

Contents

Preface to Seventh Edition

xvii

Chapter I	Introduction to Administrative Law	I
	I. Administrative Law—The Course	1
	II. Overview of the History of Administrative Law	2
	III. Overview of the Administrative Structure	5
	A. Agencies Generally	5
	B. Independent Regulatory Agencies	7
	C. Government Corporations	11
	IV. What Agencies Do and How They Do It	11
	A. What They Do	11
	B. How They Do It	13
	V. The Role of the Courts	16
	VI. States in the Federal Administrative Law System	19
	VII. State Administrative Law	21
	VIII. The Organization of This Book	22
Chapter 2	How Agencies Fit into Our System of Separated Powers	25
	I. Introduction	25
	II. Delegation Doctrine	30
	A. Legislative Powers	31
	B. Adjudicative Powers	37
	III. Different Branches' Roles	43
	A. Congress	43
	1. Congressional Appointment	44
	2. Legislative Membership on Administrative Bodies	46
	3. Congressional Removal of Officers	48
	4. Legislative Veto	49
	5. Legislative Review and Oversight	51
	B. The President	54
	1. Appointment	55
	2. Removal	63
	3. Supervision	70
	4. Line Item Veto	71

Contents

Chapter 3	Adjudication	73
	I. The Subject Matter of Adjudication	74
	II. Formal and Informal Adjudication	78
	A. Formal and Informal Adjudication in the States	82
	III. The APA Procedures for Adjudication	82
	A. Notice Requirements	83
	B. The Burden of Proof	83
	C. Rules of Evidence	85
	D. The Role of the ALJ	87
	E. The Course of the Proceeding	88
	F. The Role of the Agency	89
	G. Ex Parte Communications—5 U.S.C. § 557(d)	91
	H. Separation of Functions—5 U.S.C. § 554(d)	92
	1. Formal Adjudication in the States	98
	IV. Procedures for Informal Adjudication	99
	V. Procedures Applicable to All Proceedings	100
	VI. Alternative Dispute Resolution (ADR) and Administrative Law	101
	VII. Licensing	102
Chapter 4	Due Process	105
	I. Is Due Process Required at All?	106
	A. History	107
	B. Modern Due Process	108
	1. Modern Concept of “Property”	109
	2. Modern Concept of “Liberty”	113
	a. Liberty and Reputation	113
	b. Liberty and Correctional Facilities	117
	II. What Process Is Due?	119
	A. Historically	119
	B. The Modern Rule	121
	C. Particular Requirements	129
	1. The Need for an Impartial Judge	130
	2. Ex Parte Communications	134
Chapter 5	Rulemaking	137
	I. The Nature of Rules	137
	A. “Rule” Under the APA	138
	B. Legislative and Nonlegislative Rules	141
	C. Rules v. Orders	142
	II. Beginning Rulemaking	144
	III. Rulemaking Procedures	146

Contents

A. Rules Exempt from Section 553	148
1. The Military and Foreign Affairs Exemption	148
2. The Exemption for Matters Involving Agency Management or Personnel, Public Property, Loans, Grants, Benefits, and Contracts	150
B. Rules Excepted from Section 553’s Notice-and-Comment Requirements	152
1. Interpretative Rules, General Statements of Policy, and Procedural Rules	153
a. Interpretative Rules	153
1. The Substantial Impact Test	154
2. The “Legally Binding” or “Force of Law” Test	155
a. Whether in the absence of the rule there would not be an adequate basis for enforcement action or other agency action to confer benefits or ensure the performance of duties	156
b. Whether the rule interprets a legal standard or whether it makes policy	157
c. If the agency is interpreting a legislative rule, whether the claimed interpretative rule is consistent with the legislative rule it is supposedly interpreting	160
d. Whether the agency contemporaneously indicated that it was issuing an interpretative rule	161
e. Whether the person signing the agency document had the authority to bind the agency or make law	161
f. Doubtful factors	162
g. Conclusion	163
b. General Statements of Policy	163
c. Rules of Agency Organization, Procedure, or Practice	169
1. Substantial Impact Test	170
2. “Encoding a Substantive Value Judgment” Test	171
2. When the Agency Finds for Good Cause That Notice and Public Procedures Are Impracticable, Unnecessary, or Contrary to the Public Interest	172

Contents

C.	The Procedures for Formal Rulemaking	174
D.	The Procedures of Notice-and-Comment Rulemaking	178
1.	The Notice	178
2.	The Comment	180
3.	The Final Rule	181
4.	The “Logical Outgrowth” Test	182
E.	Procedures for Rules Not Subject to Formal Rulemaking or Notice-and-Comment Rulemaking	185
F.	Negotiated Rulemaking	186
G.	Constitutional and Other Judicially Created Procedural Requirements	188
1.	Ex Parte Communications	190
2.	Decision Makers’ Bias or Prejudice	191
3.	Undue Influence	193
H.	Other Administratively or Statutorily Required Procedures—Hybrid Rulemaking	195
1.	Executive Orders	197
2.	National Environmental Policy Act	201
3.	Regulatory Flexibility Act	201
4.	Unfunded Mandates Reform Act	203
5.	The Paperwork Reduction Act	203
6.	Congressional Review	204
7.	Information Quality Act	205
8.	Conclusion	205
Chapter 6	The Availability of Judicial Review	207
I.	Reviewability Generally	208
A.	Jurisdiction—Statutory Jurisdiction	208
B.	Jurisdiction—Standing	210
1.	Constitutionally Required Standing	211
a.	Injury for Standing	213
1.	Recreational, Aesthetic, or Environmental Injury	213
2.	Risk as Injury	215
3.	Fear as Injury	220
4.	Procedural Injury	220
5.	Informational Injury	222
6.	Other Widely Shared Injuries	224
7.	States as Plaintiffs	225
b.	Causation for Standing	226
1.	Procedural Violations and Causation	226
2.	Third-Party Actions and Causation	228
3.	Contribution as Causation	229

Contents

c.	Redressability for Standing	230
1.	Third-Party Actions and Redressability	230
2.	Procedural Violations and Redressability	231
3.	Partial Redress or Avoidance	232
2.	Representational Standing	232
3.	Prudential Standing	233
II.	Exceptions to Judicial Review Under the APA	234
A.	Statutory Preclusion	235
B.	Committed to Agency Discretion by Law	238
III.	Requirements for Judicial Review Under the APA	241
A.	Causes of Action and the Zone of Interests	241
B.	Agency Action	247
IV.	Problems of Timing	249
A.	Final Agency Action	250
B.	Exhaustion of Administrative Remedies	256
C.	Ripeness	263
D.	The Special Case of Structural Constitutional Claims	270
V.	Primary Jurisdiction	271

Chapter 7 The Scope of Judicial Review 273

I.	Review of Questions of Law	274
A.	Statutory Interpretation	275
1.	The Major Questions Doctrine	280
B.	Interpretation of Rules	283
II.	Substantial Evidence Review	286
A.	When Does a Court Review for Substantial Evidence?	286
B.	What Does Substantial Evidence Mean?	286
C.	Substantial Evidence Review in Hybrid Rulemaking	294
III.	Arbitrary and Capricious Review	295
IV.	De Novo Review	305
V.	Review of Agency Action Unlawfully Withheld or Unreasonably Delayed	306
VI.	Remedies	309
A.	Agency Inaction	309
B.	Remand Without Vacating	310
C.	Universal Injunctions	312
VII.	Equitable Estoppel	313
VIII.	The Effect of Judicial Decisions	315
A.	Res Judicata and Collateral Estoppel	315
1.	Against Parties Suing the Government	315
2.	Against the Government	316
B.	Non-Acquiescence	316

Contents

Chapter 8	Government Acquisition of Private Information	319
	I. Introduction	319
	II. Legal Limits on Government Acquisition of Private Information—In General	320
	III. Administrative Inspections—Fourth Amendment Limits	322
	IV. Obtaining Documents and Testimony	328
	A. Reporting Requirements	328
	1. Paperwork Reduction Act	329
	2. Subpoenas	334
	B. Fourth Amendment Limits on Reporting Requirements and Subpoenas	336
	C. Fifth Amendment Limits on Reporting Requirements and Subpoenas	342
Chapter 9	Public Access to Government Information	347
	I. Introduction	347
	II. Freedom of Information Act	348
	A. In General	348
	B. Exemptions	356
	Exemption 1	361
	Exemption 2	363
	Exemption 3	365
	Exemption 4	369
	Exemption 5	372
	Exemption 6	375
	Exemption 7	379
	III. Government in the Sunshine Act	385
	IV. Federal Advisory Committee Act	389
	V. The Privacy Act	397
	A. General Rule Against Disclosure	397
	B. Exceptions	398
	C. Other Functions	399
	D. Judicial Relief	399
	E. Summary	400
	<i>Table of Cases</i>	405
	<i>Index</i>	413