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Administrative Agencies

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ADMINISTRATIVE AGENCIES

Administrative agencies, often called the "fourth branch," are entities of government that make decisions within par-

ticular substantive fields. Although these fields range over the full spectrum of public concern, the specificity of agencies' focus distinguishes them from other decision-making entities in the constitutional structure—the judiciary, the presidency, the Congress, indeed the individual citizen—each of which can be taken to have a scope of interest as broad as imagination will allow.

Agencies are perceived and known as such virtually without regard to their form or institutional location. They may be independent agencies—that is, not associated with any Article II executive department—which are generally administered by officials protected by law from the President's removal power. The Interstate Commerce Commission is such an agency, established over a century ago to decide entry, rates, and standards of service in the field of transportation. Alternatively, an agency may be found deep within an executive department, as the Food and Drug Administration is found within the Department of Health and Human Services. Or an agency may be identified with a cabinet officer in his or her capacity as administrator of a program. Agencies may have a handful of employees or they may have thousands. Large or small, they may speak through single individuals or through multimember collegial bodies, usually known as commissions.

The Administrative Procedure Act of 1946 serves as a second-level constitution for agencies of the federal government, specifying procedures and structural relations within and among them, and between them and other entities. But agencies are only presumptively subject to the Administrative Procedure Act—the Selective Service system, for example, has been exempted by Congress—and the act itself is in substantial part a restatement of the combination of COMMON LAW and constitutional law known as ADMINISTRATIVE LAW, which has been developing virtually since the beginning of the Republic in response to agencies' decision-making and enforcement activities.

Agencies have their origins as alternatives to Article III courts, making decisions in suits between individuals and to executive officials making decisions and seeking to enforce them in court suits. More recently agencies also have been seen as alternatives to decision making by legislative process through Congress and the President under Article I. Agencies have thus presented a difficulty for constitutional thinking under Articles I and III, arguably absorbing functions reserved to Congress, the President, and the judiciary. Agencies present a further difficulty under the due process clause of the Fifth Amendment when DUE PROCESS OF LAW is identified with legislative substance and court process.

The constitutional problem agencies pose has never reached any kind of closure. Instead, it has remained a tension in constitutional thought, unresolved because the creation and the maintenance of agencies have proceeded from inadequacies perceived in both legislative and judicial decision making.

Courts do not investigate or plan. Courts are not thought to display the resourcefulness of decision making committed to the achievement of a particular substantive end, such as workplace safety, nor the expertise of the specialists'. Courts other than the Supreme Court do not take initiative. There is widespread consensus, in fact, that courts should remain neutral and general. Moreover, the making of decisions in very large numbers of cases—those cases produced, for example, by disability benefit claims or the military draft—may be impeded by judicial process to the point that delay alone decides issues and legislated values are imperiled.

Congress also is not equipped to make any great number of particular decisions, and may be able to attend to a field of concern only at long intervals. Furthermore, where the unprecedented is faced, such as the discovery of radio waves or of nuclear energy, Congress often cannot do much more than define the field for decision. But legislators can foresee that failure to create a decision-making agency in the field effectively consigns the decisions of great public concern which will inevitably be made to individuals exercising powers under state laws of contract, property, and corporations.

Thus the existence and activity of agencies is rooted in felt necessity and is not the product of, or subject to, independent development of CONSTITUTIONAL THEORY. Nonetheless, SEPARATION OF POWERS, due process, and delegation concerns weave through determinations of internal agency structure and procedure made pursuant to statutes establishing particular agencies or under the Administrative Procedure Act. The same constitutional concerns underlie arrangement and rearrangement of the relations of the Judiciary, Congress, and the President to and through agencies. The concerns become acute and surface as explicit issues when Congress, seeking speed of decision or protection of an agency's initiative or planning, limits access to courts for review of agency decisions—partially or wholly precluding JUDICIAL REVIEW—or when the judiciary, for similar reasons, independently constricts STANDING to challenge an agency's action. The same concerns surface when Congress proves incapable of making even large choices of value within an agency's field of decision and again when the courts or Congress demand deference to agency choices of value—"deference," in this context, consisting of giving weight to what an agency says is the law because the agency says it. Constitutional questions constantly attend agency use of informal procedures in decision making. And constitutional questions both spark and restrain efforts by units within the office of the President, such as the OFFICE OF MANAGEMENT AND BUDGET, and by committees and individual members of Congress

to intervene in an agency's consideration of issues. The LEGISLATIVE VETO, now disapproved on constitutional grounds, is only one of the means of congressional and executive involvement extending beyond formal participation in agency processes or the processes of judicial review.

The demands on agencies often press them to issue statements, characterized as rules, explicitly limiting the factors to be taken into account in a decision of a particular kind. These rules may govern decisions by the agency itself or by individuals and corporate bodies within the agency's field. In their formation some public participation may be allowed. Rule-making, if not peculiar to agencies, is characteristic of them, and agencies make rules whether or not explicitly authorized by statute to do so. But inasmuch as relevant factors for decision may then be excluded and decisions in particular cases may not be made on their full merits under the governing statutes, constitutional questions of due process are presented when individuals affected by such decisions challenge them. Here, too, justification is grounded in felt necessity, the acceptance of rough justice as preferable to the entire failure of justice. In addition, the crystallization of an agency rule is viewed as facilitating congressional reentry into a field through debate of defined issues leading to focused statutory amendments.

The demands on agencies to do what other governmental bodies are not equipped to do have also led to bureaucratic hierarchies within agencies. BUREAUCRACY raises the fundamental question of responsibility in decision making. The constitutional shadow is that of arbitrariness—the making of decisions by individuals within an agency who have not been delegated authority to make them or responsibility for them, and the enforcement of decisions that are not deliberately made but are rather the outcome of contending forces within and outside the agency. Congress and the courts have responded by establishing a body of administrative law judges, by requiring records of evidence and explanations of decisions, by requiring personal decision making (one constitutional formula is "the one who decides must hear"), and by prohibiting various kinds of EX PARTE contacts with agency decision makers. These responses to administrative bureaucracy have led in turn to fears that modern agencies may be overjudicialized as a result of attention to constitutional concerns.

The principal influence of administrative agencies on constitutional law is the impact of the form of legal thought they have generated, which has differed from conventional doctrine over a substantial period of American legal history. "Legality" in agency administration is not the correctness of an outcome but rather the proper taking of factors or values into account in the making of a decision. There is little or no finality in administration: Decisions frequently remain open to revision and to justified reversal. There is no real distinction between agency action and agency inaction. The effects of agency decisions are examined and reexamined far beyond the bipolar limits of the judicial case. Values are routinely recognized—sometimes identified as noneconomic—to which no private claim can be made. In these respects, even though administrative law is evidently molded by constitutional concerns, administrative agencies may be considered seeds of anticonstitutional thought, for standard constitutional doctrine has maintained a markedly different structure of presuppositions and dichotomies. In judicial review of agencies the strong emphasis on the actualities of agency decision making, in contrast to acceptance of formal regularity in constitutional review of other decision-making bodies, contains further fundamental challenge. In large perspective, there is in administrative law a vision of agencies and courts joined with each other and with Congress in pursuit of evolving public values. This vision sits uneasily with an inherited vision, still alive in much constitutional thought, of government as invader of a private sphere of rights that it is the duty of courts to guard. The future of constitutional law will be guided in substantial part by the way these competing visions and modes of thought are integrated.

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(SEE ALSO: *Appointing and Removal Power, Presidential.*)

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