Introduction to Administrative Process

Final Examination

Professor Field Spring 2004

General Instructions

This is a three-hour exam. You may consult any written materials but not each other.

- **Use the answers sheet provided; be sure to include your exam number.**
- **In both parts, answer only 20 of 24 questions.**
- Section references, unless otherwise indicated refer to the APA. "Agency" or "Party," for example, refers to some *specific* entity; "agency" or "party" does not.
- **Note that questions in Part I are worth four times as much as those in Part II.**

Part I: Multiple choice

[80 points]

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

1. Patents were once more frequently invalidated in infringement litigation because:
   A. applicants were apt to invest less in prosecution than defendants in litigation.
   B. alleged infringers had no opportunity to participate during prosecution.
   C. judges reviewing directly were more sympathetic to patent applicants.
   D. Each of the three listed factors played an important role.

2. Judicial review of agency action:
   A. is unavailable for informal adjudication.
   B. is subject to the rule of prejudicial error.
   C. can be precluded by properly-adopted agency rules.
   D. is more deferential in formal than informal adjudication.

3. Formal intramural administrative adjudication usually:
   A. requires the use of juries.
   B. is reviewed under § 706(2)(A).
   C. leads to orders that require judicial process to enforce.
   D. All of the prior statements are true.

4. "Nonstatutory" review of agency action (or inaction):
   A is primarily governed by legislation.
   B. usually trumps statutory review.
   C. is presumptively unavailable.
   D. does not involve legislation.

5. If a court concludes that it lacks jurisdiction over an appeal, transfers are possible:
   A. only if made within the time initially permitted to seek review.
   B. only between courts of appeal and district courts.
   C. but other courts may freely refuse the transfer.
   D. All prior statements are false.

6. In challenges to agency adjudications, courts usually:
   A. may review any action that has become final.
   B. lack jurisdiction unless all intramural appeals have been taken.
   C. may review any final action unless exhaustion is required by statute or rule.
   D. may entertain collateral actions only after all intramural options have been exhausted.

7. When agency rules are challenged as soon as they have been adopted:
   A. they need not have yet become final.
   B. participants need not have previously raised issues themselves.
   C. courts usually entertain all challenges by clearly affected persons.
   D. participants are limited to issues previously raised by themselves.

8. Unless agency-specific legislation provides otherwise, on review of adjudicative facts determined by agencies, courts:
   A. must apply § 706(2).
   B. usually apply § 706(1).
   C. usually apply the de novo standard of review.
   D. must apply the clearly erroneous standard of review.

9. On review of adjudicative facts determined by agencies, district courts:
   A. give great weight to affidavits prepared by the litigants.
   B. never take additional evidence concerning any issue.
   C. usually take additional evidence.
   D. rarely review under § 706(2)(F).

10. Intramural review of formal adjudicative proceedings:
   A. is presumptively de novo if the APA governs.
   B. is unlikely to be de novo when the APA governs.
   C. is likely to be reviewable by the President, if the agency is dependent.
   D. is likely to be reviewable by the President, if the agency is independent.

11. With regard to intramural adjudications, agencies:
   A. must not modify procedures in ongoing cases.
   B. need only provide ample notice of required procedures.
   C. cannot apply procedures set forth only in personnel manuals.
   D. may only use procedures detailed in their organic or enabling legislation.

12. When subject-specific statutes are silent, minimum process is provided by:
   A. § 554 for most informal adjudications.
   B. § 554 for very few formal adjudications.
   C. the Fifth Amendment for all informal adjudications.
   D. the Fifth Amendment for most formal adjudications.

13. In addressing statutory ambiguities, agencies usually must:
   A. use ad hoc adjudication to resolve novel issues retrospectively.
   B. use informal rulemaking to resolve most issues retrospectively.
   C. use informal rulemaking to revisit issues previously considered.
   D. not use ad hoc adjudication to resolve novel issues prospectively.

14. To fill in statutory gaps, e.g., set tire-labeling requirements, agencies:
    A. must provide adversarial hearings if judges feel that they produce better results.
    B. must use formal rulemaking when subject-specific statutes require "hearings".
    C. can never use ad hoc adjudication.
    D. must avoid all forms of bias.

15. In reviewing agency resolutions of ambiguities in their primary legislation, courts:
    A. may require that "interpretive" rules be adopted in accordance with § 553.
    B. may require the same process for modification as for promulgation.
    C. usually require that they be adopted in accordance with §§ 556-57.
    D. are unlikely to construe any ambiguities as "procedural".

16. In considering agencies' choices concerning whether to make rules, courts:
    A. regard them as unreviewable.
    B. often consider whether the agency has needed financial resources.
    C. review them with much more deference than prosecutorial choices.
    D. review them with somewhat less deference than prosecutorial choices.

17. After rules become final, courts:
    A. are unlikely to consider facial challenges prior to enforcement.
    B. will probably consider challenges based on § 706(2)(D).
    C. will only consider challenges based on § 706(2)(B).
    D. will only consider challenges based on § 706(2)C).

18. Once Agency's Rule interpreting Statute becomes final, standing to challenge it:
    A. is presumptively conferred on all interested persons.
    B. mostly depends on participation in helping to draft Rule.
    C. mostly depends on congressional intent evident in Statute.
    D. is usually voided by mootness if Agency promises not to enforce it.

19. Selecting one of several risk-reduction measures of varying cost:
    A. usually involves little more than determining key legislative facts.
    B. usually involves no more than determining key adjudicative facts.
    C. is never delegated to bureaucrats because the nondelegation doctrine forbids it.
    D. usually involves determining their comparative acceptability to affected entities.

20. Detailed risk-reduction measures:
    A. in rules made after expiration of statutory deadlines are void.
    B. never appear in legislation because the nondelegation doctrine forbids it.
    C. are often instituted after non-agency personnel have been paid to participate.
    D. are often adopted by agencies only to be vetoed by one or both houses of Congress.

21. When reviewing rule making, courts are most likely to:
    A. remand if § 553(c) is unsatisfied.
    B. remand if § 553(d) is unsatisfied.
    C. amend under authority conferred by § 706(2)(D).
    D. amend under authority conferred by § 706(2)(B) or (C).

22. When Agency attempts to enforce Rule that interprets its Statute, judges are most apt to:
A. find Rule invalid under § 706(2)(C) if it reflects poor policy choices.
B. defer under § 706(2)(C) only when informal rule making has been used.
C. defer under § 706(2)(C) despite disagreeing with Agency's policy choices.
D. remand, as in *Nova Scotia,* if Rule does not pass muster under § 706(2)(D).

23. In reviewing the application of Agency's Rule interpreting FOIA, judges are most apt to:
A. find Rule invalid under § 706(2)(C) if they disagree with Agency's policy choices.
B. defer under § 706(2)(C) despite disagreeing with Agency's policy choices.
C. defer under § 706(2)(C) if it was promulgated after notice and comment.
D. remand if Rule does not pass muster under § 706(2)(D).

24. Statute establishes duties and creates Agency to enforce them. After investigation, Agency chose not to enforce a duty probably owed by Smith to Jones. In such an instance, Jones can:
A. usually obtain satisfaction from Smith in a private action to enforce Statute.
B. rarely obtain satisfaction from Smith in a private action to enforce Statute.
C. usually get some court to compel action under authority of § 706(1).
D. not obtain review of Agency's decision.

Part II: Matching
[20 points]

Please **match only 20** (of 24) definitions that best correspond to numbered items.

1. Severability clause
2. Law of the case
3. Enrolled bill rule
4. Agency reporters
5. ALJs
6. Jurisdiction
7. Attorney fee recovery
8. *Skidmore* doctrine
9. Agency personnel manuals
10. Agency heads
11. Competent evidence
12. Presentment Clause
13. Adjudication
14. Formal
15. Hearing
16. Savings clause
17. Trade associations
18. Unpublished
19. General policy statements
20. Ex parte contact
21. Substantial evidence
22. Federal Register Act
23. Unbiased
24. Statutory

A. Includes written argument.
B. Cannot be conferred by waiver.
C. Enjoy decisional independence.
D. Preserves pre-existing causes of action.
E. Sources of intramural appellate opinions.
F. Commonly challenge rule making proposals.
G. Often important sources of procedural rights.
H. A probable consequence of *Panama Refining*.
I. Admissible under applicable exclusionary rules.
J. Does not mean ignorant or lacking in emotion.
K. A term of art that usually references §§ 556-57.
L. Requires deference as a function of persuasiveness.
M. May be available under the Equal Access to Justice Act.
O. Holdings that do not necessarily affect non-participants.
N. Sometimes fosters incorrect findings of fact or partiality.
P. May be issued without opportunity for advance comment.
Q. Indicates legislation of specific rather than general applicability.
R. Courts do not examine processes that led to enacted legislation.
S. Proceeding that affects presently identifiable individuals or property.
T. One of several bases for holding congressional vetoes unconstitutional.
U. Preserves most of a statute when a provision is found unconstitutional.
V. Standard of review for jury trials and some administrative proceedings.
W. When applied to opinions, usually intended to mean “nonprecedential”.
X. Potential removal without cause may compromise decisional independence.

Examination No. _____

Answer Sheet

Part I — 80%

*Answer **only** 20 of 24* (4% each)

1. __D__
2. __B__
3. __C__
4. __A__
5. __D__
6. __C__
7. __B__
8. __A__
9. __D__
10. __A__
11. __B__
12. __C__
13. __A__
14. __C__
15. __B__
16. __D__
17. __B__
18. __C__
19. __D__
20. __C__
21. __A__
22. __C__
23. __A__
24. __B__

Part II — 20%

*Answer **only** 20 of 24* (1% each)

1. __U__
2. __O__
3. __R__
4. __E__
5. __C__
6. __B__
7. __M__
8. __L__
9. __G__
10. __X_
11. __I__
12. __T__
13. __S__
14. __K__
15. __A__
16. __D__
17. __F__
18. __W__
19. __P__
20. __N__
21. __V__
22. __H__
23. __J__
24. __Q__