

ASPEN CASEBOOK SERIES

part of the

LIFT PROGRAM

*ROGERS
HEALY
KROTOSZYNSKI*

1-year **FREE** digital access
to an **Examples &
Explanations**
with new
casebook
purchase

**ADMINISTRATIVE
LAW**

*Fourth
Edition*



Wolters Kluwer

ASPEN CASEBOOK SERIES

ADMINISTRATIVE LAW

Fourth Edition

John M. Rogers

Judge, U.S. Court of Appeals for the Sixth Circuit
Thomas P. Lewis Professor of Law Emeritus
University of Kentucky College of Law

Michael P. Healy

Senator Wendell H. Ford Professor of Law
University of Kentucky College of Law

Ronald J. Krotoszynski, Jr.

John S. Stone Chair, Director of Faculty Research, and Professor of Law
University of Alabama School of Law



Wolters Kluwer

Copyright © 2017 CCH Incorporated. All rights reserved.

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.WKLegaledu.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-7878-0

Library of Congress Cataloging-in-Publication Data

Names: Rogers, John M. (John Marshall), 1948- author. | Healy, Michael P., 1956- author. | Krotoszynski, Ronald J., 1967- author.

Title: Administrative law / John M. Rogers, Judge, U.S. Court of Appeals for the Sixth Circuit, Thomas P. Lewis Professor of Law Emeritus University of Kentucky College of Law; Michael P. Healy, Senator Wendell H. Ford Professor of Law, University of Kentucky College of Law; Ronald J. Krotoszynski, Jr., John Stone Chair, Director of Faculty Research and Professor of Law, University of Alabama School of Law.

Description: Fourth edition. | New York : Wolters Kluwer, [2017] | Series: Aspen casebook series

Identifiers: LCCN 2016055799 | ISBN 9781454878780

Subjects: LCSH: Administrative law—United States—Cases. | Administrative procedure—United States—Cases. | LCGFT: Casebooks.

Classification: LCC KF5402.R64 2017 | DDC 342.73/06—dc23

LC record available at <https://lcn.loc.gov/2016055799>

ADMINISTRATIVE LAW

EDITORIAL ADVISORS

Rachel E. Barkow

Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law

Erwin Chemerinsky

Dean and Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine School of Law

Richard A. Epstein

Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The University of Chicago

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law
The University of Michigan Law School

Tracey L. Meares

Walton Hale Hamilton Professor of Law
Director, The Justice Collaboratory
Yale Law School

Richard K. Neumann, Jr.

Professor of Law
Maurice A. Deane School of Law at Hofstra University

Robert H. Sitkoff

John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky

Stanley Morrison Professor of Law
Stanford Law School
Faculty Co-Director
Stanford Criminal Justice Center

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

For Ying Juan.

John M. Rogers

For Carol.

Michael P. Healy

In memory of my mother, Barbara Carol
Jamison Krotoszynski (1949-2013).

Ronald J. Krotoszynski, Jr.

PREFACE

The fourth edition of the *Administrative Law* casebook is intended to meet several objectives. First, we hope to accomplish the core goal of the first edition of the text. That goal was described in the preface to the first edition:

This book is designed to serve as a streamlined workhorse for professors who like to teach out of cases and to focus on the principles underlying core doctrines. It lets the cases speak for themselves, with a minimum of editorializing text. This approach gives professors and students alike the opportunity to reconcile the principles of the case, each in his or her own way.

The fourth edition accordingly retains the organizational structure of the first edition. That structure is dictated by the four fundamental components of administrative law: (1) procedural requirements for agency adjudication; (2) procedural requirements for, and other issues related to, agency rulemaking; (3) separation-of-powers issues related to administrative agencies; and (4) judicial review of agency action. The authors' experience is that the course is most successful when taught in this order and the fourth edition of the text adheres to this order for presenting the materials. The four components are, however, presented in chapters that are largely independent. Instructors may change the order of presentation to conform to their own judgment about the optimal order of presentation.

Although adhering to the organizing principles and structure of the first edition, this new edition has been revised to account for developments in administrative law that have occurred since the third edition was published. The revised text includes as lead cases the recent Supreme Court decisions in *Kerry v. Din*, *Wellness International Network, Ltd. v. Sharif*, *NLRB v. Noel Canning*, *Decker v. Northwest Environmental Defense Center*, *King v. Burwell*, and *United States Army Corps of Engineers v. Hawkes Co.* A new note addresses the issue of delegation of governmental power to a private entity. Throughout the text, questions and notes for students have been added to reflect the insights of decisions in recent cases, including *Perez v. Mortgage Bankers Ass'n*, *City of Arlington v. FCC*, *Department of Transportation v. Association of American Railroads*, *T-Mobile South, LLC v. City of Roswell*, *Young v. United Parcel Service, Inc.*, *University of Texas Southwestern Medical Center v. Nassar*, *Michigan v. EPA*, *Cuozzo Speed Technologies, LLC v. Lee*, *Christopher v. SmithKline Beecham Corp.*, *Encino Motorcars, LLC v. Navarro*, and *Lexmark Int'l, Inc. v. Static Control Components, Inc.* The third objective of the new text is to provide opportunities for students to apply their understanding of administrative law principles in new legal contexts. The fourth edition retains the series of "Theory Applied Problems" at the conclusion of different sections of the text. These problems allow students to test their understanding of the principles of administrative law.

Although the text includes significant changes with new lead cases, we have sought to ensure that the materials included in the fourth edition may be taught in a three-hour course. Meeting this objective has meant that some materials have been removed from previous editions. Finally, we wish to acknowledge in this preface the debt that we also acknowledged in the preface to the earlier editions. That debt is owed to the teachers of administrative law and authors of administrative law texts who have affected our understanding of this subject. That group of law professors has grown since the date of publication of the first edition, because we are now indebted to the adopters of the text who have helped us to revise and, we hope, improve it in this fourth edition.

John M. Rogers
Michael P. Healy
Ronald J. Krotoszynski, Jr.

January 2017

ACKNOWLEDGMENTS

Bybee, Jay S., Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act, 59 Louisiana Law Review 431, 434-41 (1999). Copyright © 1999 Louisiana Law Review. Reprinted by permission. All rights reserved.

Uniform Law Commissioners' Model State Administrative Procedure Act (1981), §§ 1-101, 1-102, 2-104, 3-103, 3-104, 3-105, 3-106, 3-107, 3-108, 3-109, 3-110, 3-111, 3-112, 3-113, 3-114, 3-115, 3-116, 3-117, 3-201, 3-202, 3-203, 3-204, 4-101, 4-102, 4-103, 4-104, 4-105, 4-201, 4-202, 4-203, 4-204, 4-207, 4-208, 4-209, 4-210, 4-211, 4-212, 4-213, 4-214, 4-215, 4-216, 4-217, 4-218, 4-219, 4-220, 4-221, 4-301, 4-401, 4-402, 4-403, 4-501, 4-502, 4-503, 4-504, 4-505, 4-506, 5-101, 5-102, 5-103, 5-104, 5-105, 5-106, 5-107, 5-108, 5-114, 5-116. Copyright © 1981 National Conference of Commissioners on Uniform State Laws. Reprinted by permission. All rights reserved.

ADMINISTRATIVE LAW

SUMMARY OF CONTENTS

<i>Contents</i>		<i>xi</i>
<i>Preface</i>		<i>xvii</i>
<i>Acknowledgments</i>		<i>xix</i>
Chapter 1	Introduction	1
Chapter 2	Adjudication	27
Chapter 3	Rulemaking	177
Chapter 4	Role of Agencies in Three-branch Government	309
Chapter 5	Judicial Review	507
Appendix A	The Constitution of the United States	761
Appendix B	The Administrative Procedure Act (Selected Provisions)	777
Appendix C	Uniform Law Commissioners' Model State Administrative Procedure Act (1981) (Selected Provisions)	803
<i>Table of Cases</i>		<i>835</i>
<i>Index</i>		<i>847</i>

CONTENTS

<i>Preface</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xix</i>

CHAPTER 1

INTRODUCTION	1
--------------	---

A.	Overview of the Work and Place of Administrative Agencies in Our System of Government	1
	<i>Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.</i>	1
	<i>Pennsylvania v. West Virginia</i>	4
	<i>National Broadcasting Co. v. United States</i>	6
	<i>United States v. Southwestern Cable Co.</i>	12
	<i>FDA v. Brown & Williamson Tobacco Corp.</i>	15
B.	Adjudication and Rulemaking	18
	<i>Londoner v. City and County of Denver</i>	18
	<i>Bi-Metallic Investment Co. v. State Board of Equalization</i>	23

CHAPTER 2

ADJUDICATION	27
--------------	----

A.	Constitutional Right to a Hearing	27
	A Brief Introduction to Procedural Due Process	27
	<i>Bailey v. Richardson</i>	29
	<i>Goldberg v. Kelly</i>	34
	<i>Board of Regents v. Roth</i>	42
	<i>Perry v. Sindermann</i>	49
	<i>Paul v. Davis</i>	54
B.	How Much Process Is Due?	62
	<i>Mathews v. Eldridge</i>	62
	<i>Cleveland Board of Education v. Loudermill</i>	72
	Note on <i>Town of Castle Rock v. Gonzales</i>	82
	<i>Ingraham v. Wright</i>	85
	Note on <i>Goss v. Lopez</i>	93
	<i>Kerry v. Din</i>	96
	Note on Summary Deprivations of Property	104

C.	Statutory Hearing Rights: Triggering APA Requirements	107
	Note on the Federal APA	108
	<i>Seacoast Anti-Pollution League v. Costle</i>	112
	Note on When Agencies Must Observe Formal Adjudication Procedures	120
D.	Parties and Intervention	124
E.	Evidence and Proof Issues	126
	<i>Richardson v. Perales</i>	126
	<i>Steadman v. Securities and Exchange Commission</i>	133
F.	Combinations of Functions	138
	<i>Withrow v. Larkin</i>	138
	Note on “Total Quality Assurance” (“TQA”) and the Administrative Law Judge	148
G.	Bias	150
	<i>Antoniou v. SEC</i>	150
H.	Ex Parte Contacts	157
	<i>First Savings & Loan Assn. v. Vandygriff</i>	157
	<i>Vandygriff v. First Savings & Loan Ass’n</i>	159
I.	Estoppel Against the Government	162
	<i>Schweiker v. Hansen</i>	162
J.	Document Disclosure and Open Meetings	166
	The Freedom of Information Act	166
	<i>EPA v. Mink</i>	167
	Note on the Government in the Sunshine Act	173

CHAPTER 3

	RULEMAKING	177
A.	Introduction to Rulemaking	177
	<i>National Petroleum Refiners Ass’n v. FTC</i>	177
	Note on APA Requirements for Rulemaking	186
	<i>Bowen v. Georgetown Univ. Hospital</i>	187
B.	Notice and Comment: “Informal” Rulemaking	194
	<i>Chocolate Manufacturers Ass’n v. Block</i>	194
	<i>United States v. Nova Scotia Food Products Corp.</i>	203
	Note on the “Concise General Statement” Requirement	212
	Note on Bias in Rulemaking	216
C.	Exceptions to Informal Rulemaking Requirements	216
	<i>Mada-Luna v. Fitzpatrick</i>	217
	<i>Warder v. Shalala</i>	225
	Note on Other APA Exceptions from the Requirements for Notice-and-Comment Rulemaking	240
D.	Beyond Notice and Comment: “Formal,” “Hybrid,” and Negotiated Rulemaking	245
	<i>United States v. Florida East Coast Railway Co.</i>	246
	<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i>	256

	Note on Hybrid Rulemaking	267
	Note on Additional Generic Requirements for Rulemaking	268
	Note on Alternative Dispute Resolution and Federal Administrative Agencies	272
E.	Must an Agency Promulgate Rules?	275
	<i>SEC v. Chenery Corp. (Chenery II)</i>	275
	Note on <i>NLRB v. Wyman-Gordon</i>	286
	<i>NLRB v. Bell Aerospace Co.</i>	287
F.	Avoiding Adjudication Through Rulemaking	294
	<i>Heckler v. Campbell</i>	294
G.	Must an Agency Adhere to Its Rules?	301
	<i>Sameena, Inc. v. U.S. Air Force</i>	301

CHAPTER 4

	ROLE OF AGENCIES IN THREE-BRANCH GOVERNMENT	309
A.	Historical Introduction	309
	Excerpt, Jay S. Bybee, Agency Expertise, ALJ Independence, and Administrative Courts: the Recent Changes in Louisiana's Administrative Procedure Act	309
B.	Conforming Agency Practice to Article III	314
	<i>Crowell v. Benson</i>	314
	<i>Northern Pipeline Const. Co. v. Marathon Pipe Line Co.</i>	320
	<i>CFTC v. Schor</i>	324
	Note on the Seventh Amendment	335
	<i>Stern v. Marshall</i>	338
	<i>Wellness International Network, Ltd. v. Sharif</i>	348
C.	The Nondelegation Doctrine	360
	<i>A. L. A. Schechter Poultry Corp. v. United States</i>	360
	<i>Industrial Union Dept. v. American Petroleum Inst.</i>	370
	Note on <i>Mistretta v. United States</i>	378
	<i>Whitman v. American Trucking Ass'ns</i>	380
	Note on the Congressional Delegation of Power to a Private Entity	387
D.	The Legislative Veto	391
	<i>INS v. Chadha</i>	391
	Note on Statutorily Mandated Congressional Review	411
E.	Executive Power to Appoint	415
	<i>Buckley v. Valeo</i>	415
	<i>NLRB v. Noel Canning</i>	427
F.	Executive Power to Remove	440
	<i>Myers v. United States</i>	440
	<i>Humphrey's Executor v. United States</i>	448
	Note on <i>Bowsher v. Synar</i>	453

	<i>Morrison v. Olson</i>	455
	<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i>	471
G.	The Role of the President in Implementing Statutes	490
1.	Presidential Signing Statements	490
2.	Presidential Review of Agency Rulemaking	493
	Note on Presidential Review of Agency Rulemaking	493
	Regulatory Planning and Review	496

CHAPTER 5

	JUDICIAL REVIEW	507
A.	Scope of Review of Fact	507
	<i>NLRB v. Universal Camera Corp.</i>	507
	<i>Universal Camera Corp. v. NLRB</i>	512
B.	Scope of Review of Law	522
	<i>Cabinet for Human Resources v. Jewish Hospital Healthcare Svcs.</i>	522
	<i>Skidmore v. Swift & Co.</i>	524
	<i>Chevron U.S.A. v. NRDC</i>	528
	<i>MCI Telecommunications Corp. v. AT&T Co.</i>	536
	<i>United States v. Mead Corp.</i>	543
	Note on <i>Mead Corp.</i> and the Ossification of Administrative Law	558
	<i>Decker v. Northwest Environmental Defense Center</i>	563
	Note on Agency Nonacquiescence in Court of Appeals Decisions	573
	Note on Distinguishing Questions of Fact and Law	576
C.	Scope of Review of Exercises of Discretion	578
	<i>Citizens to Preserve Overton Park v. Volpe</i>	578
	Note on Judicial Supplementation of the Agency Record	584
	Note on the Arbitrary or Capricious Standard and “Hard Look” Review	585
	<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i>	588
	Note on the Relationship Between Arbitrary or Capricious Review and <i>Chevron</i> Step 2 Analysis	601
	<i>AFL-CIO v. Marshall</i>	604
	Note on Harmless Error in the Administrative Process	606
D.	Review of Scope of Review	609
	<i>King v. Burwell</i>	609
E.	Cause of Action, Reviewability, Jurisdiction, Immunity	619
	Note on Judicial Review as a Civil Action	619
	Note on Money Damage Suits	622
	<i>Johnson v. Robison</i>	626

	<i>Bowen v. Michigan Academy of Family Physicians</i>	630
	<i>Webster v. Doe</i>	635
	Note on <i>Heckler v. Chaney</i> and <i>Massachusetts v. EPA</i>	644
F.	Standing	651
1.	Article III Standing	651
	<i>Lujan v. Defenders of Wildlife</i>	651
	<i>Federal Election Commission v. Akins</i>	662
	Note on Standing in <i>Qui Tam</i> Actions	670
	Note on Redressability	671
2.	Non-Article III Standing	673
	Note on the Law of Statutory Standing Before the Supreme Court Decision in <i>Data Processing</i>	673
	<i>ADPSO v. Camp</i> ("Data Processing")	674
	Note on Agency Capture and the Availability of Judicial Review	678
	<i>Air Courier Conference v. Postal Workers</i>	681
	<i>NCUA v. First Nat'l & Trust Co.</i>	687
3.	Review of Standing Law	703
	<i>Bennett v. Spear</i>	703
G.	Ripeness	716
	<i>Abbott Laboratories v. Gardner</i>	716
	<i>Toilet Goods Ass'n v. Gardner</i>	722
H.	Finality	729
	<i>United States Army Corps of Engineers v. Hawkes Co.</i>	729
	Note on <i>Bennett v. Spear</i>	734
	Note on the Finality of Agency Inaction	735
	Note on Statutory Time Limits on Judicial Review of Agency Action	739
I.	Exhaustion of Administrative Remedies	744
	<i>Myers v. Bethlehem Shipbuilding Corp.</i>	744
	<i>McCarthy v. Madigan</i>	747
	<i>Darby v. Cisneros</i>	750
	Note on <i>Sims v. Apfel</i>	757
J.	Judicial Remedies for Unlawful Agency Action	757

Appendix A	
The Constitution of the United States	761

Appendix B	
The Administrative Procedure Act (Selected Provisions)	777

Appendix C	
Uniform Law Commissioners' Model State Administrative Procedure Act (1981) (Selected Provisions)	803

<i>Table of Cases</i>	835
<i>Index</i>	847