

Administrative Law
Prof. Kumar, Fall 2019
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Overview

Administrative agencies execute laws affecting almost every aspect of daily life—including regulating labor relations, setting tariff rates, issuing patents, and enforcing air pollution standards. This course does not focus on the substantive law of any particular agency; it instead covers principles and procedures common to all agencies, derived in large part from the U.S. Constitution and the Administrative Procedure Act. We will examine the sources of agency authority, the limitations on agency actions, the procedures that agencies must use in rulemaking and adjudication, and the availability and scope of judicial review of agency actions.

This class will meet T/TH 1pm-2:30pm. Class will be cancelled Tuesday, August 27. Because each class runs 5 minutes over the required 75-minute class time, we will bank 1.5 classes worth of extra time, meaning that we will not need to make up the August 27 class.

Casebook: Hickman & Pierce, Federal Administrative Law (Foundation Press) (2d Ed.)

There is an online-only version of the book. You are welcome to buy it, but you won't be able to access the internet during the final exam. That being said, you shouldn't need to refer to your casebook during the exam.

Attendance Policy

I will take attendance by distributing a roll sheet at the beginning of each class. Each student should personally initial by his or her name for that class session. It is your responsibility to ensure that you have initialed the roll sheet before you leave the classroom each day. Students who do not sign the roll sheet are deemed to have been absent.

Please note that you are responsible for managing your absences from class and ensuring that your total number of absences does not exceed the threshold for the class. An absence is an absence, regardless of the reason, except for those covered by the University and Law Center religious holiday policy. Students who exceed six (6) absences will be reported to the Associate Dean and will be dropped from the class.

If you need to miss a single class, do not e-mail me. Rather, e-mail a friend to see what you missed. Do let me know, however, if you need to miss several classes in a row.

Participation

Students with poor class participation will have their final grade dropped by 1/3 of a letter grade. The decision to drop a grade for participation is at my discretion and is non-negotiable. A drop in class participation can result from a combination of unpreparedness, not paying attention in class, and absences (even if you are within the six-absence limit). In exceptional circumstances, a student may go up a 1/3 of a letter grade for making a substantial contribution to the class. Note that volunteering every class does not constitute a substantial contribution—quality, not quantity matters!

Remote Attendance via Zoom

Students will have 6 times during the semester where they can attend class remotely. I will mark you as "Remote" on the roll sheet for these days. Remote days do not count as an absence. If work commitments or exceptional circumstances prevent you from attending this class in person for the duration of the semester, I will authorize 100% remote attendance on a case-by-case basis.

To participate via Zoom, there are several requirements that must be met:

- You must be logged in with a computer (not a phone) with your video camera turned on at least 5 minutes before class starts to be counted present. If your video isn't on at least 5 minutes before class starts or if you log in later, you will be marked absent.
- You must have a headset that works (i.e., the ear buds + microphone that typically come with a cellphone) and may NOT rely on your computer's built-in microphone.
- You must identify yourself with your first and last name in the Zoom videoconferencing software.
- You must present yourself professionally in the video stream, both in attire and in conduct. No attending class from your car or from your bed.
- You must be able to fulfill your responsibilities if called on to discuss a case. If you are unprepared, you need to mention this in the chat box at least 5 minutes before class starts.
- You must keep yourself muted when you are not speaking.
- If you have to leave Zoom for more than 15 minutes during the lecture, you need to e-mail me and let me know after class so that I can mark you absent.

Class Website

During the first week of class, a class website will be set up on Lexis. To enroll, follow the following steps:

- Go to www.lexisnexis.com/lawschool and sign in with your custom ID and password
- Once on the home page, under "Learning LexisNexis">"Class Preparation," select the "Access Web Courses" link. Web Courses will open in a separate page
- Click on the red "Courses" tab at the top of the page
- Under "Course Catalogue," Click the "University of Houston" link
- Scroll down the list to find "2019 Administrative Law" with Professor Kumar as the instructor
- Click the "Enroll" button

If you have any questions on accessing the class website, contact our Lexis representative Billy Saqr (billy.saqr@lexisnexis.com). Please access the class website early in the semester. This is where I post recordings of lectures, updated syllabuses, and handouts. Do not wait until two weeks before finals.

Audio Recordings of Lectures

I will record all of the lectures and upload them to the class website. These recordings are for class preparation purposes only, and they are not to be reproduced or redistributed in any manner. Note that recordings sometimes fail or are lost before they can be uploaded. Also, occasionally sensitive material will be discussed that will not be recorded. Please note that you do not have authorization to make your own recordings of class lectures.

Assessment Method

Your grade in the class will be based on an end of semester final exam. The exam will be an open book and open notes (i.e., you can bring any printed materials, including commercial outlines). The format will be a mix of multiple choice and essay. There will be a word limit on the essay portion of the exam.

Learning Outcomes

From taking this course, students will be able to (1) answer all of the focus questions in this syllabus, (2) demonstrate a detailed understanding of the Administrative Procedure Act, and (3) engage in legal analysis and reasoning, problem-solving, and written and oral communication relating to administrative law.

Miscellaneous Class Policies

- **First Names.** I call on students by first names, because it is the only way I'll ever learn your first name.

- **Socratic Method.** I will randomly call on students to discuss cases. To do this, I will shuffle a deck of index cards that you fill out on the first day and select a card. This means if you get called on one class, you can still be called on the following class. Or your card may never come up.
- **Volunteering and Class Participation.** Students are always welcome to volunteer to discuss cases. Students can also make comments and ask questions in class. That being said, nobody likes to hear from the same three students for the entire semester, so I will sometimes request to hear from students who haven't spoken recently.
- **Laptop Use.** Use of laptops is permitted, with the caveat that studies indicate students learn more when they handwrite notes. Although I do not prohibit web surfing, if your behavior becomes distracting to other students or to me, you will risk a 1/3 letter grade drop for poor participation.
- **Use of old outlines on exam.** You are permitted to use any outline you want on the final exam, and you can bring any print materials with you. However, you need to update your old outline. Citing cases or material that we did not cover will cause your answer to be marked down.

The University of Houston Provost's Office has asked all faculty in professional schools to include the following language on class syllabuses:

Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus. http://www.uh.edu/caps/outreach/lets_talk.html

Tentative Reading

The reading will be updated prior to the first day of class—please be sure that you are consulting the most recent syllabus. All statutory provisions are in the Administrative Procedure Act, Title 5 of the U.S.C. Each class will cover one bullet point worth of material.

I. What is Administrative Power?

The U.S. Constitution creates and vests three types of power in Articles I, II, and III—the legislative, the executive, and the judicial, respectively. Nowhere does it mention any other kind of power, but neither does it say that this omission is intentionally exclusive. This portion of the course explores the ways in which the three branches of government relate to the administrative departments, agencies, commissions, offices, etc., according to modern doctrine.

- **Constitutionality of Delegating Policymaking Authority.** p. 23–25, 30–35, 45–53, 60–66.

Historically, the Supreme Court has taken a very deferential view of how much lawmaking authority Congress may “delegate” to (or vest in) an administrative agency without violating Article I, as we see in *Schechter*. Post-*Schechter*, we see a dramatic drop in use of the non-delegation doctrine. The D.C. Circuit attempts to revive the doctrine in *Americian Trucking Association*, only to be reversed by the Supreme Court. Yet, the non-delegation doctrine still lives on, albeit in another form.

Focus Questions: (1) What is the non-delegation doctrine and the intelligible principal test? (2) Why is the Supreme Court concerned about the delegation in *Schechter*? (3) What is left of the non-delegation doctrine after *Mistretta* and *American Trucking Association*? (4) What is Scalia’s main concern in *Mistretta*? (5) How does *American Trucking Association* modify the non-delegation doctrine and intelligible principal test?

- **Controlling Delegations; Appointment of Agency Officials; Article II.** p. 135–144, 157 (bottom of page)–163.

The *Chadha* case represents a major shift in the law. Congress previously had included its own invented check on administrative agency discretion—better known as legislative veto—in organic acts going back for decades. We then shift to examining who is an officer of the United States under the Constitution’s Appointments Clause. This material may partially overlap with material you covered in Constitutional Law.

Focus Questions: (1) Why did the *Chadha* court find legislative veto unconstitutional? (2) After *Chadha*, would a two-house legislative veto that can’t take effect without presentment to the President be constitutional? (3) Under A2S2C2 of the Constitution, what type of officers can Congress appoint? What type of officers must be appointed by the President?

- **Agencies and Article II: The President’s Relationship to the Administrative Agency.** Excerpt of *Lucia v. SEC* (available on class website); skim 171–179, read 179–183; § 3105.

Unlike models known to the framers in the late eighteenth century, Article II vests the “executive Power” in one official alone. But as *Buckley* illustrates, Article II also creates a rather complex array of relationships between the Congress, President, and appointed officials which define their respective authorities. The recent case law on Article II’s Appointments Clause has been rather ambiguous.

Focus Questions: (1) Who is an officer of the U.S.? (2) How do we distinguish between principal versus inferior officers? (3) Can Congress circumvent the appointments clause by altering the duties of existing officers? (4) How do we distinguish between inferior officers and mere employees? (5) Which category do administrative law judges fall into?

- **Removal of Agency Officials.** p. 183–193, 222–226, skim 228–246.
Article 1, Section 5 of the Constitution tells us how to remove members of Congress. But the Constitution does not tell us how to remove executive officers, leading to confusion.

Focus Questions: (1) Can Congress specify conditions that must be met before an Officer of the United States can be removed? (2) Can Congress reserve the right to remove an officer charged with execution of the law?

II. Due Process

Due process is the chief source of procedural controls on agencies outside of those established by statute. Procedural due process doctrine has been relatively stable since a reinvention of the field in the 1970s and 1980s. Due Process concerns arise in both state and federal actions.

- **The Role of the Due Process Clause.** p. 277–296.
Londoner and *Bi-Metallic* illustrate the distinction between rulemaking and adjudication. This distinction plays a key role in whether an individual has a right to a hearing. *Goldberg* introduces the right of procedural due process.

(1) How does the distinction between legislation and rulemaking affect due process rights in *Londoner* and *Bi-Metallic*? (2) How does the Court in *Goldberg* expand due process rights?

- **The Rise of the Entitlement Theory.** p. 297–312.
Roth, *Sinderman*, and *Davis* provide us with a framework for determining whether an entitlement exists, and if a liberty or property interest has been implicated.

Focus Question: What is the framework for determining whether an individual is entitled to due process?

- **What Process is Due?** p. 312–332
Eldridge and *Loudermill* look at how much due process is required and when it is required.

Focus Question: (1) When must a due process hearing occur? (2) How does a court determine how much procedure is required?

- **The Limits of Procedural Balancing: National Security.** p. 332–343 and excerpt of Holder’s speech on national security (available on class website).

III. Adjudication & Rulemaking

Adjudication is exercise of judicial power by an administrative agency. There are two forms of adjudication. Formal adjudication is governed by §§ 554–557 of the APA. It involves a trial-like hearing with witness testimony, a written record and a final decision. By contrast, informal adjudication is a poorly defined category covering a wide range of agency actions, and is not governed by the APA. If an agency process does not involve formal adjudication or rulemaking, it often come under the default heading of informal adjudication. Formal

adjudication and informal adjudication are subject to different judicial review standards.

- **Introduction to Formal and Informal Adjudication.** p. 343–357 & § 554. Skim §§ 556, 557. *Dominion Energy* introduces formal adjudication. *Overton Park* introduces informal adjudication, and further reflects a growing skepticism towards agencies, and introduces questions of policy, which we will return to later in the semester. *Pension Benefit Guaranty* gives us a more straightforward application of the APA to informal adjudication.

Focus Questions: (1) What statutory language triggers formal adjudication? (2) What option is available to the court when the record before it is insufficient to decide the case? (3) Can courts require agencies to engage in additional procedure requires for adjudication that are not in the APA.

- **Judicial Review of Formal and Informal Agency Adjudication.** p. 385–390, 408–415; download and read *Dickenson v. Zurko*, 527 U.S. 150 (1999), Problem 5, § 559, § 706. This section introduces the different standards of review for agency decisions. Note that these standards are distinct from those we see when courts review district court decisions. Here, we examine the two different standards of review for adjudication, and attempt to discern the difference between the standards.

Focus Questions: (1) What standard of review applies to findings of fact in formal adjudication? (2) What standard of review applies to findings of fact in informal adjudication? (3) What is the difference between the two standards with regard to the record? (4) What is the difference between the two standards with regard to level of deference? (5) To what extent can Congress change the default standard?

- **The Decline of Formal Rulemaking and the Rise of Notice and Comment.** § 553, p. 458–459, skim 460–464, read 465–479. Although agencies can engaged in a trial-like proceeding to pass rules, formal rulemaking is seldom used. Instead, we see agencies engaging in informal notice-and-comment rulemaking, and rulemaking that falls somewhere in between formal and informal.

Focus Questions (1) What is formal rulemaking and why is it disfavored? (2) How do we reconcile *Vermont Yankee* with *Overton Park*? (3) What is the logical outgrowth test?

- **Public Participation in Rulemaking.** p. 479–494, review § 553(b),(c). Although agencies are bound by § 553, they will often play fast and loose with the information they disclose to the public. These cases continue to explore what constitutes a proper notice to the public of the proposed rulemaking

Focus Questions (1) What constitutes sufficient notice under the APA? (2) What type of information must the agency disclose to the public prior to the comment period? (3) What constitutes a concise general statement?

- **Highly Informal Rules.** p. 523–526, 539–541, 542–560. Much rulemaking is even less formal than notice-and-comment rulemaking. The line between legislative notice-and-comment rules and non-legislative rules (such as interpretive rules and policy statements) is blurry, at best. Yet the distinction is important, as agencies will often try to treat non-legislative rules as binding on the public, in an attempt to circumvent the more rigorous notice and comment process. This is an extremely messy and frustrating area of administrative law—do your best.

Focus Questions: (1) What is the difference between substantive rules, interpretive rules, and general statements of policy? (2) How do the standards of review differ for these three types of rules?

- **Questions of Policy & Hard Look Review.** p. 560–562, 568–578, review *Overton Park*.

Focus Questions (1) What is hard look review? (2) To what type of questions does hard look review apply? (3) What information will the agency consider when reviewing under hard look review?

IV. Statutory Interpretation in Administrative Law

Judicial deference to agencies is the heart of this course. The fact that agencies have specialized knowledge that general courts do not differentiate judicial review of agency decisions from judicial review of lower court decisions. Disputes regarding what standard review should apply can sometimes reflect tension between the judicial and executive branches of government.

- **The *Chevron* Revolution.** p. 597–598, 605–608, 613–621, *Cuozzo Speed Tech. v. Lee* excerpt, Problem 8.

Chevron is one of the most cited and influential decisions in modern Supreme Court history. The Supreme Court did not intend for *Chevron* to be a major departure from its prior precedent. But the requirement that courts provide strong deference to agencies where Congress merely *implicitly* delegates interpretive authority is the revolutionary aspect of the case.

Focus Questions: (1) Describe the level of deference that the Court affords the agency in *Skidmore*, (2) What is the *Chevron* two-step test? (3) What is a question of law versus a question of policy?

- **The “Tools” of *Chevron*.** p. 643–661, 708–709, *Clearcorrect v. ITC* excerpt
Chevron originally appeared to be highly deferential to agencies. However, the Supreme Court soon started chipping away at its decision, starting with allowing courts to utilize the traditional tools of statutory interpretation in determining whether a statute is ambiguous.

Focus Questions: (1) What tools can courts utilize in a Step One analysis? (2) What are some of the problems with using such tools, with regard to agency autonomy? (3) How does the D.C. Circuit’s approach to Step Two differ from other courts?

- **The *Mead* Counter-Revolution.** p. 718–730, 737–747, Problem 9.
Chevron was substantially weakened in subsequent Supreme Court decisions. In *Mead*, the Supreme Court begins to pull back on *Chevron*, by drawing distinctions between legislative and non-legislative rules.

Focus Questions: (1) What is the role of traditional tools of statutory interpretation? (2) Can an agency receive *Chevron* deference if it jointly administers a statute with another agency? (3) How does *Mead* distinguish between legislative versus non-legislative rulemaking?

- **Agency Interpretation of Agency Regulations.** p. 774–794, Problem 10.
Agencies are in the best position to interpret their own ambiguous regulations. What has evolved is the controversial *Seminole Rock/Auer* standard, which like *Chevron* is highly deferential to the agency. Conservative Justices have begun chipping away at this form of deference.

- **Focus Questions:** (1) How does the test for *Auer* deference differ from *Chevron* deference? (2) When is an agency interpretation of its own regulation not entitled to *Auer* deference?

V. Timing and Availability of Judicial Review

Timing is everything. Doctrines of reviewability, exhaustion, standing, and finality exert great influences over the court/agency relationship (and individuals affected by administrative agency action).

- **Limits on Reviewability: Preclusion.** p. 795–810.
Often times, Congress chooses to limit the ability of courts to review agency decisions. Such preclusion can be express or implied.
- **Limits on Reviewability: Committed to Agency Discretion.** p. 810–831.
- **Timing of Judicial Review: Finality and Ripeness.** p. 855–879.
- **Constitutional Standing.** p. 919–921, 925–931, 936–946.
Before an individual can challenge an agency action, they must show that they have standing to sue. This includes showing that constitutional standing is met.

Focus Questions: (1) How can parties who are not the direct target of agency actions challenge those actions? (2) What are the three factors for constitutional standing? (3) How do generalized grievances affect standing?

- **More Constitutional Standing!** p. 950–968, *Spokeo* handout.

Focus Questions: (1) How do we distinguish *Friends of Earth v. Laidlaw* from *Lujan*? (2) After *Laidlaw*, what does a petitioner need to establish to show injury in fact? (3) How does *Mass. v. EPA* change the rules of standing for states, and why does it do so?

- **Statutory Standing: The Zone of Interests Test.** p. 968–988, Problem 11.
The early understanding of courts was that a “legal wrong” under § 702 occurred only if there was an injury traditionally cognizable by the courts. However, the Supreme Court later established the “zone of interests” test to determine whether a particular plaintiff should have the right to complain of a particular agency action.
- **Freedom of Information Act.** Reading to be distributed from *Gellhorn & Byse*, 11th ed. 458–480.
- **Review.** Review will be based solely on questions that you send me in advance or ask during the review.