

**SETON HALL UNIVERSITY
SCHOOL OF LAW
ADMINISTRATIVE LAW
FALL 2004**

**Professor Frank Pasquale
Office: Room 408
Phone: (973) 642-8485
pasquafa@shu.edu**

Meeting Times

The course meets on Wednesdays and Thursdays from 11:45 to 1:15. We will not meet on 9/16, in observance of Yom Kippur.

Office Hours

I'll be in my office from 2:00 to 3:00 on Wednesdays and Thursdays. I'm also happy to talk most other weekday afternoons after 3:00. Feel free to email me (at pasquafa@shu.edu) or call me (at 973-642-8485) if you need to make an appointment outside these times.

Required Reading

The casebook is GELLHORN & BYSE'S ADMINISTRATIVE LAW (*Revised* 10th Edition). Peter Strauss, Todd Rakoff, and Cynthia Farina have authored it, so I refer to it as SRF below.

I have also assigned WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW (4th Ed.). Since administrative law is a complex topic, this hornbook should provide some helpful guidance.

Bring your casebook to each class. Periodically, I will distribute additional materials in the form of handouts.

I highly recommend WILLIAM F. FUNK AND RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS (2001), but I will not be assigning readings from that text.

The course's TWEN page will feature some news articles on issues and controversies related to the course. I also plan on assigning articles and cases based on current controversies in administrative law, including coverage of the implementation of the Endangered Species Act and the Social Security Act.

All of these "extra" readings will be posted at least one week before the date of the class. Therefore, you should check the TWEN page for readings one week before class.

Introduction

This course surveys federal administrative law—essentially, all the federal law that is made outside of legislatures and courts. There are many more administrative regulators than there are legislators and judges, and there is a correspondingly higher volume of administrative law than statutes and judicial opinions. Mastering the *substance* of administrative law in any particular area—say, environmental or occupational safety law—takes a lifetime of study and practice. We will be focusing on something more manageable: the *process* of administration common in many federal agencies. By the end of the course, you should possess a basic understanding of:

- 1) How rules are made by federal administrative agencies (“agencies”).
- 2) How rules are applied by agencies.
- 3) Due process requirements of agency action.
- 4) The scope and limits of agency power.
- 5) The scope and limits of presidential, judicial, and legislative control over agency action.

Class Participation

Class participation is expected. I reserve the right to exercise positive or negative discretion in grading based on the overall quality of a student’s class participation.

Starting on the fourth class, two students each will prepare a two-page response to the questions listed in the syllabus below. By the 5PM on the Monday and Tuesday before the Wednesday and Thursday classes (respectively), they are to email the response to me. These responses will be posted to the course TWEN page the next week.

Evaluation

There will be a 4-hour closed book examination, with at least one traditional “issue spotter” and one “policy question.” This examination will be worth 90% of the grade; it is now scheduled for Dec. 9 at 1PM. (The registrar’s office schedules exams, so I can’t guarantee that date.) Ten percent of the grade will be based on the brief response paper.

Attendance

I will follow the standard Law School attendance policy.

Syllabus

Below is a syllabus of topics and materials I expect to cover in the course. I may modify the syllabus during the course of the term. I will announce any such modifications in class.

#	Topic/Response Questions	Reading
<i>I. Introduction</i>		
1	<i>Introduction and Background</i> Why is administrative law important? How and why did the administrative state develop?	SRF 1-25, and note on p. 34. Fox 1-12. APA § 551 (SRF 1321).
2	<i>The Scope and Force of Administrative Law</i> How does the non-delegation doctrine restrain agency powers?	SRF 35-62, 63 (first two paragraphs of a.), 66 (first two paragraphs of b.). Fox 25, 35-43. Post Articles handout.
3	<i>Formalism and Functionalism</i> What types of administrative adjudication is constitutional, and which are unconstitutional?	SRF 101-103, 118-138, 237. Fox 79-84. APA § 551 (SRF 1337-39)
<i>II. Adjudication</i>		
4	<i>Pre-Hearing Activities</i> Who is entitled to participate in formal adjudication?	SRF 324-345. Fox 217-232.
5	<i>Evidentiary Issues</i> What evidentiary issues arise in formal adjudication?	SRF 346-366, 372-374 (all notes). Fox 233-244.
6	<i>The Agency Decisionmaker</i> Who presides at formal adjudications? What are the alternatives to formal adjudication?	SRF 374-378, 455-462, 470-482. TWEN on HCP's. Fox 247-254.
<i>III. Rulemaking</i>		
7	<i>Introduction to Rulemaking</i> What is the difference between adjudication and rulemaking?	SRF 238-275. Fox 15-18, 21-24. APA § 553 (SRF 1336-37).

8	<i>Rulemaking Procedures</i> What procedures must be used before and during rulemaking?	SRF 483-510. Fox 163-176.
9	<i>Notice and Participation in Rulemaking</i> How specific must notice be? How can interested persons participate?	SRF 519-539, 550-555.
10	<i>Displacing Individualized Adjudication with Generalized Rules</i> When and how does rulemaking replace adjudication?	SRF 586-596 (but not n. 3). Fox 177-186, 196-205.
11	<i>Initiating Rulemaking</i> How is rulemaking initiated?	SRF 596-627. Fox 164.
12	<i>Regulatory Negotiation and CBA</i> How does regulatory negotiation (reg-neg) work? How does cost-benefit analysis (CBA) constrain regulation?	SRF 627-658. Fox 186-192.
13	<i>Formal and Hybrid Rulemaking</i> What types of decision processes occur during rulemaking?	SRF 663-678, 684-698. Fox 173-182.
14	<i>Alternatives to Notice-and-Comment Rulemaking</i> What alternatives are there to notice-and-comment rulemaking?	SRF 705-732.
15	<i>Informal Agency Action</i> What types of informal agency actions are permissible?	SRF 470-478, 767-800. Fox 261-270.
<i>IV. Due Process Within the Agency</i>		
16	<i>Constitutional Due Process Considerations</i> What kind of interests trigger due process protection?	SRF 800-822. Fox 117-130.

17	<i>The Process Due</i> What process is due?	SRF 832-865. Fox 131-141.
<i>V. Judicial Review of Agency Action</i>		
18	<i>Obtaining Judicial Review</i> How does a litigant obtain judicial review of agency action?	SRF 1099-1128; 1181-1188; 1229-1238. Fox 321-327.
19	<i>Norms of Judicial Review of Agency Action</i> What baseline norms govern judicial review of agency action?	SRF 902-936.
20	<i>Judicial Review of Agency Factual Determinations</i> When and how may courts review agencies' factual determinations?	SRF 936-978. APA § 706 Fox 328-333.
21	<i>Standards of Review</i> What types of "beyond-the-facts" agency determinations do courts review? How do they do so?	SRF 978-1002. Fox 334-348.
22	<i>Assuring Reasoned Consideration</i> How do courts assure that an agency has given reasoned consideration to material facts and issues?	SRF 1002-1026.
23	<i>Chevron Deference</i> What type and level of deference do courts owe to agencies?	SRF 1026-1051.
24	<i>Statutory Interpretation and Deference to Agencies</i> How do courts operationalize deference doctrine via theories of statutory interpretation?	SRF 1052-1075 (up to Scalia dissent)
25	<i>Mead Deference</i> How does a court decide whether to defer to an agency in a particular case?	SRF 1075-1098 (Scalia dissent on)

26	<p><i>Standing to Challenge Agency Action</i></p> <p>What parties have standing to invoke judicial review of agency action?</p>	<p>SRF 1129-1161 Fox 287-293.</p>
27	<p><i>Basis of Standing</i></p> <p>What types of interests can generate standing?</p>	<p>SRF 1162-1188. Fox 294-302.</p>
28	<p><i>Future of Administrative Law, and Conclusion</i></p> <p>How might administrative law develop in the future? [We'll also do a brief re-cap, and probably schedule a review session.]</p>	<p>SRF 698-705 Fox 383-394.</p>