

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 Unpublished |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

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