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Social Security Number

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Date

ADMINISTRATIVE LAW  
Professor Foley  
Final Examination-2007

PART ONE

Please answer each of the following four questions in the space provided below the question. Write or print your answer neatly. This section is worth 40 points total. Each question is worth **10** points.

1. Congress passes a statute authorizing the President to grant favorable trade status to any foreign nation based upon the President finding that the foreign nation “meets acceptable standards on human rights” or that favorable trade status is in the “best interests of the United States.” Does this statute violate the nondelegation doctrine? Please explain your answer.

2. Is due process violated when the fines assessed by an administrative law judge are used to fund a substantial portion of the agency’s budget? Please explain your answer.

3. a). How would the federal law requiring air bags in passenger vehicles be explained under the “public interest theory” and “public choice theory”? b). Is this decision of a state trooper not to issue a citation to an operator for failing to wear a seat belt subject to judicial review? Explain your answer.

4. A federal statute authorizes the Secretary of Agriculture to transfer its agricultural programs from one Department of Agriculture facility to another. After an internal study without any public input, the Secretary decides to move a very large research program about corn growing from Wisconsin to Iowa. Should the Secretary have conducted a rulemaking or adjudication? Should the Secretary be required to explain the decision in response to a complaint from Wisconsin?

## PART TWO

Please answer each of the following two questions in the bluebook using no more than three pages in the bluebook, as directed, for each question. Write or print your answer neatly. Do not write in the margins. This section is worth 60 points total. Each question in this section is worth 30 points.

1. The federal statute, the Food Drug and Cosmetic Act (“the Act”) prohibits the use of any “drug” as a food additive without specific approval by the FDA. The Act does not define “drug.” The FDA is an agency under the U.S. Department of Health and Human Services. The Commissioner of the FDA has full authority to act on behalf of the agency, including issuing policy statements, regulations, and the power to review adjudications under the Act. The FDA is granted authority under the Act to issue “such rules and regulations as necessary to carry out the provisions of the Act.” The FDA is authorized to hold hearings and issue fines, and cease and desist orders. The Act provides that the initial hearing is before an administrative law judge (ALJ) not under the supervision and control of the Commissioner of the FDA. Appeal is to the Commissioner of the FDA, who has the same power of the initial decision-maker. Those aggrieved by the Commissioner’s decision can seek judicial review in the Court of Appeals within 30 days.

Historically, the FDA interpreted the Act not to cover chemicals found naturally in any food product. It has not regulated the use of caffeine in soft drinks, since caffeine occurs naturally in coffee and chocolate. In a 1965 policy statement, the FDA Commissioner stated “[i]t is the policy of the FDA not to require approval for any food additive found naturally in a commonly consumed food product as long as the concentrations of the additive are no greater than concentrations naturally occurring in other food products.”

The topic of extra caffeine being added to soft drinks became more popular during the 1990s with the increased popularity and marketing of products such as Mountain Dew, Jolt, Mellow Yellow Red Bull, Amp, Monster and Rock Star. Some advertisements suggested that these products had “all the sugar and twice the caffeine” as regular soda. Soon students, especially law students feel in love with these products.

Concerned about the increased use, and potential addictive effects of these caffeine laced products, the FDA Commissioner issued the following policy statement in early 2007: “The FDA will now apply the Food, Drug and Cosmetic Act to require approval as additives for all drugs used as food additives, including those naturally occurring in common food products even if the concentrations of such additives are no greater than concentrations occurring naturally in other food products. The FDA then began conducting research on caffeine in soft drinks. It contracted a nationally known research institute to gather information on the topic. After the FDA statement, several prominent soft drink manufacturers removed caffeine from their products. In the meantime, the soft drink manufacturers association and caffeine additive companies are seeking legal advice on what steps can be taken at this time regarding the actions by the FDA. These groups hire you as counsel to look into their options. Early in your research you discover that just prior to the issuance of the 2007 statement, the FDA Commissioner had extensive

contacts with health care advocates and consumer groups regarding the effects of caffeine and the prevalence of caffeine addiction among children drinking caffeine induced drinks. At the same time the FDA Commissioner, citing conflict of interest, refused to meet with representatives from your client's industry.

**Part A.** Please write a one-page memo to your clients discussing the potential challenges at this stage and any issues that might be available on judicial review later.

Now assume these additional facts. The FDA brought an enforcement action against Cape Cola, a small organic soft drink manufacturer in Hyannis, Massachusetts. Cape Cod Cola's leading product contains half the caffeine as Pepsi and Coca Cola and its market share is approximately 2% nationally. Spike actually advertises that it contains less caffeine than others and shows the actual milligrams of caffeine per serving on the label of its products. Cape hires you as its attorney regarding the enforcement action by the FDA. You learn the FDA is not bringing any enforcement actions against large soft drink manufacturers. Indeed, the FDA has not sought any action against the manufacturer of Jolt, which advertises "twice the caffeine." According to an informal policy of the FDA, it usually goes after small companies first to establish a principle that can be applied later to major manufacturers, who might put up more of a defense. Also, the lobbyist for Jolt used to be general counsel at the FDA.

**Part B.** Please write a one-page memo to your client about whether you can stop this hearing from occurring or supply any grounds for reversing any adverse decision later on judicial review.

Assume the hearing went forward. Although the ALJ finds that Cape added caffeine to its products without FDA approval in violation of the Act, he refuses to order a cease and desist or a fine because Cape "is a small player and uses less caffeine than most and an order should not issue unless other large manufacturers are prosecuted." The FDA prosecutor appealed to the Commissioner. After a full evidentiary hearing the Commissioner reverses. In his decision he announces that caffeine is a drug and may not be added to food products without FDA approval. "Therefore any manufacturer or distributor of a food product in violation of this ruling thirty days after the date of this order will be assessed substantial fines for violating the Act.

**Part C.** At this point both Cape and your original clients (soft drink manufacturers association and caffeine additive companies) seek your legal advice about whether they have grounds to sue the FDA, specifically whether there are any procedural or substantive grounds for challenging the Commissioner's order and whether the Commissioner can be prevented from participating in further proceedings on the issue. Finally, if legal action isn't taken, can you obtain the information (the documents) gathered by the research institute hired by the FDA with a Freedom of Information Act request (FOIA Request). It seems the institute only gave the FDA half of the documents it uncovered in its work. Please write a one-page memo discussing these issues.

2. Two years into his second term, President Bush decided to replace eight United States attorneys, who were originally appointed by President Clinton. The United States attorneys were told to resign or be discharged. They claim that the President discharged them solely for their political views and threaten to sue. The White House has not released an official statement with reasons for the action, except that each of the United States attorneys involved did not follow White House policy as directed. Specifically, the United States attorneys involved allegedly did not vigorously prosecute cases of voter fraud and suspected terrorist activities within their districts. The members of newly elected Democrat-controlled House of Representatives and Senate “smell a rat” and they seek a more detailed explanation of the firings. The House Judiciary Committee has issued subpoenas for all the documents detailing communications between the White House and Justice Department regarding the decision to dismiss the United States attorneys. The Judiciary Committee also seeks testimony by the Attorney General and top White House officials. Emails between the White House and Justice Department concerning the subject were “accidentally” deleted. The President has offered to make the Attorney General and members of his White House staff available for interviews only and suggested he would oppose any attempt to force their testimony before the Committee.

The newspapers reported that some members of Congress have asserted that the fired United States attorneys were targeted because they supported John Kerry for President in the 2004 election and because they refused to play “favorites” when making decisions about prosecuting members of business and industry. The news reports also state that some powerful Democrats in the House and Senate have threatened to block any attempt by the Attorney General to make interim appointments to the posts. Under the present law, the President may, without the advice and consent of the Senate, appoint interim United States attorneys to fulfill the balance of the unexpired term of those United States attorneys dismissed. The Senate has already voted 94 to 2 to reverse the law and make interim appointments subject to Senate approval. In the meantime, the House of Representatives passed a bill, which is expected to get overwhelming approval by the Senate that requires the President to have good cause before firing United States attorneys and that the Senate, by a majority vote, may reject presidential removal.

Upset with the President’s choices for new United States attorneys, Congress passes a statute, over a veto, delegating the authority to appoint United States attorneys to the courts of appeal, each which would appoint United States attorneys for districts within their respective circuits.

Discuss and explain the constitutional issues raised by these facts.

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ADMINISTRATIVE LAW  
Prof. Kevin Foley  
Final Examination

PART ONE

Please answer each of the following four questions in the space provided below the question. Write or print your answer neatly. This section is worth 40 points total. Each question is worth 10 points.

1. Can Congress delegate authority to establish income tax rates to the Secretary of the Treasury? Please explain your answer.

2. Administrative law judges (“ALJs”) who hear cases and decide claims for welfare benefits are subject to annual performance reviews by the Department head, who decides merit pay raises and promotions. The Department head can also remove ALJs for good cause and malfeasance. The ALJs often confer with agency counsel when writing the decisions of cases they hear. Does any of this arrangement violate the procedural rights of a welfare recipient in a hearing to terminate his or her benefits?

3. What are the different meanings of the phrase “committed to agency discretion by law”? What evidence should a court look for to determine whether a matter is “committed to agency discretion by law.”?

4. A federal statute requires dealers in dangerous wild animals, such as lions and tigers, have perimeter fences “of sufficient strength to contain the animals in the event they escape their primary enclosures.” Historically, the agency charged with enforcement of the statute had approved perimeter fences six feet tall or higher. The agency recently issued an interpretive rule, without notice and comment, requiring perimeter fences to be at least eight feet tall. The agency then began revoking the licenses of dealers with fences shorter than eight feet. Is this a proper interpretive rule? Explain.

## PART TWO

Please answer each of the following two questions in the bluebook using no more than three pages in the bluebook, as directed, for each question. Write or print your answer neatly. This section is worth 60 points total. Each question in this section is worth 30 points.

1. The Environmental Protection Agency (EPA) is concerned about air pollution resulting from the evaporation of gasoline fumes at gas stations when motorists fuel their vehicles. Under its statute, the EPA has authority to “issue such rules as it deems reasonably necessary to protect the human environment.” The EPA has issued notice of proposed rulemaking, which states:

EPA is seeking to reduce or eliminate the evaporation of fumes at gasoline stations. Many options are being considered, including but not limited to, a recovery device on automobiles and/or a recovery device on gasoline pumps.

In response to the notice, the EPA received hundreds of comments. Many comments suggested that recovery devices on automobiles would be unsafe and expensive and those on pumps would be ineffective and expensive. Several environmental groups provided comments suggesting a reformation of gasoline that would evaporate less and thus would accomplish EPA’s goal without a recovery device. These comments also suggested that the reformation of gasoline was the least expensive option of reducing fumes.

After the comments EPA issued a new regulation requiring reformation of gasoline sold in the U.S. within six months. The EPA Director, feeling some pressure from oil executives, made a public statement that “the oil companies were making record profits and should care more about protecting the environment than their collective corporate bottom line.”

The Oil Companies were very unhappy and claimed that they did not receive adequate notice and opportunity to comment. They filed a petition for judicial review in Federal District Court and a separate action against the EPA Director for his remarks. They also lobbied Congress and the President to overturn the regulation. Congress took no action to pass any new legislation. The President, however, issued an Executive Order suspending the effect of the regulation “until such time as the EPA conducts a thorough analysis of the regulation in light of the costs the regulation will have on the oil industry.”

Environmental groups sued the EPA seeking an order that the regulation be enforced as written. They argued that the suspension of the regulation is illegal presidential interference with EPA’s rulemaking authority. The cases have now been consolidated.

Discuss all relevant legal issues raised by these facts. Include in your answer whether the EPA has been violated by the EPA and whether the President’s action raises constitutional or statutory issues.



2. USDA inspectors obtained a warrant and inspected an egg farm. The inspection reveals numerous violations of USDA and OSHA regulations, some related to the safety of the eggs and some related to the safety of the workers on the farm. The farm owner believes the information that led to the USDA inspectors obtaining warrants was gathered illegally. He believes the inspectors broke into the farm at night and then lied on the warrant applications by stating that they were tipped off by informants. Proceedings on the citations against the farm owner are in preliminary stages. The USDA concedes that if the evidence against the farmer was obtained illegally then it could not be used against the egg farmer. The owner wants to sue the individual inspectors for damages for violating his constitutional rights. What is the likely result?

What if the inspectors claim that they learned that the egg farmer was going to destroy evidence of his violations and there was no time to obtain a warrant. They justify their warrantless search because of exigent circumstances. The first federal court opinion on whether exigent circumstances could justify a warrantless search was not decided until after this search was conducted. Does this set of circumstances give the inspectors a defense?

The administrative law judge assigned to the case, against the egg farmer, rules that the evidence can be used against the egg farmer, despite the fact it was seized illegally in violation of the Fourth Amendment. May the administrative law judge be sued under the Bivens case for damages for violating the farmer's constitutional rights?