

Professor Richard C. Reuben
Administrative Law 5310
Fall 2019. Tuesdays and Thursday. 11:30 a.m. - 12:45 p.m.
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Appointments are welcome.

Administrative Law Fall 2019 Preliminary Syllabus

Administrative law is the law of administrative agencies -- the so-called “Fourth Branch of Government” -- and is a rich combination of both constitutional and statutory law. We will deal with many different administrative agencies, and in the process develop a deeper understanding of the many areas of American life that administrative agencies touch, as well as a more comprehensive understanding Administrative Law that transcends the rules of a particular agency.

Readings: We will be using the first draft of my casebook Richard C. Reuben, *Administrative Law: Cases and Context* (forthcoming 2020), along with other supplemental materials. I am still working on it, and indeed will be working it on between classes, so I welcome your comments and suggestions for improvement. Unless otherwise specified, the book and all other readings will be on the class TWEN site.

Pace: We will cover about three cases per class session -- some days more, some days less -- and generally track the order of the syllabus. The syllabus is divided into topics, and I expect to spend about a day on each topic. I will distribute PowerPoint slides daily, and post them on the class TWEN site after class.

Class Communication: I use email to correspond with students about class readings and other matters, and I can use only university email addresses. It is your responsibility to check your university account for up-to-date information. The email reading assignments for the week generally go out the preceding weekend. If you don't receive an email from me by noon on Monday, you should read the next 25 or so pages in the book.

Class Attendance: Per ABA accreditation policy for all law school classes, class attendance is generally required, consistent with the Law School's general attendance policy posted on the Law School web site.

I understand that things come up, and sometimes choices have to be made, so I don't require attendance or expect yours to be perfect -- although I do reserve the right to require attendance for a particular class, such as if we have a guest speaker.

You are adults and need to make your own decisions about your time. For this reason, I do not distinguish between excused and unexcused absences. Rather, you may miss 6 classes for any reason. If you miss one more, for any reason, you will be dropped from the course administratively without further notice. My exams come from my classes, and I do not believe you can be competent to take the exam if you miss more than a quarter of the class.

There will be no exceptions. If you are not present when attendance is taken, you missed that class for attendance purposes. Signing in at the end of class is not an option. I will take attendance daily, and will treat representations of the attendance of another who is not present as an honor code violation.

Grading: Your final grade be based on the following elements: 50 percent exam, 30 percent practice component, and 20 percent class participation.

- a. **The Exam.** The final will be a traditional four-hour take home exam that you may take on any day beginning the first Wednesday of exams, Dec. 4, and the second Wednesday of exams, Dec. 11. The exam is to be picked up in Room 203 any time after 8:30 a.m., and must be turned in no later than 4 p.m. that day. Therefore, if you want the full four hours, you will need to pick it up no later than noon. But that's up to you.
- b. **Practice Component:** You will be required to do three short assignments focusing on a federal agency of your choice. Assignments must be filed in the TWEN Assignment Drop Box by 9 a.m. on the date of the assignment. Late assignments will be subject to grade reduction.
 1. Identify an agency, briefly describe its mission and the social problem it is designed to solve, and say why you are choosing this agency. Due: September 11.
 2. Find the agency's organic statute and analyze it from a separation of powers perspective, including agency structure, constraints on delegations, appointment and removal of officers, and separation of functions. Due: October 9
 3. Pick an issue that is subject to a current rulemaking process, write a comment, submit it to the agency, and turn in a copy and proof of filing. Due: November 6.
- c. **Class Participation:** The class participation component of your grade is not based on class attendance. Rather, it is based on your vocal, written, and otherwise demonstrable engagement with the materials, and involvement in the class' growing mastery of them. Some of you may feel uncomfortable speaking in front of others. I was that way as a student, too. However, I also quickly learned that silence is not an option for a practicing lawyer, and this classroom is the place to learn how to speak like a lawyer, as well to think and write like a lawyer.

I realize this may be particularly challenging for students who are more introverted. If that's you, please let me know privately so we can work on participation expectations for you together in light of your situation. I also recommend Heidi Kristin Brown, *The Introverted Lawyer* (2017), which offers many practical suggestions for success in law.

Statement on Political Views: Much of your first year involved private law – torts, contract, property for example – which is how law regulate private relationships. These areas are largely immune from political forces, at least theoretically.

That is not the case with public law, the law that regulates the government and its relationship with the people. Public law necessarily takes place within the public realm, and therefore must take into account, and be accountable to, the body politic. This is proper in a societal regime committed to democratic self-governance and the rule of law.

Administrative Law is an aspect of public law, and it is impossible to understand it without factoring in political considerations.

As we will see, this dynamic has always been in place. However, the Trump Administration has raised it to a new level. Specifically, its embrace of unitary executive theory has led it to actions that challenge, if not outright defy, settled understandings of how administrative law and process works as a matter of law, policy, and practice.

Rather than avoid what is happening in the real world, this class will embrace it and use it as appropriate to better understand the nature of Administrative Law from a normative perspective as well as one that is descriptive. A central question during this exploration will be: Why did Administrative Law over time reach the conclusion that it did on a particular problem, and what are the consequences of change – not just for the regulatory regime at issue, but for the rule of law and democratic self-governance as well?

Each of us will certainly have a perspective on these questions, as they go to the fundamental issue of the relationship between the state and its people. I want, and expect, you to articulate your views, just as I will articulate mine from time to time. I also want you to know that I have no expectation or desire for your views to conform with mine. In fact, I very much hope that they transcend the political spectrum because it will make for a much more engaging classroom dynamic and a better learning experience for everyone.

My one caveat is that I expect you to articulate your views like a lawyer – thoughtful, reasoned, and respectful – not mere sloganeering – and be prepared to answer the question “Why?” You can expect the same of me. In my opinion, learning how to talk about issues that are intensely charged and subject to fierce political disagreement is every bit as important as the substantive content of this course. Use this class as an opportunity to develop or improve your game.

My Class Style: I love Administrative Law, and enjoy bringing the fascinating issues it raises to students with clarity, energy, and humor. As they say about so many things, if you’re not having fun, you’re not doing it right.

However, I have come to learn over the years that my class style is not for everyone, and prefer to be up front about that so you can make your own choices about whether to stay in this class.

To begin with, I do not spoon feed, provide rubrics, use panels, or other such classroom gimmicks. Neither life nor the practice of law are so accommodating, and allowing you to continue to rely on such crutches does you no favors as a future practicing lawyer, in my view.

I do some lecturing in class. But mostly I ask questions because, as I hope you know by now, the questions are much more important than the answers.

The best way to avoid being cold-called is to volunteer. Otherwise, you *will* be cold-called – and please know that it is generally not enough to say “I don’t know” or “I am not prepared,” “I didn’t read this case,” or otherwise pass. These are not options for practicing lawyers, and besides, someone else in the class is probably in the same situation. You will be expected to think it through on the spot, so I encourage you to come prepared so you will at least have given the issues some thought.

We are in class to learn together – you by the questions I ask you, me by the questions you ask me, and collectively by our discussion about those questions. In Administrative Law, perhaps more than many other courses, cases do stand for particular propositions of law. But the questions they raise extend beyond their holding, and that is often what I am more interested in because that is often what the case not yet filed is going to be about.

I am deeply committed to my classes, and to you as my students and future members of my profession. I will work very hard to make this often-difficult area of law understandable, relevant, and engaging for you, and to support you as students and as individuals in the process of becoming members of our noble profession. If I am doing my job well, I will challenge you

in the process, in a way that will deepen your understanding of Administrative Law, the law in general, and perhaps yourself as a person.

If this is what you are looking for, great. We will have a wonderful experience together. If not, I would encourage you not to take this class because you probably will not like it. T Moreover, you do have options. You can take this course from another professor next year, and there are many other good electives you can take to get the three hours of credit this course provides. Please be honest with yourself about why you are here, and what you want to get out of this class, and make your decisions about the class accordingly.

Finally, I have a small favor to ask: There is a tradition at the law school of students giving standing ovations to professors at the end of their classes. I do not particularly like this tradition as it too often seems pro forma and insincere. If you would like to show me how much you liked the class, study hard so you can do well on your exam.

Learning Outcomes: It is my hope and objective for students to achieve both doctrinal and practical learning outcomes in a class with summative (final exam) and formative assessment that does not comply with Standard 303 as a simulation course. In particular, students will:

- learn the constitutional and statutory framework for federal administrative law;
- learn the competing policy objectives and practical considerations that make administrative law challenging;
- learn how to understand the cutting edge of contemporary administrative law issues, and how to craft arguments in light of a changing U.S. Supreme Court;
- learn to verbally articulate legal arguments relating to administrative law;
- experience administrative law practice by choosing an agency, writing a short paper about its structure, and then submitting a comment in an active rule-making of the agency;
- get some exposure to the differences between federal and Missouri state administrative processes

Cancelled Class and Make-Up: Please note the following schedule adjustments.

Schedule of Classes

Chapter I. Introduction

Topic 1: Introduction to Administrative Agencies

A. Agencies and their Environment

1. What is an agency?
Kamensky, How Big is the Government?
2. Where do agencies come from?
Delegation and deference
3. How are agencies structured?
4. External pressures on agencies
5. The Problem of Deference to Administrative Agencies
Madison, Federalist 51
Eastman, The Place of the Independent Commission
Landis, The Administrative Process
Noll, Reforming Regulation (or better statement of capture theory)
Wilson, The Politics of Regulation
6. Unitary Executive Theory

Topic 2: B. What agencies do

1. What agencies do
Londoner v. City and County of Denver (Adj.)
Bi-Metallic Investment Co. v. St Bd. of Equalization (RM)
2. Enforcement??

Topic 3: C. Administrative Law in the Age of Trump

1. Executive Orders
2. Hawaii v. Trump
3. Scalia, The Rule of Law
4. Something on Legitimacy of the Courts

Chapter II. Constitutional Constraints on Administrative Agencies

Topic 3: Formalism and Functionalism in Constitutional Interpretation

- INS v. Chadha
Nixon v. Administrator of General Services
Murphy v. NCAA (2018)

Topic 4: Agencies and Article I

- A. The First Congress
- B. The Second Congress
- C. Theories of Delegation
 1. Cargo of the Brig Aurora v. United States
 2. Wayman v. Southard
 3. Marshall Field & Co. v. Clark
 4. J.W. Hampton, Jr. v. United States
- D. Limitations on Delegations
 1. The Non-Delegation Doctrine

- 2. The New Deal Cases
 - 1. Panama Refining Co. v. Ryan
 - 2. A.L.A. Schechter Poultry Corp. v. United States
 - 3. Michigan v. EPA
- E. The Modern Articulation
 - 1. Mistretta v. United States
 - 2. American Trucking Association v. Williams
 - 3. Gundy v. U.S.(2019)
- F. Congressional Control of Administrative Agencies
 - 1. Executive
 - 2. Congressional
 - 3. Judicial

Topic 5: Article II and Agencies

- A. Presidential Control of Administrative Agencies
 - 1. The Unitary Executive and the Senate's Constitutional Role
 - 2. Executive orders
 - 3. The Civil Service Act and federal employee unions
 - 4. Budget and enforcement priorities
- B. Appointments
 - a. Buckley v. Valeo
 - i. Problem: CFPB case
 - b. Morrison v. Olson
 - c. Free Enterprise Fund v. PCAOB
 - d. Lucia v. SEC (2018)
 - i. NLRB v. SW General Inc. dba Southwest Ambulance (2017)
 - ii. Ortiz v. United States (2018)
- C. Removal
 - a. Morrison v. Olson

Topic 6: Article III and Agencies

- Crowell v. Benson
- CFTC v. Schor
- More Recent Case??

Topic 7: Agency Bias

- Withrow v. Larkin
- The Separation of Functions Doctrine

Chapter III. Statutory Constraints on Agency Procedure

Topic 8. The APA: An overview

Topic 9: Formal Rulemaking: United States v. Florida East Coast Railway

Topic 10. Formal Adjudication:

- City of West Chicago v. NRC
- Seacoast Anti-Coastal League v. Costle
- Chemical Waste Management v. EPA

Topic 11. Informal Rulemaking

- A. The structure of Section 553
- B. The D.C. Circuit and Hybrid Rulemaking
 - Automotive Parts & Accessories Assn v. Boyd
 - Portland Cement Ass'n. v. Ruckelshaus
 - Vermont Yankee Nuclear Power Plant Corp. v. NDRC
 - Connecticut Light and Power v. NRC
 - Department of Commerce v. New York (2019)

Topic 12: Exemptions from Rulemaking Procedures

- a. Procedural Rules
 - Air Transport Association of America v. DOT
- b. Interpretive Rules and Policy Statements
 - U.S. Telephone Association v. FCC
 - Professionals and Patients for Customized Care v. Shalala
- c. Good Cause
 - Tennessee Gas Pipeline v. FERC

Topic 13. Informal Adjudication

- Citizens to Preserve Overton Park v. Volpe
- Pension Benefit Guaranty Corp. v. LTV

Topic 14. The Choice Between Rulemaking and Adjudication

- Chenery Corp. v. SEC (Chenery I)
- SEC v. Chenery Corp. (Chenery II)
- Retroactivity

Chapter IV. Judicial Review of Agency Action

Topic 15. Deference and the Need for Differing Standards of Review

- Section 706
- Industrial Union Dep't, AFL-CIO v. Hodgson

Topic 16. Review of Findings of Fact in Formal Proceedings

- Universal Camera Corp. v. NLRB

Topic 17. Review of Findings of Fact in Informal Proceedings

- Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve

Topic 18. Review of Agency Legal Conclusions

- NLRB v. Hearst Publications, Inc.
- Chevron USA v. NRDC
- INS v. Cardoza-Fonseca
- Chevron Step 1: Mayo Clinic v. United States
 - Skidmore v. Swift & Co.
 - United States v. Mead
 - Auer v. Robbins
 - Kisor v. Wilke (2019)
 - Gonzalez v. Oregon
 - Rappoport v. U.S. Dep't of the Treasury
 - Zuni Public School Dist. No. 89 v. DOE
- Step 2: Michigan v. EPA

Topic 19. Review of Agency Discretion on Questions of Policy
Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Ins. Co.
Puerto Rico Sun Oil Co. v. US EPA
United States v. Nova Scotia Food Products Corp.

Chapter V. Constitutional Constraints on Agency Procedure

Topic 20. Intro to Due Process
Phillips v. Commissioner of Internal Revenue
Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy
Goldberg v. Kelly
Wisconsin v. Constantineau
Bell v. Burson

Topic 21. Entitlement Theory
Board of Regents v. Roth
Perry v. Sindermann

Topic 22. What Process is Due?
Mathews v. Eldridge
Cleveland Board of Education v. Loudermill

Chapter VI: FOIA – TO COME

G. Chapter VII. Timing and Availability of Judicial Review

Topic 23. Standing
Lujan v. Defenders of Wildlife
Associated Data Processing Service Organizations, Inc. v. Camp

Topic 24. Ripeness
Abbott Laboratories v. Gardner
Toilet Goods v. Gardner

Topic 25. Exhaustion
Statutory Exhaustion
McCarthy v. Madigan
Darby v. Cisneros

Topic 26. Finality
FTC v. Standard Oil of California

DISCLOSURES

Statement Regarding Americans with Disabilities Act

If you anticipate barriers related to the format or requirements of this course, if you have emergency medical information to share with me, or if you need to make arrangements in case the building must be evacuated, please let me know as soon as possible. This sample statement is

posted on the web at: <http://provost.missouri.edu/faculty/syllabus.html> and at <http://disabilityservices.missouri.edu/faculty/syllabus.php>.

If disability-related accommodations are necessary (for example, a note taker, extended time on exams, captioning), please register with the Office of Disability Services (<http://disabilityservices.missouri.edu>), S5 Memorial Union, 573- 882-4696, and then notify me of your eligibility for reasonable accommodations. For other MU resources for students with disabilities, click on "Disability Resources" on the MU homepage.

Statement Regarding Academic Dishonesty

Academic integrity is fundamental to the activities and principles of a university. All members of the academic community must be confident that each person's work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The academic community regards breaches of the academic integrity rules as extremely serious matters. Sanctions for such a breach may include academic sanctions from the instructor, including failing the course for any violation, to disciplinary sanctions ranging from probation to expulsion. When in doubt about plagiarism, paraphrasing, quoting, collaboration, or any other form of cheating, consult the course instructor.

Statement Regarding Intellectual Pluralism

The Law School community welcomes intellectual diversity and respects student rights. Students who have questions or concerns regarding the atmosphere in this class (including respect for diverse opinions) may contact the Dean's Office, the Director of the Office of Students Rights and Responsibilities <http://osrr.missouri.edu/> or the MU Equity Office (equity@missouri.edu). All students will have the opportunity to submit an anonymous evaluation of the instructor(s) at the end of the course.