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**EXAMINATION**  
**ADMINISTRATIVE LAW – LAW 400**  
**Section 12 – Siegel**  
**Fall, 2009**

**INSTRUCTIONS**

1. This is an open book examination. You may use any written materials that you have brought with you (including handwritten, typewritten, printed, or published materials). Computer use is permitted.
2. You have THREE HOURS to complete the exam.
3. The exam consists of this instruction page plus 13 exam pages numbered 1 through 13.
4. There are three essay questions and 15 multiple choice questions. All students must answer all questions. Recommended time allocations are:

Essay Question 1:               60 minutes  
Essay Question 2:               30 minutes  
Essay Question 3:               30 minutes  
Multiple Choice Questions: 60 minutes total

The weights of the questions are proportional to the time allocations.

5. Do not put your name anywhere on your answers. Do not indicate whether you are taking the class pass/fail. Do not write “Thank you for a great class” or anything similar on your exam.
6. If you are writing your answers by hand, remember to *write legibly*.
7. If, with regard to any essay question, you think additional facts are needed to answer the question, state clearly what facts you think are missing. Then make a reasonable assumption about the missing facts and answer the question based on your assumption. Do not change the given facts.
8. Using good judgment, address all the issues presented and assigned by the essay questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.
9. Good luck.

**ESSAY QUESTION ONE**  
(60 minutes)

In 2011, President Obama desires to increase U.S. forces in Afghanistan by 100,000 troops. To assist the President, Congress passes the “Conscription Authorization Act of 2011” (the “CAA” or “Act”), which authorizes the President to institute a draft (i.e., mandatory service in the armed forces). The Act states:

**§ 101. The President of the United States is authorized, but not required, to institute a draft. The President may institute a draft if, in his judgment, a draft is necessary.**

The Act specifies who would be subject to the draft if the President decides to implement one—males 18 to 26 years old, with various exceptions. Among other things, the Act states:

**§ 406. Where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces, the sole surviving son of such family shall not be inducted for service.**

The Act also provides:

**§ 703. The Secretary of Defense (the “Secretary”) may promulgate rules and regulations for the enforcement of this Act. In promulgating any such rules or regulations, the Secretary shall provide interested parties with an appropriate opportunity for a hearing.**

In June 2011, following passage of the CAA, the Secretary publishes a notice of proposed rulemaking in the Federal Register, in which he proposes to resolve various issues relating to the Act. Among other things, the Secretary proposes to adopt a rule which would state that, in order to qualify for exemption from service as a “sole surviving son” under § 406 of the Act, a man must have at least one living parent (in addition, of course, to having a father or sibling who died while serving in the Armed Forces and to being the sole surviving male among his siblings).

The Secretary’s notice states that, in the Secretary’s view, a man without living parents cannot be “the sole surviving son of [a] family” because the relevant “family” no longer exists. The Secretary also observes that, when the CAA came before the House of Representatives for a vote, the Report of the House Armed Services Committee justified § 406 by stating that “a mother who has seen her husband or one of her children die in the armed forces should not have to see her last son killed also.”

The Secretary invites all interested persons to submit written comments within 60 days. During this comment period, the organization Mothers Against the War in Afghanistan (“MAWA”) submits a comment opposing the proposed rule. MAWA argues that § 406 should apply without regard to whether a man has a living parent. MAWA correctly observes that the text of § 406 is identical to the text of the “sole surviving son” draft exemption that was at issue in *McKart v. United*

*States*, 395 U.S. 185 (1969).

You will recall the *McKart* case from our studies (see p. 151 in your Supplementary Materials). (The first page of *McKart* is reprinted at the end of this exam in case you do not have your Supplementary Materials with you.) In *McKart*, the Supreme Court interpreted the draft statutes that existed in the 1960s but which were repealed in 1973. The then-existing draft agency had determined that a man must have a living parent to be a “sole surviving son,” but the Court held that the then-existing draft statute exempted sole surviving sons without regard to whether they had a living parent. In portions of the case not reproduced in your materials, the Court explained its conclusion based in part on the legislative history of the 1960s-era statute, which, the Court said, showed that the statute served multiple purposes, including that of reflecting “the feeling that there is a limit to the sacrifice that one family must make in the service of the country.”

MAWA demands that the Secretary hold an oral evidentiary hearing on the proposed rule, at which MAWA would present evidence regarding the impact on surviving siblings of the premature death of the last remaining male sibling in a family, even after the death of both parents. The Secretary declines to hold an oral hearing.

In September 2011, the Secretary adopts a final rule that is identical to the proposed rule. The Secretary’s statement accompanying the rule acknowledges MAWA’s comment, but explains that the Secretary believes that his own analysis of § 406 is more persuasive. On the day the rule is adopted, the President announces that he has no immediate plans to exercise his power under the 2011 Act to actually implement a draft.

In October 2011, MAWA brings suit in district court seeking review of the Secretary’s rule. MAWA raises such challenges to the rule as one might expect based on the above facts. The Secretary raises such defenses as one might expect. MAWA also claims that the CAA itself is unconstitutional because it violates the nondelegation doctrine. No one raises any issues relating to gender discrimination in the CAA. The CAA says nothing about judicial review.

MAWA’s pleadings establish that all of MAWA’s members are women; none of them are in the Armed Forces; and some of them have already had their husband or one of their children killed in service in the Armed Forces and have only one remaining son.

**You are the law clerk to the district judge. Write a memorandum to the judge discussing the issues raised by the case and making a recommendation as to how to rule on each issue and on the overall case.**

(In case you missed them, be sure to read instructions 5-8 on the cover page.)

## ESSAY QUESTION TWO

(30 minutes)

Article II, § 2 of the Constitution says that the President “shall have Power to grant Reprieves and Pardons for Offences against the United States.” A pardon frees the convicted criminal (if he is still imprisoned) and wipes out the conviction for all purposes.

Sara is a former corporate executive who was convicted of embezzlement in violation of federal law and sentenced to 10 years in prison. From her prison cell, she writes the President asking for a pardon. She asserts that she merits a pardon because her conduct, although in violation of the applicable federal statute, was really only a technical violation and not so blameworthy as to deserve such a lengthy sentence, and also because of her otherwise outstanding personal character.

The President, in accordance with usual practice, refers Sara’s letter to an official at the Department of Justice known as the Pardon Attorney. The Pardon Attorney conducts an investigation into the circumstances of Sara’s crime. The investigation is conducted by having members of the Pardon Attorney’s staff call whomever they feel like calling and asking whatever questions they feel like asking. At no time during the investigation is Sara or any representative of Sara given an opportunity to meet with the Pardon Attorney or any member of his staff to present evidence or make arguments.

Following the investigation, the Pardon Attorney issues a report to the President recommending against a pardon for Sara. Based on the report, the President declines to issue a pardon. He writes Sara a letter advising her that her pardon request has been denied.

Sara brings a lawsuit challenging the process by which her pardon was denied. She claims she was entitled to an opportunity to appear, either in person or via a representative, before the Pardon Attorney or a member of his staff to offer evidence and arguments as to why Sara should be pardoned, and that the denial of such an opportunity to appear violated the Constitution. Sara raises only claims based on the Constitution.

The government raises *no* threshold arguments (standing, ripeness, etc.) but addresses the merits of Sara’s claims. There are no disputed facts, so both sides seek summary judgment.

**You are the law clerk to the district judge considering the case. Write a memorandum addressing the issues presented by the case and advising the judge as to how to rule on each issue and on the overall case.**

**ESSAY QUESTION THREE**  
(30 minutes)

You are the Legislative Director for Senator Gus Goodman. Another Senator introduces a bill called the “Rule Making Improvement Act of 2010,” which would delete all of the text of section 553 of the APA and replace it with the following:

**§ 553. Rule Making**

**Except as otherwise provided in its organic statute, an agency that has rule making authority may make rules using whatever procedures the agency determines to be most appropriate.**

Senator Goodman asks you to write him a memorandum that evaluates this bill. Your memorandum should explain what the likely effects of this bill would be, discuss how courts might respond to it, and evaluate whether the bill is a good or a bad idea. If you think the bill could be improved by any relevant amendments that Senator Goodman could offer to it, you should mention those, or you may recommend that he support it as is or that he just oppose the whole thing. Senator Goodman is not an expert on administrative law and could therefore benefit from a brief explanation of what the bill is all about, but the main focus of your memorandum should be your evaluation of the bill from a policy perspective.

**Write the memorandum.**

**MULTIPLE CHOICE QUESTIONS**  
(60 minutes)

**Instructions:**

- 1. For all multiple choice questions, choose the best answer from the answers provided.**
- 2. Mark your answers on the bubble sheet using a #2 pencil. Do NOT simply mark your answers on the exam itself; that will NOT count.**
- 3. There is no penalty for wrong answers, so answer every question.**

[Redacted]

**END OF EXAM**

**Appendix (for use in connection with Essay Question One)**

**McKART v. UNITED STATES**

395 U.S. 185 (1969)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was indicted for willfully and knowingly failing to report for and submit to induction into the Armed Forces of the United States. At trial, petitioner's only defense was that he should have been exempt from military service because he was the 'sole surviving son' of a family whose father had been killed in action while serving in the Armed Forces of the United States. The District Court held that he could not raise that defense because he had failed to exhaust the administrative remedies provided by the Selective Service System. Accordingly, petitioner was convicted and sentenced to three years' imprisonment. The Court of Appeals affirmed, with one judge dissenting. \* \* \* We granted certiorari. \* \* \*

I.

The facts are not in dispute. Petitioner registered with his local Selective Service board shortly after his 18th birthday and thereafter completed his classification questionnaire. On that form he indicated that he was 'the sole surviving son of a family of which one or more sons or daughters were killed in action \* \* \* while serving in the Armed Forces of the United States \* \* \*.' On February 25, 1963, petitioner's local board placed him in Class I-A, available for military service; he made no attempt to appeal that classification.

On March 23, 1964, he was ordered to report for a pre-induction physical, but failed to do so. \* \* \* The board [later] canceled his induction order and reclassified him IV-A, the appropriate classification for a registrant exempted as a sole surviving son. Petitioner remained in that classification until February 14, 1966.

Early in 1966, the local board learned of the death of petitioner's mother. After checking with the State Director, the board returned petitioner to Class I-A. The board rested this decision on the theory that a IV--A classification became improper when petitioner's 'family unit' ceased to exist on the death of his mother. Petitioner was ordered to report for a pre-induction physical. He failed to report and was declared a delinquent and ordered to report for induction. He again failed to report and, after further investigation, his criminal prosecution followed.

II.

We think it clear that petitioner was exempt from military service as a sole surviving son. \* \* \* [The Court explained its view that McKart was a "sole surviving son" within the meaning of the applicable statute even after the death of his last surviving parent.]

\* \* \* The local board erred in classifying petitioner I-A and ordering him to report for induction.

III.

The Government maintains, however, that petitioner cannot raise the invalidity of his I-A classification . . .