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Administrative Law

A Context and Practice Casebook

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To my family: Holly, Maggie, and Pei Tzu

And to my friend, mentor, and the inspiration for this book: John H. Reese

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Series Editor's Preface

Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. Student learning and preparation for law practice are the guiding ethics of these books.

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In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

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I welcome reactions, criticisms, and suggestions; my e-mail address is michael.schwartz@washburn.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Professor Michael Hunter Schwartz, Series Designer and Editor
Co-Director, Institute for Law Teaching and Learning
Associate Dean for Faculty and Academic Development

Preface

Thank you for opening this book. This preface explains the book's organizing theme, its premises, and its major features.

The book's organizing theme is **power**. Every action by an administrative agency must rest on a valid grant of power and must obey all limits on, and requirements for exercising, that power. Lawyers solve most administrative law problems by identifying and analyzing the laws granting and limiting an agency's power to take some action; and marshalling facts to persuade the agency to exercise its power favorably to the client. When an agency has failed to act within its powers — or failed to obey limits on, or requirements for exercising, those powers — the administrative lawyer must determine what court has power to remedy the agency's failure. The courts' power has special importance because it includes authority to review agency action for abuses of power in the many, many matters as to which agencies have discretion. Besides invoking judicial power, the lawyer may usefully tap other sources of power to control agency action: namely, the executive and legislative branches, and last but not least, the People, who are of course the ultimate source of all this power and the ultimate source of its control.

The book rests on two premises about administrative law. The premises concern (1) the practice of administrative law and (2) preparation for the practice of administrative law:

1. The practice of administrative law mostly involves (a) identifying and analyzing the **laws** (primarily statutes) governing a particular matter involving an administrative agency; (b) identifying and gathering the **facts** relevant to the matter and properly presenting them to the agency (or on behalf of the agency); and (c) identifying and dealing with the **people** in the agency responsible for the matter.
2. To prepare law students for the practice of administrative law, a course on administrative law should systematically (a) introduce students to (i) the variety of **laws** relevant to solving administrative law problems; and (ii) frameworks for analyzing those laws; (b) help students learn to (i) identify what **facts** are relevant to a particular administrative law problem; and (ii) present facts favorable to the client in accordance with legally required procedures; and (c) introduce students to the ways in which authority given to an administrative agency is exercised by ordinary **people** within that agency, and to the ways in which a lawyer may effectively and ethically influence those people's decision making.

These two premises underlie the following features that distinguish this book from traditional casebooks:

A. Rather than excerpting innumerable appellate court opinions, the book excerpts many statutes, agency rules, and other executive-branch material, with the aim of helping students learn to analyze the main ingredients of administrative law.

B. Rather than focusing on judicial review of agency proceedings, the book focuses on how lawyers can participate in agency proceedings in ways designed to produce outcomes favorable to clients (recognizing that the agency itself may be the lawyer's client). This focus requires careful examination of agency procedures, including procedures for presenting relevant facts and for settling matters or otherwise resolving them informally.
C. Rather than limiting itself to the inclusion of problems, the book includes many ways of prompting active learning, to prepare students for the self-education process that they must develop to practice administrative law competently. Specifically, Chapter 2 sets out a problem solving framework that provides the architecture for the book and for organizing student learning. Besides that broad framework, the book includes chapter problems at the beginning of each chapter, exercises and graphics within each chapter, and professional development reflection questions at the end of each chapter. All aim to help students organize the material and learn analytic frameworks for solving problems.

The book is meant to be easy for students and teachers to use, especially teachers who are new to the teaching of administrative law or who wish an "off the shelf" product that they do not need to supplement with their own material. Here are the features meant to make the book easy to use:

i. What you see is what you get. The book has a transparent, logical organization and explicit objectives, and the writing aims to be exceptionally clear.
ii. This is a not a casebook; it's a course book. The book relies mainly on author-created material, instead of judicial opinions, to teach the law. This minimizes the need to use class time to extract the relevant legal principles from judicial opinions, so that class time can be used instead on other activities, such as discussion of the chapter problems, exercises, graphics, and professional development questions.
iii. The book's questions generally have answers, and its problems generally have solutions. At least, the answers and solutions are governed by material presented in the book. Complete answers, solutions, and explanations are found in the teacher's manual, which also includes detailed advice for presenting the material on a day-to-day basis.
iv. The book is clean. It is not cluttered by exhaustive citation of primary law (e.g., case law) or secondary material (e.g., law review articles). The teacher's manual includes citations to selected, additional primary and secondary material where it might be helpful.
v. The book is progressive. It gets more challenging as students get ready for more challenging material. Thus, the book is organized (A) to present more accessible subjects first, saving less accessible ones for later in the book; and (B) to provide more structure and repetition of key concepts at the beginning of the book than in later chapters, where students are expected to supply their own structure and do their own review of key concepts.

It will help users of this book, and those considering using it, to know two last things. First, the book uses one agency, the Consumer Product Safety Commission (CPSC), to illustrate various administrative law issues throughout the book. Dozens of other agencies are mentioned as well. But the CPSC serves as the "go to" agency, primarily because it regulates a matter with which people are familiar and it has a fairly compact, fairly typical

organic statute. Second, almost every chapter begins with at least one chapter problem. The chapter problems have two purposes: (1) to orient students to the material that follows, so they have a sense of what kinds of problems the material can be used to analyze; and (2) to help students review and deepen their understanding of the chapter's material after they have finished studying that material. A teacher can have students skip any or all chapter problems entirely or have students read them only for orientation to the material. Except for a handful of exercises, nothing else in the book depends on students' having read the chapter problems. The exercises, too, are free standing, to give teachers flexibility in how and whether to use them.

I hope you like the book. I welcome your comments, especially your suggestions for improvement. Please email them to me at richard@uidaho.edu. Thank you.

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