

Table of Contents

Volume 1

CHAPTER 1. WHAT IS ADMINISTRATIVE LAW ABOUT?

A. BUILDING A LEGAL DISCIPLINE

§ 1:11 Evolution of administrative law as a legal discipline

§ 1:12 Survey of substantive administrative law

§ 1:13 Administrative law in a federal system

B. SOME BASIC INFORMATION

§ 1:20 The vocabulary of administrative law

PART I. THE INTERNAL PROCESSES

CHAPTER 2. SOURCES OF ADMINISTRATIVE PROCEDURE

A. BASIC CLASSIFICATION OF PROCEDURES

§ 2:11 Distinction between adjudication and rulemaking

§ 2:12 The choice between adjudication and rulemaking

§ 2:13 Deriving procedural norms

B. CONSTITUTIONAL REQUIREMENTS

§ 2:20 Procedural due process

§ 2:21 Finding a “due process interest”

§ 2:22 Elements of a due process interest

§ 2:23 Constitutionally adequate procedural design

§ 2:24 A modern due process jurisprudence

§ 2:25 Remedies for due process violation

C. PROCEDURES REQUIRED BY STATUTE

§ 2:32 Coverage of Federal Administrative Procedure Act

- § 2:33 Incorporation of the four basic procedural models
- § 2:35 Procedures established by the agency
- § 2:36 Studies and scholarship as sources

D. STATE LAW

- § 2:43 Statutory requirement in the states [correspondence: subchapter C]

CHAPTER 3. INVESTIGATIVE AND INFORMATION GATHERING POWERS

- § 3:10 Power to initiate an investigation
- § 3:12 Compulsory process
- § 3:13 Searches and inspections
- § 3:16 Discovery privileges in administrative law
- § 3:20 State law relating to investigatory and information gathering powers

CHAPTER 4. RULEMAKING

- § 4:1 Overview

A. COVERAGE OF RULEMAKING PROCEDURES

- § 4:10 Procedural norms and the concept of “legislative” rules
- § 4:11 Exception for guidance documents
- § 4:13 Good cause for avoiding procedures
- § 4:14 Exception for specified subject matter

B. IMPACT OF RULES ON GOVERNMENT AND PRIVATE CONDUCT

- § 4:22 Binding effect on the agency
- § 4:24 Preemption: effect of federal rules on state law
- § 4:25 Retroactive effect of rules

C. THE SYSTEM OF PUBLIC PARTICIPATION

- § 4:31 Initiation of rulemaking
- § 4:32 Notice
- § 4:33 Opportunity for public comment
- § 4:36 Rulemaking through negotiation

D. THE DECISION

- § 4:41 The decisionmaking process

TABLE OF CONTENTS

- § 4:42 The rulemakers
- § 4:43 The final rule
- § 4:44 The rulemaking record
- § 4:45 Statement explaining and justifying the rule

E. IMPACT ANALYSIS

- § 4:51 Cost/benefit analysis requirements
- § 4:52 Fundamentals of Cost/Benefit Analysis

F. POST-ISSUANCE PROCESSES

- § 4:60 Reconsideration, amendment and repeal
- § 4:61 Interpretation
- § 4:62 Sunset or periodic agency review

G. STATE LAW

- § 4:70 Coverage in the states [correspondence: subchapter A]
- § 4:71 Impact of a rule in the states [correspondence: subchapter B]
- § 4:73 Rulemaking decisions [correspondence: subchapter D]

Volume 2

CHAPTER 5. ADJUDICATION

A. GENERAL CONCEPTS

- § 5:14 Requirement of a hearing prior to a determination
- § 5:18 Administrative jurisdiction [*New*]

B. ACTORS

- § 5:20 Private participants
- § 5:23 General principles for adjudicative decisionmakers
- § 5:24 The structure of the administrative judge function
- § 5:25 Responsibilities of the administrative judges at the hearing
- § 5:26 Administrative judge's decision
- § 5:27 Administrative review authority
- § 5:28 Decision by the principal agency authority

C. INITIAL STAGES

- § 5:32 Notice requirements

D. PREHEARING PRACTICE

§ 5:40 Application of discovery and investigative powers to individual adjudications

E. HEARING

§ 5:50 The structure of the hearing process

§ 5:52 Evidence

§ 5:54 The right to confrontation and rebuttal

F. THE DECISION

§ 5:62 Reasoning

§ 5:63 The administrative record

§ 5:64 Factfinding

§ 5:65 Application of statutory law

§ 5:66 Application of judgemade law

§ 5:67 Impact of administrative decisions

§ 5:68 Impact of agency regulations on its adjudicatory decisions

G. IMPLEMENTATION OF AN ADJUDICATIVE DECISION

§ 5:71 Reconsideration or reopening

§ 5:72 Collateral consequences of an administrative decision

H. STATE LAW

§ 5:81 Adjudicative concepts in the states [correspondence: subchapter A]

§ 5:86 The decision [correspondence subchapter F]

§ 5:87 Implementation of an adjudicative decision [correspondence: subchapter G]

CHAPTER 6. INTEGRITY IN THE ADMINISTRATIVE PROCESS

A. DISTORTION OF THE DECISION

§ 6:10 Bias and prejudice

§ 6:11 Separation of functions

§ 6:12 Ex parte

§ 6:13 Improper influence

C. STATE LAW

§ 6:31 Distortion of the decisions [correspondence: subchapter A]

Volume 3

**PART II. CONTROL OF THE
ADMINISTRATIVE PROCESS**

**CHAPTER 7. IMPACT THROUGH
OVERSIGHT**

B. LEGISLATIVE CONTROLS

- § 7:21 Structured controls
- § 7:22 The budget process
- § 7:23 Informal controls
- § 7:25 Relations with the executive branch

C. EXECUTIVE CONTROLS

- § 7:33 Relationship between the bureaucracy and executive leadership
- § 7:34 Control of agency policymakers via appointments and removals

H. STATE LAW

- § 7:51 Legislative controls [correspondence: subchapter B]

**CHAPTER 8. LITIGATION WITH THE
GOVERNMENT**

**A. THE STRUCTURE OF THE JUDICIAL
PROCESS**

- § 8:11 Determining the proper court
- § 8:12 Courts of special jurisdiction
- § 8:13 Higher court's treatment of lower court's review
- § 8:14 Subject matter jurisdiction
- § 8:15 Jurisdiction over the case

B. MECHANICS

- § 8:20 Forms of proceeding
- § 8:22 Pleading
- § 8:23 Parties and intervention in judicial proceedings relating to agencies
- § 8:24 Timing technicalities

- § 8:25 Interlocutory review
- § 8:26 Interim relief and stays
- § 8:27 Record for review

C. REMEDIES

- § 8:31 Types of remedies in review
- § 8:32 Factors considered in fashioning a remedy against the government
- § 8:33 Monetary remedies
- § 8:34 Actions for attorneys' fees

D. ACTIONS AGAINST GOVERNMENT EMPLOYEES

- § 8:40 The special nature of suits against employees
- § 8:41 Immunity for government employees

E. ADMINISTRATIVE LAW IN PRIVATE LITIGATION

- § 8:50 Private right of action
- § 8:52 Collateral effect of agency decisions and findings on courts
- § 8:53 Use of administrative decisions in private actions

F. STATE LAW

- § 8:60 The structure of the judicial process [correspondence: subchapter A]
- § 8:61 Mechanics [correspondence: subchapter B]

CHAPTER 9. SYSTEM FOR ALLOCATING DECISIONMAKING

- § 9:1 Overview

A. EMBEDDED VALUES

- § 9:11 Capturing the advantage of administrative decisionmaking
- § 9:13 Presumption of regularity
- § 9:14 Expertise and experience restrains judicial interference
- § 9:16 The inherent political aspect to many administrative decisions

B. THE LANGUAGE OF JUDICIAL REVIEW AND THE STANDARDS OF REVIEW

- § 9:21 Overview of the standards of review

TABLE OF CONTENTS

- § 9:22 De novo review or agreement review
- § 9:24 Reasonableness and substantial evidence
- § 9:25 Arbitrariness
- § 9:26 Hard look
- § 9:27 Abuse of Discretion
- § 9:29 Harmless error

C. STATE LAW

- § 9:41 The standards systems in the states [correspondence: subchapter B]

**CHAPTER 10. REVIEW ACCORDING TO
THE INTERNAL ADMINISTRATIVE
PROCESS**

- § 10:1 Overview

A. ADJUDICATION

- § 10:10 General principles
- § 10:11 Review of formal, trial-like adjudication
- § 10:12 Review of informal adjudications
- § 10:13 Review of administrative settlement agreements
- § 10:14 Review of reopening and reconsideration
- § 10:15 Review of orders

B. RULEMAKING

- § 10:21 Review of legislative rules
- § 10:22 Review of guidance documents
- § 10:23 Review of the rulemaking process
- § 10:24 Review of rules guided by the nature of the controverted issues
- § 10:25 Relationship between the rule and the statute
- § 10:26 Review of interpretations of rules [*Retitled*]
- § 10:27 Review of amendment or repeal
- § 10:28 Review of a rule at enforcement or implementation
- § 10:29 Court action regarding a defective rule

C. OTHER

- § 10:40 Review of reasons
- § 10:41 Review of declaratory orders and advisory opinions

D. STATE LAW

- § 10:50 Review of adjudication [correspondence: subchapter A]

§ 10:51 Review of rules [correspondence: subchapter B]

Volume 4

CHAPTER 11. LITIGATION OVER SPECIFIC TYPES OF ISSUES

A. CONSTITUTIONAL QUESTIONS

- § 11:11 Constitutional review in general
- § 11:12 Separation of powers and the relationship among the three branches of government and the federal bureaucracy
- § 11:13 Delegation of authority
- § 11:15 Administrative agencies in a federal form of government
- § 11:16 Other constitutional challenges

B. FACTS

- § 11:21 Fundamental principle: Assuring a rational nexus between the factual conclusions and the administrative judgments
- § 11:22 Application of the standards of review
- § 11:24 Evaluating findings of fact
- § 11:25 Special restraint for technical findings
- § 11:26 Constitutional facts and jurisdictional facts

C. POLICY AND LAW

- § 11:30 Review of discretionary action—an overview *[Retitled]*
- § 11:30.05 Evolution of arbitrariness review *[New]*
- § 11:30.10 The Chenery principle on contemporaneous rationales *[New]*
- § 11:30.15 Evolution of “Hard Look” review *[New]*
- § 11:30.20 Modern arbitrariness review—State Farm synthesis *[New]*
- § 11:30.25 Review of policy changes *[New]*
- § 11:31 Standards of review for issues of law—As a general rule, de novo *[Retitled]*
- § 11:32 Nineteenth-century deference *[Retitled]*
- § 11:33 Mid-twentieth-century doctrine *[Retitled]*
- § 11:34 The (Overruled) Chevron Doctrine *[Retitled]*
- § 11:34.10 Chevron step zero—An overview *[New]*
- § 11:34.20 Chevron step zero—Agency authority to administer the statute *[New]*
- § 11:34.30 Chevron step zero—Procedural formality *[New]*

TABLE OF CONTENTS

- § 11:34.40 Chevron and stare decisis—The Brand X problem
[New]
- § 11:34.50 Chevron step one *[New]*
- § 11:34.60 Chevron step two *[New]*
- § 11:35 Loper Bright’s new regime—de novo review of statutory interpretations *[New]*
- § 11:35.10 Mixed-questions doctrine post-*Loper Bright* *[New]*
- § 11:36 Major questions doctrine *[New]*
- § 11:37 Skidmore weight or respect (not deference) *[New]*
- § 11:38 Deference to agency regulatory interpretations *[New]*
- § 11:38.50 Allocating deference in a split-enforcement model
[New]
- § 11:39 Review of constitutional issues of law and judicial avoidance *[New]*

D. PROCEDURE

- § 11:41 Nature of the judicial role

E. FAILURE TO ACT

- § 11:50 Overview
- § 11:51 Inaction
- § 11:52 Delay

F. STATE LAW

- § 11:61 Constitutional review [correspondence: subchapter A]
- § 11:62 Review of facts in the states [correspondence: subchapter B]
- § 11:63 Review of policy and law in the states [correspondence: subchapter C]

CHAPTER 12. THRESHOLD LIMITATIONS ON JUDICIAL REVIEW

A. REVIEWABILITY

- § 12:10 Fundamental issues
- § 12:11 Review precluded by statute
- § 12:12 Unreviewable discretion created by the absence of a meaningful basis for review
- § 12:13 Unreviewable discretion created by operation of law
- § 12:14 Judicial function in the face of unreviewability

B. FINAL AGENCY ACTION

- § 12:20 Finality

- § 12:21 Exhaustion of administrative remedies *[Retitled]*
- § 12:22 Issue exhaustion *[Retitled]*
- § 12:23 Primary jurisdiction

C. SOVEREIGN IMMUNITY

- § 12:30 Overview
- § 12:32 Foundation
- § 12:33 Flow and ebb of the doctrine in federal law
- § 12:34 Protection for state governments
- § 12:36 Equitable estoppel

D. STATE LAW

- § 12:41 Final agency action in the states [correspondence: subchapter B]

CHAPTER 13. JUSTICIABILITY FOR REVIEW OF ADMINISTRATIVE DECISIONS

- § 13:1 The concept of justiciability

A. STANDING

- § 13:9 “Standing”—One term for three doctrines *[New]*
- § 13:10 Overview of constitutional standing *[Retitled]*
- § 13:11 Injury in fact
- § 13:12 Causal connection between the injury and the administrative decision
- § 13:13 Redressibility
- § 13:14 Prudential considerations
- § 13:15 Statutory causes of action and the zone of interests *[Retitled]*
- § 13:16 Standing for entities

B. RIPENESS

- § 13:20 General background
- § 13:22 Ripeness for rulemaking

C. MOOTNESS

- § 13:30 Background principles
- § 13:31 Exceptions to mootness
- § 13:32 Review of moot administrative action

D. POLITICAL QUESTION

- § 13:40 The political question doctrine

TABLE OF CONTENTS

§ 13:41 Political question doctrine applied to administrative action

E. STATE LAW

§ 13:50 Standing [correspondence: subchapter A]

§ 13:54 Ripeness [correspondence: subchapter B]

§ 13:55 Mootness [correspondence: subchapter C]

CHAPTER 14. GOVERNMENT INFORMATION: ACCESS AND CONTROL

A. GOVERNMENT PUBLICATIONS AND INFORMATION SERVICES

§ 14:10 Federal publication systems

§ 14:11 Common law right of access to public records

B. FREEDOM OF INFORMATION ACT

§ 14:20 Introduction

§ 14:21 History

§ 14:23 Publication and “available for public inspection in an electronic format” *[Retitled]*

§ 14:24 General access

§ 14:25 Judicial review

§ 14:27 How to protect information submitted to the government

C. EXEMPTION FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

§ 14:30 The exemptions generally

§ 14:31 State secrets: Exemption 1

§ 14:32 Internal management information: Exemption 2

§ 14:33 Special statutes: Exemption 3

§ 14:34 Confidential business information: Exemption 4

§ 14:35 Internal government information: Exemption 5

§ 14:36 Individual information in government files: Exemption 6

§ 14:37 Law enforcement files: Exemption 7

§ 14:39 Oil wells: Exemption 9

D. OTHER OPENNESS LEGISLATION

§ 14:50 Privacy Act

§ 14:52 Open meetings legislation

§ 14:53 The Advisory Committee Act

E. STATE LAW

§ 14:61 State public information legislation [correspondence:
subchapter B]

§ 14:63 State open meetings statutes [correspondence: § 14:52]