

## **LECTURE #9 – BACKGROUND OF ADMINISTRATIVE LAW IN THE UNITED STATES**

Today we start American Administrative Law. I think I told you earlier last week and the week before and in several introductory classes that American administrative law has been very slow to develop for 2 reasons: 1.) in the US we have a philosophy that we want to keep government out of people's affairs. People came to America to get away from government, to get away from bureaucracy. They don't want government interfering in their affairs. Even in business we've had this laissez-faire, keep government out of business attitude. The general belief is Capitalism will work better in big business and little business if we can keep government out of our affairs. Remember, I told you there is a little saying of the average person in America, and that is "It's close enough for government work – it's close enough for a government employee". In other words, it's not very good, but that's close enough. The majority of Americans accept the truth that people in government don't work quite as hard, and aren't quite as competent, or quite as accurate as people who work in private industry and private business. There are two philosophies 1.) That government is best which governs least, and 2.) Separate government power into 3 different branches so no 1 branch can get too powerful. Notwithstanding the fact that cities have to have police and fire departments that are administrative agencies, the federal government has to have an Army, Navy and Air Force each of which is an administrative agency, we have to have mail delivered by the post office which is an administrative agency. Notwithstanding all of this, government in the US has been very slow to come into day to day affairs

America has become a modern administrative state only in the last 50 years for several reasons. We realized that modern science and modern technology requires expertise to protect consumers from improper drugs, improper food, illegal investments, and fraudulent investments. We had a stock market crash in the 1900's where investors were cheated out of millions and millions of dollars and the whole economy went dead so the US government established agencies to regulate the stock market, the SEC, Securities Exchange Commission, is one of our more important agencies and there are very prosperous lawyers who represent investors and investment companies who work mainly on Wall Street in New York and are administrative lawyers. We also have realized when we concentrate and have administrative agencies at the federal level, the state level, and the municipal level, we are often putting all executive, legislative, and judicial powers into the one agency because they will often enforce the laws, they will adopt the rules and regulations like the legislature, and they will often hear appeals from them and make decisions having to do with them. We have a suspicion of doing this and merging all 3 branches of governmental authority into one administrative agency from our Constitutional doctrine, and some Americans have a regret that when we allow administrative agencies to make decisions we are eliminating the jury.

We give up separation of powers and the jury in return for 2 very libertarian, democratic things that the US has adopted to put into administrative law, that make it palatable to Americans and make it much more open and much freer than many people would've thought. 1.) One is Freedom of Information, the fact that everything is open and free. We have government in the Sunshine Laws in the states and federal government so that almost any document, any paper, any hearing, any decision making must be done in the open. You can't have administrators meeting privately. They must meet publicly, meaning that the public must be notified in advance of any meeting and the press and public are allowed to attend. And secondly, they must make copies of everything they do and copies of every record. There are some exceptions having to do, obviously, with the Army, Navy, National Defense, Police work, and medical records that people can't get copies of, but otherwise there is broad freedom of information in administrative agencies in government in the US so that people can go in and in a short time people can request copies of things, and they're able to insist that all hearings and all decisions be made in public with Notice of when the hearings are going to be. We also adopted a rule having to do with computers and the internet 5 years ago, which is the second important rule. 2.) The E-Government Act of 2002. The Electronic Government Act requires that all rules of administrative agencies be Published in the Federal Register, which is a daily log of all federal governmental activity. It has to be published in the Federal Register and be made public 30 days in advance of becoming effective. This has had a widespread effect because not only must it be published in advance, it must be published on the internet and made available to everyone. This means that not just lawyers in Washington, DC. who used to get copies of these enormous, lengthy rules and regulations in person by mail or delivery or courier, but they go on the internet now. Everything is available through the internet. So not just lawyers in Washington DC, but lawyers all over the US – 3000 miles away in California, 2000 miles away in Florida can receive copies of what the agencies are doing and what the government is doing in advance. And there is a requirement that everything be open for 30 (sometimes 60) days to receive comments from any interested party in the public. Even though the administrative agencies are not required to adopt the comments, or to react to the comments, or incorporate them into their final rules, they are required to look at them. They do have the discretion to compromise and adopt some of the ideas, to reject them, and ignore them, or to use them. Many people feel like they are participating in the administrative process by first being able to read and review copies of the administrative rules in advance – rules that have to do with smokestacks, smoke particles into the air under the clean air act, pollution into the waters under the clean water act, how many trees have to be cut down and how many have to be replanted in forest service and timber cutting by private companies – all these rules are important to members of the public, to members of certain industries, and to certain citizen groups which have become very popular in administrative law. The citizen group is a non-profit group, not to make money, but just to watch out for violations of things like the clean air act, the clean water act, the food and drug act, improper drugs and medicines, unsafe food. In America we

allow radiated food, genetically altered seeds - I'm not even sure what that means because I'm not scientifically oriented or technologically oriented, but I do know that there are countries in Europe that won't even import corn and grain from the US grown from genetically altered seeds. The decision as to whether or not to allow a company to sell genetically altered foods and radiated foods, is very important and something that is beyond the technological expertise of we the consumers, so we need scientific experts in the government to adopt rules about that. And if they adopt the wrong rule in government, we have citizen groups, who have become experts in these fields, to make the government enforce those laws. They will actually bring administrative actions and make the agencies enforce the law or they will bring lawsuits against the agency to enforce the law. So, consumer groups are very important in the enforcement of many administrative agency rules. In my You be the Judge IV book you will see a consumer group that's really an industry group of farmers that brought an agency action against an agency that wanted to stop it from using a certain kind of pesticide to kill bugs. They wanted to be able to grow corn and grain and not have certain kinds of worms that were destroying all the corn and grain. The Environmental Protection Agency ruled that they could not use this kind of pesticide because it was poisonous and the farmers, through a citizen or industry group, went to the agency to fight it and then went to court to fight the agency when the administrative agency ruled that they could not use this chemical to kill bugs and to kill worms in corn.

Being a real estate lawyer in the last 20 years is my specialty, and I'd have to say that as a real estate lawyer almost everything I do is affected by administrative law. I'd say it's administrative agency law at every level – the municipal level of cities, the state level of states, and the federal level. Let me give you a couple examples: 1.) I was just involved with a client who's going to build a high rise building – 65 stories tall – in my home city of Miami, Florida. He has the legal right under the city zoning and land use laws to build a higher building than 65 stories, in fact, it's almost unlimited as to the height he could go according to city laws and city codes. Remember, there are some city laws in St. Petersburg that supposedly limited gazprom from building the high-rise office building that it had scheduled to build. In Miami there's nothing to limit the height in the city, however in the city of Miami one must also realize there is an airport. The airport has planes taking off and landing and they need a certain height to land and take off and if a building is over a certain height, it is too high for the airplanes and the airplanes will crash into it. So there are Federal Aviation Administration Agency rules that say you cannot build a building, in my client's case 65 stories high,  $65 \times 12 = 8$  or 9,000 feet tall, over a certain height. The Federal Aviation Administration is a federal agency we had to deal with to negotiate with and determine just how high we could build the building. Because it could only go 65 stories high and went a whole city block, a very large area that it was to be built on top of, we decided and got permission to build 2 towers 65 stories high instead of the one tower we wanted of about 100 – 110 stories high. In addition to the federal agency we had to deal with, we had to go to the city to get a permit and

permission to build the 65 stories and also to build as many units as possible. We wanted to build 865 units. To go to the city to build 865 apartments and hotel units, you have to show that you have 1½ -2 parking spaces for every unit. 1½ parking spaces for every one bedroom apartment and 2 parking spaces for every 2 bedroom apartment. Well, we didn't have that many parking spaces so we had to request that the city waive those spaces and show that there is going to be sufficient parking to comply with city requirements for that building. As far as the state government, we had to make part of the building a condominium and install condominium apartments for part of the building, so we had to get approval from the state department of condominiums as to the consumer aspects of the law, where they protect consumers by requiring that an owner of property who sells condominium apartments disclose all his prices, all his documents and everything in advance. Therefore we were dealing with the city in regard to buildings and building codes and land use, the state in regard to condominium requirements, and the federal government regarding the height requirements required for airplanes, the FAA. So in just one building project in just one city block recently I had to deal with 3 different levels of administrative agencies - municipal government, state government, and federal government.

LOCAL GOVERNMENT – As a City Attorney I had to schedule one-day long hearings twice to terminate policemen from jobs. The City had an administrative board of citizens to decide after evidence was presented. Both policemen had their own private attorneys to fight termination, but lost.

Let me windup today and just say that because of the need for consumer protection in the modern world, we do have an acceptance and acceptability in America of administrative agencies – they are everywhere. Even though the US Constitution has nothing in it about administrative agencies, and they seem to violate separation of powers doctrine, and our Constitution does say that there are to be juries, we have accepted the fact that there must be administrative agencies in the modern American state, which merge government powers of all three branches and which do not allow juries. But, in the US we have 1.) Freedom of Information – everything is public, and 2.) Due Process – Whenever rights are affected, one has the right of notice, a hearing, an attorney, and a neutral decision-maker.