

Table of Contents

<i>Preface</i>	Page vii
<i>Summary Table of Contents</i>	ix
<i>Table of Cases</i>	xxv

PART ONE—ADMINISTRATIVE PROCESS

Chapter 1. An Introduction to the Administrative Process	1
I. Historical Growth of Administrative Agencies and Administrative Law	1
II. The Sample Agencies: The Department of Health and Human Services (The Food and Drug Administration); The Federal Trade Commission; and the National Labor Relations Board ..	5
A. The Food and Drug Administration of the Department of Health and Human Services	5
1. The History of HHS	5
2. The Structure of HHS	7
3. The Food and Drug Administration	7
a. History and Scope of Authority	7
b. FDA Organization	9
c. Development of Agency Powers	12
d. The Food and Drug Administration's Rulemaking Procedures	15
e. Criticism of FDA	17
Rothschild, Food and Drug Law Institute's Briefing Session on FDA's Procedures and Practices, March 24-25, 1977, Washington, D.C.	18
B. The National Labor Relations Board (NLRB)	20
1. History and Development — Statutory Authority	20
2. Operation Today	21
a. Case-Handling Organization	21
b. Method of Operation	22
3. The Adjudicatory Process	23
a. The Office of General Counsel	24
b. The Board	24
4. Contemporary Criticism	25
a. Rulemaking v. Adjudication	27
b. "Trial by Ambush"	28
c. Administrative Delay	29
d. The General Counsel Complaint Issuance Authority ..	29
C. The Federal Trade Commission	31
1. History	31
2. Structure of FTC	33
3. FTC Practices and Procedures	36
a. Advisory Opinions	36
b. FTC Investigations	36
c. Adjudication	37
d. Rulemaking Procedures	37
4. Contemporary Criticism	37

	<i>Page</i>
5. Life as an FTC Staff Member (Being a Government Staff Attorney)	38
Notes	43
Chapter 2. Major Categories of Administrative Procedures	45
I. The Development of the Basic Procedural Concepts	45
SEC v. Chenery Corp. [Chenery I]	45
Notes	50
SEC v. Chenery Corp. [Chenery II].....	53
Notes	58
Industrial Union Department v. American Petroleum Institute	59
Note.....	60
Freedman, Crisis and Legitimacy: The Administrative Process and American Government 78-80, 93-94 (1978).....	60
II. Definition of the Procedural Categories	64
Association of National Advertisers, Inc. v. FTC	65
Notes	66
A. Distinction Between Rulemaking and Adjudication.....	68
United States v. Florida East Coast Railway Co.	69
Notes	71
B. Distinction Between Formal and Informal Procedures	77
1. Formal and Informal Adjudication.....	77
Attorney General's Manual on the Administrative Procedure Act	77
Note.....	79
Senate Committee on Governmental Affairs, Study on Federal Regulation, Vol. IV, 95th Cong., 1st Sess. (1977)	79
Note.....	89
Verkuil, A Study of Informal Adjudication Procedures, 43 University of Chicago Law Review 739 (1976).....	90
2. Formal and Informal Rulemaking	92
Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 California Law Review 1276 (1972)	92
Notes	93
United States Government Manual 1979-1980, 493-95 (GPO May 1, 1979)	94
Verkuil, Judicial Review of Informal Rulemaking, 60 Virginia Law Review 185 (1974).....	97
Notes	100
Chapter 3. Elements of Formal Procedure — Pre-Hearing	101
I. Commencement of the Adjudicative Effort.....	102
A. Initiation and Agency Power to Choose to Investigate	102
Standard Oil Co. of California v. FTC	102
Notes	106
Dunlop v. Bachowski	106
FTC v. Texaco	108
Notes	110
B. Pleading	111
Bendix Corp. v. FTC.....	111

	<i>Page</i>
Golden Grain Macaroni Co. v. FTC.....	114
Notes.....	117
C. Parties.....	118
Note.....	120
Moog Industries, Inc. v. FTC.....	121
Notes.....	122
Pepsico, Inc. v. FTC.....	122
Notes.....	124
D. Rights to Counsel.....	124
SEC v. Csapo.....	124
Notes.....	128
II. Pre-Hearing Practice.....	128
A. Discovery.....	129
FTC v. Gibson Products.....	130
Notes.....	136
1 C.F.R. § 305.70-4 Discovery in Agency Adjudication.....	140
Note.....	143
United States v. Nixon.....	144
Note.....	145
B. Pre-Hearing Conferences.....	147
E. Prettyman, Trial by Agency 24-25 (1959).....	147
Tomlinson, Discovery in Agency Adjudication, 1971 Duke Law Journal 89.....	147
Notes.....	149
Ruhlen, Manual for Administrative Law Judges 3 (1974).....	150
Notes.....	154
C. Consent Settlement.....	154
Johnson Products Co. v. FTC.....	155
Notes.....	160
Action on Safety & Health v. FTC.....	161
Note.....	162
D. Summary Judgment.....	162
Senate Committee on Government Affairs, Study on Federal Regulation, Vol. IV, 95th Cong., 1st Sess. (1977).....	163
Notes.....	167
1 C.F.R. § 305.70-3 Summary Decision in Agency Adjudication.....	168
Chapter 4. Elements of Formal Procedure — Hearing.....	171
I. Structure of the Hearing.....	171
A. Presiding Officers.....	171
Notes.....	172
Notes.....	174
Copley v. Richardson.....	174
NLRB v. Tamper, Inc.	176
Notes.....	179
1 C.F.R. § 305.71-1 Interlocutory Appeal Procedures.....	179
B. Influence and Bias.....	180
1. Separation of Functions.....	180
Grolier Inc. v. FTC.....	180
Notes.....	186

	<i>Page</i>
2. Prejudgment.....	187
Koch, Prejudgment: An Unavailable Challenge to Official Administrative Action, 33 Federal Bar Journal 218 (1974)	187
Notes	192
3. Ex Parte Communication	194
Seacoast Anti-Pollution League v. Costle	194
Notes	196
C. Intervention.....	197
MacIntyre & Volhard, Intervention in Agency Adjudications, 58 Virginia Law Review 230 (1972)	197
Notes	200
Clagett, Informal Adjudication — Rulemaking: Some Recent Developments in Federal Administrative Law, 1971 Duke Law Journal 51, 83-85.....	201
Note.....	202
II. Hearing Practice.....	202
A. Witnesses and Confrontation.....	202
1. Direct Examination.....	202
E. Prettyman, Trial by Agency 28-30 (1959)	202
Notes	206
2. Cross-Examination	206
Greene v. McElroy	206
APA, Legislative History 271 (1946)	207
Seacoast Anti-Pollution League v. Costle	208
E. Prettyman, Trial by Agency 30-35 (1959)	209
Gellhorn, Rules of Evidence and Official Notice in Formal Administrative Hearings, 1971 Duke Law Journal 1, 37	211
Notes	214
Carter Products v. FTC.....	217
B. Competent Evidence	218
Richardson v. Perales.....	220
Notes	226
C. Documentary Evidence	228
E. Prettyman, Trial by Agency 35-39 (1959)	228
D. Official Notice.....	230
Federal Rules of Evidence, Rule 201	230
Gellhorn, Rules of Evidence and Official Notice in Formal Administrative Hearings, 1971 Duke Law Journal 1	232
Notes	236
III. Post-Hearing.....	236
A. Decisions and Orders	237
Chrysler Corp. v. FTC	237
Standard Oil Co. v. FTC.....	240
Notes	243
B. Making a Formal Record	245
1. Burden of Proof	245
Samuel H. Moss, Inc. v. FTC.....	245
Notes	247

	<i>Page</i>
2. Presumption	248
Superak v. Califano	248
Note	252
3. Standard of Proof	252
Charlton v. FTC	252
Note	254
Steadman v. SEC	255
Note	260
4. Collateral Effect	261
Mosher Steel Co. v. NLRB	261
Notes	263
C. Administrative Appeal and Review	264
Cinderella Career & Finishing Schools v. FTC	264
ITT Continental Baking Co. v. FTC	268
Chrysler Corp. v. FTC	270
Notes	273
D. Enforcement and Compliance	275
United States v. Ancorp National Services, Inc.	275
United States v. J. B. Williams Co.	278
Notes	283
Chapter 5. Informal Adjudication	285
Fuller, The Forms and Limits of Adjudication, 92 Harvard Law Review 353 (1978)	285
I. When Are Special Procedures Required for Informal Action?	288
Goldberg v. Kelly	288
Notes	294
Board of Regents v. Roth	295
Rabin, Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44 University of Chicago Law Review 60 (1976)	299
Note	301
Mathews v. Eldridge	302
Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in <i>Mathews v. Eldridge</i> : Three Factors in Search of a Theory of Value, 44 University of Chicago Law Review 28, 57 (1976)	310
Rabin, Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44 University of Chicago Law Review 60 (1976)	318
Notes	321
II. What Procedures Are Required?	323
Goss v. Lopez	324
Notes	328
Mashaw, The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims, 59 Cornell Law Review 772 (1974)	330
Verkuil, A Study of Informal Adjudication Procedures, 43 University of Chicago Law Review 739 (1976)	331
Note	338

	<i>Page</i>
III. Actions for Denial of Informal Adjudicative Procedures	338
Carey v. Phipus	338
Notes	344
Chapter 6. Basic Elements of Rulemaking Procedure	347
I. Information Gathering	347
A. Initiation of a Rulemaking Proceeding	347
Schuck v. Butz	350
Natural Resources Defense Council, Inc. v. SEC	352
B. Notice	354
1. Notice of Proposed Rulemaking	354
Wagner Electric Co. v. Volpe	356
South Terminal Corp. v. EPA	357
Notes	360
2. Notice of the Information upon Which the Agency May Rely	361
Portland Cement Association v. Ruckelshaus	361
Note	363
United States v. Nova Scotia Food Products Corp.	363
C. Participation	367
1. The Nature of the Participation	367
International Harvester Co. v. Ruckelshaus	367
Notes	368
Friends of the Earth v. AEC	369
Notes	370
Vermont Yankee Nuclear Power Corp. v. NRDC	372
Notes	378
2. Adequate Representation	381
National Association of Independent Television Producers v.	
FCC	382
Cramton, The Why, Where and How of Broadened Public	
Participation in the Administrative Process, 60	
Georgetown Law Journal 525, 527-36 (1972)	384
Gage v. AEC	387
Notes	388
D. Compulsory Process in Rulemaking	390
Koch, Discovery in Rulemaking, 1977 Duke Law Journal 295,	
322-25	390
Notes	391
Association of National Advertisers v. FTC	394
Koch, Discovery in Rulemaking, 1977 Duke Law Journal 295,	
330-37	396
II. Decisionmaking	398
A. Bias and Influence	399
1. Separation of Functions in Rulemaking	399
Hoffmann-La Roche, Inc. v. Kleindienst	399
Note	402
Environmental Defense Fund v. EPA	402
2. Bias and Prejudgment	403
Association of National Advertisers, Inc. v. FTC	403
3. Ex Parte Communication	413
Home Box Office v. FCC	413

	<i>Page</i>
Action for Children's Television v. FCC	416
Notes	422
Hercules, Inc. v. EPA	426
Note	430
B. Record and Reasons	431
1. Rulemaking Record	431
National Nutritional Foods Association v. Mathews	431
Notes	433
2. Statement of Basis and Purpose	434
National Nutritional Foods Association v. Weinberger	434
Amoco Oil Co. v. EPA	436
Notes	439
C. The Final Rule	441
1. Content of Rules	441
K. Davis, Discretionary Justice: A Preliminary Analysis 59-64	
(1969)	442
Notes	445
G. Jones & E. Jones, The Importance of Plain English in	
Administrative Documents (1980)	447
2. Effective Date and Publication	460
National Association of Independent Television Producers &	
Distributors v. FCC	460
Notes	462
United States v. Gavrilovic	462
Note	467
III. After Promulgation	467
A. Petition to the Agency for Modification	468
1. Petition for Exemption and Individual Treatment	468
Clagett, Informal Agency Action, 1971 Duke Law Journal	
51, 81-83	468
Federal Trade Commission Improvement Act, 15 U.S.C.	
§ 57a (1976)	469
National Nutritional Foods Association v. FDA	469
Note	470
2. Petition for Amendment and Reconsideration	471
3. Resort to Congressional Action	472
Note	474
B. Effect of Rules	475
1. Effect on the Courts	476
Batterton v. Francis	476
Chrysler Corp. v. Brown	478
Notes	482
2. Effect on the Agency	483
United States v. Pennsylvania Industrial Chemical Corp.	483
Notes	486
People of State of California, State Lands Commission v.	
Simon	487
Daughters of Miriam Center for the Aged v. Mathews	488
3. Preemption of State Law	492
Jones v. Rath Packing Co.	492
Notes	496

	<i>Page</i>
Chapter 7. Deviations from the Basic Rulemaking Procedure.....	499
I. What Types of Rules Must Be Promulgated Following the APA Procedural Requirements?	499
A. § 553 Coverage Applies to Legislative Rules.....	500
National Petroleum Refiners Association v. FTC	501
Note.....	507
B. Categorical Exceptions to Notice and Comment Procedures.....	507
1. Non-Legislative Rules Specifically Excluded	508
Joseph v. United States Civil Service Commission	508
Notes	511
2. Procedural Rules Excluded	515
Pickus v. United States Board of Parole	516
Notes	518
3. Exception When Agencies Have “Good Cause” for Not Following Notice and Comment	518
National Helium Corp. v. Federal Energy Administration	519
National Nutritional Foods Association v. Kennedy.....	522
Kushner & Manes v. Mathews & Schmidt	525
Notes	527
C. Subject Matter Exceptions	529
Humana of South Carolina v. Califano.....	529
Note.....	531
II. Formal Rulemaking	531
Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 California Law Review 1276 (1972)	531
Administrative Conference of the United States, 1 C.F.R. § 305.72-5 Procedures for Adoption of Rules of General Applicability ...	539
Note.....	540
Long Island Railroad v. United States.....	541
Note.....	542
III. Hybrid Rulemaking.....	543
Mobil Oil Corp. v. FPC.....	543
A. The Development of the Concept of “Hybrid Rulemaking” ...	550
B. Hybrid Rulemaking as Codified	553
Joint Explanatory Statement of the Committee of Conference, Conf. Rep. No. 93-1408, 93 Cong., 2d Sess., [1974] 4 U.S. Code Cong. & Ad. News 7755, 7763-66	553
Kestenbaum, Rulemaking Beyond the APA: Criteria for Trial-Type Procedures and the FTC Improvement Act, 44 George Washington Law Review 679, 695-708 (1976).....	556
Chapter 8. Choice of Procedure	567
I. The Constitutional Constraints on the Choice of Administrative Procedures	567
Londoner v. City & County of Denver	567
Bi-Metallic Investment Co. v. State Board of Equalization	569
Note.....	570
Ewing, Federal Security Administrator v. Mytinger & Casselberry, Inc.....	570
Notes	572

Page

II. Restraints on the Choice Between Adjudication and Rulemaking ..	572
National Labor Relations Board v. Wyman-Gordon Co.	572
Notes	578
NLRB v. Bell Aerospace Co.	578
Notes	582
Notes	585
III. Restraints on the Choice Between Formal and Informal Procedures	585
A. Choice of Formal or Informal Rulemaking	585
United States v. Florida East Coast Railway Corp.	585
Notes	591
B. The Choice of Formal or Informal Adjudication	592
Seacoast Anti-Pollution League v. Costle	592
Gellhorn & Robinson, Summary Judgment in Administrative	
Adjudication, 84 Harvard Law Review 612 (1971).....	595
Notes	599
IV. "Private" Dispute Settlement	600
Notes	603

PART TWO—EXTERNAL OVERSIGHT OF ADMINISTRATIVE ACTION: JUDICIAL REVIEW AND PUBLIC AWARENESS

Chapter 9. How to Obtain Judicial Review of Administrative Action	607
I. Statutory Review	607
A. Review of Orders	607
Federal Trade Commission Act, 15 U.S.C. § 45.....	607
Robertson v. FTC.....	609
B. Appropriate Forum for Review.....	613
Currie & Goodman, Judicial Review of Federal Administrative	
Action: Quest for the Optimum Forum, 75 Columbia Law	
Review 1, 1-16 (1975)	613
C. Review of Rules.....	618
Currie & Goodman, Judicial Review of Federal Administrative	
Action: Quest for the Optimum Forum, 75 Columbia Law	
Review 1, 39-53 (1975)	619
Verkuil, Judicial Review of Informal Rulemaking, 60 Virginia	
Law Review 185 (1974)	623
Notes	627
Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health	
Review Commission	630
Note.....	634
II. Non-Statutory Forms of Proceeding Against the Government	635
Rondeau v. Mosinee Paper Corp.	635
Notes	639
Fund for Animals v. Frizzell	639
Notes	642
III. Jurisdiction	644
Califano v. Sanders	644
Note.....	647
IV. Suing the Government for Damages	647
United States v. Testan	648
McGarry v. United States	653

	<i>Page</i>
Notes	657
Solomon v. United States	658
V. The Possibility of a Private Right of Action	659
Cannon v. University of Chicago	659
Notes	666
Chapter 10. Judicial Review	669
I. Unreviewability	669
Introduction	669
A. When the Statute Precludes Review	669
Abbott Laboratories v. Gardner	670
Consumer Federation of America v. FTC	672
Notes	674
Wayne State University v. Cleland	675
Note	676
B. So Committed to Agency Discretion as to Preclude Review	676
Citizens to Preserve Overton Park, Inc. v. Volpe	677
Notes	678
II. Standard of Review	680
A. The Degree of Judicial Scrutiny	680
1. De Novo Review	681
United States v. First City National Bank	681
Notes	682
Goodman v. United States	682
Notes	686
2. Substantial Evidence	688
Currier v. Secretary of HEW	688
NLRB v. Milgo Industrial, Inc.	692
Notes	694
Martin v. Secretary of HEW	694
Warner-Lambert Co. v. FTC	696
Universal Camera Corp. v. NLRB	697
Note	703
3. Arbitrary, Capricious and Abuse of Discretion Review ...	703
Consumers Union of United States, Inc. v. Consumer	
Product Safety Commission	703
Coleman v. Darden	705
Notes	707
Song Jook Suh v. Rosenberg	708
4. Rational Basis	710
5. Merger of the Different Standards	710
Weyerhauser Co. v. Costle	710
Note	714
B. The Application of the Various Standards	714
1. The Significance of the Structure of the Agency Record ..	714
Ludlow Corp. v. SEC	714
Note	715
Aircraft Owners & Pilots Association v. FAA	715
Note	719
Scalia & Goodman, Procedural Aspects of the Consumer	
Product Safety Act, 20 University of California, Los	
Angeles Law Review 899, 933-36 (1973)	719

	<i>Page</i>
Associated Industries v. Department of Labor	721
1 C.F.R. § 305.74-4 Preenforcement Judicial Review of Rules of General Applicability	722
Camp v. Pitts	724
2. The Impact of the Type of Issue Under Review.....	726
Standard Oil Co. v. FTC	727
Notes	728
WNCN Listeners Guild v. FCC	729
Notes	736
Pittston Stevedoring Corp. v. Dellaventura	737
Notes	739
Friendly, "Some Kind of Hearing," 123 University of Pennsylvania Law Review 1267, 1313-15 (1975).....	740
C. A Practical Assessment of the Degree of Review.....	741
Gardner, Federal Courts and Agencies: An Audit of the Partnership Books, 75 Columbia Law Review 800, 820-22 (1975)	741
Chapter 11. Limitations on Judicial Review	745
I. Standing.....	745
A. Development of Citizens' Standing to Sue the Government ...	746
Associated Industries of New York State, Inc. v. Ickes	747
Note.....	750
B. New Avenues to Standing Created by the "Injury in Fact" Test	753
Association of Data Processing Service Organizations v. Camp	753
Notes	755
Barlow v. Collins.....	756
Notes	758
Sierra Club v. Morton	759
United States v. Students Challenging Regulatory Agency Procedures (SCRAP)	760
Notes	763
Simon v. Eastern Kentucky Welfare Rights Organization.....	764
Notes	774
C. Present Status of Standing	775
Duke Power Co. v. Carolina Environmental Study Group	775
Notes	781
II. Completion of the Agency Process.....	781
A. Exhaustion of Administrative Remedies	782
Association of National Advertisers, Inc. v. FTC	782
McKart v. United States	787
L. Jaffe, Judicial Control of Administrative Action 424 (1965)	788
Notes	789
B. Primary Jurisdiction.....	790
L. Jaffe, Judicial Control of Administrative Action 121 (1965)	790
Note.....	793
Ricci v. Chicago Mercantile Exchange	793
Note.....	796
III. Ripeness.....	797
Abbott Laboratories v. Gardner	798
L. Jaffe, Judicial Control of Administrative Action 396 (1965)	801
Note.....	803

	<i>Page</i>
National Automatic Laundry & Cleaning Council v. Schultz	803
Notes	813
IV. Sovereign (Governmental) Immunity	813
Note	814
V. Government Employee or Official Immunity	814
Butz v. Economou	814
Chapter 12. Public Awareness of Agency Action: The Right of the Governed to Know About the Government	829
I. Publication in the Federal Register	829
Notes	831
II. Access Through the Freedom of Information Act	833
A. History and Structure of the Freedom of Information Act, 5 U.S.C. § 552 (1976)	833
1. History	833
2. Structure	834
Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 19-22 (1975)	835
Forsham v. Harris	838
Notes	842
B. Exemptions	843
1. Exemption 1 — National Defense and Foreign Policy Documents	843
Lamont v. Department of Justice	844
Notes	847
Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 3-4 (1975)	847
Notes	848
Fox & Weiss, The FOIA National Security Exemption and the New Executive Order, 37 Federal Bar Journal 1-8 (1976)	849
2. Exemption 2 — Personnel Rules and Practices	852
Department of Air Force v. Rose	852
Notes	854
3. Exemption 3 — Withheld by Special Statute	855
Chamberlain v. Kurtz	855
Notes	857
4. Exemption 4 — Trade Secrets and Confidential Commercial Information	859
a. Special Protection for Trade Secrets	859
Notes	859
b. Confidential Business Information	860
National Parks & Conservation Association v. Morton	860
Notes	863
5. Exemption 5 — Internal Government Documents	864
EPA v. Mink	864
Notes	866
NLRB v. Sears, Roebuck & Co.	867
Notes	871
6. Exemption 6 — Protection for Privacy	872
Wine Hobby USA, Inc. v. IRS	872
Notes	874

	<i>Page</i>
7. Exemption 7 — Investigatory Records.....	875
Attorney General's Memorandum on the 1974 Amendments to the FOIA 4-8 (1975)	875
Moorefield v. United States Secret Service	877
Notes	880
Attorney General's Memorandum on the 1974 Amendments to the FOIA 8-12 (1975)	881
8. Exemptions 8 and 9 — Financial Institution and Geological Information	882
C. Protection for Private Information in the Public Information System: Reverse FOIA Litigation	883
Chrysler v. Brown	883
Notes	885
III. Other Statutes in the Public Information System.....	886
A. The Privacy Act, 5 U.S.C. § 552A (1976)	886
Note, The Privacy Act, 1976 Washington University Law Quarterly 667	886
B. Open Meetings Requirement: The Sunshine Act	892
Communications Systems, Inc. v. FCC	893
Notes	895
C. Access to Information About Advisory Committees: FACA....	895
National Nutritional Foods Association v. Califano	896
Notes	899
Aviation Consumer Action Project v. Washburn.....	899
Appendix I. Administrative Procedure Act	901
Appendix II. Uniform Law Commissioners' Revised Model State Administrative Procedure Act, 1970 Version	931
Appendix III. Regulatory Flexibility Act	937
Appendix IV. Presidential Documents — Federal Regulation	945
<i>Index</i>	951