

**OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW**  
**ADMINISTRATIVE LAW – COURSE NO. 8243-01**  
**SPRING 2007**

TuTh – 3:30-4:45 am, Room 104

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**Subject Matter**

Administrative agencies play a central role in just about everything that government does. The Department of Homeland Security, for example, is charged with protecting the nation against terrorism and natural disasters. The Environmental Protection Agency works with numerous other agencies to protect the nation's air and water quality – and safeguard other aspects of the environment. The Food and Drug Administration evaluates, and acts to assure, the safety of food, medicines, and medical devices. The Department of Transportation is charged with assuring safety, and promoting greater efficiency, on road ways, railroad tracks, and airline routes. The Federal Communications Commission protects consumers' interests in an efficient, innovative, and competitive telecommunications market.

Obviously, the specific laws that an agency enforces – and the specific rules and decisions it makes – depend heavily on that agency's specific mission: laws and administrative rules pertaining to homeland security are very different from laws aimed at giving consumers more (and better) choices between telephone and television service providers.

There are, however, some *common* legal questions and challenges that cut across many different types of agencies. For example, whether an agency is charged with defending borders, assuring drug safety, or regulating telephone service, one might ask: How should we balance our need for decisions made by experts (e.g., in security, or medicine, or telecommunications technology) with Americans' democratic tradition of governance? How can we assure that agency decisions are made in way that is fair to all parties, but at the same time, efficient enough to provide timely guidance to business and individuals with a need for up-to-date information about which practices are permissible and which are not? And how can courts review the legality of agency's actions when judges lack the expertise to fully understand the nature and consequences of an agency's arcane and highly technical rules and decisions? Moreover, even when we *do* feel comfortable deferring to agency's expertise with respect to its *own* specific mission, how do we assure that agencies will take adequate account of the spillover effects that their actions might have in areas *outside of* the agency's area of expertise?

We will spend some time in this class discussing the answers policy-makers and academics have given – and should give – to these questions. But the bulk of the class will be devoted how existing sources of administrative law strike a balance between efficiency, agency expertise, fairness, and the demands of democratic and constitutional governance. The key sources of law we will be looking at are the Administrative Procedure Act (or "APA") (enacted by Congress in 1946), the federal "common law" made by judges, the Executive Orders issued by Presidents, and the separation-of-powers limitations in the United States Constitution. We will also look briefly at some agency-specific statutes, rules, and decisions, as well as the Freedom of Information Act (or "FOIA").

## **Required Course Materials**

There are two required texts in this course:

William Funk, et al, Administrative Procedure and Practice: Problems and Cases (3<sup>rd</sup> Ed)  
[I'll refer to this in the rest of the syllabus and in class as "the casebook"]

William Funk & Richard H. Seamon, Administrative Law: Examples & Explanations (2d Ed.)

[I'll refer to this in the rest of the syllabus and in class as "the Examples & Explanations book"]

There is a web-based supplement for the casebook at <http://www.lclark.edu/~funk/adlaw/>

I will also be assigning handouts with supplementary material as indicated on the assignment schedule below. Finally, I will occasionally e-mail additional questions and comments for you to think about before class. Please check your e-mail regularly so that you receive these questions and comments when I send them (I will also make them available on the Web on the TWEN page described below).

## **Course Web Page, E-Mail, PowerPoint and MindManager**

I have set up a Course Web page on TWEN (The West Educational Network). As noted above, I'll be posting supplementary materials on this site. The TWEN site will include a discussion forum where you can post questions or comments about topics covered in class and/or in the reading assignments.

I also plan to make frequent use of PowerPoint slides and of MindManager diagrams – and will be e-mailing you selected slides and diagrams before, or in some cases, shortly after, class. The program for viewing interactive MindManager diagrams (Mindjet MindManager Viewer 6) can be downloaded, free-of-charge, at [www.mindjet.com](http://www.mindjet.com) (Click on "downloads" in the top right hand part of the Home Page, then click on MindManager Viewer 6). Please let me know if you have trouble obtaining or using this program – or if you have trouble obtaining or viewing PowerPoint.

## Attendance

Because law school education requires that students attend, and participate in, class discussion, it is crucial that you attend regularly. You may miss up to 6 classes without any automatic penalty to your grade. However, since *any* absence will deprive you of knowledge and skills that you should learn in this course, and that will be tested on the final exam, I strongly suggest that you miss class only when you have no other option – and that you talk to me (promptly after any absence) about how you can make sure you learn the material covered in any class that you have missed. The penalty for any absence beyond 6 absences will be a one-step reduction in the final grade (e.g., a grade of “A-” becomes a “B+”). Anyone who misses 11 or more classes will be administratively withdrawn from the class. Exceptions to these penalties will be made only in exceedingly rare and highly extenuating circumstances where I agree that an exception is justified. It is your responsibility to sign roll-sheets and keep track of your absences.

In the event that I need to reschedule a class, I will not apply any grading penalty to absences from the make-up class. As with any other absence, however, I urge you to attend if at all possible and to talk to me (promptly after any such absence) about how you can make sure you learn the material covered in any class that you have missed. Please also arrive promptly for each class: frequent lateness may also be penalized when I calculate the final grade.

## Participation and Clickers (for In-Class Questions)

All students are expected to be prepared for every class. You will find it difficult to understand the material in this class unless you prepare very carefully for every class. I reserve the right to penalize your grade by one or more points if you are consistently unprepared.

I will also be using two methods to encourage broader participation and involvement by students this semester:

(1) Instead of using a pure Socratic or volunteer system, I will ask you all to be on a “panel” of students (ready to take a leading role in discussion) for two of the fourteen weeks of the semester. In the first week of class, I’ll ask you to each to express a preference as to which weeks you would like to serve on such a panel and will then distribute panel assignments before the beginning of the second week of classes.

(2) As you may have heard, the Law School is for the first time this year making possible use of clicker technology in classes, which allows students to answer questions not verbally, but rather by electronically entering answers to questions posed by the teacher. **Clickers – officially called “Interwrite (PRS) Personal Response Systems” should now be available in the OCU Bookstore. I will begin using this technology in the second week of class, and will ask that each of you come to class with such clickers so that you are prepared to take advantage of this interactive technology** (and prepared to answer the questions I pose to the class with it). Among the uses we will make of clickers this semester will be: (a) short quizzes to be given periodically at the beginning of class (some of which will factor into your class grade); (b) polls during class; (c) practice questions that won’t count for your grade, but will help you master the material that will be on the exam.

## **Grading and Exercises**

Your grade will be based on your performance on an in-class closed book exam on Friday, May 11 (with possible adjustments for absences or participation in class and performance on in-class quizzes). I will provide additional details about the logistics of this exam and of the quizzes later in the course.

## **Special Accommodations**

If you need special accommodations due disability, please contact Deborah Fathree, Associate Dean of Students, at [dfathree@okcu.edu](mailto:dfathree@okcu.edu), or 521-5334, as soon as possible.

## **Office Hours**

You are welcome to stop by (Goldstar 343) with questions any time my office door is open. I will also typically be available to answer questions right after class has ended, and during office hours (which I will announce during the first week of class). You're also welcome to e-mail me with questions ([mblitz@okcu.edu](mailto:mblitz@okcu.edu)) or call to set up an appointment (ext. 5177).

# Administrative Law: The Big Picture

## Introduction

- Week 1 (Tu) - Overview of Administrative Law:  
What Administrative Agencies Do --  
and the Legal Questions They Give Rise To
- History of Administrative Law, Overview of  
the Administrative Procedure Act (APA), and an Introductory Example

## Types of Agency Action (and Due Process)

### Rulemaking

- Week 1 (Th) - An Overview of Rulemakings, Rulemaking Initiation, and an Introduction  
to Notice and Comment Proceedings

- Week 2 (Tu) - The Different Procedural Routes to a Rule:  
Part I -- “Notice and Comment” as the Default Procedure and  
Exemptions and Exceptions to “Notice and Comment”

- Week 2 (Th) - The Different Procedural Routes to a Rule:  
Continuation of Part I -- “Notice and Comment” as the Default  
Procedure and Exemptions and Exceptions to “Notice and Comment”

- Week 3 (Tu) - The Different Procedural Routes to a Rule:  
Part II -- When One Would Formal Rulemaking Instead of Informal  
Notice and Comment (and When Hybrids of Formal and Informal) and  
Ex Parte Contacts in Rulemaking

- Week 3 (Th) - Informal Agency Action and Individual Reliance on Agency Information -  
- and Estoppel

### Adjudication

- Week 4 (Tu) - Formal vs. Informal Adjudication
- Week 4 (Th) - Hearing vs. Rulemaking under the APA

### Due Process -- and APA Fair Procedure Requirement in Agency Adjudications

- Week 5 (Tu) - Agency Choice of Procedures  
and Constitutional Due Process I
- Week 5 (Th) - Additional APA Requirements: Procedures in Agency Adjudications,  
Separation of Functions, and Ex Parte Contacts

## **The Scope of Judicial Review**

### **Chevron and Statutory Interpretation (and Interpr. of Agency Rules)**

Week 6 (Tu) - Court Review of Questions of Law  
(The Chevron “Two-Step”)

Week 6 (Th) - Chevron “Step Zero” (Deciding Whether The Chevron Two-Step *Should Even Apply*) and Skidmore Deference

Week 7 (Tu) - Review on Basics of Statutory Interpretation  
(and Application to Administrative Cases) and  
+ Court Review of Agency Interpretations of Agency Rules

Week 7 (Th) - Review on Basics of Statutory Interpretation  
(and Application to Administrative Cases)

### **Substantial Evidence and Arbitrary & Capricious Standards**

Week 8 (Tu) - The Substantial Evidence Test in Formal Proceedings and Intro to  
Arbitrary & Capricious Standard

Week 8 (Th) - The Arbitrary and Capricious Standard and “Hard Look” Doctrine

## **Reviewability**

Week 9 (Tu) - Standing -- Constitutional, Prudential,  
and the Zone of Interests Requirement

Week 9 (Th) - APA Exceptions to Reviewability:

- (i) Statutory Preclusion
- (ii) Committed to Agency Discretion

Week 10 (Tu) - Timing I: Exhaustion of Administrative Remedies

Week 10 (Th) - Timing II: Ripeness

## **Separation of Powers**

Week 11 (Tu) - Delegating Powers to Agencies: Delegating Judicial Powers

Week 11 (Th) - Delegating Powers to Agencies: Delegating Legislative Powers

Week 12 (Tu) - Legislative Control Over Agencies

Week 12 (Th) - Executive Control Over Agencies

## **The Freedom of Information Act (FOIA)**

Week 13 (Tu) - Individual’s Rights to Obtain Agency Information:  
The Freedom of Information Act (FOIA)

Week 13 (Tu) - Exceptions to FOIA

## Tentative Assignment Schedule

# INTRODUCTION

### WEEK ONE

January 9 (Tuesday)

Overview of Administrative Law:

What Administrative Agencies Do -- and the Legal Questions They Give Rise To

Casebook: 5-17

**Handout 1: Massachusetts v. EPA (DC Cir. 2005)**

**Nutraceutical Corp. v. Von Eschenbach (10<sup>th</sup> Cir. 2006)**

# **TYPES OF AGENCY ACTION** **(RULEMAKING, ADJUDICATION, INFORMAL AGENCY ACTION)**

## **WEEK ONE**

January 11 (Thursday)

An Overview of Rulemakings, Rulemaking Initiation, and Notice and Comment Procedures

Examples & Explanations: 133-142

Casebook: 17-26 (Overview of Types of Agency Actions)

48-52 (We will look at the problem on p.52 in class)

57-73

### **Handout 2:**

**(In-Class Handout) Notice and Comment Scavenger Hunt**

## **WEEK TWO**

### **Rulemaking**

January 16 (Tuesday)

The Different Procedural Routes to a Rule:

Part I -- “Notice and Comment” as the Default Procedure and Exemptions and Exceptions to “Notice and Comment”

Examples and Explanations: 143-169

January 18 (Thursday)

The Different Procedural Routes to a Rule:

Continuation of Part I -- “Notice and Comment” as the Default Procedure and Exemptions and Exceptions to “Notice and Comment”

Casebook: 350-371

**WEEK THREE**  
**Rulemaking, Cont'd**

January 23 (Tuesday)

The Different Procedural Routes to a Rule:

Part II -- When One Would Formal Rulemaking Instead of Informal Notice and Comment (and When Hybrids of Formal and Informal) and Ex Parte Contacts in Rulemaking

Casebook: 90-99; 104-112

Examples & Explanations: 173-182; 184-191

January 25 (Thursday)

Informal Agency Action and Individual Reliance on Agency Information -- and Estoppel

Examples and Explanations:

Casebook: 666-682; 376-383

**WEEK FOUR**  
**Adjudication**

January 30 (Tuesday)  
Formal vs. Informal Adjudication

Examples & Explanations: 69-81  
Casebook: 202-204  
**Handout 3: FPC v. Texaco**

February 1 (Thursday)  
Hearing vs. Rulemaking under the APA

Casebook: 326-328  
334-336  
**Handout 4: Heckler v. Campbell**

## **WEEK FIVE**

### **Due Process -- and APA Fair Procedure Requirement in Agency Adjudications**

Agency Choice of Procedures  
and Constitutional Due Process  
February 6 (Tuesday)

A Review of Constitutional Due Process:  
Examples & Explanations: 103-126

Due Process Requirements re Agency Decision to Use Rulemaking vs. Hearing  
Casebook: 250-254

February 8 (Thursday)

Procedures in Agency Adjudications, Separation of Functions, and Ex Parte  
Contacts

Examples and Explanations: 81-98  
Casebook: 236-247

# **THE SCOPE OF JUDICIAL REVIEW: CHEVRON, SUBSTANTIAL EVIDENCE, AND ARBITRARY & CAPRICIOUS REVIEW**

## **WEEK SIX**

### **Chevron Deference (to Agency Interpretation of Statutes)**

February 13 (Tuesday)

Court Review of Questions of Law  
(The Chevron “Two-Step”)

Casebook: 26-30

Examples & Explanation: 259-269

Casebook: 145-154

February 15 (Thursday)

Chevron “Step Zero” (Deciding Whether The Chevron Two-Step *Should Even Apply*) and Skidmore Deference

Casebook: 388-396; 401-406

Examples & Explanations: 269-275 (and Review 259-top of 261)

**Handout 5: Other Exceptions to Chevron Deference**

**WEEK SEVEN (Tuesday)**  
**Statutory Interpretation**

February 20 (Tuesday)

Review on Basics of Statutory Interpretation (and Application to Administrative Cases)

**Handout 6: Statutory Interpretation Review**

Court Review of Agency Interpretations of Agency Rules

Examples & Explanations: 275-277

Casebook: 405-406

February 22 (Thursday)

Review on Basics of Statutory Interpretation (and Application to Administrative Cases)

**Handout 7: Statutory Interpretation and Chevron**

**Handout 8: A Look Ahead in the Syllabus: How Statutory Interpretation is Relevant under “The Arbitrary & Capricious Standard”**

## **WEEK EIGHT**

### **“Arbitrary and Capricious” (and “Substantial Evidence”) Review of Agency Reasoning and Fact-Finding**

February 27

The Substantial Evidence Test in Formal Proceedings  
and Introduction to the Arbitrary & Capricious Standard

Examples & Explanations: 277-287

Casebook: 284-291

March 1 (Thursday)

The Arbitrary and Capricious Standard and “Hard Look” Doctrine

Examples & Explanations: 287-296

Casebook: 308-314; 164-166; 175-185

**Handout 9: Cost-Benefit Analysis (CBA) in review of agency decisions**

# **REVIEWABILITY:** **Standing, Statutory Exceptions (Preclusion & Agency Discretion), Timing**

## **WEEK NINE**

### **Standing and APA Exclusions from Judicial Review**

March 6 (Tuesday)

Standing -- Constitutional and Prudential Standing and the Zone of Interest Requirement

Examples and Explanations: 201-226

Casebook: 428-435; 470-480

March 8 (Thursday)

Exclusions from Judicial Review under the APA:

- (1) Statutory Preclusion
- (2) Committed to Agency Discretion

Examples and Explanations: 228-234

Casebook: 445-466

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March 11 (Tuesday) – SPRING BREAK – NO CLASSES

March 13 (Thursday) – SPRING BREAK – NO CLASSES

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## **WEEK TEN**

### **Timing**

March 20 (Tuesday)

Timing I: Finality and Exhaustion of Administrative Remedies

Examples and Explanations: 234-247

Casebook: 481-483; 492-501

March 22 (Thursday)

Timing II: Ripeness

Examples and Explanations: 247-255

Casebook: 503-519

# **SEPARATION OF POWERS**

## **Place of Agencies in the Federal System of Government**

### **WEEK ELEVEN**

#### **Delegation of Legislative and Judicial Powers to Agencies**

March 27

Delegating Powers to Agencies: Delegating Legislative Powers

Examples and Explanations: 28-34

Casebook: 522-536

March 29

Delegating Powers to Agencies: Delegating Judicial Powers

Examples and Explanations: 34-40

Casebook: 539-552

**WEEK TWELVE**  
**Legislative and Executive Supervision of Agencies**

April 3  
Legislative Control Over Agencies

Examples and Explanations: 40-50  
Casebook: 552-561

April 5  
Executive Control Over Agencies

Examples and Explanations: 51-67  
Casebook: 561-581

# **THE FREEDOM OF INFORMATION ACT**

## **THIRTEEN FOIA**

April 10 (Tuesday)  
The Freedom of Information Act (FOIA)

Examples and Explanations: 337-346  
Casebook: 648-661

April 12 (Thursday)  
The Freedom of Information Act (FOIA)

Examples and Explanations: 347-349  
Casebook: 666-682; 376-383

## **REVIEW**

### **WEEK FOURTEEN**

April 17 (Tuesday)  
Review

April 19 (Thursday)  
Review