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SIMULATION AND ROLEPLAYING IN ADMINISTRATIVE LAW

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Before this last year I had taught administrative law twice and hated it both times. In my encounters with the subject, I used a conventional case book and case method. The result was a federal disaster area. Students were bored, confused and apathetic; class discussion was non-existent. The subject fascinated me, but bored my students. Moreover, even my limited experience in administrative practice indicated that the course simply did not prepare students for the real world.

The basic problem seemed to derive from a futile attempt to establish general principles of administrative law.[1] Each agency is unique unto itself, however, and thus has its own body of substantive law; after all, agencies are fundamentally policy-oriented and political. And the courts are quick to recognize these differences; evidence may be substantial enough to uphold an NLRB but not an FCC decision.[2]

The conventional approach to administrative law unfortunately attempts to be all things to all people. It forces a student to switch from one statutory framework to another in minutes—thus hardly encouraging contemplation or comprehension. And it often substitutes simplicity for reality.

I therefore decided to adopt precisely the opposite extreme and to explore a single—and hopefully representative—administrative agency in detail.

Since I could not place students in an actual agency environment—especially in a small Georgia town—I decided to use a simulation of the administrative process, by creating a mock agency. I had three main reasons for this one hundred and eighty degree change from the conventional method of teaching administrative law. First, nothing seemed worse than the conventional case approach. Second, a student theoretically can transfer learning from a known situation to an analogous one. And finally, Walter Gellhorn gave the project his blessing—not necessarily because he believed that it would work, but that it should be tested.

I

INTRODUCTORY PERIOD

Despite these somewhat radical plans, I began the course in a fairly conservative manner by requiring students to read Ernest Gellhorn's *Administrative Law in a Nutshell* during the first two weeks of class. Though any

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[1] Thus the three main administrative law casebooks all share this approach—and perhaps defect. See Botein, Book Review, 46 N.Y.U.L.Rev. 438 (1971).

[2] This observation is hardly unique, of course, to administrative law. After all, the Carrington Report found similar across-the-board problems throughout legal education. Association of American Law Schools, *Training For the Public Professions of the Law: 1971.*

nutshell is inherently suspicious, this turned out to be a fine teaching tool. Unlike so many other overviews, it does not sacrifice accuracy for brevity. In order to supplement the *Nutshell* and provide a basic research tool, I also assigned Gellhorn and Byse's *Cases on Administrative Law.* Though the students read some leading cases from the latter book during the first two weeks, they could have used more—not to derive non-existent "rules," but rather to concretize issues. Later in the course, the students also used the Gellhorn and Byse book very profitably as an initial research tool. Though the book thus is useful, each student probably does not need to buy it; putting a large number of copies on reserve might work just as effectively.

During this introductory period, I met with the students only to answer questions, not to conduct a prepared class. This laissez-faire attitude probably was a mistake. Students often fail to recognize and articulate problems of comprehension. Many students later were quite foggy on propositions which in class they had claimed to understand. Some very general lectures thus might elicit student comments and uncover weak spots.

At the end of this introductory period I administered a very conventional one-hour essay examination—not so much to test the students' ability, as to insure that they had done the reading. I previously had used the question as a *two* hour final examination in a conventional administrative law course. To my infinite surprise, the students did as well on issue recognition after two weeks as my previous students had after ten. If nothing else, this worked wonders in deflating my ego.

I chose this somewhat conservative approach mainly out of fear. If the course turned out to be a total bust—as well it might—I did not want to deny the students what they considered their rightful quota of "rules" for the bar exam. More justifiably, I also wanted to introduce the students to the jargon and basic concepts of administrative law, so that they would recognize a problem when it arose during the simulation.

II

SIMULATION

Having completed the introductory period without undue trauma, the class moved on to the simulation. The subject of the simulation was the Federal Communication Commission's procedure for passing on citizen groups' petitions to deny radio and television stations' license renewals. This seemed appropriate for a number of reasons. First much of my rather meagre administrative practice had been in this area; in terms of both convenience and integrity, I therefore could function most effectively in it. Second, citizen participation in administrative action is on the cutting edge of administrative law today.[3] Finally, the FCC's whole scheme of broadcast licensing has received much scholarly attention.[4]

[3] This whole area was opened up, of course, by the classic case of *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C.Cir. 1966), which extended standing to television viewers.

[4] See, e. g., H. Friendly, *The Federal Administrative Agencies* 58 et seq. (1962); W. Jones, *Licensing of Major Broadcast Facilities by the Federal Communications Commission* 198 et seq. (1962).

I then had the far more difficult problem of assigning students roles in the simulation. I divided the class into five groups—the "public interest" challengers; the FCC's Broadcast Bureau; the defending station's counsel; the seven-person FCC; and the District of Columbia Circuit.

My first difficulty was that there were simply too many students. I had planned on between nineteen and twenty-five. But on the first day of class I was shocked to see more than fifty bright young faces staring at me. I reacted like any sensible law teacher—and scared the hell out of them. After a half-hour recitation of the course's rigors, twenty students silently slipped away and—to my infinite relief—dropped the course. This still left thirty-five students, however, who were too foolish or unflappable to bluff out. Accordingly, I needed to expand all five groups beyond desirable limits—leading to the creation of a ten-person D.C. Circuit banc. A limitation on enrollment therefore may be wise.

My second difficulty was in assigning students to groups. Since I wanted to promote personal interaction and emotional involvement among the students, each student's assignment had to coincide roughly with his ideology. But I was somewhat leery of giving students free choice, since they were not yet familiar enough with the roles to make appropriate decisions. Accordingly, I asked each student to submit a choice, along with a confidential one-page explanation of his policy and political attitudes. I assigned roles on the basis of this information, and the roles apparently were appropriate in about ninety percent of the cases. Students were free to play their roles as they wished, subject to a general requirement that their tactics be pragmatic. They even were allowed to use extra-legal or illegal means—an opportunity which none took. The very uncertainty of the roles had both positive and negative side effects. On the one hand, it forced students to analyze all possible positions. On the other, it often left them confused about how to present their position. Issuing a general description of the roles at the very beginning of the course thus might be helpful.

Having done this spadework, I handed out a simulated and simplified petition to deny. It raised three of the hotter issues in contemporary communications policy—concentration of control, discrimination in employment, inadequate local programming—and was modeled upon a case which I was then working on. I also filled out a simulated license renewal application and placed it on "public file" in the law library. Just to make life a bit more interesting, the application included some otherwise unavailable facts—which most students initially overlooked. This "file" proved to be far more valuable than I initially had expected. I later placed the students' work in it, which provoked a good deal of self-evaluation.

The class used this basic problem to simulate seven aspects of the administrative process—a negotiation and pre-hearing conference, an evidentiary hearing, full Commission review, judicial review, a rulemaking proceeding, and judicial review of rulemaking. The class met for two hours in the simulation session and then reconvened the next morning to analyze the previous day's session.

Each student was responsible for writing one Commission and one D. C. Circuit document—a brief, set of comments, or opinion. In addition, the students wrote critiques of simulation sessions in which they were spec-

tators. Since the critiques' main purpose was merely to ensure that students were attentive at the simulation sessions, I did not specify the contents. The result was usually a mass of ramblings on every conceivable subject. A better approach would be to give students some clearly defined questions to answer after each session. For example, a question sheet for a judicial review session might ask a student to analyze the court's treatment of the agency's findings of fact.

The first session was a settlement negotiation and a prehearing conference. I would have preferred spending more time on the informal process, since it is terribly important but almost totally ignored in most administrative law courses.[5] Any further simulation would have required a total departure from customary law school roles, however, and thus would have been quite difficult for the students. A law school in a major city can provide this exposure, of course, by having its students observe selected administrative agencies.

The negotiation session showed that law students are unable to deal with new and non-judicial situations. Though I had discussed the general nature of negotiation with the student attorneys, they approached the session as if it were another Moot Court argument. They made no attempt to work out a compromise—which would have been easy enough—but rather just hurled insults at each other. They overplayed their roles to the point of absurdity which became quite evident when, as administrative law judge, I attempted to secure stipulations on a few factual issues. At the post-mortem analysis next day, the students agreed that they had much to learn about the lawyerly art of negotiation. Using teachers or practitioners for this part of the simulation thus might be preferable.

This first session was sheer delight by comparison to the second, however, when the class undertook a full evidentiary hearing. I had recruited some friends from the Journalism School to play station employees and citizen representatives. But though I had outlined their testimony for them, they became totally free agents once they hit the witness stand. As the station's General Manager later remarked: "Hell, we didn't just want to play the game; we wanted to win it." The station's witnesses therefore gave perfect and impregnable testimony. And to compound what had become an interesting but unproductive Journalism versus Law match, several student attorneys were second year students and had not taken a course on evidence. As administrative law judge I thus was faced with inarticulate and incorrect evidentiary objections. The moral of the story is to prepare both witnesses and student attorneys very carefully—a task for which a student assistant might be highly useful.

These shenanigans totally threw the case in favor of the station—thus complicating the later administrative and judicial appeals. When I wrote my *Initial Decision,* I therefore laid a massive fix on the case by relying heavily on demeanor evidence. Though this tactic certainly was crude, it restored balance to the simulation and actually added some good issues. I had envisioned the *Initial Decision* as a possible escape valve, and found it essential.

[5] K. C. Davis, *Discretionary Justice: A Preliminary Inquiry* vi (1969).

The next two sessions were appeals to the full Commission and the D. C. Circuit. Since the students were familiar with appellate practice from Moot Court, they felt more comfortable in their roles. As a result, sessions became crashing bores. Though I had given most major references and told the students not to concentrate on substantive law, these sessions inevitably drifted off into fairly typical and repetitive appellate legal arguments. This may have provided additional training in oral advocacy, but did almost nothing to explore the administrative process. Moreover, the Commission and D. C. Circuit members thus participated less directly in the dynamics of the simulation, and legitimately felt somewhat cheated.

One experiment at this point, however, paid off rather well. Commission and D. C. Circuit members seemed to be debating their decisions only perfunctorily, in order to rush home and write their opinions. I therefore decided to sit in on their deliberations as a silent partner. Though the students at first were loathe to speak up, they eventually felt compelled to justify their votes. This promoted more vigorous debate, which often lasted several hours. Another useful approach might be requiring the group to produce a short majority or plurality opinion. This might force students to analyze their positions, rather than voting one way and writing another.

Having spent this time on adjudication, the class then turned to rulemaking. I originally had planned to begin this segment with negotiations among the groups for a compromise rule. After all, informal action is probably more important in rulemaking than in adjudication. The pressure of time and the bad experience with the prior negotiation, however, persuaded me to abandon this attempt. Moreover, negotiations in rulemaking often function on an industry-wide basis. The best method of documenting this might be to follow a case history through the appropriate trade magazines.

At this point I also passed up a valuable opportunity to make the simulation more rewarding for Commission and D. C. Circuit members. As noted before, these students participated less actively than others. Switching judicial and adversarial roles thus would have been highly beneficial. I rejected this idea, however, on the traditional bureaucratic ground that it would cause undue disruption—a decision which naturally turned out to be wrong. By this point, all students were familiar with the basic law and policy. Accordingly, a switch would have created little difficulty and probably would have rekindled the students' interest.

I began the rulemaking simulation by distributing a simulated *Notice of Proposed Rulemaking*. The rule would have required hearings for all petitions to deny which alleged that a station had certain percentages of media ownership, minority employment, and local programming. As a result, the rule was equally offensive to all groups.

The first rulemaking session was an oral presentation of comments by a panel drawn from all groups—a form which the federal agencies, of course, increasingly favor. This session demonstrated once again that law students cannot function in new and non-judicial roles. Instead of picking on the proposed rule's practical and political elements, the students unleashed broadsides against the rule's constitutional and statutory validity—a tack which never has impressed agencies. The Commission members were required to

reach a majority position, which produced some good debate and which confirmed my suspicion that decision-making responsibility provokes thought.

The next and final session was judicial review of the rule by the D. C. Circuit. Like the prior appeal, this put the students into their accustomed Moot Court roles and thus was rather dull. The time could have been spent more fruitfully in exploring the informal aspects of rulemaking.

Thus the course ground to a logical if less than totally satisfying halt. I originally had planned to use the last week in generalizing the course's experience by assigning problems relating to other agencies and statutory schemes. This exercise not only would have expanded the students' horizons, but also would have increased their ability to transfer knowledge. A longer course or an advanced seminar would facilitate this type of comparison and information transfer.

Throughout the course I made extensive and profitable use of videotape. Friends in the Journalism School—perhaps motivated by guilt—assigned me a graduate student to videotape each simulation session. He used a very basic half-inch videotape recorder and four microphones, but produced excellent audio and video. His single camera had a fairly powerful zoom lens, and thus could be located inconspicuously to the side. Though the students were somewhat curious at first, they became accustomed to the equipment by the end of the first session. Though some commentators have observed that videotaping may distract students, it did not here.[6]

The videotape was highly useful in the post-mortem analysis classes. While the simulation session was in progress, I jotted down the videotape footage number of any interesting segment. I then gave the videotape operator a list of footage numbers which he would play back on a hand cue. Accordingly, I could replay a particular segment on a moment's notice. For example, if the class were discussing whether the D. C. Circuit had given enough weight to the Commission's findings of fact, I could replay an exchange between student judges and counsel. Both participants and spectators thus could comment on a scene which they had directly before them. In addition, I sometimes manipulated the videotape in order to make a point. For example, at the evidentiary hearing I called a bench conference and then shut off my microphone. When I replayed this silent scene the next day, I needed to add nothing about the effect of "off-the-record" statements.

These "instant replay" meetings were valuable for both participants and spectators, since much of the course's value lay in seeing and recognizing incorrect approaches. The participants, of course, usually reaped the greatest benefit. I usually positioned them directly in front of the television screen; the replays were greeted with mutters and curses—such as "Oh no, how could I have done that." Since the camera focused upon all members of the class at one time or another, however, no one appeared to feel persecuted. Spectators also benefited from the replays. Since they already had recorded their observations in the critiques, the replays enabled them to compare their observations with mine and their classmates'.

[6] Dresnick, *Uses of Videotape Recorder in Legal Education*, 25 U.Miami L.Rev. 543, 584–85 (1971).

III

CONCLUSIONS

Though the course had a number of flaws, I was reasonably pleased with it. Perhaps more important, the students were delighted—possibly to the point of being too uncritical. My standard course evaluation sheet garnered incredibly favorable reactions.

Thus if courses, like television programs, were rated solely upon audience appeal this one's option definitely would be renewed. But the apparent success only raises other questions.

The educational value of the course is open to question. Being somewhat cynical about second and third year students' academic performances, however, I like any approach which motivates students to take an exam, write two long papers, make an oral presentation, attend class regularly, and write a weekly critique. Though it is less than clear what the students learned, they were exposed to some definite things.

First, and most important in an administrative law course, the students got a reasonably accurate view of the administrative process. They should be able to transfer this experience into the context of different agencies. To be sure, the course may be too long on practicality and too short on theory. But the administrative process is far removed from administrative law; scholarship, therefore, must proceed from reality.[7]

Second, the students vigorously exercised their written and oral skills, since they produced two twenty-page papers and made at least one oral presentation. An administrative law course is certainly not the best place to teach these very basic skills. But since undergraduate and law schools have failed to provide the necessary training, any vehicle seems appropriate.

But even if educationally sound, the course simply may not be worth the large amount of the instructor's time. Between arranging sessions, counseling students, and correcting papers, I spent about thirty hours a week on the course. Normally I would spend perhaps ten or fifteen hours per week on a course which I had taught before. The student output, however, certainly seemed to justify the teacher input. Moreover, use of a student assistant can reduce drastically the necessary time. Only towards the end of the course did I discover that I could assign many administrative tasks to a student research assistant. Though a student could do little basic drafting or planning, he definitely could arrange the details of sessions.

Finally, the course may be educationally sound, worth the effort, and yet require too much practical experience for many teachers. But this seems doubtful. I had roughly one year's practical experience with the FCC, garnered from part-time practice and consultantships. To be sure, many situations are beyond first-hand experience and thus call for the exercise of some intuition or second-hand information—a practice not uncommon in all law teaching. Perhaps the only clear caveat is that a teacher should not try this approach if he has absolutely no practical experience. Though the best instructors might be three-term agency chairmen, these appear to be in somewhat short

[7] Davis, *supra* note 5 at vi.