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**593-064 Administrative Law
Fall Semester 2006**

**UNM School of Law
Final Examination
Three Credits**

**Professor E. Gauna
Friday, December 8, 2006
Friday, December 15, 2006
Part II (135 minutes)**

Examination Format

Essay Answers

1. **Laptop** computer users: Start the Securexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen & close bluebook immediately. If using a laptop, save & exit the program.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

Part II

1. Part II of this exam is 135 minutes consisting of one essay question.
2. You may take in only your own prepared outline into the exam. **Leave all other materials with the proctor at the check-in table.**
3. Please be sure to write your anonymous examination number on the upper right hand corner in the place indicated on the examination itself and on each blue book. If you use multiple blue books, please number them consecutively.
4. Please write on only one side of each page of the blue book and only on every other line. Please use ink, do not use pencil. If you are typing this examination, double space and leave room for adequate margins.

5. **Essay Question**: The essay question will be graded on the basis of the thoroughness and effectiveness of the analysis it contains. Answers which merely state conclusions, or answers without an explanation of the reasoning and analytical process used to reach the conclusions, will receive little credit. Similarly, answers that recite abstract principles of law without applying them to the facts of the problem presented in the question will receive little credit. Although your answer should be complete, you should not volunteer information or discuss legal doctrines that are not necessary or pertinent to the solution of the problem

7. **NOTE: You MUST TURN IN THE EXAMINATION.** Answers are invalid if the examination itself is not attached to your answers.

ESSAY QUESTION
(Approximately 65% of grade)

Instructions: Answer all subparts to this question, i.e., Questions 1(a) through 1(c), inclusive. Basically, the question involves three different scenarios under a set of base facts. Each scenario must be analyzed separately. The Administrative Procedures Act is referenced as the "APA." For each question, thoroughly discuss the administrative law issues and related constitutional law issues, including all potential claims, responses and related review issues (setting forth both pro and contra arguments). However, keep your discussion within the scope of topics studied this semester in Administrative Law. If you find it necessary to assume additional plausible facts to conclude your answer, state the facts you are assuming and their relevance to the issues. Have a good time and show off all that you know.

Base Facts: Under the Aviation Act, Congress delegated authority to the Federal Aviation Administration (FAA) to promulgate and implement regulations and standards for national security. The Aviation Act also provides that the FAA may "*at any time*" reexamine the issuance of an airman (pilot) certificate and, upon hearing, issue an order "*modifying, suspending, or revoking*" a certificate if the Administrator determines that such action is required for "*safety in air commerce*" and is in "*the public interest.*" A few months after the September 11, 2001 terrorist attacks, Congress established the Transportation Security Administration (TSA) and transferred much of the responsibility for civil aviation security to the TSA.

Two pilots Mr. Amari and Mr. Basan, citizens of the United States but originally from, and having many relatives in, Saudi Arabia, have used their FAA airman certificates to pilot flights abroad. However, the pilots have not operated Saudi Arabian Airlines flights to the United States in the past nine and four years, respectively. In January of 2003, the TSA sent letters to the FAA requesting that the FAA revoke the airman certificates of Amari and Basan, stating that "*[b]ased upon information available to us,*" they presented "*a security risk to civil aviation or national security.*" The FAA then notified Amari and Basan by letter that their airman certificates were immediately revoked because the TSA's Acting Under-Secretary of Transportation Security had determined that they presented risks to aviation or national security.

Question 1(a). Assume the **Base Facts** (above). Applicable FAA regulations provide that upon request within 10 working days, a revocation of a certificate may be reconsidered upon hearing before an administrative law judge (ALJ). The regulations also provide that, (a) upon request of the former certificate holder, the decision of the ALJ may be appealed to the National Transportation Safety Board (NTSB) within 10 working days; and (b) the decision of the ALJ is to be given deference by the NTSB if the NTSB finds substantial evidence in the record to support the ALJ's decision. Amari and Basan immediately requested a hearing.

The ALJ held a hearing in which Mr. Amari and Mr. Basan were allowed to attend with their lawyers, but their lawyers were not allowed to participate in the proceedings. The ALJ stated that the hearing was to determine whether Amari and Basan posed a "*security threat*" and, if so, revocation of their certificates would be in the public interest. At the hearing, the ALJ had an affidavit by Mr. Hale, a Deputy Administrator of the TSA. The ALJ refused to give Amari

and Basan (or their lawyers) a copy of the affidavit, stating that the material in it was sensitive and some of it might possibly be classified. He did note, however, that the affidavit referenced reports from the intelligence community that aircraft would continue to be used as weapons of terrorism, and the ease with which an individual may obtain access to the aircraft in the United States—once he or she has a pilot’s license—presented grave cause for concern. Amari and Basan were not allowed to ask questions concerning this affidavit.

The ALJ questioned Amari and Basan about flights to Saudi Arabia, including the dates and reasons for those flights. The gentlemen testified that they used to be employed by Saudi Arabian Airlines, but now they only operate airplanes within the United States that are owned by domestic airline companies. At one point, Mr. Amari, who does not speak English well, became confused with the ALJ’s question about a particular date. Believing the ALJ had asked him when he last went to Saudi Arabia (instead of flew an airplane to the country), he replied within the last few months. Mr. Basan, who better understood the question, explained it to Mr. Amari, who corrected his answer. The ALJ ruled against Mr. Amari and Mr. Basan. His letter ruling noted that he believed the demeanor of both gentlemen to be shifty, that they kept conferring and changing their stories, and that they were not believable. The ALJ noted that he believed they had flown airplanes to Saudi Arabia more recently than they stated. The letter ruling also noted that after the hearing, the ALJ received further “sensitive security information” that suggested these certificates should be revoked.

Thoroughly discuss the issues raised by this scenario. Although **not necessarily limited to these issues**, your analysis might include a discussion about (a) whether the proceedings were in accordance with the APA, constitutional guarantees, and hybrid procedures, if any; (b) a potential challenge to the ALJs decision and whether there were any improprieties; and (c) the issues that might arise should Amari and Basan appeal the decision to the NTSB or the issues that might arise should they decide to immediately file a lawsuit in court; and (d) appropriate standards of reviews and related issues.

Question 1(b). Assume the **Base Facts** only (i.e., don’t assume the specific facts described under question 1a). The TSA decided to issue, without notice and comment, new regulations governing the suspension and revocation of airman certificates for security reasons. The new regulations provide that upon a finding that a pilot poses a “*security threat*,” the TSA Assistant Administrator for Intelligence issues an Initial Notification of Threat Assessment (Initial Notice) to the individual and to the FAA. The FAA then suspends the airman certificate and the pilot may, within 5 days, make a written request for releasable materials upon which the Initial Notice was based. The TSA must respond to this request within 30 days and the pilot has 5 days thereafter to submit a written reply to the materials to the TSA. The Deputy TSA Administrator reviews the matter de novo and issues a decision whether the pilot poses a security risk. If the Deputy TSA Administrator finds the pilot poses a security risk, he issues a “Final Notification of Threat Assessment” (Final Notice). The pilot then has 5 days to appeal the Final Notice to the National Transportation Safety Board (NTSB). Agency action does not become final until the NTSB issues its order.

The day after publishing the new regulations, the TSA Assistant Administrator for

Intelligence sent letters to Mr. Amari and Mr. Basan, recalling the previous FAA letter and sending them an Initial Notice. Amari and Basan immediately requested releasable materials and the TSA responded to their requests 45 days later. The responses did not include the factual basis for TSA's determination, but stated that the factual basis for the finding that they are a security risk was based on sensitive and classified information. Amari and Basan immediately filed replies to the TSA's Initial Notice, stating that they *"were not afforded the proper procedures"* and that *"lack of evidence and information about the basis for the determination contained in the TSA's response made it impossible for [them] to specifically rebut the TSA's allegations,"* and they further denied that they were security threats. One week later, the Deputy TSA Administrator sent letters to Amari and Basan, stating that he had reviewed the record and concluded that Amari and Basan had been duly advised by the TSA that they posed a security threat and that his letter constituted Final Notice that they posed a security threat. The FAA then revoked their certificates.

Anticipating a challenge to the issuance of the regulations and the action taken under them, discuss potential challenges and Mr. Amari and Mr. Basan's arguments, as well as the anticipated responses by the TSA and FAA. Your answer might include, **but is not necessarily limited to** (a) whether the new regulations are promulgated properly; (b) whether Amari and Basan should appeal to the NTSB before they file suit in a federal district court; (c) the advantages and disadvantages of an immediate lawsuit; and (d) standards of review and deference given to the agencies on review.

Question 1(c). Assume the **Base Facts** only (not facts specifically listed under 1(a) and 1(b) above). One week after Mr. Amari and Mr. Basan received their letters from the FAA, Congress passed an amendment to the Aviation Act, effective immediately, that provided: *"Any person deemed a security threat by the TSA automatically becomes ineligible to hold an airman certificate"* and that *"the FAA Administrator shall issue an order amending, modifying, suspending, or revoking any part of a pilot's airman certificate upon notification by the TSA Assistant Administrator for Intelligence that the holder of the certificate poses, or is suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety. Any action taken under this Amendment is conclusive, final and not subject to review."* The U.S. President signed the Amendment one day after its passage of both Houses.

The day after the President's signature, the Assistant TSA Administrator for Intelligence sent a letter to Mr. Amari and Mr. Basan, recalling the previous FAA letter and sending them a notice that they were ineligible to hold an airman certificate because they were deemed to be a security threat. A copy of this letter was sent to the FAA Administrator, who promptly revoked their airman certificates .

Discuss potential challenges to this amendment and its applicability to Mr. Amari and Mr. Basan.