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For Ying Juan.

John M. Rogers

For Carol.

Michael P. Healy

For Ron, Sr., Barbara, and James, with thanks and appreciation for your support over the years.

Ron Krotoszynski, Jr.

PREFACE

The second edition of the *Administrative Law* casebook is intended to meet several objectives. First, we hope to accomplish the core goal of the first edition of the text. That goal was described in the preface to the first edition:

> This book is designed to serve as a streamlined workhorse for professors who like to teach out of cases and to focus on the principles underlying core doctrines. It lets the cases speak for themselves, with a minimum of editorializing text. This approach gives professors and students alike the opportunity to reconcile the principles of the case, each in his or her own way.

The second edition accordingly retains the organizational structure of the first edition. That structure is dictated by the four fundamental components of administrative law: (1) procedural requirements for agency adjudication; (2) procedural requirements for, and other issues related to, agency rule-making; (3) separation-of-powers issues related to administrative agencies; and (4) judicial review of agency action. The authors' experience is that the course is most successful when taught in this order and the second edition of the text adheres to this order for presenting the materials. The four components are, however, presented in chapters that are largely independent. Instructors may change the order of presentation to conform to their own judgment about the optimal order of presentation.

While adhering to the organizing principles and structure of the first edition, this new edition has been revised to account for developments in administrative law that have occurred since the text was first published. The revised text includes as lead cases the recent decisions in *Sierra Club v. Johnson* and *Gonzales v. Oregon*. New notes have been added to the text addressing a range of emerging administrative law issues. For example, the new edition includes note materials addressing how administrative law principles have been affected by the War on Terror. Key recent cases addressed in these notes are *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*. There is an expanded and substantially revised note on the role of the President in implementing statutes. The note includes new material on presidential signing statements and updates the materials on Office of Management and Budget ("OMB") review of rulemaking by presenting President George W. Bush's amendments to the Clinton Executive Order requiring OMB review. There are also new notes addressing the ossification of administrative law and taxpayer standing. Throughout the text, questions and notes for students have been added to reflect the insights of decisions in recent cases, including *Gonzales v. Oregon*; *Dismas Charities, Inc. v. U.S. Department of Justice*; *Town of Castle Rock v. Gonzales*; *Dominion Energy Brayton Point v. Johnson*; *Zuni Public School District No. 89 v. Department of Education*; *Long Island Care at Home, Ltd. v. Coke*; *National Cable &*

Telecommunications Ass'n v. Brand X Internet Services; *National Ass'n of Home Builders v. Defenders of Wildlife*; *Hein v. Freedom From Religion Foundation, Inc.*; and *Woodford v. Ngo*.

The third objective of the new text was to provide opportunities for students to apply their understanding of administrative law principles in new legal contexts. Although the second edition does not adopt the problem approach to teaching administrative law, the second edition now includes a series of "Theory Applied Problems" at the conclusion of different sections of the text. These problems will allow students to test their understanding of the principles of administrative law. Several of the problems implicate contemporary public policy issues, including airline passenger screening and U.S. Attorney independence.

The final objective of the second edition is to improve the content of the text by responding to the suggestions of adopters. These teachers of administrative law know the text best by having worked closely with the materials. The second edition now includes expanded treatment of the Freedom of Information Act, including inclusion of *EPA v. Mink* as a lead case. The treatment of judicial review has also been expanded with a new lead case on deference to agency interpretations of regulations and new notes on harmless error in the administrative process and judicial remedies for unlawful agency action.

In addition to revising the text to cover recent developments and to respond to adopters' comments, we have sought to ensure that the materials included in the second edition may be taught in a three-hour course. Meeting this objective has meant that some materials have been removed from the first edition. Whenever we have made a significant change from the first edition by editing or removing materials, we will be including the material that was in the first edition on the web site for the text. Faculty who have adopted the text may use those materials no longer contained in the second edition by printing the pages from the web site.

Finally, we wish to acknowledge in this preface the debt that we also acknowledged in the preface to the first edition. That debt is owed to the teachers of administrative law and authors of administrative law texts who have affected our understanding of this subject. That group of law professors has grown since the date of publication of the first edition, because we are now indebted to the adopters of that text who have helped us to revise and, we hope, improve it in this second edition.

John Rogers
Michael Healy
Ronald Krotoszynski

January 2008

ADMINISTRATIVE LAW

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CHAPTER 1

Introduction

A. OVERVIEW OF THE WORK AND PLACE OF ADMINISTRATIVE AGENCIES IN OUR SYSTEM OF GOVERNMENT

Administrative law involves the study of the place of administrative agencies in the American legal system. Agencies, of course, do what government does. Government taxes, spends, builds, paves, educates, punishes, regulates, and so on. Those who actually do this work are agents of the government, hence the word "agencies." In a sense, they are necessary if government is to do anything.

The need for government action, at all, and the appropriate government agent to take action when warranted, may vary in different contexts. Should government do a lot or leave most matters to the market and thereby preserve more freedom? When government does not leave something to the market, why not? What theory or theories justify changing what otherwise would be the market result?

When matters are not best left to the market, why not legislate a general standard and simply let courts enforce civil liability, without creating agencies? If there are good reasons not to leave the details to the courts, why can't Congress just set specific and detailed requirements in areas where regulation is warranted?

The following case excerpts introduce the principal public-policy contexts in which a need has been recognized for specialized agencies to undertake government action. These selections also raise, in a preliminary way, some of the important legal themes that will be developed through the remainder of the course.

INTERSTATE COMMERCE COMMISSION v. CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY CO.

167 U.S. 479 (1897)

. . . In view of its importance, and the full arguments that have been presented, we have deemed it our duty to re-examine the question [of the powers of the Interstate Commerce Commission under the Interstate Commerce Act] in its entirety, and to determine what powers congress has given to this commission in respect to the matter of rates. The importance of the question cannot be over-estimated. Billions of dollars are invested in railroad properties. Millions of

passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country, and subjected to varying and diverse conditions.

Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which congress had to consider was how those abuses should be corrected, and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty, or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and, if we examine the legislative and public history of the day, it is apparent that there was no serious thought of doing so. The question debated is whether it vested in the commission the power and the duty to fix rates, and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used, and was so familiar to the legislative mind, and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. . . .

It is one thing to inquire whether the rates which have been charged and collected are reasonable, — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future, — that is a legislative act. *Chicago, M. & St. P. Ry. Co. v. Minnesota,* 134 U.S. 418, 458.

It will be perceived that in this case the interstate commerce commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now, nowhere in the interstate commerce act do we find words similar to those in [some state statutes], giving to the commission power to "increase or reduce any of the rates"; "to establish rates of charges"; "to make and fix reasonable and just rates of freight and passenger tariffs"; "to make a schedule of reasonable maximum rates of charges"; "to fix tables of maximum charges"; to compel the carrier "to adopt such rate, charge or classification as said commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given. Whence then is it deduced? In the first section it is provided that "all charges . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the interstate commerce commission. Section 12, as amended March 2, 1889 (25 Stat. 858), gives it authority to inquire into the management of the business