

EXAMINATION

ADMINISTRATIVE LAW – LAW 400

Section 12 – Siegel

Spring, 2007

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 cover page plus 14 exam pages numbered 1 through 14.
4. There are three essay questions and 21 multiple choice questions. All students must answer all questions. Recommended time allocations are:

Essay Questions: 30 minutes each

Multiple Choice Questions: 90 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
(30 minutes)

The Environmental Protection Agency (“EPA”) is headed by an Administrator who is appointed by the President by and with the advice and consent of the Senate and who serves at the pleasure of the President. In 2008, Congress passes the “EPA Improvement Act,” which provides:

§ 1. There shall be an “EPA Oversight Board” consisting of three members. One member shall be chosen by the President, one member by the Speaker of the House of Representatives, and one member by the Majority Leader of the Senate. Each member shall serve a five-year term. The President may remove any member for inefficiency, neglect of duty, or malfeasance in office.

§ 2. The EPA Oversight Board shall have the following powers and duties:

- a. When the position of Administrator of the EPA is vacant, the Board shall recommend candidates for the position to the President. Whenever appropriate, the Board shall recommend to the President that the incumbent Administrator of the EPA be removed.
- b. The Board shall comment on all rules and regulations proposed by the EPA.
- c. The Board shall monitor all activities of the EPA.
- d. The Board shall report to Congress on the activities of the EPA and make recommendations to Congress regarding any legislation concerning the EPA.

The members of the Board are appointed in accordance with the Act and the Board starts to do business. In 2009, the EPA proposes to adopt a new rule using notice and comment procedures. The Board comments on the proposed rule, and the EPA makes some changes suggested by the Board in adopting the final rule. A party regulated by the rule challenges the rule on the ground that the Board is invalid, for such reasons as one might expect on the above facts. The government raises *no* threshold issues (standing, ripeness, etc.) but defends the rule on the merits.

Part A. How should the court rule on the case? Explain. (In case you missed them, be sure to read instructions 5-8 on the cover page for instructions applicable to all your answers.)

After the foregoing events, the President sends a letter to the member of the EPA Oversight Board who was appointed by the Speaker of the House of Representatives. The letter consists of the single sentence, “By virtue of my authority as President, I remove you from your position as a member of the EPA Oversight Board.” The removed member brings a lawsuit in federal district court challenging her dismissal. She seeks a declaration that the purported removal was unlawful and an order restoring her to membership on the Board. The government raises several threshold challenges (standing, ripeness, inability to grant the requested relief, etc.), but these are denied by the district court. Each side then moves for summary judgment on the merits of the case.

Part B. How should the court rule on the merits of the case? Explain.

ESSAY QUESTION TWO
(30 minutes)

Airplane pilots must be licensed by the Federal Aviation Administration (“FAA”). The Administrator of the FAA is statutorily authorized to modify or revoke a pilot’s license if the Administrator determines that “safety in air commerce or air transportation and the public interest require that action.”

Following the terrorist attacks of September 11, 2001, the FAA (using proper notice and comment procedures) adopts new rules governing the revocation of pilots’ licenses in cases involving national security. Under the rules, the Administrator may propose to revoke the license of any pilot when the Administrator determines that the pilot poses a threat to national security. The revocation will then be considered by an Administrative Law Judge at the FAA. In the course of that proceeding, the Administrator will openly present such evidence as the Administrator can reveal without endangering national security. The Administrator may also present the ALJ with a sealed file containing evidence that cannot be revealed openly without endangering national security. The pilot, the pilot’s representatives, and the public will not get to see the evidence in the sealed file. The pilot may cross-examine witnesses presented openly by the Administrator and the pilot may also present evidence on his or her own behalf.

Pursuant to the new rules, the Administrator proposes to revoke the license of Mahmud Khan, a pilot for Delta Air Lines. The Administrator states that he has determined that Khan poses a threat to national security. In the proceeding before the ALJ, the Administrator states that there is no evidence that can be presented openly. The Administrator presents the ALJ with evidence in a sealed file pursuant to the rules. Khan and his counsel do not get to see the evidence in the sealed file. Khan objects to this, but the ALJ overrules his objection. Khan presents testimony from himself and other witnesses to the effect that he is an upstanding, patriotic U.S. citizen.

The ALJ rules in favor of the Administrator. The ALJ’s ruling states, “the evidence in the sealed file shows very strongly that Khan is a threat to national security and that, if allowed to retain his pilot’s license, he might participate in terrorist actions involving airplanes.”

Khan seeks judicial review. He raises such challenges to the proceeding as might be expected on the above facts. The Administrator raises all appropriate arguments in reply. The Administrator does *not* present any threshold defenses (standing, ripeness, unreviewability, etc.), but defends the proceeding on the merits.

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.

ESSAY QUESTION THREE
(30 minutes)

You are the chief legislative aide to Senator Gus Goodman. Another Senator introduces the “Judicial Review Improvement Act,” which reads as follows:

In determining whether an agency action is “not in accordance with law” as described in § 706 of the Administrative Procedure Act, a court shall reach an independent judgment as to the meaning of any applicable “law” and shall give no deference to the opinion of any agency.

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 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.

Write the memorandum.

MULTIPLE CHOICE QUESTIONS
(90 minutes)

[Redacted]