

ASPEN CASEBOOK SERIES

CASS  
DIVER  
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ADMINISTRATIVE LAW  
Cases and Materials

*Seventh  
Edition*



Wolters Kluwer

ASPEN CASEBOOK SERIES

# **ADMINISTRATIVE LAW**

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**CASES AND MATERIALS**

**Seventh Edition**

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*For  
Suzie  
and  
Joan  
and  
Debra  
and  
Sharon*

## PREFACE

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These are truly momentous times in the field of administrative law. Powerful forces of globalization, technological change, economic dislocation, social unrest, and political conflict all seem to be converging on the administrative state. Mechanisms designed primarily to fill statutory interstices and administer stable policies are now called upon to address problems like climate change, illegal immigration, financial instability, economic inequality, and the breakdown of the health care system. With the political branches often immobilized by partisan gridlock and the judiciary constrained by institutional limitations, the burden of addressing these issues falls increasingly on our nation's vast array of administrative agencies.

The efforts of administrators to respond to these contemporary challenges place increasing strains on the system of legal principles that have evolved over the past century to legitimize and control our "fourth branch of government." The task of an introductory course in administrative law is not only to acquaint law students with those historic principles, but to equip future lawyers to apply those principles to the rapidly changing environment of administrative practice that they will soon confront. This casebook seeks to provide the platform for achieving both of those goals. Further, with the movement in many law schools to include a regulatory component in the first year, such as a course on Legislation and Regulation, this casebook is also designed to contain sufficient advanced materials to be used in an intermediate or advanced course on administrative law.

As a field of academic study, administrative law is forever in search of itself, hovering uneasily between vacuous platitudes about the place of administrative government in a constitutional democracy and the numbing detail of daily bureaucratic life in the regulatory state. Those who teach and write about administrative law are constantly challenged to strike the appropriate balance between abstraction and concreteness. In the formative era of administrative law, when administrative agencies were fewer in number and less complex in operation, textbook and casebook authors tended

to favor concreteness. Materials were often grouped by particular agency or substantive topic. Since the watershed period of the New Deal, however, the emphasis has shifted toward the abstract. Administrative lawyers have attempted to capture the growing profusion and complexity of administrative life in a handful of universal legal principles. While these efforts at constructing overarching principles have given coherence to discussion of some administrative law problems, they also are a source of disaffection that afflicts teachers and students of administrative law.

The attempt to filter the rich and changing variety of administrative life through a handful of doctrinal categories can have three unfortunate consequences. One is the sense of redundancy, or worse, superfluity that so often characterizes students' perceptions of administrative law. A second ill effect is the distorted view of administrative agencies when seen exclusively through the prism of appellate review. And, finally, formal doctrines frequently offer an incomplete or erroneous picture, causing many students to view administrative law "doctrines" as pedagogical abstractions, not genuinely explanatory constructs.

As a result, all too often students end a course in administrative law without understanding how administrative agencies behave, without appreciating the working of nonjudicial controls over agency behavior, and without even understanding the judicial controls themselves. In preparing teaching materials for the course in administrative law, then, we have been guided by a determination to overcome these deficiencies.

At the same time, we recognize the essential importance of teaching traditional doctrine: courts and agencies approach issues in doctrinal terms and couch decisions in that language. Our attempt, thus, has been to retain the benefits of doctrinal discussion while avoiding the difficulties attending overreliance on it. In this endeavor, we have relied primarily on two devices—a mixture of categorical and functional organization, and the "case study" method—to supplement the traditional emphasis on legal doctrine.

The book's organization begins and ends with inquiries that run congruent to traditional doctrinal categories. These categorical sections examine general issues concerning the creation of agencies and control over agency operation. The materials integrate arguments based in theories of administrative regulation and theories of behavior within large organizations—public interest theories, public choice theories, organizational and agency-cost theories—with presentation of doctrinal developments. In contrast, the middle portion of the book explores issues of agency operation in a functional context, grouping the traditional cases and supporting materials around distinct forms of administrative behavior. Each set of materials is designed to explore one of the recurring generic patterns of administrative behavior, the problems peculiar to that function, the solutions that have been attempted, and the manner in which these solutions have worked.

Part One of the book introduces the institutional framework of the course. The first chapter acquaints students with the basic issues of social



policymaking and governmental organization that underlie all of administrative law. After discussing the origin and nature of administrative agencies, the chapter focuses on their continuing relationships to the legislative and executive branches. The next two chapters explore in greater depth the role of the courts in supervising administrative behavior. Although these chapters introduce students to the conventional rules and principles governing the scope and availability of judicial review, they serve more as vehicles to explore basic themes of comparative institutional competence that run throughout the succeeding chapters.

Part Two is the heart of the book's functional presentation, systematically examining the legal problems and doctrinal responses associated with four generic administrative activities: policy formation (covered in two chapters, one on choice of policymaking instruments, the second on rulemaking), adjudication, enforcement (including private alternatives to agency enforcement), and licensing. Although government activities are of almost infinite variety, most can be classified within these four functional headings. Despite obvious differences from one agency to another, these functions tend, wherever they are used, to elicit similar patterns of behavior and to create similar relationships between governmental and nongovernmental parties. It is those commonalities that these chapters seek to illuminate.

In Part Three, we shift the spotlight from direct judicial supervision to indirect legal control of administrative behavior. While modes of indirect controls are legion, this part focuses on one that has generated extensive litigation and controversy: access rules. Chapter IX focuses on the use of information and open meeting laws to increase public access to the decisionmaking process.

The second device on which we have relied to correct the deficiencies of traditional administrative law materials is the case study method. Much of the book is divided into self-contained units centering around a particular episode, situation, or conflict. Most case studies focus on litigated disputes, including the controversies that have produced the leading modern judicial precedents in the field of administrative law. As in traditional treatments, we present sufficient excerpts from the appellate court's opinion (and separate opinions) to illuminate the doctrinal issues presented and the doctrinal development signaled by the decision. But we typically provide a much fuller presentation of background information on the political, legal, institutional, and technical context than is found in other texts.

In sum, our effort is not to abandon legal doctrine, but to infuse it with flesh and blood—to orient the course around what is peculiar to the formation and operation of administrative agencies, to place administrative law issues in the political and social contexts that are so critical to their resolution, to suggest alternative theoretical frameworks that can inform both positive and normative discussion of administrative behavior, and to facilitate the learning process by providing a fuller, less judicially biased group of materials drawn from a smaller number of disputes.



While adhering to the basic architecture of previous editions, this seventh edition makes significant changes to most chapters. Many of these changes are designed, through the highlighting of contemporary developments, to convey a sense of the dynamism discussed in the opening paragraph of this Preface. Other changes are designed simply to improve the flow, organization, and teachability of the book. In particular, we have tried in the current edition to highlight especially important secondary cases by presenting them in squib format and to streamline the notes and questions following leading cases. Highlights of changes made in this edition include the following:

*Chapter I.* The basic structure of this chapter has been retained, with general updating and tightening. We have added extended excerpts from the Supreme Court's recent *Noel Canning* decision, elucidating the meaning and application of the Recess Appointments Clause. In several instances, we signaled what we consider the heightened significance of important secondary cases, by presenting lengthier excerpts from the judicial opinion, or by elevating them to squib-case status. An example of the former is *Buckley v. Valeo*; examples of the latter are the *Mistretta*, *Robertson*, *Youngstown*, and *U.S. Telecom* cases. Conversely we substantially shortened the excerpt from *Clinton v. New York*, reflecting a judgment that the line item veto issue is not particularly central to administrative law. Finally, we have drastically shortened the concluding unit on controls within agencies, preserving the "subdelegation" section, but shifting some of the materials on civil service and patronage to the notes following *Free Enterprise* (since that case, including Justice Breyer's dissent in particular, raises issues about the extent to which Congress can insulate the federal workforce from presidential control).

*Chapter II.* Not surprisingly, the major changes in this chapter are to be found in the unit on *Chevron* and its aftermath. In addition to adding new material reflecting recent developments, we have organized the material following *Chevron* to give a clearer and more complete presentation of its doctrinal components and conundrums. The "step one" unit includes a subsection highlighting the various methods of statutory interpretation used by the Court at step one, and a second subsection focusing on the particular issue of applying step one to "extraordinary cases." The "step two" unit uses the new *UARG* case as the vehicle for asking what the Court means by a "permissible" or "reasonable" construction. A new "step zero" unit explores the domain of *Chevron*, with regard to the "force of law" issue raised by *Mead* and the "jurisdictional" interpretations issue raised in the recent *City of Arlington* decision. Finally, we devote a subunit to the recent dispute on the Court about *Seminole Rock* deference, featuring the recent *Decker* case.

*Chapter III.* The main focus in revisions to Chapter III has been to make the material easier to teach. For example, we have beefed up the introduction to the *SUWA* case to make it more effective as one of the book's "case studies." Following *SUWA* we inserted a squib version of the *Public Citizen* case, transposed from the "committed to agency discretion" unit because

it follows so directly from the discussion of “agency (in)action” in *SUWA*. In the standing materials, in addition to generally streamlining the background notes, we have deleted the *Barlow* excerpt, which we felt added little to *Data Processing* (and included a rather confusing discussion of reviewability by Justice Brennan). Also, following *Massachusetts v. EPA*, we present *Earth Island* as a squib case, to raise questions about whether *Massachusetts v. EPA* is simply an outlier. Finally we have deleted the concluding unit on res judicata and collateral estoppel, summarizing the *Mendoza* doctrine and the issue of nonacquiescence in a note following *Abbott Laboratories*.

*Chapter IV.* As noted above, we have divided the former chapter on policymaking into two parts, for both conceptual clarity and pedagogical flexibility. The new Chapter IV (Choice of Policymaking Instruments) includes most of the material in part A of the Sixth Edition’s Chapter IV. In the introductory section on application of the Due Process Clause to policymaking, we present *Londoner* and *Bi-Metallic* as squib cases, including somewhat lengthier excerpts from the cases, as a way of both signaling their continuing doctrinal importance and also providing a foundation for a richer introductory exploration of the scope of due process hearing rights. We have bolstered the unit featuring the *Petroleum Refiners* case by relocating two doctrinally-related principal cases from other parts of the book—*Storer* (from old Chapter VII) and *Heckler v. Campbell* (from old Chapter V), both discussing the use of rulemaking to foreclose otherwise contestable issues in adjudications – and by inserting as a squib the recent *Chamber of Commerce* decision in which the Fourth Circuit suggested that the NLRB may not use rulemaking to make policy, at least in some contexts. In the introduction to the *Excelsior-Wyman-Gordon* unit, we present *Chenery II* as a squib case, in recognition of its doctrinal importance.

*Chapter V.* This chapter contains the bulk of the material on rulemaking that appeared in parts B and C of old Chapter IV. In the unit on formal and informal models of rulemaking, we present *Allegheny-Ludlum* and *Florida East Coast* as squib cases, once again for the purpose of highlighting their doctrinal significance. In the unit on notice, we have added a squib-case version of *Long Island Care*, as the leading statement by the Supreme Court on the test for determining the adequacy of a rulemaking notice. The unit on statement of basis and purpose presents an extended excerpt from *Nova Scotia*, to facilitate its use as a teaching vehicle. We have also added a squib version of *D.C. Federation*, following the *Sierra Club* case, to provide a contrasting discussion of the issue of “undue” congressional influence on rulemakers. Following *Vermont Yankee*, we present an excerpt from *American Radio Relay* to stimulate discussion of the impact of *Vermont Yankee* on prior doctrines such as those announced in *Nova Scotia* and *Portland Cement*. In the section on “strengthening the analytic basis of policymaking,” we have flipped the order of the “presidential oversight” and “cost-benefit” units, on the theory that it made more conceptual sense to present the theory and legal applications of cost-benefit first, before discussing its embodiment in the Executive

Orders. Among other changes we have inserted a discussion of the *EME Homer* case on applying cost considerations to the Clean Air Act's "good neighbor" provisions. The "impact statement" section is largely unchanged except for elevating *Calvert Cliffs* to squib status, and presenting more factual background to *Strycker's Bay*, so that students can better understand the factual and legal dispute.

*Chapter VI.* Almost all of the significant changes in the adjudication chapter occur in part C (statutory hearing rights). In part A, we add a squib version of *Stern*, to enable teachers to explore whether *Schor's* public rights-private rights dichotomy is still good law (and to do so in a factually enticing context). The Due Process materials in part B are essentially unchanged, reflecting the apparently settled nature of this corner of constitutional law. The one change is the deletion of the *Caperton* case and its reduction to a brief mention in a note on standards for judicial disqualification. The discussion of statutory hearing procedures in part C has been dramatically expanded, permitting an instructor to spend several days on this material, which makes the book a better vehicle for an advanced administrative law course. Part C begins with a unit on "triggering" the APA's formal adjudication model, using the First Circuit's opinions in *Seacoast* (pre-*Chevron*) and *Dominion Energy* (post-*Chevron*) as primary vehicles. The second unit of part C surveys five procedural issues—discovery and cross-examination, official notice, statement of findings, intervention, and ex parte communications—that arise in formal administrative adjudication, each centering on a Court of Appeals decision followed by notes. Part C concludes with a unit on supervision of ALJs, drawn mostly from prior editions, and a unit on informal adjudication, featuring *LTV* as a principal case.

*Chapter VII.* While retaining the structure of the chapter on enforcement and liability, we have added some new materials and substituted materials in some other instances. The unit on citizen suit statutes now uses *Bennett* as the principal case rather than *Scott*, with the latter reduced to a relatively brief excerpt. *Bennett* has the double virtue of being a pronouncement by the Supreme Court and a case already introduced to students in the standing materials of Chapter II. In the section on private rights of action, we have added a squib version of *Cannon*, focusing on Justice Powell's influential dissent. The materials on the Federal Torts Claims Act now use *Varig Airlines* (as a squib case) and *Berkovitz* (as a principal case) as the primary teaching vehicles, reflecting the fact that each involves a regulatory agency engaged in fairly familiar kinds of regulatory activities. *Gaubert* has been retained as a squib case. The materials on official immunity have been drastically shortened to a brief concluding note.

*Chapter VIII.* The licensing chapter has changed significantly, in an effort to increase its contemporary relevance. Part A on occupational licensing now includes a unit on antitrust law, with the recent *North Carolina Dental* case presented as a principal case. Although students may be unfamiliar with antitrust doctrine, the "state action" issue discussed in the case provides

an accessible vehicle for exploring issues of delegation of regulatory power to private (self-interested) groups. Although the business licensing material in Part B still focuses on the FCC, the unit on broadcasting regulation has been drastically shortened. We retain *Ashbacher*, which raises an important issue about the proper procedures for making competitive awards of scarce resources. *Storer* has been moved to Chapter IV, and the other materials on broadcast licensing standards are reduced to a brief note. The chapter ends with a newly denominated part C on the expansion of regulatory jurisdiction often characteristic of licensing regimes, using the FCC's ongoing struggle to regulate the Internet as the case study. Very recent regulatory developments presage further changes in these materials in future updates and editions.

*Chapter IX* is changed in only one significant aspect: the addition of the Supreme Court's recent *Milner* decision on FOIA Exemption 2. The case is important primarily as an occasion to consider competing modes of interpreting FOIA, with the conventional "narrow" reading of exemptions set against more instrumentalist concerns. In addition, we elevated the *Forsham* case to squib status, to encourage its use as a possible counterpoint to the Court's ruling in *Kissinger* on what is an "agency record."

No undertaking of this magnitude could possibly be completed, much less succeed, without the dedicated effort of many people. At the unavoidable risk of slighting some by inadvertent omission, we would like to acknowledge with gratitude the assistance of the following: Susan Banks, Charles Bennett, Larry Boisvert, Melissa Connell, Eric Dannenmaier, Jaime Eagan, Rob Evans, Shirin Everett, Deborah Fawcett, Marcia Fleschel, Lydia French, Mike Fricklas, Maria Gonzalez, Alan Gordee, Howard Haas, Caroline Hayday, Ben Jones, Robert Kanapka, Erica Larence, Marie Martineau, Ephraim McDowell, Bruce Meyer, Carla Munroe, Ben Narodick, David Nirenberg, Scott Owens, David Palamé, Ken Parsigian, Christopher Parsons, Nina Pickering, Tom Pfeifle, Beth Pollack, Dee Price, John Re, Tal Ron, Adam Rowland, Susan Silberberg, Joshua Simon, Risa Sorkin, Daniel Suraci, Patricia Washienko, Courtney Worcester, and William Zolla II for their diligent research assistance; Holly Escott, Shantelle Evans, Charlotte Gliksmann, William Kaleva, Susan Michals, and Lisa Vogel for their superb clerical and administrative assistance; Renée Barnow, Jeffrey Lubbers, and David Pritzer for help and guidance; Professors Robert Anthony, Betsy Foote, Gary Lawson, Ron Levin, Marc Poirier, and Robert Rabin for advice, criticisms, and good counsel; and Professors Clark Byse and Glen Robinson for their general inspiration.

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