

ANTONIN SCALIA LAW SCHOOL
The Administrative State and the Courts (LAW 152-001)

SPRING 2024 SYLLABUS (revised to Nov. 27, 2023)

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Student Learning Outcomes/Objectives:

1. Students will learn the intellectual history of the administrative state and how it became largely independent of the “checks and balances” that apply to other branches of government.
2. Students will review opinions, briefs and oral arguments in several pending Supreme Court cases reconsidering key aspects of the administrative state, including deference to agency determinations and the absence of jury trials.
3. Students will consider critically various strategies that have been proposed to “rein in” the administrative state, including the non-delegation doctrine and expanded powers of the president to fire subordinates.

Grading: Students will have the option of either submitting a paper on a topic of their choice related to the course or taking an essay exam. This written work will account for 80% of their grade, with class participation accounting for the other 20%.

Class Topics and Assignments:

I. Thursday, January 18, 2024 – Introduction to One Another and the Course

Reading Assignments:

(1) Ruth Marcus, The big question before the Supreme Court this term, THE WASHINGTON POST (Oct. 9, 2023), <https://www.washingtonpost.com/opinions/2023/10/09/court-regulators-federal-agencies-cfpb/>

(2) E. Donald Elliott, The On-Going Reconsideration of the Administrative State in the U.S., CONSTITUTIONAL DISCOURSE (JULY 20, 2023), <https://constitutionaldiscourse.com/e-donald-elliott-the-on-going-judicial-reconsideration-of-the-administrative-state-in-the-u-s/>

II. Thursday, January 25, 2024 – The Progressive Era Vision of Apolitical Administration

Reading Assignments: (1) Woodrow Wilson, The Study of Administration, 2 POLITICAL SCIENCE QUARTERLY (Jun., 1887), pp. 197-222, <https://faculty.fiu.edu/~revellk/pad3003/Wilson.pdf>;

(2) Ronald J. Pestritto, The Birth of the Administrative State: Where It Came From and What It Means for Limited Government, <https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited>

III. Thursday, February 1, 2024 – The New Deal and the Role of Expertise

Reading Assignments: (1) Fuchs, Ralph F., "Book Review. Landis, J.M., The Administrative Process," 24 WASH. U. L. Q. 300 (1939).

<https://www.repository.law.indiana.edu/facpub/1594>

(2) Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent With the Rule of Law*, 3 NYU J. LAW & LIBERTY 491 (2008)

http://www.law.nyu.edu/sites/default/files/ECM_PRO_060974.pdf

IV. Thursday, February 8, 2024 – Foundations of Judicial Deference on Facts

Reading Assignments: (1) *Universal Camera Corp. v. NLRB*, 340 U.S. 474,

[https://supreme.justia.com/cases/federal/us/340/474/;](https://supreme.justia.com/cases/federal/us/340/474/)

(2) *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87 (1983),

<https://supreme.justia.com/cases/federal/us/462/87/>

(3) E. Donald Elliott, Retiring “No Look” Judicial Review in Agency Cases Involving Science (CSAS Working Paper 21-15), [https://administrativestate.gmu.edu/wp-](https://administrativestate.gmu.edu/wp-content/uploads/2021/02/Elliott-Retiring-No-Look-Judicial-Review-In-Agency-Cases-Involving-Science.pdf)

[content/uploads/2021/02/Elliott-Retiring-No-Look-Judicial-Review-In-Agency-Cases-Involving-Science.pdf](https://administrativestate.gmu.edu/wp-content/uploads/2021/02/Elliott-Retiring-No-Look-Judicial-Review-In-Agency-Cases-Involving-Science.pdf)

V. Thursday, February 15, 2024 – Foundations of Judicial Deference on Law and Policy

Reading Assignments: (1) *FTC v. Gratz*, 253 U.S. 421 (1920),

<https://supreme.justia.com/cases/federal/us/253/421/>

(2) APA §706, <https://www.law.cornell.edu/uscode/text/5/706>

(3) *Chevron v. NRDC*, 467 U.S. 837 (1984),

<https://supreme.justia.com/cases/federal/us/467/837/>

(4) *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005),

<https://supreme.justia.com/cases/federal/us/545/967/#tab-opinion-1961903>

VI. Thursday, February 22, 2024 – By Zoom from London- The Rise and Fall of the APA

Reading Assignment: (1) Administrative Conference of the US Sourcebook on the Administrative Procedure Act,

https://sourcebook.acus.gov/wiki/Administrative_Procedure_Act/view

(2) E. Donald Elliott, *How the Supreme Court Blocked Congress's Effort to Redeem the Administrative State Over and over the Court vetoed reform*, THE AMERICAN SPECTATOR

(August 21, 2022), <https://spectator.org/how-the-supreme-court-blocked-congresss-effort-to-redeem-the-administrative-state/>

(3) *PBGC V. LTV Corp.*, 496 U.S. 633 (1990),

<https://supreme.justia.com/cases/federal/us/496/633/>

(4) Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 Harv. J.L. & Pub. Pol'y 925 (2013), <https://scholarship.law.georgetown.edu/facpub/1346>

VII. Thursday, February 29, 2024 - Contemporary Critiques

Reading Assignment: (1) PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (Encounter Books, 2017) (on reserve) <https://www.encounterbooks.com/books/the-administrative-threat/> ISBN: 9781594039492 List Price: \$4.79

Thursday, March 7, 2024 – no class – spring recess

VIII. Thursday, March 14, 2024 - The (Non) Delegation Doctrine

Reading Assignments: (1) *Whitman v. American Trucking Assn.*, 531 U.S. 457 (2001), <https://supreme.justia.com/cases/federal/us/531/457/>;
(2) *Gundy v. U.S.*, No. 17-6086, 588 U.S. ___ (2019), https://www.supremecourt.gov/opinions/18pdf/17-6086_2b8e.pdf
(3) Greve?

IX. Thursday, March 21, 2024 – Why Now?

Reading Assignment: (1) E. Donald Elliott, Fixing a broken process for nominating US Supreme Court justices, *THE CONVERSATION* (October 15, 2018), <https://theconversation.com/fixing-a-broken-process-for-nominating-us-supreme-court-justices-104629>;
(2) *Axon Enterprise, Inc. v. FTC*, U.S.S.C. No. 21–86 (April 14, 2023), https://www.supremecourt.gov/opinions/22pdf/21-86_l5gm.pdf

X. Thursday, March 28, 2024 – Exempting Agencies from Congress’s Power of the Purse

Reading Assignments: (1) Transcript of Oral Argument, *CFPB v. Com. Fin. Services Assn.*, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-448_4f15.pdf;
(2) <https://www.scotusblog.com/case-files/cases/consumer-financial-protection-bureau-v-community-financial-services-association-of-america-limited/>

XI. Thursday, April 4, 2024 – Reconsideration of *Chevron*

Reading Assignments: (1) <https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo/> (2) <https://www.scotusblog.com/case-files/cases/relentless-inc-v-department-of-commerce/>

XII. Thursday, April 11, 2024 – The Shrinking Right to Jury Trial

Reading Assignments: (1) <https://www.brennancenter.org/our-work/analysis-opinion/there-any-way-resuscitate-seventh-amendment-right-jury-trial>

(2) <https://www.seyfarth.com/news-insights/the-supreme-court-will-determine-when-federal-agencies-must-provide-for-the-right-to-a-jury-trial-in-civil-enforcement-actions.html>

(3) *Jerkesy v. SEC*, No. 20-61007 (5th Cir,)

<https://www.ca5.uscourts.gov/opinions/pub/20/20-61007-CV0.pdf>

(4) <https://www.scotusblog.com/case-files/cases/securities-and-exchange-commission-v-jarkesy/>

XIII. Thursday, April 18, 2024 – Restoring Presidential Authority to Manage the Bureaucracy

Reading Assignments: (1) Philip K. Howard, Restoring Accountability to the Executive Branch (CSAS Working Paper 20-02), <https://administrativestate.gmu.edu/wp-content/uploads/2020/02/Howard-Restoring-Accountability-to-the-Executive-Branch.pdf>;

(2) GAO, CIVIL SERVICE Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category of Federal Positions (GAO-22-105504)(Sept. 2022), <https://www.gao.gov/assets/730/723120.pdf> (only the “Highlights” portion is assigned).