Administrative Law
Brooklyn Law School | Fall 2016 (3 credits)
Mondays / Wednesdays 4:00pm – 5:50pm
250 Joralemon Street, Room 501

Professor K. Sabeel Rahman
Email: <Sabeel.rahman@brooklaw.edu>
Office: 250 Joralemon St, Room 817

Syllabus
[Last revised: August 30, 2016]

Overview
This course provides an introduction to the nature and functioning of federal administrative agencies, and to the legal and policy issues that arise. The course covers such topics as: the Constitutional position and structure of administrative agencies; the Administrative Procedure Act and agency rulemaking and adjudication; judicial review of agency actions; access to judicial review. The goal of this course is to provide students a working knowledge of the major legal issues in administrative law, as well as a familiarity with the kinds of policy, advocacy, and political issues that arise when working with federal agencies, whether as a lawyer, policymaker, or advocate.

Required sources:
- Breyer, Stewart, Sunstein, Vermeule, Herz, 2015-2016 supplement
- Assorted additional readings, to be posted on course website

NB – Reading assignments may be adjusted from time to time based on our progress in the course (any changes will be announced in advance).

Assessment:
Students will be assessed on the basis of an in-class final exam and in-class participation. Participation grades consist of attendance, preparedness, and quality (not necessarily quantity!) of contributions to in-class discussions.
COURSE TIMELINE

1. Introduction – Conceptualizing inequality (Aug 29)

UNIT I: Agencies and structure
2. Article I delegation of legislative functions (August 31)
3. Article III delegation of judicial functions (September 12)
4. Article II executive control (September 14)
5. Separation of powers problems (September 19)

UNIT II: Procedure
6. APA, rulemaking, and adjudication (September 26)
7. The practice of rulemaking and regulatory analysis (September 28)
8. Rulemaking exceptions (October 5)
9. Adjudication (October 10)
10. Enforcement and other regulatory tools (October 19)
11. Regulatory reform and capture (October 24)

UNIT III: Judicial control of agency practice
12. Review of agency legal interpretation I (October 31)
13. Review of agency legal interpretation II (November 2)
14. Review of agency policy I (November 7)
15. Review of agency policy II (November 9)
16. Access to judicial review I (November 14)
17. Access to judicial review II (November 16)

UNIT IV: Modern developments
18. Agencies and policy change I: Social movements (November 21)
19. Agencies and policy change II: Presidential control (November 28)
20. Deference and delegation, revisited (November 30)
21. Privatization and administration (December 7)
1. INTRODUCTION

MONDAY, AUGUST 29

Introduction to regulation:
- BSSVH, pp. 1-28 [On the history and purposes of regulation]

Case study: Department of Labor overtime rules

Skim and bring to class for discussion

Regulation in the Obama Era:

Reading questions:

Begin with the introductory material in the casebook.
- What are the justifications (economic and non-economic) for regulations?
- “Regulation” is a catch-all term; what are the specific tools that regulatory agencies have at their disposal?
- Where did the modern regulatory state come from? What are the key periods in its historical emergence?

As an example, we will walk through the Department of Labor’s new “Overtime Rule.”
- What substantive policy changes is the agency proposing? Why does the agency think this is an important policy change? (see NPRM, Part I, IV)
- How does the agency justify its legal authority to promulgate this rule? What legal authorities does it cite? (see NPRM, Part II)
- What is the role of the President in shaping this proposal? (see NPRM Part III)
- How does the agency calculate the costs and benefits of this proposal? (see NPRM Part I)

For some contemporary political context surrounding the themes of the course, look at the recent New York Times coverage of President Obama’s use of regulatory agencies to make public policy (see NYT articles)
- What kinds of policies has the Obama administration implemented through Executive branch agencies? Why might this be legally troubling in light of Congressional inaction?
- Consider for yourself the tradeoffs raised by this article: should we trust regulatory agencies to make public policy without further Congressional action? Why or why not? What are the benefits? The dangers?
Unit I: Agencies and structure

2. **Article I Delegation of Legislative Functions**  
**Wednesday, August 31**

What are the limits on agencies exercising legislative powers?

The legislative function
- BSSVH, pp. 989-990 (US Constitution, Article I)
- BSSVH, pp. 37-39 (“Introductory note”)

The nondelegation doctrine: origins
- BSSVH, pp. 42-47 (“The Nondelegation Doctrine’s Short-Lived Triumphs”; *Panama Refining; Schechter Poultry*)
- BSSVH, pp. 39-41 (“Nondelegation Doctrine—Analytical and Textual Foundations”)
- BSSVH, pp. 47-49 (“Questions” following *Schechter Poultry*)

The modern nondelegation doctrine
- BSSVH, pp. 64-67 (“The Modern Nondelegation Doctrine”)
- BSSVH, pp. 67-71 (*American Trucking; Whitman*)
- BSSVH, pp. 71-2, 74-6 (Notes 1, 2, 3, 7, 8; “Note on nondelegation and statutory interpretation”)

[No Class – Flex Schedule]  
**Wednesday, September 7**

3. **Article III Delegation of Judicial Functions**  
**Monday, September 12**

What are the limits on agencies exercising judicial powers?

- BSSVH, pp. 990-991 (US Constitution, Article III)
- BSSVH, pp. 168-177 (*Crowell; Northern Pipeline; Schor*)
- BSSVH, pp. 178-9 (Questions 1-6)

4. **Article II Executive Control**  
**Wednesday, September 14**

How does the President exercise control over agency officials?

Executive control
- BSSVH, pp. 990 (US Constitution, Article II)
- BSSVH, pp. 89-91 (“Executive and the Agencies”)

Hiring and removal authority of the President
- BSSVH, pp. 91-97 (“Hiring”; *Buckley; Notes; inferior officers and Morrison*)
- BSSVH, pp. 105-111 (“Removal”; *Myers, Humphreys; Notes 1-6*)
- BSSVH, pp. 117-124 (*Free Enterprise Fund v. PCOAB*)
5. **Separation of Powers Problems**  
**Monday, September 19**

What are the limits of Congress’ ability to shape and control agencies?

The extent of Congressional control
- BSSVH, pp. 76-83 (*Chadha*)
- BSSVH, pp. 124-126 (*Bowshar*)
- BSSVH, pp. 73-4 (Note 6: *Clinton v. NY*)
- BSSVH 2015-2016 Supplement, pp. 7-23 (*Noel Canning v. NLRB*, plus notes 8, 10,11)
- BSSVH, pp. 83-89 (Other means of Congressional control)

**Case study:** Creating a new agency after the financial crisis
- Barack Obama, Remarks on Wall Street Reform, April 22, 2010

**[No Class]**  
**Wednesday, September 21**
Unit 2: Procedure

6. APA, Rulemaking, and Adjudication  Monday, September 26

What is the difference between rulemaking and adjudication? Why would an agency choose one procedure over another?

Introduction to the APA [Skim]
- BSSVH, pp. 500-502 (Introduction to procedure)
- BSSVH, pp. 993-994, 1006-1007, 1008-1009 (APA §§ 551, 553, 554, 556)
- BSSVH, pp. 509-510 (basics of APA)

Rulemaking or adjudication?
- BSSVH, pp. 502-506 (Londoner, Bimetallic; rulemaking vs adjudication)
- BSSVH, pp. 445-55 (Chenery I and II)
- BSSVH, p. 537 (Bell Aerospace)

7. The Practice of Rulemaking and Regulatory Analysis  Wednesday, September 28

How does the process of rulemaking work in practice? What steps must agencies take? How does the President exercise control over the day-to-day process of rulemaking? How does cost-benefit analysis shape rulemaking?

- BSSVH, pp. 136-65 (Supervisory authority – Presidential control; EOs; CBA method; etc.)
- OMB Circular A4, excerpts (Regulatory analysis for informal rulemaking)
- BSSVH, pp. 214-220 (Critique of cost-benefit analysis)

Case study: Read for discussion in-class
- “New DOT Consumer Rule Limits Airline Tarmac Delays, Provides Other Passenger Protections,” Department of Transportation press release, December 21, 2009
- Department of Transportation, “Enhancing Airline Passenger Protections” (Tarmac rule) – on course website and Regulations.gov
  - Regulatory impact analysis, Introduction and Executive Summary
  - Final rule
- Bill McGee “Tarmac delay rules: Consumer success or industry burden?” USA Today, February 4, 2015

8. Rulemaking Exceptions  Wednesday, October 5

When must an agency rule undergo notice-and-comment procedures? When is it exempt?

- BSSVH, pp. 565-7 (“logical outgrowth”; Long Island Care v. Coke)
- BSSVH, pp. 576-581 (Exceptions to NC requirements; Bowen)
- BSSVH, pp. 581-583 (General statements of policy; CNI v Young)
- BSSVH, pp. 584-5 (interpretive rules)
- BSSVH, pp. 590-595 (reigning in guidance)
9. ADJUDICATION  
MONDAY, OCTOBER 10  
How does the process of adjudication work in practice? What legal requirements apply?  
- BSSVH, pp. 510-9 (overview; Dominion Energy)  
- Strauss et al, Administrative Law:  
  o pp. 286-97 (Castillo-Villagra v. INS; role of evidence)  
  o pp. 297-302 (Envirocare; UCC v FCC; participation in adjudication)  
- BSSVH, 539-45 (rulemaking shapes adjudication – Texaco; Heckler)  

[NO CLASS – FLEX SCHEDULE]  
MONDAY, OCTOBER 17  

10. ENFORCEMENT AND OTHER REGULATORY TOOLS  
WEDNESDAY, OCTOBER 19  
Outside of rulemaking and adjudication, what are some other tools agencies can employ?  
How can agencies enforce the rules they make?  
- BSSVH, pp. 738-40 (information as a regulatory tool)  
- BSSVH, pp. 211-14 (disclosure as a regulatory tool)  

Case study: OSHA and enforcement  
- Strauss et al, Administrative Law, pp. 67-80 (OSHA compliance and enforcement)  

Case study: DOL and enforcement  
- FLSA statutory excerpts  

11. CASE STUDY: REGULATORY REFORM AND CAPTURE  
MONDAY, OCTOBER 24  
Are the current procedural limits on agencies enough to protect against arbitrary action or interest group ‘capture’? How might we reform or improve the regulatory process?  
- BSSVH, pp. 558-565 (Vermont Yankee and additional procedural requirements)  
- BSSVH, pp. 570-576 (E-rulemaking and participation in rulemaking)  
- BSSVH, pp. 720-9 (FOIA, information, disclosure)  
- BSSVH, pp. 734-7 (open government)  

Case study: Oil spill and regulatory reform  
[NO CLASS – FLEX SCHEDULE] WEDNESDAY, OCTOBER 26
Unit 3: Judicial control of agency practice

* Review p. 1013 (APA § 706)

12. Review of Agency Legal Interpretation               Monday, October 31

How should agencies interpret their statutory mandates? How should courts review the legal interpretations of agencies? What is “Chevron deference” and how does it work?

- BSSVH, pp. 278-82 (Skidmore and Note 1)
- BSSVH, pp. 282-91 (Chevron and notes)
- BSSVH, pp. 317-324 (Sweet Home)
- BSSVH, pp. 359-65, 373-8 (Entergy; Babbitt)

13. Review of Agency Legal Interpretation II           Wednesday, November 2

When should “Chevron deference” apply? To what extent is (or should) Chevron deference be limited or cabined?

- BSSVH, pp. 293-302 (Mead)
- BSSVH, pp. 304-11 (Gonzales)
- BSSVH, pp. 324-36 (MCI; Brown & Williamson)
- BSSVH, pp. 383-5 (“Agency interpretations of agency regulations”)

14. Review of Agency Policy I                          Monday, November 7

How should courts oversee the substantive policymaking activities of agencies? What is “hard look” and “arbitrary & capricious” review?

Review of agency fact-finding and “substantial evidence”

- BSSVH, pp. 239-44 (Universal Camera v NLRB; Frankfurter opinion)
- BSSVH, pp. 247-53 (Allentown Mack)

Hard look / Arbitrary & Capricious review

- BSSVH, pp. 386-407 (Overton Park, State Farm)
15. REVIEW OF AGENCY POLICY II

WEDNESDAY, NOVEMBER 9

How has arbitrary and capricious review doctrine evolved? What are the implications for agency policymaking and practice?

Modern A&C review
- BSSVH, pp. 336-45 (Massachusetts v. EPA)
- BSSVH, pp. 412-424 (FCC v Fox)

Recent developments in A&C review
- Investment Company Institute v. CFTC, 720 F.3d 370 (D.C. Cir. 2013), excerpts
- BSSVH, 2015-2016 Supplement pp. 56-63 (Michigan v. EPA, 135 S. Ct 2699 (2015))
- Zero Zone v. Department of Energy, 7th Circuit, 2016, excerpts

16. ACCESS TO JUDICIAL REVIEW I

MONDAY, NOVEMBER 14

Who has standing to bring suit against agencies?

Introduction to standing
- BSSVH, pp. 852-854 (introduction to standing)
- BSSVH, pp. 856-857 (FCC v. Sanders Brothers; note on APA)
- BSSVH, pp. 859-860 (Note on difference between constitutional and statutory cases)

Statutory standing
- BSSVH, pp. 860-863 (Data Processing; “injury in fact”)
- BSSVH, pp. 864-866 (Clarke v. SIA; “arguably within the zone”)
- BSSVH, pp. 818-820 (Block v. Community Nutrition Institute)

Constitutional standing
- BSSVH, pp. 874-877 (Sierra Club v. Morton)
- BSSVH, pp. 880-888 (Lujan)

17. ACCESS TO JUDICIAL REVIEW II

WEDNESDAY, NOVEMBER 16

Who has standing to bring suit against agencies? What other legal requirements apply?

- BSSVH, pp. 908-914 (Friends of the Earth; causation and redressability)
- BSSVH, pp. 936-942 (Abbott Labs – ripeness; Toilet Goods and Fortas’ dissent; note 3 only)
- BSSVH, pp. 888-893 (Massachusetts v. EPA – standing for states)
Unit 4: Modern developments

18. AGENCIES AND POLICY CHANGE I: SOCIAL MOVEMENTS        MONDAY, NOVEMBER 21
How do social movements and political climate shape agency actions?

The case of Net Neutrality
- *Verizon v. FCC* (2014), excerpts
- FCC 2015 order, excerpts
- Ajit Pai, FCC 2015 order dissent, excerpts
- *US Telecom Assoc v. FCC* (2016), excerpts

OPTIONAL:

19. AGENCIES AND POLICY CHANGE II: PRESIDENTIAL CONTROL      MONDAY, NOVEMBER 28
How might the Executive drive agency action in response to judicial or Congressional restraint?

The case of climate change regulation

Forcing a recalcitrant agency: 2008
- *Review Massachusetts v. EPA*, BSSVH pp. 335-46
- EPA, ANPRM, “Regulating Greenhouse Gas Emissions under the Clean Air Act, 73 FR 44354, excerpts
  - Summary, intro, background; preface from administration; letters from other agencies

Approving an active agency 2010-14
- *Utility Air v. EPA*, 573 U.S. ____ (2014), Scalia opinion only

Restraining an overreaching agency? 2014-16
- *West Virginia et. al. v. EPA* (2016), excerpts

OPTIONAL:
- Review – Appelbaum and Shear on Obama’s use of regulation [from Class 1]
Given the expansions of agency authority in an era of Congressional gridlock, should we revisit (and curtail) administrative law principles of agency deference and restraint?

- REVIEW CLASS 1 readings:
  - DOL “Overtime rule”
  - New York Times articles about Obama administration
- BSSVH, 2015-16 supplement, pp. 41-8 (King v Burwell, City of Arlington)
- King v. Burwell, additional excerpts
- City of Arlington, additional excerpts
- Separation of Powers Restoration Act, excerpt
- Michigan v. EPA, J. Thomas, dissenting, excerpt
- US v Texas, excerpt

OPTIONAL:
- Adrian Vermeule and Eric Posner, Executive Unbound, Introduction

Many governmental functions are increasingly delegated to private actors not bound by the dictates of administrative law or Due Process. Should administrative law models of accountability and procedure be extended to cover these actors?

The problem of privatization
- David Hatcher, The Poverty Industry, excerpt
- Strauss et al, Administrative Law:
  - pp. 900-8 (Rendell-Baker)
  - pp. 624-8 (private delegations)
- Minow and Freeman eds., Government by Contract, excerpts
  - Nina Mendelsohn, “Six Simple Steps to Increase Contractor Accountability”
  - Gillian Metzger, “Private Delegations, Due Process, and the Duty to Supervise”
  - Laura Dickinson, “Public Values/Private Contract”

OPTIONAL
- Neal Katyal, “Internal separation of powers: Checking today’s most dangerous branch from within,” 115 Yale L. J. 2314, excerpt