Introduction to Administrative Process

Final Examination

Professor Field — Spring 2007

General Instructions

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

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.

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

• Questions in Part I are worth four times as much as those in Part II; in both, answer only 20 of 24 questions.

Part I: Multiple choice

[80 points]

Please choose the letter corresponding to the most correct concluding phrase or statement.

1. De novo judicial review of administrative action:
   A. is common.
   B. is never explicitly authorized by Congress.
   C. often occurs when Congress provides otherwise.
   D. is unlikely to occur when there is no law to apply.

2. Judicial review of final administrative action is:
   A. generally available in an appropriate U.S. appellate court.
   B. presumptively available to someone in some court.
   C. generally unavailable absent explicit authorization.
   D. usually available to all who seek it.

3. Parties adversely affected by final rules where Statute is silent concerning review:
   A. can challenge collaterally in enforcement proceedings.
   B. must promptly challenge directly or not at all.
   C. neither A nor B is correct.
   D. both A and B are correct.

4. If a court decides that it probably lacks subject matter jurisdiction to review an agency, it:
   A. must dismiss the appeal and advise appellant to refile elsewhere.
   B. may not dismiss the appeal if the case has been transferred there.
   C. must dismiss the appeal unless the time to file elsewhere has expired.
   D. may not dismiss the appeal if other courts seem also to lack jurisdiction.

5. Staff Attorney (SA) initiated prosecution against Petitioner (P). After an ALJ found SA's complaint meritless, the five-member Board reversed. If P seeks to terminate the proceedings, a court should:
   A. consider whether SA filed a credible complaint.
   B. dismiss for lack of primary jurisdiction.
   C. dismiss for lack of final agency action.
   D. remand for a better explanation.

6. Nosey (N) opposed Broadcaster's (B) license renewal, but Agency (A) ruled in B's favor. If, having newly discovered key facts, N challenges without seeking reconsideration, a court should:
   A. remand despite any exhaustion requirement.
   B. affirm because N didn't exhaust its remedies.
   C. affirm because the issue wasn't raised before A.
   D. review on the merits; it would have been futile to raise the issue before A.

7. Court basically agrees with Agency's (A) decision but not with its opinion. If so, it should:
   A. affirm if A's brief offers necessary support.
   B. affirm because the decision is correct.
   C. reverse despite its view of the merits.
   D. remand for a better explanation.

8. By statute, Directors are appointed by the President, subject to Senate confirmation, and Commissioners are appointed by Directors for five-year terms. This means that, upon election of a new President:
   A. Directors can be dismissed only for cause.
   B. Commissioners can be dismissed only for cause.
   C. Directors and Commissioners can be replaced with party loyalists.
   D. Neither Directors nor Commissioners can be replaced with party loyalists.

9. Because of Frugo's (F) patent for flavor-enhancing technology, its stock sells at a hefty price. The SEC, skeptical about F's invention, launched an investigation. At F's behest, a court should:
   A. hold that the SEC lacks jurisdiction; utility was determined by the PTO.
   B. hold that the SEC's subject matter jurisdiction is unreviewable.
   C. reject F's facial challenge to the SEC's jurisdiction.
   D. remand the issue to the PTO for resolution.

10. After being urged by the SEC, the PTO is considering its options for dealing with F's (Q 9) patent. Yet, it refuses to hear from F before deciding how, if at all, to proceed. On those facts:
   A. any PTO reconsideration violates F's right to a jury trail.
   B. its current inability to participate violates F's due process rights.
   C. F deserves no more than a formal assessment before final action is taken.
   D. PTO's dealings with the SEC amounts to impermissible ex parte communication.

11. Based on written SEC submissions and F's written responses, the PTO (Q 10) later found F's patent invalid. If SEC's documents would be inadmissible in a jury trial:
   A. they cannot be considered except in a formal PTO adjudication.
   B. any harm can be rectified in a 35 U.S.C. § 145 proceeding.
   C. the PTO could not regard them as substantial evidence.
   D. the PTO cannot consider them in any context.

12. Agency (A) usually develops standards through ad hoc adjudication. Despite lack of explicit authority, A recently promulgated a major rule using APA § 553. If A's statute does not say otherwise, that ought to be:
   A. acceptable because the rule applies only prospectively.
   B. acceptable because fewer people will be able to participate.
   A. unacceptable because of blatantly harmful retroactive effects.
   C. unacceptable because affected parties have no opportunity to participate.

13. Agency (A) has explicit authority to promulgate type-X rules subject to hybrid rulemaking requirements. In such circumstances, Court is likely to hold that agency:

A. must add safeguards that seem necessary for just results in all rule making.
B. is obligated to follow APA §§ 556-57 in type-X rulemaking.
C. can promulgate no rules other than ones of type X.
D. may use APA §§ 556-57 for type-X rulemaking.

14. Agency (A) has broad authority to promulgate procedural rules. If A modifies such a rule by mailing notices to all lawyers known to practice before it, a court would find the modification:

A. enforceable upon everyone.
B. enforceable upon all recipients.
C. unenforceable unless it was also published in the C.F.R.
D. unenforceable because it was not published in Federal Register.

15. Moonbeam (M) applied for a license. By statute, Board (B) is to issue licenses needed to serve "public convenience and necessity." M's license was initially denied for one reason, on review for a second reason, and finally by the Board itself for a third reason. Under those circumstances, a federal reviewing court would most likely:

A. order B to issue M's license if that is consistent with B's published opinions.
B. reverse and order B to promulgate standards by formal rulemaking.
C. find the statute unconstitutional for lack of an intelligible principle.
D. affirm if B's opinion satisfies APA § 706(2)(A).

16. Agency often enforces ZTRA, its 50-year-old policy setting zero tolerance for refiled applications that pose no new issues. On that basis, Bub's second application was summarily rejected. After he filed for court review of both ZTRA and A's decision, Bub's application was allowed. If Bub nevertheless insists that ZTRA be eliminated, the court is most likely to:

A. dismiss; courts lack jurisdiction over moot cases.
B. regard ZTRA as facially valid but not yet ripe for consideration.
C. find ZTRA to be facially inconsistent with the Fifth Amendment.
D. regard ZTRA as facially valid but open to challenge on the merits.

17. Agency asked XS to participate in rule making; it did not. Unhappy with the rule, XS sought the statutory review open to parties in Court. On those facts, Court is likely to:

A. hold that it lacks jurisdiction because XS is not an interested person.
B. reconsider everything considered by A regardless of the source.
C. hold that it lacks jurisdiction because XS was not a party.
D. review under APA § 706(2)(F).

18. Statute directs Agency (A) to adopt rules to eliminate major risks posed by lawn darts and other named toys or to ban them. A found that lawn darts cannot be made less risky and still be "lawn darts," so it ordered no changes. It also rejected a petition to ban them. If A stands by its threshold finding, on review a court should:

A. regard A's discretion as unreviewable.
B. regard A's expert opinion as irrelevant.
C. defer to A's expertise if backed up with sound reasons.
D. defer if technical experts uniformly support A's position.

19. Later A (Q 18) adopted a rule banning sale of Toy for use by children under the age of twelve. Only informal rulemaking was necessary, but the stakes were high. A therefore used "formal" rule making. If Maker, who participated, challenges the rule, a court is likely to:
A. see differences between 706(2)(A) and (E) review as not outcome determinative.
B. hold that Maker cannot challenge on any basis it did not itself argue.
C. given the process used, review only as specified in APA § 702(E).
D. reverse on the basis of APA § 706(2)(D).

20. XO cannot account for a significant quantity of a hazardous material it once owned. Because its statute calls for a hearing, Board's chief officer briefly discussed the matter with XO's president and counsel. She then ordered XO to investigate. Because failure to conduct an adequate investigation might result in loss of a license, XO seeks judicial review. The court should:
A. reject XO's challenge for failure to exhaust its remedies.
B. remand for a formal hearing because the APA requires it.
C. because the Sixth Amendment applies, uphold B's choice of process.
D. unless inconsistent with the Fifth Amendment, uphold B's choice of process.

21. After investigation, Agency (A) refers about 40% of certain matters to the Department of Justice for prosecution. If Nosey wants memos concerning the other 60%, A can refuse:
A. because prosecutorial decisions involve unreviewable discretion.
B. because that is supported by FOIA § 552(b)(7)(A).
C. if Nosey has offered no good reason to have them.
D. if that is supported by FOIA § 552(b)(7)(E).

22. If the IRS urges FOIA § 552(b)(7)(C) or (D) in response to a request, a court is apt to:
A. summarily reject them.
B. allow only minimal redaction when needed.
C. exempt each and every IRS document of concern.
D. let the requester inspect but not copy documents of concern.

23. Fox (F) wants documents prepared for Agency by his competitor, Box (B). A's best reason to refuse is likely to be that they are exempt under:
A. FOIA § 552(a)(2)(A).
B. FOIA § 552(b)(2).
C. FOIA § 552(b)(4).
D. FOIA § 552(b)(6).

24. If A (Q 23) tells B that it intends to give F all that it wants, B can file an action under:
A. the APA.
B. the FOIA.
C. the Trade Secrets Act (18 U.S.C. § 1905).
D. the Economic Espionage Act (18 U.S.C. §§ 1831 et seq.).

Part II: Matching

[20 points]

Please match the best definitions to any (and only) 20 numbered items.

1. ACUS
2. Hearings
3. Finality
4. Ripeness
5. Prejudice
6. Golden rule
7. Attorney fees
8. Reversal rates
9. Savings clauses
10. Federal Circuit
11. Legislative veto
12. Federal Register
13. 28 U.S.C. § 1361
14. Dependent agency
15. Public participation
16. Nonstatutory review
17. Substantial evidence
18. Independent agency
19. Formal adjudications
20. Enrolled bill doctrine
21. Rulemaking deadline
22. Informal adjudication
23. Code of Federal Regulations
24. Copyright Office's Compendium II

A. Common feature of statutes.
B. Inspired by *Panama Refining*.
C. Not necessarily "on the record."
D. Authorized by 44 U.S.C. §1510.
E. Never initiated in appellate courts.
F. Principal officers serve for fixed terms.
G. One approach to statutory construction.
H. Often named in 28 U.S.C. § 1631 motions.
I. Requirement unlikely to void agency action.
K. Doomed by a famous case involving the INS.
L. Of dubious value when APA § 706 is available.
M. Influential in refining administrative processes.
N. Explicitly subject to de novo intramural review.
O. Shouldn't foreclose facial review of agency rules.
P. Of dubious value in assessing procedural fairness.
Q. The APA sets no standards for intramural review.
R. Provided by, e.g., the Equal Access to Justice Act.
N. Exclusive source of rules governing intramural review.
S. *Principal officers serve at the pleasure of the President.*
T. Exempts legislatures from judicial scrutiny of their processes.
U. An important distinction between adjudication and rule making.
V. Standard for judicial review of "formal" administrative proceedings.
W. Not achieved merely by exhausting currently available intramural appeals.
X. Generally required, and specifically flagged by APA §§ 556(d) and 706(2).

Examination No. _____KEY____

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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