

# ADMINISTRATIVE LAW

公共管理经典教材系列

## 行政法

### 原理与案例

史蒂文·J·卡恩 著

Steven · J · Cann

张梦中 曾二秀 蔡立辉等 译



#### average rises

... reported a jump in fourth-quarter sales and profit. Fourth-quarter profit rose by 19 cents a share before a 10-cent average estimate from First Call/Thomson Financial. The so-called whisper number was US\$0.39, according to the Web site. Microsoft fell 3.18 to 112.12, while the S&P 500 rose 2.12 to 11,212.12.

... dollar fell more than 1% to 114.17, the lowest since the start of the year. The British Pound fell to 1.5816, the lowest since the start of the year. The South Korean won fell to 1,112.57, the lowest since the start of the year. The Philippine peso fell to 47.57, the lowest since the start of the year.

# ADMINISTRATIVE LAW

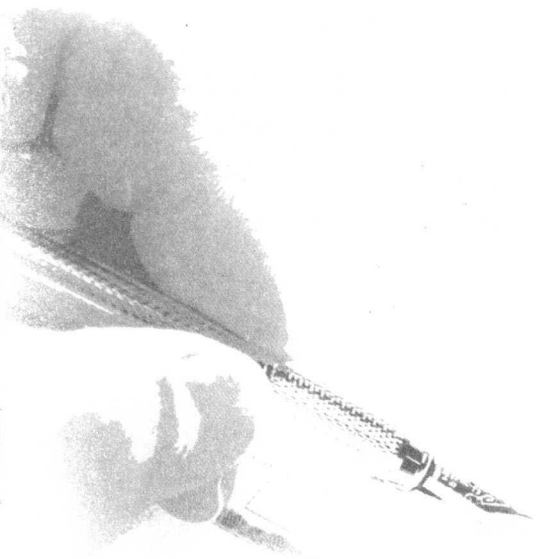
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## 第三版序言

最初，因为我所授课班级的学生对于时下市场上的教材不满意而写作这本教材。到现在，这本书已经面世6年并且两次修订。学生似乎欣赏民主与行政国家对照的理论背景。学生似乎同样喜欢每一章末尾原理小结和法律测试，他们喜欢这些案例。

《行政法》第三版保持了前面版本的优势，但第三版添加了起诉资格的探讨，包括起诉行政机构、无搜查令的行政搜查、政府行动（如政府私有化和外包、日益增加的私有公司和个人类似政府的决策）、性骚扰，以及在《信息自由法案》下对隐私的侵犯。

《行政法》第二版写于1997年下半年。从那时起，法院作出了很多有趣并且重要的行政法判例，其中的相当一部分已经包括在这本新版教材中。以下是一些样本注解：

克林顿诉纽约市 (Clinton v. City of New York) 宣布单项款项否决 (the line-item veto) 违背宪法，这个判决进一步削弱了总统控制行政机构的能力。

食品与药物管理局诉布朗和威廉森 (Food and Drug Administration v. Brown and Williamson, 2000)。FDA曾经被禁止规制烟草，找出理由。

联邦选举委员会 (Federal Election Commission, FEC) 诉埃金斯 (Federal Election Commission v. Akins, 1998)。一个关注选民的集体能够获得资格以挑战联邦选举委员会决定美国以色列公共事务委员会 (Israel Public Affairs Committee, AIPAC) 在法令下不是一个政治委员会吗？

加州牙医协会诉联邦贸易委员会 (California Dental Association v. Federal Trade Commission, 1999)。加州牙医协会限制牙医折扣价格广告。联邦贸易委员会认为加州牙医协会这个举动构成了对贸易的限制，但是由于加州牙医协会是一个非盈利协会，联邦贸易委员会是否有规制加州牙医协会的司法管辖权尚不明了。

美国司法部诉新闻自由记者委员会 (United States Department of Justice v. Reporter's Committee for Freedom of the Press, 1989)。找出媒体为什么不能获得一个报道的副本，这个报道是在《信息自由法案》下暴徒首领的谈话

记录。

弗格森诉查尔斯顿市 (Ferguson v. City of Charleston, 2001)。找出一家公立医院是否能够检查未预期的 (并且未经过许可) 怀孕妇女的尿液, 怀孕妇女是到医院作孕前护理。医院在寻找使用可卡因的证据, 这种搜索是没有搜索许可的。

商务部诉美国众议院 (Department of Commerce v. United States House of Representatives, 2000)。找出为什么人口普查局不能使用将会改善统计所有美国人口的抽样调查技术。

吉尔伯特诉霍马 (Gilbert v. Homar, 1997)。一个有财产利益的公共部门雇员被错误地停发薪水。找出在停发薪水前他是否有权出席一个剥夺前听证会。

法戈尔诉博卡拉顿市 (佛罗里达州) (Fargher v. City of Boca Raton, 1998)。在什么情形下一个公共部门雇员为雇用机构带来性骚扰的责任?

格里加尔瓦诉沙拉拉 (Grijalva v. Shalala, 1998)。当他拒绝在与老年医疗保险方案签署的合同下提供治疗时, 一个健康保持组织 (HMO) 是一个州的扮演者吗? 如果是, 受到负面影响的老年医疗保险方案接受者有权参与剥夺前听证会。如果HMO不是州扮演者, 那么就没有权力举行这样的听证会 (那么, 他们就不能因为其决策而被起诉)。

韦斯特诉吉布森 (West v. Gibson, 1999)。平等就业机会委员会 (EEOC) 能够要求其他联邦机构支付违反1964年《民权法案》的损失补偿金吗? 这是一个主权豁免的问题。

## 第二版序言

当然，我教书，《行政法》是最有回报的。当学生学会很多人知之甚少的一个主题——官僚机构和行政法的运行时，我们能够容易地看到我们劳动的成果。然而，学生对我授课的评估表明，尽管学生对主题感兴趣，他（她）们对教材却不恭维。我相信，那种不满源于这样一个事实，即许多教材是由律师和实践者写作的，没有在大脑中把本科生作为读者对象。行政法是复杂的，但却不必然是困难的。学生的反馈不仅显示教材对于提升理解没有多少益处，而且在我看来没有为学生提供足够的案例。作为案例方法为教学手段的信徒，我以为可以撰写出比市场上的教材更为对学生友善的一本案例教科书。我相信这本教材，回应了这些要点，为学生和教员提供了一些显著的特色。

## 本教材的显著特色

善待学生的概念框架 (Student-Friendly Conceptual Framework)。本书的组织围绕一个概念框架去对照民主与行政国家，或：政府的“第四分支”（隔离的技术专家官员和官僚）。

解说性的案例 (Illustrative Cases)。每一章始于一种场景或例证，用一种争辩的方式展示，以激发学生的兴趣。每一案例显示该章的中心主题，并且经常建议学生回头参看该案例以阐明全章的概念。

案例的平衡 (Balance of Cases)。因为是我的经验，即案例是优秀的教学工具——一方面学生喜欢阅读它们——本教材大量地使用案例，比起多数针对本科生和MPA学生的教材使用的案例还要多。我已经试图寻求在一方面太多的案例和另一方面太少的案例（我发现市场上的许多教材都有此共性）之间找到平衡。

更多案例内容 (More Case Content)。与其他使用案例的教材对照，本书的每一案例都包含了更多的内容，如此学生能够更好地掌握什么因素导致法律诉讼，并且法院是如何解决问题的。除了引言部分的例证外，本书贯穿每一章都呈现了多个案例，章尾有几个更多的与该章内容相关的案例。章节中部的案例倾向于“经典”，章尾的案例代表了同样法律见解的更多新近判例。

原理小结 (Summary of Doctrines)。最后，我包含了行政法原理、法律原则和宪法测试的篇章小结，学生应该从每一章呈现的案例中收集整理出来，学生也应该能够将这些原理运用于章尾案例或假设的案例。

教学设计 (Pedagogical Design)。本书的设计是与解决问题的教学路径相匹配的。案例末尾的问题是查看学生对于原理、原则和宪法测试的理解，以及法院是否运用了、修改了或者忽略了这些原理、原则和测试。同样，每一章末尾的小结是与教学路径相匹配的。这一教学路径使用假定案例测试并且要求学生能够勾勒出纲要。法院的案例素材以每页双列（编辑注：中文版采用单列）的方式展现，使得参考具体案例更为便利。



## 理论框架

本教材的理论框架是并列民主与政府的第四分支，即行政国家。民主的展现仅仅通过这样的理念，即公民，无论直接还是间接，应当对政府政策有一定影响。然而，每一章为学生提供了行政国家的实例——由不负责任的机构作出的决策和政策，这些机构依赖非选举个人的专长制定决策和政策。在教材的前半部分引入权力的授予，以便学生熟悉日益增加的国会机构的授权。本教材进一步认为，总统一方面拥有控制机构的意愿，但缺乏原始的权力去履行这种意愿。另一方面，国会拥有这种权力，但却缺乏施展这种权力以控制机构的意愿。因此，几乎是通过默认，控制政府第四分支的任务落到法院的肩上。行政法是支配它们的工具。在本书的最后一章，学生被要求分析法院是否很好地适合于这个任务，并且，从总体上讲，法院是否做得成功。正如美国劳工部前部长罗伯特·赖克 (Robert Reich) 指出，关于司法审查和民主方面的不协调论著汗牛充栋，但关于行政国家和民主方面的不协调几乎是一片处女地。

## 读者

本书是为学习行政法的三、四年级本科生而写。它适合于MPA课程学习，因为即使在研究生层次，法学院的教材由于价格的缘故而使用甚少。由于本教材比起非法学院典型的案例教材包括更多的案例和每一案例更多的内容，它也适用于法律预科的课程。

## 内容

教材的第一部分包含四章，建立理论背景。第一章将机构欲做之事的描述与民主的讨论相连。第二章提供了总统试图控制官僚机构途径的讨论，始于分析总统的宪法条款二的权力，并包含总统任命和免职权力的分析。这里，讨论侧重于总统对于任命者和“俘虏”概念的失望。案例的呈现与讨论是与总统的免职权相连的。该章同样分析执行控制的其他传统模式，包括对于“行政总统”概念的讨论。

最后，1990年的案例，呈现并讨论多尔诉美国联合钢铁工人 (Dole v. United Steelworkers of America)。该案例并没有很好地预示总统通过管理与预算办公室 (the Office of Management and Budget, OMB) 对于机构规则制定的控制。我认为宪法未能为总统提供控制官僚机构的原始权力，并且其他机制