

EXAM NO.

CAPITAL UNIVERSITY LAW SCHOOL

Examination in Administrative Law  
Fall Semester, 1995

Professor Rodney Smith

This examination is a take home examination. Your answers are due in my office by 5:00 p.m. on Monday, December 18, 1995. Exam answers should be turned in to my secretary, Ms. Phyllis Cole. Late papers will be reduced by at least one letter grade.

Number each page of your answers, noting which question is being answered on each page. Also write your examination number on the top of each page of your written answers.

You are to type your answers on regular 8 1/2 by 11 inch typewriter paper, using standard one inch margins on all sides of the each page. Your answers are to be double-spaced. For consistency purposes, your type size should be a standard pica (10 characters per inch if your typewriter or computer uses characters per inch terminology or 12 point if your typewriter or computer uses point terminology).

The written work product is to be your own. You are not permitted to consult with other students or any one else in preparing your answers. While you may consult materials in the library, your work must be your own. I strongly recommend that you focus on class materials and notes in preparing your answers, since I will be grading the exams based on concepts and material covered in class.

This exam consists of three essay questions. Each question has a page limit and will generally be weighted, for final grade purposes, based on the number of pages assigned to a particular answer. Organization and clarity of analysis are significant, for grading purposes. Since spelling and writing errors will also be factored into the grade, I suggest that you carefully proof your answers and redraft them as necessary.

Good luck and have a wonderful holiday break. I look forward to seeing you again next semester.

## EXAM QUESTIONS

Question #1 (5 pages)

Commentators, and to some extent state courts, continue to write extensively about the nondelegation doctrine. Despite the fact that for the last fifty years the Supreme Court has essentially approved all of the legislation it has reviewed under the nondelegation clause of the

Constitution, some commentators advocate a return to a more stringent version of the nondelegation doctrine as a means of preventing the abuse of agency power. Other commentators respond by asserting that courts should not worry about how broadly Congress delegates power to agencies; rather, they should pay attention to how agencies use the delegated power. These "prodelegation" commentators often add that other legal doctrines have been used to curb excess administrative discretion.

What single legal doctrine would you raise as the primary (most effective) example of the use of some doctrine, other than nondelegation, to curb abuse of administrative discretion? Why do you believe that this doctrine is primary (i.e., more effective than others)? As a collective matter, do you think that existing legal doctrines, other than nondelegation, are sufficient checks on abuse of administrative discretion or do you believe that the nondelegation doctrine should be revitalized? Why?

Question #2: 4 pages

During the 1970s and 1980s there was a significant shift toward greater use of rulemaking by many agencies. It is generally believed that this shift was primarily due to changing calculations of agency self-interest and to congressional directives.

You recently accepted a position as the chief staff attorney to the new chairperson of the Federal communications Commission. As your first assignment, you have been asked to write a memorandum delineating the comparative advantages and disadvantages of rulemaking and adjudication from the viewpoint of an administrator considering how to implement a new regulatory program. In writing the memorandum, you will need to discuss legal and policy factors that are relevant to your recommendation. Ultimately, you need to make and defend a recommendation.

Question #3: (5 pages)

Since the beginning of the Republic, statutory provisions recognizing the special status of conscientious objectors have existed in the operation of the military, because of this consistent policy, there has never been any statutory protection afforded those who became conscientious objectors after entering the armed services. In 1962, however, the Secretary of Defense issued a directive that "bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable." Pursuant to this directive, which was recently reissued by the current Secretary of Defense, the Army has promulgated regulations applicable to such persons.

The relevant provisions of the Department of Defense Directive, as reissued, and the Department of Army's regulations may be briefly summarized. A member of the service who seeks discharge on the ground that he has become a conscientious objector since he entered the service must file a discharge request containing substantial personal information and, if possible, supporting statements from others. The applicant is then to be interviewed by his or her commanding officer, who forwards a recommendation to the Chief of Army Personnel. The Chief

of Army personnel is required to refer each application to the head of the Selective Service System for an "advisory opinion," and to give the opinion great weight. The regulations do not provide for any opportunity to be heard, other than in the application and in the interview with the commanding officer. It is further provided by the directive and in the regulations that, "determination of a request for discharge is committed to the discretion of the department, and such determination shall be final and binding and not subject to further review in any tribunal with respect to the administrative separation of its members."

Sheila Samuelson, then a 19-year old junior at The Ohio State University, enlisted in the Army Reserve in 1993, and has been a participating member of the active reserves since that date. As an economic matter, her compensation for her service in the Army Reserves has enabled her to stay in school. In the fall of 1995, she started law school. In October of 1995, she joined a pacifist organization. She has not been called for active duty. But, when she met with you (for our purposes, you are to assume that you are a practicing member of the Bar), she indicated that she fears that she will be called to serve in Bosnia. She has submitted her request for discharge on the ground of conscientious objection and is scheduled to have her interview with her commanding officer on December 20, 1995.

What legal arguments can be raised in Sheila's behalf?

What responses/ counter-arguments should you anticipate?

What legal and practical advice would you give Sheila at this stage in the proceedings?

What further information would you want from Sheila to assist you in this matter?