

Watson
Administrative Law
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FACT SITUATION FOR QUESTIONS 1 THROUGH 4

This fact situation involves a challenge to a regulation issued by the Secretary of Commerce under the Marine Mammal Preservation Act (MMPA). The five sections of the MMPA are set forth below:

MARINE MAMMAL PRESERVATION ACT

§1. Congressional findings and declaration of policy

(1) certain species of marine mammals are, or may be, in danger of extinction as a result of man's activities;

(2) measures should be taken to replenish, and protect, the population stocks of marine mammals that have been diminished below their optimum sustainable population.

§2. Prohibition on taking of marine mammals

Except as otherwise provided by regulation, it is unlawful to take any marine mammal in waters under the jurisdiction of the United States. For each unlawful taking of a marine mammal, a person shall be subject to a civil penalty of up to \$10,000, or imprisonment of up to one year, or both.

§3. Definitions

(1) The term "person" includes not only individuals, but also corporations, partnerships, and other commercial entities.

(2) The term "take" means to hunt, capture, or kill, or attempt to hunt, capture, or kill a marine mammal.

§4. Regulations

(1) The Secretary of Commerce, on the basis of the best scientific evidence available, shall prescribe such regulations as he or she deems necessary and appropriate to clarify and carry out the provisions of this Act.

(2) Regulations prescribed to carry out this Act must be made after the opportunity for a hearing.

§5. Judicial review

Any person, as defined in section 3, may obtain judicial review of any regulation under the Act that is of nationwide scope and application, by filing a petition for review in the United States Court of Appeals for the District of Columbia within 90 days after the date of issuance of the regulation in question.

In 1989, the Secretary of Commerce became aware that the Atlantic bottlenosed dolphin was falling farther and farther below its optimum sustainable population level. The Secretary directed agency personnel to come up with information that would enable the Secretary to take necessary and appropriate action to preserve and protect the species.

In response, a two-year study was initiated in 1990, which focused on the effects of the feeding of the bottlenosed dolphins by humans during

the dolphins' spring migration to the Gulf of Mexico. (Such feedings have become a popular tourist attraction.)

In 1992, upon completion of the study, the Secretary proposed in the Federal Register to amend the preexisting regulatory definition of "take" to include the feeding of Atlantic bottlenosed dolphins. The old regulatory definition of "take" simply tracked the statutory definition. The new regulatory definition (with the proposed amendment underlined and in bold) would be as follows:

16 C.F.R. § 100 -- Definitions

(a) The term "take" means to hunt, capture, or kill, or attempt to hunt, capture, or kill any marine mammal. **This includes offering, giving, or attempting to give food to Atlantic bottlenosed dolphins while in those parts of the Gulf of Mexico that are under the jurisdiction of the United States.**

In support of the proposed rulemaking, the Secretary included the following statement in the Federal Register:

Although much is still unknown about Atlantic bottlenosed dolphins, our study does show that human feeding alters the behavior of these mammals insofar as the dolphins are attracted to the feedings. We conclude from this that feeding bottlenosed dolphins affects their ability to cope and live in the wild. Dolphins that learn to approach boats may also increase their interactions with fishing vessels. This could result in injury to the dolphins because they could become entangled with fishing gear.

Written comments on the proposed rule were received from tour boat operators and customers, state wildlife agencies, conservation groups, scientists, the commercial fishing industry, and the general public. In

addition, oral comments were received at public hearings held in Tampa, New Orleans, and Houston.

One commenter favoring the rule stated that, in her experience, dolphins in recent years have indeed approached tour boats in increasing numbers. On the other hand, a commenter who opposed the rule noted that "feeding dolphins in the wild is the only chance for many people to interact with marine mammals in their natural environment rather than in captivity. Feeding promotes an interest in the environment." In addition, a marine biologist commented on the lack of firm evidence that human feeding has contributed in any way to the decline in the bottlenosed dolphin population levels. This commenter, citing to the echolocation abilities of dolphins, also disputed that feeding dolphins increases the chances of colliding with boats or becoming entangled in fishing gear.

In the final rulemaking, published in the Federal Register on March 20, 1993, the Secretary concluded that the rule should be issued as originally proposed. The Secretary acknowledged that "scientists generally will state that our level of knowledge of bottlenosed dolphins is very low," but found the proposed rule necessary and appropriate since, "in the absence of more information, it is wise to adopt a cautious attitude toward exploitation of these mammals."

In addition, despite comments urging that the rule be broadened in geographic scope and applied to other marine mammals, the Secretary determined in the final rulemaking that the new rule would be limited to Atlantic bottlenosed dolphins, and would apply only to the Gulf of Mexico region. Thus, according to the Secretary:

"the new amendment to the regulatory definition of "take" comes into play when the bottlenosed dolphins have left the Atlantic waters bordering South Carolina, Georgia, and eastern Florida, and have entered the waters of the Gulf."

Finally, the Secretary determined in the final rulemaking that, in view

of the impending spring migration of bottlenosed dolphins into the Gulf of Mexico, there was good cause to make new regulatory definition of "take" immediately effective upon publication.

You are a lawyer in Corpus Christi, Texas. Two days after the rule is issued, you agree to represent three would-be plaintiffs who desire to challenge the new rule. Client #1 is a "feed the dolphins" tour boat operator. Client #2 owns a restaurant (located next door to the tour boat operator) which relies almost exclusively on dolphin-feeding tourists for its customers. Client #3 is an individual who -- prior to the new rule -- had reserved a spot on a tour boat to fulfill a lifelong desire to observe and feed the dolphins as they cavort in the Gulf waters. Each client seeks to have the new rule declared invalid.

QUESTION #1 (15 points) (7 1/2 % of exam)

Identify, and briefly discuss, the method by which you will seek judicial review. In other words, where will you file your lawsuit? What statutory provisions will you cite as the authority for your lawsuit?

QUESTION #2 (60 points) (30 % of exam)

It can be expected that the government will file a motion to dismiss that focuses not on the merits, but on the availability and timing of judicial review. What possible arguments could the government raise in support of its motion to dismiss? Please identify and evaluate the possible arguments.

QUESTION #3 (20 points) (10 % of exam)

Assume for this question that the court has denied the

government's motion to dismiss and will proceed to address your clients' challenges to the new rule. Can you argue that the new rule is invalid for failure to comply with certain procedural requirements? Please identify and evaluate the possible arguments.

QUESTION #4 (35 points) (17 1/2 % of exam)

Assume for this question that the court has denied the government's motion to dismiss and has rejected your clients' challenges to the new rule based on failure to comply with procedural requirements. Can you challenge the rule on substantive grounds (i.e., on the merits)? Please identify and evaluate the possible arguments. In addition, please note the appropriate scope of judicial review, as well as any "judge-made doctrines of judicial review" that may apply.

FACT SITUATION FOR QUESTIONS 5 and 6

Peter Principal was hired in 1988 by the County Board of Education to be the school superintendent for Hoop County, Kentucky. Principal was given a six—year contract that was "subject to state law." By the fall of 1992, it became clear that most of the Board members no longer wanted Mr. Principal as school superintendent. The Kentucky legislature has addressed the question of when and how a Board of Education can remove a superintendent of schools. Kentucky Revised Statute § 666 provides as follows:

A superintendent of schools may be removed by a board of education for misconduct or failure to perform duties in a satisfactory manner. At least one month prior to voting on removal, the board is to place the charges for removal in the minutes of the board and give written notice of the charges to the superintendent. A hearing shall thereafter be held by the board in

order to investigate the accuracy of the charges and to evaluate the superintendent's overall performance. Removal requires a vote by at least four-fifths of the membership of a board of education.

The Board of Education presented Mr. Principal with several "charges for removal" on December 7, 1992. The charges, which were placed in the minutes of the Board and published in the local newspaper (the "Hoop Scoop"), included the following allegations: hiring personnel for political reasons; being insubordinate; being politically loyal to former Board members; personal use of school vehicles; and failing to oversee the maintenance needs for the schools.

After a two-day hearing in February 1993, the Board discharged Principal by a vote of 4-1. The announcement of the decision was accompanied by the following statement: "The Board finds that Peter Principal has engaged in misconduct and has failed to perform his duties in a satisfactory manner."

Principal responded by filing a suit in federal district court pursuant to 42 U.S.C. §1983. The suit alleges that the Board has violated Principal's procedural due process rights.

QUESTION #5 (20 points) (10 % of exam)

Principal claims the Board deprived him of a constitutionally protected "property" interest without providing him "due process." Please evaluate Principal's assertion. [Note: you do not need to discuss the "what process is due" issue.]

QUESTION #6 (20 points) (10 % of exam)

Principal claims the Board deprived him of a constitutionally protected "liberty" interest without providing him "due process." Please evaluate Principal's assertion. [Note: you do not need to discuss the "what process is due" issue.]

FACT SITUATION FOR QUESTION 7

Pursuant to Chapter 909 of the Ohio Revised Code, the state of Ohio maintains a beehive inspection program. The program is designed to detect bee diseases in their early stages and to prevent their spread. Under ORC § 909.02, beekeepers are supposed to register with the Ohio Director of Agriculture. However, most beekeepers do not register, presumably out of ignorance of the statutory requirement.

ORC § 909.05 provides that the Director, or his authorized representative, may enter commercial structures and examine beehives and bee equipment without prior notice, without a warrant, and outside the presence of the owners. Inspectors are provided with a training manual that outlines the objectives of the inspection program. The manual discusses the bee diseases that are of particular concern, and states a "goal" of at least one inspection each year, to be conducted during "business hours" in the months of June, July, and August.

Three weeks ago, a commercial beekeeper sued the State of Ohio in federal district court, seeking to have ORC § 909.05 declared unconstitutional "insofar as it purports to authorize nonconsensual beehive inspections without a warrant."

QUESTION #7 (20 points) (10 % of exam)

You are the Ohio Attorney General, and it is your job to persuade the court that ORG § 909.05 is constitutional because it falls within the administrative search exception to the warrant requirement. Briefly outline your argument and evaluate its chances for success.

[Note: assume for this question that there is no problem with either the availability or timing of judicial review.]

QUESTION #8 (10 points) (5 % of exam)

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), has been described as the "counter Marbury [v. Madison] for the administrative state." Why?
