

ADMINISTRATIVE LAW
LAW 700, Section 511

Professor Kimberly N. Brown
Summer 2017

Syllabus

Welcome! This course is about the law and procedures governing federal agencies. In the broadest sense, this body of law deals with the delegation of power to federal agencies, the procedural requirements agencies must follow to function effectively, and the limitations on agency power.

Administrative agencies affect virtually every aspect of modern life. Agencies regulate in areas as diverse as public health and safety, energy, air and water quality, consumer protection, labor law, taxation, securities markets, telecommunications, immigration, workplace safety, and welfare benefits – to name but a few. We rely on administrative agencies to deal with some of the most pressing national issues of the day, ranging from terrorism to corporate scandals to natural disasters. Government lawyers are essential to the day-to-day functioning of every agency, and most lawyers in private practice (particularly those in and around D.C.) find themselves dealing with an administrative agency at some point in their careers.

The course is designed to equip you to work effectively in the administrative context and to think broadly about how the administration of law through bureaucratic entities relates to the political theory underlying the Constitution. Moreover, this class aims to help you critically assess and make informed contributions to the current debates concerning regulation.

We will not study the substantive law of any particular area. For instance, we will not study securities regulations enforced by the Securities and Exchange Commission or environmental laws enforced by the Environmental Protection Agency. These kinds of specialized topics are covered elsewhere in the law school curriculum. We will study the procedures that all agencies use in taking actions that affect private parties. In other words, this is a course about the procedural framework governing the work of federal agencies, rather than the substantive law in a particular regulatory field, similar to the way that Civil Procedure is a course about litigation procedures rather than the governing substantive law (e.g., tort or contract). Accordingly, as with Civil Procedure, this is not a course for which the big picture will likely come together for you until the end of the semester, so please be patient. It *will* come together.

Course description from catalogue: Analysis of federal administrative agencies, including their legislative and judicial nature, congressional delegation of powers, promulgation of regulations, adjudication and judicial review. Emphasis will be on the Federal Administrative Procedure Act.

A. CLASS TIMES

Class will be held on Mondays and Wednesdays from 6:00 p.m. to 9:00 p.m. in Room 603.

B. ASSIGNED READING

1. The assigned text for this class is Funk, Shapiro & Weaver, Administrative Law and Practice: Problems and Cases (Thompson West 5th ed. 2014).
2. We will study the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq., in detail. **A version of the statute will be posted in .pdf form on TWEN. Please print it, carefully read the assigned portions as indicated on the syllabus, and bring it to each class.** The APA is also at the end of the casebook.
3. There will be occasional handouts that are required reading. They are either listed on the outline of assignments or will be announced as required reading during class and posted on TWEN. You must enroll in TWEN for this course.

C. OPTIONAL READING

Funk & Seamon, Administrative Law: Examples & Explanations (4th ed. 2011). No readings will be assigned from this book, but students may find it helpful. Because one of its authors is also an author of the assigned casebook, the material is covered in a similar manner.

D. STUDENT LEARNING OUTCOMES

By the end of this course, the successful student will be able to:

1. Explain how agencies make rules and the differences between rules that have the force of law and other types of rules.
2. Explain agencies’ adjudication function.
3. Contrast the differences between rulemaking and adjudication.
4. Identify the judicial standards for reviewing agency decision-making in federal court.
5. Identify and apply the constitutional provision, statute, regulation and/or relevant case law most applicable to solving a hypothetical administrative law problem.
6. Assess the separation of powers implications of public law cases.
7. Research and write a persuasive administrative law document on a pending issue.

8. Discuss the basic policy and theoretical underpinnings of modern administrative law.

E. ATTENDANCE

Please be on time for class.

Absent an emergency, please do not leave the classroom during class, including when we are doing group exercises.

According to law school policy, class attendance is a primary obligation of each student whose right to continued enrollment in the course and to take the examination is conditioned upon a record of attendance satisfactory to the professor. A student who exceeds the maximum allowable absences will get a zero for class professionalism (see Part G, below), and may in addition lose up to a half letter grade for the final grade in the class (e.g., a B to a B-). Alternatively, the student may be compelled to withdraw from the course, or may be barred from sitting for the final exam. This policy is consistent with the American Bar Association Standards for Law Schools.

The sole means of establishing attendance is by signing the attendance sheet.

Students are responsible for making sure that they sign the attendance sheet each day. Please do not approach me after I have left the classroom or on some later date and tell me that you were in class on a particular day. If you forget to sign in, **or you come in more than 5 minutes late without having contacted me before class**, you will be counted as absent for that day.

F. CLASS PARTICIPATION

Class will be conducted by calling on volunteers and asking various questions of the material. **If all volunteers have spoken I will call on other students at random.**

You will need to prepare carefully in order to participate in class discussion, which is required in this course. Preparing the material in advance and coming to class is also the single best thing you can do to learn the material and perform well on the exam. But most importantly, preparation and participation are the most basic elements of professional competence.

Accordingly, “passing” when called on or informing me that you did not prepare the particular material are not acceptable practices in this class. If you are unable to provide the basic facts of a problem or a case when called on, I will assume you are not prepared. That said, I realize that you are juggling lots of competing responsibilities as law students. **If you are unprepared for class at some point during the semester, please notify me in advance of class and I will not call on you that day.** I do not need to hear your reasons for being unprepared. Please use this policy sparingly.

I will consider you prepared if you come to class (a) on time (b) having read and thought about the material and you (c) demonstrate a good faith effort to respond to my questions when I call on you and (d) participate fully in small group work.

I understand that some people are more comfortable than others voluntarily raising a hand to participate. If you are one of those people, you can still do well if you are fully prepared when I call on you. I recommend that you try to push yourself out of your comfort zone and raise your hand when you feel particularly strong on a subject. **If you email me or let me know in advance that you would like to discuss a particular problem, case or topic, I will be sure to call on you that day so that you can participate when you are feeling confident.**

G. PREPARATION FOR CLASS

The casebook is oriented toward the actual practice of administrative law. It contains numerous problems designed to help you learn and apply the legal principles we will cover. The syllabus specifies which problems we will cover in class. Please come to each class prepared to respond to the assigned problems. This will require doing more than simply reading the assigned pages of text. Although you are not expected to have the “right” answers to the problems in advance of class, you are expected to have thought through the problems and problem materials very carefully and come to class with your analysis. Although not mandatory, putting your answer in writing is the best way to prepare for class discussion of the problems. It is also immensely helpful for exam preparation. I encourage you to work with other students for this purpose.

The problems consist of exam-type hypotheticals followed by so-called “Problem Materials.” The Problem Materials consist of cases, statutes, regulations, and other sources that you must read and apply in order to answer the problem. For Problem 2-1 on page 55, for example, you must read the Problem Materials on pages 56-63 and apply them to the hypothetical.

H. CLASS CANCELLATION

If I must cancel a class, notices will be sent to students via TWEN email.

I. LAPTOP POLICY

Laptops are fine for note-taking on a word processing program and for accessing the casebook in electronic format. Otherwise, please do not use the Internet or email during class. My assumption is that students will comply in good faith. **No laptops are allowed during class if we have guest speakers, as a courtesy to the speaker.**

J. GRADING

Your grade in this course will be based on:

- **a final exam (60%);**
- **a regulatory writing assignment (20%); details to be posted on TWEN.**
- **a Chevron “framework” assignment (10%); details to be posted on TWEN.**
- **a reflective memorandum writing assignment (10%); details to be posted on TWEN.**

The exam will be open book. You may bring hard copies of any document or book into the exam.

I do not have sample exams and answers for your review, but we will do worksheets throughout the semester to reinforce the material and thus prepare you for the exam.

I reserve the right to increase or decrease your final grade by a half step (e.g., B+ to a B or B+ to an A- based on your preparation for class and compliance with the policies set forth in this syllabus.

K. OFFICE HOURS

Room 509. See me after class or send an email to schedule an appointment. I am happy to discuss any questions or concerns that you have related to this course or law school and practice in general. I will schedule formal office hours during the pre-exam study period.

L. ACADEMIC INTEGRITY:

Students are obligated to refrain from acts that they know or, under the circumstances, have reason to know will impair the academic integrity of the University and/or School of Law. Violations of academic integrity include, but are not limited to: cheating, plagiarism, misuse of materials, inappropriate communication about exams, use of unauthorized materials and technology, misrepresentation of any academic matter, including attendance, and impeding the Honor Code process. The School of Law Honor Code and information about the process is available at http://law.ubalt.edu/academics/policiesandprocedures/honor_code/

M. TITLE IX SEXUAL MISCONDUCT AND NONDISCRIMINATION POLICY:

The University of Baltimore's Sexual Misconduct and Nondiscrimination policy is compliant with Federal laws prohibiting discrimination. Title IX requires that faculty, student employees and staff members report to the university any known, learned or rumored incidents of sex discrimination, including sexual harassment, sexual misconduct, stalking on the basis of sex, dating/intimate partner violence or sexual exploitation and/or related experiences or incidents. Policies and procedures related to Title IX and UB's nondiscrimination policies can be found at: <http://www.ubalt.edu/titleix>.

N. DISABILITY POLICY:

If you are a student with a documented disability who requires an academic accommodation, please contact Leslie Metzger, Director of Student Services, at 410-837-5623 or lmetzger@ubalt.edu.

O. OUTLINE OF ASSIGNMENTS

The following outline sets forth the order of assignments.

I will give you advance notice of guest speaker visits and post supplemental reading assignments on the portal.

There will be times when we will not get through an entire assignment in a single class period. In those circumstances, please re-read the remaining material for the next class in addition to preparing the next assignment on the syllabus. In other words, if I call on you at the beginning of class on a Wednesday, it is not acceptable to decline to discuss the remaining material from Monday's class because you haven't read it in a while.

Given the numerous variables that can affect the pace and order in which we move through the material, the syllabus is subject to modification as the semester progresses. I will alert you to any changes.

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Introduction

May 15: Carefully read the syllabus. Read pp. 1-36 and APA § 551. Prepare Fund for Animals, Inc. v. Rice chart [posted on TWEN]. The chart will not be collected.

Read the following articles on the separation of powers and executive orders:

http://www.huffingtonpost.com/david-schultz/presidential-executive-or_b_14544996.html

<http://time.com/4655131/executive-orders-history/>

<https://www.nytimes.com/2017/02/06/opinion/executive-power-run-amok.html>

Rulemaking

Rulemaking Initiation; Intro to Formal and Informal Rulemaking

May 17: Read pp. 51-68, 94-111, 134-35 (notes 3-6 only) and APA §§ 553, 555, 706. Prepare Problems 2-1, 2-2 and 2-5.

Formal and Informal Rulemaking; Hybrid Rulemaking

May 22: Read pp. 111-14, 128-45. Review APA §§ 553, 556, 557, 706. Prepare Problems 2-6 and 2-7.

Researching Administrative Law

May 24: **Guest Speaker**, Adeen Postar, Library Director. Assignment to be posted on TWEN.

Judicial Review of Rulemaking

May 31:¹ Read pp. 90-94, 145-87, 331-33 (through note 2). Review APA § 706. Prepare Problems 2-8 and 209. Skip Problem 4-3.

SCOTUS Field Trip

June 5: We will be taking a trip to the Supreme Court to see the announcements of decisions and to have a private tour from the Clerk of the Court, Scott Harris. **You will need to arrive by 9:15 a.m.** It should last until about 10:45 a.m. I understand that some of you have day jobs. If you cannot make this trip, please contact me to discuss. **There will be no evening class because of the field trip.**

Exceptions to Rulemaking; Nonlegislative Rules; Judicial Review of Nonlegislative Rules

June 7: Read pp. 73-77, 86-90, 339-54, 358-64, 384-406 (skip note 3). Review APA §§ 552(a)(1)(D) (at pp. 857-58 of the casebook), 553, 706. Prepare Problems 2-4, 4-5, 4-6, and 4-7, 4-8, 4-9 and 4-10. Read Problem 2-1. Read Perez v. Mortgage Bankers Ass'n (posted on TWEN).

June 12: **Guest speaker**, Professor Michael Hayes, former Director, Office of Labor-Management Standards, U.S. Department of Labor. Assignment TBA.

Review material from June 7 (it is likely that we will not get through it all).

Assignment due: Draft comments due on TWEN.

Adjudication

Formal and Informal Adjudications and Judicial Review

June 12: Read Fournier v. Sebelius (posted on TWEN). Read pp. 189-207, 278-81, 297-311 and APA §§ 554, 555, 556, 557, 706. Prepare Problem 3-8.

¹ No class on May 29 due to Memorial Day.

Assignment due: Chevron Framework due on TWEN.

Due Process and Informal Adjudications

June 14: Read pp. 241-64 (through note 1); 266-74. Read Goldberg v. Kelly (on TWEN) and U.S. Constitution, Amendments 5 and 14 (available online). Prepare Problems 3-4 & 3-5.

Assignment due: Responses to comments due on TWEN.

June 19: **Guest speaker**, Michele Gilman, Professor of Law, University of Baltimore School of Law; Director, Saul Ewing Civil Advocacy Clinic; Co-Director, Center on Applied Feminism. Prepare reading posted on TWEN for this date.

Threshold Objections to Judicial Review

Justiciability Doctrines: Standing, Zone of Interests, Ripeness

June 21: Read pp. 407-39, 489-498, 527-38, APA §§ 702-704, and U.S. Constitution Article III, §§ 1-2 (available online). Prepare *Lujan/Akins* Chart [posted on TWEN]. Prepare Problems 5-7 (consider NEPA only) & 5-10. For the facts of Abbott Laboratories v. Gardner, please also read pp. 456-57 (top).

Assignment due: Final comment due on TWEN.

APA Exceptions to Judicial Review, Finality, Exhaustion

June 26: Read pp. 454-79, 503-27. Review APA §§ 701-702. Prepare Problems 5-4, 5-5, 5-8 & 5-9.

Assignment due: Final comment due on regulations.gov.

The Constitution and Agency Structure

Nondelegation Doctrine, Appointment, Removal

June 28: Read pp. 543-58, 585-95, 607-25. Prepare Problem 6-1, 6-6 and 6-8. Read U.S. Constitution, Article II (available online).

Assignment due: Reflective memorandum writing assignment due on TWEN.