

**FINAL EXAMINATION**

**ADMINISTRATIVE LAW**

TIME: Three Hours

This is a limited “open book” examination. You may use the Schwartz Casebook, the supplement, any notes or outlines prepared by students, a photocopy of the Administrative Procedure Act and any materials handed out in class. You may not use **any** other materials.

The examination consists of three essay questions. I recommend that you allow one hour for each question, as each will received equal weight in the grading process.

The examination contains 11 pages. Be certain that you have the entire examination. You are required to hand in your copy of the examination along with your bluebook(s). Please write your exam number where indicated on this page as well as on each of your bluebooks. On each bluebook, please indicate both the number of that particular book in the series of books you write and the total number in the series.

It is essential that your writing be clear. You will not be given credit for illegible answers. Please write on only one side of each page and, if your handwriting makes it necessary, on every other line.

If you find it necessary to make any assumption as to law or fact in writing your answer, please state the assumption and explain why you are making it. If you believe additional information is necessary in order to answer a question, explain what information is necessary and how it might affect your answer.

## I.

You are the General Counsel of the Interstate Commerce Commission (ICC) and have sought relief from a typically hot Washington, D.C. summer day by loitering at the executive water fountain. This was a mistake, as you are observed by Adam Smythe, chairman of the ICC. Smythe says, "Glad to see you - let me run a few problems past you," and tells you the following:

"As you are aware, the ICC is proceeding on a number of fronts to assure safer interstate rail operations. We recently proposed a regulation which, if adopted, will require all railroads to install protective coverings over all "live" wires and "live" third rails. As you can imagine, this proposal is hotly contested by the railroads, each of which claims that the regulation would be both too costly and unnecessary. A number of consumer groups, on the other hand, claim that the proposal has loopholes and doesn't go far enough to assure safety.

"Yesterday we - the commissioners - met with the executive board of the Interstate Rail Carriers Association about an unrelated matter. Nevertheless, Gerard Oxboggle, the President of the Trans New England Railroad, griped about the proposed regulation and spent a half-hour explaining that the cost of compliance would put his railway out of business. He also handed us some documents which showed his company's exemplary safety record and the cost impact of the proposed regulation. When Oxboggle began, however, Commissioner Ralph Rader stood up and said, 'This is an outrage. You can't make this argument to us here and it's grossly unsafe to have uncovered live wires and rails.' Rader then stormed out of the room.

"After the meeting, I remembered that the ICC had an enforcement case pending against Trans New England. It seems two people were killed at a crossing due to an inoperable gate. Thinking the documents might be relevant, I sent them over to Allison Integritio, the Administrative Law Judge hearing the case.

"You wouldn't believe the calls I've gotten this morning. First, Carla Marks, the head of Safepac, a consumer group interested in safety in interstate commerce, called. She told me that the meeting was an outrage and her group would do everything in its power to prevent us from watering down the regulation or dropping the enforcement case. Then Judge Integritio called to yell at me for sending her the Trans New England documents. Then Commissioner Harriman called to say that I should disqualify Rader from participating in the decisions on the proposed regulation and on any appeal in the enforcement case. Then Commissioner Rader called to say that I

should disqualify myself and everyone on the commission except Rader from participating in those decisions.

Having told you this tale of woe, Chairman Smythe wants your legal advice. Please advise him, making certain you discuss the following:

- 1) all arguable violations of law;
- 2) all possible ways of curing those violations or minimizing their effect on the administrative process;
- 3) defenses to potential law suits filed by Safepac challenging the ICC's consideration of the proposed regulation and any appeals in the enforcement case.

Your advice should take account of the following two sections from the statute governing rail safety:

- 1) The ICC may, after hearing, establish reasonable regulations with respect to safety in all aspects of rail service;
- 2) The ICC may, after hearing, impose sanctions on railroads found to have engaged in unsafe practices if such sanctions are supported by findings based on the transcript of testimony and exhibits, together with all papers and requests filed in connection with the hearing.

## II.

A number of states are considering proposals to regulate the day care industry. Assume that Connecticut has enacted a statute which includes the following provisions:

1. There is hereby established a Board of Day Care Oversight, within the Executive Department, consisting of five (5) members.
2. The Board shall have authority to adopt standards setting reasonable, job-related qualifications for all persons engaged in the day care field.
3. The Board shall have authority to determine, with or without evidentiary hearings, whether persons engaging or wanting to engage in the day care field meet those standards.
4. Only persons determined by the Board to meet those standards may engage in the day care field.
5. No person shall have the right to engage in the day care field.

Soon after their appointment, the members of the Board began to consider the adoption of qualification standards. In full compliance with the procedural requirements of the Connecticut Administrative Procedure Act, the Board adopted the following regulation setting standards:

- A. A person shall be approved by the Board and permitted to engage in the day care field if, and only if,
  - i. The person has a Bachelor's degree in any discipline, and
  - ii. the person is of good moral character.

The Board developed the following informal practices in reviewing individual applications. Persons who had been engaged in the day care field prior to the adoption of the statute received routine approval if they had the required academic degree and had never been convicted of a crime. Persons who had not been engaged in the day care field received approval if they had the required academic degree and a background investigation turned up no evidence of serious misconduct.

You are the law clerk to a Connecticut Superior Court judge who must rule on cases brought by three persons whose applications were denied by the Board. The pertinent facts of each case are as follows:

1. Morris Katz had been engaged in the day care field for five years prior to enactment of the statute. He has a Bachelor's degree from the University of Bridgeport. Katz, however, admitted that he had been convicted of disorderly conduct several years ago. The Board convened a hearing to consider Katz's application and Katz was the only witness. The Board denied his application, stating that the criminal conviction prevented the Board from finding Katz to be of good moral character. In his lawsuit, Katz claims that he was deprived of the right to cross-examine witnesses. Katz also points out that the testimony was not transcribed, although he admits that he did not specifically request it of the Board.
2. Tanya Wilcox has never worked in the day care field. She earned a Bachelor's degree from the Fairfield School of Day Case Studies, an unaccredited college no longer in existence. The background investigation turned up no evidence of misconduct. Because the Board had never considered the status of a degree from an unaccredited college, however, it convened a hearing. An auditor from the Connecticut Department of Education testified that Fairfield was denied accreditation due to the weakness of its day care facility. Wilcox asked to cross-examine the auditor but was not permitted to do so. She also requested that the testimony be transcribed. This request, too, was denied. At the conclusion of the hearing, the Board declined to approve Wilcox's application and stated that the requirements of Regulation A.i. should be interpreted to require a degree from an accredited institution.
3. Bruce Margulies has never worked in the day care field but earned a Bachelor of Arts degree from the University of Connecticut. The State Police advised the Board, however, that Margulies "failed" the background investigation. When notified of this fact, Margulies asked the Board for an explanation of the basis of the decision but was told, "We cannot tell you the reasons." He then requested a hearing on his application but this request was also denied. The Board notified Margulies by letter that his application was denied because of his failure to satisfy the requirements of Regulation A.ii.

Katz, Wilcox and Margulies have challenged the denials on all arguably pertinent grounds. Your judge is mindful of judicial economy and wants to resolve the three cases in a single opinion. Write a draft opinion.

### III.

In 1973, Congress passed and the President signed the Emergency Petroleum Allocation Act (EPAA). That statute authorized the President or his delegate to adopt through informal procedures rules regulating the price and allocation of crude oil and refined petroleum products, such as motor gasoline. The statute was adopted in response to severe oil shortages and was intended to prevent the high prices and gasoline hoarding that could have resulted from the shortages. The statute provided that beginning in 1979, the President or his delegate could repeal or amend the rules when the objectives of the EPAA would be better served by allowing the free market to allocate and price crude oil and petroleum products. Pursuant to this statutory authority, regulations were adopted (EPAA regulations) and the President delegated his authority to the Department of Energy (DOE), but retained the power to act by Executive Order. You may safely assume that the EPAA and the EPAA regulations were lawful in all respects.

On January 28, 1981, President Reagan issued Executive Order 12287, which “exempted” crude oil and refined petroleum products from the EPAA regulations. A copy of the Executive Order is reproduced at pages 8 to 10. **You should not concern yourself with the technical exceptions addressed in parts 2 and 3 of the Executive Order.** It was published in the Federal Register on January 30, 1981. Accompanying the executive order, but never published in the Federal Register, was a press release. It is reproduced on page 11.

On February 12, 1981, without providing notice or opportunity for comment, the DOE issued a document titled “Ruling 1981-1” which purported to interpret Executive Order 12287. The ruling stated, in pertinent part, that the regulations were repealed and rendered null and void at 12:01 A.M. on January 28, 1981 as a result of the Executive Order. Thus, according to the DOE, a seller of motor gasoline could charge whatever he or she wished, notwithstanding the EPAA regulations. Ruling 1981-1 was published in the Federal Register on February 19, 1981.

On March 2, 1981, the DOE issued a Notice of Proposed Rulemaking. The notice stated that while the Executive Order constituted a valid rule repealing the EPAA regulations, a rulemaking to revoke the regulations was appropriate in view of Section 1 of the Executive Order. Interested parties were invited to submit written data, views and arguments.

On March 30, 1981, the DOE issued a Final Rule expressly revoking the EPAA

regulations. The statement accompanying the Final Rule noted that some persons submitting comments favored revoking the EPAA regulations while others opposed the proposal. The DOE stated that it was revoking the regulations because they had been without legal effect since January 28 and because the President's reasons for lifting the regulations were persuasive. The Final Rule revoking the regulations was made effective immediately because "this action eliminates restrictions on the sale of crude oil and refined petroleum products." The Final Rule and accompanying statement were published in the Federal Register on April 3, 1981.

It is April 4, 1981. You are an attorney in private practice and have been consulted by Senator Metzenbaum of Ohio, a strong advocate of regulating the oil industry. The Senator hopes to bring an action for a declaratory judgment that the EPAA regulations remain in effect.

Please advise him of the following:

1. Whether each of these actions, the Executive Order, Ruling 1981-1, and the Final Rule was procedurally valid, and why; (30 minutes)
2. Assuming that each was procedurally valid, what other arguments could be made that these actions were unlawful; (20 minutes)
3. Whether the EPAA regulations were still in effect on April 4, 1981 and if not, on what day they were effectively revoked. (10 minutes)

THE WHITE HOUSE  
Office of the Press Secretary

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EMBARGOED UNTIL: After Press Briefing, January 28, 1981

EXECUTIVE ORDER

DECONTROL OF CRUDE OIL AND REFINED  
PETROLEUM PRODUCTS

By the authority vested in me as President by the Constitution and statutes of the United States of America, including the Emergency Petroleum Allocation Act of 1973, as amended (15 U.S.C. 751 et seq.), and notwithstanding the delegations to the Secretary of Energy in Executive Order No. 11790, as amended by Executive Order No. 12038, and in order to provide for an immediate and orderly decontrol of crude oil and refined petroleum products, it is hereby ordered as follows:

Section 1. All crude oil and refined petroleum products are exempted from the price and allocation controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended. The Secretary of Energy shall promptly take such action as is necessary to revoke the price and allocation regulations made unnecessary by this Order.

Section 2. Notwithstanding Section 1 of this Order;

(a) All reporting and record-keeping requirements in effect under the Emergency Petroleum Allocation Act, as amended, shall continue in effect until eliminated or modified by the Secretary of Energy. The Secretary of Energy shall promptly review those requirements

and shall eliminate them, except for those that are necessary for emergency planning and energy information gathering purposes required by law.

(b) The State set-aside for middle distillates (Special Rule 10, 10 CFR Part 211, Subpart A, Appendix A) shall remain in effect until March 31, 1981.

(c) The special allocation of middle distillates for surface passenger mass transportation (Special Rule 9, 10 CFR Part 211, Subpart A, Appendix A) shall remain in effect until March 31, 1981.

(d) The Buy-Sell lists and orders issued prior to this Order under the Buy-Sell Program and the Emergency Buy-Sell Program (10 CFR 211.65) shall remain in effect according to their terms and the Secretary of Energy may issue such further orders as may be necessary to give effect to lists and orders issued prior to this Order.

(e) The Canadian Allocation Program (10 CFR Part 214) shall remain in effect until March 31, 1981.

Section 3. The Secretary of Energy may, pursuant to Executive Order No. 11790, as amended by Executive Order No. 12038, adopt such regulations and take such actions as he deems necessary to implement this Order, including the promulgation of entitlements notices for periods prior to this Order and the establishment of a mechanism for entitlements adjustments for periods prior to this Order.

Section 4. The Secretary of Energy is authorized to take such other actions as he deems necessary to ensure that the purposes of this Order are effectuated.

Section 5. Because advance notice of and public procedure on the decontrol provided by this Order would be likely to cause actions that could lead to economic distortions and

dislocations and would therefore be contrary to the public interest, this Order shall be effective immediately.

Ronald Reagan  
THE WHITE HOUSE

THE WHITE HOUSE

Office of the Press Secretary

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EMBARGOED FOR RELEASE UNTIL AFTER THE BRIEFING

January 28, 1981

STATEMENT BY THE PRESIDENT

I am ordering - effective immediately - the elimination of remaining Federal controls on U.S. oil production and marketing.

For more than 9 years, restrictive price controls have held U.S. oil production below its potential, artificially boosted energy consumption, aggravated our balance of payments problems and stifled technological breakthroughs. Price controls have also made us more energy-dependent on the OPEC nations - a development that has jeopardized our economic security and undermined price stability at home.

Fears that the planned phase-out of controls would not be carried out for political reasons have also hampered production. Ending these controls now will erase this uncertainty.

This step will also stimulate energy conservation. At the same time, the elimination of price controls will end the entitlements system, which has been, in reality, a subsidy for the importation of foreign oil.

This order also ends the gasoline allocation regulations which the Departments of Energy and Justice cite as important causes of the gas lines and shortages which have plagued American consumers on and off since 1974.

In order to provide for the orderly termination of petroleum controls, certain minor provisions of the current regulatory program will not end until March 31, 1981.

Ending price controls is a positive first step towards a balanced energy program - a program free of arbitrary and counterproductive constraints - one designed to promote prudent conservation and vigorous domestic production.