Introduction to Administrative Process

Final Examination

Professor Field Spring 2006

General Instructions

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

Section references, unless otherwise indicated, refer to the APA or to FOIA. References to, e.g., "Agency" or "Statute" are to a *specific* entity or document; "agency" or "statute" are not. Where action by state or local agencies is implied, federal law applies unless otherwise stated.

• 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. That many patents are invalidated is most apt to mean that:
   A. patent examiners are incompetent.
   B. ex parte examination is inadequate.
   C. different courts now review directly and collaterally.
   D. more resources are invested in collateral challenges than in examination.

2. When Statute and Agency rules make no provision for intramural review:
   A. direct supervisors have inherent authority to review.
   B. only nonstatutory judicial review is available.
   C. review is necessarily de novo.
   D. judicial review is unavailable.

3. When parties file constitutional and APA challenges to agency action:
   A. APA § 706(2)(A) review is on the agency record.
   B. APA § 706(2)(B) review is de novo.
   C. neither A nor B is correct.
   D. both A and B are correct.

4. When a statute or agency rules provide for "hearings," parties are minimally entitled to:
   A. present oral argument.
   B. present sworn testimony.
   C. present written arguments.
   D. review under APA § 706(2)(E).

5. When Agency has authority to regulate specified commercial practices:
   A. Agency consideration must precede any tort suit challenging those practices.
   B. if not forbidden by Agency rule, those practices are presumptively legal.
   C. private litigation is never available to challenge such practices.
   D. no prior statement is true.

6. If Agency is alleged to have initiated a trial-type proceeding for political reasons (or others unrelated to its statutory authority), a suit to halt that proceeding:

A. is apt to fail for lack of standing.
B. is apt to be barred by APA § 704.
C. may be opposed by any interested person.
D. must be preceded by Agency's denial of a request that it do so.

7. If Statute states that certain Agency actions may be reviewed in courts of appeal but is silent on standards, in challenges to such actions:

A. APA § 706(2)(A) review in district courts is unlikely to be foreclosed.
B. courts are most apt to review under F.R.C.P rule 52(a).
C. courts are most apt to review under APA § 706(2)(F).
D. courts are least apt to review under APA § 706(2)(F).

8. Statute empowers Board, after hearings on the record, to ban unsafe "toys." If Statute defines neither "toy" nor "safe":

A. any ban would be reviewed only for abuse of discretion.
B. Board cannot act before defining those terms in rule making.
C. Board may define such terms in opinions banning named toys.
D. Statute will probably be found to delegate excessive legislative power.

9. With regard to Board composition, Statute(Q8) provides only that it consists of five Officials who each serve for 3-year terms. If so:

A. Officials, appointed by the President, must be confirmed by the House and Senate.
B. Officials, appointed by the House and Senate, must be approved by the President.
C. Board members, after appointment, serve at the pleasure of the President.
D. Board is the type of entity commonly called an independent agency.

10. If Board (Q8) bans the sale of Blade's 2-inch knives as toys, a court is most likely to:

A. affirm if the decision is supported by substantial evidence.
B. reverse and order Blade only to label them as unsuitable for children.
C. affirm if Board counsel offers several reasons why the ban is justified on the facts.
D. reverse if Blade now agrees to label its knives as unsuitable for people under sixteen.

11. Board's personnel manual says that enforcement should not be undertaken before affording parties a brief hearing. If Blade (Q10) was denied such a hearing, courts would most likely:

A. hold that Board cannot modify published procedures without Federal Register notice.
B. find no basis for reversal under APA § 706(2)(D).
C. reverse on the basis of APA § 706(2)(D).
D. reverse on the basis of APA § 706(2)(B).

12. Board's (Q8) enforcement options include injunctive orders, seizures and criminal prosecutions. If Board, after discovering that Jones sold an arguably banned toy, chooses the last:

A. it may impose penalties after an internal trial-type hearing.
B. it may prosecute the defendant in any court of suitable jurisdiction.
C. it should bring Jones' infraction to the attention of the Department of Justice.
D. the arguably violated ban will be liberally construed because child safety is involved.

13. After Board (Q8) ruled that certain toys must be *labeled* as suitable only for children over *five,* the FTC took measures to prohibit *advertising* those toys for use by those younger than *ten*. If a court can consider a challenge to FTC's jurisdiction, it will find:

A. for the FTC based on its extensive power to prevent deceptive practices.
B. against the FTC if Board's current rules and its proposed rules conflict.
C. that the FTC, absent written agreement with Board, lacks jurisdiction.
D for the FTC because its statute predates Board's.

14. The Bus Board Act (BBA) states that the BB may terminate bus drivers' licenses only after hearings on the record. If the BB adopts rules that (1) require annual renewals and (2) deny licenses to persons over 65, the most effective challenge would focus on the:

A. unfair termination of existing licenses.
B. abolition of individual hearings for people over 65.
C. failure, if true, to promulgate the rules using APA §§ 556-57.
D. failure, if true, to provide a concise general statement of basis and purpose.

15. Investigation shows that BB's rules (Q14) were inspired by a Senator's criticism at a legislature hearing. Soon thereafter, BB's 35-year-old Chair begin opining that 75-year-old bus drivers are a hazard. In light of that, the rules are apt to be:

A. valid without stronger evidence of predisposition or external interference.
B. invalid based on outside interference and clear administrative policy bias.
C. invalid only because of unacceptable legislative interference.
D. invalid only because the Chair did not recuse himself.

16. Six months after BB's rules (Q 14) went into effect, Chauffeurs Local 446 (CL) successfully lobbied for replacement of "65" with "70". BB's amended rules can be construed to:

A. automatically cancel licenses of bus drivers over 70.
B. deny bus drivers over 70 the right to petition for waivers.
C. permit formerly-licensed bus drivers between 65 and 70 to reapply.
D. automatically reinstate licenses of bus drivers who are between 65 and 70.

17. Had the BB refused to consider CL's petition (Q16), courts most likely would have:

A. regarded such a refusal as the exercise of unreviewable prosecutorial discretion.
B. required a brief statement of BB's grounds for denial.
C. denied review under APA § 701(a)(2).
D. reviewed under APA § 706(2)(F).

18. The BBA (Q14) also provides that bus fares are subject to BB approval. Court review is explicitly available only to companies dissatisfied by fares established after hearings. If passengers may participate in those hearings, any passengers seeking review of an approved fare would be:

A. denied review if that would disrupt BBA's basic scheme.
B. denied review because such review is not explicitly provided.
C. granted review because they are at least as much affected as the companies.
D. granted review unless they chose not to participate in the agency proceedings.

19. Joe was previously licensed by the BB. A glitch in BB's amended rules (Q16) led to his being treated differently from others similarly situated. When Joe filed a complaint challenging both the rules and their application to him, BB responded by reinstating his license. If it also moves for dismissal of his entire complaint, a court is most likely to:

A. refuse to consider the facial validity of the rule absent a live controversy.
B. dismiss if the BB has begun proceedings to remove the glitch.
C. grant BB's request because the dispute is now moot.
D. order the BB to amend the offending rule.

20. Fred, who is 73, was licensed before the BB began to impose age bars (Q14). If Fred wants his license renewed, his best approach would be to:

A. show that the BB has misconstrued its enabling legislation.
B. demand the hearing to which he is entitled under the BBA.
C. claim that the BB has been delegated excessive legislative authority.
D. point out, if one is present, BBA's one-house legislative veto provision.

21. The BB recently announced that it will henceforth issue 3-year rather than 1-year licenses (Q14). If the group, Safety First (SF), objects to that change, a court would be most apt to:

A. uphold the BB's exercise of its prosecutorial discretion.
B. uphold the change as supported by APA § 706(2)(A).
C. rule that SF lacks standing for failure to participate.
D. find BB's procedure to offend APA § 706(2)(D).

22. The BBA (Q14) does not apply to cabs or cab drivers, but the BB has announced that any vehicle that can carry more than five passengers is a bus. On these facts, a court:

A. must afford *Mead* deference.
B. must afford *Chevron* deference.
C. may afford *Skidmore* deference.
D. is likely to require 553 rule making.

23. If (toy) Board refuses to provide a copy of internal guidelines for deciding which of its enforcement options (Q12) to pursue, a court is likely to:

A. order their release under FOIA § 552(a)(2)(C).
B. refuse on the basis of FOIA § 552(b)(2).
C. refuse on the basis of FOIA § 552(b)(3).
D. refuse on the basis of FOIA § 552(b)(7).

24. If (toy) Board refuses to provide copies of unpublished memos denying authorization to staff who have sought to pursue certain alleged infractions(Q8), a court is likely to:

A. refuse on the basis of FOIA § 552(b)(4).
B. refuse on the basis of FOIA § 552(b)(5).
C. refuse on the basis of FOIA § 552(b)(7).
D. order their release under FOIA § 552(a)(2)(A).

Part II: Matching
[20 points]

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

1. Procedural
2. Post hoc rationalization
3. Legislative silence
4. Exclusive jurisdiction
5. Primary jurisdiction
6. Exhaustion
7. Executive decisions
8. Reasoned decision making
9. Safe activity
10. ALJ opinion
11. Competent evidence
12. Adjudication
13. Legislation
14. Savings clauses
15. Severability
16. Public participation
17. APA
18. Rulemaking deadline
19. Golden rule
20. Peanut butter rule
21. Trade secret
22. ITC orders
23. Court of claims
24. Private bill

A. Presents acceptable risk.
B. Subject to executive veto.
C. Reviewed under § 557(b).
D. Binds persons who do not exist.
E. One objective of §553 rule making.
F. Exempt from disclosure under FOIA.
G. Classic instance of formality run amok.
H. Usually binds only identifiable persons.
I. Sometimes inferred from "may review."
J. Generally confers benefits on named persons.
K. Unacceptable to support administrative action.
L. Necessary to support most administrative action.
M. Rarely needed to support administrative decisions.
N. Required only if a statute or agency rule so provides.
O. Unlikely to be construed to invalidate agency action.
P. A type of rule exempt from some § 553 requirements.
Q. Subject to exceedingly circumspect review prior to 1947.
R. Rarely used to determine the scope of agencies' authority.
S. May affect whether a statute supplants other causes of action.
T. May guide courts in deciding whether to stay their proceedings.
U. Redresses some private grievances against the federal government.
V. Determines whether statutes survive despite invalidity of a provision.
W. May make broad delegations of legislative authority more acceptable.
X. May be applied when plain meaning generates arguably unintended results.

Examination No. _____KEY____

Answer Sheet

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

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

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

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