

# ADMINISTRATIVE LAW

## Cases and Materials

# LexisNexis Law School Publishing Advisory Board

---

**William D. Araiza**

*Professor of Law*

**Brooklyn Law School**

**Lenni B. Benson**

*Professor of Law & Associate Dean for Professional Development*

**New York Law School**

**Raj Bhala**

*Rice Distinguished Professor*

**University of Kansas, School of Law**

**Ruth Colker**

*Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law*

**Ohio State University, Moritz College of Law**

**Richard D. Freer**

*Robert Howell Hall Professor of Law*

**Emory University School of Law**

**David Gamage**

*Assistant Professor of Law*

**UC Berkeley School of Law**

**Craig Joyce**

*Andrews Kurth Professor of Law &*

*Co-Director, Institute for Intellectual Property and Information Law*

**University of Houston Law Center**

**Ellen S. Podgor**

*Professor of Law & Associate Dean of Faculty Development and Electronic Education*

**Stetson University College of Law**

**David I. C. Thomson**

*LP Professor & Director, Lawyering Process Program*

**University of Denver, Sturm College of Law**

# ADMINISTRATIVE LAW

## Cases and Materials

---

*Second Edition*

**Daniel J. Gifford**

*Robins, Kaplan, Miller & Ciresi Professor of Law  
University of Minnesota Law School*

978-1-4224-7687-1 (Hardbound)

**Library of Congress Cataloging-in-Publication Data**

Gifford, Daniel J., 1932-  
Administrative law : cases and materials / Daniel J. Gifford. -- 2nd ed.  
p. cm.  
Includes index.  
978-1-4224-7687-1 (Hardbound)  
1. Administrative law--United States--Cases. 2. Judicial review of administrative acts--United States--Cases.  
I. Title.  
KF5402.G54 2010  
342.73'06--dc22

2010000373

This publication is designed to provide accurate and 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 and Michie is a trademark 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 © 2010 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 25¢ per page per copy 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](http://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](http://www.lexisnexis.com)

MATTHEW  BENDER

# Table of Contents

<b>Chapter 1</b>	<b>ADMINISTRATIVE REGULATION: AN INTRODUCTION</b> . . . . .	<b>1</b>
A.	What administrative law is about . . . . .	1
B.	A short overview of the history of administrative regulation . . . . .	2
C.	Critiques of the administrative process and reforms . . . . .	3
D.	Regulation and deregulation . . . . .	5
E.	The organizational structure of administrative agencies and their place in government . . . . .	9
<b>Chapter 2</b>	<b>JUDICIAL REVIEW OF AGENCY ACTION: AN INITIAL LOOK</b> . . . . .	<b>11</b>
A.	Preliminary consideration of the policies and language of judicial review . . . . .	11
B.	Judicial review of agency orders issued in trial-type hearings . . . . .	18
C.	Judicial deference to agency interpretations . . . . .	66
D.	Judicial review of informal action . . . . .	112
<b>Chapter 3</b>	<b>CONSTITUTIONAL RIGHTS TO HEARINGS UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS</b> . . . . .	<b>121</b>
A.	The constitutional parameters . . . . .	121
B.	Note: Procedural due process developments of the 1950s and early 1960s . . . . .	125
C.	The <i>Goldberg v. Kelly</i> paradigm . . . . .	129
D.	<i>Goldberg</i> reconsidered: The developing boundaries of the new approach . . . . .	141
E.	The remedy as defining the right . . . . .	154
F.	Liberty . . . . .	162
G.	Note: The due process clause and remedies for negligence and intentional torts . . . . .	181
<b>Chapter 4</b>	<b>THE BACKGROUND AND GENESIS OF THE ADMINISTRATIVE PROCEDURE ACT</b> . . . . .	<b>185</b>
A.	The <i>Morgan</i> cases and related matters . . . . .	185
B.	Prejudgment and bias . . . . .	207
C.	More on the structure of the federal administrative procedure act . . . . .	212
D.	Procedures not modeled upon either a trial or rulemaking; limitations (and limits) of the apa . . . . .	218

---

*Table of Contents*

<b>Chapter 5</b>	<b>AN ALTERNATIVE MODEL OF ADMINISTRATION: INDEPENDENT ADJUDICATION</b>	<b>225</b>
A.	The traditional agency model	225
B.	An alternative model	226
C.	The benefit agencies	227
D.	Policy coordination and the problem of deference	228
E.	Attempts by the social security administration to reduce the level of inconsistent decision-making by aljs	228
F.	Comparing the attributes of the traditional agency structure with the alternative involving independent adjudication	234
<b>Chapter 6</b>	<b>THE CHOICE OF ACTION BY RULE OR BY AD HOC ADJUDICATION OR OTHER MEANS</b>	<b>239</b>
A.	Agency discretion: The basic factors	239
B.	The use of informal rulemaking by agencies to avoid or shorten trial-type proceedings	274
C.	The expanding use of informal rulemaking	279
<b>Chapter 7</b>	<b>JUDICIAL REVIEW OF AGENCY RULES AND RULEMAKING: AN INTRODUCTION</b>	<b>287</b>
A.	Agency rulemaking in the pre-administrative procedure act period	287
B.	Agency rulemaking under the administrative procedure act	289
C.	Judicial review of agency rulemaking	289
D.	The complex history of judicial review of informal rulemaking	295
E.	<i>A vermont yankee</i> analogue: Procedures in informal adjudication	309
F.	Other judicial involvements in administration	309
<b>Chapter 8</b>	<b>THE “HARD LOOK” DOCTRINE AND JUDICIAL REVIEW OF AGENCY REASONING</b>	<b>313</b>
A.	The “hard look” doctrine	313
B.	Judicial review of agency reasoning	320
<b>Chapter 9</b>	<b>THE ADMINISTRATIVE RECORD AND RELATED MATTERS</b>	<b>337</b>
A.	The new paradigm of administrativedecision-making: The comment record andinformal rulemaking	337
B.	An array of procedural problems underthe new paradigm of administrativedecision-making	366

---

*Table of Contents*

<b>Chapter 10</b>	<b>PROCEDURAL PROBLEMS INCIDENT TO JUDICIAL REVIEW</b> .....	<b>391</b>
A.	Reviewability .....	391
B.	Primary jurisdiction .....	403
C.	Exhaustion .....	410
D.	Ripeness and finality .....	437
E.	Standing .....	471
<b>Chapter 11</b>	<b>CONSTITUTIONAL DIMENSIONS OF ADMINISTRATIVE REGULATION</b> .....	<b>527</b>
A.	The (limited) role of the courts .....	527
B.	The (limited) role of the legislature .....	540
C.	The (limited) role of the executive .....	587
Appendix A	Selected provisions from Title 5 of the U.S. Code governing administrative procedure and judicial review .....	591
Appendix B	Regulatory Flexibility Act .....	613
Appendix C	Federal Advisory Committee Act .....	623
Appendix D	Executive Order 12866 .....	635
Appendix E	Executive Order 13422 .....	649
Appendix F	Uniform Law Commissioners' Model State Administrative Procedure Act (1961) .....	653
Appendix G	Uniform Law Commissioners' Model State Administrative Procedure Act (1981) .....	661
<b>Table of Cases</b>	.....	<b>TC-1</b>
<b>Index</b>	.....	<b>I-1</b>

---

