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ADMINISTRATIVE LAW FINAL EXAM

FALL SEMESTER, 1993

PROFESSOR JOHNSON

INSTRUCTIONS

1. The exam consists of 3 questions. Credit for each question corresponds to the suggested time limit. You have a total of 3 1/2 hours in which to complete the exam. The suggested time limits are:

Question 1:	75 minutes
Question 2:	80 minutes
Question 3:	35 minutes
2. Questions will be graded on your ability to focus on the pertinent legal issues and discuss them in a knowledgeable and convincing fashion. Organization and coherence of your answer will count, so invest some time thinking about the problem and organizing your answer before you begin writing.
3. It is probably useful, but not mandatory, to read through the entire exam before beginning any question in order to get a sense for which questions may require more or less than the allotted time.
4. This is an OPEN BOOK exam. Any materials, including non-commercial outlines prepared by you, are permitted in the examination room.
5. If you believe that unintended ambiguities are present in any question, the safest approach is to present arguments based on alternative interpretations of the question. Alternatively, make the most reasonable assumption that you can, and state the assumption in your answer.
6. Good luck and happy holidays!

Question I

Due to the failure of prior legislation, such as the Brady Bill of 1993, to stem the tide of escalating violence involving handguns, the House of Representatives, in 1995, proposed the following legislation:

The Handgun Control Act of 1995

Section 1. Purpose.

- a. In recent years, there has been an alarming increase in the number of violent crimes perpetrated in the United States involving the use of handguns, and the laws currently in force have not been effective in curbing the frequent use of handguns in perpetrating crime;
- b. The Constitution protects the right of citizens to bear arms, and there are many legitimate purposes to which firearms may be put in accordance with the laws of this nation, including sporting, self-protection or law enforcement purposes. However, there are many handguns which are currently being sold which are not designed for, and are not normally used for, such legitimate purposes;
- c. Further regulations on the ownership and use of handguns are necessary to preserve the peace and tranquility of the Nation while protecting the rights and liberties of its citizens;

Section 2. Handgun Roster Board.

- a. There is hereby created a Handgun Roster Board within the United States Department of Justice.
 - i. Members of the Board shall be appointed by the Attorney General and may be removed by the Attorney General only for good cause.
- b. After opportunity for an agency hearing, the Handgun Roster Board shall establish and publish a roster of "approved handguns," the ownership or use of which it determines to be consistent with the public interest.
 - i. Prior to publishing the roster of approved handguns, the Handgun Roster Board shall notify Congress of its intention to take such action, and the reasons for the proposed action. If any member of Congress submits comments to the Board on the Board's proposed action within 15 days after receiving notice of the action, the Board shall not take the proposed action until it responds to such comments.

- ii. If the House and Senate pass a joint resolution opposing the inclusion of a handgun on the roster of approved handguns, the Board's inclusion of the handgun on the roster shall be suspended.

Section 3. Grants to establish handgun licensing programs.

- a. There is hereby established a Handgun Grant Board, which shall be composed of seven members appointed by the Senate, and removable by the Senate at will for any reason.
- b. \$15,000,000 may be appropriated to the Handgun Grant Board in each fiscal year after enactment of this Act, to provide grants to State and local governments to establish programs to license the ownership or sale of handguns.
- c. The Handgun Grant Board shall establish a procedure which will allow State and local governments to apply to the Board for grants under this Section, and the Board shall award such grants as public interest and necessity dictate.

Section 4. Prohibited acts.

- a. After the roster of approved handguns is established under this Act, no person may own, possess, sell or offer for sale any handgun unless:
 - i. the handgun is included on the roster of approved handguns established under this Act; and
 - ii. the person has a license to own or sell the handgun.
- b. Any person who is convicted in a criminal action for violating this section shall be sentenced to at least one year, and not more than five years, imprisonment for each violation.

Section 5. Judicial review.

- a. Actions of the Handgun Roster Board under this Act are committed to agency discretion and are not reviewable in any court.

A.

In your capacity as legislative counsel for the House of Representatives, you have been asked to review the proposed legislation and to provide an objective analysis of the various provisions of the legislation. If you conclude that any of the provisions may be legally problematic, indicate the basis for your conclusion, and suggest an alternative approach that would, in a legally permissible fashion, come as close as possible to addressing the concerns that appear to have prompted the inclusion

of that provision in the proposed legislation. Indicate a supporting rationale for any alternative approaches that you suggest. (45 minutes)

B.

Despite your wise counsel, Congress eventually adopted the Handgun Control Act as proposed above. The Handgun Roster Board has not yet established the roster of approved handguns (or even a proposed roster). You are no longer counsel for the House of Representatives, but have established your own practice. Representatives of the National Rifle Association ("NRA") have retained you to represent them in challenging the implementation of the statute (do not discuss any potential ethical concerns with such representation in your answer). The NRA wants to bring a lawsuit against the Handgun Roster Board, and seeks a declaration that Section 2b of the Act, which authorizes the Board to establish a roster of approved handguns, is unconstitutional, and an injunction to prevent implementation of that section. The NRA is a national association dedicated to preserving the rights of all citizens to bear arms, and the association includes, among its members, persons that own and sell handguns. The NRA wants your advice regarding whether it can bring its constitutional challenge at this time and obtain the declaratory and injunctive relief it seeks, and if so, in what court. Advise the NRA fully regarding any potential impediments that might prevent it from bringing its constitutional challenge at this time. Do not address standing in your response. Is the analysis any different if the NRA is also seeking money damages against the Board, for the potential cost that will be incurred by its members in disposing of handguns that are not approved for sale on whatever roster of approved handguns is eventually established by the Board. (20 minutes).

C.

Despite your impassioned argument on behalf of the NRA, assume that the Court in which the NRA brought its challenge to Section 2b of the Handgun Control Act refused to review the NRA's challenge. Subsequently, the Handgun Roster Board adopted a roster of approved handguns pursuant to the Act. Once again, the NRA would like to challenge the constitutionality of Section 2b of the Act. Advise the NRA regarding what facts it will have to prove, and why, in order to establish standing to challenge the constitutionality of the Board's adoption of the "approved handgun" roster. (10 minutes).

Question II

In addition to the provisions described above, when the Handgun Control Act was enacted, it included the following provision regarding rulemaking by the Handgun Roster Board:

Section 6. Rulemaking.

Prior to establishing a roster of "approved handguns," the Handgun Roster Board shall, on the record after opportunity for an agency hearing, define the criteria that the Board will use to determine whether inclusion of a handgun on the roster is "consistent with the public interest."

Due to public dissatisfaction with the judicial review provision of the Handgun Control Act that was originally enacted, Congress modified the provision to allow review of actions by the Handgun Roster Board in the United States Court of Appeals for the D.C. Circuit. Neither the statute nor the agency's regulations provide any procedure for petitioning the Board to administratively reconsider any of its actions before a lawsuit can be brought to challenge the actions.

Before the Board established a roster of approved handguns in accordance with Section 2 of the statute, the Board adopted a regulation pursuant to 5 U.S.C. § 553 that defined the criteria that the Board would use to establish the roster of approved handguns. Prior to publishing a notice of proposed rulemaking for the rule that defined the Board's criteria for including a handgun on the roster, the Board reviewed a wide variety of scientific and technical information regarding handguns. Among the documents that the Board reviewed were (1) A study by the National Association of Law Enforcement Personnel that argued that an analysis of crime statistics showed that handguns that exceed 44 calibers are rarely, if ever, used for self-protection purposes. The study concluded that such handguns are too powerful to be used responsibly for sporting or self-protection purposes; (2) A study by the National Rifle Association that analyzed criminal reports and statistics in the nation's ten largest cities, and concluded that there is no evidence that handguns exceeding 44 calibers are used any more frequently than other handguns in criminal activity.

The notice of proposed rulemaking issued by the Board described the National Association of Law Enforcement Personnel's study, but not the NRA study, and provided that ownership, use, or sale of handguns exceeding 44 calibers for any purpose other than law enforcement is not consistent with the public interest. The

proposal also described several other criteria that the Board would consider to determine whether a handgun should be placed on the roster of "approved handguns," because the ownership, use or sale of the handgun is consistent with the public interest. The proposal established a ten day period during which persons could submit comments on the proposed rules.

During the comment period for the proposal, the NRA resubmitted the study described above, and commented that it was inappropriate for the Board to determine that the ownership, use or sale of handguns exceeding 44 calibers for any purpose other than law enforcement was not consistent with the public interest.

Although she did not submit any written comments, the Administrator of the Federal Aviation Administration ("FAA") met informally with the members of the Handgun Roster Board during the comment period, and suggested that, in order to reduce the potential for hijacking of American airlines, the final rule of the Board should provide that the ownership, use or sale of any handgun which is constructed in a manner that is not detectable by the standard security equipment approved by the FAA for use in airports is not consistent with the public interest. The proposed rule had not addressed the issue of concealability or detectability of handguns.

At the close of the comment period, the Board promulgated a final rule that provided that the ownership, use, or sale of handguns that possess one or more of the following characteristics is not consistent with the public interest:

- (1) handguns that exceed 44 calibers (except for law enforcement purposes);
- (2) handguns that are constructed in a manner that is not detectable by the standard security equipment approved by the FAA for use at airports;
- (3) handguns that are equipped with laser sights (except for law enforcement purposes).

In the notice that accompanied the final rule, the Board did not discuss the NRA study or its comment. The Board indicated that it adopted the provision of the rule regarding detection by FAA approved security equipment to address the hijacking concerns raised by the FAA, which the Board felt were significant. Finally, the Board indicated that it had taken official notice of the fact that laser sights are inappropriate for sporting or self-protection purposes, and that it adopted the provision of the final rule regarding laser sights in reliance on that fact. The proposed rule was silent regarding laser sights.

A.

The NRA has sought your advice once again, and wants to know what challenges can be made with respect to the Board's adoption of the rules described above. At this point, the NRA is not concerned with whether they could make the challenges, or whether this is an appropriate time to make any of the challenges. Advise the NRA fully regarding what challenges could be made to the Board's adoption of the rules, and analyze the potential success of each challenge. (40 minutes).

B.

Would your advice to the Board be different if, instead of the rulemaking provision set forth above, the statute included a rulemaking provision that provided:

Section 6. Rulemaking.

Prior to establishing a roster of "approved handguns," the Handgun Roster Board shall, after opportunity for an agency hearing, define the criteria that the Board will use to determine whether inclusion of a handgun on the roster is "consistent with the public interest."

What challenges can be brought against the final rule based on this provision? Analyze the potential success of each challenge. (40 minutes).

Question III

A few years after the Handgun Control Act was enacted, it was amended to provide that the Federal Bureau of Investigation, rather than State and local governments, was authorized to issue handgun licenses required by the Act. Specifically, the following provision was added to the statute:

Section 7. Licenses

A license to own or use a handgun shall be issued within a reasonable time by the Director of the Federal Bureau of Investigation, upon application therefor, to any person whom he finds:

- (1) Is eighteen years of age or older;
- (2) Is not an addict, a habitual user of a controlled dangerous substance, an alcoholic, or otherwise dependent on mind-altering drugs; and
- (3) Has, based on the results of investigation, good and substantial reason to own or use a handgun.

After the new licensing provision became effective, Kramer, a resident of New York City, applied to the FBI for a license to own a handgun. Kramer does not own a handgun at this time. On the application form that he was given by the FBI, Kramer indicated that he was over eighteen years old, and was not an addict, habitual user of a controlled dangerous substance, or an alcoholic. In addition, he indicated that he had a substantial reason to own or use a handgun because he had a reasonable apprehension that he would be attacked in the near future because he had been recently involved in a series of unfortunate and unintended altercations. (Although the specific altercations are not particularly relevant for purposes of answering Question III, in his application, Kramer described altercations with Mickey Mantle (the former baseball player) at Mantle's restaurant in New York, a television script writer named "Crazy" Joe DeVola, and a former girlfriend who was also a fashion designer of "puffy shirts.")

In reviewing Kramer's application, the FBI contacted several witnesses for information regarding Kramer's qualifications to own a handgun. During the course of the investigation, the FBI discovered that Kramer habitually bought, smoked and sold a variety of Cuban cigars, the purchase or sale of which is prohibited by United States law. The FBI did not interview Kramer after he filed his initial application, and did not notify Kramer regarding their investigation until they reached a final decision on his application. They did, however, contact him prior to denying his application and verified that he habitually smoked the cigars that the witnesses had told the FBI he smoked. The FBI does not conduct hearings on applications for licenses under the Act because it has determined that such hearings would be too costly and time-consuming.

Less than a month after Kramer applied for a license to own a handgun, the Director of the FBI sent a letter to Kramer that indicated that the FBI had decided to deny Kramer's application for a license because (1) Kramer was a habitual user of a controlled dangerous substance; and (2) Kramer did not have a good and substantial reason to own or use a handgun.

With regard to the FBI's conclusion that Kramer was a habitual user of a controlled dangerous substance, the FBI specifically determined that: (a) the term "controlled dangerous substance" in the Handgun Control Act refers to any substance the use, purchase, or sale of which is prohibited by United States law; (b) Kramer habitually used a variety of Cuban cigars, the purchase or sale of which is prohibited by United States law.

With regard to the FBI's conclusion that Kramer did not have a good and substantial reason to own or use a handgun, although the FBI determined that a person who has a reasonable apprehension that they will be attacked in the near future has a good and substantial reason to own or use a handgun, the FBI concluded that Kramer did

not have a reasonable apprehension that he would be attacked in the near future because the agency refused to believe that Kramer was involved in any of the altercations that he described in his application. Although no witnesses testified to the FBI that Kramer was not involved in those altercations, the agency determined that Kramer's testimony was inherently unbelievable. In the words of the Director of the FBI, "His stories sounded like they came directly out of a television situation comedy."

On the advice of the NRA, Kramer has retained you to represent him in challenging the FBI's decision to deny his application for a handgun license. Without regard to concerns of jurisdiction, sovereign immunity, ripeness, or standing, Kramer wants to know what challenges he can make to the FBI's decision. Advise Kramer fully regarding the possible challenges, and the potential success of each. (35 minutes)