  
Administrative Law from This  
Casebook*

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### SECTION 1. AN INTRODUCTORY EXAMPLE

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#### *The Problem of Airplane Tarmac Delays*

What follows is a real problem: the legal materials are genuine, and the facts are true. It is a real problem in another sense, too; its pieces are complex and open to multiple solutions. Of course, if you are reading this at the beginning of your study of administrative law, you do not know much of what you would need to know to answer the questions posed in the way an experienced lawyer or policymaker would. (Some of the questions are not so easy even if you do know what there is to know!) So, the purpose of the problem is twofold: first, to show you the kinds of questions administrative law tries to answer, and second, to invite you to use your imagination, along with the information given, to think about some of the complexities of the issues.

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#### The Problem of Airplane Tarmac Delays

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Most of you have taken an airplane to travel to a destination. What has been the longest delay of a flight that you have experienced? Were you stuck in the airplane at the gate or on the tarmac or even the runway for some of that time? What has been the longest amount of time that you have remained on the airplane after boarding but before taking off? These are descriptive questions. How long do you think passengers should be forced to stay on a grounded airplane before having access to food or water? Before having the opportunity to get off? These are normative queries.

In the eight months between December 2006 and July 2007, hundreds of thousands of passengers boarded airplanes that then remained grounded on airport tarmacs for more than three hours,

typically because of weather and its interactions with airline operations. In December 2006, passengers sat on an American Airlines plane diverted in flight to the airport in Austin, Texas, for almost ten hours. During a February 2007 snowstorm, ten Jet Blue flights kept their wheels down, full of passengers, at New York City's John F. Kennedy International Airport. One plane scheduled to travel to Aruba remained on the ground for almost eleven hours. Another to Cancun stayed for almost nine hours before the flight was canceled. Because these airplanes were not at the gates, passengers could not get off—to walk around the airport, to use bigger bathrooms, to eat or drink in airport restaurants—in these situations.

Airline passengers were hopping mad. Airlines, though apologetic, argued that returning to the gate was not always possible and, even if possible, might have resulted in even longer delays.

*Assuming it were a completely open question, where in the legal universe should we put the law of airline passenger service? Should it be a matter of tort, requiring an airline to take “reasonable care”? Should it be a matter of contract, so that passengers get what they, individually or collectively, bargain for? Should we pass statutes, state or federal, specifying things like the length of time airplanes can sit on the tarmac and when food and drink have to be provided, and stipulating civil and possibly criminal penalties? Or should we give the matter over to a state or federal administrative agency to consider and regulate? Or should we simply have no law on the subject and leave the issue to the forces of reputation and social norms?*

Let's consider the solution of just relying on courts first. *Should passengers stuck on a grounded flight for hours be able to sue the airline under tort or contract law?* If such suits were permitted and plausible, plaintiffs themselves could be compensated (unlike regulatory fines, which typically go, at least in major part, to the government).

One passenger on that December 2006 American Airlines (AA) flight, Catherine Ray, tried the courts. She filed a five-count class action suit in Arkansas state court (which was later removed to federal court by the carrier) that alleged false imprisonment, intentional infliction of emotional distress, negligence, breach of contract, and deceit/fraud. These allegations come from the fact section of her complaint:

9. While confined on the ground in Austin, the toilets became full and would not flush and the stench of human excrement and body odor filled the plane.
10. While confined, in the aircraft, plaintiff and other passengers were unable to wash their hands due to the aircraft running out of water and not being re-supplied by AA.
11. Plaintiff and other passengers were provided only two soft drinks and only a few granola bars for food.

12. Plaintiff and other passengers were also deprived of access to medications, nutritional supplements and needs, and hydration especially needed by [the] infirm, elderly and children. . . .

18. Defendant had ample advanced warning of weather conditions at Dallas and knew or should have known that it was not able to land aircraft at Dallas (DFW) airport at the capacity it had scheduled on December 29, 2006, due to transient thunderstorms and could have cancelled or delayed from departing many of the flights that it diverted and stranded, thereby preventing the diversions and confinements.

19. With the exception of a few passengers whose destination was the Austin[,] Texas area, AA refused to permit passengers to exit the aircraft even though buses and available gates at the terminal were available to AA.

Complaint, *Ray v. American Airlines*, Civil Case No. 08–5025 (W.D. Ark. 2008) (removed from state court).

Some of Ray’s claims were preempted by the Airline Deregulation Act, 47 U.S.C. § 41413(b)(1), and others were dismissed for failing to state a claim. But her false imprisonment, intentional infliction of emotional distress, and negligence claims made it to the summary judgment stage. The district court granted summary judgment to the airline, however, holding that Ray did not revoke her consent to be on the plane (and therefore was not falsely imprisoned) and that the airline “had no duty to provide Plaintiff with a stress-free flight environment” (and thus she lacked a key element for the other tort claims). *Ray v. American Airlines*, 2009 WL 921124 (W.D. Ark. 2009), affirmed, 609 F.3d 917 (8th Cir. 2010). In other cases, instead of assessing the elements of any tort claims, courts have held that such claims were preempted. See, e.g., *Biscone v. JetBlue Corp.*, 103 A.D.3d 158 (N.Y. App. Div. 2012). Litigation thus seems an unlikely avenue for changing airline practices, unless Congress enacts federal statutes that permit such suits (barring preemption defenses) or force airlines to put more guarantees in their contracts of carriage with passengers (making contract claims plausible). *Would you favor such changes?*

As noted above, an alternative to litigation is new legislation. Senators Barbara Boxer (D-CA) and Olympia Snowe (R-ME) introduced S.678, the Airline Passenger Bill of Rights Act of 2007, in the Senate. In main part, the proposed bill would have amended Chapter 417 of Title 49 of the United States Code to add:

**SEC. 41781. AIRLINE CUSTOMER SERVICE REQUIREMENTS.**

(a) IN GENERAL.—Not later than 60 days after the date of the enactment of the Airline Passenger Bill of Rights Act of 2007, each air carrier shall institute the following practices:

(1) PROVISION OF FOOD AND WATER.—In any case in which departure of a flight of an air carrier is delayed, such air carrier shall provide—

(A) adequate food and potable water to passengers on such flight during such delay; and

(B) adequate restroom facilities to passengers on such flight during such delay.

(2) RIGHT TO DEPLANE.—

(A) IN GENERAL.—Except as provided in subparagraph (B), if more than 3 hours after passengers have boarded an air carrier and the air carrier doors are closed, the air carrier has not departed, the air carrier shall provide passengers with the option to deplane safely before the departure of such air carrier. Such option shall be provided to passengers not less often than once during each 3-hour period that the plane remains on the ground.

(B) EXCEPTIONS.—Subparagraph (A) shall not apply—

(i) if the pilot of such flight reasonably determines that such flight will depart not later than 30 minutes after the 3 hour delay; or

(ii) if the pilot of such flight reasonably determines that permitting a passenger to deplane would jeopardize passenger safety or security.

(b) AIR CARRIER.—In this section the term “air carrier” means an air carrier holding a certificate issued under section 41102 that conducts scheduled passenger air transportation.

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The legislation also instructed the Secretary of Transportation to “promulgate such regulations as the Secretary determines necessary to carry out the amendments made by this Act” and imposed a tight deadline of 60 days after the Act’s enactment for these rules. Similar legislation was introduced in the House.

A passenger on one of the grounded flights formed a new group, the Coalition for Airline Passengers Bill of Rights, to lobby for this legislation.<sup>1</sup> The Consumer Federation of America, Consumers Union, and Public Citizen, among other groups, also supported the bill. The Business Travel Coalition, which represents “the managed travel community,” announced its opposition. And the airlines, as expected, voiced their alarm. The CEO of Virgin America was quoted by *USA Today* worrying about unintended consequences: “We had a situation about a month ago at (New York’s JFK), where we had a plane sit out on the

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<sup>1</sup> This specific group no longer seems to be in existence, having been replaced by FlyersRights.org.

taxiway for four hours and 10 minutes. We normally bring our planes back after four hours, unless we're certain takeoff is imminent. Well, if we had had a four-hour law in place, that plane would have gone back to the terminal and then would have been 35th or 40th in line to take off. As it was, they got in the air 10 minutes later."

The Constitution requires that a bill pass both the House of Representatives and the Senate and be signed by the President to become law—or be repassed by two-thirds majorities in each chamber to overcome a presidential veto. But traditional legislation faces other obstacles in Congress too—including having to be voted out of committees in the House and Senate (sometimes more than one in each chamber) and possibly needing 60 votes in the Senate to overcome a filibuster. In this case, the relevant committee in the Senate was the Committee on Commerce, Science, and Transportation, which held a hearing on April 11, 2007, on the proposed law.

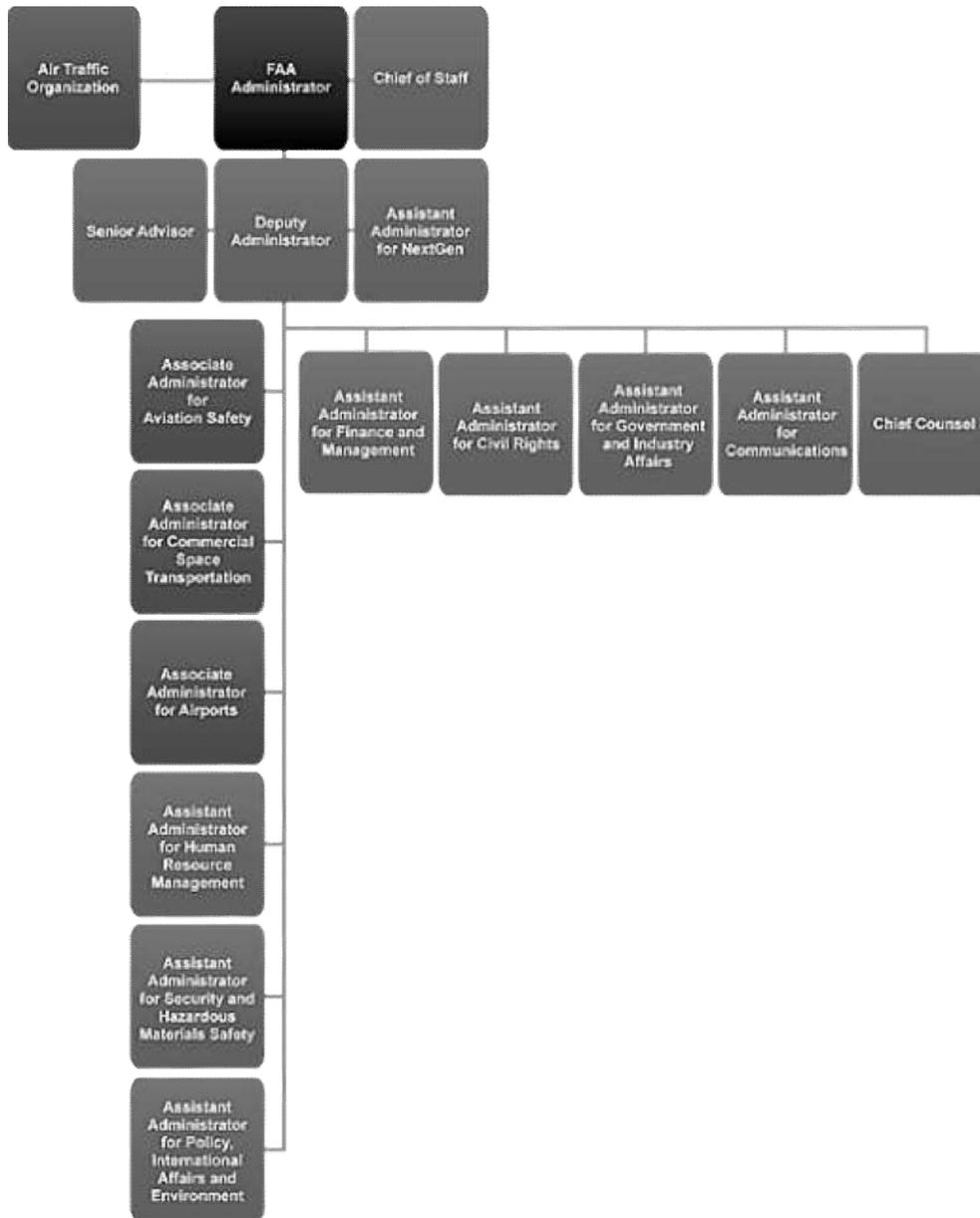
*Would you vote for this legislation? What were the legislation's chances of success in 2007? How much does party affiliation matter for this issue?* Democrats held the majority of seats in both chambers of Congress at the time, the November 2006 election having shifted control from the Republicans. President George W. Bush was in the White House. After the Senate hearing, nothing else happened in either the House or Senate to advance the legislation in that congressional session. *What advantages does Congress have over the courts in addressing policy issues? Disadvantages?*

An alternative to both the courts and new legislation (almost always with tasks for the bureaucracy) is agency regulation based on existing laws. *Which federal agencies govern airlines?* The Federal Aviation Administration (FAA) and the Department of Transportation are two of the primary entities. The FAA is an agency that sits within the Transportation Department, which is one of fifteen cabinet departments. The FAA has some independent authority but often must get approval from its parent agency for action. Both are led by individuals nominated by the President and confirmed by the Senate. By statute, the Administrator of the FAA must "(1) be a citizen of the United States; (2) be a civilian; and (3) have experience in a field directly related to aviation," and serves (since 1994) a five-year term. 49 U.S.C. § 106(b)–(c). The Secretary of Transportation, a member of the President's cabinet, has no statutory term or qualifications. *Can you figure out, if you do not know already, who served as FAA Administrator and Secretary of Transportation in 2007 (and who serves in those positions now)? Why do you think they were chosen for those jobs? Should there be expertise requirements for either position? Why shouldn't a military officer be allowed to run the FAA?*

We include below the organizational charts for both these agencies so you can get a sense of the institutional complexity. The one for the



## FEDERAL AVIATION ADMINISTRATION



An agency needs legal authority to act. In 2007, the following statutory provisions were already on the books:

On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds

that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.

49 U.S.C. § 41712(a).

. . . the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity: . . . (4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices. . . . (9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

49 U.S.C. § 40101(a)(4), (9).

An air carrier shall provide safe and adequate interstate air transportation.

49 U.S.C. § 41702.

*Under these provisions, what could the Secretary of Transportation do to address tarmac delays, if anything? What parts of the provisions are important to your reasoning? What might be some competing policy areas the Secretary of Transportation could focus on, under these provisions? And given that there are additional provisions (beyond these) delegating authority to the agency, how should the Secretary prioritize potential policymaking?*

Those unhappy with a decision by the Secretary of Transportation often can “fil[e] a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business” within 60 days of any final “order” or “action” by the Secretary. *Why might Congress want to allow challengers to agency action to skip filing first in a district court? If the Secretary decides not to address tarmac delays and consumer groups sue to force action, what should a court do? On the substantive side, the statutory provisions promise consumers non-deceptive, adequate air travel. On the process side, they provide considerable discretion to the agency. What is the role of the judiciary in a situation like this?*

The Secretary of Transportation is, of course, a member of the President’s cabinet. Insofar as high political judgment is involved in framing proper regulations, the President may well be involved. *Is this such an issue?* But the Secretary hardly has time to determine how many airplanes sat on tarmacs for how long during specific periods. Most of the work, then, is done by offices or administrations within the Department, such as the FAA and the Office of Aviation Enforcement in the General Counsel’s Office. In FY 2008, the Department was allotted 55,150 full-time equivalent positions, of which only 23 were slots for Senate-

confirmed presidential appointees, 41 were excepted Schedule C (political) positions, and 31 were non-career Senior Executive Service (also political) jobs. Its FY 2008 budget exceeded \$63.4 billion.<sup>3</sup> *How much should the Secretary of Transportation rely on political appointees? On career employees?*

*How would the Secretary (and subordinates) go about enacting a new policy?* The Administrative Procedure Act (APA), which you will learn about in this course, briefly details procedures for notice-and-comment rulemaking: “After notice . . . , the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.” 5 U.S.C. § 553. In bare bones, this translates into a notice of proposed rulemaking (often called an NPRM), a comment period, and a final rule.

Rulemaking in practice often looks far more complicated. In November 2007, the Department of Transportation issued an *Advance* NPRM (think of it as a prior notice to the notice), not discussed in the APA, asking for comment on the following seven possible measures:

1. Require Contingency Plans for Lengthy Tarmac Delays and Incorporate Them in Their Contracts of Carriage<sup>4</sup> [which would be tied, according to the ANPRM, to a four-hour delay]
2. Require Carriers To Respond to Consumer Problems
3. Declare the Operation of Flights That Remain Chronically Delayed To Be an Unfair and Deceptive Practice and an Unfair Method of Competition
4. Require Carriers To Publish Delay Data on Their Web Sites
5. Require Carriers To Publish Complaint Data on Their Web Sites
6. Require Carriers To Report On-Time Performance of International Flights
7. Require Carriers To Audit Their Adherence to Their Customer Service Plans

Department of Transportation, *Enhancing Airline Passenger Protections*, 72 Fed. Reg. 65,233, 65,234–65,236 (Nov. 20, 2007). *How would you classify each of the seven items? How many rely on disclosure*

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<sup>3</sup> For FY 2016, the Department had 51,876 full-time equivalent positions (with 22 Senate-confirmed slots, 2 positions requiring presidential appointment (with no Senate role), 39 excepted Schedule C positions, and 28 non-career Senior Executive Service jobs), and its budget exceeded \$75.5 billion.

<sup>4</sup> “With the contingency plan incorporated in the contract of carriage, passengers would be able to sue in court for damages if a carrier failed to adhere to its plan.” Department of Transportation, *Enhancing Airline Passenger Protections*, 72 Fed. Reg. 65,233, 65,234 (Nov. 20, 2007).

*of information to regulate? How many impose duties other than information disclosure? What are the advantages and disadvantages of specifying a particular time period for tarmac delays?*

The ANPRM also listed a series of questions for commenters to answer, including on the first measure:

What costs would it impose on the carriers? Would it have any negative consequences? Is it likely to succeed in protecting passengers from the conditions described above? If not, why not? What additional or different measures should we consider adopting? Would incorporation of the contingency plan in the contract of carriage give consumers adequate notice of what might happen in the event of a long delay on the tarmac? When prolonged delays occur, would these measures succeed in reducing the resultant uncertainty and discomfort for passengers? Should the types of carriers covered by the regulation be expanded or limited? What would be the cost or benefit of narrowing or expanding coverage? Should the requirement of coordinating the plan with airport authorities apply to all primary airports (i.e., commercial service airports that enplane more than 10,000 passengers annually) rather than only to medium hub airports (primary airports that enplane between 0.25 and 1 percent of total U.S. passengers) and large hub airports (primary airports that enplane at least 1 percent of total U.S. passengers)?

*Id.* at 65,235.

*How many comments do you think the Department received, and from whom, on its ANPRM?* Surprisingly, fewer than 10 percent (of the approximately 200 comments) came from industry. Only four airlines—Delta Air Lines, Virgin Atlantic Airways, Jet Airways (India), and China Eastern Airlines—submitted comments, though five carrier associations also provided their views. On the consumer side, 131 members of the Coalition for an Airline Passengers Bill of Rights “filed identical or nearly identical comments.” Five consumer associations—the Aviation Consumer Action Project, National Business Travel Association, Federation of State Public Interest Groups, Public Citizen, and National Consumers League—and 34 other individuals also sent in reactions. The Department summarized the views as follows:

In general, the consumers and consumer associations maintained that the Department’s proposals do not go far enough, while the carriers and carrier associations attributed the current problems mostly to factors beyond their control such as weather and the air traffic control system and tended to characterize the proposals as unnecessary and unduly burdensome. The travel agency associations expressed support for consumer protections but not at their members’ expense.

Department of Transportation, Enhancing Airline Passenger Protections, 73 Fed. Reg. 74,586, 74,587 (Dec. 8, 2008).

After the November 2008 election, which changed party control of the White House from Republican President George W. Bush to Democrat President-Elect Barack Obama, but before Obama's inauguration, the Department of Transportation published an NPRM, seeking comments before February 6, 2009 (a 60-day comment period). *Should then-Secretary of Transportation Mary Peters, who knew she would no longer be in her job in January 2009, continued to have engaged in policymaking?* (President Obama chose Republican Ray LaHood, a former member of Congress, to head the Department of Transportation initially). The NPRM continued with a subset of the ANPRM's issues. The proposed regulation would:

- (1) Require air carriers to adopt contingency plans for lengthy tarmac delays and to incorporate these plans in their contracts of carriage, (2) require air carriers to respond to consumer problems, (3) declare the operation of flights that remain chronically delayed to be an unfair and deceptive practice and an unfair method of competition, (4) require air carriers to publish delay data on their Web sites, and (5) require air carriers to adopt customer service plans, incorporate these in their contracts of carriage, and audit their adherence to their plans.

Id.

Before the NPRM was published, it had to be approved by the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget in the Executive Office of the President, as a significant regulation under Executive Order 12,866. The Order, issued by President Bill Clinton and continued by each of his successors, Republican and Democrat, requires OIRA to sign off on significant proposed and final rules by executive agencies and departments like the two agencies we are discussing.<sup>5</sup> One of OIRA's duties is to ensure that a rule's benefits are greater than its costs and indeed that the agency's action maximizes net benefits, so long as a specific statute does not prevent such cost-benefit analysis. The APA makes no mention of these mandates. Because of the Executive Order, the Transportation Department performed a detailed regulatory evaluation of the proposed rule's benefits and costs. In the NPRM, the agency stated:

On the cost side, many of the measures suggested in this NPRM would impose costs for both implementation and operation on the entities that its proposed requirements would cover. The benefits we seek to achieve entail relieving consumers of the burdens they now face due to lengthy ground delays, chronically delayed flights, and other problems discussed in the NPRM. The

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<sup>5</sup> Independent agencies such as the NTSB do not need OIRA approval.

benefits would be achieved by affording consumers significantly more information than they have now about delayed and cancelled flights and about how carriers will respond to their needs in the event of lengthy ground delays. Making this information accessible should not only alleviate consumers' difficulties during long delays but also enable them to make better-informed choices when booking flights. The Regulatory Evaluation has concluded that the benefits of the proposal appear to exceed its costs. A copy of the Regulatory Evaluation has been placed in the docket.

Id. at 74,600.

Interestingly, in May 2008, then-White House Chief of Staff Joshua Bolten had told executive agencies and departments that “regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008.” The NPRM here made clear that the Transportation Department was not trying to finish the rulemaking by the time President George W. Bush left office. *Why did the agency not try to finish it before the change of Administration?*

Despite dealing with an issue that hundreds of thousands of passengers had recently experienced, only 21 comments—split essentially equally between industry on one side and consumers and consumer associations on the other—came in during the 90-day comment period for the NPRM (the agency ended up providing a 30-day extension to the original 60-day period). To be fair, one of those comments summarized the views of those who participated in a discussion on the NPRM on [regulationroom.org](http://regulationroom.org) (see p. 763). *Does the low number surprise you?* You can find information online about many rulemakings at [www.regulations.gov](http://www.regulations.gov). You can even file comments on many agencies' open rulemakings there. *How easy is it to navigate that website, compared to other online resources and services you use?*

Industry commenters supported some of the proposals, but noted concerns with the regulatory evaluations (i.e., the cost-benefit analyses) and pushed for alternatives that “address[ed] weather-related and air traffic control related issues.” As with the ANPRM, consumer comments indicated that “the Department’s proposals do not go far enough and contend that additional regulatory measures are needed to better protect consumers.” Department of Transportation, Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983, 68,983–68,984 (Dec. 30, 2009). US Airways was one of two carriers to comment on the NPRM (it had not commented on the ANPRM). Its comment, submitted on March 9, 2009, read, in part:

Although the Department is well-intentioned, this NPRM is overreaching and attempts to regulate air carriers for situations beyond their control. US Airways already has in place many of the elements that the Department is proposing to

require in this NPRM. Nevertheless, US Airways opposes other provisions of the NPRM that would impose substantial new burdens on air carriers. In these comments, US Airways will highlight two particular areas of concern—the overall rationale for the NPRM and two needed revisions to any contingency plan requirement: (a) exclusion of international operations; and (b) enhanced regulatory accountability for airports. The Company also fully supports the comments of the Air Transport Association (“ATA”) filed today in this docket. . . .

As an initial proposition, the notion that air carriers want to delay or inconvenience passengers should be forever stricken as a credible argument. There is no air carrier that would ever knowingly want to put passengers on an airplane for extended periods of time. Unfortunately, there are times where gridlock occurs that causes schedule delay and passenger inconvenience. These excessive delays extending well beyond scheduled departure/arrival times usually result from extreme weather conditions beyond the control of the air carrier. Nevertheless, air carrier management makes every attempt to avert or reduce the overall number of delays by making costly and inconvenient decisions to cancel flights, reroute passengers, permit cost-free itinerary changes, and in extreme examples, suspend all operations at a hub.

When facing extended delays, air carrier management makes decisions based on the based available data at the time, but weather forecasts do not always cooperate, and passengers, unfortunately, can experience long delays. . . .

US Airways understands that it is tempting to want to regulate to give passengers some relief from the rare case of lengthy on-board delays. Even with continued improvements by all air carriers in on-time performance, passengers are still occasionally delayed. For delays that are within the control of the air carrier, the Department’s effort to identify chronically delayed flights and remind air carriers of their disclosure obligations is a good example of government and industry working constructively to address a problem for the benefit of consumers. As the Department knows, US Airways worked aggressively in reviewing all of the flights that were identified as chronically delayed and has reduced the number of US Airways flights appearing on DOT Tables 5 and 6 to a very small number, if any. . . .

US Airways understands the Department’s interest in imposing an inflexible return-to-gate standard to attempt to avoid lengthy tarmac delays. As described above, however, US Airways already has a contingency plan in place to deal with lengthy onboard delays. It has long been necessary to have such

a “voluntary” plan because it is inevitable that when certain weather conditions occur, passengers will experience longer-than-normal delays.

US Airways’ existing contingency plan is substantially similar to the contingency plan that the Department proposes, except that it leaves to the carrier’s expertise the decision about when the aircraft should return to the gate. We oppose any enforceable provision that the air carrier return to the gate at a fixed time. Not only will returning to the gate at a specific time result in the possibility of additional cancellations, but it could also trigger a spillover effect to the next day. Air carriers do not have unlimited resources to recover from these types of situations. . . .

Comments of US Airways, Inc. in Docket OST–2007–0022, <https://www.regulations.gov/document?D=DOT-OST-2007-0022-0246> (footnotes omitted).

*What do you find persuasive in US Airways’s comment? Less persuasive?* The carrier filed its comment on the last possible day but knew what another industry commenter, ATA, was going to say even though it was filing at the same time. Consumer groups would not have had time to respond to either US Airways’s or ATA’s comment. *Is this sharing of information between US Airways and ATA, or the lack of time to respond, a problem?* As noted below, the rule was adopted. An academic study published five years after the rule took effect found the regulation “has been highly effective in reducing the frequency of occurrence of long tarmac times.” On the other hand, the study also found that “another significant effect of the rule has been the rise in flight cancellation rates [and subsequent rebooking and delays to destination].” Using some data modeling, the study found “a significant increase in passenger delays, especially for passengers scheduled to travel on the flights which are at risk of long tarmac delays.” Chiwei Yana et al., *Tarmac delay policies: A passenger-centric analysis*, 83 *Transportation Research Part A: Policy and Practice* 42, 42 (2016). *Does this change your mind about your reactions to US Airways’s comment?*

Some proposed rules that are not finalized before a change in administration are withdrawn under new leadership. But the Department of Transportation here issued a final rule in December 2009, to take effect in April 2010, after clearing it with OIRA (then headed by administrative law scholar extraordinaire, Cass Sunstein) [hereinafter 2010 rule]. In short, according to the agency:

We have decided to adopt a final rule along the lines set forth in the NPRM, with one important exception: We are strengthening the protections for consumers from those initially proposed by setting time limits (1) for carriers to provide food and water to passengers; and (2) to deplane passengers when lengthy tarmac delays occur on domestic flights. In adopting this approach, we

have carefully considered all the comments in this proceeding and believe that our action strikes the proper balance between permitting carriers the freedom to make marketplace-based decisions while ensuring consumers can count on receiving the protections they deserve in the unlikely event of an extended tarmac delay.

The final rule requires that each plan include, at a minimum, the following: (1) An assurance that, for domestic flights, the air carrier will not permit an aircraft to remain on the tarmac for more than three hours unless the pilot-in-command determines there is a safety-related or security-related impediment to deplaning passengers (e.g., . . . weather, air traffic control, a directive from an appropriate government agency, etc.), or Air Traffic Control advises the pilot-in-command that returning to the gate or permitting passengers to disembark elsewhere would significantly disrupt airport operations . . . .

Department of Transportation, Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983, 68,987 (Dec. 30, 2009). The final rule was weaker than the NPRM in some respects. Notably, the Department did not mandate that carriers incorporate their contingency plans in their contracts of carriage—which would have permitted breach of contract suits—after receiving comments that it lacked the legal authority to force such a change. Instead, the final rule “strongly encourages carriers to incorporate the terms of their contingency plans in their contracts of carriage, as most major carriers have done voluntarily with respect to their customer service plans.” *Id.* at 68,989.

Had the final rule required a change to contracts of carriage, airlines could have sued the Transportation Department on substantive grounds, though they may not have succeeded. Theoretically, airlines could have argued that the enacted 3-hour time limit exceeded the agency’s statutory authority. *Look back to the statutory provisions. Would you agree with such an argument? Are those provisions ambiguous? If so, should courts defer to the Department’s interpretation of those provisions?* In other rulemakings, substantive objections may derive not only from relevant statutes but also from the U.S. Constitution.

Here, the Department of Transportation engaged in considerable process before issuing its final rule: an ANPRM with a comment period and an NPRM with a comment period. Those unhappy with the rule would not have a plausible argument that the agency should have provided more opportunity to comment (though perhaps there would have been a plausible claim if the agency had denied the request for a 30-day extension of the NPRM’s comment period and there were other extenuating circumstances making the original 60-day period insufficient). But there are other potential process objections to a rulemaking. For instance, a challenger might allege that the agency did not provide sufficient information with the NPRM to permit meaningful

comment. In addition, if the final rule is not identical to the proposed rule, a challenger could claim that the final rule not a “logical outgrowth” of the proposed rule, as is required. The final rule was largely stronger than the proposed rule. *Should that be permissible?* As with the substantive challenges, statutes (particularly the APA) and the Constitution can come into play for procedural objections.

The Department’s final rule was followed by legislation. In 2012, Congress enacted, with support from both parties, a modified version of the proposed legislation discussed above—notably without the time limits on how long a plane can remain on the tarmac before giving passengers the opportunity to deplane. The FAA Modernization and Safety Improvement Act of 2012, a major reauthorization bill covering many issues, codified some of the earlier adopted regulatory structure. Section 415 mandates that carriers and airport operators of a certain size submit (for the Secretary of Transportation’s approval) emergency contingency plans for how they will:

- (A) provide adequate food, potable water, restroom facilities, comfortable cabin temperatures, and access to medical treatment for passengers onboard an aircraft at the airport when the departure of a flight is delayed or the disembarkation of passengers is delayed;
- (B) share facilities and make gates available at the airport in an emergency; and
- (C) allow passengers to deplane following an excessive tarmac delay in accordance with [another section].

Although the legislation did not adopt the three-hour cut-off mandate that appears in the Department’s final rule, it also did not repeal the regulation. Section 415 also requires the Secretary to “establish a consumer complaints toll-free hotline telephone number for the use of passengers in air transportation and shall take actions to notify the public of—(1) that telephone number; and (2) the Internet Web site of the Aviation Consumer Protection Division of the Department of Transportation.” It also mandates covered carriers to provide information on the telephone hotline and the Aviation Consumer Protection Division, among other items. Public Law No. 112–95, 126 Stat. 11, § 415.

In fact, as with much significant agency regulation, no legal challenges were filed against this major rulemaking. It is a myth—largely held by commentators, even in administrative law—that most rules result in legal challenges in federal courts.

Having a regulation in place, of course, is not the end of the story. It may not be followed. *Should the agency that has authority to regulate also have authority to enforce? Or should another agency be in charge of enforcement? What kind of enforcement regime would you desire? For instance, should the agency be able to issue penalties itself or should the agency have to take the matter to a federal court? Should an enforcement agency go after every violation? Could it as a practical matter do so?*

By statute, the “Secretary of Transportation may impose a civil penalty for . . . [certain] violations [including of the 2010 rule] only after notice and an opportunity for a hearing.” 49 U.S.C. § 46301. The Department learns of violations from carriers themselves (as the rule has reporting mandates) and from consumer complaints (see: <https://www.transportation.gov/airconsumer/file-consumer-complaint>).

The Department’s Office of Aviation Enforcement and Proceedings came after American Airlines for violating the 2010 rule, among other provisions. The parties settled in 2016. The agreement began:

This consent order concerns violations by American Airlines, Inc. (American Airlines) of 14 CFR 259.4 (the Department’s tarmac delay rule), 49 U.S.C. § 41712 (prohibition against unfair and deceptive practices), and 49 U.S.C. § 42301 (requirement to adhere to a carrier’s tarmac delay contingency plan). American Airlines failed to adhere to the assurances in its contingency plan for lengthy tarmac delays for twenty domestic flights at Charlotte International Airport (CLT) on February 16, 2013, six domestic flights at Dallas/Fort Worth International Airport (DFW) on February 27, 2015, and one domestic flight at Shreveport Regional Airport (SHV) on October 22, 2015. Specifically, the carrier permitted the flights to remain on the tarmac for more than three hours without providing passengers an opportunity to deplane. This order directs American Airlines to cease and desist from future similar violations of Part 259 and sections 41712 and 42301 and assesses American Airlines \$1.6 million in civil penalties.

Department of Transportation, Consent Order with American Airlines (Dec. 14, 2016), at 1, <https://www.transportation.gov/sites/dot.gov/files/docs/eo-2016-12-10.pdf> (footnotes omitted).

The fine is steep. But unlike successful contract or tort litigation where any damages would go entirely to the plaintiff (and her attorneys), only \$602,000 of the fine gets “credited to American Airlines for compensation provided to passengers on the affected flights”; another \$303,000 goes back to the carrier for part of “the carrier’s expended costs of acquiring, operating and maintaining a surface management and surveillance system at CLT and DFW to monitor the location of each aircraft on the airfield.” *Id.* at 15. *Does the fine, as structured, strike you as appropriate?*

The 2010 rule and 2012 legislation, of course, did not make air travel trouble free. In April 2016, President Obama issued an Executive Order, Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy. In part, it directed executive departments and agencies “with authorities that could be used to enhance competition (agencies)” to, “where consistent with other laws, use those authorities to promote competition, arm consumers and workers with the information they need to make

informed choices, and eliminate regulations that restrict competition without corresponding benefits to the American public.” Exec. Order No. 13,725, 81 Fed. Reg. 23,417 (April 20, 2016). *Should the President be able to order agencies to undertake particular rulemakings in this manner?*

Following the White House’s directive, the Department of Transportation finalized rules requiring more information disclosure by airlines and barring “cherry picking” of data for certain performance metrics. It also issued an ANPRM mandating that airlines refund baggage fees when the baggage is “substantially delayed.” The White House touted both actions in a released fact sheet titled “Obama Administration Announces New Actions to Spur Competition in the Airline Industry, Give Consumers the Information They Need to Make Informed Choices.” *What are the benefits and costs of having such coordination between the White House and a cabinet department on agency regulation?*

In the first few months of President Trump’s Administration, overbooking of airplane flights and poor customer service has generated considerable media attention (and You Tube hits). For instance, David Dao was physically dragged off a United Airlines flight (operated by a regional carrier) in April 2017. He eventually settled with the airline before filing an actual suit, but after obtaining an attorney. Some are calling for additional legislation, and others for more regulation. The House Transportation and Infrastructure Committee and the Senate Subcommittee on Aviation (of the Transportation Committee) held hearings in May 2017. And so, the circle of potential policymaking continues. *If you were advising President Trump and you know that one of the President’s programs is to eliminate two regulations for every new regulation, would you advise him to pressure the Transportation Department to get rid of the 2010 tarmac rule?*

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## SECTION 2. THE BASICS

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<i>Frequently Asked Questions</i>
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If you were to log on to a hypothetical website—www.admin.law.gov—to find some fundamental background for understanding administrative law in general (or the preceding problem in particular) you might find something like the following. As with most sets of Frequently Asked Questions, the responses to these FAQs are only initial entry points for more sophisticated questions and answers that will arise throughout this book.

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## Frequently Asked Questions

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- What is administrative law?
- What entities are administrative agencies?
- Is everything the government does considered agency action?
- Is administrative law important?
- Is administrative law just politics by another name?
- How are administrative agencies organized?
- How do administrative agencies do their work?
- How do administrative agencies make regulations?
- How do administrative agencies decide cases?
- How do courts review the work of administrative agencies?
- How do the White House and Congress oversee the actions of administrative agencies?
- How does administrative law contribute to social welfare?
- How does administrative law contribute to freedom?
- How does administrative law contribute to social justice?

### **What is administrative law?**

Administrative law comprises the body of general rules and principles governing administrative agencies—governing both how they do their own work and how the results of that work will be viewed, or reviewed, by the President, Congress, and the federal courts. It exists in every country and at all levels of government—federal, state, and local—in our system and there are some emerging principles of international (or global as it is sometimes called) administrative law, too. Federal administrative law, the subject of this book (and website), can be found in many sources: the Constitution, federal statutes, executive orders, and decisions of the federal courts—as well as in the legal materials, decisions and rules of all sorts, developed by the agencies themselves.

Administrative law, as a body of general principles, needs to be distinguished from the particular substantive law implemented by each individual agency—distinguished, that is, from the tax law practiced by the Internal Revenue Service, the labor law of the National Labor Relations Board, or the occupational safety and health law of the Occupational Safety and Health Administration. Administrative law takes place on a more general, and more process-oriented, plane. The distinction is somewhat analogous to that between civil procedure and torts or contracts. Every torts or contracts case, because it came from a judicial proceeding, has a civil procedure matrix, even if the principal topic of dispute concerns a substantive torts or contracts doctrine. Similarly, administrative law treats general questions like the process by which agency regulations must be made, or the authority agency

regulations will have if reviewed in court, rather than of the more particular questions regarding labor or tax policy.

### **What entities are administrative agencies?**

Administrative agencies are all of the authorities and operating units of the government except for the constitutionally established entities in the first three Articles: that is, except for Congress, the President and Vice President, and the Supreme Court. They are sometimes called “agencies,” but sometimes “departments,” sometimes “boards,” sometimes “commissions”—they are all still agencies. Just as agents, in the ordinary sense of the term, carry out tasks for their principals, so, too, do agencies carry out the instructions of, and are responsible to, the three great constitutionally established, institutional “principals.” Because administrative agencies largely are not established or even mentioned by the Constitution, they have to be created by statute or, in some cases, by presidential order.

There are five major categories of agencies. First, White House agencies, such as the Office of Management and Budget (which houses OIRA, described in the example above), sit within the Executive Office of the President. Second, there are fifteen cabinet departments. The most recent addition was the Department of Homeland Security, which started operations in 2003. Their leaders, along with the Vice President, make up the President’s Cabinet. Third, executive agencies are sometimes housed within cabinet departments, like the FAA discussed above. Others are freestanding, like the Environmental Protection Agency. A few of their leaders (along with some leaders of the White House agencies) are often considered “cabinet-level,” at the discretion of the President. Fourth, independent regulatory commissions and boards, like the National Transportation Safety Board (another transportation agency described briefly in a footnote above), are run by multi-member leadership and excluded from some administrative procedures imposed by the White House. As with cabinet departments and executive agencies, they cover a wide range of policy areas. Finally, there are agencies that are only partly federal in nature, including public-private entities like government corporations, federal-state organizations like those established under the Compact Clause, and federal-foreign institutions like those created by treaties.

Sometimes, agencies change type. The Postal Service, one of the country’s oldest agencies (even pre-dating the country’s founding), started as a freestanding executive agency, with its leader considered cabinet-level for decades. Since 1971, it has functioned as a government corporation. It is the largest employer of nonmilitary government employees and the second largest employer of civilians in either the public or private sector, after Walmart.

### **Is everything the government does considered agency action?**

Almost. When Congress passes a statute, that is not agency action, nor is a court making a decision or the President giving a speech or issuing a pardon. But when the Internal Revenue Service collects taxes, the Bureau of Land Management leases public lands, the National Labor Relations Board supervises a workplace election, the Centers for Disease Control collect epidemiological data, Immigration and Customs Enforcement deports an undocumented immigrant, the Environmental Protection Agency sets a new air quality standard, or the Social Security Administration pays disability benefits—these all are agency action.

However, some agency action is so given over to the discretion of the officials involved that it almost disappears from the ken of administrative law. The decisions of the Air Force as to what jets to order, a federal prosecutor as to whether to press charges, or the State Department trying to set foreign policy in the Middle East are all in some sense agency action, but they are unlikely to raise issues subject to traditional forms of administrative law control covered in this book. Some raise unique issues of law, such as government contracting, with bid disputes in front of the Government Accountability Office or the Court of Federal Claims, for example. And sometimes the length or breadth of agency discretion, in this large sense of the term “discretion,” is uncertain, as, for example, in the degree to which Congress intended to give individual agencies the complete freedom to decide what priorities they should establish in carrying out their general mandates.

### **Is administrative law important?**

Indeed! Given what has already been said, it is clear that it is almost impossible to be a lawyer for the government (except perhaps for those who prosecute ordinary crimes) without some knowledge of administrative law. But the same is really true for most practitioners with private clients. Most transactions these days have a regulatory aspect to them, and understanding any regulatory framework requires knowledge not merely of the substantive policies but also of the types of processes and materials involved—the knowledge, in short, of administrative law. A recent survey by the National Council of Bar Examiners found that over 20 percent of new law school graduates listed administrative law as a primary practice area (and over 70 percent did some work in the field).

One might even go a bit further and say that it is hard even to follow the news knowledgeably without some understanding of administrative law. To speak of matters growing out the events of September 11, 2001: the implications of making airport security into a matter handled by a federal agency, the proper distribution of emergency funds to airlines in need of bailout and to the families of those killed, the powers and limits of a new Department of Homeland Security—these were all deeply affected by the doctrines of administrative law. The same could be said

of the responses to the recent “Great Recession” (the financial crisis of 2007–2009): the handling of the Troubled Asset Relief Program and other bailout funds, the augmentation of the powers of the Federal Reserve Board and the Securities and Exchange Commission, and the establishment of a new agency, the Consumer Financial Protection Bureau. Given the growth of federal regulation over the last century or so, administrative law is one of the best places to see how law works in the modern world. (Two members of the current Supreme Court—Justices Breyer and Kagan—used to be professors of administrative law. And the late Justice Scalia also taught administrative law.)

### **Is administrative law just politics by another name?**

Some say so. Because administrative agencies wield the government’s power, they are of course intimately connected with many issues that are the subject of political debate. They are subject to frequent oversight by the President and Congress at the federal level and by states and localities beneath. But because administrative law deals with the proper legal structure for that use of power and that process of oversight, it brings to bear the values of the law: values such as regularity, consistency, evenhandedness, and participation. This tension—or if you like, this persistent problem of how to encapsulate political will in legal norms—bedevils administrative law. But this very closeness to, but separation from, politics also helps make the subject both interesting and important.

### **How are administrative agencies organized?**

The Constitution says very little about the details of the structure of the federal government, so each agency is basically organized by the statute (or sometimes, by presidential directive) that puts it in business and tells it what its basic tasks are—this is often called the agency’s “organic” statute (or founding memorandum). (Many times, but not always, the statute and the agency are eponyms: for example, the National Labor Relations Act establishing the National Labor Relations Board.) Nevertheless, and not surprisingly, there are many commonalities among most administrative agencies. There is a head of the agency, with a small cadre of advisers immediately responsible to that office, but the great bulk of agency personnel serve in “administrations,” “services,” “offices,” or the like—subordinate units each with its own particular responsibilities and hierarchical organization. Thus, for example, the problem of controlling the gypsy moth is the immediate responsibility of a group of specialists in the Animal and Plant Health Inspection Service, headed by an Administrator and itself one of several bureaus under the authority of the Under Secretary for Marketing and Regulatory Programs, who is one of several undersecretaries under the authority of the Secretary of Agriculture. Legal staffs within agencies are typically segregated into special law offices. In any agency with substantial adjudicatory responsibilities, the administrative law judges (or other first-level

adjudicators) and any appellate agency tribunal are separated from both the staff and the legal counsel of the agency. (Descriptions of the various federal departments and agencies, and organizational charts of their various units, can be found in the U.S. Government Manual, online at [www.usgovernmentmanual.gov](http://www.usgovernmentmanual.gov).)

At the top of the agencies are Senate-confirmed presidential appointees. There are, however, two different general patterns for these leadership structures. As described above, some agencies are regulatory commissions or boards, almost always headed by multi-member bodies, whose members can be removed from office by the President only for “cause,” and accordingly are sometimes called “independent” agencies. The NTSB is such an example. Other entities—White House agencies, cabinet departments, and executive agencies—are typically headed by a single administrator who serves at the President’s pleasure without any term specified at the start. There are agencies with unusual leadership arrangements. The new CFPB, for example, is headed by an administrator appointed to a five-year term, who can be fired only for cause (at the time when this casebook went to press, the constitutionality of this structure was under en banc review at the U.S. Court of Appeals for the D.C. Circuit, with oral arguments having taken place in May 2017). The Postal Service’s entire Board of Governors is appointed by the President and confirmed by the Senate; that Board (and not the President) then chooses the Postmaster General (and then the Board and Postmaster General select the Deputy Postmaster General).

To determine who has what specific substantive responsibilities within an agency, one has to work with statutes that delegate authority and with presidential directives and agency rules that redelegate it. Some of the procedural requirements of administrative law also vary by the form of organization of an agency—for example, the Government in the Sunshine Act applies to agencies headed by multi-member boards but not to those headed by single administrators, and the Federal Vacancies Reform Act largely permits acting officials only in agencies that are not run by multi-member boards. But the overwhelming majority of administrative law requirements do not turn on the particularities of each agency’s organization. Rather, they are responsibilities placed on all agencies simply because they are agencies.

### **How do administrative agencies do their work?**

Agencies act in many ways. The Chairman of the Federal Reserve Board may well influence the course of the economy—or at least the financial markets—simply by giving a speech. The Department of Defense takes a more direct route to the same end—it spends a lot of money. According to a new government website ([www.usaspending.gov](http://www.usaspending.gov)) that brings spending across the government together for the first time in one place, the federal government spent \$3.85 trillion in 2016 (about half of that went to Social Security, Medicare, and national defense)—of the total, individuals received 30 percent; for profit entities obtained 19

percent, and states and localities took in 17 percent. Even spending actions have a legal structure, depending as they do on delegated authority, not to mention appropriations.

But agencies also do things that look more “law” like, and it is those things that mostly come to mind when one speaks of administrative law. Agencies make regulations. A quick look at the Code of Federal Regulations (CFR) (available in hard copy or online at [www.ecfr.gov](http://www.ecfr.gov)) will show that agencies make a great many regulations. According to the Congressional Review Service, between 1976 and 2015, agencies published between 3,410 (in 2015) and 7,745 (in 1980) final rules in the Federal Register. In addition, in the period of 1997 to 2015, “major rules,” which are rules expected to have an annual economic impact of at least \$100 million or other significant economic effects, ranged between an annual low of 51 (in 1999 and 2002) and a high of 100 (in 2010). To compare, looking at two-year Congresses between 1977 and 2014, enacted laws ranged from 284 (for 2011 and 2012 together) to 804 (for 1977 and 1978).

Agencies also adjudicate. In Fiscal Year 2014, the Social Security Administration decided over 2.8 million initial claims for disability benefits (and presided over 680,000 hearings). In the same year, the Veterans Administration processed over 1.3 million initial disability and pension claims for benefits, and immigration courts, under the Department of Justice, completed over 184,000 cases. All of these agencies have considerable backlogs of claims. To compare, in that year, including both civil and criminal matters, the federal appellate courts saw nearly 55,000 filings and district courts received over 376,000 filings. Many of these matters, particularly at the district court level, are settled out of court.

Agencies license activities or individuals too. One cannot just decide to be a pilot and start carrying passengers for hire! And agencies enforce their statutes and regulations—by sending out inspectors, revoking licenses, levying penalties, or bringing criminal actions in court. Any particular agency can do only the things that its governing statutes authorize it to do, but the typical agency will have many of these powers. Or, in other words, individual agencies—say, the Securities and Exchange Commission—can set priorities, administer budgets, make rules, decide cases, and pursue enforcement actions, and in doing so exercise legislative, executive, and judicial powers that at the constitutional level would be split up among Congress, the President, and the federal courts.

Finally, although administrative law often assumes only one agency is acting in a particular issue area, there are considerable overlaps in regulatory authority across agencies. Sometimes, agencies work together to produce joint action; other times, they fight with each other over turf and policy outcomes.

### **How do administrative agencies make regulations?**

Needless to say, this is in some respects a technical question that can only be answered after considerable study. In general, administrative rulemaking begins as you might expect—with a decision on the part of an agency to do something to carry out one of its statutory responsibilities. Because agencies usually have more they could do than they have time or money for, this is not necessarily an easy decision to make. Thus setting priorities, although usually thought of as a purely executive task, has important legal consequences. And along with the decision to do something is, of course, the issue of what to do. Here, most commonly, a team within the agency—some with technical expertise, some with legal expertise, and so forth—will develop a more-or-less worked out proposal. The archetypal procedure is then to conduct a “notice-and-comment” rulemaking—that is, to give notice that a rule is in the offing and to allow for those outside the agency to comment on the proposal. Staff then review that rulemaking record before making any rule final. The White House is often involved in big rulemakings by cabinet departments and executive agencies from the very start (in terms of prompting action) through to the very end (reviewing proposed and final rules). Assuming that the proper procedures have been followed, and that the rule is substantively within the agency’s statutory authority, final administrative rules have full legislative force, binding courts, agencies, and citizens alike to their terms.

### **How do administrative agencies decide cases?**

If by “cases” you mean the application of statutes or rules to individual circumstances, administrative agencies decide cases informally, and by the millions, all the time. (If, for example, you have been away from the United States and, on returning, turned in a customs form (now often electronic) and passed through customs without paying duty, you have successfully “won” an administrative adjudication.) If by “cases” you instead mean the relatively formal proceedings that lead to final determinations of contested matters and may form precedents for future agency action, then you will not be mistaken if you think of them as trial-type proceedings—with some differences. The most formal agency cases are heard in the first instance before administrative law judges, officials who are not judges as understood in Article III of the Constitution but have substantial civil service protections to help them maintain their independence. Often there is an intermediate level of review before a reasonably sheltered appeals panel. But if the case is important, or has significant contested issues, the ultimate decision may be made by the head of the agency (the head may be a single person or a multi-member board or commission). These officials also have political and policy responsibilities; they are not the same as appellate judges. But they are empowered to decide the issues in the adjudication. In short, there is often a closer connection between overt policy authority and case decision in administrative adjudication than in courtroom adjudication.

This might be viewed as the genius of administrative adjudication, or as its fatal flaw. (Sometimes, Congress has shied away from this standard arrangement and separated adjudicatory matters from the rest of the agency's responsibilities. The Occupational Health and Safety Act, for example, created both a regulatory and an enforcement agency in one, the well-known OSHA, and a separate case-hearing agency, the lesser-known OSHRC (Occupational Safety and Health Review Commission).)

### **How do courts review the work of administrative agencies?**

Almost every statute that creates an administrative agency and delegates authority to it also provides for the major final decisions of the agency—the rules it makes and the cases it decides—to be reviewed by a federal court. Occasionally this review is *de novo*, for example, when a court reviews an agency's decision to withhold information that has been requested by someone under the Freedom of Information Act. And sometimes the matter on review can raise an issue, such as a constitutional issue, on which a court will displace completely the agency's judgment. But on most matters, the fact that the agency has decided one way or another has some weight before the court; to put the point another way, the court will to some extent defer to the agency's initial judgment. In part, this is a straightforward reflection of the reality that, in both rulemaking and adjudication, most often review takes place on the record the agency has built, which necessarily reflects how the agency framed the issue. (Indeed, Congress often provides for agency decisions to be reviewed for the first time in a federal Court of Appeals, that is, in a court that hears argument but doesn't take new evidence.) But deference to the agency is also grounded on the belief that on many matters the agency may have made a better decision than the judges would if they substituted their own judgment. This might be because the agency understands the factual matrix better because of its daily involvement with the problem at hand, because the agency gets more political input on a matter that turns on a value-laden choice among possible policies, because the agency has a set of experts who understand the science or economics of the problem better than generalist judges, or perhaps some other reason. What the grounds of deference are, and how far they go, are a matter of considerable debate among scholars, judges, and politicians. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837—the *Chevron* case, decided in 1984, which you will hear much about—held that judges should even defer to an agency's interpretation of Congress's statutory language if the language is ambiguous and the view of the agency delegated to act under the statute is reasonable. It is both the most cited case in modern administrative law and one of the most controversial.

### **How do the White House and Congress oversee the actions of administrative agencies?**

Most agency actions are not reviewed by a court, though agencies, like private parties, act in the “shadow of the law.” In addition, agencies face considerable non-judicial oversight, within and outside the federal government, and a fair number of pages in these materials deal with this. At the front end, top agency leaders are selected by the President and confirmed by the Senate. On the one hand, Congress orders agencies to perform tasks, and at times even imposes deadlines on them; on the other, its appropriations of operating funds may not suffice for agencies to perform these tasks. The White House also “directs” certain agencies to undertake particular programs. In the middle, OIRA reviews significant regulations by cabinet departments and executive agencies before they are issued. The President (and another agency leader for that matter) can also ask an agency—of any type—to consider her views in a particular policy area. Congress can withhold funding for particular agency programs through appropriations riders and can hold hearings to question agency officials on their plans.

At the back end, the President can fire almost all political officials not located in independent regulatory commissions and boards for any reason. In addition, the President can express her displeasure, short of firing, in public or private forums. Congress too can attack agency decisions at the back end. Congress can repeal certain important agency regulations under the Congressional Review Act, which then prevents an agency from issuing a rule in the future in “substantially the same form”. Until 2017, only one regulation had been overturned through the CRA. In 2017, with unified Republican government, Congress repealed 14 rules issued by agencies during President Obama’s Administration (and one rule issued by the Consumer Financial Protection Bureau, which was still led by a President Obama appointee after President Trump took office) under the CRA’s fast track procedures. Congress can also launch formal investigations, hold hearings, and engage in less formal mechanisms.

How much force the White House’s views should carry is a matter of considerable dispute, depending on agency type and other factors. (There is also conflict, although less, about congressional pressure). These tensions generally do not play themselves out in court.

### **How does administrative law contribute to social welfare?**

The programs run by administrative agencies have considerable effects on our economy and on other aspects of our welfare as a society. The Federal Reserve Board sets interest rates; the Securities and Exchange Commission tries to keep securities markets free of fraud; the Environmental Protection Agency establishes and enforces pollution standards; the National Park Service maintains many of our greatest natural treasures. Administrative law, as the law of the process by which

these things happen, contributes to social welfare insofar as it improves the performance of these functions—insofar as it contributes to agency decisions being better thought through, taking account of more varied interests, being better communicated to those affected, paying greater attention to human dignity, being more rationally enforced, *and* by not creating enormous burdens such as making things costlier, more cumbersome, or too slow. The cost-benefit analysis required by OIRA for significant rulemakings by many agencies appears, at first blush, to guarantee an improvement in social welfare. But the regulatory analysis is overseen by a White House agency, with close ties to presidential priorities, and it is only one component of what the agency considers in signing off on major rulemakings. Whether administrative law improves social welfare—or, perhaps better put, what the doctrines of administrative law should be so it will have this beneficial effect—is one of the persistent problems of the subject.

### **How does administrative law contribute to freedom?**

Many administrative agencies regulate private activity. Regulation inherently reduces the freedom of some people compared to what they would have had if only common law rules applied. At the same time, regulation can increase freedom—of regulatory beneficiaries and even of regulated entities that receive permission to undertake particular actions. Whether any particular regulatory regime increases or decreases individual freedom overall is thus a program-by-program question. But freedom is not just an individual matter; it also is a matter of the working of our governmental institutions. Administrative law serves to increase this social or political freedom when it makes the workings of the government more transparent to citizens and when it provides increased opportunities for them to participate in governmental affairs. Whether American administrative law adequately does this or whether it overdoes this are persistent questions. But it is at least worth noting that many foreign legal scholars and law reformers consider some of the doctrines of American administrative law—for instance, the wide comment possibilities available during much rulemaking and the Freedom of Information Act—to be considerably better in this regard than their own existing arrangements.

### **How does administrative law contribute to social justice?**

The programs run by administrative agencies also have tremendous consequences for how benefits and burdens are distributed throughout the society—benefits as disparate as disability pensions, minimum wages, cleanups of toxic wastes, and admission to the United States itself, and burdens as disparate as filing forms, reengineering production processes, and, of course, paying taxes. The very disciplining of these activities to the regularity of the law—the reduction in arbitrariness of the distribution of either benefits or burdens—might be considered a considerable contribution to social justice. That administrative law

doctrines make some real contribution of this sort is hard to deny. More difficult is the question whether administrative law conduces toward or away from social equality, or if not equality, then toward or away from the fair distribution of society's benefits. Seemingly technical doctrines can have distributive effects. Indeed, those effects have fueled some of the major disputes in the history of administrative law. As to what the overall balance is, perhaps all that can be said with safety is that the issue is contentious.

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### SECTION 3. THE TASKS OF ADMINISTRATIVE LAW

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| <ul style="list-style-type: none"><li>a. <i>Historical Perspectives on the Administrative State</i></li><li>b. <i>Legal Perspectives on the Administrative State</i></li><li>c. <i>Contemporary Perspectives on the Administrative State</i></li></ul> |
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Administrative law begins with the statutes that establish and empower administrative agencies—decisions taken by the political branches of government that define the scope of each agency's authority and mandate the modes through which that authority is to be exercised. Have Congress and the President acted wisely? Given the ubiquity of agencies in the modern world, these decisions are probably best evaluated not in absolute terms (administrative agencies are "good" or "bad") but in comparative terms (they are "better" or "worse").

Better or worse than what? When a new agency is being considered—such as the recently established and controversial Consumer Financial Protection Bureau—political rhetoric usually frames the choice in terms of action, inaction, or reverse action: administrative agencies are equated with "regulation" and contrasted with the choices of "doing nothing" or "deregulation." From the standpoint of legal analysis, however, this is insufficient. The difficulty can be seen most clearly if we ask: what in the legal universe does Congress's "doing nothing" equate with? It doesn't equate with "no law," if only because there are very few things on which there is ever "no law." There may be state statutes, state regulations, or common law requirements that govern, for example. Indeed, "doing nothing" from the political point of view might well leave in place a highly articulated and demanding set of legal norms.

In the American legal system, there are three likely alternatives to the establishment of administrative agencies. First, there are common law regimes, created and implemented through the courts. Products liability law is, by and large, an example of a common-law legal regime. Second, there are statutory law regimes, in which legislatures establish rules that are directly enforceable in court. The law of sales under the

Uniform Commercial Code is an example of this type of legal regime. Third, there are privatization regimes, where legislatures or agencies contract with private entities to provide goods or services that the government could have dispensed. The use of private prisons and detention facilities to confine inmates and immigrants without proper documentation, respectively, is an example of the third regime. It is also important to keep in mind that agencies exist at the federal, state, and local levels, and that one alternative to federal regulation is state or local regulation. This book focuses on federal agencies, but many of the lessons also apply, at least in part, to nonfederal agencies.

To decide the value of establishing an administrative law regime to handle a particular topic, it is thus necessary to compare the advantages or disadvantages of it to each of these other possibilities. These pluses and minuses are of two general varieties. One is institutional: what are the advantages or disadvantages of creating special-purpose agencies staffed by appointed and career personnel rather than relying on general-purpose legislatures and courts or, alternatively, on a specialized private organization. The other is in terms of conferred powers: legislatures generally make rules, while courts usually decide cases; agencies can be given both these powers within their jurisdictions *and* the powers to conduct inspections, grant licenses, broadcast information, undertake research, and do other things as well. One might then ask overall whether the probable use of a panoply of powers by a specialized organ of government resting on delegated powers is likely to be better or worse, in addressing the matter at hand, than having the legislature itself establish a set of directly legally effective rules or than leaving the whole matter to the courts to work out as cases arise. In addition, one might query what decisions should be governmental decisions as opposed to private decisions with some or no governmental oversight.

These are complex questions. In addition, administrative agencies are not static. Their design, authority, and oversight can change through time. Below is a scholarly introduction to some of the issues. We begin with some brief histories of the federal administrative state, presented in chronological order of the periods they describe, from the founding of our country to the 1960s. And then we turn to some fundamental legal perspectives on the tasks and legitimacy of the administrative state, listed in chronological order of publication. Finally, we conclude with more recent views of the modern federal bureaucracy, also provided in publication order.

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### **a. Historical Perspectives on the Administrative State**

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(1) NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 1–4 (2013): “In America today, the lawful income of a public official consists of a salary. However, in the eighteenth century and often far into the nineteenth and

early twentieth centuries, American law authorized a wider variety of ways for officials to make money. Judges charged fees for transactions in the cases they heard. District attorneys won a fee for each criminal they convicted. Tax investigators received a percentage of the evasions they discovered. Naval officers were awarded a percentage of the value of the ships they captured, plus bounties for the enemy sailors on board ships they sank. Militiamen enjoyed rewards for capturing Indians or taking their scalps. Policemen were allowed rewards for recovering stolen property or arresting suspects. Jailors collected fees from inmates for permitting them various privileges, and the managers of penitentiaries had a share of the product of inmates' labor. Clerks deciding immigrants' applications for citizenship took a fee for every application. Government doctors deciding veterans' applications for benefits did the same, as did federal land officers deciding settlers' applications for homesteads. Even diplomats could lawfully accept a 'gift' from a foreign government upon finalizing a treaty.

"What these arrangements had in common was that the officers' incomes depended, immediately and objectively, on the delivery of services and the achievement of outputs. By a gradual yet profound transformation extending from the late eighteenth century through the early twentieth century, American lawmakers abolished all these forms of income and replaced them with the fixed salaries that we now take for granted in government service, thus attenuating the relationship of officials' income to their conduct. In so doing, they made the absence of the profit motive a defining feature of government.

"The key to comprehending this transformation is to understand the nonsalary forms of pay that initially predominated. There were two basic types, which I term *facilitative payments* and *bounties*. A facilitative payment was a sum that an officer received for performing a service that the affected person wanted or needed, such as processing an application or issuing a permit. A bounty was a sum that an officer received for performing a task that the affected person did not want and might resist, such as arresting a suspect, discovering tax delinquencies, or forcing an inmate to do hard labor.

"The two forms of payment tended to give rise to two very different social relationships between officials and the people with whom they dealt. The facilitative payment tended to promote reciprocal exchange between the officer and the recipient of the service, working to the benefit of both. It fostered mutual accommodation. . . . In contrast, the bounty tended to promote adversarialism. The officer gained by the affected person's loss-by taking state-mandated action that the affected person wanted left undone. . . .

"The two different social dynamics generated by facilitative payments and bounties inspired, respectively, two different arguments for why officials' profitseeking was incompatible with the needs and values of a liberal-democratic republic and therefore had to be abolished.