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ADMINISTRATIVE LAW
AND REGULATORY POLICY
Problems, Text, and Cases

*Fifth
Edition*



ASPEN LAW & BUSINESS

Administrative Law and Regulatory Policy

Problems, Text, and Cases

Fifth Edition

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To Louis I. Jaffe
Teacher, Scholar, Colleague, Friend

Table of Abbreviations

The following acronyms are used throughout the text.

ABA	American Bar Association
AEC	Atomic Energy Commission
APA	Administrative Procedures Act
CAB	Civil Aeronautics Board
CBA	cost-benefit analysis
CFTC	Commodities Futures Trading Commission
CPSC	Consumer Product Safety Commission
CSC	Civil Service Commission
DEA	Drug Enforcement Administration
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FERC	Federal Energy Regulatory Commission
FMC	Federal Maritime Commission
FPC	Federal Power Commission
FRC	Federal Radio Commission
FTC	Federal Trade Commission
HEW	Department of Health, Education, and Welfare
HHS	Department of Health and Human Services
ICC	Interstate Commerce Commission
NHTSA	National Highway Traffic Safety Administration
NIOSH	National Institute for Occupational Safety and Health
NIRA	National Industrial Recovery Act of 1933
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
NRDC	National Resources Defense Council
NTSB	National Transportation Safety Board
OIRA	Office of Information and Regulatory Activities
OMB	Office of Management and Budget
OPA	Office of Price Administration
OSHA	Occupational Safety and Health Administration
OSH	Occupational Safety and Health Act
OSHRC	Occupational Safety and Health Review Commission
SEC	Securities and Exchange Commission

Preface to the Fifth Edition

The traditional course on Administrative Law primarily concerns the delegation of power to administrative agencies, the procedures that the law requires them to follow, the legal requirements for obtaining judicial review of agency decisions, and the standards applied during that review. Critics of this course persistently raise two important objections:

First, isn't such a course too abstract? Too remote from the substantive essence of agency decisionmaking? Aren't efforts to generalize across decisions arising out of many different agencies and substantive fields misleading? Don't those decisions often reflect no more than result-oriented court efforts to deal with a bewildering variety of very different agency action on a case-by-case basis, perhaps masked by appeals to procedural principle? In a word, is it possible to understand these court decisions without understanding the substantive work of the agency?

Second, doesn't concentration on appellate court decisions mislead the student about what agencies do? The impact of judicial decisions on agency work may often be slight; and court review may constitute only a small part of the work of the lawyers who practice before the agency. Shouldn't future lawyers be given a broader understanding of the many other factors that affect the impact that agency action has upon the world?

This casebook represents an effort to preserve the essential coverage and virtues of the traditional course while adapting it to meet these objections. The materials are organized along traditional lines, as updated to reflect the vast change that has overtaken this body of law in recent years. At the same time the book uses notes and problems systematically to survey regulation, as broadly conceived to deal not only with prices and entry, but also with health, safety, and the environment. It shows the interaction between substance and procedure, and it describes some of the bureaucratic and political factors at work.

In the last two decades, administrative law has undergone extraordinary change. American presidents have imposed new controls on the bureaucracy. Congress has enacted important new legislation, some of it requiring attention to the costs and benefits of agency action, some of it pointing in the direction of new procedural controls. Courts have gone in new directions in many important areas, involving, for example, separation of powers and the basic relationships among courts, agencies, and Congress.

The Fourth Edition traced and analyzed these changes, with attention to both practical and theoretical issues. It represented a significant rethinking of the administrative law course, designed for the particular challenges that lawyers will face in the next decades.

The Fifth Edition consists of a substantial updating, and to some extent a significant revision, of its predecessor. We have added the most recent material on pressing issues in administrative law: constitutional problems, the scope of government regulation, the nature of judicial review, the shape of the ever-changing *Chevron* doctrine. We have included fresh work on risk regulation, cost-benefit analysis, telecommunications — and also added key recent cases involving regulation of tobacco, the nondelegation doctrine, and judicial review of decisions involving health, safety, and the environment. As before, we have worked especially hard to give users of this book a sense of “state of the art” debates now beginning within the courts and likely to play a large role in the future.

Although this is a substantial revision, we have maintained considerable continuity with prior editions of this book. The basic structure is the same, as is the basic goal: to study administrative law in a way that is informed by, and integrated with, an understanding of the issues of regulatory policy that lie beneath, and sometimes at the surface of, every doctrinal problem, however technical or abstract it may seem. In this way, we have sought to help the next generation of lawyers and law students with the endlessly fascinating problems of administrative law — some of them old, some of them new, some of them now barely on the horizon.

Justice Breyer has not participated in the preparation of the last two editions of this book, but we have retained a great deal of material from the editions for which he was coauthor. We are grateful to Tyler Roozen and Laura Warren for research assistance.

Cass R. Sunstein
Richard B. Stewart
Matthew Spitzer

November 2001

Preface to the First Edition

The traditional course on Administrative Law primarily concerns the delegation of power to administrative agencies, the procedures that the law requires them to follow, the legal requirements for obtaining judicial review of agency decisions, and the standards applied during that review. Critics of this course persistently and increasingly raise two important objections:

First, isn't such a course too abstract? Too remote from the substantive essence of agency decisionmaking? Aren't efforts to generalize across decisions arising out of many different agencies and substantive fields misleading? Don't those decisions often reflect no more than court efforts to deal with distasteful agency action on a case-by-case basis, perhaps masked by appeals to procedural principle? In a word, is it possible to understand these court decisions without understanding the substantive work of the agency?

Second, doesn't concentration on appellate court decisions mislead the student about what agencies do? The impact of judicial decisions on agency work may often be slight; and court review may constitute only a small part of the work of the lawyers who practice before the agency. Should future lawyers not be given a broader understanding of the many other factors that affect the impact that agency action has upon the world? See R. Rabin, *Perspectives on the Administrative Process* 7-14 (1978).

This casebook represents an effort to preserve the essential virtues of the traditional course while adapting it to meet these objections. The materials are organized along traditional procedural lines, as updated to reflect the vast change that has overtaken this body of law in recent years. At the same time the book uses notes and problems systematically to survey regulation, as broadly conceived to deal not only with prices and entry, but also with health, safety, and the environment. It shows the interaction between substance and procedure; and (particularly in Chapter 8) it describes some of the bureaucratic and political factors at work.

Thus, this casebook might be used in two different ways. The teacher who wishes to emphasize the "administrative process" rather than "administrative procedure" might use this book to do so. It will introduce the future practitioner to the substance of much regulation, its interplay with procedural rules, the agency seen as a bureaucratic institution, and the basic steps for obtaining court review. The teacher of the traditional course might teach that course from this book as well, using the substantive notes and comments as supplementary aids.

We recommend that those emphasizing the substantive regulatory aspects of the book in their courses refer to the Teachers Manual, which is based on our teaching notes. The book's cases, questions, and problems are deliberately organized to elicit in class discussion the points and issues that the Manual contains.

The book provides sufficient material for a four-hour course. Those wishing to teach a three-hour course are advised to forgo selected substantive areas of regulation (such as utility rate regulation, food and drug regulation, FTC regulation of false advertising) or procedural topics (such as application of due process, privacy jurisdiction, Freedom of Information Act) or a combination thereof.

We wish to acknowledge the great debt we owe our predecessors, and we mention specifically Professors Clark Byse, Kenneth Gulp Davis, Walter Gellhorn, and Louis Jaffe. Our work is obviously based upon their achievement. We particularly acknowledge our debt to Louis Jaffe, who, in mastering the intellectual problems of judicial review, laid the foundation on which we erect our own view of administrative law. We also acknowledge our use of the work of many others too numerous to mention, though we wish to point out that the discussion of the Federal Trade Commission in Chapter 8 draws upon that in G. Robinson & E. Gellhorn, *The Administrative Process* (1974), though we put that discussion to somewhat different use.

We have dealt with the perennial problem of footnoting in casebooks as follows: All footnotes in a chapter are numbered consecutively from its beginning to its end. Thus footnotes belonging to cases within the chapter will not bear their original footnote numbers. The footnotes attached to cases are those written by the court unless the note itself specifically indicates that it was written by the editors.

We gratefully acknowledge the research assistance of Linda Agerter, Dee Carlson, Kenneth Kettering, Kenneth Kleinman, Diane Millman, Joseph Post, Richard Rose, Cass Sunstein, Victor Thuronyi, Jeffrey Wohl, and Michael Young. Alan Morrison and Robert Pitovsky were generous in providing helpful comment and criticism. The unstinting work of our secretaries, Sue Campbell, Astrid Dodds, Cindy Dodge, Sarah Johnson, Karen Lee, Gayle McKeen, Angela O'Neill, and Shane Snowden, was indispensable and very much appreciated.

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