

**Introduction to Administrative Process
Final Examination**

Professor Field

Spring 2009

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.

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. Ex parte determinations that affect substantial rights of third parties are:
 - A. acceptable only if third parties can participate in procedures for reconsideration.
 - B. acceptable only if they can be reversed on a preponderance of evidence.
 - C. acceptable if they can be collaterally challenged.
 - D. unacceptable.

2. When the bases for agency refusals are not apparent, courts most often:
 - A. remand.
 - B. put decision makers on the stand.
 - C. order agencies to grant the requested action.
 - D. accept legitimate reasons offered when refusals are challenged.

3. Intramural appellate procedures not set forth in statutes or rules:
 - A. easily run afoul of APA § 706(2)(B).
 - B. are fundamentally unacceptable.
 - C. are apt to be found acceptable.
 - D. run afoul of APA § 706(2)(D).

4. Agency rules that can be enforced by injunction, seizure or criminal penalties:
 - A. cannot be challenged in the context of enforcement.
 - B. can frequently be challenged when they become final.
 - C. can be challenged only in the context of enforcement.
 - D. cannot be challenged by a party who did not participate when the rule was made.

5. Ralph's due process challenge to Agency's refusal to accept a late fee can be based:
 - A. only on the Constitution.
 - B. on APA § 706(2)(B) and (F).
 - C. on APA § 706(2)(B) but not (F).
 - D. on APA § 706(2)(F) but not (B).

6. If Statute says that Agency action "may" be challenged in a particular court:
 - A. mandamus is apt to be available in most district and appellate courts.
 - B. APA review is apt to be available in any appropriate appellate court.
 - C. APA review is apt to be available in any appropriate district court.
 - D. many courts are apt to construe "may" as "shall."

7. Agency has exclusive jurisdiction to set rates, conditions and territories of service. If its Statute also contains a savings clause, the statute is apt to be construed to permit:
 - A. no private action affecting the same subject matter.
 - B. consumers to sue regulated parties but only in tort.
 - C. causes of action consistent with regulatory objectives.
 - D. consumers to sue regulated parties in both contract and tort.

8. If Agency has dubious grounds to proceed against Respondent (R):
 - A. a court would probably halt the proceedings under the 5th Amendment.
 - B. a court would probably halt the proceedings under APA § 704.
 - C. a court might halt the proceedings under APA 706(2)(A).
 - D. the best R could hope for is relief under the EAJA.

9. When an ALJ's initial order to take corrective action becomes final, Respondent (R):
 - A. must ask for reconsideration before challenging the order.
 - B. can challenge the order unless a court requires intramural review.
 - C. can get judicial review unless Statute or existing Rule compels intramural review.
 - D. cannot obtain judicial review unless Agency waives all rights to intramural review.

10. Review under 35 U.S.C. § 145 or 15 U.S.C. § 1071(b):
 - A. can compensate for process deficiencies within the PTO.
 - B. is essentially the same as review under §§ 141 or 1071(a).
 - C. is more deferential than review under §§ 141 or 1071(a).
 - D. is based on only the record compiled within the PTO.

11. If, by Statute, Agency Head (AH), appointed by the President, serves for a five-year term:
 - A. Agency is best described as "dependent."
 - B. AH serves at the pleasure of the President.
 - C. Senate participation in the appointment process is unconstitutional.
 - D. Agency will probably be represented in court by the Attorney General.

12. Procedures set forth in agencies' employee manuals:
 - A. impose duties that can be enforced only against employees by supervisors.
 - B. cannot be changed except by notice and comment rule making.
 - C. may confer important rights on outside parties.
 - D. are usually of small interest to private parties.

13. If new Statute provides that the Copyright Office may reconsider and cancel registrations made prior to its effective date and that litigation must be stayed during reconsideration:
 - A. the Office could adopt rules of retrospective effect.
 - B. it is apt to violate the 5th, 6th and 7th Amendments.
 - C. it is apt to violate only the 5th and 7th Amendments.
 - D. the Office could take retrospective action only by adjudication.

14. If Agency may issue “orders” that set uniform milk prices “after hearing”:
- A. it may use rule making, but APA § 553(c) requires formal proceedings.
 - B. the quoted terms indicate that it may do so only under APA § 554.
 - C. it may use § 553, but courts may require oral hearings.
 - D. it may use informal rule making.
15. Director (D) of Agency (Q. 14) has given speeches indicating that she favors powdered over liquid milk because it has a longer shelf life. If Producer (P) asks D not to participate in proceedings that may affect relative product availability in selected markets, and she refuses:
- A. judicial review is certain to be unavailable at this time.
 - B. a court might order recusal based on D’s evident biases.
 - C. a court should order recusal if D clearly has an unalterably closed mind.
 - D. a court should order recusal if D probably has an unalterably closed mind.
16. For years, Agency has required applications to be in a particular form. Bob regards that formal requirement as silly and refuses to conform. If Agency rejects his application:
- A. Bob can prevail if the requirement was not promulgated after notice and comment.
 - B. Bob can prevail if the requirement does not appear in the C.F.R.
 - C. Agency will prevail unless a court finds the requirement silly.
 - D. Agency’s decision is likely to be sustained.
17. Agency has long issued licenses “in the public interest.” If Applicant is denied a license on differing grounds at several levels of informal review, Applicant might:
- A. convince a court to order formal adjudication.
 - B. convince a court to order the grant of its license.
 - C. absent rules on point, convince a court to require use of agency precedent.
 - D. be best served by claiming that Agency’s authority is unconstitutionally broad.
18. Beta, distressed that Agency is not forcing a competitor to comply with its rules:
- A. is unlikely to get a court order compelling Agency enforcement.
 - B. can get a court order compelling Agency enforcement.
 - C. can petition for enforcement under APA § 553(e).
 - D. can cease its own compliance.
19. Agency (Q. 18) announced new enforcement guidelines that focus on the volume of parties’ sales rather than the relative cost of their products. If Rudd, adversely affected, seeks review:
- A. standing is unlikely.
 - B. courts are likely to regard Rudd’s challenge as moot.
 - C. courts are likely to regard Agency’s guidelines as now unfit for review.
 - D. Agency’s guidelines are unlikely to survive an APA § 706(2)(A) challenge.
20. By statute, Congress effectively reversed the priorities adopted by Agency (Q 19), and new, conforming rules were promulgated after notice and comment. If Gomez, adversely affected, challenges those rules based only on the results of studies that justify the Agency’s prior approach:
- A. his best arguments will be based on APA § 706(2)(E).
 - B. he is most likely to fail under APA § 706(2)(C).
 - C. he will clearly prevail under APA § 706(2)(A).
 - D. the rules will be seen as unreviewable.

21. Agency undertook to meet a congressional demand for more efficient hybrid vehicles. Various battery manufacturers urged self-serving standards. The final rules pleased no one. If LiOx challenges them on technical bases, a court is most apt to:
- A. focus on the “concise general statement” required by APA § 553(c).
 - B. determine whether all relevant factors were addressed in testimony.
 - C. closely compare the technologies with an eye to § 706(2)(E).
 - D. remand, ordering full opportunity for cross-examination.
22. Agency never sought congressional approval, but it has long funded rulemaking participants seen to provide missing, relevant perspectives. If the Pacific Legal Foundation (PLF) receives support and Public Citizen (PC) challenges, the most important consideration should be:
- A. whether PLF serves the public interest.
 - B. whether PLF can offer a relevant perspective.
 - C. that Congress is aware of how Agency has used its money.
 - D. that parties in litigation usually bear their respective expenses.
23. After investigation, Agency charged Bono (B) with encouraging unsafe workplace practices. If B is refused pretrial statements of employees expected to testify, a court is most apt to:
- A. determine whether their release will harm Agency’s case.
 - B. halt the procedure as denying fundamental due process.
 - C. require that they be available before final disposition.
 - D. order their immediate release.
24. If Nosey, under Agency rules, is refused several requested documents, judicial resolution of the dispute is most apt to turn on:
- A. a court’s de novo consideration of FOIA.
 - B. whether Agency employed formal rule making.
 - C. whether a court finds Agency’s interpretation reasonable.
 - D. the adequacy of Agency’s explanation of grounds for refusal.

Part II: Matching
[20 points]

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

- | | |
|--------------|---------------------------------|
| 1. Bose | 13. Athridge |
| 2. Mead | 14. Butterworth |
| 3. Ooms | 15. J.B. Williams |
| 4. Jerri's | 16. Air Line Pilots |
| 5. Leeds | 17. Brown-Forman |
| 6. Block | 18. Vermont Yankee |
| 7. Perales | 19. Dominion Energy |
| 8. Syntek | 20. Dickinson v. Zurko |
| 9. Rydeen | 21. Sierra Club v. Costle |
| 10. McKart | 22. Public Citizen v. Young |
| 11. Colligan | 23. Am. Horse Prot'n Ass'n |
| 12. Chrysler | 24. National Petroleum Refiners |

- A. Delaney clauses limit FDA choices.
- B. Most PTO rule making is exempt under the APA.
- C. Hearsay is often admissible in agency adjudications.
- D. FOIA does not limit agencies' discretion to disclose.
- E. Agency rules can effectively reverse judicial precedent.
- F. Standing was denied despite statutory use of "any person."
- G. Juries are presumedly available before penalties are imposed.
- H. Rules enacted after statutory deadlines are nevertheless valid.
- I. Rules that discriminate between indistinguishable people are invalid.
- J. The APA gives interested persons a right to petition for rule changes.
- K. Beneficiaries of administrative schemes may be denied judicial review.
- L. Agency supervisors cannot necessarily review all decisions of subordinates.
- M. Specific grants of agency jurisdiction trump general grants of jurisdiction.
- N. Rule making can narrowly limit issues to be resolved in later adjudications.
- O. With few exceptions, APA § 559 makes that Act applicable to all agencies.
- P. Information unavailable under FOIA can sometimes be otherwise obtained.
- Q. Many factors influence the degree of deference due agency pronouncements.
- R. Substitution of a Board member after hearing did not warrant another hearing.
- S. Failure to exhaust may foreclose collateral challenges to agency determinations.
- T. Review of adjudications under APA § 706(2)(A) is limited to the agency record.
- U. Policy is more fairly developed in rule making rather than adjudicatory contexts.
- V. Propriety of a registration was referred to the Copyright Office for reconsideration.
- W. Absent a legislative mandate, adjudicatory safeguards are unnecessary in rule making.
- X. Notice and comment rule making may be needed before eliminating prior exemptions.

Answer Sheet

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

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

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