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). The use of computers to type answers is permitted.

2. You have THREE HOURS to complete the exam.

3. The exam consists of this cover page plus 5 exam pages numbered 1 through 5.

4. There are FIVE QUESTIONS. All students must answer all questions. The questions are of equal weight and should take about 35 minutes each. That leaves 5 minutes to be spent as you wish.

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 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, state your assumption, 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 questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.

9. Good luck.
The Food and Drug Administration (“FDA”) is a federal agency headed by a single Commissioner who is appointed by the President with Senate confirmation and who serves at the pleasure of the President. Anyone desiring to manufacture a new drug must first receive the FDA’s approval. In 2016, Congress passes the “FDA Improvement Act” (“the Act”), which provides:

§ 1. There shall be an “FDA Commenting Board” (“the 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 of the Board for inefficiency, neglect of duty, or malfeasance in office.

§ 2. The Board’s duties shall be as follows: Whenever a new drug application is submitted to the FDA for approval, the FDA shall publish notice of the application in the Federal Register and shall then take no action with respect to the application for 60 days. During that time, the Board shall submit comments regarding the application to the FDA. The FDA shall consider the Board’s comments when deciding whether to approve the application.

The members of the Board are appointed in accordance with the Act and the Board starts to do business. In 2017, the Pfizer Corporation submits a drug to the FDA for approval. The FDA publishes notice of the application in accordance with the Act. During the 60-day period, the Board submits negative comments on the proposed drug, and the FDA then rejects the application. Pfizer seeks judicial review of the rejection 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 Board on the merits.

**Part A. How should the court rule on the case? Explain.** (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 FDA Commenting 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 FDA Commenting 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, 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.**
QUESTION TWO
(35 minutes)

Concerned about school shootings, Congress passes the “Federal Safe Schools Act” (“FSSA” or “the Act”). The Act provides:

The Secretary of Education shall require any school that receives federal funding to have a plan to prevent school shootings. The plan must require the use of appropriate safety equipment to detect firearms at the school. The Secretary may make rules to implement this Act.

The Senate Report that accompanies the Act states:

The Secretary shall determine what constitutes “appropriate safety equipment” under the Act. Obviously, metal detectors would be appropriate, but Congress does not want to prevent the Secretary from taking advantage of technological developments that might permit detecting firearms by other equipment that is equally or even more effective. Therefore, the Act simply requires that “appropriate safety equipment” be used to detect firearms at schools.

Following passage of the Act, the Secretary of Education proposes a rule to implement the Act. Citing cost concerns, the Secretary’s proposed rule does not require schools to install metal detectors. Instead, the proposed rule provides that a school that receives federal funds may comply with its obligations under the Act by having a plan that (a) requires the school to appoint a school employee to act as the “Safety Officer,” (b) requires the Safety Officer to keep an eye out for any potential trouble and particularly for any firearms, and (c) requires the Safety Officer to be equipped with a pen and pad to note down any signs of trouble.

The Secretary publishes the proposed rule in the Federal Register and calls for comments to be submitted within 90 days. During the 90-day period, the National Association of Metal Detector Manufacturers (NAMDM) brings a lawsuit against the Secretary in federal district court. NAMDM claims that the Secretary’s proposed rule is illegal under the FSSA and that the Secretary must require schools to install metal detectors.

The Secretary moves to dismiss the lawsuit or in the alternative for summary judgment. Both sides make all arguments that would be expected on the above facts.

You are the law clerk to the district judge considering the case. Write a memorandum to the judge addressing the issues presented by the case and making a recommendation as to how to rule on each issue and on the overall case.
On November 20, 2014, President Obama announced a new policy regarding immigration law enforcement. The following is a simplified account of the policy and of underlying immigration law. For exam purposes, please ignore any outside knowledge you have regarding the new policy or immigration law and accept what is stated here.

The Immigration and Nationality Act (“the Act”), a federal statute, provides that “Any alien in the United States shall, upon the order of the Attorney General, be removed [i.e. deported] if the alien is deportable.” The Act defines deportable aliens to include all aliens who are present in the United States illegally and all aliens who have violated any condition placed on their entry.

The Act provides that “The Secretary of Homeland Security [“the Secretary”] shall be charged with the administration and enforcement of this Act.” The Act authorizes the Secretary to make rules to implement the Act. Under the Act, a removal (i.e. deportation) proceeding is initiated by the Secretary, who gives notice to the alien involved. The removal proceeding is adjudicated by the Department of Justice. The Attorney General, subject to judicial review, decides whether an alien is deportable.

The new policy announced on November 20, although announced by the President, is really a policy of the Secretary. The policy is an instruction from the Secretary to all officers of the Department of Homeland Security (“DHS”). It instructs them that in deciding when to bring removal actions, they shall give priority to removing aliens (a) who represent a threat to national security or who have been convicted of felonies, (b) who have been convicted of multiple misdemeanor offenses, or (c) who entered the United States after January 1, 2014. The policy allows a DHS officer to exercise judgment: a DHS officer may initiate a removal proceeding against an alien who is not in one of the priority categories, or may fail to initiate a removal proceeding against an alien who is in one of the priority categories, if in the officer’s judgment the individual circumstances of the case make such action appropriate to serve federal interests. In announcing the policy, the President noted that there are approximately 11 million deportable aliens in the United States and that DHS has the resources to remove about 400,000 aliens per year. The practical impact of the policy is that an alien who is deportable but who is not in one of the priority categories is unlikely to face removal proceedings.

After President Obama announces the new policy, John Boehner, the Speaker of the U.S. House of Representatives, brings a lawsuit against the Secretary in United States District Court. The Speaker claims that the new policy is unlawful and unconstitutional. The Secretary moves to dismiss the suit. Each side makes all arguments that one would expect based on the above facts.

You are the law clerk to the district judge considering the case. Write a memorandum identifying the strongest arguments on each side, addressing the issues presented by the case, and advising the judge as to how to rule on each issue and on the overall case.
Concerned about the safety of drone aircraft, Congress passes the Drone Aircraft Regulation Act (“DARA” or “the Act”). The Act defines a “drone” as any unmanned aircraft operated by remote control. The Act provides:

§ 1. No person shall operate a drone for commercial purposes without a license from the Federal Aviation Administration (“FAA”). The FAA shall grant such a license if and only if the proposed use of the drone is safe.

§ 2. When any person applies for a license under § 1, the FAA shall decide the application on the record after opportunity for an agency hearing and shall decide the application on the basis of the evidence presented at the hearing.

§ 3. The FAA may adopt rules to implement this Act.

The FAA is headed by an Administrator. The Administrator uses notice and comment to adopt a rule to implement DARA. The rule provides that no commercial use of a drone shall be determined to be safe unless the drone operator maintains direct visual contact with the drone at all times—i.e., the drone cannot fly out of the line of sight of the drone operator. The FAA rule also provides: “A drone license application shall be initially considered by an ALJ. If the ALJ denies the application, the applicant must, within 30 days, appeal to the FAA Administrator before seeking judicial review. During the pendency of this appeal, the ALJ action shall be inoperative.”

Thereafter, Amazon.com, an Internet retail company, seeks a license to use drones to deliver packages to customers. Amazon’s proposal calls for the drones to fly many miles out of the line of sight of their operators, but it claims that the drones will be equipped with cameras, radar, artificial intelligence software, and other equipment that will allow them to operate safely.

An ALJ at the FAA denies Amazon’s license application on the basis of the FAA rule. Amazon demands a hearing in accordance with § 2 of the Act. The ALJ denies this request.

Without appealing to the FAA Administrator, Amazon seeks judicial review of the denial of its license application. Amazon claims that the FAA was required to hold a hearing under § 2 of DARA. Amazon also claims that the FAA Administrator should have recused himself from the proceeding in which the FAA rule was issued. In support of the claim, Amazon notes that the Administrator, before assuming his post, wrote a book called “Drone Aircraft: Unsafe at Any Speed.” Finally, Amazon asks the district court to consider the evidence that Amazon would have presented to the agency proving that its proposed use of drones would be safe. The FAA moves to dismiss or in the alternative for summary judgment and makes all appropriate arguments.

You are the law clerk to the district judge considering the case. Write a memorandum to the judge addressing the issues presented by the case and making a recommendation as to how to rule on each issue and on the overall case.
You are the Legislative Director for U.S. Senator Gus Goodman. Another Senator introduces a bill that proposes the “Rule Making Improvement Act.” The proposed act would repeal section 553 of the Administrative Procedure Act and replace it with the following:

§ 553. Rule Making

Any federal agency that is empowered to make rules may do so using whatever procedure the agency believes to be appropriate.

Senator Goodman asks you to write him a memorandum that evaluates this bill. Your memorandum should explain what the likely effects of the 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.

END OF EXAM