

Administrative Law
Prof. Kumar, Fall 2013
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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.

Class will meet on Mondays and Wednesdays from 10:30am to 11:50pm. By virtue of extending class from by 5 minutes each day, we will gain one extra class worth of lecture time. Consequently, if I am sick or there is bad weather, we will not need to make up the missed class. If we get through the semester with an extra class remaining, we will end early.

Textbook

Hickman & Pierce, Federal Administrative Law (Foundation Press).

An extra copy of the book is kept on reserve in the Library under my name, and is available for your use if you forget your book or if there is a delay in ordering your book. Please use it to avoid being unprepared for class.

Attendance Policy

You should attend class sessions and arrive on time. If you arrive late, out of respect for the other students and the class environment, please try to minimize the disturbance. The Law Center attendance policy requires attendance of 80% of all scheduled (or makeup) classes or a student risks being dropped from the class.

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 insure that you have initialed the roll sheet before you leave the classroom each day. Students who do not sign the role sheet are deemed to have been absent. You may not sign the role sheet if you miss more than 15 minutes of class.

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. Even if you have notified me that you will be absent, that absence still uses one of your available absences. An absence is an absence, regardless of the reason, except for absences covered by the University

and Law Center religious holiday policy.¹ Students who exceed six (6) absences will be reported to the Associate Dean. In addition, if a student exceeds the threshold by one absence, the student will take a grade reduction of 1/3 of a letter grade. Each additional absence will result in an additional report to the Associate Dean and an additional 1/3 of a letter grade drop.

Participation

I will call on students, both to discuss cases and to comment on the issues we are discussing. If you are unable to prepare for a particular class, be sure to indicate so on the Pass Sheet, which will be at the podium. You may pass twice without any negative effect to your final grade.

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!

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. Having lectures recorded is a privilege. If there is ever a class where more than 20% of the class skips (excluding poor weather or approved UH events), the lecture will not be recorded.

Grading

Midterm Exam: Monday, Sept. 30, 2013 at 10:30am. The midterm will be a 70-minute in-class exam covering Parts I and II of the syllabus. The midterm will be an open book and open notes, and is worth 35% of your final grade. The questions will be essay and possibly short answer.

Final Exam: Wednesday, Dec. 11, 2013 at 9:00am. The final exam will be 1 hour and 50 minutes long, and will cover the remaining Parts of the course material (i.e., it will NOT test the material that was on the mid-term). The final exam will be an open book and open notes, and will be worth 65% of your final grade. The questions will be essay and possibly short answer.

Office Hours: Wednesdays, 12pm-1pm. Additional hours will be added before the midterm and the final exam.

¹ In highly unusual cases, I will grant an exception to my grade dropping policy for a student with a major medical condition. Such a student would still be reported to the associate dean. Thus far, the only exception granted on such grounds was a student undergoing chemotherapy.

Reading

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.

- **(Aug. 26) Introduction to Agencies.** pp. 1-22.

At the federal level, Congress creates most agencies through explicit statutory acts, known as “organic statutes.” This legislation determines what authorities the created agency shall have.

Focus Questions: (1) Be able to identify what is an agency and have a general understanding of why they are useful, (2) Be able to explain how independent agency vary from a traditional executive agency, (3) Why was the Administrative Procedure Act created?

- **(Aug. 28) Constitutionality of Delegating Policymaking Authority.** pp. 23-26, 30-33, 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 *American 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?

- **(Sept. 4) Controlling Delegations; Appointment of Agency Officials; Article II.** pp. 120-130, 141-150

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. Are all legislative vetoes in any form whatever unconstitutional after *Chadha*?

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?

- **(Make-up Friday, Sept. 6) Agencies and Article II: The President's Relationship to the Administrative Agency.** pp. 154-181

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? Which category do ALJs fall into?

- **(Sept. 9) Removal of Agency Officials.** pp. 189-95, 198-202, plus edited *Free Enterprise Fund*.

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?

- **Sept. 11: Prof. Kumar is out of town, class canceled**

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.

- **(Sept. 16) The Role of the Due Process Clause.** pp. 225-245
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?

- **(Sept. 18) The Rise of the Entitlement Theory.** pp. 246-262.
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?

- **(Sept. 23) What Process is Due?** p. 262-282
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?

- **(Sept. 25)** Wrap-up of Part I and II and Q&A review.
- **Sept 30:** Mid-Term Exam