EXAMINATION
ADMINISTRATIVE LAW – LAW 6400
Section 13 – Siegel
Spring 2020

INSTRUCTIONS

1. This is an open book examination. You may consult written materials, and you may do Internet research, but you may not directly or indirectly consult, share ideas with, or discuss the exam (even in general terms) with any other person, whether or not either or both of you has submitted your answers, until after the deadline for submitting answers has passed.

2. You may download this exam from the Records Office starting at 2:00 pm Eastern Time Friday, April 24. You must upload your answer no later than 2:00 pm Eastern Time Saturday, April 25. It is strongly recommended that you upload your answer no later than 1:00 pm Eastern Time Saturday April 25 so that you will have time to address any uploading problems.

3. All exams will be graded CR (credit) or NC (no credit). To get a CR, your exam must be good enough that it would have received a grade of C- or better on the A-F letter-graded scale.

4. The exam consists of two instructions pages plus 6 exam pages numbered 1 through 6. Make sure you have all the pages.

5. There are FOUR QUESTIONS. All students must answer all questions.

6. Do not put your name anywhere on your answers. Do not write "Thank you for a great class" or anything similar on your exam.

7. You must prepare your exam answer using a word processing program that is capable of counting the words in your answer to each question. At the end of your exam, the final page must consist of a certificate in the following form:

> I certify that my answers to the exam questions have the numbers of words shown below:
>
> Question 1: [number]
> Question 2: [number]
> Question 3: [number]
> Question 4: [number]
>
> [GWid]

where each [number] is replaced by the number of words in your answer to the corresponding question, and [GWid] is replaced by your GWid, which constitutes your signature to the certificate. (Remember not to put your name on the certificate.)

8. The number of words shown in your certificate must conform to the word limits shown below. Words in excess of the word limits will be disregarded.

   Question 1: 1600 words
   Question 2: 1200 words
   Question 3: 1200 words
   Question 4: 800 words

9. 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.

10. 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.

11. Unless otherwise specified, assume all events described in the questions occurred within the United States and answer all questions on the basis of current law.

12. Good luck.

QUESTION ONE

(1/3 of exam; 1600-word limit)

The Federal Student Loan Act ("FSLA" or "Act") provides aid in the form of loans to pay for college tuition and related expenses. The Act is administered by the federal Secretary of Education. The FSLA states:[*]

> **§ 1. For the purpose of assisting students to pay for college, the Secretary of Education (hereinafter referred to as "the Secretary") shall provide loans to all persons who meet the eligibility criteria stated in § 2.**
>
> **§ 2. An applicant for a loan must be a full-time registered college student who demonstrates a financial need for federal loan assistance.**
>
> **§ 3. The Secretary may make rules for the administration of this Act. Before adopting any such rule, the Secretary shall hold an appropriate hearing.**

In 2010, during the first Obama administration, Congress amends § 1 by inserting ", except as provided by § 4," after the word "shall," and it also adds the following section to the Act:

> **§ 4. No person who has been convicted of a drug offense under federal or state law shall receive any benefits under this Act.**

Following adoption of § 4, the question arises whether § 4 applies to persons found to have committed drug offenses in juvenile justice proceedings. A juvenile is someone who has not yet reach the age of legal adulthood. In every state, a juvenile justice proceeding is civil, not criminal. When a juvenile receives an adverse result in a juvenile justice proceeding corresponding to an adult criminal prosecution, the adverse result is called an "adjudication" or "finding of delinquency" rather than a "conviction." (Note, however, that in many states, when a juvenile is suspected of a crime, a prosecutor may, under certain circumstances, choose whether to prosecute the juvenile in a regular criminal proceeding—i.e., to "try the suspect as an adult"—or to proceed in a juvenile justice proceeding.)

President Obama's Secretary of Education, using proper procedures, adopts a rule providing that a person who, as a juvenile, is found to have committed a drug offense in a state civil juvenile justice proceeding, and who is therefore the subject of an adjudication or finding of delinquency, has not been "convicted of a drug offense" within the meaning of § 4 of the FSLA. The stated basis for the rule is the Secretary's determination that juveniles should not suffer lifelong consequences for youthful errors and that it is therefore best to determine that someone who has been the subject of an "adjudication" or a "finding or delinquency" has not been"convicted" as that term is used in the

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[*] Many details of the student loan program have been changed and/or fictionalized for exam purposes. Please disregard any outside knowledge of the program that you may have and accept what is stated here.

Act.

In 2017, however, President Trump's Secretary of Education publishes a notice that she proposes to repeal the Obama administration rule and to adopt a rule stating that a person found guilty of a drug offense in a juvenile justice proceeding has been "convicted of a drug offense" within the meaning of the FSLA. The notice gives interested parties 60 days to submit comments. The Secretary notes that while the 2010 FSLA amendment that added § 4 was being debated in the U.S. Senate, the following colloquy occurred on the Senate floor (Senator Base was the main Senate sponsor and floor manager of the bill that led to the 2010 amendment):

> Senator DIM: Would the proposed § 4 of the Act apply to juveniles?
> Senator BASE: Oh, yes. This section would reach everyone convicted of a drug offense, including juveniles.

George Washington University requests that the Secretary hold an oral hearing under § 3 of the FSLA, at which GW could submit evidence regarding the wisdom of the proposed rule. The Secretary denies this request. GW submits a comment instead.

At the end of the comment period, the Secretary adopts a final rule that is identical to the proposed rule. In the statement accompanying the rule, the Secretary says, "I am persuaded by the comments that this proposed rule is *not* desirable as a policy matter. If it were within my lawful discretion to do so, I would retain the existing rule. However, the clear text of the statute, particularly as amplified by the legislative history, leaves me no choice but to change the rule so that it bars loans to all persons found to have committed drug offenses, even in juvenile justice proceedings."

Elena Martinez is a junior in high school. She desires to go to college and she anticipates having a financial need for federal loan assistance. She brings suit against the Secretary of Education in federal district court to challenge the Secretary's rule. She challenges it on such grounds as might be expected on the above facts, and the Secretary raises such defenses as might be expected. Both sides make all appropriate arguments. The FSLA says nothing about judicial review.

You are the law clerk to the federal district judge considering the case. Your judge asks you to write a memorandum addressing the issues raised by the parties and to recommend how the judge should rule on each issue and on the overall case.

Write the memorandum.

QUESTION TWO

(1/4 of exam, 1200-word limit)

A statute of the state of California authorizes the Governor of the state to name "a distinguished poet" to be the Poet Laureate for the state. The statute provides no other criteria for the position and establishes no procedure for the naming of the Poet Laureate. Customarily, the Governor acts on the recommendation of the state's Arts Council. Anyone may recommend a candidate for the position of Poet Laureate and submit a statement in writing to the Arts Council in support of the recommendation, but the Council does not hold any oral hearing on the matter. The Council conducts such investigation and gathers such information as it pleases, without telling anyone else what information it is considering, and makes its recommendation to the Governor. The position of Poet Laureate is purely honorific and comes with no salary, no powers, and no fixed term of office, but typically the Poet Laureate remains in the position for at least two years and enjoys reputational benefits from having been named to the position.

In 2021, Sylvia, a poet, recommends herself for the position of Poet Laureate of California. She requests that the Arts Council hold an oral hearing at which she can present evidence and argument as to her suitability to for the position, and she requests an opportunity to see what information the Council is considering as it makes its recommendation. The Council denies these requests and recommends Andrew, another poet, for the position. The Governor names Andrew to be Poet Laureate.

Sylvia sues the Arts Council and the Governor in the United States District Court for the Northern District of California. She asserts (1) that the defendants violated the Administrative Procedure Act by refusing to hold an oral hearing and by refusing to allow her access to any critical documents that the Council considered in making its recommendation, and (2) that the process by which the defendants named Andrew instead of her as Poet Laureate violated her rights under the Due Process Clause of the federal Constitution. Both sides make all appropriate arguments.

You are the law clerk to the district judge considering the case. Your judge asks you to write a memorandum addressing the issues raised by the parties and to recommend how the judge should rule on each issue and on the overall case.

Write the memorandum.

QUESTION THREE

(1/4 of exam, 1200-word limit)

The Consumer Financial Protection Bureau (CFPB or Bureau) is a federal government agency that enforces federal consumer financial laws. The CFPB is headed by a Director.

In 2021, Congress passes the Credit Card Regulation Act (CCRA or Act). Among other things, the Act provides that, henceforth, before any credit card issuer offers any kind of credit card, on any terms not in effect on the date the Act was enacted, it must get approval from the CFPB for the terms and conditions of the credit card. The Act directs the Bureau to approve applications for such approval from credit card issuers if the terms and conditions of the proposed credit card are "fundamentally fair and not deceptive to consumers" and to deny approval otherwise.

Among other provisions, the CCRA provides:

> **§ 207. If the CFPB initially denies a credit card issuer's application for approval of credit card terms and conditions, the credit card issuer may appeal the denial to an Administrative Law Judge (ALJ) at the CFPB. The ALJ shall conduct a hearing in accordance with §§ 556 and 557 of the APA and the ALJ shall determine the matter based on the evidence presented at the hearing.**
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> **§ 208. If, upon appeal taken pursuant to § 207, an ALJ denies a credit card issuer's application, the credit card issuer may appeal the denial to the Director. A credit card issuer must take such an appeal before seeking judicial review. During the pendency of such an appeal, the ALJ's decision shall be fully operative.**

The CCRA also provides that the Bureau may promulgate rules and regulations for the enforcement of the Act.

Using proper notice and comment procedures, the Bureau promulgates a rule that provides that any credit card that offers an interest rate that could be changed by the issuer within the first year of a consumer's use of the card even though the consumer is making at least the minimum payments owed on the card is not fundamentally fair and is deceptive to consumers.

Thereafter, the Chase bank seeks approval of a new credit card offering. The credit card would offer an initial annual interest rate of 3% for the first six months, after which the interest rate would be determined each month by a formula based on market conditions, and would typically be about 21% a year.

The CFPB denies Chase's initial application. Chase appeals to an ALJ in accordance with § 207 of the Act. Chase offers to prove that consumers are fully capable of understanding the terms and conditions of its proposed credit card and that such a credit card could benefit consumers by

allowing them to pay down their debt during the initial, six-month period. Chase also requests that the particular ALJ involved disqualify himself and that another ALJ hear the case. Chase observes that the ALJ, before becoming an ALJ, was the leading credit card expert at Consumers' Union, a public interest group that agitates for consumer rights.

The ALJ declines to recuse himself. Also, without holding any hearing or receiving any evidence, the ALJ denies Chase's application in accordance with the Agency's rule.

Without appealing to the Director, Chase seeks judicial review of the denial in district court. Chase raises such issues as might be expected on the above facts and the government raises such defenses as might be expected. Among other things, Chase requests that the District Court hold an evidentiary proceeding in which Chase may submit the evidence that Chase had desired to present to the ALJ.

You are the law clerk to the district judge considering the case. Write a memorandum in which you discuss the issues raised and make a recommendation as to how the court should rule on each issue and on the overall case.

QUESTION FOUR

(1/6 of exam; 800-word limit)

The U.S. Department of Justice (DOJ) is headed by the Attorney General, who serves at the pleasure of the President. With exceptions not relevant here, representation of the federal government in criminal cases "is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516.

In 2019, Roger Stone, a longtime friend of President Donald Trump, was prosecuted in federal court on federal criminal charges including obstruction of justice, lying to Congress, and tampering with witnesses in a federal investigation. In accordance with § 516, DOJ conducted the prosecution. The DOJ prosecutors who worked on the case were career DOJ employees.[*]

Stone was convicted in November 2019. On February 10, 2020, DOJ, in a document submitted to the court by the career prosecutors working on the case, recommended that Stone be sentenced to 7 to 9 years in federal prison. The next day, President Trump tweeted (i.e., released as a public message via the Twitter social media service): "This is a horrible and very unfair situation. . . . Cannot allow this miscarriage of justice!" Subsequently, Attorney General William Barr directed that DOJ withdraw its sentencing recommendation and submit a revised recommendation for a lesser sentence. All of the career prosecutors who had worked on the case withdrew from the case, and one resigned from DOJ altogether. President Trump subsequently tweeted, "Congratulations to Attorney General Bill Barr for taking charge of a case that was totally out of control."

The actions of the Attorney General and the President caused controversy, as some commentators asserted that it is inappropriate for the President to involve himself in any prosecutorial decisions (including sentencing recommendations) in individual criminal cases, particularly with regard to a personal friend. Other commentators, however asserted that the President may appropriately instruct the Attorney General as to how to carry out his duties. President Trump himself asserted that the President is the nation's "chief law enforcement officer" and White House officials asserted that the President has "every right" to give instructions to the Attorney General, including instructions relating to individual cases.

Write an opinion piece, suitable for publication in the New York Times, the Washington Post, or the Wall Street Journal, in which you discuss the above points from a legal and policy perspective and give your own opinion, supported by reasoned argument, as to the proper role of the President in individual criminal cases such as the Stone case.

END OF EXAM

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[*] At any federal agency, a "career" employee is one whose job is open-ended and does not depend on who wins the next Presidential election. A "political" employee is appointed by the Presidential administration and would typically leave at the end of the administration. In most agencies, the top-level employees are political while the bulk of the employees are career.