

Introduction to Administrative Process

Final Examination

Professor Field

Spring 2010

General Instructions

This is a three-hour, open-book exam; you may consult any written materials.

Use the answer sheet provided; be sure to include your exam number.

References to, e.g., "Agency" or "Statute" are to a *specific* entity or document; "agency" or "statute" are not. Federal law applies to action by state or local agencies. All statutory citations are to 5 U.S.C. unless otherwise stated.

In Parts I and II, only the first 20 answers to any of 24 questions count.

Part I: Multiple Choice

[80 points]

Choose the best concluding phrase or statement for any 20 of the following questions.

1. If an unhappy applicant for a research grant seeks court review, the court is apt to:
 - A. find the merits unreviewable.
 - B. find the process unreviewable.
 - C. remand for hearing under § 553.
 - D. remand for hearing under § 554.
2. Despite protests about its need and feasibility during informal rulemaking, Agency's rule was adopted as proposed. In such a case, a court would be most likely to refuse enforcement if:
 - A. the affected party had not previously challenged the rule directly.
 - B. the affected party had previously challenged the rule directly.
 - C. Agency offered no response to participants' objections.
 - D. it disagreed with Agency's assessment of the facts.
3. In an ex parte proceeding, Board issued a unanimous opinion. If one of three members had been replaced after oral argument, a court:
 - A. would ordinarily review de novo.
 - B. should consider the last clause of § 706.
 - C. would remand for reargument if Appellant was entitled to a hearing.
 - D. should remand for reargument because Appellant was entitled to a hearing.
4. Statute says that Court X "may" review all Agency action. If Jones (J) seeks APA review of an ALJ's decision in an otherwise appropriate district court, the latter court:
 - A. is obligated to transfer to Court X under 28 U.S.C. § 1631.
 - B. should transfer to Court X under 28 U.S.C. § 1631.
 - C. may dismiss if an intramural appeal is required.
 - D. is unlikely to read "may" as "shall."
5. If J (Q. 4) had filed in Court X instead, that court:
 - A. should transfer the case to an appellate court.
 - B. may consider the challenge despite failure to exhaust.
 - C. must reject the challenge if Statute requires exhaustion.
 - D. may reject the challenge if it would prefer a higher-level Agency opinion.

6. 35 U.S.C. § 292(a) imposes fines for patent mismarking. Under § 292(b), "any person" may sue for the fine but must split the recovery with the government. If Competitor (C) sues, a court:
 - A. will dismiss because private parties cannot sue under criminal statutes.
 - B. should consider the meaning of "any person" in the Lanham Act.
 - C. must consider the meaning of "any person" in the Lanham Act.
 - D. is apt to regard C as suing on behalf of the government.

7. If, after formal proceedings and intramural review, Agency orders a firm to cease using a trademark found to be deceptively misdescriptive:
 - A. Section 706(2)(A) review of the order is appropriate.
 - B. a court that views the order as too harsh must revise it.
 - C. a court that questions the need for the order may quash it.
 - D. Section 706(2)(E) compels enforcement if there is substantial evidence of deception.

8. If FDA prosecutes a patentee for making deceptive claims of therapeutic utility, a court will:
 - A. find the government collaterally estopped as to uses claimed in the patent.
 - B. dismiss, finding the PTO's grant binding on all issues.
 - C. dismiss if criminal penalties are sought.
 - D. if requested, set the case for jury trial.

9. When agencies' statutory jurisdictions overlap, courts resolve conflicts in favor of the agency:
 - A. that acts first.
 - B. with general jurisdiction.
 - C. with specific jurisdiction.
 - D. whose jurisdiction was first conferred.

10. If Official is criticized in congressional oversight hearings, courts are apt to:
 - A. preclude Official from thereafter acting on adjudicatory matters discussed in detail.
 - B. find such criticism by members of the House and Senate to be inappropriate.
 - C. overlook most discussions of pending adjudications.
 - D. regard that as part of political life.

11. Decisions of agency adjudicators subject to intramural review:
 - A. can be dictated by those who may review de novo.
 - B. cannot be influenced by those who may review de novo.
 - C. cannot be influenced except by those who may review de novo.
 - D. can generally be dictated by those who can assign cases for decision.

12. If, after ex parte proceedings, Agency refuses Brown's (B) application to register, a court:
 - A. must remand if the rejection is not supported by clear and convincing evidence.
 - B. must remand if the rejection is not supported by substantial evidence.
 - C. must remand if it cannot discern Agency's reason for refusal.
 - D. must remand if Agency failed to follow §§ 556 and 557.

13. If Agency publishes a manual explicitly for guidance of its employees:
 - A. parties to Agency proceedings are also bound.
 - B. parties may rely on it, but they are not necessarily bound.
 - C. parties who appear before Agency cannot cite it as authority.
 - D. persons affected by Agency decisions are entitled to participate in its drafting.

14. Inspired by *Syntek*, the Copyright Office plans to adopt procedures for third party cancellations. Before doing so, it should appreciate that courts would find:
- A. such rule making to be outside the scope of its delegated authority.
 - B. it necessary for initiating third parties to participate.
 - C. such rule making not to require § 553 proceedings.
 - D. such rule making to require § 553 proceedings.
15. Meanwhile (Q. 14), the Office decided to cancel a registration based on a finding of fraud. Under those circumstances, a court would:
- A. defer if the Office states that court opinions compelled its action.
 - B. reverse because no current rule provides such a basis for cancellation.
 - C. defer if the Office bases its action on its perception of administrative needs.
 - D. reverse if its decision is at odds with judicial opinions addressing common law fraud.
16. If the Office (Q. 14) contemplates designing procedures for cancelling registrations obtained only by fraud, it should appreciate that a court would likely find:
- A. formal, trial-type proceedings to be required by the 5th Amendment.
 - B. administrative expertise to warrant scant deference on the facts.
 - C. formal trial-type proceedings to be required by § 554.
 - D. the procedure to exceed delegated agency authority
17. A new Copyright Register proposes to test and license practitioners. To sit, candidates would be required to hold college degrees in, e.g., literature, art or music. A court would:
- A. find the promulgation of such requirements to be § 553 exempt.
 - B. insist that such requirements be imposed through formal rule making.
 - C. find her unable to impose such requirements on members of state bars.
 - D. find her unable to impose such requirements on any would-be practitioner.
18. Following Agency action, Flo, a lawyer, filed a court challenge to a rule and its application to her. Agency then gave Flo what she wanted and moved to dismiss for mootness. If that occurs, and she later files for attorney fees:
- A. her ability to recover will be unaffected by whether she represented herself.
 - B. her ability to recover would not depend on whether the case is moot.
 - C. she will be unable to recover because she was not a prevailing party.
 - D. they will be unavailable if her income is above the poverty line.
19. Statute obligates Agency to eliminate unnecessary childhood pesticide risks. Assume that use of a toxic pesticide on corn is needed to keep milk affordable, and the risk of exposure is already remote. If, despite those facts, Agency bans production of the pesticide and refuses to consider other means to reduce the risk of exposure to children, a court is most likely to:
- A. uphold the ban.
 - B. reject the decision as clearly erroneous.
 - C. find Statute to delegate excessive legislative authority.
 - D. remand for consideration of options that were ignored.

20. After Registrant (R) sued Firm (F) for trademark infringement, F instituted cancellation proceedings. The TTAB found its filing untimely, however, and dismissed F's petition. If so, F:
- must seek intramural review before challenging in any US District Court.
 - may seek intramural review before appealing to the Federal Circuit.
 - must seek rehearing before appealing to the Federal Circuit.
 - will be unable to assert invalidity as a defense.
21. Nibby (N) noticed Duh's (D) pending claims for a process of entertaining cats with ribbon and emailed a friend in the PTO. N was told that D's application had already been sent to issue and the fee paid. If N files suit before the PTO acts, a court would:
- order the PTO to permit N to intervene.
 - order the PTO to withdraw the application.
 - be unlikely to interfere with issuance of the patent.
 - interfere only if it could do so before the PTO acts.
22. Assistant Commissioner (AC) knows from personal experience that D's invention (Q, 21) is unpatentable. Alerted by N, she prevented issuance. If D sues under the APA, a court would:
- order the patent to issue because of N's ex parte contact.
 - defer to the PTO's resolution of the substantive issues.
 - defer to the PTO's resolution of the procedural issues.
 - order the patent to issue because of AC's clear bias.
23. OED accused Kruk (K) of backdating PTO correspondence. In preparation for a hearing, K has sought documents explaining failure to pursue previously alleged infractions of that kind. If so, the FOIA Officer will most probably:
- receive judicial deference with regard to her views of § 552(b) exemptions.
 - be justified in withholding all such documents under § 552(b)(5).
 - be justified in withholding all such documents under § 552(b)(7).
 - be obligated to provide such documents in redacted form.
24. Several attorneys have filed complaints accusing Examiner (E) of ethnic and sexual bias in her treatment of applicants. Assume that E is entitled to a §§ 556-57 hearing if needed before she is discharged or other action is taken. If her case goes to hearing, refusal to provide copies of those complaints would be most problematic in light of:
- § 552(d).
 - § 556(d).
 - § 552(b)(7)(C).
 - § 552(b)(7)(D).

Part II: Matching

[20 points]

Please match the best description to any (and only) 20 of the numbered cases.

- | | |
|-------------|---------------------------------|
| 1. PHC | 13. Chrysler |
| 2. Mead | 14. Athridge |
| 3. Block | 15. WATCH |
| 4. Eltra | 16. Butterworth |
| 5. Perales | 17. Christianson |
| 6. MPAA | 18. Toilet Goods |
| 7. Winner | 19. Florida E. C. Ry. |
| 8. Chadha | 20. Vermont Yankee |
| 9. Rydeen | 21. Morgan v. Daniels |
| 10. Heckler | 22. Dickinson v. Zurko |
| 11. SOCAL | 23. Sierra Club v. Costle |
| 12. Sun Ray | 24. National Petroleum Refiners |

- A. Considers implicit limits on intramural reviewers.
- B. Considers a rule unsupportable under § 706(2)(A).
- C. The residuum rule does not apply to federal agencies.
- D. Decisions to prosecute are presumptively unreviewable.
- E. Administrative rules advance a variety of important ends.
- F. Courts' ability to make reciprocal transfers is very limited.
- G. Some statutory requirements do not strictly bind agencies.
- H. An agency's decision to file a formal complaint is not reviewable.
- I. Even when exhaustion is required by statute, there are exceptions.
- J. A rule was not facially unconstitutional or otherwise unsupported.
- K. Criminal statutes rarely confer standing on incidental beneficiaries.
- L. Notice and comment rules can normally be applied only prospectively.
- M. If the chief officer is appointed by the president, the agency is executive.
- N. The presumption in favor of court review can be rebutted by implication.
- O. Courts should defer to adjudicatory decisions of executive branch officials.
- P. Compared to court proceedings, inter partes PTO proceedings are "informal."
- Q. Addresses factors relevant when courts may, but need not, await agency action.
- R. A § 553 proceeding satisfies any requirement that a rule be made after "hearing."
- S. Agencies are presumptively delegated the capacity to exercise procedural options.
- T. Agencies whose legal views are entitled to deference may make rules under § 553.
- U. The same process is required to disapprove action as to delegate the capacity to act.
- V. Sets forth a variety of factors that influence courts' deference to agencies' legal views.
- W. Unlike review under § 706(2)(A), § 706(2)(B) permits consideration of new evidence.
- X. Unless otherwise provided by statute, agency review is presumptively governed by the APA.

Answer Sheet

Part I — 80%
Answer only 20 of 24 (4% each)

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____
- 8. _____
- 9. _____
- 10. _____
- 11. _____
- 12. _____

- 13. _____
- 14. _____
- 15. _____
- 16. _____
- 17. _____
- 18. _____
- 19. _____
- 20. _____
- 21. _____
- 22. _____
- 23. _____
- 24. _____

Part II — 20%
Answer only 20 of 24 (1% each)

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____
- 8. _____
- 9. _____
- 10. _____
- 11. _____
- 12. _____

- 13. _____
- 14. _____
- 15. _____
- 16. _____
- 17. _____
- 18. _____
- 19. _____
- 20. _____
- 21. _____
- 22. _____
- 23. _____
- 24. _____