

Antonin Scalia Law School at George Mason University

ADMINISTRATIVE LAW (116-001)
Spring 2023

Tuesdays & Thursdays, 9:50 to 11:15 AM ET
3 credits

This course meets in person (with Zoom as a backup).

Read this syllabus carefully! It is your roadmap for all course assignments.

Professor Caroline Cecot
ccecot@gmu.edu

Office hours:

Open office hours: Thursdays, 1:30 to 2:30pm PM ET.
Office: Hazel Hall 321

Virtual office hours: E-mail me to schedule a virtual meeting.

Format Expectations:

This course meets in person. It might become necessary, however, for us to meet remotely at some point during the semester. For those class sessions, we will meet in the Zoom classroom noted below. *I will try to give you as much advance notice as possible if a class session will meet remotely instead of in person.*

Virtual Classroom:

Zoom: <https://gmu.zoom.us/j/92068087378> (meeting ID: 920 6808 7378).

Course Overview:

A network of federal agencies charged with regulating air and water quality, occupational health and safety, and financial markets, among myriad other subject areas, makes up the administrative state, which functions as a de facto fourth branch of government. This course will introduce students to the powers and processes of agencies while exploring how the three formal branches of government—Congress, the President, and the judiciary—exert control over agency action.

The course is divided into four sections. The first section, **Congressional Control of Agencies**, spans three class sessions. A basic premise of administrative law is

that an agency derives its power to act from Congress. In this section, we will examine how much power Congress can delegate to agencies and examine the effectiveness of Congress's options for controlling agency action once it has conferred power on the agency. The second section, **Presidential Control of Agencies**, spans five class sessions and explores the means by which the President can oversee agency implementation of statutes. Next, the course will switch gears and discuss **Choice and Form of Agency Procedures**, focusing on agency regulation through rulemakings and adjudications. This section spans eight class sessions. Finally, the course will dive into **Statutory Interpretation and Judicial Review of Agency Decisionmaking**. In this section, which spans nine class sessions, we will discuss how courts oversee agency decisionmaking, focusing primarily on the *Chevron* doctrine.

Administrative law is a broad, complex, and evolving body of law. Despite my best efforts, there are several useful topics, such as agency disclosure under the Freedom of Information Act or prerequisites to review besides standing, among other things, that we will be unable to cover. In addition, please note that for some topics this course relies on students having working knowledge of constitutional law (though the course will provide some review of important concepts).

Learning Outcomes:

This course incorporates the general learning outcomes listed at <https://www.law.gmu.edu/academics/degrees/jd/>. More specifically, at the conclusion of the course, students are expected to understand the powers and processes of federal agencies; appreciate the complex interrelationship between agencies and the three branches of government; read and analyze statutory mandates to agencies and evaluate the permissibility of agency action; and think critically about emerging issues, evolving doctrines, and other developments in administrative law.

Casebook and Readings: The casebook for this course is

Kristin E. Hickman & Richard J. Pierce, Jr., Federal Administrative Law: Cases and Materials (3d ed.) (Foundation Press, 2020).

Please note that the Constitution and relevant portions of the Administrative Procedure Act are found in appendices at the end of the casebook. All readings are contained in this casebook, unless otherwise noted. Any other required readings will be posted on Blackboard.

Attendance: This course adheres to the Law School's attendance policy. If a student is absent for any reason for more than 20% of the course (or, more than 5 class sessions), then the student is not eligible for credit. I appreciate advance

notice of any absences. In addition, you are required to view any pre-recorded videos as part of your attendance this semester, unless they are noted as optional.

Assessments:

- **Reading questions**, which will count for 10% of your grade, are due before each class session.
- The **final exam**, which will count for 90% of your grade, will be held on **May 3 at 12 PM ET**, details to be announced.

Reading Questions: You are required to post a brief question or comment on the reading for at least 10 class sessions out of 26 total class sessions. Your submission should be no longer than a few sentences. The submission should be a question or comment about the reading or related issues.

I will accept written questions or comments up until the start of a class session. To submit a question or comment, please go to the “Discussion Board” tab in Blackboard. Find the appropriate forum for that class session. Submit a question or comment by creating a new thread with an informative title *or* by replying to any thread that has already been posted for that class session by another student. (Interaction is encouraged!)

Timely submission of a reading question for 10 class sessions will count for 10% of your grade. Credit for this portion of your grade will be based on *submission* and not on content. That is, if you timely submit questions or comments for at least 10 class sessions, you will obtain full credit for this portion of your grade. But if, for example, you submit a question or comment for 8 class sessions, then you will receive credit for 8% out of the available 10%.

For the first class session, please introduce yourself. (And if you prefer me to call you by a different first name than the one indicated in PatriotWeb, please let me know in your post or e-mail me.)

Pre-Recorded Videos:

- I may pre-record a short video for you to view either before/after some class session or in place of a class session. I will let you know in advance if this occurs. These videos would count as class time, and material from the videos may be tested on the final.
- Videos will be equipped with captions. To enable captions, please click on the applicable icon on lower right of the video.
- Please do not download these videos or share them with students outside of our class. The videos will be available to you through the end of the finals period.

Live Classes:

- During portions of live class sessions, I will “cold call” on students from one of two panels defined below.

Panel A	On call during odd-numbered class sessions: Class 3, etc. <i>The class session numbers are indicated under assigned reading in this syllabus.</i>	Last name A through L
Panel B	On call during even-numbered class sessions: Class 2, Class 4, etc.	Last name M through Z

- Notice that *every student* is on call during the first class session.
- I anticipate getting through at least half of a panel during each class session.
- Please note, however, that **I expect everyone to be prepared for each class session**. We will have group discussion components that will require all students to be prepared.

In-Person Class Session Rules:

- Recorder: Each class session will have a recorder (as well as a backup recorder) from the Panel that is not on call. The recorder will take notes and e-mail them to me so that I can post them to Blackboard before the next class session.¹
 - If you cannot take notes during your scheduled class session, you must contact the backup recorder.
- We will take at least one break during each class session.
- I expect everyone to contribute to a respectful and welcoming learning environment.

Additional Remote Class-Session Rules:

For class sessions that occur over Zoom, please adhere to the following rules:

- Please mute your microphones when you are not speaking to avoid unnecessary background noise.
- I prefer for all students in the on-call Panel (A or B) to have their videos turned on, to the extent possible. (Please use your good judgment.) All other students may have their videos turned off, except when participating with other students in a breakout session.
- If you would like to ask a question, please use the “raise hand” feature in our virtual classroom. All students are encouraged to ask questions, although I may defer some questions to office hours in the interest of time or focus.

¹ Some of you will prefer to take handwritten notes during the semester. In that case, please e-mail me a photo/scan of your notes when you are the recorder.

Feedback:

I encourage constructive feedback at any time. Please provide such feedback either by emailing me or (if you prefer to be anonymous) by using the “Anonymous Feedback” option on Blackboard.

Additional School Policies and Resources:

- I expect every student to adhere to the **Student Honor Code**.
 - Please be aware of the **Academic Regulations**.
 - University Life provides student support resources such as:
 - **Counseling and Psychological Services (<https://caps.gmu.edu/>)**
 - **Student Health Services (<https://shs.gmu.edu/>)**
 - **Student Support and Advocacy Center (<https://ssac.gmu.edu/>).**
- For more information about University Life on the Arlington Campus, please visit: <https://ularlington.gmu.edu/>.

Assigned Reading

Please note that assigned readings are subject to change based on class pacing, new developments in the law, or other considerations. I will give at least a week’s notice in the event of any changes, if possible.

Because administrative law is a broad and complex subject, some class sessions will require a significant amount of reading. But such is the nature of practicing administrative law; administrative records are long! That said, I have tried to keep the reading to no more than about 60 pages per week.

Finally, please also note that four class sessions have been altered, with one moved to Zoom and two rescheduled to another day:

Cancelled Class	Rescheduled Class
Tuesday, January 31	Friday, February 10 9:50 to 11:15 AM ET For attendance credit: Participate in person or via Zoom —or by viewing the recording by Friday, February 17.
Thursday, February 2	Zoom class session on same day and time
Tuesday, March 21	Prerecorded class session (no live class) <i>View before March 28.</i>

Thursday, March 23

Friday, March 31
9:50 to 11:15 AM ET

For attendance credit: Participate **in person** or **via Zoom**—or **by viewing the recording by Friday, April 7.**

1. **Tuesday, January 17** (everyone is on call)

What is Administrative Law?,

<https://www.youtube.com/watch?v=ow5hZmU7Yfw&feature=youtu.be>

Introduction to the course [skim pp. 1–5; 13–17; 17–25]

Sackett v. EPA discussion

Read:

1. Clean Water Act, 33 U.S.C. § 1362(7), § 1344(g)(1) (Blackboard)
2. Skim the photos at the end of the Joint Appendix (Blackboard)
3. Listen: Oral Argument (Oct. 3, 2022):
<https://www.youtube.com/watch?v=HyPsjwmUCwc> (SCOTUS Toons version)
(listen to about 20 min of the Petitioner’s argument and about 20 min of the Respondent’s (Government’s) argument, about 0:00 to 20:00 and about 58:00-1:18:00)†
4. Skim EPA/Army Corps Final Regulation (issued December 30, 2022), pp. 7-14 (Blackboard)

Issue before the Court: Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are “waters of the United States” [WOTUS] under the Clean Water Act, 33 U.S.C. § 1362(7).

Reflection:

- a. What are the tests advanced by the Petitioner, the Respondent (Government), and the EPA/Army Corps (in the Final Regulation) for determining whether wetlands are WOTUS?
 - i. Where does each test come from?
 - ii. How does each test apply to the Sackett’s property?
- b. Why are the justices interested in EPA/Army Corps’s rulemakings? In what ways might it matter whether an agency has issued a rule for determining whether wetlands are WOTUS?

† Alternatively, you may read the relevant portions of the oral argument transcript here: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-454_g31h.pdf, pp. 1-24; 61-87.

- c. Is this an important question or just a matter of filling out the details of the statutory scheme? And what does that mean for who should determine this issue?

Section 1. Congressional Control of Agencies

2. **Thursday, January 19**
Const. art. I, § 1
Delegating power [pp. 27–35; 39–44; 50 (note 5)–53; 65 (note 4)–82]
3. **Tuesday, January 24**
Delegating power, cont. [pp. 103–10]
Other congressional oversight [pp. 144–54]
4. **Thursday, January 26**
Limits on congressional oversight [pp. 154; 160–81]
Congressional Review Act (read) (Blackboard)
REINS Act (skim) (Blackboard)

Section 2. Presidential Control of Agencies

Tuesday, January 31 – NO CLASS

5. **Thursday, February 2 – ZOOM CLASS**
Const. art. II, § 1, cl. 1
Appointment power [pp. 183–209]
6. **Tuesday, February 7**
Appointment power, cont. [pp. 209–10]
Arthrex (2021), excerpt (Blackboard) (pp. 24-45)
7. **Thursday, February 9**
Removal power [pp. 260–81]
8. **Friday, February 10 – RESCHEDULED CLASS**
Removal power, cont. [pp. 281–99]
Seila Law LLC v. CFPB (2020), excerpt (Blackboard)
9. **Tuesday, February 14**
Other presidential oversight [pp. 299–309; 314–20; 320–32 (skim); 332–43]

Self-Assessment 1 available on Blackboard

Section 3. Choice and Form of Agency Procedures

10. Thursday, February 16

Choice [pp. 534–53; 508–09; 514–16]
Administrative Procedure Act (“APA”), §§ 551 & 553

A. Rulemaking

11. Tuesday, February 21

APA, §§ 553, 556–557 (skim)
Decline of formal rulemaking [pp. 553–60]
Aaron L. Nielson, *In Defense of Formal Rulemaking* [pp. 238–42; 259–90 (skim)]
Regulatory Accountability Act, H.R. 5, excerpt [pp. 1, 4, 19-21] (Blackboard)

Optional: *The Peanut Butter Wars*, *The Uncertain Hour*,
<https://www.marketplace.org/shows/the-uncertain-hour/s02-2-peanut-butter-wars/>

12. Thursday, February 23

Informal rulemaking [pp. 561–69 (hearings); 569–87 (notice)]
Little Sisters of the Poor (2020), excerpt (Blackboard)

13. Tuesday, February 28

Informal rulemaking, cont. [pp. 587–92 (concise statement); 592–98; 603–12 (ex parte communications)]

14. Thursday, March 2

Informal rulemaking, cont. [pp. 612–23 (impermissible bias)]
Ossification [pp. 702–09]

15. Tuesday, March 7

Exceptions to rulemaking requirements [pp. 623–32; 641–47; 647–55]
Review: *Little Sisters of the Poor* (2020), excerpt (Blackboard)

16. Thursday, March 9

Exceptions to rulemaking requirements [pp. 655–67]
Review problem (optional) (Blackboard)

SPRING RECESS – NO CLASS Tuesday, March 14, and Thursday, March 16

B. Adjudication

17. Tuesday, March 21 – **NO LIVE CLASS**

APA, §§ 554–557

Formal adjudication [pp. 425–27]

Informal adjudication [pp. 433–42; 448 (notes 2-3); 449–50; 457–59]

Watch: Pre-Recorded Video (Blackboard)

Optional: Review Due Process [pp. 345–55; 392–96; 404–07] (*minimum required procedures for informal adjudication*)

Self-Assessment 2 available on Blackboard

Combined Self-Assessment 1 & 2 also available on Blackboard

Thursday, March 23 – **NO CLASS**

Section 4. Statutory Interpretation and Judicial Review of Agency Decisionmaking

18. Tuesday, March 28

APA, §§ 701–706

Reviewing facts [pp. 472–96 (formal adjudication); 498; 503 (note 1)]

19. Thursday, March 30

APA, § 706

Reviewing reasoning [pp. 667–69; 675–702]

Department of Homeland Security v. Regents of the University of California (2020), excerpt (Blackboard) (skim)

20. Friday, March 31 – **RESCHEDULED CLASS**

Interpreting statutes [pp. 711–12; 720–25]

Chevron revolution [pp. 728–41]

21. Tuesday, April 4

Chevron Step 1 [pp. 746–52; 761–65; 781–788; 798–806]

Justice Scalia's cost-consideration EPA trilogy cases (Blackboard)

22. Thursday, April 6

Chevron Step 2 [pp. 807; 816–31]

Hard look review and *Chevron* Step 2 [pp. 833–42]

23. Tuesday, April 11

Applicability (*Chevron* Step 0) [pp. 844–45; 852–66]

Jurisdiction [pp. 897–914]

24. Thursday, April 13

Major questions doctrine

King v. Burwell (2015), excerpt (Blackboard)

West Virginia v. EPA (2022), excerpt (Blackboard)

25. Tuesday, April 18

Stare decisis [pp. 874–84; 897 (note 2)]

Effect [pp. 842–44]

Interpreting regulations [pp. 914–15; 919–23; 924–42]

26. Thursday, April 20

Standing (one prerequisite to review) [pp. 1078–79; 1146–50]

TransUnion LLC v. Ramirez (2021), excerpt (Blackboard)

Optional video: Prerequisites to Review