 Exam # _____

Administrative Law
Spring 2016 – Richards
4 Hours

The exam is closed book and closed notes. Put your exam number on each page of the examination if you are **handwriting** the exam. Put your exam number on the first page of the paper exam if you are **using the computer**. Do not put your name or any identifying information other than your exam number 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. **Do not write answers on the back**. You may use the back for scratch paper. (If you are using the computer, you may use the whole exam as scratch paper.)

Each question has a word limit. If you are hand writing, you are also bound by the word limit. Read the question carefully and think about your answer before you start writing. **If you use the computer, make sure to number your answers to match the question numbers. If you use the computer, you still have to turn in the paper exam because we have exam deferrals and have to keep track of the questions. Turn the exam in to my secretary, Kristi Parnell, in Room 431 and sign the check in sheet.**

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1) After Hurricane Katrina flooded New Orleans, Congress directed the Corps of Engineers to build levees that would protect New Orleans against a 100 year storm. The 100 year storm threshold is important because the National Flood Insurance Program assumes that a property is not subject to flooding if will not be flooded by a 100 year storm. Congress gave the Corps a fixed amount of money to do the job - $18 Billion – which meant that the Corps had to build cost-effectively. Since the cost of the levee system rises dramatically with each additional foot of height, the stronger the 100 year storm that was used, the more the more the levees would cost. The Corps built to the height and strength that it could afford with the money available. It used a model for the 100 year storm that did not breach or overtop the levees and certified them as providing the level of protection required to satisfy FEMA that the properties inside the levees would not flood in a 100 year storm. At the same time, the National Oceanic and Atmospheric Administration (NOAA) published model results showing that its 100 year storm would overtop the levees and flood the city. The difference was the Corps only ran the model with relatively fast moving storms – which develop less surge – whose path posed the least threat to the levees. The Corps rejected the standard maximum of maximum (MOM) model used by NOAA which ran storms at all speeds and all directions. When criticized for ignoring NOAA's findings, the Corps stated that there is no legally binding definition of a 100 year storm and it was free to use its own standards for a 100 year storm. (Internal memos indicated that the Corps had considered using the NOAA model, but rejected it because it would be too expensive to build the higher levees it would have mandated.)

A slow moving Category 3 hurricane flooded the city. Experts showed that this storm was predicted by the NOAA model but not the Corps's model. Had the Corps used the NOAA model, it would have built the levees higher and the city would not have been flooded. You are clerking for a New Orleans law firm and have been asked to write a memo on suing the Corps for the damage caused by the flooding. Assume that the 5th Circuit still rejects flood control act immunity so that the case will only be decided by the FTCA. **You have two issues to address and 500 words total:**

What is necessary for a flooded homeowner to get jurisdiction to sue the Corps?

Analyze the negligence claim against the Corps. Assume the senior partner only knows private tort law.

2) How did the Wooley Court construe the statute creating the state central panel of ALJs so that it was not an unconstitutional delegation of authority under the Louisiana constitution? How do the Bonvillian cases potentially undermine the Wooley holding? Which ruling more closely matches the legislative intent? You have 250 words.

3) Policy at State U, a public college, is that employees are fired if they are found to be using illegal drugs at work. A delivery driver employed by State U was pulled over by the police and taken to a local emergency room where he was forced to give a sample of blood for drug testing. It was positive for marijuana and he was charged for driving while intoxicated. He was summarily fired by the university. The evidence was then thrown out because there was no probable cause for the stop. The University will not reconsider the firing. Discuss whether the U has violated the driver's constitutional rights. You have 250 words.

4) A fundamental difference between civil and common law systems is the use of inquisitorial courts rather than adversarial courts. In this way, administrative law resembles international civil law. Focusing on the US federal administrative law system and the federal Article III courts, how do inquisitorial systems differ from common law court systems? Discuss these three issues:

What are the different expectations for the judges?

Why are the standards for the admission of evidence sometimes different?

How is the problem of ex parte contacts different for ALJs and Article III judges?

You have 500 words.

100 word questions.

5) In the context of private data aggregators such as Equifax and Facebook, how does the Silver Platter Doctrine undermine constitutional protections?

6) What is the key factor that determines whether an agency must be in the executive branch? What is an example of an agency that is controlled by Congress and what powers can it exercise?

7) If a document is covered by one of the nine FOIA exceptions, under what circumstances may the agency still release the document? What is necessary to assure that a document will not be released under FOIA?

8) The city council sets a tax rate for real property: Rulemaking or adjudication and why? Do you get a hearing to contest the rate?

9) What is the modern test for whether the delegation of power to an agency has been properly done? If a statute exceeds this delegation, does the court treat it as an unconstitutional delegation or is there now another solution?

Read the DHS Directive handout for questions 10 and 11 that is attached to the end of the exam.

Question 10

The DHS Directive lead to US v. Texas. This is a challenge to prosecutorial discretion by agencies before the United States Supreme Court this term. Putting aside the substantive legal issues in the challenge, the most interesting question is whether the states (as states) have standing to bring the challenge. The key issue is whether the states can show an injury that meets the constitutional test for standing. This is the harm language from the amended complaint filed in district court in US v Texas:

> G. The DHS Directive Harms Plaintiffs
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> 61. The DHS Directive will substantially increase the number of undocumented immigrants in the Plaintiff States. At the most basic level, the Directive is a promise to openly tolerate entire classes of undocumented immigrants. In addition, the Directive offers affirmative legal inducements to stay, such as work authorization and the tolling of unlawful presence. White House officials also have stated that the beneficiaries of deferred action are eligible for Social Security and Medicare. The removal of the deportation threat, combined with the incentives to stay, will make remaining in the United States far more attractive for the affected classes of undocumented immigrants.
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> 62. Moreover, the DHS Directive is certain to trigger a new wave of undocumented immigration. As explained above, DACA led directly to a flood of immigration across the Texas-Mexico border and a "humanitarian crisis" in Texas. The federal government itself recognized that its lax attitude toward the immigration laws caused this wave. See Vitiello Memorandum. The DHS Directive is a much larger step than DACA, and it will trigger a larger response.
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> 63. The DHS Directive will increase human trafficking in the Plaintiff States. Such trafficking is largely controlled by the Mexican drug cartels, which are the most significant organized crime threat to the State of Texas. See Texas Department of Public Safety, Texas Public Safety Threat Overview at 2, 23 (Feb. 2013). By boosting undocumented immigration, the DHS Directive will bolster the business of the cartels and greatly exacerbate the risks and dangers imposed on Plaintiffs by organized crime. See Nava-Martinez Order at 6 (explaining that human trafficking "help[s] fund the illegal drug cartels which are a very real danger for both citizens of this country and Mexico").
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> 64. The Plaintiff States will be forced to expend substantial resources on law enforcement, healthcare, and education. Some of these expenditures are required or coerced by federal law. For instance, the Supreme Court has held that States are constitutionally obligated to provide free education to children of undocumented immigrants. Plyler v. Doe, 457 U.S. 202 (1982). Similarly, both Medicare and Medicaid require provision of emergency services, regardless of documented immigration status, as a condition of participation. See 42 U.S.C. § 1395dd; 42 C.F.R. § 440.225.
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> 65. Other expenditures are required by state law. For example, Texas law requires local governments to provide healthcare for the indigent. See Indigent Health Care and Treatment Act, TEX. HEALTH & SAFETY CODE §§ 61.001 et seq. In FY2014, Texas counties reported over $23 million in indigent health care expenditures. Texas law also requires nonprofit hospitals to provide unreimbursed care for the indigent as a condition of maintaining their nonprofit status. See TEX. HEALTH & SAFETY CODE § 311.043.
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> 66. Other costs follow specifically from the extension of deferred action status. For instance, federal work authorization functions as a precondition for certain professional licenses in the Plaintiff States. See, e.g., 16 TEX. ADMIN. CODE § 33.10 (requiring applicants for an alcoholic beverage license to be

"legally authorized to work in the United States"); 37 TEX. ADMIN. CODE § 35.21 (requiring employees of private security companies to submit application, including a copy of a current work authorization card); TEX. RULES GOVERN. BAR ADM'N, R. II(a)(5)(d) (making individuals who are "authorized to work lawfully in the United States" eligible to apply for admission as licensed attorneys).

67. Texas and other Plaintiff States also rely on Defendants' evidence of lawful presence for certain benefits under their respective state laws. See, e.g., TEX. LAB. CODE § 207.043(a)(2) (extending unemployment benefits to individuals who were "lawfully present for purposes of performing the services"); TEX. FAM. CODE § 2.005(b)(4) (allowing an "Employment Authorization Card" to be used as proof of identity for the purposes of a marriage license application).

68. By authorizing a large class of undocumented immigrants to work in the United States, the DHS Directive will expose Texas to the cost of processing and issuing additional licenses and benefits. Moreover, it will cause Texas to issue such licenses and benefits to individuals who are not legally authorized to be in the country (or to take on the burdensome task of attempting to figure out which undocumented immigrants have bona fide deferred action status and which ones benefited from the unlawful DHS Directive).

69. If the Plaintiff States had the sovereign power to redress these problems, they would. See Massachusetts v. EPA, 549 U.S. 497, 519 (2007) (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982)). But the Supreme Court has held that authority over immigration is largely lodged in the federal government. See, e.g., Arizona v. United States, 132 S. Ct. 2492 (2012). Accordingly, litigation against the federal government is the only way for the States to vindicate their interests and those of their citizens.

You are to write a short memo analyzing these claims and outlining the government's arguments that they do not meet the constitutional standards for injury as part of the standing analysis. You are also to discuss whether accepting these claims as a valid standing injury would only create standing in this case or would have wider implications for challenging agency actions. **You have 1000 words.**

Question 11

Assume that the plaintiffs in US v Texas get standing. Their first count is that the President did not comply with the Take Care Clause, but none of the court addressed that count. This is the second count:

> COUNT TWO
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> Violation of the APA, 5 U.S.C. § 553
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> 78. The allegations in paragraphs 1-77 are reincorporated herein.
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> 79. The APA requires this Court to hold unlawful and set aside any agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).
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> 80. DHS is an "agency" under the APA. 5 U.S.C. § 551(1).
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> 81. The DHS Directive is a "rule" under the APA. 5 U.S.C. § 551(4).
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> 82. With exceptions that are not applicable here, agency rules must go through notice-and-comment rulemaking. 5 U.S.C. § 553.
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> 83. The Defendants promulgated and relied upon the DHS Directive without authority and without notice-and-comment rulemaking. It is therefore unlawful.

Write a short memo analyzing the directive in the light of § 553 and its exceptions. Outline the government's arguments that the directive does not violate § 553 and thus does not need notice and comment rulemaking. **You have 1000 words.**

Exam # _____

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents**

This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. The following supplements and amends that guidance.

The Department of Homeland Security (DHS) and its immigration components are responsible for enforcing the Nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. Secretary Napolitano noted two years ago, when she issued her prosecutorial discretion guidance regarding children, that "[o]ur Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case."

Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.[1] A form of administrative relief similar to deferred action, known then as "indefinite voluntary departure," was originally authorized by the Reagan and Bush Administrations to defer the deportations of an estimated 1.5 million undocumented spouses and minor children who did not qualify for legalization under the *Immigration Reform and Control Act* of 1986. Known as the "Family Fairness" program, the policy was specifically implemented to promote the humane enforcement of the law and ensure family unity.

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States. Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.[2]

Historically, deferred action has been used on behalf of particular individuals, and on a case-by-case basis, for classes of unlawfully present individuals, such as the spouses and minor children of certain legalized immigrants, widows of U.S. citizens, or victims of trafficking and domestic violence.[3] Most recently, beginning in 2012, Secretary Napolitano issued guidance for case-by-case deferred action with respect to those who came to the United States as children, commonly referred to as "DACA."

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[1] Deferred action, in one form or another, dates back to at least the 1960s. "Deferred action" per se dates back at least as far as 1975. *See,* Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

[2] INA § 204(a)(1)(D)(i)(II), (IV) *(Violence Against Women Act (VAWA) self-petitioners not in removal proceedings are "eligible for deferred action and employment authorization");* INA § 237(d)(2) *(DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request "shall not preclude the alien from applying for . . . deferred action")*; REAL ID Act of 2005 § 202(c)(2)(B)(viii), Pub. L. 109-13 *(requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status")*; National Defense Authorization Act for Fiscal Year 2004 § 1703(c) (d) Pub. L. 108-136 *(spouse, parent or child of certain U.S. citizen who died as a result of honorable service may self-petition for permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").*

[3] In August 2001, the former-Immigration and Naturalization Service issued guidance providing deferred action to individuals who were eligible for the recently created U and T visas. Two years later, USCIS issued subsequent guidance, instructing its officers to use existing mechanisms like deferred action for certain U visa applicants facing potential removal. More recently, in June 2009, USCIS issued a memorandum providing deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status.

By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

The reality is that most individuals in the categories set forth below are hard-working people who have become integrated members of American society. Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted.

A. Expanding DACA

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012 provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (*i.e.*, those who were born before June 15, 1981). That restriction will no longer apply.

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work

authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

USCIS should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement.

B. Expanding Deferred Action

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics for USCIS to conduct background checks similar to the background check that is required for DACA applicants. Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of

the Immigration and Nationality Act.[4] Deferred action granted pursuant to the program shall be for a period of three years. Applicants will pay the work authorization and biometrics fees, which currently amount to $465. There will be no fee waivers and, like DACA, very limited fee exemptions.

USCIS should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement. As with DACA, the above criteria are to be considered for all individuals encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or USCIS, whether or not the individual is already in removal proceedings or subject to a final order of removal. Specifically:

- ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria and may thus be eligible for deferred action to prevent the further expenditure of enforcement resources with regard to these individuals.

- ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for case-by-case determinations. ICE should also establish a process to allow individuals in removal proceedings to identify themselves as candidates for deferred action.

- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear. The USCIS process shall also be available to individuals subject to final orders of removal who otherwise meet the above criteria.

Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority.

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[4] INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the[Secretary]."); 8 C.F.R. § 274a.12 (regulations establishing classes of aliens eligible for work authorization).