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Support Your Local Professor of Administrative Law

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CHAIRMAN'S MESSAGE

Support Your Local Professor of Administrative Law



ANTONIN SCALIA

One of the strengths of American law schools, often envied by observers from other systems, is their close association with the practicing bar, producing an education that combines the practical and the theoretical, the academic and the pragmatic. To a large degree this is an historical accident, attributable to the fact that our first law schools, unlike the European law faculties, did not grow out of the universities themselves but were founded and staffed by practicing lawyers. They were in academia, but not entirely of it.

It is a phenomenon well known to the world's diplomatic corps that foreign service officers left too long in a single post will often "go native," reflecting the attitudes and outlooks of the country to which they are accredited rather than of their own. Some believe that our law faculties have fallen victim to a similar sort of complaint—becoming too "academic," rejecting some of the most closely held values of the bar, and even failing any longer to teach the skills needed for practice. I do not share that view. But I do believe that retaining the close relationship between the teaching and the practice is a difficult and important goal that merits and requires constant attention. Which leads me to think that the readers of this journal would be interested—or, if not, should be interested—in a few remarks concerning the current teaching of administrative law.

The subject is prompted by my recent attendance at a workshop for professors of administrative law held under the auspices of the American Association of Law Schools. It was appropriately entitled "Teaching Administrative Law," and more imaginatively subtitled, by

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one of my more puckish colleagues, "Ad Law Nauseam." It was held in New Orleans on March 5–6, a datum which makes it difficult at the outset for charges of impracticality to be levelled against this particular group of legal academics—or at least for such charges to be levelled by the ABA, which found itself in New Orleans in *August* (not to mention Chicago in January).

The workshop demonstrated that in at least one important respect the teaching of administrative law resembles its practice. You may recall that our Section Council, at its fall meeting, rejected a proposal to establish standards and criteria for the practice specialty of administrative law, principally for the reason that the field is too diverse. Well, you will be happy to learn that we professors can be no more precise about what it means to teach administrative law than you practitioners can be about what it means to practice it. Indeed, the very first panel was plaintively entitled "What Are We Trying to Do?"

Large portions of our subject can be said to have been filched from other courses. Or perhaps more accurately claimed as abandoned property, left behind by professors of constitutional law who in recent years have acquired too much paraphernalia to keep track of. I have in mind particularly the portion of the course dealing with the constitutional due process requirements applicable to administrative action—everything from *City of Denver* to *Goldberg v. Kelly*. This could be taught as well in a constitutional law course, and sometimes is. Similarly, the portion of the course (or of my course, at least) dealing with separation of powers and so-called independent regulatory agencies—*Schechter, Humphrey's Executor* and all of that. These topics get increasingly short shrift in the crowded constitutional law curriculum, and when I am Commissar of Education I shall consign them all to administrative law, where they can be treated in the context of an overall examination of executive action.

Another topic which, as the workshop disclosed, some but not all of us ad law professors pinch from other courses is the doctrine of standing. It is central to the constitutional role of the judiciary, and so is logically treatable in the course on constitutional law or federal courts. On the other hand, an increasing proportion of the significant standing cases—from *SCRAP* to *Simon v. Eastern Ky. Welfare Rights Org.* to *Goldwater v. Carter*—involves attempted challenges to executive action. And if the doctrine is central to the role of the courts, it is also central to the role of the executive, since when all executive action becomes challengeable in court the duty to "take care that the laws be faithfully executed" is entirely converted from the ultimate responsibility of the President to the ultimate responsibility of the courts. Moreover, much

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of the modern development in the law of standing consists of statutory conferral of standing, through the APA and various substantive statutes. It is difficult to study the subject apart from these administrative law developments. So I shall require this to be taught in the Ad Law course as well; and those obstinate professors at the workshop who persist in their disagreement will be set to teaching the UCC.

But surely, you say, there must be agreement upon some core of administrative law that everyone must teach, and that is not purloined from other courses. Yes, there is. We can all huddle about the APA—and some of us (myself not included) can even draw warmth from a mystical common law of administrative process, separate from the requirements of either Constitution or statute, developed by the courts (except, apparently, the Supreme Court—see *Vermont Yankee*). And there is a substantial body of law to be taught regarding judicial review of administrative action (though much of that, dealing with so-called “scope of review” could plausibly be said to have been purloined from a long-vanished course called “Poetry in the Law”). But the problem with these properly proprietary topics is that it is difficult to teach them—and perhaps impossible to teach them accurately—apart from the substantive fields of law to which they are appended. One can teach, to be sure, the minimal requirements of the APA; indeed, one can do that in about a week. But to know the APA rulemaking requirements is not to know rulemaking as it exists in almost any of the major regulatory agencies. And judicial review makes more sense (the subtopic “scope of review” perhaps only makes *any* sense) when one considers a series of decisions dealing with a single agency rather than cases ranging from the Department of Defense to the FCC.

Hence the continuing and never-to-be-resolved dispute in the teaching of administrative law, evident at this workshop as at all others: Should the students be immersed in the business of a particular agency—whether EPA, or the FTC or the FCC; or should they rather be given a Cooke’s Tour of cases and case studies from various agencies? Personally, I favor the latter approach. Partly because I believe that one of the most important things an educated lawyer must experience (and not merely be *told*) is the wondrous diversity of administrative practice; and partly for the somewhat contradictory reason that the search for and emphasis upon commonality is essential to facilitate dispersal of the best practices, and to prevent a centrifugal field from becoming utterly chaotic. But I may be wrong.

The workshop displayed a healthy receptivity to the teachings of other disciplines. One of the sessions dealt with the lessons that administrative law theory may usefully learn from sociology, political science

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and organization theory. Well, yes, it was somewhat theoretical. And no, I doubt whether any of our graduates will be able to use any of that good stuff in the first memo they are assigned. But one of the functions of academic study (and teaching) of the law is rationalization and improvement as well as description of the status quo. *Somebody* has to be doing the groundwork for the next revision of the APA. If not we, then OMB.

In any case, any practitioners who may be upset at such extra-legal innovation will be comforted (as I was) by another remarkable phenomenon. One of the points I made in a short presentation concerning the teaching of rulemaking was the importance of historical perspective. The lamp of the past lighting the future, and so forth. To my great disappointment, I found that I was preaching to the choir. There was general agreement that it is important to teach not only what the law now is, but also how it came to be so. Only in this way will students appreciate that the law in this rapidly developing field may be as different from today's fifteen years from now as it was fifteen years ago; and only in this way will they be enabled to make some informed calculations as to what the nature of the changes may be.

But there was some bad news at the workshop as well. One of the most discomfitting presentations was made by our Council member, Prof. Arthur Bonfield, who urged an increased emphasis upon the teaching of state administrative law. He is unquestionably right—and was right even before the advent of the New Federalism which promises to shift a greater proportion of administration to the states, and a greater proportion of our graduates to practice before state agencies. What is discomfitting is that our lack is not merely the teaching of it but the knowing of it. Except for Arthur and Harold Levinson (also a member of our Council) and Fred Davis (formerly a member of our Council) there are few law teachers who know very much about state administrative law. Perhaps the market is about to remedy that shortage.

Finally, I must note that in accordance with the tradition of bar-gown collegiality that I referred to at the beginning of this essay, the workshop had an administrative law practitioner as luncheon speaker. You would have been proud of him. It was as though he had been sent over by Central Casting, in response to a request for an impressive lawyer who would say to all these professors just what John Q. Adlawpractitioner would want to say. Peter Barton Hutt, former General Counsel of FDA, gave it to us good. His theme was that we were too other-worldly, and the line from his talk that I most vividly recall was to the effect that in his real-life practice he considers it a failure if his dealings

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with an agency *ever* reach a stage (formal adjudication or rulemaking, much less judicial review) where *any* thing he learned in law school would be useful. He is probably right. A successful ad law practice consists, as he said, of knowing the agency, its institutional history, incentives and proclivities, intimately, and of persuading its staff—often at relatively low levels of authority—that particular action is or is not in the public interest. I am skeptical that we can possibly teach such skills in a general administrative law course; but we should at least be conveying the message that those skills are necessary, and that the client's battle is usually won or lost at a stage *before* the legal rules make any difference.

Random and unscientific observation causes me to remark that over the years the practicing bar and the teaching professoriate have enjoyed a much closer relationship in the field of administrative law than in most other fields. Many of the most prominent administrative law scholars—Walter Gellhorn, K. C. Davis, Nat Nathanson, Carl Auerbach, Clark Byse, to name only a few—have been active in the work of this Section. No less than five law professors are currently members of our Council. I do not know what accounts for this unusually high degree of affinity. Perhaps it is that people who understand administrative law appreciate the importance of institutions and the efficacy of person-to-person contacts. And perhaps they are more aware that everything they need to know is not to be found in the case reports. Whatever the cause, I view it as a desirable phenomenon, and I hope that the practitioners among you think so as well.

You would be, I believe, pleased with the current company of ad law teachers—judging, at least, by their representation in New Orleans. They are, by and large, undoctinaire, inquisitive, eager that what they teach be not only true but also generally useful to their students in the practice. They have none of that disdain for the practice which sometimes creeps into the academy. They merit an interest on your part in their enterprise which matches theirs in yours.

