

**The George Washington University
Trachtenberg School of Public Policy and Public Administration**

PPPA 6075: Law and the Public Administrator

Fall 2023, Thursdays 6:10 — 8:00 PM
Rome B103

Professor:

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Summary:

Regulation is the primary mechanism by which the federal government sets policy, and administrative law governs how the agencies that write and enforce regulations operate. In this course, students will learn about the rise of the regulatory state and where federal agencies fit with the constitutional system of government. They will learn the principles of administrative law that undergird the process of agency rulemaking and enforcement and dictate how the three constitutional branches of government influence and control agencies' work.

Readings:

Lisa Schultz Bressman, Edward L. Rubin, & Kevin M. Stack, *The Regulatory State* (3d ed. 2019)

Susan E. Dudley & Jerry Brito, *Regulation: A Primer* (The George Washington University & Mercatus Center 2012)

Other assigned readings will be made available on Blackboard or the Internet.

Students will also read, in their selected areas of interest, materials issued by the Administrative Conference of the United States.

Learning Objectives

- **Understand** the legal, economic, social, environmental, and other public policy justifications for regulatory intervention
- **Analyze** the constitutional framework within which regulatory agencies operate
- **Explore** the mechanisms by which regulatory agencies go about setting and implementing policy, including rulemaking, adjudication, and enforcement
- **Examine** the ways in which the legislative, executive, and judicial branches both control and are affected by the actions of regulatory agencies
- **Influence public policy** by learning the mechanisms by which advocates and stakeholders can sway the regulatory process
- **Contribute** to the public debate by filing a comment in connection with an ongoing project of the Administrative Conference of the United States

Course Format:

- **Practical lectures** on regulatory theory, the constitutional underpinnings of the regulatory state, the regulatory policymaking and enforcement processes, and oversight of the regulatory state
- **Guest lectures** from practitioners involved in setting and enforcing regulatory policy and in advocating before regulatory agencies
- **Drafting** of a comment on an ongoing project of the Administrative Conference of the United States

Grading:

Class Participation	10%
Mid-Term Exam	30%
ACUS Comment	20%
Final Exam	40%

Attendance Policy:

It is important that you attend all classes, arrive on time, and read the assigned material before class so that you can contribute your insights to class discussion and learn from the insights of other students. If you must miss a class, please send me an email in advance letting me know you'll be absent. A small component of your grade will be governed by your class participation. In assigning this grade, I will focus much more on the quality of your contributions to the discussion than on the frequency with which you offer comments. Students should also be respectful of colleagues and strive to maintain a respectful and collegial environment.

Course Effort:

Across the 15-week semester, students should expect to devote 7.5 hours per week to this class. This total includes a two-hour class session each week, as well as an average of 5.5 hours of out-of-class time spent on assigned readings, class preparation, and assignments. Some weeks will involve less reading than others. In addition, the larger assignments will occur towards the end of the semester, so getting ahead earlier in the semester will help you manage your time towards the end.

Class Schedule & Assignments

<p>Why Regulation? The Rise of the Regulatory State</p> <ul style="list-style-type: none"> • Excerpts from Susan Dudley & Jerry Brito, Regulation: A Primer (2d ed.) (pp. 11-20) • Excerpts from OMB Circular A-4 (Parts B & C) • Reeve T. Bull, Uber and the Future of Regulation 	<p>Thursday, August 24</p>
<p>Alternatives to Regulation</p> <ul style="list-style-type: none"> • <i>Tort Law</i> <ul style="list-style-type: none"> ○ Bressman et al. Chapter 1.A (pp. 3-27) 	<p>Thursday, August 31</p>

<ul style="list-style-type: none"> ○ U.S. v. Carroll Towing Co. (you can skim the first ¾ of the case, till you get to the paragraph that begins “It appears from the foregoing review . . .”) • <i>Contract Law</i> <ul style="list-style-type: none"> ○ Bressman et al. Chapter 1.B (pp. 27-30) 	
<p>Who Should Regulate?</p> <ul style="list-style-type: none"> • U.S. Constitution Articles I (Sections 7-10), II, and III • Bressman et al. Chapter 2.E (pp. 122-30) • Section II of Justice Gorsuch’s dissent in Gundy v. United States • Comparative Analysis: The EU System 	Thursday, September 7
<p>The Regulatory Process: Part I (Delegation)</p> <ul style="list-style-type: none"> • Bressman et al. Chapter 2.C (A Statute: The 1996 Motor Vehicle Safety Act: pp. 76-106) [Note to Students: You can skim the statutory text at pp. 82-98: the goal is not to understand the substance of the underlying statute but rather to get a sense of what statutory text involves.] 	Thursday, September 14
<p>The Regulatory Process: Part II (Rulemaking Procedure)</p> <ul style="list-style-type: none"> • Guest Lecture by Carol Ann Siciliano • Administrative Procedure Act (APA) (5 USC §§ 553, 556, 557) • “Making the [Regulatory] Sausage”: Bressman et al. Chapter 5.A-B (The Notice-and-Comment Rulemaking Process; An Example of Notice and Comment Rulemaking: NHTSA Standard 208 (end at notes and questions at end of 1st, shorter CFR excerpt): pp. 436-49) • ACUS Recommendation 2018-7, Public Engagement in Rulemaking • ACUS Recommendation 2021-3, Early Input on Regulatory Alternatives 	Thursday, September 21
<p>The Regulatory Process: Part III (Rulemaking Substance)</p> <ul style="list-style-type: none"> • Guest Lecture by Jim Tozzi • <i>The Role of Science</i> <ul style="list-style-type: none"> ○ Bressman et al. Chapter 5.D.2 (Scientific Analysis (2 pg intro only), The Use of Science (McGarity excerpt only), Assessing Risk (3 pg intro only), The Misuse and Abuse of Science: pp. 497-98, 504-05, 508-11, 516-22) ○ ACUS Recommendation 2013-3, Science in the Administrative Process • <i>The Role of Economics</i> <ul style="list-style-type: none"> ○ Bressman et al. Chapter 5.D.3 (pp. 525-26, 544-46, 550-52, 557-64) ○ Executive Order 12,866 • <i>The Role of Democratic Input</i> <ul style="list-style-type: none"> ○ Reeve T. Bull, Reimagining the Public’s Role in Agency Rulemaking ○ Executive Order 13,985, Section 8 	Thursday, September 28
<p>Regulatory “Dark Matter”: Guidance Documents</p> <ul style="list-style-type: none"> • Bressman et al. Chapter 5.E.2 (Guidance: pp. 618-26) 	Thursday, October 5

<ul style="list-style-type: none"> • ACUS Recommendation 2017-5, Agency Guidance Through Policy Statements • ACUS Recommendation 2019-3, Public Availability of Agency Guidance Documents • Executive Order 13,891, Promoting the Rule of Law Through Improved Agency Guidance Documents 	
<p>Mid-Term Exam</p>	<p>Thursday, October 19</p>
<p>Agency Adjudication and Enforcement</p> <ul style="list-style-type: none"> • Bressman et al. Chapter 5.E.1 (Other Policymaking Formats: Adjudication & Formal Adjudication (intros only); Informal Adjudication (intro only): 576-79, 590-91) • ACUS Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act • <i>Heckler v. Chaney</i> (available here—read only majority opinion) 	<p>Thursday, October 26</p>
<p>Oversight of Agency Action</p> <ul style="list-style-type: none"> • Susan E. Dudley, <i>Milestones in the Evolution of the Administrative State</i> (available here) <p>Congressional Oversight</p> <ul style="list-style-type: none"> • Review U.S. Constitution, Article I • <i>Substantive Lawmaking</i> <ul style="list-style-type: none"> ◦ Bressman et al. Chapter 6.B.1 (Congressional Control of Agency Action (2 pg intro only): pp. 717-19) • <i>Appropriations</i> <ul style="list-style-type: none"> ◦ Bressman et al. Chapter 6.B.2 (Appropriations Legislation: pp. 720-23) • <i>Testimony</i> <ul style="list-style-type: none"> ◦ Bressman et al. Chapters 6.B.3 (Oversight Hearings: pp. 723-27), 6.B.4 (Fire Alarms: pp. 727-28) • <i>Remedial Legislation</i> <ul style="list-style-type: none"> ◦ Try 1: Legislative Veto—Bressman et al. Chapter 6.B.5 (Legislative Vetoes: pp. 728-43) ◦ Try 2: Congressional Review Act—Bressman et al. Chapter 6.B.6 (Congressional Review Act: pp. 745-50) 	<p>Thursday, November 2 & 9</p>
<p>Presidential Control</p> <ul style="list-style-type: none"> • Review U.S. Constitution, Article II • <i>Appointment and Removal Power</i> <ul style="list-style-type: none"> ◦ Bressman et al. Chapter 6.A.1 (Presidential Control of Agency Action (through <i>Humphrey’s Executor</i>): pp. 645-56) • <i>Oversight of Career Staff</i> <ul style="list-style-type: none"> ◦ Bressman et al. Chapter 6.A.2 (Control of Agency Personnel: pp. 679-81) ◦ Reeve T. Bull, Combatting External and Internal Regulatory Capture • <i>Appropriations</i> 	<p>Thursday, November 16</p>

<ul style="list-style-type: none"> ○ Bressman et al. Chapter 6.A.3 (Control of Appropriations: pp. 681-85) ● <i>Substantive Control</i> <ul style="list-style-type: none"> ○ Bressman et al. Chapter 6.A.4 (Regulatory Planning and Review (2 pg intro only), Return and Prompt Letters (2 pg intro only), The Debate About Regulatory Planning and Review: pp. 685-86, 701-02, 710-12) ○ Review Executive Order 12,866 ○ Skim full document of OMB Circular A-4 (no need to read word-for-word; just browse through headings of document) 	
<p>ACUS Comment Due</p> <ul style="list-style-type: none"> ● Students will select an ongoing ACUS project and write a comment of no more than 1000 words 	<p>Thursday, November 16</p>
<p>Judicial Review</p> <ul style="list-style-type: none"> ● Review U.S. Constitution, Article III ● APA (5 U.S.C. §§ 704, 706) ● <i>Review of Agency Statutory Interpretation</i> <ul style="list-style-type: none"> ○ Bressman 6.C.1 (Judicial Control of Agency Action: 2 pg. intro + <i>Chevron</i> + <i>Mead</i>: pp. 762-63, 767-77 (<i>Chevron</i>), 805-15 (<i>Mead</i>)) ○ <i>West Virginia v. EPA</i> (excerpts to be circulated) ● <i>Review of Agency Policymaking</i> <ul style="list-style-type: none"> ○ Bressman 6.C.4.a (Judicial Control of Agency Statutory Interpretation (2 pg intro) + <i>State Farm</i>: pp. 845-46, 403-15 (<i>State Farm</i>)) ○ Reeve T. Bull, Chapter on <i>State Farm</i> (to be posted on Blackboard) ● <i>Review of Agency Enforcement</i> <ul style="list-style-type: none"> ○ Lecture on <i>Heckler v. Chaney</i> (no associated reading) 	<p>Thursday, November 30 & December 7</p>
<p>Final Exam</p>	<p>Week of December 13- 19 [Date TBD]</p>

APPENDIX: UNIVERSITY & TRACHTENBERG SCHOOL CLASS POLICIES

1. Incompletes: A student must consult with the instructor to obtain a grade of I (incomplete) no later than the last day of classes in a semester. At that time, the student and instructor will both sign the CCAS contract for incompletes and submit a copy to the School Director. Please consult the TSPPPA Student Handbook or visit http://www.gwu.edu/~ccas/faculty/files/Incomplete_poli0.pdf for the complete CCAS policy on incompletes.

2. Submission of Written Work Products Outside of the Classroom: It is the responsibility of the student to ensure that an instructor receives each written assignment. Students can submit written work electronically only with the express permission of the instructor.

3. Submission of Written Work Products after Due Date: Policy on Late Work: All work must be

turned in by the assigned due date in order to receive full credit for that assignment, unless an exception is expressly made by the instructor.

4. Academic Honesty: All examinations, papers, and other graded work products and assignments are to be completed in conformance with the George Washington University Code of Academic Integrity. (see <http://www.studentconduct.gwu.edu/code-academic-integrity>)

Academic dishonesty is defined as cheating of any kind, including misrepresenting one's own work, taking credit for the work of others without crediting them and without appropriate authorization, and the fabrication of information. Note especially the definition of plagiarism: "intentionally representing the words, ideas, or sequence of ideas of another as one's own in any academic exercise; failure to attribute any of the following: quotations, paraphrases, or borrowed information."

5. Changing Grades After Completion of Course: No changes can be made in grades after the conclusion of the semester, other than in cases of clerical error.

6. The Syllabus: This syllabus is a guide to the course for the student. Sound educational practice requires flexibility and the instructor may therefore, at her/his discretion, revise content and requirements during the semester.

7. Safety and Security: In the case of an emergency, if at all possible, the class should shelter in place. If the building that the class is in is affected, follow the evacuation procedures for the building. After evacuation, seek shelter at a predetermined rendezvous location.

8. University policy on observance of religious holidays: In accordance with University policy, students should notify faculty during the first week of the semester of their intention to be absent from class on their day(s) of religious observance. For details and policy, see: students.gwu.edu/accommodations-religious-holidays.

9. Accommodation for Students with Disabilities: Any student who may need an accommodation based on the potential impact of a disability should contact the Disability Support Services office at 202-994-8250 in the Rome Hall, Suite 102, to establish eligibility and to coordinate reasonable accommodations. For additional information see: <http://www.disabilitysupport.gwu.edu/>.

10. University Mental Health Services Center: The University's Mental Health Services (202-994-5300) offers 24/7 assistance and referral to address students' personal, social, career, and study skills problems. Services for students include: crisis and emergency mental health consultations, confidential assessment, counseling services (individual and small group), and referrals. For additional information see: <http://www.counselingcenter.gwu.edu/>.