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# Administrative Law

■ A Contemporary Approach ■

SECOND EDITION

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Andrew F. Popper  
Gwendolyn M. McKee  
Anthony E. Varona  
Philip J. Harter

**WEST®**

THE INTERACTIVE CASEBOOK SERIES™

# ADMINISTRATIVE LAW

*A Contemporary Approach*

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*For John – A.E.V.*

*For Nancy, Alexa, and Reinaldo – P.J.H.*

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# *Preface*

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This is a casebook – and the first interactive text – in the field of administrative law. Our goal is to provide students and faculty a logical presentation of traditional and familiar cases including those essential decisions (followed by commentary, updating materials, and questions) taught in every administrative law course. However, what distinguishes these materials is that in addition to the carefully edited judicial opinions and notes, linked to the on-line version of this book are hundreds of cases, underlying administrative agency decisions, and other unique supplementary material that illuminate the doctrines, arguments, and principles in the field.

Taken in the aggregate, administrative law covers a broad array of topics: rulemaking, adjudication, constitutional imperatives affecting agency action, the Administrative Procedure Act, distinctions between state and federal administrative law, separation of powers, federalism, judicial review of agency action, deregulation, reregulation, privatization, cost-benefit analysis, and of course questions related to the success or effectiveness of administrative action in particular fields.

We wrote this casebook with the understanding that there is no broad agreement on the order in which topics should be covered or the emphasis to be given to any particular subject area. While we believe the materials in this book flow organically from beginning to end, we recognize that the order of presentation is very much an individual choice – and almost any order will work. Accordingly, the book is prepared to facilitate faculty who have evolved their own order of presentation, allowing one to move selectively between and among the cases, notes, and linked materials. The notes following each case are, for the most part, a unit of material connected with that case. They were prepared with the idea that one could assign any primary case in any order desired and the notes and linked documents would serve to illuminate the main case without requiring (for the most part) references to immediately adjacent material. We have linked electronically material between and among cases, providing a pedagogical opportunity to move at will throughout the casebook, rather than a pedagogical obligation to proceed in any one particular order.

The fact that this course can be taught using any coherent organization of case material is in part a reflection of the nature of the regulatory state. At different times in our history, separate aspects or subfields within the administrative domain have been dominant. For example, some years ago, the focus in Congress, the courts, and the legal academy shifted to efficiency – or the lack thereof – of the regulatory process. At other times, the intensity of judicial review, the role of the president, the economics of regulation, citizen participation, and many other areas became – at least for a time – dominant. Each of those periods in our regulatory history has a sustaining influence. Each can still be the focus of a course – each survives at present, at varying levels of importance.

We have shied away from declaring, by word or emphasis, the defining theme in administrative law at the end of the first decade of the 21st Century. It seems to us that legitimate study of the field is not just possible but extremely workable regardless of the central theme or focus of a course.

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Editorial notes:

1. We recommend strongly reference to the original scholarship and full text of all cases and articles to get a complete sense of the material. Since all major cases and most of the secondary source materials we use are available in full through the on-line version of this text with a keystroke or two, we took the liberty of consolidating language and editing aggressively all opinions and articles. We relied on ellipses and square brackets to denote omitted materials instead of using asterisks.
2. We dropped many concurring and dissenting opinions and omitted most footnotes, references, and citations we saw as non-essential. Where they added or clarified important points, non-majority opinions survived the editorial scalpel.
3. We cut multiple case references within opinions to streamline the presentation and allow students to focus on the core material in this book: the primary cases. We did so in part because all such references are readily available on-line and because we wanted to limit the distracting effect of multiple case citations where a single cite would get you to the source on which a court relied. For example, we edited out many “case cites within case cites” leaving only those references we believe have pedagogical value.
4. Every effort has been made to identify all sources from which this material is drawn. We place great faith in the interactive nature of these materials. Every quote or reference can be secured in its original form with ease. In compiling and

editing thousands of documents (including cases and scholarship) it is possible to make errors. We have made effort to quote all original sources and note all edits – but mistakes can happen for which we are, in the end, responsible.

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We wish you great success in your study of this exciting field.

A.F.P.

G.M.M.

Washington, D.C. 2008



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## *Preface to the Second Edition*

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It has been just over a year since the publication of the first edition of ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH. Since that time, three events prompted us to prepare a second edition to this text.

First, we are thrilled to announce the addition of two new and distinguished co-authors, Professor Anthony E. Varona, American University, Washington College of Law, and Professor Philip J. Harter, the Earl F. Nelson Professor of Law, University of Missouri School of Law. They bring to this exciting project a wealth of experience – both are wonderful teachers and legal scholars – and both have years of experience in practice of administrative law.

Second, we felt it imperative to provide materials to facilitate coverage of the substantive changes in the field driven by the presidential election.

Third, we have added six new Supreme Court cases – three decided in recent months and three decided decades ago but allow for a better understanding of executive power, particularly during a time of transition.

Our new cases include *Wyeth*, *Fox*, and *Summers*, as well as fully developed notes and questions for each case. In addition, we added a more fully elaborated section on presidential powers, including as main cases *Myers*, *Humphrey's Executor*, and *Wiener*.

As a consequence of the election of a new president, we have added more than 30 items such as Executive Orders and Executive Declarations, some in full-text but most hot-linked to the on-line version of this text, reflecting the changes that have taken place since January 2009 that affect the regulatory state.

Beyond the substance of the text, there are a number of new developments we wanted to call to your attention:

- (a) We added 130 new highlighted text boxes including 50 boxes under a new category, "Good Question!";

(b) Of great importance to the second edition, we added 25 new and challenging practice hypotheticals covering many areas in the field; and,

(c) Although the text is fully searchable, we have added a new index at the back of the book.

As with the 1st edition, cases and supporting materials were edited and organized in a manner compatible with many pedagogical approaches to teaching administrative law, and with an eye towards facilitating self-contained, efficient, and engaging reading assignments for individual class sessions. For the most part, each case is a self-contained teaching unit, allowing one to reorganize the materials in any manner that fits the goals and objectives of a particular course.

We will continue to add materials to the interactive casebook web site to keep you up to date on developments in the field. We will also make available any additional substantive or teaching materials, beyond the manual and statutory supplement. If you would like to suggest materials (we will of course give full attribution) to be posted on the site, please contact us.

We look forward to hearing from you and wish you the very best in your study of administrative law.

A.F.P.

G.M.M.

A.E.V.

P.J.H.

Washington, DC

March 2010

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We want to thank the fine professional staff of the American University Washington College of Law for their unconditional support. In particular, we wish to express our deep appreciation to Frankie Winchester for her insight, academic and technical assistance, and commitment.

Finally, we wish to thank our colleagues, families, and friends who provided support and understanding throughout this process.

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