

Introductory Note for Administrative Law-- Fall 2020
Professor Michael Froomkin

Mon & Wed 2:00-3:40
Primarily Live via Zoom
4 Credits

Class blog at <http://adlaw20.uml.edu>

Ver 1.0 Last edited Aug 7, 2010

Welcome! Congratulations on choosing to take Administrative Law. By doing so you are joining an elite group of law students and lawyers. Fewer than half of US students take Administrative Law, despite its importance. But of that majority who avoid administrative law, many are sorry later because it is (a) hard to teach yourself; (b) ubiquitous; and (c) remunerative.¹

I've been teaching Administrative Law since my first year as a law teacher. I think it is probably the most important thing I teach. It is without doubt the course that the largest number of students have thanked me for – although I will admit that this usually tends to happen well after it's over. Indeed, the thanks often come several years later – after the students have recovered, and after they've discovered just how useful it is to understand this stuff. Persevere.

This note addresses these topics:

- What Administrative Law is About
- Why it Matters
- Learning Objectives
- Organization of the Syllabus
- Important Class Policies
 - Background Knowledge
 - Being Online
 - Organization of Class Time
- Frequently Asked Questions

There's a lot in what follows, and parts of it will matter considerably to what happens this term, so please read it with care.

¹Studies have shown that in medium-sized law firms, on average the partners specializing in administrative law make the most money over the long term. Unlike many other subjects, administrative law is largely insulated from the boom-and-bust cycle. You will hardly if ever have the big score of the litigation partner, but the federal government never goes away (even when shut down).

I. What Administrative Law is About

Administrative Law – Adlaw for short – is formally about the rules that govern how federal government agencies do their work of implementing laws passed by Congress. It’s also about what powers Presidents have to manage the bureaucracy or circumvent it (spoiler alert: less than you probably think, and certainly much less than President Trump seems to think). In particular, administrative law defines how agencies go about writing and implementing (or, in some cases, enforcing) regulations, and what constraints apply when an agency wishes to issue a regulation, an order, or make a decision with legal or economic consequences. That decision might involve whether to license a nuclear power plant, grant a fishing license, pay a veteran’s disability claim, make a complex scientific judgment about the amount of water that can be taken from a river for agriculture without killing the fish, or any of a myriad of other things that regulate life in a complex, technology-reliant, mixed capitalist economy.

Lawyers often say that Adlaw is about procedure and it is to a point, but it would be more accurate to say that at its heart Adlaw is applied Constitutional Law. In one sense it’s true that a great deal of administrative law involves the workings of the Administrative Procedures Act (APA), and frequently if your client does not like what the agency did or proposes to do to her, the most effective challenge will be to find a procedural flaw in the agency’s actions. Even if the remedy is only a court order requiring a do-over, as it often is when procedural challenges succeed, that usually means a substantial delay – perhaps years – before the agency is able to act. If, say, the regulation creates a costly obligation, even a delay can be a profitable victory.

On the other hand, the idea that Adlaw is about procedure is also wrong, or at least quite incomplete, and not only because – as I’m sure you’ve heard by now – “procedure is substance.” It’s not just that the rules defining how we do things also, in practice, define what we can do and often will shape how we will choose among alternatives. It’s also that there are directly substantive components to administrative law. Some of these components come directly from the Constitution, others come from the APA which instructs courts to overturn agency action if it is “arbitrary and capricious” or contrary to law. Determining whether an agency’s action is “reasonable” and thus legal or “arbitrary and capricious” and thus illegal is not just a question of determining whether the agency followed procedure. It also requires a determination of whether what the agency did makes any sense. As we will see there is more than a little debate as to how deferential courts should be to agency legal, scientific, and policy judgments. Almost all sides in these debates, however, agree that whatever the standard might be for a court’s review of an agency, it is different from an appellate court’s review of an inferior court. They also almost all agree that the review is at least somewhat deferential in that the agency is not in most cases legally required to come up with the best possible answer, or the answer the court might have chosen. Rather, the agency is in most cases² required to ground its actions on the facts available to it at the

²We’ll discuss the exceptions too.

time it took the decision, and to explain how it got from the facts and the statutes to the decision it made. And, as we will see, sometimes judicial review seems very deferential indeed.

This course is primarily about *federal* agencies. Some of the things we cover, primarily the constitutional aspects of Adlaw, also apply to all states. Some other things we cover, primarily the Administrative Procedures Act (APA), apply with varying degrees of similarity to those states whose state administrative laws mirror the APA. Unfortunately for some of you, Florida is not one of those states. Indeed Florida has one of the most deviant Administrative Law regimes in the country, so unusual that there's a whole different course called "Florida Administrative Law" that we teach from time to time (but which I don't teach because I don't know it well enough). Even if you think that your interests lie primarily in an area governed by a Florida state agency, it is probably wise to take a course in Federal Administrative law first because you will learn about the Constitutional constraints on agency action – Due Process works the same under the 5th and 14th Amendments – and because Florida's departure from the APA model is moderately recent, and it makes sense to understand the roots of Florida's practices in order to best understand the modern turn away from those roots. In addition, there are many areas where state and federal agencies share responsibilities, so it makes sense to understand the federal rules too.

II. Why Administrative Law Matters

Very few laws are self-implementing. Most laws require that someone, or many someones, do something to turn them into action. With relatively narrow exceptions, for federal laws the implementing body is usually a federal agency. Federal agencies exercise authority over the economy, and over the lives of every American. These agencies have the power to make legally binding rules ("regulations"), to write checks (e.g. "welfare" or "crop subsidies"), to issue valuable permits and licenses, to levy fines, and to adjudicate.

One agency, the Social Security Administration, decides more cases every year than all the state and federal courts combined. Other agencies decide issues of life and death, ranging from ruling on immigration petitions by people who claim they would be persecuted at home, to how much toxic material is allowed on the factory floor, or to car safety standards. Administrative Law is vitally important for anyone contemplating a practice that might involve federal regulations in any way. It is particularly valuable for students who are considering a practice involving highly regulated areas such as: Communications, Disability, Energy, Environment, Family and Child Services, Financial Markets, Immigration, Labor, Housing, or Land Use, but it is also relevant to almost every other area of practice.

More generally, I believe that administrative law exists at the sharp end of the democratic experiment that is (was?) the United States. Agencies are headed by a small cadre of politically appointed (and thus, in theory, somewhat accountable) leaders, and staffed by a large cadre of relatively permanent, ostensibly non-political civil servants. None of these people are elected. Yet collectively they have tremendous power. Yes, all that power derives from Congress, and

Congress can in theory take it away, but the daily life of agencies is as likely to be in the shadow of often broad or ambiguous delegations of authority from Congress as it is to be in fear of Congressional oversight ... although oversight, and in some cases arguably unconstitutional Congressional meddling, are always theoretical possibilities.

Our predominant solution to the problem of the inescapable necessity of establishing a bureaucracy to implement ostensibly democratic legislation designed to run the country, do justice, and defend us from toxins and other dangers, is to turn to the courts to review the actions of agencies. Every administrative decision threatens to raise the question of how we reconcile our dependence on an unelected, expert bureaucracy with our commitments to a government that is democratically accountable and legitimate. Yet even before one encounters the various convoluted doctrines of judicial review and degrees of deference – not to mention standing rules that may foreclose any judicial intervention at all – one might ask how and why we believe that review by unelected and life-tenured federal judges will tend to improve the decisions of federal officials who were at least appointed by an elected³ President, or by someone appointed by someone appointed by a President. Noting that generalist judges may be at some disadvantage in deciding sometimes very arcane and technical issues on which the agency personnel are presumably expert only makes the conundrum worse.

And yet, having *some* mechanism by which citizens can challenge what agencies do is critically necessary. And boy do we have a mechanism. Indeed, some have suggested that the mechanism is now so out of control that agencies have ‘ossified’ as they struggle to issue any rules at all or, more subtly, that agencies are so concerned with avoiding judicial review that the process of making rules has become cumbersome beyond belief. And yet, at the same time, statistics show that in normal times (we do not live in normal times) agencies win court cases much more often than they lose. Nevertheless, they don’t always win, and both the losses and the fear of losses are important legal and jurisprudential life rafts for your future clients and perhaps for democratic theory.

Among other things, this course surveys the means by which people can challenge or influence administrative exercises of authority. That’s important. Very important. And our experience of the first three and half years of the Trump administration proves that in spades.

III. Learning Objectives.

Obviously we can’t learn about every agency’s rules in any kind of detail. Instead, we will concentrate on the rules that cover all (or most, there are an amazing number of exceptions in Administrative Law) administrative agencies. I hope that you will leave the course with a working knowledge of the subject, sufficient for a judicial law clerk, a new government official, a politician, someone representing a client with an interest affected by an administrative agency. I hope that in any of these roles at the very least you will know what to ask. We will discuss the

³For some definitions of elected, anyway.

types of redress available if you think you have been or will be injured by government actions.⁴ You will be able to identify issues, have a "feel" for how things work – e.g. how to stop an agency from doing something, or at least have a feel for the type of things you will want to see if you can argue. Plus, you will know to whom to argue it.

This is a four-credit class. It is not an easy one. At least some of the topics will be new to almost all of you. In addition, the topics we cover are vast. The course may not make much sense in the early weeks. By the end of the semester, however, you will understand how the parts fit together. Try to focus on what we are covering at the moment. Unlike your other classes that focus on the substance of a specific body of law, Administrative Law will use cases and other materials involving many areas of substantive law to teach you about the administrative process and its oversight by Congress, the White House, and the courts. We will examine Administrative Law from many angles—from the technical details of the Administrative Procedure Act to the constitutional constraints on the system

IV. Organization of the Syllabus

Federal agencies are creatures of law: no agency can exist without an enabling statute passed by Congress. And every agency has its own rules of both procedure and substance. As a result, every administrative law problem is potentially subject to each and every of the following sources of law:

- The US Constitution, especially the Due Process Clause (but also other parts, notably separation of powers)
- The statute(s) creating the agency and giving it the power(s) it purports to be exercising
- The Administrative Procedure Act
- Relevant agency regulations
- Relevant agency decisional precedents
- Presidential orders
- Decisions of executive branch agencies, notably the Office of Management and Budget
- Relevant court decisions interpreting any and all of the above

Yes, that's a long list. Yet, which of these things would we want the agency to ignore?

Administrative law is one of those subjects where everything wants to be first. Indeed, the single thing that probably makes the subject most difficult is how much the different parts of what we are learning this semester are inter-related. It can be somewhat frustrating to be learning complex rules that seem to interlock with other rules you haven't learned yet – if this were a car

⁴Unless it looks like a constitutional Takings claim, or tort claim, most often involving physical injury – in which case we don't really consider it an administrative law issue at all – odds are that you cannot get money. But you might get an injunction, an order striking down the agency rule or action, or, most likely, a do-over.

course, it would be a bit like learning about a catalytic converter or a carburetor before learning about an engine or a wheel. The good news is that if you have been paying attention, it really all should come together beautifully when you review your outline at the end of the semester. The bad news is that it will be a long outline.

Although you really could start almost anywhere, most commonly administrative law teachers and texts adopt either a top-down or a bottom-up approach. In the top-down approach you start with the constitutional issues, especially the separation of powers. Then you might look at judicial review, the legislative angle, and finally at various agency procedural issues. The virtue of this approach is that it has an elegant logic: begin with the legal (and policy) environment in which agencies exist, add the multiple external constraints which define their legitimate role, and only when you understand that complex environment do you turn to what the agency does. So armed, you are ready to test agency actions against all the limits on agency behavior. After all, what would be the point of looking at agency actions in any detail before knowing the tests they must meet?

The proponents of the bottom-up approach reply that the problem with going top-down is that any discussion of separation of powers or anything else relating to agencies is pretty sterile and deracinated without a richer body of examples of what agencies actually do. Especially given that many students do not have, or do not realize that they have, much exposure to federal agency action before they take the course, bottom-up partisans argue that it is better to look at actual cases reviewing actual agency actions first, allowing some of the other issues to filter in by osmosis, and then tackle the framework issues last when one has a firmer idea of what the issues are and what the fuss is about.

This casebook is organized mostly along ‘bottom-up’ lines, even though the two casebook authors I know assign it in a scrambled order designed to be considerably more ‘top-down’. This year we’re going to follow the order in the book to a large extent, with the major exceptions of skipping most of Chapter II on statutory interpretation, and skipping most of Chapter VI, and front-loading Due Process which I believe is the essential background for everything that follows. This means we’ll do standing last; many of you will have had standing in Constitutional Law, making it easier. Even for those who haven’t had it before will I think find the rules of standing relatively easier to learn, if not perhaps to get into the spirit of them.

V. Class Policies

A. Background Knowledge

What you will need most of all in class is an open and yet critical mind informed by experience. A little bit of knowledge about the basics of how the government works – how a law gets passed, that sort of thing – wouldn’t hurt either. I won’t, however, assume much more than Constitutional Law I – but if you are a foreign or transfer student who has not had Con Law I,

your probably ought to get the Conlaw nutshell and read considerable chunks of it; feel free to get in touch to discuss what you can skip.

Everyone will need to have the casebook available in every class. There is one required book for the course: STRAUSS, ET AL, ADMINISTRATIVE LAW (12th ed. 2018). Please do not settle for an earlier edition as the organization is vastly different, as is the selection of cases. I am aware that this is an expensive book, but it is also really good. If you are lucky, Amazon may offer a discount, although sadly the day I checked it was full price. They will likely give you free 2-day shipping if you sign up using your miami.edu mailing address.⁵

I will also provide occasional illustrative or supplementary material as we go along, including some important recent decisions or adlaw-related lawsuits, which the Trump administration seems to breed on an almost weekly basis. The casebook authors have promised me that the official supplement will be available electronically before the end of August. I'll probably have to adjust our assignments a little once that happens.

B. Teaching and Learning in a Time of Covid

I am in a number of high-risk groups for COVID, not least because I recently had chemotherapy which reset my immune system to zero. So I would be teaching this class online even if the risk of coronavirus were much less than it currently seems to be.

We are thus all forced to experiment. I will appreciate your help and forbearance.

Why this is an experiment: Let's start with the obvious—we're using Zoom instead of being in a nice uncomfortable classroom. What's more, while in the past I've taught three times per week, the administration in its debatable wisdom has calendared us for 26 longer classes (100 minutes) twice a week. That's a lot of administrative law – and a lot of reading – per class. I'd strongly advise you to try to get ahead on Wednesday's readings before Monday's class, or otherwise plan to set aside a very large block of time on Monday night and/or Tuesday to do the Wednesday reading. This stuff can, at times, be dense and difficult. (But it's worth it – it's important.)

One consequence of the new mode of teaching plus the new schedule is that it makes predictions about how much we'll accomplish per class very difficult. This is one of several reasons why the bulk of the class will be conducted live, via Zoom. I may experiment with some pre-recorded content for material that seems to lend itself to it, but I worry about doing complicated things without giving you a chance to stop me and me questions, an option that won't be available for pre-recorded content until our AI capability gets a lot more sophisticated.

⁵See <http://www.amazon.com/gp/student/signup/info> for details.

Everyone I have spoken to says that Zoom-based classes need tailored rules of conduct. Almost everyone I've spoken to has, for example, counseled requiring that students attend with webcams on for a number of reasons, high among them that it is too weird for both instructors and fellow students to interact with black rectangles with a name or photo on it. But it is not quite that simple: some people are forced to work from crowded or distracting spaces; some people are worried that their images may be captured and deepfaked for some nefarious purpose; some people have serious wifi or other technical issues that makes it difficult to maintain a live feed. I have tried, therefore, to craft the following policy with those and other special circumstances in mind.

1. Students should attend class via webcam whenever possible. Students should not have webcams off if it is avoidable.

2. If you have a distracting background, especially if you have one with other people moving about, please consider using Zoom's 'virtual background' feature if your hardware supports it.

3. I do not actually believe this needs saying, but one of the leading articles on remote teaching recommends it very strongly, so here goes: Students should "refrain from engaging in behavior (e.g., eating dinner, lounging in bed, using a treadmill) that would be inappropriate in a residential classroom." (Then again, if you consider [this](https://www.abajournal.com/news/article/lawyers-are-dressing-way-too-casual-during-zoom-hearings-judge-says) [https://www.abajournal.com/news/article/lawyers-are-dressing-way-too-casual-during-zoom-hearings-judge-says] maybe it does need saying.)

4. If for some reason you believe you will need to have your webcam off routinely, then please get in touch to explain your reasons.

The law school is requiring me to record all classes conducted on Zoom. In order to protect your privacy, however, I have elected to not make those recordings available routinely on the web. Rather, if you miss a class for an excused absence, you can ask me, or my Faculty Assistant Ms. Clarita Amador, camador@law.miami.edu, for a copy of the recording. It follows from this that I am trusting you not to make recordings of the class; indeed, recording the class is strictly prohibited. If you are ill and have to miss class I am very happy to make an appointment to discuss the material with you.

More generally, I will count on your feedback: if something is not going right, or if there's something I could do differently and perhaps better, it would be very nice if you would send an email to tell me about it.

Attendance. Legal instructors differ in the extent to which they are willing to be parentalist. Some of us observe that law students are adults, and conclude from this fact that they should be allowed to make their own choices as to whether they show up for class and whether they participate in class. All that matters, these instructors argue, is how students do on the exam. Other instructors respond that by signing a contract with the law school, our students have engaged us to be trustees for their education, and to use our trained judgment to do whatever we can, within the bounds of law and reasonableness, to maximize our beneficiaries' educations. I agree with

both of those views. But what carries the day for me is the thought of your future clients. They're entitled to expect the best you can deliver. So they're entitled to expect me to try to encourage you to be the best you can be. Plus the ABA requires that I certify you actually attended class.

Zoom automatically notes who is signed in and when the joined the lecture (or dropped out)—welcome to the panopticon! Gripped with the delusion that what I have to say after teaching this stuff for two and a half decades may be of value, I will use this information to have my Faculty Assistance compile a record of your attendance. You can cut up to a whole week's worth of classes (that's, sadly, just two of them) without giving any reasons or suffering any penalty to your grade, although who knows what the lost knowledge will do to your education, or the fear of the lost knowledge will do to your mental health. Miss more than that without an excuse, and it will begin to lower your class participation grade.⁶ If you miss five or more classes without a good excuse⁷ I will contact the Dean of Students office and ask them to speak to you. Miss seven or more classes without a good excuse and there's a risk we may drop you from the class.

Please make every effort to join the class on time. If you can't make it on time, it's still better to come late than not at all, as a lateness only counts as half an absence. One of the few unmitigated benefits of using Zoom to hold a class is that it should make the parking problem a lot easier. Set an alarm on your phone. I do.

C. Organization of Class Time

Ordinarily, the class will proceed by a mixture of lecture and discussion. I lecture more in this class than anything else I teach, mostly because I think the material can be quite difficult, and there is a lot of it. Your questions are always welcome. I recognize that this is a difficult class. I want to help, but **you have to help me** by telling me what you need help with.

How to ask (or answer) a question. We're going to have to experiment. You can try putting questions into the Q&A on zoom, but as I'm likely going to be looking at my notes and at your faces (I got an extra-big monitor so you will not be too tiny), I may not notice the chat in the Q&A quickly enough. So for starters at least, I think we should experiment with just having you unmute and saying you have a question. When I get to the end of an idea, I'll turn the (virtual) microphone over to you. If that doesn't work, we'll try something else.

A colleague of mine shared her law school's 'ground rules' for effective group discussions. They're worth emulating when another student is speaking (I've elided the part about physical space that didn't apply online):

⁶Grades are discussed below.

⁷Historically, I have been very stingy with excused absences for anything other than personal illness, relatives in hospitals, or matters involving the courts or law enforcement. The management is encouraging us to be less rigid given the special circumstances this year, and I'll try.

1. Respect the speaker, even when you do not agree with or respect the point the speaker is making.
2. Listen carefully; do not interrupt, even when you are excited to respond. [Note, however, that this doesn't apply to interrupting me - you're invited to do this to say you have a question or contrary view, and then I'll either say go ahead or get back to you shortly.]
3. When you disagree, make sure that you use arguments to criticize the idea, not the person.
4. Try not to generalize about groups (even groups with which you identify) and do not ask another person to speak as a representative of a group.
5. Keep an open mind. Enter the classroom dialogue with the expectation of learning something new. Look forward to learning about-and being challenged by-ideas, questions, and points of view that are different than your own.
6. Do not monopolize the conversation; give others a chance to contribute to the discussion.
7. Bring out ideas, perspectives, or solutions that you think are not yet represented or haven't yet been adequately discussed.
8. If you are nervous about speaking in class, remember that your perspective is valid and the class deserves to hear it.
9. If a statement is made that offends you or you think might offend others, speak up and challenge it but always show respect for the person who made it.
10. Be conscious of body language and nonverbal responses. They can be as disrespectful as words.
11. Participate to the fullest of your ability. Community growth depends on the inclusion of every individual voice.

I want our discussions to be inclusive. In particular, I do not want you to panic about making a "mistake"; all of us will make them. (Me too, I promise.) Learning from mistakes is part of the process. In any case, if you already knew all this stuff cold, why would you be taking the class? Nevertheless, I do expect you to have done the reading and be prepared for class. And that is a load.

Being called on. I like volunteer participants and often ask for them. Nevertheless, if (when) I think that the same voices are enjoying too much class time, I will broaden the pool by calling on others. You are free to decline, but I'd ask you not to do that often please. If it turns out that this policy is not working well on Zoom, we'll experiment with something else, perhaps panels. I'm not a big fan of panels, but as I said before, we may need to experiment....

The daily joke. In response to the national (unjustified) perception that Administrative Law is somehow boring, in my first year of teaching it I decided to have every class start with a joke. I've kept that tradition going ever since. I'll tell the first one, and then I will assign the joke-telling responsibilities to others in the class, on a rotating basis. Think of it as a small part of the skills

component of your legal education – knowing how to tell a joke can be a useful skill. Remember to keep it clean, though.

How to contact me. I urge you to contact me if you have questions, comments, or suggestions about the class. I cannot stress strongly enough how important it is to contact me early in the semester if you think you need help understanding something. If you are doing the reading but still feel lost or confused, don't wait until the last three weeks of class. I can help. But odds are that I can't help nearly as much at the last minute.

Probably the easiest way to contact me is to send me e-mail at froomkin@law.miami.edu, putting the word ADLAW at the start of your subject line. I am online a lot. If you don't hear back from me within 24 hours, it means my spam filter ate your email and you should resend it to my backup email account at michael.froomkin@gmail.com. You don't get as fast service on that account, so don't use it first, but the spam filter is a little more accurate. Please note also that the gmail account is in some ways less secure. I would not if I were you send anything confidential to that account; if you have something confidential and I didn't reply to you at the froomkin@law.miami.edu address, then write to the google one asking me to see your other email (if indeed it got to me at all...).

Office Hours & Shmooze Sessions. I will have online office hours; after add-drop is over I will take a class poll to find out what times work best for the largest number of you, and to the extent I am able given my other commitments, I will schedule office hours then. Office hours will consist of my having a zoom session open, to which anyone can join if they have a question. Please note that office hours will be for administrative law related matters only. I will also schedule a small number of optional online shmooze sessions, without topic restriction, to which I will invite smaller groups in turn; I hope this will help me get to know you a bit better.

The Fine Print.⁸

Professional Behavior. Outside of class, I am as happy to kick back as the next (sober) person, but I have somewhat old-fashioned ideas of how both you and I should behave during the all-too-brief period we are yoked together in the (virtual) classroom. Please be sure to mute your zoom when you are not intentionally participating orally.

⁸Alert readers will have noticed that the type face which follows is not in fact any smaller than the type which precedes it. The text is not smaller because excessively small print can be an issue for people with disabilities. This class, like most law school classes, is heavily oriented toward reading a large quantity of difficult material in a small amount of time. If you are aware that you have a learning disability, or if you just think that it takes you twice as long to learn things by reading as other people, please talk to Jessie Howell, our Director of Accessibility, for information about available opportunities, resources, and services. Her phone number is 305-284-4551, and her email address is access@law.miami.edu.

Class Assignments and Hypothetical Exercises: Whether or not each part of a class' reading is specifically discussed, you are responsible for all cases, notes and materials assigned.

Examinations and Grades. There will be an open-book 8-hour final examination at the end of the course. It will be composed substantially (and perhaps exclusively) of essay questions. This is not a 'take-it-when-you-like' exam – it will be scheduled like in-class exams, starting in the morning. *In the event of exam conflicts issues **please do not contact me as this undermines the anonymous grading system.** Contact the Dean of Students office or the Registrar for all exam conflict issues.* The exam is 'open world' in that you are free to consult the book, your notes, hornbooks, the Internet, chicken entrails, anything you like – except other people. I will make every effort to design an exam that rewards doing the reading and paying attention in class and which does not reward internet searches or reliance on hornbooks. In other words, my goal in writing the exam is that it be possible to do very well on it based only on the class and assignments, and that the questions be sufficiently idiosyncratic or unusual that they reward understanding rather than last-minute research skills. Each question will have a length limit designed in part to level the playing field between slow and fast writers. Organization counts; and when the length limits are short, so does the ability to summarize and prioritize; my theory is that in order to say something concisely you really need to understand it well.

Class participation. Normally, I give significant credit for class participation. I take notes during every class, awarding checks (helpful/competent) and stars (wow!). Note that unless you are rude or disruptive I don't give negative credit, so having a bad day is just a lost opportunity, not a disaster. I total it all up at the end of the semester and divide the class into groups. Extraordinarily good class participation will raise your final grade by one step (e.g. from a B to a B+); good class participation will raise your grade by half a step (put you over the top if you are close to the line between two grades); negative class participation will lower your grade by one step if you are close to the line between two grades (this, I am happy to say, is very rare); outrageously bad class participation (i.e. disruptive or offensive behavior) will lower your grade one full level (has only happened once in 25 years). Poor attendance may contribute to a diagnosis of poor class participation. For your information, I have now given a half-step decrease five times in my over 25-year law-teaching career. In four cases the student missed *a lot* of classes. In the other the student was repeatedly rude to peers, even after being warned privately.

Exactly how all this will work for a Zoomed course is an interesting question. I reserve the right to change the policy—with notice—no later than midterm.

Mechanics of Grading. Consistent with the law school's rules, I grade all exams in a manner designed to disguise the author's identity — I see only the anonymous grading number, not your name. After I turn in the exam grades to the Registrar's office, the Registrar's office produces a list of names and anonymous grading numbers so I can factor in class participation. However, I ask my assistant not to show me this list, and instead I am given a list of grading numbers sorted by the class participation grades I have already given to my assistant. I then compute the final grade. I make it a point to not know the names that go with an exam until after

the final grade has been turned into the Registrar's office. Once grades are turned into the Registrar's office, the law school's rules prohibit me from changing a grade for ANY reason other than clerical error. These are rare.

VI. Frequently Asked Questions

A. How do I "brief" a case for this class?

This is the most commonly asked question at the start of the semester. Sadly, there is no perfect answer that works for everyone. You have to do what works for you, which may be very different from what works for me, or for the person sitting next to you. The same technique may not work in every course. Experiment. Some people find it useful to head the case brief with "question presented". I do not object to this, but I do not advocate it for several reasons. First, it suggests that there is only one question when there are usually several. Second, it suggests that the court limited itself to questions raised by the litigants which is not always the case. Third, I find it confusing when there are fractured opinions in which the Justices do not all discuss the same issues. Fourth, even in the best of circumstances there is no way to figure out what the question presented really is until you have fully digested the case. Personally, I find it easier to put this information nearer the end, under "holding".

Whatever method you use, I would hope you know the answers to the following questions about a case if called upon (some parts of the following may not apply to a particular case):

Parties. Who are the parties? What is their relation to the case?

Procedural History. This is especially critical in a course on *Administrative Procedure*. You need to identify what the agency did. You need to categorize that action, especially if the APA applies. You need to identify the various steps in the agency's actions. Who did what, when. What did the party bringing the suit do, if anything, before the matter went to court? It's also useful to figure out what the lower courts (if any) did and why, but it's essential to know what the agency did – and not just the facts of what the agency did but the legal categories applicable (e.g. formal rulemaking? informal adjudication?).

Arguments. This too is critical. Figuring out the parties' legal and factual arguments may be more important than figuring out the court's decision. After all, the court tells you its decision; figuring out the arguments takes work. But it is important work: parties rarely make frivolous arguments on appeal, if only because appeals are expensive. If the court does not identify one side's argument as sanctionable, it's a good bet that they had a serious argument (maybe better than the one that the court adopted), and that you need to understand it. Indeed, you may be called upon in class to make it. And only by knowing what argument the court rejected can you possibly understand (1) what the court decided; (2) why (whether) this is an important case; (3) whether the court got it "right".

The holding. What did the court actually decide? Did it address all of the parties' arguments? If not, why not? If the opinion is from a multi-member court, and is not unanimous, be certain you understand where and why the opinions differ. In reading fractured Supreme Court opinions it is particularly important to be absolutely certain you know how many Justices agree with each significant point in an opinion, even if you have to annotate the case paragraph-by-paragraph to be certain. Remember, it takes five Justices to make up a majority; anything less is not binding on the lower courts.

Loose ends. What's not decided by the opinion (explicitly or implicitly)? What's the next case of this kind going to be about?

How to Apply It? Administrative Law requires that you read cases through many lenses simultaneously. This is in some sense true of all law classes, where you need to be able to think like a judge, and like a litigant, and like a practitioner who might advise clients. But administrative law also requires that you be able to see things from an additional perspective: that of the agency's lawyers.

Do not expect to be able to capture all this in a single paragraph or on your first try. Ordinarily it is just not possible. More may be better than less; you can worry about summarizing it when you do your review at the end of the semester and have a clearer idea of what is important.

B. Is the class graded on a curve?

No. In theory everyone could earn an A. It hasn't ever happened yet, but I keep hoping.

C. How do I access the class blog?

The class blog is located at <https://adlaw20.uml.edu>. All the assignments and many other good things too will be found there. In order to protect your privacy from google searches and the like, access to the blog is protected by a password. To get access to it use the following user/password combo:

User: adlawyer

Pass: 2020

D. Where is the Zoom login information?

On the class blog. See "C" above for access information.