

PUBLIC INSTITUTIONS/ADMINISTRATIVE LAW

COURSE OVERVIEW

SPRING 2022

Tuesday 6:15-7:45
Thursday 6:15-7:45
Office Hours drop in before class
And by appointment

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We will be using a MOODLE for this class. All required readings are posted there for your free access. This is an experiment—first time I have done this, rather than using a TWEN site. So please be understanding if things are not perfect. Before the first class, you should sign up for MOODLE (you will receive an email with log in instructions the week before school starts).

****ALL Cases and Course Readings will be posted to this class MOODLE**

I strongly suggest you also purchase WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW (6th ed. 2012). I have provided pages to read in this book that will give general background and help you understand the readings.

ZOOM LINK

Our plan is to meet in person for this class. But, if we ever need to meet remotely, we will use this zoom link.

Join Zoom Meeting

<https://us02web.zoom.us/j/81856339947?pwd=dUZQWEp4QXFCEEN5aEpMYzVTTTFzdz09>

Meeting ID: 818 5633 9947

Passcode: 775475

One tap mobile

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COURSE DESCRIPTION

Administrative law is central to the American experience—agencies are the most visible face of the federal government, and the primary point of contact most people have with ‘the law’ and ‘the government.’ Indeed, administrative agencies have become so pervasive in modern life that they are often referred to as the fourth branch of government. Throughout your legal career you will almost certainly interact with regulatory agencies and therefore need an understanding of administrative law.

The reach of administrative law is remarkably broad, extending from tax and securities regulation to labor and environmental protection; from communications and energy to antitrust and

intellectual property; and from health-care and financial institutions to civil rights and land use. Administrative agencies also regulate entry into many professions (including law), determine who is entitled lawfully to drive an automobile and where public amenities will be located.

In a society premised on notions of separation of powers, administrative agencies are unique, and in some ways problematic. Our constitutional model assumes the legislative branch enacts laws that are enforced by the executive branch, with litigation before the judicial branch acting as a check on executive and legislative power. Administrative agencies combine these discrete constitutional functions within a single governmental entity. Thus we find agencies charged not only with enacting binding rules, but also with investigating alleged violations of those rules, adjudicating and meeting out civil punishment for those violations, and adjudicating challenges to the validity of agency actions. Administrative agencies also perform a number of relatively informal activities, such as providing advice to regulated entities; entering into settlement agreements that affect future conduct; recalling products that pose potential danger to public safety; and executing contracts for the procurement of goods and services. The fundamental challenge of administrative law is to develop and enforce procedural rules that capitalize on the efficiency and expertise of administrative agencies, while simultaneously holding agencies democratically accountable.

In this course, we will examine the procedural due process rights of regulated persons; the statutory procedures that govern administrative adjudications and agency rulemaking; and the nature of the controls on agency action provided by the political process and by judicial review.

Our exploration will focus on three main concepts in administrative law: **Power, Process and Review**. **Power** refers to the sources of authority that agencies wield, as well as the constitutional constraints on the way that the President and Congress interact with administrative agencies. **Process** refers to the means that agencies must employ to enact, alter, or enforce administrative policies. Finally **Review** refers to the checks and balances on agency action provided by our tripartite government, most specifically to oversight exercised by the courts. By the end of the course, you should have a firm understanding of the procedures that govern administrative actions, the extent and limits to agency powers, and the tools available to regulated parties to challenge agency action that adversely affects them.

LEARNING OBJECTIVES

Over the course of the semester students should acquire or refine the following skills:

- Students will be able to identify, explain, and apply basic concepts, theories, procedures and rules relevant to administrative law.
- Students will cultivate their ability to conduct research involving administrative materials including agency rules, adjudicatory decisions and guidance documents.
- Students will be able to identify administrative law issues in a range of fact patterns and be able to evaluate those issues in light of the Constitution, the Administrative Procedures Act, and applicable case law.
- Students will gain exposure to the socio-justice dimensions of administrative law, including the social, moral, and economic policies that give rise to legal rules and continue

to affect their application.

ATTENDANCE AND CLASS PREPARATION

Administrative law is a challenging and complex area of the law and we have a lot of material to cover in a relatively short period of time. In order to make the most of our class time, I expect that each of you will complete all assignments, and will attend class prepared to discuss the readings, and to use them to resolve hypothetical disputes.

We will use an on-call list for class. The schedule is posted on our class MOODLE. Each of you has been assigned to specific class sessions during which you can expect to be called on. Each 'on call' student should be prepared to engage in rigorous discussion of the material assigned for that class. Feel free to swap dates if you need to (just give me a heads up before class so I don't call on you.) In addition, I may randomly call on students. That said, I get that life happens and that we are still in a pandemic. If there is a reason you do not want to be called on in a particular class, just let me know (and I don't need to know the reason why.) But fair warning, any students who exhibits a pattern of being repeatedly unprepared may receive a downward adjustment to his/her grade. Those who make significant, positive contributions to the classroom discussion may receive an upward adjustment.

Attendance is a course requirement. I will take attendance each class. ABA Standard 403(f) conditions the award of credit in any course upon a student's regular and punctual class attendance. As such, CUNY School of Law requires that I report more than two consecutive absences to the Office of the Academic Dean. Absences may lead to your involuntary withdrawal from or failure of the course. Again, I get that we are in a pandemic. If you are having any issues that get in the way of attendance, please contact me and I will work with you. Again, I don't need to know the reasons why.

In the event of an extended absence or an emergency that interferes with coursework, please contact Student Affairs. All the relevant procedures and policies are available in the Student Handbook, available at www.law.cuny.edu/student/CUNYLawStudentHandbook.pdf.

ACADEMIC INTEGRITY

Students must comply with standards of academic integrity. That means following the CUNY Academic Integrity Policy <http://www.cuny.edu/about/info/policies/academic-integrity.pdf>. Please refer to pages 17-19 of the CUNY School of Law Student Handbook.

GRADING

MIDTERM EXAM (10 POINTS)

The midterm exam will be a timed, on-line exam that will consist of 10 multiple choice questions. You will be able to take it twice and I will count the highest grade. You will need to use your exam number to ensure anonymous grading.

IN-CLASS PECHA KUCHA PRESENTATIONS (10 POINTS)

Students will propose administrative law topics for in-class presentations. After I have approved the topics, students will work in teams of two or three to make in-class presentations using the Pecha Kucha format (20 images for 20 seconds each.) For those not familiar with the format, [here](#) is an explanation and [here](#) is a sample presentation. There are many other examples available online.

ADMINISTRATIVE LAW COMMENT (15 POINTS)

Each student will write an individual comment to be submitted to an open rulemaking TBD. We will devote class time to understanding the context and substance of the rulemaking.

CLASS PARTICIPATION AND OUT-OF-CLASS ASSIGNMENTS (10 POINTS)

Any student who fulfills their obligations during their ‘on call’ sessions and turns in all out of class assignments will receive full credit.

FINAL EXAM (55 POINTS)

The final exam will consist of multiple choice and essay questions, although the exact format remains to be determined. You will need to use your exam number to ensure anonymous grading.

*If you must miss an examination and wish to schedule a make-up, you must file a petition with the Director of Student Affairs who will render a decision based upon the submission of documentation verifying appropriate circumstances. In some cases (e.g., conflicts with other examinations) the petition must be filed at least one (1) week in advance of the examination. Please refer to the CUNY School of Law Student Handbook for further information.

SOME ADVICE FOR THIS CLASS: Understanding how one prepares for intensive and discrete events, such as contract negotiations, depositions and trials, is as much a part of good lawyering as is learning the substantive law. With that in mind, the best way to succeed in this course is to keep up with the assignments and take good notes. When studying for the midterm and final exam, I recommend preparing an outline that is detailed and comprehensive. Using your outline, you should also prepare a checklist that lays out the steps you will go through and the issues you will address in answering potential problems on the exam. Feel free to use commercial outlines to fill in holes in your notes—though asking me directly is always the best policy—but it is the *preparation* of the outline and checklist that constitutes proper studying for a final exam. If you paid attention in class and prepared your own outline and checklist, you should do well on the exam.

ACCOMMODATIONS

The Law School is committed to providing reasonable accommodations for students with certified physical or learning disabilities. For information about certification requirements and appropriate accommodations, please refer to the section of the CUNY School of Law Student Handbook on “Services for Students With Disabilities.”

SYLLABUS

Many of the cases we will read contain references to the federal Administrative Procedure Act (APA). **For purposes of class preparation, you *must* carefully read the sections of the APA discussed in the assigned reading in addition to the cases.**

I. INTRODUCTION:

CLASS 1: JANUARY 18. WHAT IS ADMINISTRATIVE LAW?

Before class:

Read: Fox pp. 1-10;

Ducktown Sulphur

Watch: *What is Administrative Law* <https://www.youtube.com/watch?v=ow5hZmU7Yfw>

Administrative Law <https://www.youtube.com/watch?v=xLABhd4x4b8>

****FIND AND POST** an article on a current administrative law that interests you. Post to the MOODLE discussion forum.

II. RULEMAKING

CLASS 2: JANUARY 20. ADMINISTRATIVE STRUCTURE IN THE UNITED STATES

Before class:

Read: Fox pp 11-24; APA §551.

The Rulemaking Process

Watch: *Regulation.gov* https://www.youtube.com/watch?v=Jodp_uykoNQ

After class:

Begin research about your assigned federal agency by going to your agency website, and investigating. Answer the *Better Know an Agency Part 1* questions (on MOODLE).

Submit your answers **BEFORE** next class.

CLASS 3: JANUARY 25. INITIATION OF RULEMAKING

Before Class:

Read: *Environmental Integrity* (Proposed Rule, Final Rule and Court Decision)—focus on how the rule changed over time. Do not worry about mastering the details of the substantive law—focus on the procedure
APA §553 (read carefully)

CLASS 4: JANUARY 27. FORMAL VERSUS INFORMAL RULEMAKING (**ASYNCHRONOUS**)

Read: APA §§554; *Florida East Coast Railway*, *Buckeye Power*, *Vermont Yankee* (Vermont Yankee is a very important case. Read it with care).
Also read pp. 1-6 of the CRS REPORT: A BRIEF OVERVIEW OF RULEMAKING.

Watch video on formal and informal rulemaking

1. Write and Submit a brief 3-4 sentence paragraph explaining how the court in Florida East Coast Railway justified not requiring a hearing. After that case, why did the court even have to decide Vermont Yankee?
2. Submit a brief paragraph highlighting the difference between formal and informal rulemaking. Identify one advantage and disadvantage of each procedure.

*****FEBRUARY 1: NO CLASS LUNAR NEW YEAR*****

CLASS 5: FEBRUARY 3. PUBLIC PARTICIPATION IN INFORMAL RULEMAKING

Before class:

Read: APA §§553, 555,
Text of Proposed Rule for Class Project (TBD)
Watch: John Oliver on Net Neutrality <https://www.youtube.com/watch?v=fpbOEoRrHyU>

After class: Find 3 comments submitted via regulation.gov related to the proposed rule (ideally from different constituencies). Submit a three-sentence evaluation of the substance and/or persuasiveness of the comments you read.

CLASS 6: FEBRUARY 8. ADMINISTRATIVE LAW RESEARCH

Before class:

Read: TBA

In class: T.B.A.

After class: Begin research for comment project.

CLASS 7: FEBRUARY 10. EXEMPTIONS FROM RULEMAKING

Before Class:

Read: *Hector*, *National Mining Ass'n*, CRS REPORT (from Class 4) pp. 7-9, Materials TBA on COVID Vaccine Mandate

Review: APA §553

Do: Locate one final direct rule and one interim rule on www.regulation.gov. Create short summary for each and submit to MOODLE.

In Class: Bring rule summaries to class

After Class: Continue research for comment. Draft and submit your comment thesis before next class (Just a short summary of key points—can be in list form).

CLASS 8: FEBRUARY 15. REQUIRED RULEMAKING AND PETITIONS

Before Class:

Read: *Bell Aerospace, Massachusetts v. EPA.*, Alaska petition concerning lead in aviation gas (*skim*)
Fox pp. 158-162

After Class: Continue research for comment.

III. ADJUDICATION

CLASS 9: FEBRUARY 17. THE RULEMAKING-ADJUDICATION DISTINCTION

Before Class:

- Read: *Londoner; Bi-Metallic; Anaconda.*

*Although the cases assigned for this class are short, they set up a *critical* distinction in administrative law. Read them carefully and make sure you understand the difference between administrative decisions that implicate due process and administrative decisions that do not implicate due process.

- Prepare: Problem 2

In Class: Discuss Problem 2

After Class: Submit a short paragraph explaining why rulemaking is not subject to a due process analysis, and which legal standards do apply.

CLASS 10 & 11: FEBRUARY 22 AND FEBRUARY 24. The CONSTITUTIONAL RIGHT TO A HEARING

Before Class:

Read: *Goldberg, Matthews, Goss v. Lopez, Board of Regents v. Roth; Loudermill*,
Fox pp. 122-144
Do: Chart the difference in process due in *Goldberg* and in *Goss*.

CLASS 12: MARCH 1. FORMAL VERSUS INFORMAL ADJUDICATION

Before Class:

Read: Review *Mathews, Dominion Energy*
APA §§554, 555, 556, 557

For these sections, find the key provisions.

Notice the two ex parte rules. Be prepared to discuss how the process of formal

adjudication works.

In Class: Various problems.

After Class: Submit a list of requirements that apply to an informal adjudication

CLASS 13: MARCH 3. SEPARATION OF FUNCTIONS, BIAS, AND ALJS

Before Class:

Read: *Department of Alcoholic Beverage Control; Cinderella*,
Fox pp. 247-260

Review APA§556(b); 554(d) 557(c): Identify the section(s) you think support separation of functions.

After Class:

Find an adjudication from your agency (or another agency if yours does not adjudicate). Answer the Adjudication Question Sheet (on MOODLE), upload your answers, and be prepared to discuss next class.

CLASS 14: MARCH 8. INVESTIGATIONS, DISCOVERY, AND EVIDENCE

Before Class:

Read: *Craib; Circu; Dept of Health and Mental Hygiene v. Bakeways*.
Fox pp 233-242
APA§ 555

Find your agency's policies (if any) about investigation and discovery processes.

IV. POLITICAL CONTROL OF AGENCIES

CLASS 15: MARCH 10. THE EXECUTIVE POWER OF APPOINTMENT AND REMOVAL

Before Class:

Read: *Humphrey's Executor; Morrison v. Olson; Selia Law v. CFPB, Lucia v. SEC*

Watch: Video *John McCain on Removal*

<https://www.youtube.com/watch?v=FolW7FupVz4>

In Class: Be prepared to discuss the constitutional issue with the CFPB? What are the President's Powers over agency executives?

MIDTERM EXAM: Take on your own online between March 11-14. You can take the exam once or twice. I will count the better score.

CLASS 16: MARCH 15. EXECUTIVE OVERSIGHT AND COST-BENEFIT ANALYSIS

Before Class:

Read Executive Order 12,866, and the Biden Executive Order on Vaccinations

Do: Explore OIRA website <http://www.reginfo.gov/public/>,
Answer and Submit OIRA Questionnaire (on MOODLE site)

In Class: how CBA reshapes agency decision-making

CLASS 17: MARCH 17. LEGISLATIVE CONTROL OF AGENCY ACTION

Before Class:

Read: *INS v. Chadha, Congressional Review Act: The Case for Repeal*

After Class: Submit a brief paragraph explaining the constitutional problem in *Chadha* and if the Congressional Review Act avoids that problem.

***** Spring Break*****

CLASS 18: MARCH 29. DELEGATION OF LEGISLATIVE POWER TO AGENCIES

Asynchronous class

Before Class:

Read: *Panama Refining; Schechter Poultry; Whitman*

Watch Video on Nondelegation

V. JUDICIAL REVIEW OF RULEMAKING

CLASS 19: MARCH 31. CHEVRON: REVIEW OF AGENCY STATUTORY INTERPRETATIONS

Before Class

Read: *Chevron, Mead, Skidmore*

Listen: [Podcast on Tariffs](#)

CLASS 20: APRIL 5. THE LIMITS OF CHEVRON DEFERENCE

Before Class:

REVIEW: *Chevron, Skidmore, Mead.*

READ: TBA

CLASS 21: APRIL 7. JUDICIAL REVIEW OF AGENCY RULEMAKING RECORD

Before Class:

Read: *State Farm, Overton Park*, CRS REPORT (from Class 4) pp. 13-17

In Class: Focus on “the record”: What is it? What should be there? How does a court review it? How can you challenge it?

VI. BASIC REVIEWABILITY CONCERNS

CLASS 22: APRIL 12. STANDING TO SEEK JUDICIAL REVIEW

Before Class:

Read: *Lujan, Laidlaw, Michel v. McConnell*

Make a chart of the facts that led to different standing outcomes in these cases

In Class: Small group discussion to create standing checklist

CLASS 23: APRIL 14. EXHAUSTION, RIPENESS, AND FINALITY

Before Class:

Read: *Sackett v. EPA, Block, Center for Highway Safety, U.S. Army Corps v. Hawkes*

In Class: Review relationship between standing and these prudential concerns

VII. STUDENT PECHA KUCHA PRESENTATIONS

CLASS 24: APRIL 19. Pecha Kucha presentations

CLASS 25: APRIL 21. Pecha Kucha presentations

CLASS 26: APRIL 26. LAST CLASS: Pecha Kucha presentations
REVIEW SESSION