

MASTER

Administrative Law
Prof. Lockhart

Final Examination
Dec. 15, 1995

This examination is entirely open book. Any and all materials or reference sources may be brought into the examination. But don't get diverted into a syndrome of "thumbing through."

The assigned casebook may be essential in responding to some of the questions in this examination. If you do not have the book available, please advise the exam proctors before commencement of the exam, and you will be given time to obtain it before beginning the examination.

If you find any question on the examination to be unclear, ambiguous or incomplete in some way, simply specify the difficulty briefly and go on to answer the question based on your best understanding. Subject to a "reasonableness" standard, any identified difficulty will be fully considered in grading.

TOTAL TIME ALLOCATED = 3 AND 1/2 hours

TIME BREAKDOWN:

PART I -- ESSAY QUESTIONS

TOTAL ELAPSED TIME:

		40	
QUESTION 1	0	MINUTES	/ 40 MINUTES
		20	
QUESTION 2	=	MINUTES	1 HOUR / 00 MINUTES
QUESTION 3			
		40	
#A	=	MINUTES	1 HOUR / 40 MINUTES
#B	=	1 HOUR	2 HOURS/ 40 MINUTES

PART II -- SHORTER ANSWER QUESTIONS

	QUESTION 4	=	10 MINUTES	2 HOURS/ 50 MINUTES
MINUTES	QUESTION 5	=	10 MINUTES	3 HOURS/ 00 MINUTES
	QUESTION 6	=	10 MINUTES	3 HOURS/ 10 MINUTES
	"EXTRA" --		10 MINUTES	

PART I -- ESSAY QUESTIONS
QUESTION #1c [40 MINUTES]

The Ute Indian Tribe has applied to the Secretary of the Interior for exercise of the Secretary's authority under 25 U.S.C. §465 [PRE-EXAM HANDOUT, ITEM A] to acquire two blocks of land of approximately 100,000 acres and 30,000 acres in the State of Utah. The 100,000 acre block is located in a configuration ranging from 15-20 miles from the existing Ute Indian reservation. The 30,000 acre block runs along a river corridor which connects the larger block to the reservation. Substantial portions of these lands had formerly been held as tribal lands, but had subsequently been sold off by individual Indian owners to whom the land had been "allotted" in the 1930s under Congress' allotment policy. In addition to interspersed federal lands which the tribe proposed to acquire by "relinquishment," the lands include nearly 70,000 acres of state and private land. The Tribe requested the Secretary to acquire the state and private lands for it under §465 by utilizing available statutory authority which empowers the federal courts, at the request of the United States, to condemn land for "public uses."

The Tribe's application to acquire the above land was filed with the Secretary, accompanied by a resolution adopted by the tribal governing council which called for the acquisition "in order to restore to the Ute people lands which were sacred to our forbearers and which are essential to preserve traditional hunting practices and vision quests."

Within a month of receiving the Tribe's application, the Secretary approved the request in a brief letter advising the tribe that he found the application to be "within the purposes for which land acquisition is authorized by 25 U.S.C. §465." The Secretary's approval was conditioned upon the Tribe's agreement to a transfer of funds from a Tribal trust account held by the United States, to pay for acquisition of the condemned land. The Tribe promptly approved the transfer of funds, and the Secretary initiated administrative action to "relinquish" the requested federal lands. He simultaneously transmitted his approval letter to the U.S. Attorney for Utah with a request that an action be filed in the U.S. District Court for Utah for condemnation of the requested state and private lands "to fulfill the accompanying Tribal request approved under 25 U.S.C. §465."

You have been consulted by the State, by affected private owners, and by representatives of a mining company interested in a mining development on the affected lands. They request your advice regarding possible legal challenge to the Secretary's approval of the Tribe's request, either by intervening in the condemnation action or by initiating separate litigation. State officials claim they can show that the affected State lands are

critical to the operation of a copper mine recently approved by the Utah Division of Oil, Gas and Mining that will return substantial royalties to the state treasury. The private owners claim they can show that their lands also contain vast copper reserves, and that they had recently entered into an agreement with the mining company to extend the state-approved mining operations to their lands. All claim that upon communicating these concerns to the Secretary by letter, his only response, dated the same day as his approval letter to the Tribe, was that their claims "are entirely speculative because there has been no demonstration that your proposed developments can comply with mandatory environmental protection requirements."

In considering your clients' potential claims, your research discloses that the Department of the Interior has long had in effect the following regulations:

25 Code of Federal Regulations §151.3 - Land acquisition policy

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the acquisition is necessary to facilitate tribal selfdetermination, economic development, or Indian housing.

The QUESTION: What legal challenges might reasonably be raised on the foregoing facts? How would you expect those challenges to be resolved, and on what basis?

(For purposes of assessing potential claims, you should assume that intervention, standing and ripeness issues would be resolved in favor of your clients. You may also assume that any "taking" of property in this circumstance is valid if properly compensated, subject to the validity of the administrative action.)

[After the exam, you may be interested in checking State of South Dakota v. United States, 1995 WL 649595, 64 U.S. Law Week 2316 8th Cir. Nov. ? 1995). P.S. -- wanna bet on the outcome in the Supreme Court?]

QUESTION #2: [20 MINUTES]

An aide to Senator Glatch (D. Utah) has sought your advice in an effort to respond to "constituent" complaints about the condemnation action brought by the United States in the U.S.

District Court resulting from the Secretary of Interior's request described in Question #1. She seeks advice regarding prospects for a strategy the Senator hopes to employ which would adopt an approach suggested by the recent enactment of a provision on "Limitation On Use Of Funds For The Provision Of Certain Foreign Assistance." [ITEM #B OF PRE-EXAM HANDOUT - SEC. 632 OF 109 STAT. 468.] She explains that §632 takes the following approach:

(a) It first prohibits the use of appropriated funds for certain purposes if the funds used would exceed a specified sum; (b) It then authorizes the President to waive the specified sum limitation if he certifies that certain conditions exist; and (c) It then authorizes Congress to determine that the Presidential waiver "shall not take effect . . . if the Congress within thirty days after receiving such certification enacts a joint resolution of disapproval."

(d) Finally, it goes on to define "joint resolution" to mean "only a joint resolution of the 2 Houses of Congress" phrased to specify that "the Congress disapproves the action of the President."

Senator Glatch's aide proposes that a modified version of SEC. 632 be adopted with regard to any decision by the Secretary of the Interior under 25 U.S.C. § 465 which would involve condemnation of state or private land. Implementation of any such decision would be prohibited. The prohibition could be waived by the President upon his determination that a proposed condemnation was "essential to tribal development." But the waiver would not take effect, and any pending legal action for condemnation would be subject to dismissal on motion, if Congress within 6 months adopted a "joint resolution" like that provided for in SEC. 632.

The QUESTION: How would you advise Senator Glatch's aide with regard to the prospects for the Senator's strategy if challenged, and on what legal basis?

QUESTION #3 [Background for PART A and PART B]:

In 1989 and again in 1993 Bills were introduced in Congress proposing to prohibit the use of police radar detectors in both private automobiles and commercial vehicles otherwise licensed or regulated under federal law. Following defeat of those bills in Congress, highway safety advocacy groups and the international Association of Chiefs of Police in late 1993 petitioned the Federal Highway Administration [FHA] for commencement of rulemaking proceedings. The petitioners requested FHA to adopt a regulation that would prohibit the use of police radar detectors in all commercial trucking vehicles on state and federal highways. They contended that the FHA has authority to adopt the proposed regulations under the Motor Vehicle Carrier Safety Act of 1984, 49 U.S.C. § 31136. That Act provides that the Secretary of Transportation "shall prescribe minimum safety standards for commercial motor vehicles" which, "at a minimum, shall ensure that . . . commercial motor vehicles are maintained, equipped, loaded and operated safely." The Petitioners further contended that: (1) drivers of commercial trucks operating interstate were the most likely to use radar detectors; and (2) truck drivers with radar detectors were substantially more likely to exceed speed limits than those without detectors.

A petition seeking similar regulations had previously been denied in 1988 with a statement by the FHA to the effect that a federal ban on radar detectors would violate principles of federalism, concluding as follows:

It is our view that the enforcement of speed limit laws on the highways is a problem which is common to the States and not truly national in scope. As a common state problem, we believe that the States, acting either individually or together, can effectively deal with this matter.

In response to the new 1993 petition, however, the FHA proceeded to publish in the Federal Register a notice of proposed rulemaking [NPRM] which proposed to "amend the Federal Motor Carrier Safety regulations to prohibit the use of radar detectors in operation of commercial motor vehicles." The NPRM asserted that "authority for the proposed ban on radar detector use and possession is inherent in the broad, long-standing powers conferred on the Secretary to regulate safety of interstate motor carriers." Basic reasons recited by the NPRM as supporting the proposal quoted from the petitioners' proposal, which summarized studies claimed to show that: (1) drivers of tractor-trailer trucks were the most likely to use radar detectors; and (2) drivers of tractor-trailers with radar detectors were two to three times more likely to exceed speed limits than those without radar detectors; and (3) law enforcement authorities now have available technology capable of detecting the use of radar detectors. The NPRM also included a summary of statistical

studies sponsored by FHA which concluded that users of radar detectors have a higher propensity to speed than nonusers. Finally, the NPRM included a statement asserting the agency's belief that "enforcement of speed limit laws is better left to the states," and requested comments on whether the proposed ban should more appropriately be left to the states.

In late 1994, FHA promulgated a final rule reading as follows:

Prohibition of use or possession of radar detectors:

(a) No driver shall use a radar detector in a commercial motor vehicle, or operate a commercial motor vehicle that is equipped with or contains any radar detector.

(b) No motor carrier owner or manager shall require or permit a driver to
[NO QUESTION HERE -- GO ON TO PART A.]

[After the exam, you may be interested in checking Radio Association On Defending Airwave Rights, Inc. v. United State Department of Transportation, Federal Highway Administration,_47 F.3d 794 (6th Cir. 1995).]

PART A: [40 MINUTES]

FHA's "Statement of Basis and Purpose" submitted with the promulgated rule referred to the studies previously cited by the NPRM showing a relationship between use of radar detectors and excessive speeding. The statement predicted that the rule would result in reduction in the speed of trucks which will result in a decline in the severity of accidents. The statement acknowledged that its predictions relied significantly on the judgment and experience of its accident investigators, and provided a summary of their conclusions to the effect that:

(a) Truck drivers who use radar detectors travel at higher speeds, often in excess of posted limits, than drivers without detectors.

(b) Truck drivers who travel at excessive speeds are likely to be in more severe accidents than truck drivers who do not. (c) A ban on use of radar detectors will cause a reduction in their use by truck drivers and a related reduction in truck speeds by former users.

(d) The resulting reduction in truck speeds will result in a reduction in the severity of accidents involving commercial trucks.

A group of commercial truck drivers organized as the "Radio Association on Defending Airwave Rights, Inc." [RADAR] had participate in the rulemaking proceeding. RADAR's written

comments submitted studies conducted by the Texas Research and Development Foundation [TRDF] which concluded that the dominant causal factor in accidents involving commercial vehicles was not high speed, but variability in highway speeds. The TRDF study also concluded that a ban on radar detectors would not increase highway safety because there was no evidence showing a correlation between radar detector use and the occurrence or severity of accidents involving commercial motor vehicles.

After promulgation of the rule, RADAR obtained a copy of a Preliminary Regulatory Evaluation of the proposed ban prepared by FHA staff in connection with the aborted 1988 rulemaking proceeding. The Preliminary Evaluation summarized available data relating to the correlation between radar detector use and speeding, and between speeding and accidents. It concluded that the agency was not aware of any concrete evidence that would prove a direct link between radar detectors and the occurrence of accidents involving commercial motor vehicles. It also reported that the staff had found no evidence demonstrating that bans on radar detector use (imposed by some individual states) had resulted in any demonstrable reduction in accident rates for such vehicles.

RADAR initiated a properly filed action for review before the 6th Circuit Court of Appeals challenging the new radar detector rule. What claims are available to RADAR, what result on the merits, and why?

PART B: [1 HOUR]

Joe Schmoie, driver of a double-trailer commercial haul truck, was arrested for speeding and at his arrest was found to have been using a radar detector. Subsequently, he was cited by FHA both for violation of its new regulation and for violation of FHA's general regulation which prohibits operation of federally licensed vehicles "in an unsafe manner." Subsequently, at hearing on FHA's complaint for imposition of civil penalties and 6-month suspension of Joe's license to operate interstate commercial trucks, Joe admitted that he had been exceeding the posted speed limit and had an activated radar detector in the cab of his vehicle. Joe contended, however, that: (a) that his conduct did not involve a "safety" violation within the meaning of the Motor Vehicle Carrier Act; and (b) on the contrary, his use of the radar detector was intended to enhance safety by permitting him to travel at the speed of accompanying traffic; and (c) his use of the radar detector for the latter purpose was encouraged by the owner of American Carriage, Inc., the truck line by which he was employed.

In the same proceeding, American Carriage, Inc., was cited for imposition of civil penalties on the ground that, as Joe's

employer, it had "permitted" Joe's use of the radar detector. Joe's supervisor at American Carriage testified that he had no knowledge of Joe's use of a radar detector. But the supervisor admitted on cross examination that the company's routing schedule for its trucks could not be achieved unless its drivers either drove for nearly 20-hour stints or drove at an average speed significantly in excess of posted speed limits. In addition, American Carriage contended that the portion of the radar detector rule which provides that "no motor carrier owner or manager shall require or permit" a driver to violate the rule was not validly adopted by FHA.

The proceeding was heard by an administrative law judge pursuant to an FHA regulation which provides that "all agency actions to impose civil penalties for violations of safety regulations shall be heard on the record after opportunity for informal hearing before an administrative law judge." The ALJ rejected all defenses presented by both parties, imposed maximum civil penalties on both parties, and suspended Joe's license for 6 months.

In actions for judicial review by Joe and by American Carriage, what standard will govern the court's scope of review and why? To what extent is it likely that the governing standard of review could make a difference in either parties' case? Why or why not? What result on the merits, and why?

PART II -- SHORT-ANSWER QUESTIONS

The following short-answer questions will be weighted equally on the basis of an allocation of 10 minutes per question.

Each question can be answered with adequate specificity in no more than four (non-run-on) sentences. Please respond to the question asked, and understand that a conclusory result will be given consideration only in relation to the substance of the 4-sentence explanation.

QUESTION 4: (10 minutes]

In *Independent U.S. Tanker Owners Committee v. Dole* (CASEBOOK p. 330], Judge Bork asserted that even in informal rulemaking, the statement of basis and purpose required by 5 U.S.C. §553 --

should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve.

That position seems to contradict the Supreme Court's general holding in Vermont Yankee [CASEBOOK p. 243] that reviewing courts may only demand that an agency fulfill the statutory "minima" of procedural requirements, as well as the Court's more specific ruling in Pension Benefit Guaranty Corp. [Casebook p. 253] that the lower court had erred in requiring the agency in question to "provide a statement showing its reasoning" in applying ascertainable standards for decision. Please explain the basis, if any, on which judge Pork's positⁱon is defensible in light of these decisions.

QUESTION 5: [10 minutes]

Please summarize all legal bases on which a Court can reasonably hold, compatibly with the APA and governing case law, that a right to cross examination or similar adversary process may be available in an agency proceeding despite the fact that the proceeding is not literally an "adjudication required by statute to be determined on the record after opportunity for an agency hearing."

QUESTION 6: [10 minutes]

In Association of Data Processing Service Organizations, _Justice [then Judge] Scalia suggested that, as a measure of the adequacy with which agency factual judgments are supported, the "substantial evidence" test may not be substantively different from the "arbitrary, capricious, abuse of discretion" test. However, he suggests there may be at least one circumstance in which courts may be justified in finding an actual substantive difference in the meaning of those standards. Please explain.

QUESTION 7: [10 minutes]

In NLRB v. Curtin Matheson Scientific, Inc. [Casebook p. 532], Justice Scalia complains in dissent that the Court entirely ignored application of the "substantial evidence" test in a case where the central question was whether an employer had adequate grounds for "reasonable doubt" about a union's continuing majority support among the company's workers. Since "substantial evidence" is indisputably the standard that controls review of the factual basis for NLRB adjudications (and no statute has modified that standard) on what legal basis could the Court properly disregard the duty to apply that standard?