

LECTURE # 10 – BASICS OF AMERICAN ADMINISTRATIVE LAW

Today we talk about the basics of American Administrative Law. We touched on several of them yesterday when we talked about the background of administrative law in the US. The basics of Administrative Law relate to two things: 1.) Federalism, the difference between federal, state and local government. We do have a division of authority among them and each has administrative agencies over its jurisdiction. The most important nationwide power in the country is the federal government and these are the most important administrative agencies, the federal agencies. We then have agencies for each state that each state can govern differently from one state to the next. And we even have local agencies, those of local governments – the school board is the most important. It handles much money and governs the schools in every community. The local governments are the city governments. Remember I told you I was a City Attorney – I was in charge of local government. I had to fire 2 policemen, as I told you yesterday. The police, the fire, the local zoning and building codes are local administrative law matters. So we have federal, State and Local matters. One of the best examples of a state matter that I can think of, and if I have time today I will tell you about one I conducted, is State Condominium Regulation. I have here the filing of a condominium with the State to give consumer protection.

Our 3 levels of government – federal, state, and local – disagree a lot and compete for authority. Federal, of course, is nationwide and is the most important as we become more and more a nation of people who move about linked by highways. The main agencies and most important administrative law in America is that of the federal government. Several examples are the Internal Revenue Service that taxes us with an income tax on everyone in America. We call it the IRS. The Environmental Protection Agency, the EPA, that puts clean air and clean water acts and standards in effect for our air and water which obviously move about from state to state and can't be governed by state or local laws. We have the Food and Drug Administration, FDA, which governs drugs, medical prescriptions, food and what can be put into our bodies and sold over the counter in pharmacies. We have the Department of Transportation that governs the highways. When can a highway be built through a beautiful park, such as here in Petrozavodsk, what if the federal government decided to put a road through it? Who has the most power to do that? That is a federal matter and yet there again you would have some conflict between a local park agency, state park agency, and the federal highway agency. We have the Securities Exchange Commission, SEC, that governs the sale of stocks, bonds, investments, mainly on Wall Street n New York and the US - a very important agency. It's actually an independent regulatory agency, meaning it's independent of the President. The governing board of it is appointed in staggered terms, meaning every year 2 of them are appointed so if there are 6 of them, 2 are appointed this year, 2 next year, and 2 the following year, so that every year 2 new ones are appointed. It's a rule that they may not be removed by

the President alone. A director can be removed only for cause – in other words, for doing something wrong. There's a third rule that they may not be appointed based on their political party. I believe there's a fourth rule that they must be equally different political parties. So this is one of the few independent administrative agencies we have in the US and it is a federal one. We have the Social Security Administration – that has to do with pensions nationwide for everyone in the country that works. That's a very important administrative agency. It has many judicatory hearings to decide whether or not people are entitled to pensions and how much they are entitled to. If you look at my YBTJ book you will see there are issues as to whether a divorced ex-wife has a right to a deceased husband's social security benefits, which normally a widow would have a right to. There's also an issue of whether or not people get disability benefits under social security, so they have hearings and rulings on whether or not, for instance, a pregnant woman in her 7th month of pregnancy when due must leave employment is entitled to disability pay.

We have several influences on American administrative law. They permeate and go through the entire process, and that is: 1.) We have freedom of information – the Freedom of Information Act means that anyone can come in and look at the papers, records, and files of an administrative agency. The public has the right to request that copies of these things be made public to it, 2.) We have open meeting laws called Government in the Sunshine Laws which require that all meetings of all agencies and anyone who is going to make any decision of an agency be publicized and be held in the open so anyone can sit and observe – newspapers can come and someone could even come and record it, 3.) Due Process Requirements of all administrative agencies, which in some cases are very burdensome. We have the requirement that someone be given Notice under due process, which we've talked about before, a right to a hearing, and the right to a written ruling, and the right to appeal that written ruling, and even a right to an attorney if they're going to have a ruling which affects their property interest, their money interest, their life, or their liberty. So the requirements that are in American law of due process, open meetings, and freedom of information are 3 things that permeate all administrative law. Because of these, most Americans have started to trust administrative law even though there are no juries. As we talked about the first week of class, juries are becoming unpopular with the majority of Americans. Our juries are required in the US Constitution - if you look at the Bill of Rights, Amendments 6 & 7, the 6th Amendment says that in all cases of criminal law there shall be the right to a trial by jury. Administrative agencies may fine people, but they are not criminal law and not criminal penalties. Second, in all cases in English common law involving amounts of money over \$20, a party has a right to a jury trial. Again, administrative agency hearings are not English common law – we're not involved in English common law, so the US Constitution does not give anyone a right to a trial in a civil matter before an administrative agency, even though it may be taking away or granting a television station license which may be worth millions of dollars – there is no right to a jury trial.

All Administrative Law is divided into 3 functions: 1.) Rule Making, 2.) Adjudication, and 3.) Judicial Review. First, in Rule Making – Rules are the policies, the rules given in advance by administrative agencies : 1.) As to the rules of the agency itself – the rules that they will follow in the agency. 2.) What to file with the agency – what forms to file. If you're going to file an application to do something, to change something – what are those forms? Those must be given out in advance - what forms they are going to have you file, what the fees for those forms are, and what the taxes they are going to ask you to pay are. 3.) Most important are rules of prohibition: what are they going to prohibit you from doing? 4.) there are certain kinds of rules – for example, when pilots fly an airplane they can only fly a certain number of hours per week – can they fly more than 40 hours a week? Can they fly a route more than 10 hours? These are rules that are adopted by administrative agencies. There are rules adopted in advance for the strength of drugs, fertilizers, and medicine that is going to be prescribed. All of these are rules that are going to be made by administrative agencies. We have a rule for state and federal and local laws that only if a rule is published in advance to the public and time allowed for the public to look at it and examine it and comment on it, may it become a final rule. No administrative rule may become a final rule or regulation until it has been published in advance. And for the federal government, a new law was passed 5 years ago that has been one of the most influential laws in America – that is the E-Government Law. It requires electronic docketing of all proposed rules and receipt of comments from all interested members of the public by e-mail. Only after this is done, publication to the public on the internet and comments received from the public– 60 days afterward - may a final rule be published. The agency must consider comments by the public, not every comment, but every group that is similar. The agency has the discretion to use those, to compromise those comments, or to ignore them. But there is also a requirement that allows citizen groups and industry groups to comment on rules and participate in the negotiation of changes of the rules or improvements of the rules. Because these citizens groups may go to work to enjoin these rules or to stop them, many of the agencies actually do allow citizen groups and industry groups to participate in rule making. So the E-Government Act of 2002 is a very important part of rule making in the US and in partnership with the Freedom of Information act, which requires that all rules and all information that leads to rules be available to the public. It's one of the contributions of the American internet to Administrative Law and that is the E-Government Act of 2002. Notice and comment rule making is one of the most significant parts of American Administrative Law.

The second function of administrative law is Adjudication which is when the administrative agencies adjudicate or make final rulings and hold hearings on what they are going to do about their rules, regulations, and policies. For instance, they're going to grant a license – it may be a driver's license, which may just be routine, or they're going to grant an order that the sale of a certain pesticide, such as Aldrin, must be stopped because it causes cancer, or that a pilot

must have his license suspended or revoked because he has been flying too many hours under the rules of the Federal Aviation Administration. All these are adjudications of the rules that have been promulgated in advance by administrative agencies. So the adjudication by an agency is very important. Agency adjudications, in many cases, are like trials, but without juries. So parties must receive notice of them, they may give evidence, they may bring witnesses, they may actually appear and testify at those hearings, and the requirement of due process does actually apply to agency hearings, whether it's a small hearing to grant or deny someone social security benefits, to grant or deny someone welfare benefits, or to grant or deny someone a license to own and operate a television station. Due process rights must be granted according to the courts of America. And due process means the: 1.) Notice of a hearing, 2.) Right to be heard, 3.) Right to bring an attorney and have an attorney represent you if you want, 4.) Right to present your own witnesses and documents, 5.) Right to a decision by a neutral disinterested decision maker, 6.) Written ruling, 7.) Right to appeal if you disagree with it, or to appeal that ruling to a final administrative agency board.

The final step or operation that's very important in American administrative law is Judicial Review. We actually say, instead of judicial review of administrative agency rulings, court process or judicial intervention. We do have some uses of the courts in judicial intervention at the adjudication level – and that is this – at an administrative adjudication, whether it is to grant a license, revoke a license, revoke the right of a factory to operate because it's violating clean air standards, many of the parties to these hearings want the right to subpoena witnesses. They want the right to bring witnesses in and documents in. An administrative agency does not necessarily have the power and force of government that a court has, so a court may actually end up being involved and being applied to by an administrative agency for a subpoena to force a witness to come in and testify or to bring documents and evidence into court. If someone does not come into court when he is subpoenaed or does not bring documents to court when he is subpoenaed, what is the penalty? There's a contempt of court penalty. Contempt of court means a fine of money, it could mean jail. A judge can put someone in jail for not appearing for a subpoena or for not bringing documents that were subpoenaed. This can be very important in large hearings. So the courts can be applied to and used by both administrative agencies, or the parties who are being brought before the administrative agency. In my YBTJ IV book you'll see there's an administrative agency hearing about terminating and prohibiting the use of a popular fertilizer widely used by all farmers.

Judicial review, itself, of an agency action is very limited in America because we allow complete hearings before administrative agencies and we even have administrative law judges, neutral people who do nothing but hear administrative cases. We have full time social security judges who do nothing but hear old age pension disputes and disability pension disputes. We have immigration judges who hear nothing but immigration disputes. Judicial review is very important in the common law system because we are so involved with courts and likely to use

courts before we use administrative agencies, so when you finally go to court from an agency it's surprising to many lawyers in our system and to many people outside the system to find out that there's no such thing as a totally new de novo review – you cannot hold court all over again, bring all your witnesses and documents before the court. It's assumed that the administrative agency has made a ruling and it's treated like an appeal from that ruling. In a court of law the only question becomes: is that ruling valid? Is it supported by substantial evidence? Is the evidence good? So the court reviews the record that is made in the administrative agency. And that's one of the requirements of an administrative agency process - that a record be made. A court reporter must be there or a recording with a tape recorder must be made and typed up and transcribed, so that a judge later on review could read it. The limit of the judge in deciding is whether the agency has made a correct decision – have they made the decision of deporting someone in an immigration case properly? Have they made the decision properly of granting or denying a social security pension or a disability pension? That decision is often an issue as to just how much weight to give an agency decision – how much weight do you give the administrative judge who already made the decision. Many of these decisions are very important decisions and many of the lawyers would like to go before a judge and hold a whole new hearing, but the only issue is whether there is substantial evidence to support that decision? So the argument in court on judicial review, becomes not conducting an entire new trial – the issue becomes were they correct or incorrect, did they abuse their discretion at the agency? In other words you defer to the expertise of those people in the administrative agency. And isn't that the whole point of administrative agencies and law – to get specialists looking at and deciding problems and disputes – and not generalists – which is what judges are.

So again, I emphasize that there are 3 areas of administrative law: Rule Making, Adjudication, and Judicial Review. We divide the 3 functions of law that administrative agencies are involved in into that. And we have 3 different types of agencies or levels, depending on the reach and expansion of that agency: 1.) Federal Agencies, which are the most important are nationwide. 2.) State Agencies, which are just state wide. We have 50 states so there are 50 state agencies. 3.) Local Agencies – each local government has its own agencies for building and zoning, for schools, for fire, for police, etc. As I told you, I was in local government once. Sometimes I feel a little self conscious – I'm not especially proud of the fact that local government decisions have to do with sewer, garbage, water, parks, streets – do the streets have holes in them? These are very important things to all of us day to day, but to the politician, the person in government, they don't seem like they're at an especially high level of importance to the field of Political Science.

America likes to think that we've made 2 important contributions to Administrative Law: 1.) Notice and Comment Rule Making – the fact that you can't have an administrative rule unless it's been Noticed to the public, and comments received from the public before the final rule is published, and 2.)

Open Government and Freedom of Information – that all things that agencies do – meetings, documents, files records, everything is public. Sometimes we add a third - 3.) Due Process, which permeates everything in America. The fact that in everything an administrative agency does, it must give Notice and a right to be heard before it take any action.