TO: **Fall 2020 Administrative Process students**
FROM: **Professor Ford**
RE: **Midterm exam**

This memo discusses the scoring and substance of the midterm exam. As I said in class, this was a flawed exam, with too many issues to address in a too-stingy word limit. So if you are unhappy with your score, don't be discouraged, especially if you felt that you couldn't fit everything you wanted to say in the word limit. It was basically impossible to do so.

The exams were scored out of 24 possible points, with an average score of 8.1, a median score of 8, and a high score of 15. Please note that these scores can't be compared to a traditional grading scale in which 90–100% corresponds to an A, 80–89% to a B, and so forth. Because the course is graded on a standard curve, the actual raw numbers are basically arbitrary. So I generally try to write exams with scores distributed across the range of possibilities, since otherwise the final scores can reflect a large amount of randomness.

My goal for the midterm is that it is a learning opportunity more than an evaluation tool, which is why it will only affect your course grade if it helps. If meeting with me would help you learn the material and prepare for the final, I am very happy to do so; please email me to set up a time to talk.

The rest of this memo discusses the substance of the exam. As always, this does not address every possible issue or argument; there are things that are not mentioned in this memo that could and did receive points. Still, I've tried to lay out the major discussion points.

The question in this midterm was whether AstroMat could challenge the Extraterrestrial Technologies Agency's action awarding a license to another company, TIRC. As with any admin question, the first step is to figure out what the Agency did—whether it performed a rulemaking or an adjudication, or both—and whether it had the statutory authority to act in that way.

The authority question is easy: agencies are generally presumed to have the power and discretion to choose between rulemaking and adjudication within the statutes they administer, *see Nat'l Petroleum Refiners Ass'n v. FTC,* and here § 702 of the EARTH Act (the organic act) makes that authority explicit.

The antecedent question of how to characterize the Agency's action is almost as straightforward. Section 703 of the EARTH Act directs the Agency to

adopt regulations governing a new licensing program, and the Agency proceeded with three rounds of rulemakings that set up the details of the program. (Breaking up complicated rules into multiple rounds instead of writing all of them at once is a fairly common agency practice.) Besides being expressly referred to as a rulemaking, these actions check all the *Londoner / Bi-Metallic* boxes to be classified as such: they operate prospectively, generally apply to a large number of people, don't depend on any specific facts about individual cases, and so forth. Likewise, the later licensing proceeding was an adjudication: in addition to checking the opposite boxes, § 551(6)–(7) of the Administrative Procedure Act defines adjudication to include "licensing," as we mentioned in class and a few of you mentioned in your responses.

So we have a rulemaking that sets up the structure of a licensing program and an adjudication to award a specific license as part of that program. AstroMat's goal is to set aside the award, though it doesn't much care how. There are two approaches: AstroMat could persuade a court to set aside the adjudication directly, or it could persuade a court to set aside the rules under which the adjudication was conducted.* Accordingly, there are two options to analyze: legal challenges to the rulemakings and legal challenges to the subsequent adjudication.

The preliminary issues discussed in the last few paragraphs were worth two points: one for the authority question and one for the classification of the Agency's actions as rulemaking and adjudication. (Formatting and adherence to the instructions were worth an additional two points.)

Challenges to the rulemakings

There are two broad categories of challenges to a rulemaking: procedural challenges and substantive ones. Both can be made here.

Procedural challenges

On the procedural side, the first question is what procedures are required. The EARTH Act doesn't specify any particular rulemaking procedures, so we can apply the APA's default rules. Because the statute doesn't use the phrase "on the record after opportunity for an agency hearing" or similar, the Agency may use informal notice-and-comment rulemaking under APA § 553. *See Dominion Energy; Vermont Yankee.*

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* We can set aside the question of whether AstroMat could wait until the adjudication to challenge the underlying rulemaking, as it depends both on timing issues that we didn't cover in the first half of the course and on details of the organic act that are omitted from our fact pattern.

Here, the first two rounds of rulemaking adhered to the notice-and-comment procedures of § 553, and so seem to be procedurally valid. (A few of you noted that we didn't have any details about the notices of proposed rulemaking, the concise general statement of the rules' basis and purpose, and so forth. True enough, though the facts did state that the Agency considered 18,000 comments; it presumably responded to them in the published final rules, or at least, we don't have any reason to infer that it did not.)

The key procedural vulnerability comes in the third round of rulemaking, for which the Agency skipped notice and comment. The rules are thus invalid unless the Agency could rely on one of § 553's exemptions from notice and comment. Three exemptions could apply here:

- The rules specifying what applications need to contain and how they will be evaluated could be procedural rules, or "rules of agency organization, procedure, or practice," § 553(b)(A). This is likely: unlike the rule at issue in *Mendoza v. Perez,* here the rules do not appear to be designed to change the substantive rights of the parties or to control their behavior. The biggest counterargument is that the $250,000 application fee is a significant limitation on who can apply for licenses, though the fee is arguably negligible for a company capable of applying for an exclusive license to an alien technology.
- The rules providing additional guidance on the evaluation criteria are likely to be "interpretative rules [or] general statements of policy," § 553(b)(A). Like the interpretive rules at issue in *American Mining Congress,* the guidance purported to offer more details on the criteria that were already in place after the first round of rulemaking rather than imposing new criteria. And unlike the rule at issue in *Community Nutrition Institute v. Young,* the rules did not purport to tie the Agency's hands; instead, they expressly said that the restriction to one licensee per technology applied "generally" but could be disregarded "in extraordinary circumstances" and that the presumption in favor of the first applicant could be overcome by "persuasive evidence that a competing applicant is better suited."
- And both kinds of rules might be justified by the good-cause exemption, when notice and comment is "impracticable, unnecessary, or contrary to the public interest," § 553(b)(B). We did not focus on this exemption, but the tight timetable—the third rulemaking was undertaken shortly before the two-year statutory deadline—could be enough to make notice and comment impracticable.

Substantive challenges

On the substantive side, a court will subject the rules to hard-look review, examining the Agency's policy judgments to determine if they are arbitrary and capricious, and so unlawful under APA § 706(2)(A). *See, e.g., Nat'l Tire Dealers & Retreaders Ass'n; Motor Vehicle Mfrs. Ass'n v. State Farm.* A rule can fail hard-look review in various ways, for instance if a rule conflicts with the organic act or an agency considers irrelevant factors, fails to consider some important aspect of the problem, or fails to provide a reasoned basis, supported by the record, for its decision.

Here, we don't have much information about the factors the Agency considered during the rulemakings, but we do know some things about the statute and about the final rules guiding the Agency's consideration of a license application.

Maybe the two biggest issues ripe for challenges in hard-look review are the limits on the number of licenses and the presumption in favor of the first applicant. On the numbers issue, the EARTH Act is ambiguous: it refers to an application for "an exclusive license," § 704, but also grants the Agency the authority to "determine whether to issue licenses and to which applicants" when there are multiple applications, *id.* It's not obvious whether awarding multiple licenses would further the statute's economic goals—questions like this have been the stuff of intellectual-property-theory debates for decades—but it's at least plausible that awarding only one license would give the recipient company an incentive to invest in developing the technology.

Similar arguments can be made about the presumption in favor of the first applicant. Though the EARTH Act says nothing about prioritizing the first applicant, the Agency might have good reason for applying a presumption, since that would encourage companies to apply for licenses as quickly as possible. This would hasten the public benefits from alien technologies. Or, maybe it's unfair to reward copycat applications—though unlike patents and other kinds of intellectual-property laws, the EARTH Act does not seem designed to encourage people to create new information goods. Regardless, it seems likely that these are the sort of fill-in-the-details policy decisions that Congress intended to delegate to the Agency, in which case the rules would likely survive hard-look review.

Within challenges to the rulemakings, identifying the correct procedures that the Agency had to apply was worth one point; evaluating the procedural challenges to the rulemakings was worth up to six points; and evaluating the substantive challenges was worth up to three points.

Challenges to the adjudication

As with the rulemakings, challenges to the licensing proceeding—the adjudication—come in two flavors, procedural challenges and substantive challenges. And again, both are plausible here.

Procedural challenges

With procedure, as before, the first question is what procedures are required. Since the APA has little to say about procedures for informal adjudications, the major constraints are those imposed by the EARTH Act, the Agency's own regulations, and due process. (As before, because the statute doesn't say "on the record after opportunity for an agency hearing" or similar, we are dealing with informal adjudication. *See Dominion Energy.*)

The EARTH Act imposes procedural requirements that sound a lot like notice-and-comment rulemaking, with the Agency publishing a Notice of Proposed Licensure and inviting public comments before awarding a license. (Note that this procedural similarity doesn't turn the proceeding into a rulemaking; as always, the APA just sets forth default rules, which can be changed in an individual organic act). It looks like those procedures were followed here. And though the third round of rulemaking announced a set of procedural requirements for applications, the facts give us no reason to suspect that the Agency departed from those requirements.

Due process is a closer issue. For a basic due-process claim, three things are needed: (1) government action (2) that deprives one of life, liberty, or property, (3) without adequate process. Here, government action is clear, but whether AstroMat was deprived of life, liberty, or property is less so. Although after *Goldberg v. Kelly* it is clear that legal entitlements like government-issued licenses count as "property," AstroMat was never *deprived* of a license—it was just never issued one in the first place—and it is unresolved whether failure to grant a property right can count as the deprivation of that right.

But even if we resolve the "property" element in favor of AstroMat, its claim likely fails because the process it received was good enough. The licensing proceeding is important enough to AstroMat that we might plausibly infer a requirement that the government provide a hearing, but a "paper hearing" is almost certainly fine—outside of *Goldberg* itself, the Supreme Court has been highly flexible about the precise form of process required—and here, AstroMat was able to submit (and had to submit) thousands of pages of documents in order to apply for the license in the first place. So it likely had a sufficient opportunity to make its case to the Agency.

There are additional due-process issues posed by potential biases at the Agency: bias due to Dr. Chin's past rejection from the AstroMat cofounder's lab and bias due to the Agency director's possible *ex parte* communications with the smartphone industry. Such biases could arguably deprive AstroMat of a meaningful opportunity to be heard. But this kind of potential bias isn't disqualifying unless there is some evidence of a direct (likely financial) conflict of interest or there is some other reason to believe the Agency's mind is "irrevocably closed," *Winthrow v. Larkin.* Nothing here comes close.

Substantive challenges

On the substantive side, a court can set aside the result of an adjudication under APA § 706 for both factual and legal reasons. The former asks if the Agency's factual determinations are supported by substantial evidence or are arbitrary and capricious. *See, e.g., Universal Camera v. NLRB; Allentown Mack v. NLRB.* The latter applies hard-look review to the Agency's policy choices. *See, e.g., FCC v. Fox Television Stations.*

Although many of the Agency's conclusions could be characterized as either factual determinations or policy choices, in principle both approaches present plausible issues here. And though we don't have whatever record the Agency created of its decision-making process, we know enough about the facts that we can make some assumptions about the contents of that record, which is enough to start planning the legal fight.

The Agency's factual conclusions could include its determination that semiconductors are a better use for the alien technology and its determination that TIRC is an American entity that qualifies to receive a license under the EARTH Act. On the former, the Agency's conclusion might depend on how big a power savings the novel semiconductors would provide, how many devices would benefit from those savings, how much fuel would be saved by developing lighter air- and spacecraft, how much further development would be needed to commercialize each use of the technology, and what alternatives each industry is investigating that could provide similar benefits. On the latter, the Agency's conclusion might depend on where TIRC is incorporated, where its headquarters are, and how many of its customers are in the United States.

The Agency's policy conclusions could include its decision that no extraordinary circumstances justified awarding multiple licenses here. It's hard to imagine what factors could have persuaded the Agency not to award separate licenses to participants in the distinct industries of semiconductor manufacturing and air- and spacecraft manufacturing, since there is little chance that companies in each industry would compete against each other or

deter investment to further develop the technology. It's possible that the Agency simply concluded that AstroMat was not a plausible candidate to receive *any* license, as it hasn't shown a history of successful commercialization or grown large enough to compete with the Boeings and Airbuses of the world. But absent such a conclusion, it seems likely that the Agency should have more strongly considered awarding two licenses.

Within challenges to the licensing proceedings, procedural issues were worth up to four points (two for statutory questions and two for due process), while substantive issues were worth up to six points. (This was probably the wrong allocation of points; the procedural issues were more complicated than I initially intended when I wrote my rubric. Though this discrepancy did not wind up affecting scores significantly.)