

Understanding

ADMINISTRATIVE LAW

SIXTH EDITION



William F. Fox

UNDERSTANDING ADMINISTRATIVE LAW

SIXTH EDITION

William F. Fox

Visiting Professor of Law

Penn State University

Dickinson School of Law



LexisNexis®

ISBN: 978-1-4224-9865-1

Library of Congress Cataloging-in-Publication Data

Fox, William F.
Understanding administrative law / William F. Fox. -- 6th ed.
p. cm.
Includes index.
ISBN 978-1-4224-9865-1 (softbound)
1. Administrative law--United States. 2. Administrative procedure--United States. I. Title.
KF5402.F68 2012
342.73'06--dc23
2012016980

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2012 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.
2012

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW  BENDER

UNDERSTANDING ADMINISTRATIVE LAW

LEXISNEXIS LAW SCHOOL ADVISORY BOARD

William Araiza

Professor of Law
Brooklyn Law School

Ruth Colker

Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law
Ohio State University, Moritz College of Law

Olympia Duhart

Associate Professor of Law
Nova Southeastern University, Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

David Gamage

Assistant Professor of Law
UC Berkeley School of Law

Joan Heminway

College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried

Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus

Haynes Professor of Law
William and Mary Law School

Melissa Weresh

Director of Legal Writing and Professor of Law
Drake University Law School

PREFACE

Students react in various ways to the study of administrative law. Some elect the course because they anticipate employment in a federal or state administrative agency; some choose the course merely because it is a subject tested on the bar examination; others have some abstract interest in a course that deals with the manner in which agencies make policy and decide individual cases. Often it is not until a student graduates and begins the practice of law that the pervasiveness of various administrative decision-making models becomes apparent. These models are not limited to the federal government, but may be found at the state and regional level, in municipal governments and even in many private entities such as corporations and educational institutions. For that reason this text includes a certain amount of state-based material. Students who go into a state administrative practice will encounter concepts and terminology nearly identical with federal practice.

Law professors also approach the subject from different angles: some emphasize the administrative system of a single state; others focus exclusively on the federal system; still others explore only one or two specific administrative agencies, in the belief that the administrative *process* can be understood best in the context of a specific agency carrying out a specific assigned mission.

This book will help the reader grasp the fundamental concepts of administrative law regardless of the approach taken by an instructor and regardless of the reader's personal motivation for electing the course. By and large the book concentrates on the *process* of administrative decision-making in contrast to the substantive law of a particular agency. But as a student moves through the course and later enters practice, he or she will find that substance and procedure become more and more intertwined and, in many instances, become almost inextricable. An awareness that there is no bright line between substance and procedure, particularly in an administrative agency context, is especially helpful for a thorough understanding of the subject.

Students should also realize that the practicing bar has serious reservations as to the utility of the typical administrative law course. One prominent Washington, D.C. lawyer commented that if he ever got to the point in handling a case before an administrative agency that he needed to use or refer to anything he had been taught in his administrative law course in law school, he probably would have failed his client.¹ For this reason, this book contains a number of attempts to sensitize law students to the lawyering operations involved in administrative law — *i.e.*, to the manner in which a client's problem moves through a typical agency and the manner in which a lawyer copes with the various problems and issues encountered in representing clients before administrative agencies. The relative informality of the administrative process and the fact that agencies exercise both adjudicative and legislative powers means that an administrative lawyer must often be far more creative and adaptable in dealing with an agency dispute than in handling a piece of civil litigation. Moreover, many agencies are beginning to experiment with alternative dispute resolution techniques so a well-trained lawyer needs to know something about regulatory negotiation, arbitration and mediation.

¹ Comments of Peter Barton Hutt, as quoted in Peter L. Strauss, *Teaching Administrative Law: The Wonder of the Unknown*, 33 J. LEGAL EDUC. 1 (1983).

PREFACE

In addition, the book contains a significant amount of material on trends in administrative law such as deregulation and regulatory reform. Many governmental entities, including a number of federal agencies, have begun to move away from traditional models for exercising governmental power (the so-called “command and control” regulatory techniques) toward concepts of policymaking and decisional processes that take full advantage of the marketplace as regulator. Students anticipating thirty to forty more years of practice must realize that many areas of practice involving deregulation and regulatory reform are in fact fertile fields for a legal practice. In many cases these trends have enhanced, rather than diminished, the lawyer’s role.

A good deal of the material in this book consists of suggestions on ways to identify administrative problems and ways to organize the reader’s thinking after the problem is identified. The book does not, of course, ignore the statutory and case law basis of administrative law; but often, whether the reader is a student or practitioner, a guide on how to think through a problem is more helpful than a mere paraphrase of a statute or recitation of a case holding. Since one of the assumptions of the author is that most readers will be using this book as an adjunct to a course in administrative law and thus will have access to a casebook, lengthy verbatim quotations from cases are kept to an absolute minimum.

This book should also prove helpful to practitioners who either missed the course in law school or find themselves dealing with topics not covered in their course. In those instances, a practicing lawyer might profitably read at least a bit of the full text of any case discussed.

Hopefully, most readers will concur that there are no insoluble mysteries in administrative law, although as in all areas of law, there are many schools of thought, a large number of differing (and often conflicting) viewpoints and a great deal of controversy. But there should not be very much mystery as you dig through the issues and concepts. As the author has often remarked: students are just as bright and capable as teachers, it’s just that a teacher has usually covered the same ground before; and it’s always easier to walk through a maze with someone who has already been there than to attempt the journey on your own.

This book may be used with any of the existing commercially-published casebooks on administrative law. While this Book’s tables of contents and chapter headings may not correspond directly with some of the headings used in the casebooks, there is a generally accepted core of administrative law topics that virtually every casebook covers and for which there is a standard vocabulary. There are two ways for a reader to use this book without reading it from cover to cover. First, if an outline heading in this book corresponds to a similar heading in a casebook (for example, the topic of “delegation”), the reader may move immediately to that topic. If there seems to be no correspondence between this book’s outline headings and those headings used in the casebook, the most efficient mechanism for finding relevant discussion is to match the case in the casebook against the table of cases in this book.

My thinking on administrative law has been shaped by all those who have walked the ground before me. I am especially grateful to the many students at my former academic home, The Catholic University of America, who took my course, who challenged me in class, and who sent me scurrying back to the library and to practice for answers to their questions. My current students at Penn State-Dickinson School of Law keep me busy and engaged with all of their questions, comments and insights. I have been enriched by an

PREFACE

association with the many lawyers I encounter in Washington practice. I owe a great debt to a number of other people who helped me grow as a lawyer and law professor: Professors Clinton Bamberger, Albert J. Broderick, and Harvey Zuckman, Judge Benigno C. Hernandez, Counselors William T. Simmons, and Theodore Voorhees, Sr. A number of research assistants, now all practicing law, were indispensable. They include: Andrew Palmieri, Scott Squillace, B. Erin Sullivan, and Roman Majtan. My most recent research assistant, Madison Cassels, was enormously helpful in preparing the manuscript for the sixth edition.

Table of Contents

Chapter 1	INTRODUCTION	1
§ 1.01	STUDYING AND PRACTICING ADMINISTRATIVE LAW	1
[A]	An Overview of Administrative Law	1
[B]	The Study and Practice of Administrative Law	2
§ 1.02	THE NATURE OF ADMINISTRATIVE AGENCIES	5
[A]	Addressing Legal Disputes	5
[B]	Legislative Choices Involving Administrative Agencies	7
[C]	“Command-and-Control Regulation”	9
[D]	Licensing Agencies	9
[E]	The Structure of an Agency	9
§ 1.03	JUSTIFICATIONS FOR REGULATION	11
[A]	Economic Justification	11
[B]	Political Justifications	12
[C]	Evolution of Regulatory Philosophy	13
§ 1.04	THE ADMINISTRATIVE PROCESS	16
[A]	Generally	16
[B]	Rulemaking	17
[C]	Adjudication	17
[D]	Informal Agency Action	18
[E]	Alternative Dispute Resolution	18
§ 1.05	JUDICIAL REVIEW OF AGENCY ACTION	19
[A]	Effect of Judicial Review	19
[B]	Preclusion from Judicial Review	20
[C]	Other Barriers to Judicial Review	20
[1]	Statutory and Common Law Barriers	20
[2]	Odds of Judicial Reversal of Agency Decision	21
§ 1.06	RESEARCHING ADMINISTRATIVE LAW	22
[A]	Student Awareness of Administrative Materials	22
[B]	Official Materials	22
[1]	<i>The United States Code</i>	22
[2]	<i>The Federal Register</i>	23
[3]	<i>The Code of Federal Regulations</i>	23
[4]	Agency Decisions	23
[5]	Other Agency Publications	23
[6]	Presidential Documents	24
[7]	Opinions of the Attorney General	24
[C]	Unofficial Commercial Services	24

Table of Contents

Chapter 2	EXTERNAL CONTROLS ON ADMINISTRATIVE AGENCIES — THE LEGISLATIVE BRANCH	25
§ 2.01	INTRODUCTION	25
§ 2.02	CONSTITUTIONAL LIMITATIONS ON THE CREATION OF AGENCIES — THE DELEGATION ISSUE	26
[A]	Legislative Authority	26
[B]	Federal Agencies and the Non-Delegation Doctrine — The Early Cases	26
[C]	The New Deal Cases	27
[1]	Background	27
[2]	The Litigation Arising from the National Industrial Recovery Act of 1933	28
[D]	Delegation Since the New Deal	31
[E]	Delegation in State Administrative Systems	34
[F]	Solving a Delegation Problem	35
[1]	Identifying a Delegation Issue	35
[2]	Resolving the Standards Issue	35
[3]	Resolving the Delegation to Whom Issue	36
[4]	Delegation Outside the Executive Branch — The Separation of Powers Muddle	39
[G]	Delegation in the Future	43
§ 2.03	OTHER LEGISLATIVE CONTROLS	44
[A]	Congressional Devices for Policing Administrative Agencies	44
[B]	The Power to Investigate and the Doctrine of Executive Privilege	44
[C]	The Oversight Process	46
[D]	Agency Budgets and Specific Statutory Controls	47
§ 2.04	THE SPECIAL PROBLEM OF THE LEGISLATIVE VETO	48
[A]	Streamlining Agency Rulemaking	48
[B]	<i>Immigration and Naturalization Service v. Chadha</i> and <i>Process Gas Consumers Group v. Consumers Energy Council of America</i>	49
[C]	Issues Unresolved After <i>Chadha</i>	51
Chapter 3	EXTERNAL CONTROLS ON ADMINISTRATIVE AGENCIES — THE EXECUTIVE BRANCH	55
§ 3.01	INTRODUCTION	55
§ 3.02	AN EXCURSUS ON AGENCY ORGANIZATION	55
[A]	Introduction	55
[B]	The Agency's Mission	56
[C]	Agency Accountability	56
[D]	Political Considerations	57
§ 3.03	THE APPOINTMENT AND REMOVAL PROCESS	60
[A]	The Appointment Process	60

Table of Contents

[B]	Termination of Officers	61
[1]	Statutory Limitations on Removal of Federal Personnel	61
[2]	Constitutional Limitations on Removal	62
§ 3.04	OTHER PRESIDENTIAL POWERS	67
[A]	Presidential Powers Generally	67
[B]	The Role of the Executive Order	68
[C]	The Special Role of the Attorney General	69
[E]	The Unresolved Theory of the “Unitary Executive”	70
§ 3.05	ETHICS IN GOVERNMENT SERVICE	71
[A]	Ethical Issues Arising Facing Administrative Lawyers	71
[B]	The Ethics in Government Act	72
[C]	The Office of Independent Counsel	73
[D]	Presidential Signing Statements	74
Chapter 4	THE EXERCISE OF AGENCY POWER	77
§ 4.01	INTRODUCTION	77
§ 4.02	AGENCY JURISDICTION-THE <i>ULTRA VIRES</i> DOCTRINE	78
§ 4.03	AGENCY EXERCISE OF LEGISLATIVE POWER	80
§ 4.04	AGENCY EXERCISE OF JUDICIAL POWER	81
[A]	The Basic Power to Adjudicate	81
[B]	Penalty Assessments and Other Remedies	87
[C]	Agencies and Criminal Sanctions	88
[D]	Agency Regulation of Attorney Conduct	90
§ 4.05	AGENCY ACQUISITION OF INFORMATION — AN OVERVIEW	92
[A]	Congress’ and the Courts’ Recognition of Agency Need for Information	92
[B]	Recordkeeping Requirements	92
[C]	Reporting Requirements	93
[D]	Subpoenas	93
[E]	Physical Inspections	93
[F]	Other Forms of Information Gathering	93
§ 4.06	RECORDKEEPING AND REPORTING REQUIREMENTS	94
[A]	Information Requests Generally	94
[B]	The Limitations of the Fifth Amendment Right Against Self-Incrimination	95
[C]	Limitations Imposed by the Paperwork Reduction Act	99
§ 4.07	AGENCY SUBPOENAS	100
[A]	Some General Considerations	100
[B]	Who May Issue Subpoenas?	100
[C]	Who May Utilize an Agency’s Subpoena Power and What Showing Is Necessary to Obtain a Subpoena?	101

Table of Contents

[D]	What May a Subpoena Compel and to Whom May it Be Addressed? . .	104
[E]	May a Subpoena be Resisted and, if Resisted, What Are the Dangers of Impermissible Resistance?	105
§ 4.08	PHYSICAL INSPECTIONS	106
[A]	Background and Preliminary Analysis	106
[B]	Analyzing the Exceptions to the Warrant Requirement	108
[1]	Categories of Exceptions	108
[2]	Consent	108
[3]	Emergency	109
[4]	Border searches	109
[5]	Welfare inspections	109
[6]	Plain view inspections	110
[7]	Pervasively regulated industries	110
[C]	Analyzing the Warrant Requirement	114
§ 4.09	AN AGENCY'S USE OF INFORMATION AS A SANCTION	115

Chapter 5	AGENCY DECISION-MAKING: THE CONSTITUTIONAL LIMITATIONS	117
------------------	---	------------

§ 5.01	AN INTRODUCTION TO CONSTITUTIONAL DUE PROCESS	117
[A]	Issues Pertaining to Due Process	117
[B]	<i>Whether</i>	119
[C]	<i>When</i>	119
[D]	<i>What Kind</i>	119
§ 5.02	THE EARLY DECISIONS	119
§ 5.03	THE IMPACT OF <i>GOLDBERG v. KELLY</i>	122
§ 5.04	THE CURRENT TEST FOR DUE PROCESS — <i>MATHEWS v.</i> <i>ELDRIDGE</i>	127
§ 5.05	RESOLVING ADMINISTRATIVE DUE PROCESS ISSUES	132
[A]	Approaches	132
[B]	Resolving a <i>Whether Issue</i>	132
[C]	Resolving a <i>When Issue</i>	140
[D]	Resolving a <i>What Kind Issue</i>	142
§ 5.06	SUBSTANTIVE DUE PROCESS IN ADMINISTRATIVE LAW	144
[A]	Substantive Due process Generally	144
[B]	The Impact of the “Takings” Doctrine	145

Chapter 6	AGENCY DECISION-MAKING: CHOOSING RULE OR ORDER	149
------------------	---	------------

§ 6.01	INTRODUCTION	149
§ 6.02	SOME BASIC DISTINCTIONS BETWEEN A RULE AND AN ORDER	150

Table of Contents

§ 6.03	THE SUPREME COURT'S VIEW: <i>CHENERY</i> AND <i>WYMAN-GORDON</i>	152
§ 6.04	THE CURRENT VIEW: <i>BELL AEROSPACE</i>	158
§ 6.05	SOLVING A RULE VERSUS ORDER PROBLEM	161
Chapter 7	RULEMAKING	163
§ 7.01	INTRODUCTION	163
§ 7.02	BASIC RULEMAKING PROCEDURE UNDER THE APA	164
[A]	Triggering of Rulemaking Process	164
[B]	The Scope of § 553	165
[C]	The Notice Requirement	166
[D]	Consideration of Comments	168
[E]	Promulgation of a Final Rule	169
[F]	Electronic Rulemaking	171
§ 7.03	THE IMPACT OF <i>FLORIDA EAST COAST RAILWAY</i> AND <i>VERMONT YANKEE</i> ON BASIC RULEMAKING PROCEDURE	173
[A]	<i>Formal</i> and <i>Hybrid</i> Rulemaking	173
[B]	Formal Rulemaking and <i>Florida East Coast Railway</i>	173
[C]	"Hybrid" Rulemaking and <i>Vermont Yankee</i>	175
§ 7.04	PROPER HYBRID AND FORMAL RULEMAKING	177
§ 7.05	NEGOTIATED RULEMAKING AND OTHER STATUTORY CONTROLS ON AGENCY RULEMAKING	178
[A]	Negotiated Rulemaking	178
[B]	Other Statutory Controls	182
§ 7.06	SUPERVISION OF EXECUTIVE BRANCH RULEMAKING BY THE OFFICE OF MANAGEMENT AND BUDGET	183
§ 7.07	COST-BENEFIT ANALYSIS	187
[A]	Cost-Benefit Methodology	187
[B]	The Supreme Court and Cost-Benefit Analysis	189
[C]	Cost Benefit Analysis Under Presidential Executive Orders	192
§ 7.08	EX PARTE CONTACTS AND BIAS IN AGENCY RULEMAKING ...	193
[A]	Ex Parte Contacts	193
[B]	Agency Bias	196
§ 7.09	THE LEGAL EFFECT OF AGENCY RULES	197
[A]	Distinguishing Between Substantive Rules and Other Types of Agency Pronouncements	197
[B]	The Legal Effect of Substantive Rules	199
[C]	Amending or Rescinding Substantive Rules	200
[D]	The Legal Effect of Other Than Substantive Rules	202
[E]	The Retroactive Effect of Agency Rules	203
§ 7.10	ESTOPPEL AGAINST THE GOVERNMENT	206
[A]	WARNING!	206

Table of Contents

[B]	The Estoppel Case Law	206
[C]	Dealing With Estoppel as a Practitioner	208
§ 7.11	RULEMAKING IN THE STATES	210
§ 7.12	DRAFTING A RULE	212
§ 7.13	SOLVING RULEMAKING PROBLEMS	214
Chapter 8	TRIAL-TYPE PROCEEDINGS	217
§ 8.01	INTRODUCTION	217
§ 8.02	AN APA ROADMAP	218
[A]	Agency Impact on Trial-Type Proceedings	218
[B]	The Scope of APA Adjudications	218
[C]	Pre-Hearing Matters	221
[D]	The Hearing	221
[E]	The Agency Decision	222
[F]	Alternative Dispute Resolution in Federal Agencies	222
§ 8.03	INITIATION OF AN AGENCY ACTION	224
§ 8.04	PRE-HEARING ACTIVITIES	225
[A]	Analysis of Pre-Hearing Process	225
[B]	Participation and Right to Counsel	225
[1]	Participation	225
[2]	Right to Counsel	229
[C]	Discovery	230
[D]	The Pre-Hearing Conference	232
§ 8.05	THE HEARING	233
[A]	Preparation for the Hearing	233
[B]	The Hearing Format	233
[C]	Cross-Examination	234
[D]	Formal Rules of Evidence	234
[E]	Official Notice	238
[F]	Limiting Evidence at Hearing by Prior Rulemaking	241
[G]	Burden of Proof	241
[H]	Standard of Proof	242
[I]	Hearings on a Purely Written Record	243
§ 8.06	THE ADMINISTRATIVE LAW JUDGE	244
[A]	Establishing and Appointing ALJs	244
[B]	The Role of the ALJ	245
[C]	Separation of Functions	246
§ 8.07	BIAS AND EX PARTE CONTACTS IN AGENCY PROCEEDINGS	247
[A]	Poisoning of Agency Hearing	247
[B]	Bias and Disqualification	247
[1]	Need for Impartiality	247

Table of Contents

[2]	Pre-Decisional Bias	249
[3]	Bias at Hearing	250
[4]	The Rule of Necessity	250
[C]	Ex Parte Contacts in Trial-Type Hearings	251
§ 8.08	PREPARING THE INITIAL DECISION	252
[A]	Preliminary Matters	252
[B]	A Decision Based Exclusively on the Record	253
[C]	Preparing the Initial Decision-The Requirement of Findings and Conclusions	253
[1]	The APA Requirements	253
[2]	An Illustration of ALJ Decision Making	254
§ 8.09	REVIEW OF AN INITIAL DECISION WITHIN THE AGENCY	257
[A]	The APA Provisions	257
[B]	The Impact of <i>Universal Camera</i> and the <i>Morgan Quartet</i>	257
Chapter 9	INFORMAL AGENCY ACTION	261
§ 9.01	INTRODUCTION	261
§ 9.02	APA PROVISIONS AFFECTING INFORMAL ACTION	263
§ 9.03	THE CONTROL OF INFORMAL AGENCY ACTION BY THE COURTS	265
[A]	Control of the Substance of Informal Agency Action	265
[B]	Control of the Process of Informal Action	267
Chapter 10	JUDICIAL REVIEW OF AGENCY ACTION: GETTING INTO COURT	271
§ 10.01	AN ANALYTICAL FRAMEWORK FOR JUDICIAL REVIEW ISSUES	271
§ 10.02	JURISDICTION	272
[A]	Generally	272
[B]	Enabling Act Jurisdiction	273
[C]	Review Under General Jurisdictional Statutes	274
§ 10.03	VENUE, SERVICE OF PROCESS AND A PROPER FORM OF ACTION	275
§ 10.04	SOVEREIGN IMMUNITY	277
§ 10.05	PRECLUSION	278
[A]	Section 701 of the APA	278
[B]	The Presumption in Favor of Judicial Review	278
[C]	Statutory Preclusion	279
[D]	Preclusion of Action Committed to Agency Discretion	282
[E]	Discretion to Take No Agency Action	285
[1]	Discretion Not To Make a Rule	285

Table of Contents

[2]	Discretion Not to Take Enforcement Action	286
§ 10.06	STANDING	288
[A]	The Basic Concepts	288
[B]	The Early Cases	289
[C]	The <i>Data Processing</i> Test	290
[D]	The Post-Data Processing Refinements-The Journey from <i>Sierra Club to Valley Forge</i>	291
[E]	Tightening Standing: The Contributions of <i>Lujan, Clarke</i> and <i>Air Courier</i>	294
[F]	Taxpayer Standing	300
[G]	Third-party Standing	302
[H]	Standing on the Part of State Governments	304
§ 10.07	RESOLVING THRESHOLD JUDICIAL REVIEW ISSUES	305
Chapter 11	JUDICIAL REVIEW: STAYING IN COURT	307
§ 11.01	INTRODUCTION	307
§ 11.02	PRIMARY JURISDICTION	309
[A]	Analysis of the Fundamentals	309
[B]	The Landmark Case - <i>Abilene Cotton</i>	310
[C]	The Case Law After <i>Abilene Cotton</i>	311
[D]	The Impact of <i>Nader</i>	315
§ 11.03	THE APA'S FINAL ORDER REQUIREMENT	317
§ 11.04	RIPENESS	317
[A]	Limitations on Court's Analysis of Issues	317
[B]	The Impact of <i>Abbott Laboratories</i>	318
§ 11.05	EXHAUSTION	323
[A]	An Analytical Framework for Exhaustion Issues	323
[B]	Some Exhaustion Case Law	324
Chapter 12	JUDICIAL REVIEW: ON THE MERITS	327
§ 12.01	INTRODUCTION	327
§ 12.02	JUDICIAL REVIEW UNDER THE APA	329
§ 12.03	THE <i>OVERTON PARK</i> ROADMAP FOR § 706	330
[A]	Introduction	330
[B]	Reviewing the Agency Record	330
[C]	Picking the Appropriate Standard for Review	331
[1]	Parties' Choices	331
[2]	<i>De Novo</i> Review	331
[3]	Substantial Evidence Review	332
[4]	Arbitrary/Capricious Review	333

Table of Contents

§ 12.04	JUDICIAL REVIEW OF AN AGENCY'S FACTUAL DETERMINATIONS	334
[A]	Introduction	334
[B]	<i>De Novo</i> Review	335
[C]	Substantial Evidence Review	335
[D]	The Arbitrary/Capricious Test	339
§ 12.05	JUDICIAL REVIEW OF QUESTIONS OF LAW AND MIXED QUESTIONS OF LAW AND FACT	342
[A]	Formulating the Issues	342
[B]	The Constitutional Fact/Jurisdictional Fact Muddle	344
[C]	An Agency's Interpretation of Its Own Statutes: <i>NLRB v. Hearst</i> and <i>Gray v. Powell</i>	345
[D]	An Agency's Interpretation of Its Own Statutes: From <i>Chevron</i> Through <i>Brown & Williamson</i> and <i>Mead</i> and Beyond	347
[B]	An Agency's Interpretation of Its Own Rules: <i>Skidmore</i> , <i>Christensen</i> and <i>Mead</i>	354
[C]	Agency Consistency	358
[D]	Agency Policy and Political Considerations	360
§ 12.07	RESOLVING PROBLEMS INVOLVING REVIEW ON THE MERITS	361

Chapter 13	PRIVATE ACTIONS AGAINST THE GOVERNMENT AND GOVERNMENT OFFICIALS	363
-------------------	--	------------

§ 13.01	INTRODUCTION	363
§ 13.02	SOVEREIGN IMMUNITY AND SUITS AGAINST FEDERAL OFFICERS	364
[A]	<i>Ex Parte Young</i>	364
[B]	Immunity on the Part of Federal Officers- <i>Larson</i> and <i>Barr</i>	365
[C]	Immunity for Constitutional Violations-the Progeny of <i>Bivens</i> and <i>Butz</i>	366
§ 13.03	THE FEDERAL TORT CLAIMS ACT	369
§ 13.04	THE TUCKER ACT	372

Chapter 14	OBTAINING GOVERNMENT INFORMATION	375
-------------------	---	------------

§ 14.01	INTRODUCTION	375
§ 14.02	THE FREEDOM OF INFORMATION ACT	377
[A]	Background	377
[B]	A FOIA Roadmap	377
§ 14.03	WHO MAY REQUEST GOVERNMENT INFORMATION?	379
[A]	Generally	379
[B]	Which Agencies Are Subject to the FOIA?	380
[C]	How and With Whom Do You File an FOIA Request?	380