

**Administrative Law**  
**Prof. Kumar, Fall 2014**  
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**Assistant: Robin Huff**

**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 2:30pm to 3:50pm. 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 one class early.

**Textbook**

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

**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.<sup>1</sup> Students who exceed six (6) absences will be reported

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<sup>1</sup> 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.

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**

**Final Exam: Dec. 8, 2013 1pm-4pm.** The final exam will be an open book and open notes. The format will be short answer and essay.

**Office Hours:** TBA

**Reading: Each bullet point equals one class assignment**

**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.

▪ **Introduction to Agencies; Constitutionality of Delegating Policymaking Authority.**

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?

▪ **Controlling Delegations; Appointment of Agency Officials; Article II.**

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?

▪ **Agencies and Article II: The President’s Relationship to the Administrative Agency.**

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?

- **Removal of Agency Officials.** pp. 171–181, 189–195, 198–202, plus paragraph on *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?

## 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.** 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?

- **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?

- **What Process is Due?** pp. 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?

- **TBD**

**III. Adjudication & Rulemaking:** Note that some topics may be cut based on what was covered in Stat Reg!

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.**

*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.** *Dickenson v. Zurko*; § 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?

- **Introduction to Rulemaking.**

This section introduces rulemaking, a powerful tool that allows agencies to create rules that can potentially bind the public. It further looks at why agencies might choose rulemaking over adjudication.

Focus Questions: (1) What are some of the advantages of rulemaking? (2) What disadvantages does rulemaking cause to individuals? (3) What discretion does an agency have in choosing between rulemaking and adjudication?

- **The Decline of Formal Rulemaking and the Rise of Notice and Comment.** § 553

Although agencies can engage 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) Why is formal rulemaking disfavored? (2) How do we reconcile *Vermont Yankee* with *Overton Park*? (3) What is the logical outgrowth test?

- **Public Participation in Rulemaking.** 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.**

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.**

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.** Note that some topics may be cut based on what was covered in Stat Reg!

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**

*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?

- **The “Tools” of Step One Analysis; Step Two and Hard Look Review.** *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.**

*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.**

Agencies are in the best position to interpret their own ambiguous regulations. What has evolved is the non-controversial *Seminole Rock/Auer* standard, which like *Chevron* is highly deferential to the agency. In contrast, the courts recast the highly deferential arbitrary and capricious review standard into a probing review of policy questions.

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 (subject to change)**

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).

- **Constitutional Standing.**

Before an individual can challenge an agency action, they must show that they have standing to sue. To do so, they need to show both constitutional and prudential standing.

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?

- **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?

- **Prudential (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.

- **Limits on Reviewability: Preclusion.**

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.**

## **VI. The Freedom of Information Act (if time)**