
SYLLABUS

U.S. Administrative Law and Cross-Atlantic Comparative Approaches to Administrative Governance

Lecturer: Professor M. Akram Faizer

Institution: Lincoln Memorial University Duncan School of Law

Duration of the course: 10 hours

Start and end of the lectures: March 4-8, 2024 from 16H to 18H

Place: ULisboa Faculty of Law

Assessment: 40% of the course grade will be based upon preparation and in-class participation, and 60% of the course grade will be based upon your memo which will lay out your recommendations as to how the United States might improve governmental capacity by adopting aspects of European administrative law and vice versa.

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PURPOSE OF THE COURSE UNIT:

The course is designed to introduce European law students to the American administrative state with goal of explaining how it developed in a way that is distinct from western European countries and why this explains why the U.S., unlike western European countries, struggles with the legitimacy of administrative action as a means of protecting the rule of law, furthering human development and balancing the obvious need for abundant sources of energy with the goal of protecting the environment and mitigating climate change. It begins by introducing students to the fundamentals of the U.S. constitution and its system of government. It then explains how unlike in western Europe where the administrative state preceded democratization, the converse happened in the U.S., which leads Americans to see the any extended discretion afforded to the administrative state to be in tension with the country's democratic and republican ideals. The course will then move onto an analysis of how the U.S. administrative state developed and how its legitimacy was at its apogee during President Franklin Roosevelt's New Deal and resulted in the enactment of the Administrative Procedure Act (APA), which purported to reconcile Madisonian checks and balances with the need for larger government. The course then moves onto how the APA failed to anticipate the problem of divided government, i.e. when different political parties control Congress and the White House. The federal court's initial response to this was to side with the White House and allow agencies to delay rulemakings and defer to agency interpretations of Congressional law in a process known as Chevron Deference, based on the U.S. Supreme Court decision of *Chevron v. Natural Resources Defense Council* (1984). Although initially controversial amongst liberals, Chevron came under attack from conservatives who argued that the discretion it afforded agencies furthered a liberal bias amongst agency officials that can overwhelm even conservative-minded Presidential administrations. As a result, they have replaced Chevron with what is known as the major questions doctrine, which requires the reviewing court to grant no discretion to agency rulemakings that are of major economic and political significance. This problematically could deprive agencies of needed discretion to progressively apply otherwise stale laws to address human development and environmental concerns. The examples of COVID-19 and climate change will be discussed.

On top of this, the White House increasingly involves itself in the agency rulemaking and adjudicatory process to fulfill its political goals. This often is done to undermine both

Congressionally enacted laws and rule of law by depriving agencies of professional discretion to enforce Congressional enactments.

This course will then survey how western European administrative states have avoided these tensions, which may explain why most European nation states have achieved far superior outcomes in terms of education, human development and environmental protection and conservation as compared to the U.S., notwithstanding the fact the U.S. has a significantly higher GDP per capita than most European states. It recommends that U.S. policymakers and academicians adopt a comparative framework to address problems with its administrative state. It also, however, recognizes that problems with respect to democratic retrogression and illiberal hostility to the rule of law is also found in European mature democracies and posits that a comparative approach to administrative law will help lawyers on both sides of the Atlantic ocean advance the rule of law in their home countries.

MAIN TOPICS TO BE DISCUSSED:

Class One – Monday, March 4, 2024 16:00-18:00

- **The U.S. Constitution – A Detailed Review with comparison with European States**
- **The Development of the U.S. Administrative State**
 - Early American administrative enforcement via lawsuit.
 - Growth of administrative state enforcement during the late 19th century, e.g. Sherman Antitrust Act and enforcement by federal lawsuit.
 - Growth of the administrative state during the Progressive and New Deal Eras and creation of Independent Regulatory Commissions as well as agency adjudications.

Class Two – Tuesday, March 5, 2024 at 16:00-18:00

- **Case Study of the Google Antitrust Suit and The Administrative Procedure Act and Agency Rulemaking**
 - The APA and the introduction of agency rulemaking.
 - Adjudication under the APA.
 - Deferential Judicial Review.

Class Three – Wednesday, March 6, 2024 at 16:00-18:00

- **The Development of Divided Government and Chevron Deference**
 - Chevron Deference and the controversy surrounding agency deference.
 - Major Questions Doctrine as Chevron's Replacement
 - Application of Major Questions to the issues of COVID-19 and environmental protection.

Class Four – Friday, March 7, 2024 at 16:00- 18.00

- **The European and Canadian Approaches to Administrative Agencies and Agency Discretion**
 - France
 - Germany
 - Italy
 - Canada
 - Class discussion on how the U.S. and other mature countries can learn from each other to update their administrative states to protect against authoritarianism and democratic retrogression.

Class Five – Thursday, March 8, 2024 at 16:00- 18.00

- **Case Study: Energy Law and the Administrative State**
 - Introduction to issues related to U.S. energy law.
 - U.S. Agencies involved in energy resources.
 - Massachusetts v. EPA
 - West Virginia v. EPA

LITERATURE:

CLASS ONE:

The U.S. Constitution with focus on executive branch (Handout)

The United States of America v. Google, LLC Complaint

The Administrative Procedure Act (Handout)

CLASS TWO:

Key Cases:

Telecommunications Research & Action Center v. FCC (1984) (Handout)

Massachusetts v. EPA (Handout)

Chevron v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) (Handout)

King v. Burwell, 576 U.S. 473 (2015) (Handout)

NFIB v. Department of Labor (Handout)

Alabama Association of Realtors v. HHS (Handout)

Biden v. Nebraska (Handout)

West Virginia v. EPA (Handout)

CLASS THREE:

M. A. Faizer and Steward Harris, Administrative Law Symposium Debate Article on the Legality of Agency Rulemakings, Adjudications and Judicial Deference, 8.2 Belmont L. Rev. 427 (Spring 2021).

M. A. Faizer, What Everyone Should Know About Administrative Law – University of Alabama School of Law Journal of the Legal Profession, 47.2 Journal of the Legal Profession 183 (2023).

Kathryn A. Watts, Controlling Presidential Discretion, 114 Mich. L. Rev. 683 (2016).

CLASS FOUR:

The European and Canadian Approaches to Administrative Agencies and Agency

Discretion

Susan Rose Ackerman and Thomas Perroud, Policymaking and Public Law in France, 19 Colum. J. Eur. L. 225 (2013).

Kent Barnett and Lindsey Vinson, Chevron Abroad, 96 Notre Dame L. Rev. 621 (2020).

James W. Garner, French Administrative Law, 33 Yale L. J. 597 (1924)

Susan Rose-Ackerman, Executive Rulemaking and Democratic Legitimacy: 'Reform' in the United States and the United Kingdom's Route to Brexit," Chicago-Kent Law Review 94(2): 267-313 (2019).

Susan Rose-Ackerman and Eduardo Jordao, Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, Administrative Law Review 66(1):1-72 (March 2014).

Maciej Bernatt, Transatlantic Perspective on Judicial Deference in Administrative Law, 22 Colum. J. Eur. Law, 275 (2016).

Class Five:

The Example of Energy and Environmental Law:

Classroom breakout sessions.

ESSAY/EXAM REQUIREMENTS:

You have been appointed to a joint European Union-United States task force on addressing rule of law problems on both sides of the Atlantic. Please draft a memorandum that does both of the following:

1. Analyzes the principles that we have studied;
2. Provides at least one recommendation for U.S. administrative law to adopt from the European framework that would be consistent with the U.S. Constitution and at least one recommendation for . For each recommendation, please include:
3. An analysis of why you are making these recommendations;
4. An explanation of relevant concerns about the implementation of these recommendations.

EVALUATION CRITERIA:

In this course, we will study the interesting and important topic of administrative law in the U.S with a goal of having students compare and contrast the issues confronting the U.S administrative state, with those found in western Europe. Upon successful completion of this course, students should:

- (1) Be aware of the constitutional and legislative bases for the American administrative state.
- (2) Be familiar with the current controversies surrounding the American administrative state; and

- (3) Be familiar with approaches to administrative governance in western European nation states and the European Union, such that a comparison can be made between different approaches to the rule of law on both sides of the Atlantic; and
- (4) Arrive at a general comparative understanding of administrative law and develop ideas as to how the U.S. system could be improved by incorporating elements of western European administrative law and vice versa.