

Administrative Law – Fall 2019 – Sample Exam - Essay Questions

I have several old exams posted with sample answers, but none of these include essay questions. These are the essay questions from the fall 2018 exam. The **bold** entries after each question are my notes on the key information I was looking for in an answer to the question. Some of the entries are abbreviated because I already know what I mean. You would need to write a bit more to make sure I understand what you mean..

500 words each

11. One of the threads that runs through administrative law is the judicial standards for reviewing agency discretion. We see this in three contexts; adjudications, rulemaking, and tort claims. Separate your answer into these four parts:

a) What is the Matthews test, when is it used, and what is an example?

Balance costs of improved procedure against the value of reducing errors. It is used everywhere outside of criminal law. Any example.

b) What are the tests for deference to the agency when judging rulemaking and how do we decide which to use?

Chevron and Hearst defer to the agency, Skidmore and Barnhart are persuasion. They are applied based the completeness of the record, agency expertise, and importance of the issue.

c) What is the DFE (discretionary function exception) in the FTCA, and what is an example?

The court must defer to agency decisionmaking unless constrained by a statute or regulation.

d) Explain how the tests from a, b, and c can be seen part of a more general jurisprudential approach to the judicial review of agency actions.

These are all manifestations of separation of powers – the judicial branch should not interfere with agency policy making, as long as it is not limited by statute, regulation, or the constitution.

12. What is the unitary executive theory and how does President Trump illustrate it? **[we did not cover the DOJ regs on independent counsels in 2019, so you would not see this on the exam]**

How does his interaction with the Department of Justice show the limits and problems of the unitary executive, especially any implied in the constitution? The DOJ regs on the special counsel are attached to this exam. As we know from Twitter, the President believes that the legal system is rigged and that he has been railing at the AG and assistant AG for not controlling and/or firing the special counsel. Discuss the special counsel issues as part of your discussion of presidential control of agencies and the unitary executive theory.

What are the ultimate limits on the president as unitary executive?

The unitary executive theory holds that the president can make all executive branch decisions. It has been constrained by statutes that give agency heads a term of office, creating independent agencies.

Senate confirmation in the appointments clause implies that that the president is not meant to make decisions directly and he cannot substitute his decision if the agency head position vacant. He also cannot appoint a new agency head if the Senate disagrees.

Morrison v Olson was a statute, not a reg. The Regs say that the special counsel can only be fired by the attorney general, and other regs require the AG to leave supervision of the SC to an assistant if the AG has a conflict of interest. No day to day supervision, but can review prosecution steps and indictments and block them. The president cannot fire the assistant, and the AG has recused himself, so the president would have to fire the AG. If the assistant will not fire the SC, then the president would have to fire the assistant and hope the next in line would fire the SC. Like the Saturday night massacre in Watergate.

Refusal to confirm replacements for fired officials and impeachment are the two congressional tools to fight the unitary executive.

13. One of the key questions in due process is whether you get a hearing before or after the agency acts. In Goldberg, the court found that the hearing needed to be before the welfare benefits were terminated. In Matthews, the court found that the hearing could be after the termination of benefits. Compare and contrast the facts and how the court handled them in these cases to explain why the results were different. While post-deprivation hearings have become the norm, when can you successfully argue that your client should get a hearing before the agency acts?

The facts in Goldberg included witness testimony and inferences by the case agent about the family situation. Hearsay was important. These were contested and demanded cross-examination. The clients were indigent and not able to properly assert their rights in a written proceeding, and they would be injured by any delays in benefits if there was a mistake. Because of these factors, the court ordered a live pre-termination hearing.

Matthews involved medical and employment records and written reports by experts. These could be evaluated as written by agency experts and did not demand cross-examination. The statute provided for back benefits if the termination was overturned through appeal, so the court did not see irreparable harm or the need for a pre-termination live hearing.

You have to argue that your client will suffer an irreparable injury from an erroneous determination, and that there are contested facts to justify a hearing. For example, a teacher being fired for assaulting a student.

14. Even if you have not yet taken evidence, you know that there are strict rules governing the admission of evidence in civil and criminal trials. Explain how the difference between ALJs adjudications and Article III judge trials allows more freedom to admit evidence in adjudications than in Article III trials. Be sure to discuss how hearsay is handled in adjudications. (Hint – this is an opportunity to discuss the differing roles of ALJs and Article III judges.)

**Article III trials – adversary, impartial/non-expert judges,
Adjudications – inquisitorial, expert judges, no jury bias issues, review by the agency before final ruling.**

No Jury

**Hearsay only admitted through exceptions to the hearsay rule that it cannot be admitted
APA 556**

Hearsay can be admitted and considered as part of the overall record, as long as the decision is based on substantial evidence. No Residium Rule any more.

15. In the Rapanos case decided by the United States Supreme Court, the court split 4-1-4, over what navigable waters means under the Clean Water Act (CWA). One faction effectively said it means you need to be able to float a boat in the waterway for it to be navigable. The other thought that the term could include smaller waterways that drained into float a boat waterways, including through ground water connections. The Obama EPA promulgated the Waters of the United States rule (WOTUS) based on the broad interpretation of the definition of navigable waters. As part of the rulemaking, the agency provided a deep factual and scientific record explaining why the critical functions of wetlands could not be maintained if the legal definition of wetlands followed the float a boat interpretation. This record included wetland science on how the whole ecosystem is interdependent and that wetlands cannot be protected by only looking at the big waterways that will allow floating a boat.

Assume that EPA Secretary Pruitt has promulgated a new WOTUS rule, replacing the Obama rule. The Pruitt rule follows the float a boat legal interpretation of the one of the United States Supreme Court factions in Rapanos. Assume Pruitt's rule does not have a deep factual record explaining why the Obama rule was incorrect in its argument that wetlands protection depended on the broad definition of navigable waters. Instead, the new rule says that the United States Supreme Court recognized that there are two allowable policies, and the agency has decided to change from the broad definition to the float the boat definition. The EPA says that since this is a policy choice, it does not require a new factual record.

You work for the Center for Biological Diversity, which is concerned with wetlands protection. Their director has just seen the new final rule and wants to challenge it. Remembering our discussion of State Farm and the subsequent cases construing it - FCC v. Fox (indecent language), and Sierra Club v EPA (CO emissions levels) – what are the arguments pro and con for whether a rule based on a deep factual records can be substantially changed without a new factual record, only a statement that the EPA has changed its policy? How hard a look should the courts take at the new rule and how much deference should they give the agency?

State Farm – must publish full record justifying the change.

Fox – Most acknowledge that the policy has changed, but do not have to justify why the new policy is better, just that it is allowable. Consistent with Chevron.

Sierra Club – have to deal with data in the record that conflict with the new policy, and must provide any necessary data to support the policy – consistent with State Farm.

The agency is free to change its policy to float a boat if it can persuade the court that it is an allowable policy. Split court – clearly allowable.

It must show that the policy change is either consistent with the data in the record, or is not contradicted by the data.

16. A recent article in the Atlantic postulates that the American presidency has become an impossible job because we expect the president to do so many things. One of the problems the president has to deal with is coordinating the work of all the federal agencies so they carry out his policies and do not work at cross-purposes. This is complicated because there are two different types of agencies, typified by the Department of Health and Human Services versus the Federal Communications Commission. Explain the difference in presidential control over these two types of agencies. Include a discussion of the objectives of White House coordination of rulemaking under Executive Order 12866 and OIRA and how this applies to the two different types of agencies.

Regular agencies - advise and consent, removable at will, generally single agency head. Intended to carry out political direction of the president.

Independent agencies – advise and consent, term of office or for cause firing, generally a commission with staggered terms of office, may also include limits such as political balance. Intended to be independent of direct presidential control. No precedent for bad faith firings.

EO requirements. CBA, small business, threshold impact, support administration's policies, not conflict with other agencies.

Office of Information and Regulatory Affairs. White House review of proposed rules before they are published. Enforces EO and political choices.

Does not apply to independent agencies.