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# FOREWORD

# THE SYMPOSIUM AT FIFTY

RANDOLPH MAY†

Looking back half a century, I can happily proclaim that my own work on the Administrative Law Symposium—what then was simply called the "Administrative Law Project"—was a labor of love. But truth be told, reaching back into the now misty recesses of the part of my brain holding memories of my *Duke Law Journal* days, it is just as easy to recall the labor as the love.

For me, working on the Administrative Law Symposium as a *Journal* staff member sowed the seeds for what became deep roots in the administrative law field. For many years in private practice, and when I served as Associate General Counsel at the Federal Communications Commission, my principal focus was communications law—then, as now, a fount of administrative law. And since founding the Free State Foundation in 2006, a think tank focusing heavily on communications law and policy, administrative law has remained central to my work.

Moreover, I have been privileged to serve as Chairman of the ABA's Section of Administrative Law & Regulatory Practice; a Public Member of the Administrative Conference of the United States ("ACUS") as well as an ACUS Senior Fellow; and a Fellow at the National Academy of Public Administration.

So, my own labor on the Administrative Law Symposium did indeed spur a lifelong love.



† Randolph May is president of the Free State Foundation. He was a staff member of the *Duke Law Journal* during the inaugural administrative law symposium and an editor during the second symposium in 1971.

But now back to the genesis of the Administrative Law Symposium. A statement introducing the first Administrative Law Issue—signed by "The Editors"—announced: "[T]he Journal initiates a major project designed to produce an annual commentary on each year's major developments in the field of federal administrative law."[1] It is worth quoting a bit more from the statement to provide context for considering the early history and subsequent evolution of the Administrative Law Issue:

> Our first survey is organized according to the framework of the Administrative Procedure Act, and each discussion attempts to relate to that central procedural scheme even though that Act does not govern all of the situations involved. An obvious deficiency of this first survey is the inadequate treatment of new legislation and agency rulemaking, and we have established procedures which hopefully will improve this aspect of our second survey.[2]

The Editors, as I will refer to them throughout, acknowledged the role Leo Huard, Dean of the Santa Clara Law School, played in initiating the project—who, but for his untimely death, was scheduled to join the Duke Law School faculty in 1970—and Duke Law professor Ernest Gellhorn. The *Journal*'s executive officers for the inaugural issue were William Sumner, George Krouse, Jr., James Hasson, Jr., C. William Reamer, III, William Stevens, David Wycoff, Jeffrey Lapic, and John Dawson—all of whom deserve credit.

But above all, my good friend Jim Hasson deserves special acknowledgment and thanks. In the masthead of the first issue, Jim's title is listed as "Comment and Project Editor." There had never before been a "Project Editor." If you know Jim, then you know the addition of "Project Editor" was by no means a case of honorific title creep. In reality, it meant that Jim, more than any other person, assumed the overall responsibility for ensuring that The Editors' aspiration became a reality.

In preparing this Foreword, I spoke with Jim to dig deeper into the Project's origin story—and The Editors' mindset—than what was revealed in the inaugural statement. A primary impetus for introducing the Project, according to Jim, was to make the still-young *DLJ* distinctive in some special way. After doing due diligence, it was

1. The Editors, *Project: Federal Administrative Law Development—1969*, 1970 DUKE L.J. 67.

2. *Id.*

determined that, while various law reviews had staked out different fields such as criminal law or constitutional law for publication of annual surveys, for the most part, other journals were not focusing on administrative law. What is more, The Editors surmised—with Ernie Gellhorn's reinforcement—that administrative law was on the cusp of becoming dramatically more impactful as the number of federal agencies and their activities expanded.

Well, they got that right. In the first three annual Administrative Law issues, these seminal decisions, along with other notable ones, were addressed in the student-authored Developments section: *NLRB v. Wyman-Gordon Co.*,[3] which discussed the discretion of agencies to choose adjudication or rulemaking to establish a new policy; *Goldberg v. Kelly*,[4] a case about the due process requirements applicable before terminating welfare benefits; *Association of Data Processing Service Organizations v. Camp*,[5] which covered standing to seek judicial review; and *Citizens to Preserve Overton Park, Inc. v. Volpe*,[6] which examined the adequacy of judicial review of agency action under the Administrative Procedure Act.

Notably, the first Developments survey was organized, as The Editors' statement promised, "according to the framework of the Administrative Procedure Act," and this was true in the two succeeding issues, as well. Moreover, students authored the entire Developments sections of each volume—171 pages discussing 43 different decisions for Volume 1970, 169 pages and 49 decisions for Volume 1971, and 214 pages discussing 53 different decisions for Volume 1972. Those are a lot of topical developments covered each year under a tight schedule. There is no doubt that the hard work by the *Journal*'s student staff that went into producing those early surveys got the project off to a solid start.

Perhaps not unexpectedly, the format the *Journal* followed in succeeding years has been a work in progress. So, by the fourth volume, the *Duke Law Journal* abandoned the more structured Administrative Procedure Act organizational format, never to be resurrected. The student-authored material, placed under the headings "Notes" and "Recent Developments," addressed a disparate set of topics in the administrative law realm, focusing only partially on cases decided in

3. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).
4. Goldberg v. Kelly, 397 U.S. 254 (1970).
5. Ass'n of Data Processing Serv. Orgs v. Camp, 397 U.S. 150 (1970).
6. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

the prior year. One of the Notes, however, was denominated *Developments Under the Freedom of Information Act – 1972*. And for the next eighteen years running, the prior year's Freedom of Information Act developments were surveyed under the same heading.

Thus far, I have focused on the student contributions, which, of course, have continued to this day. After all, the *Duke Law Journal* is a student-run law journal. Indeed, I think it is fitting—in this Fiftieth Anniversary Administrative Law Issue—to digress just a bit to quote the late Robinson Everett, one of the law school's most beloved faculty members. In 2000, in the *Journal*'s fiftieth anniversary volume, he wrote: "Most of all, I am proud of being associated with a law school whose outstanding students have displayed for a half-century great initiative, resourcefulness, perseverance, writing skills, and editing ability in creating, sustaining, and expanding a premier legal periodical."

Of course, in addition to chronicling recent developments, the Administrative Law Issue aimed from the outset to attract important articles from prominent scholars and, occasionally, from accomplished practitioners. In other words, to publish works that not only address the theoretical underpinnings of administrative law developments in a timely fashion, but works that also address the practical applications of such developments for agency officials, private practitioners, and affected members of the public.

Were you to spend any time at all, as I have, combing through the forty-some Administrative Law Issues that followed those early ones, I am confident you would agree that The Editors' initial ambitions have been realized, and then some. I easily could fill more than an entire volume discussing highlights of the first fifty years, but I must content myself here with these necessarily selective observations and examples.

Within the first decade, the Administrative Law Symposium had attracted articles from D.C. Circuit Chief Judge David Bazelon and leading scholars Paul Verkuil, Charles Koch, Sid Shapiro, and Hal Bruff. As the years went by, the roster of prominent authors continued to grow. So, again, only by way of illustration, take the Twentieth Issue (1989), which included articles by Justice Antonin Scalia (his early post-*Chevron*, much-cited *Judicial Deference to Administrative Interpretations of Law*) and by Cass Sunstein, Dick Pierce, Peter Strauss, and Susan Low Bloch. Or take the Twenty-Second Issue (1991), which included important articles by D.C. Circuit Judge Patricia Wald (*The New Administrative Law – With the Same Old Judges in It*) and by scholars Christopher Edley, Marshall Breger,

Cynthia Farina, Jerry Mashaw, and Cass Sunstein (again, in one of his multiple appearances).

But to put a fine point on it: the very next year, the Twenty-Third Issue (1992) featured a lineup of Robert Anthony, Thomas McGarrity, Peter Strauss, Don Elliot, and Ron Levin—all very prominent scholars. Bob Anthony's article, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public*, examined the proper classification and practical consequences of these types of agency actions often referred to as "soft law." Tom McGarrity's *Some Thoughts on "Deossifying" the Rulemaking Process* examined the increasingly procedure-laden, analytically burdensome notice-and-comment rulemaking process and the practical consequences of converting what the Administrative Procedure Act envisions as a relatively informal rulemaking process into a heavily formalistic one. Both of these articles, among the most-cited and influential in administrative law scholarship, became instant classics—spurring fresh thinking about how agencies could be more transparent, effective, and efficient in carrying out their missions. By any measure, these lineups of "ad law all-stars" are difficult to top in three close-in-time volumes. And the prominence of the authors which the Administrative Law Issue attracted early on has never abated.

Now, I want to highlight—again, out of necessity, and only highly selectively—a few of the special symposium issues focusing on particular subject matters. The Nineteenth Issue (1988) was devoted to "The Independence of Independent Agencies," a subject as topical today as it was in 1988. That volume was notable for contributions by Dick Wiley, former FCC Chairman, and Jim Miller, former FTC Chairman, as well as Alan Morrison, then director of the Public Interest Litigation Group—a frequent challenger of a variety of agency actions. In other words, it included the views of prominent experts with first-hand experience. Of course, their contributions were accompanied by the usual scholarly pieces—such as another of Paul Verkuil's oft-cited articles, *The Purposes and Limits of Independent Agencies*.

The Thirtieth (2000) and Thirty-Fifth (2005) Issues typify ones that focused on topics on the cusp of producing potential paradigm shifts in certain administrative law domains. The Thirtieth, titled "Governance of the Internet," addressed foundational questions regarding the emerging law of cyberspace. The Thirty-Fifth Issue, styled "The Role of the Internet in Agency Decisionmaking," examined the way in which the internet could change agency

rulemaking practice. Duke Law School's own Stuart Benjamin led off with *Evaluating E-Rulemaking: Public Participation and Political Institutions*, and Cary Coglianese, a prominent rulemaking expert, contributed *Citizen Participation in Rulemaking: Past, Present, and Future*.

Alas, given more space, I could give countless other "shout-outs" regarding the Administrative Law Symposium's first fifty years. Recall I said a complete volume could not do justice to what, rightly, should be said. But I trust I have said enough that "The (Original) Editors," can rest assured their initial ambitions have been fully realized.

In closing, two salient points from The Editors' original statement. First, an admission that the initial efforts were "necessarily experimental." That was a generous green light for succeeding generations of *Duke Law Journal* editors to be free to adapt the Project's format—as I have shown they did—and to improve upon it.

Second, The Editors expressed regret for the "inadequate treatment" of rulemaking in the first survey but promised to remedy what they called that "deficiency." Well, surely, I have shown they succeeded in that, as the Administrative Law Issue published many articles on rulemaking that have become classics. So perhaps now, a half century after the First Issue discussed the landmark *NLRB v. Wyman-Gordon Co.* decision, it is only fitting that this Fiftieth Anniversary Issue revisits adjudication. You will not be surprised it does so in the typically forward-looking Administrative Law Symposium fashion under the banner, "Charting the New World of Administrative Adjudication."

May the *Duke Law Journal*'s Administrative Law Symposium during the next half century be as successful in enriching our understanding of administrative law, and the crucial role it plays in furthering the proper governance of our nation under the rule of law, as it has been in the first half century!