

Administrative Law

Prof. Meidinger

Final Examination

December 11, 2000

Instructions

1. This exam consists of 12 pages, numbered consecutively. Make sure all of the pages are here.
2. There are 21 questions, each worth 3 to 20 points, for a total of 120. Each answer will be weighted according to its allocated points, but especially insightful answers could conceivably receive more than the allocated number of points.
3. All answers should be based solely on the reading materials, lectures, and discussions in the course. Where a question calls for a yes-no or true-false response, you must choose one or the other and circle it. You can then justify or qualify your choice in the explanatory part of your answer.
4. Answer each question in the space provided on the exam, and write legibly.
5. You have four hours to complete the exam.
6. You may consult the assigned course materials, your class notes, and any other materials you played a sufficient role in preparing to justify your using them, but nothing and no one else. You are on your honor.
7. Good luck!

QUESTIONS

1. Imagine that Congress passes a statute stating that it has determined that specified acts of a named agency meet the legal requirements governing the agency with regard to those acts. Based on the material we read in this course, such a statute would violate the separation-of-powers doctrine. True or false, and why? (5 points)

2. Congress should pass a statute requiring each agency of the federal government to perform a cost-benefit analysis before promulgating any rule likely to result in substantial expenditures (say \$10,000 or more) by parties outside the government. The law should also require that no rule be promulgated unless expected benefits exceed costs. True or false, and why? (8 points).

3. In *Chadha*, Chief Justice Berger defined a legislative act as having “the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.” Hoist the Chief by his own petard with a logical argument that by this definition the legislative veto complained of was not in fact a legislative act. (4 points)

4. The real focus of the “arbitrary and capricious” standard is on how an agency explains its decision, rather than on what the agency decides. True or false, and why? (4 points)

5. When an agency conducts an adjudicative proceeding to determine whether an applicant for a license, grant, or other benefit should receive it, the burden of proof is on the agency to justify its decision, regardless of the substance of the decision. True or false, and why? (3 points)

6. The Internet Corporation for Applied Names and Numbers (ICANN)* describes itself as “a technical coordination body for the Internet.” It is “dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy through private-sector, bottom-up, consensus-based means.” It “welcomes the participation of any interested Internet user, business, or organization.” (all citations omitted)

The main thing ICANN does is coordinate the assignment of identifiers, such as internet domain names, IP address numbers, and protocol parameter and port numbers. These must be globally unique for the internet to function.

ICANN has adopted formal rules for giving out domain names and for resolving disputes among contending claimants for domain names, including problems involving asserted trademark infringement. Every internet user that seeks to register a domain name is required to consent to be bound by ICANN rules and regulations before receiving a domain name. ICANN’s governing body is a board of directors, selected by the various types of members in the organization. ICANN is accorded and exercises ultimate authority to determine who gets any given domain name (such as www.law.buffalo.edu).

The internet system was originally fostered and supported by agencies of the U.S. government, starting in 1969. Domain name registration was largely managed by a non-governmental organization, but the government retained ultimate control by controlling the top of the domain name system, the “root zone file.” In the mid-1990s, President Clinton declared his administration’s intention to “support efforts to make the governance of the domain name system private and competitive and to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis.” The lead agency in the effort was the Department of Commerce, which first issued a “request for comment” and then a notice of proposed rulemaking in 1998. The agency received more than 650 comments, many opposing substantive aspects of the proposed rule. In response, the agency ended the rulemaking proceeding and opted instead to publish a policy statement. The policy statement announced that the Department was prepared to enter into an agreement with a not-for-profit corporation organized by internet stakeholders to administer policy for the internet name and address system. It also stated that an appropriate organization must offer stability, competition, private, bottom-up coordination, and representation, and invited interested persons and organizations to submit proposals meeting those criteria. It left controversial issues raised by the proposed rule, such as membership and governance of the corporation, as well as how it would handle trademark matters, to be addressed by the proposals. The policy statement generated four proposals, of which the one to establish ICANN was selected. The Department then entered into various memoranda of

* This hypothetical organization is not to be confused with the real world Internet Corporation for Assigned Names and Numbers. Any resemblance is accidental.

understanding and contracts to support the establishment of ICANN to and to transfer management of the domain system to it. The Department provided hundreds of thousands of dollars to fund the process.

Congress has not passed specific legislation governing the domain name system, nor designated a specific agency to be responsible for it. It did, however, pass riders in appropriations acts for 1999 and 2000 prohibiting the National Science Foundation from spending any funds “to enter into or extend a grant, contract, or cooperative agreement for the support of administering the domain name and numbering system after September 30, 1998.” The Commerce Department cites three general bases for its authority to transfer domain name management to ICANN. These include various statutes allowing it to: (1) “foster, promote, and develop foreign and domestic commerce;” (2) “engage in joint projects on matters of mutual interest with nonprofit organizations; and (3) provide for “coordination of the telecommunications activities of the executive branch.”

a. You become familiar with the ICANN system when a client enters your office complaining about it. The client, HightimesNow, applied for the internet domain name, www.hightimesnow.com. Its application was rejected by ICANN because HightimesNow refused to sign the form consenting to be bound by ICANN’s rules. HightimesNow is particularly concerned about submitting to ICANN’s process for trademark arbitration, because it believes that a Swiss company is illegally infringing on its name and will be advantaged by ICANN’s rules. HightimesNow believes that its commercial prospects are being severely damaged by its inability to secure a domain name without subjecting itself to possible loss of its trademark rights. What arguments do you have under administrative law for challenging the ICANN’s requirement that Hightimes consent to its rules, and how successful is each argument likely to be? (18 points)

b. After your initial analysis, Congress passes a law as part of an appropriations bill simply stating as follows: “On and after January 1, 2001, the Internet Corporation for Applied Names and Numbers, a California not-for-profit corporation, shall be recognized as the governing body on all matters regarding usage of the internet in the United States, or elsewhere by citizens or residents of the United States.” What additional arguments can you make for your client, and how successful is each likely to be? Which, if any, arguments can you no longer be make, and why? (12 points)

7. If the Secretary of Commerce had a financial interest in a company seeking to register a domain name under the new system, the Secretary would be disqualified from participating in the decision to transfer domain name coordination to ICANN. True or false, and why? (4 points)

8. If the Secretary of Commerce had lunch with a board member of ICANN after the policy statement was published but before the proposal for ICANN to take over coordination was received, the lunch and any communication relevant to the policy statement or proposal would have to be docketed. True or false, and why? (4 points)

9. Other than in the type of action to which it applies, how is the substantial evidence test different from the arbitrary and capricious test? Explain. (4 points)

10. Under modern Supreme Court doctrine, a reviewing court is expected to extend the same level of deference to an administrative agency decision, regardless of whether a question of law, fact, or policy is involved. True or false, and why? (4 points)

11. A “hybrid” administrative procedure is one that combines elements of rulemaking and adjudication in the same proceeding. True or false, and why? (3 points)

12. An important advantage to an agency in promulgating an “interpretive rule” is that will not be subject to pre-enforcement review. True or false, and why? (3 points)

13. *NLRB v. Wyman-Gordon* is inconsistent with *Morton v. Ruiz*. True or false, and why? (4 points)

14. The only real problem with “probing the mind of the administrator” is that a court will have a hard time getting accurate facts, since the administrator is free to say whatever she wants in explaining her action. True or false, and why? (5 points)

15. The main difference between rules and orders is that rules have future effect, while orders do not. True or false, and why? (4 points)

16. In today’s system of administrative law the ability of an agency to write an adequate statement of the basis and purpose for a new rule is in fact crucially dependent on its providing adequate notice and comment processes. True or false, and why? (4 points)

17. Although one can try to influence an agency by offering written comments in a rulemaking proceeding, the agency need not really consider the comments. True or false, and why? (5 points)

18. Whether an interest in property or liberty is protected under the Due Process clause depends ultimately on how it comes out in the Supreme Court's balance with the interests of government and society. True or false, and why? (4 points)

19. The ready availability of pre-enforcement review of agency rules adds significantly to the burden of agency rule making. True or false, and why? (4 points)

20. You are advising an agency which is in the process of promulgating a new rule. The agency wants to avoid pre-enforcement judicial review if at all possible. Describe four characteristics the agency should craft into the rule to maximize chances of avoiding pre-enforcement review? (4 points) (next page)

21. Assume Justice Scalia has a broader agenda in attempting to narrow standing. What is it? Explain. (6 points)

End of Exam

I wish you good luck with your other exams and a relaxing holiday period.