

**Administrative Process
Spring 2009
Prof. David Franklin**

The Basics

Class meetings: Mondays and Wednesdays, 10:30 to 11:45 a.m., in Room 904

My office: Room 717

My office hours: Mondays and Wednesdays, 2:30 to 3:30 p.m.

My phone number: 312-362-5226

My email address: DFRANKL2@depaul.edu

Required Reading

The casebook for this course is Gary Lawson, *Federal Administrative Law* (4th ed. 2007). Casebook assignments in the syllabus are marked “FAL.” There is also a photocopied handout, emailed separately with this syllabus and available on the law school website and in hard copy on the seventh floor. Reading assignments from the handout are marked with an “H”.

The attached syllabus lists the reading assignments for the course. The reading assignments are denominated by Arabic numerals (1, 2, 3...). (The Roman numerals and letters are for organizational purposes only.)

Course Requirements

You are required to

- (a) do the reading carefully and on time,
- (b) show up to class on time and participate thoughtfully in class discussion, and
- (c) take the final exam.

You should be aware that I call on students in class by name, at random, and without warning. If you are unprepared to participate thoughtfully in a given class, you must tell me beforehand, preferably by email. It is a bad idea to be unprepared.

Two notes on in-class decorum: 1) Please arrive for class on time. A steady stream of late-arriving students during the first ten minutes of class is extremely distracting. 2) Please do not use your laptop computer during class for things other than taking notes. This too is extremely distracting.

Grading Policy

Your grade will be determined on the basis of the final exam. In addition, I reserve the right to add or subtract one grade step (e.g., from a B to a B+ or vice versa) based on classroom participation, at my sole discretion.

The Exam

Anything we cover in the reading is fair game for the exam, even if we don't end up discussing it in class. You will hear more about the exam around the middle of the course.

Classroom Participation

Classroom participation will be measured by the quality and not the quantity of your contributions. It is possible to have high quality participation without ever volunteering to speak, so long as your contributions are good when I call on you. Being unprepared to discuss assigned material when called upon is a form of low-quality participation. Asking good questions is a form of high-quality participation, but it does not relieve you of the obligation to answer the questions I ask.

Recommended Reading

The casebook and handouts are the only required reading for the course. You are welcome to go beyond the required reading as long as you don't let your outside reading supplant careful study of the assigned material. The following books are recommended:

Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*. Often opinionated, but the closest thing to an authoritative source in the field. 3 vols.

William F. Fox, Jr., *Understanding Administrative Law*. An engaging, easy-to-read overview.

Ernest Gellhorn & Ronald M. Levin, *Administrative Law and Process in a Nutshell*. For those of you who like the nutshell format.

Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law & Process*. A useful and straightforward textbook.

William F. Funk & Richard H. Seamon, *Administrative Law: Examples & Explanations*. Well-organized with lots of helpful hypos.

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I. Introduction

1. What is an agency?: H 1-4; FAL 1-8; FAL 24-30

II. Is the administrative state unconstitutional?

A. The relation of agencies to Congress

2. The rise and fall of the nondelegation doctrine: U.S. Const., Art. I (FAL 32-35); FAL 47-49; 54-62; H 5-8; FAL 62-72, 95-98
3. Dealing with delegations I—the problem of legislative precision: FAL 72-91; H 9-12
4. Dealing with delegations II—other legislative responses, and a taste of the scholarly debate: FAL 98-113; skim FAL 989-1004; FAL 113-21

B. The relation of agencies to the President

5. Appointment: U.S. Const., art. II (FAL 35-36); FAL 121-45
6. Removal, and presidential control over agency action: FAL 149-54 (through end of *Myers*), 37-39 (Landis), 154-68; H 13; skim FAL 1004-18

C. The relation of agencies to the judiciary, and the separation of powers

7. The role of Article III: U.S. Const., art. III (FAL 930-31); FAL 172-80
Separation of powers: FAL 180-90, 40-47

III. An Introduction to Administrative Procedure

A. Principles of administrative “common law”

8. The requirement of consistency: FAL 334-42, 353-54, 600-08
9. Estoppel and *res judicata*: H 14-21

B. Rules, orders, and how to choose between them

10. The constitutional distinction between rulemaking and adjudication: FAL 8-24
11. *May* the agency make rules? H 22-31
Must the agency make rules? FAL 342-53, 355-56, 359-60

V. Agency adjudication and the Due Process Clause

- 12. The emergence of the “new due process”: H 32, FAL 630-34, 645-70
- 13. When is “process” “due”? FAL 671-82, 703-16
- 14. How much “process” is “due”? FAL 716-26; H 33-39; FAL 727-37

IV. The Administrative Procedure Act and its procedural requirements

- 15. Introduction to the APA, and triggering formal rulemaking: FAL 191-221; skim FAL 943-54
- 16. The rise and fall of “hybrid rulemaking”: FAL 240-63; H 40
- 17. Has hybrid rulemaking risen again?: FAL 263-83
- 18. Exceptions to § 553: FAL 286-98, 309-18

VI. Judicial review of agency action

A. Scope of review

- 19. Overview, and review of agency factual findings: FAL 361-79, 394-402
- 20. Review of agency legal conclusions I—to the *Chevron* station: FAL 410-18, 429-42; H 41; FAL 442-49
- 21. Review of agency legal conclusions II—*Chevron* in action: H 42-48; FAL 496-524
- 22. Review of agency legal conclusions III—“*Chevron* Step Zero”: FAL 467-96, 535-46
- 23. Review of agency legal conclusions IV—*Chevron*’s domain: FAL 535-55
- 24. Review of agency discretion and policymaking—the “hard look” doctrine: FAL 555-64, 323-29, 572-84; H 49

B. Availability and timing of review

- 25. Preclusion of review: FAL 773-801
- 26. The problem of agency inaction: H 50-72
- 27. Exhaustion and ripeness: FAL 863-77, 895-904
- 28. Statutory (“zone of interests”) standing: FAL 829-32, 837-40, 842-61