

Administrative Law  
Spring 2003 - Richards

Put your exam number on each page of the examination. Do not put your name or any other identifying information on the examination. Read the entire exam before answering any questions. Make sure you have all the pages and that they are all different. Use no more than the space provided. None of the questions require all the space provided so you have enough space to be neat and organized. Use specific case and statute references as necessary to answer the question. **Do not write on the back** - I only read what is on the front.

1. The tax assessor in the town of Peace in the State of Bliss is setting a new tax rate. The rate is based on the square footage of each lot as determined by the official plat map on file in the tax assessor's office. The rate has been correctly promulgated using the appropriate procedures. Joe comes to you because his tax bill has tripled. Under the old system, the taxes were based on the value of the house and lot, and he did not pay much because he lives in a small house. Is he entitled to a hearing? Explain your reasoning with reference to appropriate cases.

The rate setting is a rulemaking because it does not require individualized decision making. As shown in *Bi-metallic*, Joe does not have right to an individual hearing to contest the rate because this is a policy decision left to the agency. He must contest the rate through the agency notice and comment process or other public methods made available by the state administrative procedure act. Joe might be able to contest the square footage of his lot if he has evidence that the plat map is wrong because the number of square feet is an individualized decision - *Londoner*

2. The CDC was established by Congress to assist the states by providing expert assistance and information about communicable diseases, and to act as a national clearinghouse for information about the nation's health. The CDC has no specific enforcement powers. The CDC is concerned that states are not aggressively investigating SARS cases because the state governors are afraid of losing tourist revenue if any cases are found. The CDC passes an emergency regulation based on its clearinghouse function requiring that every person with a potential case of SARS call the CDC SARS Hotline at 1-800-WECOUGH.

Question 2.1 - Your client is the Louisiana Travel Agents Association, an NGO. They are concerned that even one case of SARS in LA, added to the West Nile Virus and the serial killer publicity, will put LA out of the tourist business. What is their argument for standing and what is the agency's rebuttal? Who do you think will prevail? (Ignore other potential problems with the regulation.)

Association standing

- a) Does at least at least one of their members have standing? (see below)

b) Is the interests the association seeks to protect are germane to the association's purpose?

yes, because the association deals with issues that affect the business of the individual agencies.

c) Does the claim or relief require the participation of individual members in the lawsuit?

no, because they want to stop the regulation from being enforced and are not seeking money damages.

Member standing

Are the agencies directly affected by the regulation? - No, it does require them to do anything, nor does it change the business practices of their competitors.

What is the affect on the agencies? - The regulation collects information about the incidence of SARS. Publicity about SARS will affect the agencies' business.

What is the relationship between the purpose of the statute and the regulation and the travel agency business?

None - the CDC's clearinghouse function is intended to improve the public health through better data collection. The CDC has no role in the tourist business and no obligation to protect the interests of the tourist business in making its regulations.

The association may be able to sue on behalf of its members, but no member is going to be able to show that it is within the zone of interest or that it otherwise has an individualized stake that justified standing.

Question 2.2 - You have been contacted by the Cystic Fibroses Foundation. Their members are always getting colds and they do not want to comply with this law. They want to mount a facial challenge to the regulation. Assume that they have standing. What is your argument on their behalf and what is the agency's rebuttal?

The problem with a facial challenge is that it requires that every application of the regulation be legally void. In this case the Foundation will have to argue that the regulation is unconstitutional, beyond the agency's authority, or improperly promulgated. The Foundation can raise the constitution question of whether there is a proper commerce clause nexus to allow the Federal government can require persons who are not in interstate commerce to report themselves to the CDC. The Foundation can question whether the CDC has the authority to require people to call and report themselves if it is only intended to act as a clearinghouse for information from the states. The Foundation can also attack the regulation as improperly supported by the record, claiming that getting reports from millions of people with colds does not improve SARS surveillance.

The agency will argue that SARS has a major impact on interstate commerce and thus justifies federal involvement. The agency will argue that requiring direct reporting to the

CDC is justified as part of the clearinghouse function because the disease is moving so fast that it does not want the delays involved in first reporting to the states. It will argue that this is a classic public health action and that the court's should defer to its expertise. The agency will also argue that the facial challenge should fail because, without enforcement powers, this is only a voluntary request for cooperation and thus has no impact on the Foundation.

Question 2.3 - A number of persons with cystic fibrosis did call the hotline and give the CDC their names, addresses, and information about their medical conditions. You have just read in the NY Times that a medical research group has filed a Freedom of Information request to the CDC for the names and medical conditions of persons identified with SARS. The agency is under pressure to release the information to avoid claims of a cover-up. May the agency release this information? What can you do to stop this release?

This would be governed by exception 552(b)(6) - personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Since the purpose of the FOIA is to encourage disclosure, the agency has some latitude in releasing information covered by exemption. In this case, the agency could argue that this would not be an unwarranted invasion of privacy because of the importance of identifying persons with SARS to better understand the epidemic. Releasing that information to the news media would further the agency's goals by improving public trust of the agency and by alerting the public to the dangers posed by the disease. The individuals could file an injunction asking the court to prevent the agency from acting improperly by releasing the data, claiming that keeping the public informed about SARS cases can be done without identifying the infected individuals. The individuals can also argue that since data was provided through voluntary reports, the agency should be prevented from releasing it because that will make it very difficult to collect voluntary data in the future.

You could also argue that section 552a - Records maintained on individuals, would control and not allow the information to be released without the individual's permission. The agency would argue that this release as otherwise authorized under 552 and was necessary for the public health.

3. Assume that the Federal quarantine law provides that the President, through an executive order, may prevent any person with a listed disease (which includes SARS) from traveling in interstate commerce. The President issued an order to restrict all travel by persons suspected of having SARS. Your client, Mary, was visiting her sick mother in Lake Charles when she started coughing. She asked her mother's doctor about it and he reported her to the 1-800-WECOUGH line. The Department of Justice sent a federal marshal to Lake Charles and he has detained her so that she cannot drive back to her home in Baton Rouge.

Question 3.1 - What do you file to contest this? Should you ask for a bail hearing? Explain your reasoning.

File a writ of habeas corpus requesting that she be brought before a judge and that the government be required to show cause why they are detaining her and the source of their legal authority. She should argue that the driving back to BR is not interstate commerce so that they do not have grounds to hold her. If they want to hold her, they should get the LA department of health to do it. The DOJ will argue that SARS is an international problem justifying the quarantine of persons who are using means of interstate commerce, that she could expose other drivers in interstate commerce at rest stops, and that by traveling on the interstate highway system she is potentially in interstate commerce and the government cannot assume that she will not leave the state. You can ask for bail, but the judge should not grant it - if the government can show a valid risk to the public and legal authority to survive the habeas corpus hearing, it has shown that you pose a risk to others that justifies detention, thus you should not be out.

Question 3.2 - The judge says the case turns on whether driving from Lake Charles to Baton Rouge under these facts is interstate commerce. The judge says that since this is a disease control case he is leaning toward deferring to the DOJ and CDC. What is your argument against agency deference in resolving this question? (Just focus on the argument against deference, not constitutional arguments about whether it is interstate commerce.)

You will argue that whether this is interstate commerce is a legal question, not a factual question. All the facts are before the court - the location of both cities, the location of I10, and the judge is familiar with the activities involved in driving between the two points. There are no facts that need to be developed through agency investigation and hearings. The agency has no expertise that will solve the issue. The court must decide if the trip, which is within LA, qualifies as interstate commerce, based on relevant precedents. If there is no factual issue, then there is no reason to defer to the agency.

4. Explain that case! For each case, briefly explain its significance in administrative law and any tests it stands for.

### **NLRB v. Sears, Roebuck & Co**

This case involved a FOIA request for agency memos concerning filing unfair labor practices memos. The court found that these would be covered by exemption 5 if they involved the decision making process, but not if they just documented or explained a decision already made. The court wants to protect the agency deliberation process.

### **Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001)**

Congress cannot limit the arguments presented by legal services attorneys. Any attorney's advice to a client and advocacy to the courts is not governmental speech.

### **State v. Broom, 439 So.2d 357 (La. 1983)**

LA SC held that it would violate separation of powers to allow a criminal prosecution based on an agency regulation.

**Chocolate Manufacturers Ass'n v. Block**

The rule attempted to ban flavored milk without proper notice in the proposed rule making. The rule failed and had to be repromulgated because it did not provide sufficient indication about the content of the final rule.

**Reguero v. Teacher Standards and Practices Commission**

This was an employment termination hearing. The court rejected the residuum rule requiring that agency actions be based on a residuum of evidence that would be admissible in a trial and subsisted the substantial evidence rule.

**UAW of America v. NLRB**

Court held that agency adjudications are not bound by prior precedent, but that the agency must explain the basis for changing its policy.

**Grant v. Shalala**

District court may not order a deposition of the ALJ to determine if an ALJ is biased.

**Mathews v. Eldridge**

An agency may balance the cost of increased due process against the improvement in accuracy that the process will provide and the injury to the party caused by an incorrect determination.