

# CHAPTER 5

## SUBJECT-SPECIFIC LAW TITLES

### ADMINISTRATIVE LAW

**A**dministrative law is that body of law embracing the creation and operation of administrative agencies within the executive branch of government. Administrative agencies are created by statutes at the federal and state levels, and municipal ordinances at the local level. These agencies are the governmental bodies most likely to have contact with the public-at-large because they constitute the meat, or substantive part, of government. Administrative law encompasses the powers granted to administrative agencies by statute, the regulations promulgated by the agencies pursuant to that legislative authority, and the adjudicatory functions of the agencies themselves to enforce those regulations. Because Congress and state legislatures cannot enforce the laws they enact, they rely on administrative agencies to perform that function. If you think about the executive branch as a percentage of the federal budget, you would be talking about 98% of the budget, while the legislative and judicial branches comprise a mere 2%. If you have any contact with the federal, state or local government, it is likely to be with some executive branch, or administrative, agency.

At the federal level, the operations of administrative agencies are governed by the **Administrative Procedures Act** (5 U.S. Code, Ch. 5; Pub.L. 79-404, 60 Stat. 237, enacted June 11, 1946) which prescribes guidelines for the rulemaking function, including notice of proposed rulemaking before adoption and publication of a final rule in the **Federal Register**. These final rules are then published in the **Code of Federal Regulations**, a multi-volume set that provides a systematic arrangement of all federal regulations currently in force. Each state has its own administrative procedure act, modeled after the Revised **Model State Administrative Procedure Act** (1981, 2010), which was promulgated by the National Conference of Commissioners on Uniform State Laws. The problem with the administrative law process is that

it takes place largely out of the public eye and with the participation, by and large, of insiders, i.e. government officials, or those directly impacted by the regulations who have the legal manpower (generally a large law firm) to monitor the process for their clients. While it owes its existence to the democratic process (i.e. the legislation creating the agencies), its operations proceed largely outside the democratic process.

The growth of the administrative state since the New Deal years now constitutes a threat to the traditional separation of powers envisioned by the Founders. It was the Founders' intent that Congress would be the most powerful of the three branches, since it was the branch closest to the people. Today, Congress is by far the weakest of the three branches and its oversight function has been emasculated by the growth of executive branch power. During the New Deal, the Supreme Court was cowed by Franklin Roosevelt's efforts, albeit unsuccessful, to pack the court and began giving increasing deference to administrative agencies, including the power to interpret and enforce their own rules.

That authority was reinforced in the landmark case of *Chevron v. Natural Resources Defense Council* (467 U.S. 837, 1984), by which the Supreme Court, in a unanimous vote, directed lower courts to defer to administrative interpretations of their own authorities, if that interpretation was "reasonable." This allowed administrative agencies to reinterpret existing statutory authority in new ways and substantially increase administrative power. Unchecked actions by the Environmental Protection Agency, among others, have flowed from this increased grant of power which has no authority in statute. Anyone who has closely observed the oversight function of Congress knows that Congress has only limited authority to hold executive branch agencies accountable, and what authority they do have is indirect, as a consequence of their budgetary authority. It is administrative branch officials who have the clear advantage in terms of the day-to-day operation