

**Professor Richard C. Reuben**

**Administrative Law 5310**

**Fall 2021. Tuesdays and Thursday. 11:00 a.m. - 12:15 p.m.**

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**Appointments are welcome.**

## **Administrative Law Fall 2021 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.

**Learning Outcomes: Learning Objectives and Outcomes.** Students will learn:

- the federal constitutional and statutory frameworks for Administrative Law;
- the legal, policy, practical constraints on administrative decisionmaking;
- the doctrines courts use to interpret the Administrative Procedure Act and other statutes,
- to articulate legal, policy, and practical 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 agency rulemaking process;
- get some exposure to the differences between federal and Missouri state administrative processes.

**Readings:** We will be using the current draft of my casebook Richard C. Reuben, *Administrative Law: Cases and Context* (forthcoming 2022), 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 Canvas site. I will also share a version on Google Docs so that you can make corrections, additions, etc.

**Pace:** We will cover about 20 pages 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 cover a topic or two in each class session. I will distribute PowerPoint slides daily and post them on Canvas shortly before class.

**Class Communication:** I use Canvas to correspond with students about class readings and other matters, and it is your responsibility to check it regularly. The reading assignments for the week will generally be posted the preceding weekend. If it's not posted by noon on Monday, you should read the next 20 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 ordinarily have a permissive but meaningful attendance policy on top of the ABA standards. However, in light of the pandemic and the need for extra precaution on matters of public health, I will simply say if you don't feel well, please don't come to class. I hope to be able to record the classes for those who can't attend, but that will depend upon factors beyond my control at this time.

**Classroom Covid Policy:** Per University policy, masks are required for admission into the classroom until at least Sept. 15. See Administrative Disclosures below for University policies respecting Covid.

If the University terminates its mask requirement, I will follow the CDC guidelines for masking and social distancing in the classroom as they relate to Columbia at the time, and expect you to do the same. The rule of law depends on voluntary compliance with rules, regulatory guidance, democratic norms, and governmental institutions, and this principle will be honored in this class.

**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. 8, and the second Wednesday of exams, Dec. 15. 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.
- b. **Practice Component:** You will be required to do three short assignments focusing on a federal agency of your choice that I approve. Assignments must be filed in the Canvas Assignment Drop Box by 11:59 p.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 address and say why you are choosing this agency. This paper should be 1-2 pages. Due: September 15.
  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. This paper should be 3-4 pages. Due: October 15.
  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. This paper should be as long as it needs to be. Due: November 17.
- 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 law student, too. However, I also quickly learned that silence is not an option for a practicing lawyer, and view this classroom as a place to practice speaking like a lawyer, as well as thinking and writing 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

for those who are more introverted.

- d. **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 raised it to a level not seen since the administration of Franklin Delano Roosevelt. Specifically, its embrace of unitary executive theory led it to actions that challenged, if not outright defied, settled understandings of how administrative law and process works as a matter of law, policy, and practice.

I realize that it is difficult not to hold a strong view about Donald Trump and the Trump Administration. In this class, we will embrace this dynamic as a teachable moment, assessing it critically but fairly, just as we will President Biden's administration. At times, the discussion may seem more tilted against Trump and in favor of Biden. However, that is only because it is the most recent past administration, because the positions it took were so often extreme from an Administrative Law perspective, and because the U.S. Supreme Court issued several important rulings based on those actions. By contrast, Biden's approach toward Administrative Law to date has been more traditional and the cases that reflect his policy preferences largely have not yet reached the U.S. Supreme Court.

Each of us will certainly have a perspective on these questions, as they go to the fundamental issue of the relationship between the government and its citizens. 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 the views within the class 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.

- e. **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 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 they won’t be options for you. Rather, 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 of 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, and the law in general.

If this is what you are looking for, great. We will have a wonderful experience together. If not, I would encourage you consider taking another class because you probably will not like this one. 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 then 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.

# Schedule of Classes

## **First Principles: Democracy and the Rule of Law**

- Topic 1. Fuller, The Elements of the Rule of Law (from Lon Fuller, *The Morality of Law*)  
John Hart Ely, *Democracy and Distrust*  
Tyler, *Does the American Public Accept the Rule of Law?*

## **Chapter I. Introduction**

- Topic 2: Introduction to Administrative Agencies  
Agencies and their Environment

What is an agency?  
Canvas: Kamensky, How Big is the Government?  
Where do agencies come from?  
Delegation and deference  
How are agencies structured?  
External pressures on agencies  
The Problem of Deference to Administrative Agencies  
Madison, Federalist 51  
Eastman, The Place of the Independent Commission  
Landis, The Administrative Process  
Noll, Reforming Regulation  
Wilson, The Politics of Regulation  
Unitary Executive Theory

- Topic 3: What agencies do: Rulemaking and Adjudication  
Londoner v. City and County of Denver (Adj.)  
Bi-Metallic Investment Co. v. St Bd. of Equalization (RM)

- Topic 4: Administrative Law in the Trump and Biden Administrations  
Executive Orders  
Hawaii v. Trump  
Chevron v. NRDC  
*Hollyfrontier Cheyenne Refining v. Renewable Fuels Association*

## **Chapter II. Constitutional Constraints on Administrative Agencies**

- Topic 5: Agencies and Article I  
The First Congress  
The Second Congress  
Theories of Delegation  
Cargo of the Brig Aurora v. United States  
Wayman v. Southard  
Marshall Field & Co. v. Clark  
J.W. Hampton, Jr. v. United States

- Topic 6. Limitations on Delegations

The Non-Delegation Doctrine  
The New Deal Cases  
Panama Refining Co. v. Ryan  
A.L.A. Schechter Poultry Corp. v. United States

Topic 7. The Modern Articulation

Mistretta v. United States  
American Trucking Association v. Williams  
Michigan v. EPA  
Gundy v. U.S.(2019)

Topic 8. Congressional Control of Administrative Agencies

Executive  
Congressional  
Judicial

Topic 9: Article II and Agencies

Presidential Control of Administrative Agencies  
The Unitary Executive and the Senate's Constitutional Role  
The Civil Service Act and federal employee unions  
Budget and enforcement priorities

Topic 10. Appointments

Buckley v. Valeo  
Morrison v. Olson  
Free Enterprise Fund v. PCAOB  
Lucia v. SEC

Topic 11. Removal

Morrison v. Olson

Topic 12 Article III and Agencies

Crowell v. Benson  
CFTC v. Schor

Topic 13: Agency Bias

Withrow v. Larkin  
The Separation of Functions Doctrine

**Chapter III. Statutory Constraints on Agency Procedure**

Topic 14. The APA: An overview

Topic 15: Formal Rulemaking: United States v. Florida East Coast Railway

Topic 16. Formal Adjudication:

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

Topic 17. Informal Rulemaking

The structure of Section 553

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. NDRRC  
Connecticut Light and Power v. NRC  
Department of Commerce v. New York

Topic 18: Exemptions from Rulemaking Procedures

Procedural Rules

Air Transport Association of America v. DOT

Interpretive Rules and Policy Statements

U.S. Telephone Association v. FCC

Professionals and Patients for Customized Care v. Shalala

Good Cause

Tennessee Gas Pipeline v. FERC

Topic 19. Informal Adjudication

Citizens to Preserve Overton Park v. Volpe

Pension Benefit Guaranty Corp. v. LTV

Topic 20. 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 21. Deference and the Need for Differing Standards of Review

Section 706

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

Topic 22. Review of Findings of Fact in Formal Proceedings

Universal Camera Corp. v. NLRB

Topic 23. Review of Findings of Fact in Informal Proceedings

Association of Data Processing Service Orgs. Inc. v. Board of Governors  
of the Federal Reserve

Topic 24. Review of Agency Legal Conclusions

NLRB v. Hearst Publications, Inc.

Chevron USA v. NRDC

INS v. Cardoza-Fonseca

Topic 25. 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

Topic 26. Step 2: Michigan v. EPA

Topic 27. 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 28. 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 29. Entitlement Theory  
Board of Regents v. Roth  
Perry v. Sindermann

Topic 30. What Process is Due?  
Mathews v. Eldridge  
Cleveland Board of Education v. Loudermill

#### **Chapter VI: Timing and Availability of Judicial Review**

Topic 31. Standing  
Lujan v. Defenders of Wildlife  
Associated Data Processing Service Organizations, Inc. v. Camp

Topic 32. Ripeness  
Abbott Laboratories v. Gardner  
Toilet Goods v. Gardner

Topic 33. Exhaustion  
Statutory Exhaustion  
McCarthy v. Madigan  
Darby v. Cisneros

Topic 34. 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](mailto:equity@missouri.edu)). All students will have the opportunity to submit an anonymous evaluation of the instructor(s) at the end of the course.