

Administrative Law
Prof. Kumar, Fall 2020
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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.

Please note that JD students are expected to have completed statutory interpretation and regulation (“Stat Reg”) prior to taking this class. Transfer students should ideally wait until they have completed Stat Reg prior to enrolling in this class. There are no prerequisites for LLM students, who are graded on a separate curve from the JDs.

Casebook

We will be using Hickman & Pierce, *Federal Administrative Law* (Foundation Press) (3d ed.). I like this book because the cases draw from a wide range of agencies, instead of skewing towards environmental law like most books. It also covers a wide variety of topics, making it suitable for a law school where the students have some overview of administrative law from 1L year.

Administrative law evolves quickly, so many of the cases have changed since the Second Edition. That being said, if the third edition is prohibitively expensive for you, many of the new cases are available in the 2019 supplement, which you can download at https://www.law.uh.edu/schedule/class_information.asp?cid=16317 (see First Day Assignments). Last year’s syllabus (keyed to the second edition) is there too, though it is important to note that a number of the readings have changed.

Attendance Policy

I will take attendance via Zoom. 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 absences will be reported to the Associate Dean, and may be dropped from the class or have their final grade lowered.¹

If you need to miss a single class, please 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.

Class Preparation

This class will utilize a partially flipped classroom. Each class will have a reading assignment and a 15-20 minute pre-lecture (available on the Lexis class website) that you should listen to prior to class. The pre-lecture will generally contain black-letter law and provide context for the cases. It may be helpful to listen to the pre-lecture before doing the reading. Note that actual class time will be consequently be a little shorter.

Note that the pre-lecture for the first day of class reviews basic administrative law concepts covered in

¹ An absence during a scheduled make-up class will not count towards the six-absence limit.

Statutory Interpretation and Regulation and is therefore optional.

Class Website

A class website has been set up on Lexis. Go to www.lexisnexis.com/lawschool and log in (using your UH Lexis ID). In the top right-hand screen, click “Training,” then click “Add Course” from the drop-down menu. Look for Kumar, then add “2020 Administrative Law.”

Note that pre-lecture and lecture recordings, handouts, the current syllabus, and old exams will all be posted there. If you have any trouble accessing the class website, contact our Lexis representative Billy Saqr at billy.saqr@lexisnexis.com. If you are a transfer student who doesn't have a UHLC Lexis account, send Billy an e-mail from your UHLC e-mail account, and he can set you up.

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 unpreparedness when your panel is on call and/or not participating during group work. Note that if you are absent when your panel is on-call, you need to contact me to make it up by temporarily serving on another panel.

In rare 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!

Attendance via Zoom

This class will be taught via this Zoom link: <https://uhlc.zoom.us/j/98243160941> (password: CHEVRON). To participate, 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 and microphone muted (note: the class will be set up to mute you automatically upon entry). Video must stay on for the entire class.
- When your panel is on call, you need to 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.
- Do your best to present yourself professionally in the video stream, both in attire and in conduct.
- You must be able to fulfill your responsibilities if your panel is on call, even if you are taking the class pass/fail.
- If you have to leave Zoom for more than fifteen minutes during the lecture, you will be counted as absent.

Video 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 exam. The exam will be an open book and open notes (i.e., you can bring any printed materials, including commercial outlines). The format of the exam will be essay and short answer. However, citing cases or material that we did not cover will cause your answer to be

marked down.

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 portions of the Constitution relating to administrative law, and (3) engage in legal analysis and reasoning, problem-solving, and written and oral communication relating to administrative law.

Names and Pronouns

Chosen names and preferred pronouns (including non-binary ones such as they/them/their) must be respected in my classroom. Please feel free to reach out to me at any time if you want to make me aware of your chosen name or preferred pronoun, or if you have concerns about how I or your classmates address you.

Law School During the Pandemic

Our goal for the semester will be to do our best. Some days, that may mean volunteering to take the first case for your panel. Other days, that may mean muting yourself while your partner takes a conference call in the same room or while your child has a meltdown. You will almost certainly hear and see my cat, Siegfried. Your dog/cat/child/partner/roommate may join us inadvertently from time to time. All of this is fine—we will do our best. I realize that this will be a stressful time for many of you—know that my (virtual) door is open to you.

Mandatory Notices from the University:

- 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. www.uh.edu/caps/outreach/lets_talk.html
- Students may not record all or part of class, livestream all or part of class, or make/distribute screen captures, without advanced written consent of the instructor. If you have or think you may have a disability such that you need to record class-related activities, please contact the Center for Students with DisABILITIES. If you have an accommodation to record class-related activities, those recordings may not be shared with any other student, whether in this course or not, or with any other person or on any other platform. Classes may be recorded by the instructor. Students may use instructor’s recordings for their own studying and notetaking. Instructor’s recordings are not authorized to be shared with anyone without the prior written approval of the instructor. Failure to comply with requirements regarding recordings will result in a disciplinary referral to the Dean of Students Office and may result in disciplinary action.
- Due to the changing nature of the COVID-19 pandemic, please note that the instructor may need to make modifications to the course syllabus and may do so at any time. Notice of such changes will be announced as quickly as possible through the class website.

Reading

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.

Each class will also have a 15-20 minute recorded prelecture uploaded to the class website that you should listen to before class.

I. Congressional and Executive Control of Agencies

This portion of the course explores how the U.S. Constitution governs the powers Congress can delegate to agencies, as well as the appointments and removals of agency officials. This material may overlap with what you learned in Constitutional Law.

- **Class 1. Constitutionality of Delegating Policymaking Authority.** 27–30, 35–40, 66–82, 183–187. Note that the pre-lecture for this class provides a review of basic administrative law concepts from your statutory interpretation class.

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 nondelegation doctrine. However, *Gundy v. United States* may signal a potential future change.

Focus Questions: (1) What is the non-delegation doctrine and the intelligible principal test? (2) Why does *Gundy* signal a possible future change for the status of the non-delegation doctrine?

Cases: *Schechter Poultry v. U.S.*; *Gundy v. U.S.*

- **Class 2. Controlling Delegations; Appointment of Agency Officials; Article II.** 160–171, 187–194, 199–209. Read over Problem 1 (available on class website).

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?

Cases: *INS v. Chadha*, *Buckley v. Valeo* (note: I won’t call on anyone for this case), *Lucia v. SEC*

- **Class 3. Agencies and Article II: The President’s Relationship to the Administrative Agency.** pp. 210–233.

Unlike models known to the framers in the late eighteenth century, Article II vests the “executive Power” in one official alone. But 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?

Cases: *Morrison v. Olson* (note: I won't call on anyone for this case), *Edmond v. U.S.*, *Freytag v. Comm. of Internal Revenue*

- **Class 4. Removal of Agency Officials.** 260–281; skim 281–297.
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?

Cases: *Myer v. United States*, *Humphrey's Executor v. U.S.*, *Morrison v. Olson*, *Free Enterprise Fund v. PCOAB* (I won't call on anyone for this case).

II. Due Process

Due process is the primary source of procedural controls on agencies outside of those established by statute. Governed by the Fifth and Fourteenth Amendments, it provides a hearing to individuals who are deprived of life, liberty, or property by either state or federal agency adjudication. Note, however, that due process rights are much weaker in areas concerning national security and border security.

- **Class 5. Removal of Agency Officials (cont.); The Role of the Due Process Clause.** Read edit of *Seila Law v. CFPB* (available on class website); 345–355.
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.

Focus Questions: (1) How does the *Seila Law* case reflect a political split over the role of the President? (2) How does the APA distinguish between rulemaking and adjudication? (3) Under the common law, how does the distinction between legislation and rulemaking affect due process rights in *Londoner* and *Bi-Metallic*?

Cases: *Seila Law v. CFPB*, *Londoner v. City and County of Denver*, *Bi-Metallic v. State Board of Equalization*

- **Class 6. The Rise of the Entitlement Theory.** 355–383.
Goldberg introduces the right of procedural due process. *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.

Cases: *Goldberg v. Kelly*, *Wisconsin v. Constantineau*, *Paul v. Davis*, *Board of Regents v. Roth*, *Perry v. Sinderman*

Focus Question: (1) How does the Court in *Goldberg* expand due process rights? (2) What is the framework for determining whether an individual is entitled to due process? (3) Why did *Roth* and *Sinderman* come out differently?

- **Class 7. The Rise of the Entitlement Theory (cont.), What Process is Due?** 383–414
Kerry looks at the intersection of liberty interests and national security. *Eldridge* and *Loudermill* examine how much due process is required to comply with the Constitution and issues of timing.

Cases: *Kerry v. Din*, *Matthews v. Eldridge*, *Cleveland v. Loudermill*

Focus Questions: (1) When must a due process hearing occur? (2) How does a court determine how much procedure is required? (3) How does the Supreme Court limit the *Goldberg* decision?

- **Class 8. Liberty Interests: National Security and Public Health Emergencies.** 414–425; Problem 5; edit of *Jacobson v. Mass.* (on class website).

Cases: *Hamdi v. Rumsfeld*, *Jacobson v. Massachusetts*

Focus Questions: (1) How does the traditional procedural due process analysis change in a national security context? (2) Why is due process different in this context? (3) What authority do states have to require vaccinations?

III. Adjudication & Rulemaking

This section of the class will cover the two core powers of agencies: adjudication and rulemaking. It will discuss the APA requirements for rulemaking and adjudication and the distinction between formal and informal proceedings. It will further discuss the various judicial review standards.

- **Class 9. Wrap up of Public Health & Due Process; Introduction to Formal and Informal Adjudication.** Parmet & Sinha, *Covid-19—The Law and Limits of Quarantine* (on class website); Poly Price, *Law and the Public's Health* (on class website); 425–441; § 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.

Cases: *Dominion Energy v. Johnson*, *Citizens to Preserve Overton Park v. Volpe*, *Pension Benefit Guaranty v. LTV*

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.

- **Class 10. Permissible Decisionmaking Structures and Impermissible Bias.** 441–465, § 554(d), § 556(b).

Agencies are supposed to be politically accountable and yet, we expect for adjudication to be unbiased.

This class looks at ways in which unpermissible bias can occur in agencies and how agency structure can lead to bias. Note that this class will have a guest speaker, Kate Chapman (UHLC '2016), who will talk about bias in immigration cases.

Cases: *Withrow v. Larkin*, *Nash v. Bowen*, *Gibson v. Berryhill*

Focus Questions: (1) How does the Judicial Model differ from the Bureaucratic Model? (2) Why might state agencies be more prone to bias than federal agencies? (3) What are the risks of using private adjudicators, as opposed to public ones?

- **Class 11. Judicial Review of Agency Adjudication.** 473–488; *Dickenson v. Zurko* (available on class website), § 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.

Cases: *Dickenson v. Zurko*, *Universal Camera v. NLRB*, *Allentown v. Mack*

Focus Questions: (1) What does “or otherwise supported by law” mean in § 559? (2) What is a question of fact? (3) What standard of review applies to findings of fact in formal adjudication?

- **Class 12. Judicial Review of Agency Adjudication (cont.), The Decline of Formal Rulemaking, and the Evolution of Notice-And-Comment Rulemaking.** § 553, 498–509, 553–554, 561–575

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.

Cases: *ADAPSO v. Board of Governors*, *Vermont Yankee v. NRDC*, *Shell Oil v. EPA*

Focus Questions (1) What standard of review applies to findings of fact in informal adjudication? (2) What is formal rulemaking and why is it disfavored? (3) How do we reconcile *Vermont Yankee* with *Overton Park*? (3) What is the logical outgrowth test?

- **Class 13. Public Participation in Rulemaking.** 576–592

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

Cases: *Portland Cement v. Ruckelshaus*, *American Radio Relay League v. FCC*, *U.S. v. Nova Scotia Food Products*

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?

- **Class 14. Highly Informal Rules.** 623–626, 641–643, 647 (beginning at d.)–665

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.

Cases: *Am. Mining Congress v. Mine Safety & Health Admin.*, *Pacific Gas & Elec. v. Fed. Power Comm.*

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?

▪ **Class 15. Arbitrary & Capricious “Hard Look” Review.** 667–669, 676–702

Cases: *Motor Vehicle Mfrs. Association v. State Farm*, *FCC v. Fox*

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.

▪ **Class 16. The *Chevron* Revolution.** 711–712, 720–723, 728–737, *Cuozzo Speed Tech. v. Lee* (available on class website)

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.

Cases: *Skidmore v. Swift*, *Chevron U.S.A. v. Natural Resources Defense Council*, *Cuozzo Speed v. Lee*

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?

▪ **Class 17. The “Tools” of *Chevron* & Substantive Canons.** 761–788

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.

Cases: *HUD v. Rucker*, *General Dynamics Land Systems v. Cline*, *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*

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) What role do substantive canons play with *Chevron*, including the canon of constitutional avoidance?

- **Class 18. *Chevron* Step Two & Hard-Look Review.** 807–816, 833–844, *Clearcorrect v. ITC*
In the early days of *Chevron*, Step Two was an easy standard to meet. But over time, step two has looked increasingly like hard-look review.

Cases: AT&T Corp. v. Iowa Utilities Board, Encino Motorcars v. Navvaro, *Clearcorrect v. ITC*

Focus Questions: (1) How do courts assess what is “reasonable” for step two purposes? (2) What is the relationship between *Chevron* Step Two and hard-look review?

- **Class 19. The *Mead* Counter-Revolution.**
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?

- **Class 20. Agency Interpretation of Agency Regulations.**
Agencies are in the best position to interpret their own ambiguous regulations. What has evolved is the controversial *Auer/Seminole Rock* standard, which like *Chevron* is highly deferential to the agency.

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).

- **Class 21. Limits on Reviewability: Preclusion.**
Under the APA, there is a presumption that agency decisions are reviewable. But sometimes Congress will preclude the court from reviewing certain agency decisions. Such preclusion can be expressly stated in a statute or implied. The presumption reflects a tension between maintaining separation of powers and preventing judicial second-guessing of sensitive areas, such as national security.

Focus Questions: (1) How can Congress overcome the presumption of reviewability? (2) When will a court find implied preclusion?

- **Class 22. Limits on Reviewability: Committed to Agency Discretion.**

Under the APA, there is a presumption that agency decisions are reviewable. However, some statutes may provide so much discretion to the agency that the court is unable to review the decision.

Focus Questions: (1) What does it mean for an agency action to be “committed to agency discretion by law?” (2) Why don’t these unreviewable decisions violate the non-delegation doctrine?

- **Class 23. Timing of Judicial Review: Finality and Ripeness.**

- **Class 24. Constitutional Standing.**

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?

- **Class 25. More Constitutional Standing.**

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?

- **Class 26. Statutory Standing: The Zone of Interests Test.**

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.

- **Class 27. Freedom of Information Act: Reading TBA**

In-Class Review. Review will be based solely on questions that you send me in advance or ask during the review.