

# Administrative Law and Process



# Administrative Law and Process

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FOURTH EDITION

**Alfred C. Aman, Jr.**

ROSCOE C. O'BYRNE PROFESSOR OF LAW  
INDIANA UNIVERSITY MAURER SCHOOL OF LAW

**William Penniman**

EVERSHEDS SUTHERLAND (U.S.) LLP  
(RETIRED)

**Landyn Wm. Rookard**

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*To my wife, Carol.*

—*Alfred Aman*

*To my wife, Judy, and my children, Lauren and Jake,  
who supported me over my career, and to the lawyers and  
clients who helped me to learn how to practice law.*

—*William Penniman*

*To Judge Dinsmore and Chief Judge Magnus-Stinson,  
for whom I had the greatest honor of clerking; my mentors  
and professors at Indiana University Maurer School of Law;  
my brilliant co-authors; Trevor and Mallori Waliszewski;  
and my spouse, Courtney.*

—*Landyn Wm. Rookard*



# Contents

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Online Materials	xvii
Table of Cases	xix
Acknowledgments	xxix
Introduction	xxxix
A. Administrative Law	xxxix
B. Organization of This Book	xxxix
C. Facing Forward by Looking Back	xxxv
D. Administrative Law Values	xxxvi
E. Context and the Limits of Binary Thinking	xxxviii
<b>Chapter 1 • Relating Individuals to Government</b>	<b>3</b>
§ 1.01 Three Questions	3
§ 1.02 Rules or Orders?	6
<i>Londoner v. City and County of Denver</i>	6
<i>Bi-Metallic Investment Co. v. State Board of Equalization of Colorado</i>	10
Notes and Questions	11
Problem 1-1	12
§ 1.03 Action or Inaction—Public or Private	13
<i>Deshaney v. Winnebago County Department of Social Services</i>	13
Notes and Questions	20
§ 1.04 Rules, Orders, and Theories of Procedure—Some Preliminary Reflections	21
A. Introduction	21
B. Red Light Theories of Administrative Law	23
C. Green Light Theories of Administrative Law	24
Notes and Questions	27
<i>Aman, The Limits of Globalization and the Future of Administrative Law: From Government to Governance</i>	28
<b>Part One • Within Agency Walls</b>	<b>31</b>
<b>Chapter 2 • Due Process and Administrative Adjudication</b>	<b>33</b>
§ 2.01 Introduction	33

§ 2.02	The Right/Privilege Distinction	33
	<i>Bailey v. Richardson</i>	35
	Notes and Questions	41
	<i>Cafeteria &amp; Restaurant Workers Union v. McElroy</i>	46
	Notes and Questions	51
§ 2.03	The Demise of the Right/Privilege Distinction	52
§ 2.04	Due Process, the War on Poverty, and the New Property	57
	<i>Goldberg v. Kelly</i>	59
	Notes and Questions	68
§ 2.05	Due Process Methodology: What Are Property and Liberty Interests?	74
	<i>Board of Regents of State Colleges v. Roth</i>	74
	<i>Perry v. Sindermann</i>	81
	Notes and Questions	85
§ 2.06	Modern Battlegrounds in Due Process: Immigration and Family Separation	98
	A. Immigration	98
	B. Family Separation	100
§ 2.07	Due Process and Prison Reform	104
	<i>Sandin v. Conner</i>	104
	Notes and Questions	111
	Problem 2-1	114
	Bail-Plus	115
§ 2.08	How Much Process Is Due and When Should It Be Provided?	117
	<i>Mathews v. Eldridge</i>	117
	Notes and Questions	126
§ 2.09	Streamlining Due Process	134
	<i>Goss v. Lopez</i>	134
	<i>Ingraham v. Wright</i>	138
	Notes and Questions	145
	<i>Walters v. National Association of Radiation Survivors</i>	147
	Notes and Questions	150
<b>Chapter 3 • Formal and Informal Adjudication</b>		<b>163</b>
§ 3.01	Introduction	163
§ 3.02	The New Deal and the APA: An Overview	164
	A. Development of the APA	165
§ 3.03	Formal Adjudication and the APA	166
	<i>Wong Yang Sung v. McGrath</i>	167
	Notes and Questions	172
	<i>Dominion Energy Brayton Point v. Johnson</i>	174
	Notes and Questions	177
	<i>Citizens Awareness Network, Inc. v. Nuclear Regulatory Commission</i>	181
§ 3.04	Party Status and Intervention in an APA Proceeding	185
§ 3.05	Evidence	186
	A. Rules of Evidence	186
	B. Official Notice	190



<i>Castillo-Villagra v. Immigration and Naturalization Service</i>	190
Notes and Questions	196
C. Burden of Proof, Burden of Production, and Burden of Persuasion	197
<i>Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries</i>	197
§ 3.06 The Administrative Structure of Formal Adjudication— Combination of Functions and the Constitution	201
<i>Withrow v. Larkin</i>	201
Notes and Questions	207
§ 3.07 The Administrative Law Judge as an Unbiased Decision Maker	212
ALFRED C. AMAN, JR. & WILLIAM MAYTON, ADMINISTRATIVE LAW	212
<i>Grolier Inc. v. Federal Trade Commission</i>	213
Notes and Questions	217
§ 3.08 <i>Ex Parte</i> Communications	218
<i>Professional Air Traffic Controllers Org. v. Federal Labor Relations Authority</i>	218
Notes and Questions	230
§ 3.09 Pre-Judgment	231
ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW	231
<i>Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission</i>	232
Notes and Questions	235
§ 3.10 Informal Adjudication: Introduction	241
§ 3.11 Informal Agency Adjudication and Judicial Review	243
<i>Citizens to Preserve Overton Park v. Volpe</i>	243
<i>Camp v. Pitts</i>	248
Notes and Questions	250
<i>Department of Commerce v. New York</i>	252
Notes and Questions	260
<i>Pension Benefit Guaranty Corporation v. LTV Corp.</i>	260
Notes and Questions	264
§ 3.12 Administrative Equity	266
Aman, <i>Administrative Equity: An Analysis of Exceptions to Administrative Rules</i>	266
Notes and Questions	269
§ 3.13 Conditions and Commitments	271
§ 3.14 Administrative Settlement Processes	272
<b>Chapter 4 • Agency Rulemaking</b>	<b>273</b>
§ 4.01 Introduction	273
§ 4.02 What Is a Rule?	277
<i>Bowen v. Georgetown University Hospital</i>	278
<i>Arkema Inc. v. Environmental Protection Agency</i>	282
Notes and Questions	288

§ 4.02(a) Rule or Guidance?	290
<i>Industrial Safety Equipment Ass’n, Inc. v. Environmental Protection Agency</i>	290
Notes and Questions	293
<i>Sugar Cane Growers Cooperative of Florida v. Veneman</i>	296
§ 4.03 Formal and Informal Rules and Rulemaking Processes	298
A. Overview	298
B. Informal Rulemaking Processes— Notice and Comment	300
<i>Chocolate Mfrs. Ass’n of United States v. Block</i>	300
Notes and Questions	305
<i>United States v. Nova Scotia Food Products Corp.</i>	307
Notes and Questions	310
C. Informal Rulemaking Processes— The Double-Edged Sword of E-Regulation	313
Notes and Questions	316
D. Administrative Common Law	316
<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council</i>	318
Notes and Questions	325
E. Hybrid Rulemaking Procedures	327
<i>Industrial Union Department, AFL-CIO v. Hodgson</i>	327
Notes and Questions	333
<i>United States Steelworkers of America v. Marshall</i>	335
Notes and Questions	343
F. Negotiated Rulemaking	346
G. Exceptions to Section 553 Rulemaking Procedures	348
1. Policy Statements and Procedural Rules	350
<i>American Hospital Assoc. v. Bowen</i>	350
2. Interpretive Rules	357
<i>Hocotor v. United States Department of Agriculture</i>	357
Notes and Questions	363
3. Interim Rules	366
<i>United States v. Reynolds</i>	366
Notes and Questions	370
4. Other APA Rulemaking Exemptions	370
H. Reliance on Private Standard-Setting Through Incorporation by Reference	372
I. Policymaking by Delays and Rescissions	374
§ 4.04 Choosing Rulemaking or Adjudication	376
A. Introduction	376
B. The Power to Choose	377
<i>Securities and Exchange Commission v. Chenery Corp.</i>	377
<i>National Labor Relations Board v. Bell Aerospace Co.</i>	386
Notes and Questions	388

<b>Part Two • Legislative, Executive, and Judicial Control of Agency Discretion: Outside the Walls of the Agency</b>	<b>391</b>
<b>Chapter 5 • Legislative Control of Agency Discretion</b>	<b>395</b>
§ 5.01 Introduction	395
§ 5.02 Legislative Influence over Agency Discretion: Constitutional Limitations	395
<i>Pillsbury Co. v. Federal Trade Commission</i>	396
Notes and Questions	400
§ 5.03 Article I of the Constitution	403
<i>Immigration and Naturalization Service v. Chadha</i>	403
Notes and Questions	416
A. The Congressional Review Act (CRA)	418
B. Congressional Power to Seek and Receive Information for Legislative Oversight Purposes	421
<i>Committee on the Judiciary v. Donald F. McGahn, II</i>	421
§ 5.04 The Nondelegation Doctrine	423
<i>A.L.A. Schechter Poultry Corp. v. United States</i>	424
Notes and Questions	429
§ 5.05 The Nondelegation Doctrine Since <i>Panama</i> and <i>Schechter</i>	430
§ 5.06 Nondelegation Doctrine Revival?	432
<i>Mistretta v. United States</i>	434
<i>Whitman v. American Trucking Associations, Inc.</i>	437
Notes and Questions	440
<i>Gundy v. United States</i>	441
Notes and Questions	455
§ 5.07 Delegating Legislative Power to Private Actors	456
<i>Department of Transportation v. Association of American Railroads</i>	458
Notes and Questions	466
§ 5.08 Delegation Twice Removed: Privatization and Public-Private Partnerships	469
A. OMB and Privatization	470
Notes and Questions	471
B. Private Prisons	474
Aman, <i>Administrative Law for a New Century</i>	474
Aman, <i>Private Prisons and the Democratic Deficit</i>	474
<i>Richardson v. McKnight</i>	475
Notes and Questions	482
C. Privatizing Welfare Administration	485
D. Reforming the APA	488
E. Reforming the Freedom of Information Act (FOIA)	489
§ 5.09 Delegating Legislative Power to International Actors	491
<i>Natural Resources Defense Council v. Environmental Protection Agency</i>	491
Notes and Questions	496

§ 5.10	The Delegation of Judicial Power: Article III	497
	Pound, <i>Administration of Justice in the Modern City</i>	499
	ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW	500
§ 5.11	Administrative Adjudication and Jury Trials	501
	Notes and Questions	503
§ 5.12	The Return of <i>Crowell v. Benson</i>	504
<b>Chapter 6 • Executive Control of Agency Discretion</b>		<b>505</b>
§ 6.01	Introduction	505
	AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA	506
§ 6.02	Controlling Spending: The Line Item Veto	509
	<i>Clinton v. City of New York</i>	509
	Notes and Questions	518
§ 6.03	The Power to Appoint	518
	A. Appointments Clause	518
	<i>Buckley v. Valeo</i>	519
	<i>In re Grand Jury Investigation</i>	527
	Notes and Questions	531
	B. Administrative Law Judges: <i>Lucia v. SEC</i>	537
	<i>Lucia v. Securities and Exchange Commission</i>	538
	Notes and Questions	542
	C. The Recess Appointments Clause	544
	Notes and Questions	548
§ 6.04	The Power to Remove	557
	<i>Humphrey's Executor v. United States</i>	557
	Notes and Questions	561
	<i>Morrison v. Olson</i>	564
	Notes and Questions	570
	<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i>	572
	Notes and Questions	585
§ 6.05	Executive Oversight: Executive Orders and the Office of Management and Budget	590
	ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW	591
	Steven Croley, <i>White House Review of Agency Rulemaking:     An Empirical Investigation</i>	592
	Executive Order No. 12,866	596
	Notes and Questions	599
	Executive Order 13771	604
	Notes and Questions	605
	Executive Order Nos. 13769, 13780, and Proclamation No. 9645	607
	<i>Trump v. Hawaii</i>	611
§ 6.06	Executive and Congressional Participation in Agency Rulemaking Proceedings	614

<i>Sierra Club v. Costle</i>	614
Notes and Questions	619
<b>Chapter 7 • Judicial Control of Agency Discretion</b>	<b>623</b>
§ 7.01 Introduction	623
§ 7.02 Judicial Review of Questions of Fact	625
<i>O’Leary v. Brown-Pacific-Maxon</i>	626
Notes and Questions	628
§ 7.03 Judicial Review of Findings of Fact — The Substantial Evidence Standard	630
<i>Universal Camera Corp. v. National Labor Relations Board</i>	631
Notes and Questions	638
§ 7.04 Questions of Law	641
<i>National Labor Relations Board v. Hearst Publications, Inc.</i>	643
Notes and Questions	650
<i>Skidmore v. Swift</i>	651
Notes and Questions	653
§ 7.05 The <i>Chevron</i> Revolution	654
<i>Chevron v. National Resources Defense Council</i>	655
Notes and Questions	662
<i>Immigration and Naturalization Service v. Cardoza-Fonseca</i>	669
Notes and Questions	674
<i>Food and Drug Administration v. Brown &amp; Williamson Tobacco Corporation</i>	677
Notes and Questions	693
§ 7.06 <i>Chevron</i> Step Two	697
<i>Mayo Foundation for Medical Education and Research v. United States</i>	698
Notes and Questions	701
<i>Chemical Manufacturers Association v. Environmental Protection Agency</i>	702
Notes and Questions	705
§ 7.07 When <i>Chevron</i> Does Not Apply: Other Types and Degrees of Deference	705
<i>United States v. Mead Corporation</i>	707
Notes and Questions	720
<i>Barnhart v. Walton</i>	725
Notes and Questions	730
<i>Gonzales v. Oregon</i>	731
Notes and Questions	740
<i>King v. Burwell</i>	741
Notes and Questions	747
<i>City of Arlington, Texas v. Federal Communications Commission</i>	747
Notes and Questions	753
<i>National Cable &amp; Telecommunications Association v. Brand X Internet Services</i>	754

Notes and Questions	761
§ 7.08 Judicial Review of Agency Rules	763
A. The Arbitrary and Capricious Standard of Review and the Rational Basis Test	763
B. The Hard Look Doctrine	765
AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA	765
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mutual</i>	767
Notes and Questions	779
<i>Federal Communications Commission v. Fox Television Studios, Inc.</i>	780
Notes and Questions	791
<i>Air Alliance of Houston v. Environmental Protection Agency</i>	792
Notes and Questions	801
<b>Chapter 8 • The Availability and Timing of Judicial Review</b>	<b>803</b>
§ 8.01 Introduction	803
§ 8.02 APA Exclusions from Judicial Review: “Committed to Agency Discretion by Law”	804
<i>Heckler v. Chaney</i>	804
Notes and Questions	808
<i>Webster v. Doe</i>	811
<i>Lincoln v. Vigil</i>	814
Notes and Questions	817
§ 8.03 Who Has Standing to Seek Judicial Review?	822
<i>Association of Data Processing Service Organizations v. Camp</i>	822
Notes and Questions	824
A. Constitutional Requirements	827
<i>Allen v. Wright</i>	828
Notes and Questions	832
<i>Lujan v. Defenders of Wildlife</i>	834
Notes and Questions	843
<i>Spokeo, Inc. v. Robins</i>	845
Notes and Questions	848
<i>Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC), Inc.</i>	849
Notes and Questions	854
B. Do States Have Standing?	855
<i>Massachusetts v. Environmental Protection Agency</i>	855
Notes and Questions	864
§ 8.04 When Should Judicial Review Occur?	866
A. Finality	866
<i>Federal Trade Commission v. Standard Oil Co. of California</i>	867
Notes and Questions	869
B. Exhaustion of Administrative Remedies	871
<i>Smith v. Berryhill</i>	871
Notes and Questions	875

C. Ripeness	878
<i>Abbott Laboratories v. Gardner</i>	878
<i>Toilet Goods Association v. Gardner</i>	882
Notes and Questions	885
D. Primary Jurisdiction	888
<i>Nader v. Allegheny Airlines, Inc.</i>	889
Notes and Questions	893
E. Mootness	894
§ 8.05 The Proper Forum	895
<i>Telecommunications Research &amp; Action Center v. Federal</i>	
<i>Communications Commission</i>	896
Notes and Questions	898
<b>Part Three • Administrative Law Practice</b>	<b>901</b>
<b>Chapter 9 • Problems and Exercises</b>	<b>903</b>
§ 9.01 Administrative Adjudication Problems: Introduction	903
§ 9.02 Getting Started with an Administrative Adjudication Problem	906
§ 9.03 Preparing a Motion to Intervene and Protest	911
Problem Facts for Homersville Exercises 9.03–9.06	911
§ 9.04 Procedural Options	917
§ 9.05 <i>Ex Parte</i> Communications	923
§ 9.06 Administrative Settlement Processes	925
§ 9.07 Agency Rulemaking Problems: Introduction	930
§ 9.08 The Choice Between Rulemaking and Adjudication	931
§ 9.09 How to Find Rulemaking Proceedings and File Comments	932
§ 9.10 Developing a Rulemaking Strategy	935
A. Substantive Analysis	935
B. Strategic Issues	937
§ 9.11 Ethics in Filing Rulemaking Comments	942
§ 9.12 Judicial Review: Introduction	945
§ 9.13 Judicial Review—Getting Started	950
§ 9.14 Arguing for Judicial Relief	955
§ 9.15 Judicial Review of Enforcement Actions	957
§ 9.16 Judicial Review of a Rule	958
§ 9.17 Information and Open Government: Introduction	963
§ 9.18 Preparing a FOIA Request	966
§ 9.19 FOIA and Private Entities	967
§ 9.20 Sunshine Laws and Open Meeting Requirements	968
§ 9.21 Complex Issues: Introduction	970
§ 9.22 Getting Guidance from an Administrative Agency	970
§ 9.23 Privatization and the Outsourcing of Agency Responsibilities:	
The Management of Federal Prisons	975
§ 9.24 TSA No Fly Lists	979

<b>Appendix A • The Constitution of the United States of America (Selected Provisions)</b>	<b>983</b>
Article I.	983
Article II.	988
Article III.	990
Article IV.	991
Article V.	992
Article VI.	992
Article VII.	992
Article [I] (Amendment 1—Freedom of expression and religion)	994
Article [II] (Amendment 2—Bearing Arms)	994
Article [III] (Amendment 3—Quartering Soldiers)	994
Article [IV] (Amendment 4—Search and Seizure)	994
Article [V] (Amendment 5—Rights of Persons)	995
Article [VI] (Amendment 6—Rights of Accused in Criminal Prosecutions)	995
Article [VII] (Amendment 7—Civil Trials)	995
Article [VIII] (Amendment 8—Further Guarantees in Criminal Cases)	995
Article [IX] (Amendment 9—Unenumerated Rights)	995
Article [X] (Amendment 10—Reserved Powers)	995
Article [XI] (Amendment 11—Suits Against States)	995
Article [XIV] (Amendment 14—Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection)	996
 <b>Appendix B • Federal Administrative Procedure Act United States Code, Title 5 (Selected Provisions)</b>	 <b>997</b>
Table of Sections	997
5 U.S.C § 551 United States Code, Title 5	998
 <b>Appendix C • Freedom of Information Act</b>	 <b>1013</b>
United States Code, Title 5, Chapter 5	1013
 <b>Index</b>	 <b>1033</b>



# Online Materials

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In several chapters of this edition of *Administrative Law and Process*, we have included references to an online supplement containing chapter appendices. The online materials can be accessed at [caplaw.com/sites/adminlaw4e](http://caplaw.com/sites/adminlaw4e).



# Table of Cases

---

[References are to pages.]

- A.L.A. Schechter Poultry Corp. v. United States, 423, 424, 447
- Abbott Laboratories v. Gardner, 867, 878, 887
- Abdullah v. INS, 129
- Action on Smoking and Health v. CAB, 363
- Adoption of (See Name of Adoptee)
- Aera Energy LLC v. Salazar, 400
- Agosto v. INS, 640
- Aiken County, In re, 585
- Air Alliance Houston v. EPA, 375, 792
- Air Brake Systems, Inc. v. Mineta, 871
- Alden v. Maine, 752
- Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 862
- Allah v. Seiverling, 114
- Allen v. Wright, 828
- American Airlines, Inc. v. CAB, 341
- American Ass'n of Exporters & Importers v. United States, 371
- American Bus Ass'n v. United States, 354
- American Elec. Power Co., Inc. v. Connecticut, 866
- American Fed'n of Gov't Emps. v. Clinton, 473
- American Fed'n of Gov't Emps. v. United States, 473
- American Hospital Assoc. v. Bowen, 350
- American Trucking Assns., Inc. v. Atchison, T. & S.F. R. Co., 771
- American Trucking Assns., Inc. v. United States, 517, 646
- Appalachian Power Company v. EPA, 334
- Aref v. Lynch, 112
- Arkema Inc. v. Environmental Protection Agency, 282, 290
- Arlington, Texas, City of, v. Federal Communications Commission, 747
- Armstrong v. Exceptional Child Center, Inc., 893
- Arnett v. Kennedy, 89
- Asbestos Information Assoc. v. OSHA, 363
- Associated Industries of New York State v. Ickes, 824
- Associated Industries v. United States Dept. of Labor, 332
- Association of American Railroads v. DOT, 457
- Association of Data Processing Service Orgs. v. Board of Governors of the Fed. Res. Sys., 640
- Association of Data Processing Service Orgs. v. Camp, 822
- Association of Nat'l Advertisers, Inc. v. FTC, 337
- Astra USA, Inc. v. Santa Clara, 978

- AT&T Corp. v. Fed. Commc'ns  
Comm'n, 307
- AT&T Corp. v. Iowa Utilities Board,  
697, 755
- AT&T Corp. v. Portland, 754, 761
- Atchison T. & S.F.R. Co. v. Wichita  
Bd. of Trade, 771
- Atkins v. Parker, 158
- Atlas Roofing, Inc. v. Occupational  
Safety and Health Review  
Commission, 501
- Auer v. Robbins, 727, 734, 740
- B&B Hardware, Inc. v. Hargis  
Industries, Inc., 820
- Babcock v. White, 114
- Bailey v. Richardson, 35, 76
- Baltimore Gas & Electric v. NRDC,  
765, 801
- Bandimere v. SEC, 537
- Banks v. Schweiker, 193, 196
- Banner Health v. Price, 346
- Banner Health v. Sebelius, 346
- Barnes v. Zaccari, 146
- Barnett, United States v., 142
- Barnhart v. Walton, 725, 752
- Barrington, Ill., Village of, v.  
Surface Transportation Board,  
705
- Batterton v. Marshall, 353
- Beeler v. Colvin, 556
- Beley v. City of Chicago, 93
- Bell v. Wolfish, 107
- Bennett v. Spear, 870, 873
- Bettendorf v. St. Croix Cty., 69
- Biestek v. Berryhill, 188, 217, 313,  
640, 641
- Bill Johnson's Restaurant, Inc. v.  
NLRB, 642
- Bi-Metallic Investment Co. v.  
State Board of Equalization of  
Colorado, 10, 322
- Bishop v. Wood, 86
- Bivens v. Six Unknown Named  
Agents of Fed. Bureau of  
Narcotics, 483, 484
- Block v. Community Nutrition  
Institute, 817
- BNSF Ry. Co. v. Loos, 391
- Board of Regents of State Colleges v.  
Roth, 74, 85, 135, 161
- Bob Jones University v. United  
States, 829
- Bowen v. Georgetown University  
Hospital, 278, 285, 719
- Bowles v. Seminole Rock & Sand Co.,  
722
- Bowman Transportation, Inc. v.  
Arkansas-Best Freight System,  
Inc., 264, 772, 782
- Bowsher v. Synar, 565, 574, 577
- Boyd v. Constantine, 189
- Bragdon v. Abbott, 710
- Brock v. Cathedral Bluffs Shale Oil  
Co., 355
- Brown v. Board of Education, 136,  
829
- Buckley v. Valeo, 407, 408, 412, 519,  
529, 573
- Burella v. City of Philadelphia, 88
- Burlington Truck Lines, Inc. v.  
United States, 772, 773, 774, 775
- Bush v. Lucas, 484
- Cabais v. Egger, 354
- Cafeteria & Restaurant Workers  
Union v. McElroy, 46, 62, 77, 78,  
90, 117, 120
- Calhoun v. Bailar, 187
- California v. E.P.A., 375
- Camp v. Pitts, 248, 256, 772
- Caperton v. A.T. Massey Coal Co.,  
208, 235
- Carter v. Carter Coal Co., 429, 463
- Castillo-Villagra v. Immigration and  
Naturalization Service, 190
- Castle Rock v. Gonzales, 87
- Cayuga Nation v. Bernhardt, 231
- Center for Auto Safety v. Dole, 810
- Chapman v. United States, 757
- Chemical Manufacturers Ass'n v.  
EPA, 697, 702

- Chemical Waste Management, Inc.  
v. U.S. Environmental Protection  
Agency, 179
- Cheney v. United States Dist. Court  
for the Dist. of Columbia, 236
- Cherokee Nation v. Georgia, 817
- Chevron U.S.A. Inc. v. Natural  
Resources Defense Council, Inc.,  
175, 642, 643, 655, 672, 673, 678,  
680, 681, 685, 686, 699, 700, 703,  
704, 707, 709, 710, 717, 718, 725,  
727, 735, 740, 742, 747, 751, 754,  
758, 759, 875
- Chocolate Mfrs. Ass'n of United  
States v. Block, 300
- Christensen v. Harris County, 706,  
740, 755
- Chrysler Corp. v. Brown, 642
- Chrysler Corp. v. Department of  
Transportation, 768
- Cinderella Career and Finishing  
Schools, Inc. v. Federal Trade  
Commission, 232, 338
- Citizens Awareness Network, Inc. v.  
Nuclear Regulatory Commission,  
181
- Citizens to Preserve Overton Park v.  
Volpe, 243, 255, 256, 257, 263, 348,  
804, 805
- City of (See Name of City)
- Clapper v. Amnesty Int'l USA, 44,  
866
- Clarke v. Securities Industries, 826
- Clean Air Council v. Pruitt, 375, 794,  
799
- Cleburne v. Cleburne Living Center,  
Inc., 612
- Cleveland Board of Education v.  
Loudermill, 90
- Clinton v. City of New York, 452, 509
- Collins v. Mnuchin, 590
- Colony v. Commissioner, 761
- Committee of United States Citizens  
Living in Nicaragua v. Reagan,  
494
- Committee on the Judiciary v.  
Donald F. McGahn, II, 421
- Commonwealth v. (See Name of  
Defendant)
- Community Nutrition Institute v.  
Young, 355
- Connecticut Bankers Ass'n v. Bd. of  
Governors, 180
- Consarc Corp. v. OFAC, 800
- Consolidated Edison Co. v. NLRB,  
641
- Consumer Financial Protection  
Bureau v. RD Legal Funding, LLC,  
589
- Consumer Financial Protection  
Bureau v. Seila Law LLC, 589, 590
- Cook v. FDA, 809
- Correctional Service Corporation v.  
Malesko, 483
- Crowell v. Benson, 500, 517
- CSI Aviation Servs., Inc. v. U.S. Dep't  
of Transp., 869
- Currin v. Wallace, 457
- Cushman v. Shinseki, 155, 160
- Cutler v. Hayes, 810
- D.C. Federation of Civil Associations  
v. Volpe, 618
- Darby v. Cisneros, 876
- Decker v. Northwest Environmental  
Defense Ctr., 723
- Department of Commerce v. New  
York, 252, 821
- Department of Transportation  
v. Association of American  
Railroads, 458
- Deshaney v. Winnebago County  
Department of Social Services, 13
- Dickinson v. Zurko, 641
- Director, Office of Workers'  
Compensation Programs v.  
Greenwich Collieries, 197
- Dixon v. Alabama State Board of  
Education, 52, 62
- Dole v. United Steelworkers of  
America, 674

- Dominion Energy Brayton Point v. Johnson, 174  
 Dominion Resources, Inc. v. United States, 701  
 Doyle v. City of Medford, 88  
 Dunlop v. Bachowski, 807  
 DuPuy v. Samuels, 96  
 Edmond v. United States, 530, 533, 570  
 Edwards v. Balisok, 114  
 Edwards v. Shinseki, 159  
 Eichenberger v. ESPN, Inc., 849  
 Encino Motorcars, LLC v. Navarro, 798, 801  
 English v. Trump, 550  
 Envirocare of Utah, Inc. v. NRC, 186  
 Epic Systems v. Lewis, 675  
 Esso Standard v. Standard Oil Co. v. Lopez-Freytes, 208  
 Estelle v. Gamble, 16  
 Ethyl Corp. v. EPA, 316, 317  
 Ewing v. Mytinger & Casselberry, Inc., 62  
 Excelsior Underwear Inc., 387  
 Federal Communications Comm'n v. Fox Television Studios, Inc., 780, 792, 798, 799  
 Federal Communications Comm'n v. Pacifica Foundation, 780, 784, 792  
 Federal Communications Comm'n v. Schreiber, 318  
 Federal Communications Comm'n v. WNCN Listeners Guild, 269  
 Federal Elections Comm'n v. Akins, 833  
 Federal Elections Comm'n v. Democratic Senatorial Campaign Committee, 657  
 Federal Elections Comm'n v. NRA Political Victory Fund, 532  
 Federal Maritime Comm'n v. South Carolina Ports Authority, 752  
 Federal Trade Comm'n v. Cement Institute, 203, 399  
 Federal Trade Comm'n v. Standard Oil Co. of California, 867  
 Field v. Clark, 511  
 First Bancorporation v. Board of Governors of the Federal Reserve System, 271  
 Fisher v. University of Texas, 21  
 Five Points Rd. Joint Venture v. Johanns, 179  
 Flast v. Cohen, 829  
 Florida East Coast Ry., United States v., 181, 299  
 Florida Gulf Coast Bldg. & Const. Trailer v. NLRB, 642  
 Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 456, 677, 741, 742, 743, 857  
 Ford Motor Co. v. FTC, 388  
 Ford Motor Co. v. Texas Dep't of Transp., 208  
 Ford Motor Credit Co. v. Milhollin, 293, 642  
 Foucha v. Louisiana, 152  
 Fowler v. Butts, 211  
 Frank v. Gaos, 849  
 Franklin v. Massachusetts, 870  
 Free Enterprise Fund v. Public Company Accounting Oversight Bd., 452, 463, 537, 572, 752  
 Freytag v. Commissioner of Internal Revenue, 535, 538, 540  
 Friends of the Earth, Inc. v. Laidlaw Environmental Services, 463, 849, 894  
 Fritz v. Evers, 95  
 Fry v. Napoleon Community Schools, 877, 878  
 Fusari v. Steinberg, 122  
 General American Transp. Corp. v. ICC, 705  
 Georgia v. Tennessee Copper Co., 858, 862  
 Germaine, United States v., 522  
 Gibbons v. Ogden, 840  
 Gibson v. FTC, 217  
 Gibson Wine Co. v. Snyder, 353  
 Global Tel\*Link v. FCC, 551

- Gloucester Cty. Sch. Bd. v. G.G. ex  
 rel. Grimm, 551  
 Goldberg v. Kelly, 59, 76, 78, 118  
 Goldsmith v. United States Board of  
 Tax Appeals, 61  
 Gonzales v. Oregon, 731  
 Gonzalez Ruano v. Barr, 172  
 Gonzalez v. Freeman, 62  
 Goss v. Lopez, 134, 141, 144  
 Graham County Soil and Water  
 Conservation Dist. v. United  
 States ex rel. Wilson, 743  
 Graham v. Richardson, 76  
 Grand Jury Investigation, In re, 527  
 Grayned v. City of Rockford, 451  
 Greater Boston Television Corp. v.  
 FCC, 766, 778  
 Green v. McCall, 115  
 Greene v. McElroy, 65  
 Grolier Inc. v. Federal Trade  
 Commission, 213  
 Guardian Federal Savings & Loan  
 Insurance Corp., 353  
 Guedes v. ATF, 544  
 Guevara-Flores v. INS, 671  
 Gundy v. United States, 424, 441  
 Gutierrez-Brizuela v. Lynch, 763  
 Halbig v. Burwell, 743  
 Hamdi v. Rumsfeld, 133  
 Hampton & Co. v. United States, 520  
 Handley v. Chapman, 791  
 Hardin v. Kentucky Utilities Co., 824  
 Harrington v. County of Suffolk, 89  
 Hatch v. District of Columbia, 113  
 Hazardous Waste Treatment Council  
 v. EPA, 826  
 Heckler v. Chaney, 804  
 Helvering v. Gregory, 692  
 Hernandez v. Sessions, 89  
 High Fructose Corn Syrup Antitrust  
 Litig., In re, 189  
 H-M, Matter of, 196  
 Hoctor v. United States Department  
 of Agriculture, 357  
 Home Box Office, Inc. v. FCC, 341  
 Home Concrete & Supply, LLC,  
 United States v., 761  
 Homer v. Richmond, 48  
 Horizon Healthcare Servs. Inc. Data  
 Breach Litig., In re, 848  
 Hornsby v. Allen, 55, 61  
 Housing Auth. of City of Omaha,  
 Neb. v. U.S. Hous. Auth., 371  
 Humphrey's Executor v. United  
 States, 409, 524, 557  
 Humphries v. County of Los Angeles,  
 207  
 IBM v. State, 487  
 IBM, State v., 487  
 ICORE, Inc. v. FCC, 294  
 Immigration and Nat. Serv. v.  
 Cardoza-Fonseca, 669  
 Immigration and Nat. Serv. v.  
 Chadha, 392, 403, 452, 463, 465,  
 511, 518, 572  
 Immigration and Nat. Serv. v. Stevic,  
 669  
 Impro Products, Inc. v. Block, 293  
 In re (See Name of Party or Matter)  
 Independent Equipment Dealers  
 Ass'n v. EPA, 871  
 Independent Ins. Agents of Am. v.  
 Bd. of Governors, 180  
 Independent U.S. Tanker Owners  
 Comm. v. Lewis, 388  
 Indiana Family & Soc. Servs.  
 Admin., State ex rel., v.  
 International Bus. Mach. Corp.,  
 486  
 Indigenous Env'tl. Network v. United  
 States Dep't of State, 200  
 Industrial Safety Equipment Ass'n,  
 Inc. v. Environmental Protection  
 Agency, 290  
 Industrial Union Dept., AFL-CIO  
 v. American Petroleum Institute,  
 431, 432, 455, 642  
 Industrial Union Dept., AFL-CIO v.  
 Hodgson, 327, 336, 640  
 Ingraham v. Wright, 107, 138

- Innovation Law Lab v. McAleenan, 173
- International Chem. Workers Union, In re, 603
- International Harvester Co. v. Ruckelshaus, 308, 317
- International Union, U.A.W. v. Donovan, 899
- Interstate Commerce Comm'n v. Locomotive Engineers, 815
- Jennings v. Rodriguez, 115
- Joint Anti-Fascist Refugee Committee v. McGrath, 43, 48, 51, 53, 62, 77, 119
- Jones v. Baker, 112
- Judulang v. Holder, 702
- Kamal v. J. Crew Grp., Inc., 848
- Kapps v. Wing, 91
- Karpova v. Snow, 207
- Kennett, City of, v. EPA, 885
- Kent v. Dulles, 431
- Kentucky Waterways Alliance v. Johnson, 269, 270
- Kerry v. Din, 45, 98
- King v. Burwell, 741
- Kirwa v. United States Dep't of Def., 289
- Kisor v. Wilkie, 723
- Kleindienst v. Mandel, 611
- Knauff, United States ex rel., v. Shaughnessy, 53
- Kolender v. Lawson, 451, 452
- Korematsu v. United States, 613
- Krell v. Saul, 189
- Kuck v. Danaher, 128
- Kwong Hai Chew v. Colding, 53
- Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton, 825
- Lacson v. U.S. Dep't of Homeland Sec., 187
- Laney v. Farley, 146
- Lebron v. National Railroad Passenger Corp., 460
- Lechmere, Inc. v. NLRB, 759
- Lee v. Verizon Commc'ns, Inc., 848
- Leedom v. Kyne, 898
- Lexmark International, Inc. v. Static Control Components, Inc., 826
- Lincoln v. Vigil, 814
- Liteky v. United States, 231
- Locke's Appeal, 516
- Londoner v. City and County of Denver, 6, 11, 33
- Los Angeles v. Lyons, 851, 853
- Lucia v. Securities and Exchange Comm'n, 212, 538, 571
- Lujan v. Defenders of Wildlife, 834, 846, 858
- Lynch v. Alworth-Stephens Co., 746
- Lyng v. Payne, 158, 160
- Mach Mining, LLC v. EEOC, 818
- Mack v. Purkett, 114
- Macon Cnty. Samaritan Mem'l Hosp. v. Shalala, 269
- Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 757, 759
- Marathon Oil Co. v. E.P.A., 179
- Marbury v. Madison, 422, 462, 745, 843
- Martin v. Occupational Safety and Health Review Comm'n, 739
- Massachusetts v. EPA, 694, 855
- Massachusetts v. Mellon, 862, 865
- Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 236
- Mathews v. Eldridge, 117, 151, 152, 153, 158
- Matter of (See Name of Party)
- Mayo Foundation for Medical Education and Research v. United States, 698
- McAuliffe v. Mayor of New Bedford, 45
- MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 456, 693, 758
- Meachum v. Fano, 105, 114



- Mead Corporation, United States v.,  
451, 707, 727, 735, 736, 739, 750,  
755, 756, 757, 759, 760
- Mickelson v. Cnty. of Ramsey, 146
- Milk Train, Inc. v. Veneman, 820
- Minneci v. Pollard, 483, 484
- Missouri River Basin to North  
Dakota. Manitoba v. Bernhardt,  
865
- Missouri v. Horowitz, 127
- Mistretta v. United States, 423, 434,  
438, 439, 448, 495, 517
- Monell v. Department of Social  
Services, 94
- Morrison v. Olson, 517, 525, 529, 530,  
533, 564, 570, 572
- Morrissey v. Brewer, 114, 115
- Morton v. Ruiz, 672, 718
- Moses v. District of Columbia, 89
- Motion Picture Assoc. of America,  
Inc. v. FCC, 720
- Motor Vehicle Mfrs. Assn. of United  
States, Inc. v. State Farm Mut.  
Automobile Ins. Co., 685, 755, 767,  
782, 783, 785, 787, 789, 798
- Ms. L. v. ICE, 101, 102
- Murchison, In re, 204
- Murray Energy Corp. v. DOD, 899
- Murray's Lessee v. Hoboken Land  
and Improvement Co., 48
- Myers v. United States, 557, 572, 579
- Nader v. Allegheny Airlines, Inc., 889
- National Air Traffic Controllers  
Ass'n v. Secretary of DOT, 473, 474
- National Ass'n of Mfrs. v. DOD, 900
- National Ass'n of Radiation  
Survivors v. Derwinski, 154
- National Broadcasting Co. v. United  
States, 438
- National Cable & Telecomms. Ass'n  
v. Brand X Internet Servs., 176,  
700, 741, 754, 798
- National Educ. Ass'n v. DeVos, 347
- National Ins. Co. v. Tidewater Co.,  
76
- National Labor Relations Board v.  
Alternative Entertainment, 676
- National Labor Relations Board v.  
Bell Aerospace Co., 386, 716, 717
- National Labor Relations Board  
v. Columbian Enameling &  
Stamping Co., 631
- National Labor Relations Board v.  
Hearst Publications, Inc., 643
- National Labor Relations Board v.  
Standard Oil Co., 632
- National Labor Relations Board v.  
Walton Mfg. Co., 638, 639
- National Labor Relations Board v.  
Wyman-Gordon Co., 387
- National Maritime Union of  
America v. Herzog, 41
- National Mining Ass'n v. Dep't of  
Labor, 286
- National Muffler Dealers Association,  
Inc. v. United States, 699
- Natural Resources Defense Council  
v. Abraham, 721
- Natural Resources Defense Council  
v. EPA, 491, 800
- Natural Resources Defense Council  
v. NHTSA, 799
- Neal v. United States, 756, 757, 759
- Neighborhood TV Co., Inc. v. FCC,  
356
- Neustar, Inc. v. FCC, 388
- New York Central Securities Corp. v.  
United States, 438
- New York Statewide Coalition of  
Hispanic Chambers of Commerce  
v. New York City Dept. of Health  
& Mental Hygiene, 440
- New York v. Nuclear Regulatory  
Commission, 326
- New York v. United States, 774
- Nixon, United States v., 422, 783
- Nnebe v. Daus, 128
- Noel Canning v. NLRB, 545
- North American Cold Storage Co. v.  
Chicago, 62

- Norton v. Southern Utah Wilderness Alliance, 818, 819
- Norwegian Nitrogen Products Co. v. United States, 649
- Nova Scotia Food Products Corp., United States v., 307
- O’Leary v. Brown-Pacific-Maxon, 626
- Office of Communication of United Church of Christ v. FCC, 185
- Ohio Bell Telephone Co. v. Public Utils. Comm’n, 193
- Old Colony Bondholders v. New York, New Haven & Hartford Railroad Company, 765
- Ortiz v. United States, 544
- Overton Park. In Bowen v. Michigan Academy of Family Physicians, 817
- Pacific Gas & Electric Co. v. FPC, 354
- Pacific Legal Foundation v. Department of Transportation, 769
- Packard Motor Car Co. v. NLRB, 650
- Palmer v. Massachusetts, 745
- Panama Refining Co. v. Ryan, 423, 428, 447
- Paralyzed Veterans of America v. D.C. Arena L.P., 364
- Park v. Volpe, 640, 763, 771, 772
- Paul v. Davis, 92
- Paul v. United States, 456
- Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp., 746
- Peckham, Commonwealth v., 192
- Peer v. Griffeth, 158
- Penasquitos Village, Inc. v. NLRB, 639
- Pennsylvania v. Trump, 374
- Pension Benefit Guaranty Corporation v. LTV Corp., 260
- Perez v. Mortgage Banker’s Ass’n, 364, 467, 723
- Perkins v. Lukens Steel Co., 371
- Perkins, United States v., 572
- Permian Basin Area Rate Cases, 771
- Perry v. Sindermann, 81
- Pharmaceutical Research and Manufacturers of America v. Thompson, 721
- PHH Corp. v. Consumer Financial Protection Bureau, 588
- Pickus v. United States Board of Parole, 354, 355
- Pillsbury Co v. FTC, 238, 396
- Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio Supreme Court, 335
- Plaut v. Spendthrift Farm, Inc., 452
- Policy & Research, LLC v. U.S. Department of Health & Human Services, 819
- Porter v. Califano, 640, 642
- Portland Audubon Society v. Endangered Species, 231
- Portland Cement Ass’n v. Ruckelshaus, 308, 317
- Posy, Adoption of, 46
- Procurier v. Navarette, 480
- Professional Air Traffic Controllers Org. v. Federal Labor Relations Authority, 218
- Public Citizen v. Steed, 798
- Public Citizen, Inc. v. Trump, 605
- R.A. Holman & Co. v. SEC, 62
- Raines v. Byrd, 422
- Rathke v. Corrections Corp. of America, 978
- Regents of the University of California v. U. S. Department of Homeland Security, 20
- Reno v. Catholic Social Services, 886
- Resnick v. Hayes, 114
- Reynolds v. United States, 366, 443
- Reynolds, United States v., 366
- Richardson v. Belcher, 122
- Richardson v. McKnight, 475
- Richardson v. Perales, 123, 187, 204, 641

- Robins v. Spokeo, Inc., 848  
Robinson v. California, 16  
Robledo-Soto v. Lynch, 810  
Rochin v. California, 16, 67  
Roelofs v. Secretary of Air Force,  
252  
Romer v. Evans, 612  
Rutherford, United States v., 681  
Saginaw Broadcasting v. FCC, 629  
Salerno, United States v., 115  
San Francisco v. Whitaker, 295  
Sandin v. Conner, 104  
Scott v. United States, 473  
Seacoast League v. Costle, 175, 178,  
184  
Sealed Case, In re, 530  
Securities & Exchange Comm'n v.  
Chenery Corp., 247, 256, 377, 383,  
384, 386, 387, 389, 716, 717, 766,  
772, 774, 789  
Shelley v. Brock, 811  
Sherbert v. Verner, 61  
Sherrill v. Knight, 131  
Sibley v. U.S. Dept. of Educ., 179  
Sierra Club v. Costle, 256, 344, 346,  
402, 614, 642  
Sierra Club v. FERC, 854  
Sierra Club v. Morton, 825  
Simpson v. Brown County, 130  
Skidmore v. Swift and Co., 642, 651,  
707, 710, 712, 713, 718, 735, 739  
Slochower v. Board of Higher  
Education, 61  
Smiley v. Citibank (South Dakota),  
N.A., 718, 748, 783  
Smith v. Berryhill, 871  
Social Security Bd. v. Nierotko, 700  
Socialist Workers Party v. Illinois  
State Bd. of Elections, 11  
South Chicago Coal & Dock Co. v.  
Bassett, 646  
Speiser v. Randall, 61  
Spokeo, Inc. v. Robins, 845  
Springer v. Philippine Islands, 521  
Stanchich, United States v., 259  
Standard Oil Co. of California v.  
United States, 396  
State ex rel. (See Name of Relator)  
State Railroad Tax Cases, 10  
State v. (See Name of State)  
Stearn v. Dep't of Navy, 161  
Steel Co. v. Citizens for a Better  
Environment, 894  
Stern v. Marshall, 452  
Sugar Cane Growers Cooperative of  
Florida v. Veneman, 296  
Sullivan v. Everhart, 674  
Sunshine Anthracite Coal Co. v.  
Adkins, 457  
Swanigan v. City of Chicago, 42  
Telecommunications Research &  
Action Committee (TRAC) v.  
FCC, 355, 896  
Texaco, Inc. v. FTC, 234  
Texas v. EEOC, 871  
Texas v. United States, 542, 810, 866  
Texas, United States v., 810  
Ticor Title Insurance Co. v. Federal  
Trade Commission, 887  
T-Mobile South, LLC v. City of  
Roswell, 640  
Toilet Goods Association v. Gardner,  
882  
Trump v. Deutsche Bank AG, 423  
Trump v. Hawaii, 238, 251, 611  
Trump v. Mazars USA, LLP, 423  
Trump v. Vance, 423  
Turlock Irr. Dist. v. FERC, 825  
Turner v. Rogers, 128, 151  
TVA v. Hill, 661  
U.S. Army Corps of Engineers v.  
Hawkes Co., 871  
United Public Workers v. Mitchell,  
49  
United States Department of Labor v.  
Kast Metals Corp., 356  
United States ex rel. (See Name of  
Relator)  
United States Lines, Inc. v. FMC, 341,  
342

- United States Steelworkers of  
America v. Marshall, 335
- United States v. (See Name of  
Defendant)
- Universal Camera Corp. v. Labor  
Board, 627, 631
- USA Grp. Loan Servs., Inc. v. Riley,  
346, 348
- Utility Air Regulatory Group v. EPA,  
455, 456, 694, 695, 742, 744
- Vander Jagt v. O'Neill, 828
- Vermont Yankee Nuclear Power  
Corp. v. NRDC, Inc., 256, 263,  
318, 336, 365, 764, 774, 775, 782
- Veterans for Common Sense v.  
Shinseki, 153, 154
- Veterans Justice Grp., LLC v. Sec'y of  
Veterans Affairs, 150
- Village of (See Name of Village)
- Virginia Petroleum Jobbers  
Association v. FPC, 956
- Walling v. Jacksonville Paper Co.,  
652
- Walters v. National Association of  
Radiation Survivors, 147, 154, 155,  
158
- Washington Metropolitan Area  
Transit Commission v. Holiday  
Tours, Inc., 957
- Washington v. Glucksberg, 731
- Washington v. Harper, 114
- Wayman v. Southard, 423, 443
- Webster v. Doe, 811
- Wein, State v., 115
- Weinberger v. Hynson, 180
- Weiss v. United States, 536
- West Chicago, City of, v. NRC, 179
- West Virginia ex rel. Morrissey v. U.S.  
Dep't of Health & Human Servs.,  
866
- White v. Ind. Parole Bd., 207
- Whitman v. American Trucking  
Associations, Inc., 437, 463
- Wieman v. Updegraff, 49
- Wiener v. United States, 561
- Wilkie v. Robbins, 483, 484
- Wilkinson v. Austin, 111, 113
- Williams v. Pennsylvania, 210
- Williamson County Regional  
Planning Comm'n v. Hamilton  
Bank of Johnson City, 877
- Wisconsin Central Ltd. v. United  
States, 676
- Withrow v. Larkin, 201, 209
- Wolff v. McDonnell, 105
- Wong Wing v. United States, 116
- Wong Yang Sung v. McGrath, 167
- WWHT, Inc. v. FCC, 811
- Wyatt v. Cole, 476
- Yakus v. United States, 62, 452
- Young v. Community Nutrition  
Center, 662
- Youngberg v. Romeo, 15
- Youngstown Sheet & Tube Co. v.  
Sawyer, 409, 422, 521, 580, 590
- Zen Magnets, LLC v. United States  
of Am. Consumer Prod. Safety  
Comm'n, 344

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ALFRED C. AMAN, JR.

## NOTE:

We have edited cases liberally to keep the casebook as reasonable in length as possible, while also showcasing the judges' rationale to allow students to see for themselves how jurists at all levels of the judicial system approach administrative law. To that end, however, citations and footnotes are generally omitted without notation. Note numbers within cases are continuous with chapter notes. We encourage instructors and students interested in the cases to peruse the full cases, including those provided in the online supplement.



# Introduction

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## A. Administrative Law

Administrative law provides the broad legal framework that structures and controls the exercise of administrative agency power. It also includes legislative, executive, and judicial oversight of agency discretion. It thus connects the implementation of governmental authority to procedural and constitutional principles. In so doing, it facilitates agency actions while also regulating the regulators to ensure that they act within legal boundaries set by the Constitution, applicable statutes, and their own regulations.

Administrative agencies consist of almost any governmental body that exercises regulatory power over individuals or entities, dispenses benefits to individuals or entities according to their legal entitlements, and otherwise implements laws enacted by lawmakers. *Lawmakers* include not only members of Congress and state assemblies, but also local zoning boards, state welfare agencies, federal cabinet level agencies (such as the Department of Labor), free-standing executive agencies (such as the Environmental Protection Agency), and multimember independent commissions (such as the Federal Communications Commission and the Federal Energy Regulatory Commission). The power that administrative agencies exercise is derived from the Constitution and federal, state, or municipal legislation. This book will focus primarily on the powers and actions of federal agencies, but will do so in a manner that is applicable, in principle at least, to state and local agencies as well.

Administrative law is distinct from other areas of law. Not only do agency statutes, structures, and responsibilities vary widely, but agencies are expected to develop and utilize subject-matter expertise in order to best achieve both broad and specific statutory objectives. Legislators and judges are generalists with limited time and expertise; however, industries and subjects have unique technological and business characteristics, risks, and potential public impacts, all of which need to be understood in order to implement regulation effectively. By creating expert agencies, legislatures can balance general principles and specific needs—the basis for intelligent laws that establish standards, policies and administrative structures, while empowering administrators to define and adjust regulatory details, based on evolving facts and knowledge, in order to implement those statutory policies. Because an agency's actions will often affect the public at large or entire industries, the processes for gathering and evaluating evidence and for making decisions follow

administrative rules and norms. These administrative processes often differ from the judiciary's litigation model.

The delegation to expert agencies of responsibility for implementing and, in many cases, filling out details of broadly worded statutory provisions, presents one of the key issues for congressional and judicial review. Neither a traditional majoritarian legislative body nor the judiciary is designed to act with the flexibility and expertise that is required to respond to rapid advancement in science, sudden shifts in market behavior, or public health crises, to name just a few examples. At the same time, both the legislature and the courts must oversee the actions of administrative agencies to ensure that their actions remain within the boundaries of their authorizations, both procedurally and substantively. Legislators can correct erroneous actions by oversight and, if necessary, by amending or repealing applicable laws.

Lacking both technical expertise and law-making responsibilities, judges face a different situation. The central challenges in judicial review are how to review an agency's actions in light of applicable statutes, the agency's record and explanations for its actions, and how much deference to pay to those judgments. Notwithstanding a judge's personal opinions, it is the agency to which the legislature delegated the decisional authority. Deference is due to the agency provided that its actions are authorized by law, *i.e.*, provided that its actions advance statutory goals consistent with the terms of applicable statutes and the facts available to it, and provided that the agency follows proper procedures and reasoned decision making in reaching its decisions. As we shall see, judicial approaches to review and deference have changed and fluctuated over time in response to such factors as technological change and shifts in social norms, including norms of executive power. Administrative agencies are part of the executive branch and that branch may seek to influence their policies through executive orders, the appointments process or less formal ways of furthering an administration's policies and goals.

In a country with a large population and complex economic and social relationships, administration of national and state laws is a complicated undertaking. In practice, the agencies rely heavily on their professional staff to provide the expertise upon which their policies and decisions are made. Herein lies one of the most important differences between administrative law and traditional judicial litigation, important in both theory and practice. Administrative decisions are the product of multi-faceted agencies—bureaucracies. In civil or criminal litigation, both the record and the decision makers are clearly identified and visible to the litigants. Although some administrative adjudications are conducted before an administrative law judge (“ALJ”), as we study in Chapter 3, and therefore closely resemble judicial litigation, others are far more complex. Agency decisions are often the products of teams of individuals who provide data, analysis, drafting, and policy and legal recommendations to the administrator or commission. The staff contributing to the decision will usually be divided into offices based upon substantive responsibilities (*e.g.*, legal, industry, technology, environmental, economic, and enforcement), which may in turn be divided into areas of expertise (addressing distinct environmental



issues, such as water, air, land, species, mitigation technology, etc.). To those levels of bureaucracy, one must add the personal advisory staff to the administrator or the commissioners who bear ultimate responsibility for an agency's decisions. In addition, an agency may have a trial staff, an investigatory staff, its own solicitor's office (to handle judicial review proceedings), a secretary's office to process and maintain records, and a public relations office. If the agency is headed by a commission, the chair will be particularly important in setting priorities and overseeing the staff.

But what happens when agencies lack some of these important pieces? For example, imagine the Environmental Protection Agency with no biology experts or with a depleted enforcement staff. Or suppose instead that these agencies were nominally staffed, but rather than carrying out their statutory mandate, the staffers were forced to reverse positions supported by science and research and instead defend theories or policies supported mainly by campaign promises. Statutes themselves may drift away from solid foundations in research-based evidence as lawmakers find themselves navigating strong political currents. Over the course of a career in administrative law, you may encounter agencies which are running at less than full capacity or whose new leadership is determined to shift the agency's direction, possibly counter to statutory policies with which it disagrees. Judicial review can be made more complex and more important by such circumstances.

## B. Organization of This Book

This section provides a brief overview of the book that will also be useful as guidance to the rest of this chapter.

Part One (Chapters 1 to 4) reviews how agencies operate, how they obtain and process information important to their decisions, and how they implement statutory policies in light of relevant factual and policy considerations.

As laid out in Part One of this book, administrative agencies exercise their powers in a variety of ways. They may issue orders, rules, interpretations, policies, rulings, exceptions, and licenses to name but a few. For example, agencies may do this in the context of adjudicating disputes arising from the application of their regulatory powers to those within their jurisdiction; those adjudications may be formal pursuant to the Administrative Procedures Act (APA) or informal, pursuant to the APA, the agency's enabling statute, or other statutes that may apply. Adjudications must also accord with the Due Process Clause of the U.S. Constitution. Agencies may also, for example, make rules and create policies to carry out their statutory goals. Those rules may be made pursuant to rulemaking proceedings open to the public in general or they might be the result of guidance documents and interpretations of agency statutes or regulations already in place and subject, at that point, to less public involvement. We shall examine rulemaking and its many exceptions in Chapter 4, *infra*. In short, an important first question for us is whether the agency in question exercised its power legally. When we look at how an agency operates within its own

walls, what is procedurally required for that agency to exercise its power in a legitimate way? How much public participation is allowed or required so as to protect the interests of those most directly affected by agency decisions?

Part Two of this book (Chapters 5 to 8) looks to structural and constitutional issues, including the sources of agency powers and how agencies are subject to outside review and influence by the legislative, executive, and judicial branches of government. It examines the means by which legislative, executive, and judicial powers are exercised over and through administrative agencies. The principles underlying federal administrative law are fundamental to the structure of federal government in the United States, particularly regarding the separation of powers and the relative authority of the three branches of government vis-a-vis each other. Those principles have generated extensive debate, since administrative agencies by definition involve intersecting grants of authority (*e.g.*, as executive agencies governed by Congressional statute) and, inevitably, those intersections yield gray zones when it comes to constitutional coverage. Moreover, the role of these branches of government vis-à-vis federal administrative agencies has changed over time, as has the nature of agency regulation. The second half of this book thus looks outside the walls of the agency as it examines legislative, executive, and judicial powers over these entities.

While questions of legal theory and application are addressed throughout this book, Part Three (Chapter 9) focuses directly on how lawyers actually practice administrative law.<sup>1</sup> Agencies often have flexibility to revise their interpretations of laws and their manner of implementing them in order to better achieve a statute's objectives in light of new facts, understandings, and forecasts of how policies will function in the future. The variety of fields subject to regulation presents a wide array of opportunities to join policy analysis with more traditional skills of legal practice. With that in mind, Part Three offers insights and practical exercises designed to give students a feel for how lawyers approach regulatory and judicial review proceedings. In some instances, it highlights the different vantage points of serving as a lawyer for the agency or one for a private client. Whether or not particular exercises are assigned, you will benefit from reviewing relevant portions of Part Three as you are reviewing the underlying doctrinal issues found in Parts One and Two. The combination can help you to better understand how administrative law plays out in practice. As explained in Part Three, some of the materials relevant to the exercises in this section are compiled in an online supplement. There also are online supplements for some of the chapters in Parts I and II as well.

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1. An earlier version of the problems and exercises in Part 3, Chapter 9, appeared in *Administrative Law: Skills and Values* (Lexis Nexis 2012). Carolina Academic Press acquired the rights to both this Administrative Law casebook and the Skills and Values book in 2015.

## C. Facing Forward by Looking Back

The first two editions of this book followed the change and controversies arising from the deregulatory and anti-regulatory trends of the 1970s and 1980s, and the neoliberalism of the 1990s and 21st century. Those debates continue. The third edition reflected the then-emerging trend towards privatization and marketization of governmental services. That trend is now well established, and public/private partnerships, outsourcing, and various forms of deregulation are now pervasive. A purely state-centric approach to administrative law is insufficient, as administrative law today must mediate public and private power in novel ways, the implications of which can be far reaching, debilitating democracy and increasing transparency deficits. These new arrangements of power and authority across the lines between government and the private sector are reflected throughout this edition, particularly in Chapter 5, §§ 5.07 through 5.08.

You will notice that many of the cases we use have been precedents and guideposts in administrative law for many, many years. This is deliberate, as there is a method in such turning to the past. Most of these cases remain good law, and we think it especially important to show how they apply today. But they also show how law has evolved—sometimes changing dramatically. Progress is not at all inevitable, but change is. Looking to the past as we move toward the future teaches us how change can and does occur through the professional work of legislators, administrators, staffers, advocates and other actors. It also brings us into contact with approaches and doctrines that may no longer be prominent but remain available, sometimes just below the surface, ready to reemerge in new contexts. For example, the rights/privileges distinction we analyze in Chapter 2 is one of those doctrines that has a way of reinventing itself—and not always in a manner that advances the public interest. If one qualifies for a welfare payment today, can it be taken away by imposing a work requirement that may not be possible to meet? At what point does the right to a benefits payment turn into a “mere privilege”? Lawyers are like archeologists in that they often must dig down several layers of historical case law to find parallels in old arguments, available for reuse in new doctrinal debates.

There is another way we can learn from older cases that came into being at different moments in history. At least since the mid and late 1970s, administrative law and regulation in general have taken a distinct turn toward cost-benefit analysis. Efficiency has emerged as an important norm, sometimes to the extent that it seems to outweigh all other considerations—especially those that do not lend themselves to quantifiable analysis. The need for certainty and the appearance of objectivity, even in areas fraught with judgment and discretionary choices, can render some judgments almost too personal when compared with a desire for hard-nosed cost data and objective metrics. In Chapter 2, for example, there is quite a change in the reasoning and language of due process as expressed first in *Goldberg v. Kelly* and later in the landmark case of *Mathews v. Eldridge*. Both cases involve benefits payments to individuals in need—“brutal need” in the case of welfare recipients

and more varied financial circumstances in the case of disability benefits. *Goldberg* talks about how procedure can provide individuals with dignity. *Matthews* dwells more on procedural efficiency, especially where issues of mass justice are involved. Read together, the cases allow us to see values, choices, and trade-offs that would not otherwise be visible. We think it is important both to realize that decisions can always have been otherwise and to ask what might have been left behind that remains doctrinally available for future use—a kernel of a dignity argument, in this example, remaining alive within an efficiency argument. Indeed, it is important to realize that administrative law is not just about the administration of technical details, it often involves fundamental conflicts of value and fundamentally different understandings of legitimate governmental power. Administrative law, for better or for worse, serves as a battleground for these considerations.

## D. Administrative Law Values

Administrative law is a dynamic field of law. It has long functioned as the canary in the coal mine in relation to democratic and social values. Democracy is not limited to electoral voting alone. Participation, transparency, and access to information at the agency level all greatly enhance the accountability of agencies and government generally. Administrative procedures facilitate both the citizen participation and flows of information necessary for this effectively to occur. They are also designed to keep bureaucrats within legal boundaries as established by lawmakers. Still another fundamental value of administrative law is fairness—in terms of how these processes operate in individual cases as well as the outcomes they help deliver.

These procedures are not just for solving technical problems. They provide the means and the forum for important disputes to be resolved in a way that involves multiple forms of expertise—including ethical judgment. Recent examples include the cumulative health risks and risk of death to children exposed to air pollution in American cities, and, along the southwestern border, in migrant detention camps with inadequate medical attention. In such cases, the procedures used to resolve policy disputes involve conflicts over fundamental values concerning justice and the common good. Acknowledging such conflicts and providing for informed deliberation are commitments of administrative law that are central to democratic life.

In U.S. democratic traditions, accountability flows from the state-centric nature of administrative law and agencies as well as from constitutional law. The Constitution and critical “quasi-constitutional” legislation, such as the Administrative Procedures Act, are written to apply to state actors and government agencies. But—looking forward—as policy decisions increasingly involve the private sector, this may not be enough.

There has been a dramatic expansion of the role of private actors in carrying out governmental functions, largely through deregulation, outsourcing, and marketized approaches to regulation. Business norms and market values have become

central even to non-economic institutions such as welfare, prisons, and safety net regulation generally. Many administrative agencies now regularly form contracts with private parties, specifying terms at the outset, and maintaining a certain degree of supervisory authority. We shall explore these and related issues in Chapter 5, § 5.08(A)-(E).

Another aspect of modern administrative law is its increasingly transnational character. Not only is the substance of regulation affected by activities in other countries, but the private actors involved are increasingly transnational too. This affects both public/private partnerships and the constitutional posture of agencies. Many of the private providers contracted to perform administrative agency functions, such as the construction and management of prisons or the administration of welfare, are transnational corporations. The expansion of the transnational sector in relation to government effectively makes transnationalism an integral part of domestic administrative law, even as the legal structures have often been slow to acknowledge and adapt to the unique challenges of transnationalism. The economic interests of these entities may drive their desire for uniform market approaches in the various jurisdictions in which they operate globally. There is an international aspect to administrative law as well, especially when the executive and often the legislative branches of government choose to pool their powers at the international level in the form of a treaty, such as that which binds the U.S. to the World Trade Organization (WTO), the Montreal Protocol, or the Paris Accords on climate change. When we look at what the transnational and the international levels of regulation involve, we see, in effect, two delegations of power: a horizontal delegation of governmental power to the private sector, and a vertical delegation of power to what has been called the “international branch” of government in the form of binding treaties. These delegations and the administrative law issues they trigger are discussed in Chapter 5, § 5.09.

Several fundamental premises of administrative law are showing signs of tension, and our discussion of practical problems of application underscore the possibilities for extending, and perhaps reimagining, aspects of administrative law particularly where the public interest is vested in private providers and international organizations. The stakes are especially clear in several key areas where traditional premises are challenged by modern circumstances, *e.g.*: (1) the state-centric nature of administrative law, as if there were always a bright line distinguishing public and private power—that is, as if states and markets were two separate structures; (2) the long-standing assumption that there is a bright line between transnational law and domestic law, neglecting the extent to which domestic administrative law is increasingly the domestic face of globalization; and (3) the assumption that cost-benefit analysis is universally applicable.

This book develops approaches to these problems in a way that highlights the fundamental values of administrative law, though they now may need new structures and rationales to thrive. These changes in perspective also enable us to focus on the practical aspects of such change and, specifically, on the people on the ground who

are directly affected by agency action or inaction. To that end, we offer a hands-on approach for preparing students for the practice of administrative law. By taking such a ground-up, practice-oriented approach, we demonstrate that practice and theory are two sides of the same coin.

## E. Context and the Limits of Binary Thinking

In addition to considering the underlying theoretical bases of the administrative processes we discuss, we must also consider the context in which these processes occur. Context can mean many things, from the substance of the statutes being administered and the values and goals those laws embody to the overall political economy in which these statutes are administered. In determining the kinds of procedures appropriate to the substance of the regulation involved, consider the words of the artist Ben Shahn, in *THE SHAPE OF CONTENT* 62 (Harvard Univ. Press 1957). To what extent do form and content in art correspond to procedure and substance in law?

I would not ordinarily undertake a discussion of form in art, nor would I undertake a discussion of content. To me, they are inseparable. Form is formulation—the turning of content into a material entity, rendering a content accessible to others, giving it permanence, willing it to the race. . . .

It is the visible shape of all man's growth; it is the living picture of his tribe at its most primitive, and of his civilization at its most sophisticated state. Form is the many faces of the legend—bardic, epic, sculptural, musical, pictorial, architectural; it is the infinite images of religion; it is the expression and the remnant of self. Form is the very shape of content.

Form and content, procedure and substance go hand in hand. Similarly, the means and ends of regulation are often indistinguishable from each other. The regulatory means by which substantive statutory goals are carried out have much to do with what those goals are and how successfully they are achieved. For example, some regulatory approaches may try to directly specify how a company should ensure a safe working place or a clean environment. Other regulatory approaches, however, may try to rely on market forces to provide incentives for the kinds of behavior regulators seek to encourage. The choice of regulatory means often affects not only how well the regulatory ends are achieved, but what these regulatory ends will be. In some contexts, it is important to ask when the market can function effectively as a regulatory tool or when the use of market means is, in fact, an attempt to alter the regulatory ends of the statute involved.

Perhaps among the most significant factors affecting not only the substance of regulation, but also the way we view the entire enterprise, are the changes that have occurred and continue to occur in the overall global context in which domestic regulation now takes place. We are now in a new era of our regulatory history, a global era. In this era, we are witnessing not only the globalization of politics and markets,

but law as well. Changes in the political economy at the global level can encourage profound contextual changes at the domestic level. How should we view agency deregulation from the 1980s and 1990s? Does the substitution of market approaches for regulation signify a return to a red light conception of administrative law, or does it simply reflect the use of a new, more efficient regulatory means in an effort to achieve long-standing regulatory goals in a more global context? Can the market be used as a regulatory tool? Does it allow us to do more with less when it comes to regulation in times of budgetary crises, or do these new regulatory means introduce new regulatory ends as well? Consider the following:

Global competition drives deregulatory forces more vigorously than regional or national markets can. It places the costs of domestic regulation in stark relief, whether or not new competition-encouraging technologies are involved or true market failure, in fact, persists. A global perspective on domestic regulation encourages a more cost conscious regulatory perspective and often reinforces the increasingly global, market oriented perspective of the regulated. Moreover, whether a regulation deals primarily with economic conflicts of interest rather than fundamental conflicts of value is of less importance when a global perspective is involved. The inability of regulators to impose regulation on producers worldwide emphasizes the domestic impact of regulatory costs. . . .

Global competition creates pressure for a least common denominator regulatory approach. Such pressure is similar to the political forces that affected state and local regulation before the regulatory nationalism of the New Deal. National regulation came about, in part, because certain problems were beyond the jurisdiction of individual states. In addition, states often had significant incentives to avoid regulation that would increase manufacturing costs and put local industry at a competitive disadvantage. Moreover, it was perhaps easier for opponents to block regulatory attempts at the state or local level than at the national level. Global pressures favoring a more economical, cost-conscious form of regulation need not necessarily translate into a return to *laissez faire*, but they can encourage an identification of deregulation with “the public interest.”

ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA*, 78-79 (Cornell University Press 1992).

As we proceed with this course and examine various kinds of regulation, including deregulation and privatization and especially the procedures used to achieve these ends, it is important to ask what role market approaches are now playing. For an analysis of some of those issues, see Alfred C. Aman, Jr., *Politics, Policy and Outsourcing in the United States: The Role of Administrative Law*, in *ADMINISTRATIVE LAW IN A CHANGING STATE* 205, 207–08, 218 (Linda Pearson, Carol Harlow & Michael Taggart eds., Hart Publishing 2008).

