

Administrative Process

Fall 2020

Prof. Ford

OPTIONAL TAKE-HOME MIDTERM

This optional take-home midterm is due on [Wednesday, October 21, at noon](#). You must not spend more than four hours total completing this exam (I expect you will need far less time than that), and you must not use more than 800 words total for your responses (not including the honor statement discussed below). When finished, convert your responses to a PDF file and name the file “[exam number] midterm, Admin.pdf.” Email your responses to registrar@law.unh.edu with the subject line “[exam number] midterm, Admin.”

You may consult any existing material you wish while completing this exam, though answers discussing cases, doctrine, or principles that were not included in the first ten reading assignments will not receive credit. You must write your entire response, yourself, during the exam period; you may not paste any previously written material into your answers. You may not discuss the exam with anyone until everyone has finished taking it. Type the following at the top of your exam (without copying and pasting!): *I affirm that I have not discussed this exam with anyone else during its administration and that I understand and have complied with the word and time limits governing this exam.*

The formatting instructions in this paragraph are very important, and you should follow them or expect to lose points. Type your responses. Format them similarly to this document: single-spaced, with 1.5-inch margins, numbered pages, and space between paragraphs. Use 12-point Book Antiqua, Cambria, Century, Constantia, or another high-quality serif font appropriate for body text. Do not use Times New Roman, which is a terrible font. Do not include your name or any identifying info. Instead, place only your assigned exam number on the top right of your responses. Include your total word count at the end of your exam.

As in legal practice, writing counts, so take time to outline your responses and leave some time for editing. Follow standard practices of good writing: use topic sentences; break up your text into paragraphs, each focused on a single idea; use short, complete, grammatically correct sentences.

If any questions are unclear or missing information, draw reasonable inferences from the available information and explain why you draw those inferences or, if no such information is available, state any assumptions you make and explain how your answer depends on those assumptions.

Good luck!

The EARTH Act.

In mid-2021, the SARS-COV-2 pandemic ends in an unexpected way, when space aliens land a flying saucer in downtown Las Vegas and offer a cure to the people of Earth. The revelation that there's intelligent extraterrestrial life out there dominates the headlines for months, changing life in numerous ways, large and small. To many, though, the most significant effect comes from the advanced technologies that the aliens bring, like the cure for COVID-19. These technologies could be highly profitable for companies that can use them.

In an effort to regulate the resulting gold rush, Congress passes, and the president signs, the Extraterrestrial Alien Relations, Technologies, and Hospitality Act, or EARTH Act. Among other things, the Act creates an agency within the Department of Commerce called the Extraterrestrial Technologies Agency. Chapter 7 of the Act tasks the Agency with operating a program to evaluate and approve exclusive licenses to novel extraterrestrial technologies. The chapter reads, in relevant part:

Section 701. It is the sense of Congress that enabling Americans to harness novel extraterrestrial technologies to develop new and improved products and services is essential to the public interest of the American people and the competitiveness of the American economy.

Section 702. The Agency shall have the exclusive authority to enact regulations and adjudicate disputes concerning the commercial exploitation of novel extraterrestrial technologies, consistent with the provisions of this Act and the Administrative Procedure Act.

Section 703. To further the purposes and implement the requirements of this Chapter, the Agency shall operate a Novel Extraterrestrial Technology Licensure Program. Within two years of the effective date of this Act, the Agency shall adopt regulations governing the Program.

Section 704. When an American entity seeks to exploit a novel extraterrestrial technology for commercial or research purposes, it may petition the Agency for an exclusive license to make commercial or research uses within the United States of such novel extraterrestrial technology. Upon receipt of an application meeting the statutory and regulatory requirements of the Program, the Agency shall publish a Notice of Proposed Licensure in the Federal Register and on the Agency's website, describing the applicable technology and inviting public comments and competing applications. Upon receipt of multiple applications seeking to license the same technology, the Agency shall determine whether to issue licenses and to which applicants.

After the law is enacted and goes into effect, the Agency undertakes three rounds of rulemaking. In all, it enacts more than 700 pages of rules implementing the Act, including rules implementing the Program. For the first two rounds of rulemaking, the agency publishes notices of proposed rulemaking and receives and considers more than 18,000 comments. For the third round of rulemaking, which is focused on procedural requirements and is undertaken shortly before the two-year statutory deadline, the agency publishes the final rule without going through the notice and comment steps. Some of the elements of the enacted rules include the following:

- The first rulemaking includes a rule stating criteria by which the Agency will evaluate applications for licenses to novel extraterrestrial technologies. The rule indicates that the Agency will prioritize applications that show the greatest promise for commercial advances based on a technology, applications that demonstrate the applicant's realistic ability to successfully develop and exploit a technology and a history of successful technology development, and applications that will produce the greatest benefit in the short term. It also includes a rule limiting the duration of exclusive licenses to 20 years.
- The third rulemaking includes rules specifying the contents of applications and the procedures by which applications will be evaluated. The process is complicated, with applications and supporting exhibits running to the thousands of pages; the assessment process includes a technology and business evaluation by an Agency analyst and an opportunity for the public to comment on each application received. It also requires each applicant to pay a nonrefundable application fee of \$250,000, which both covers the cost of evaluating the applications and helps dissuade companies from filing copycat applications.
- The third rulemaking also includes a rule providing additional guidance on the evaluation criteria included in the first rulemaking. The guidance says that the Agency will not generally approve more than one license for the same technology, though it interprets the criteria to permit multiple approvals in extraordinary circumstances. The guidance also says that the Agency will generally presume that the first applicant to use a technology is the best suited applicant to use that technology, absent persuasive evidence that a competing applicant is better suited.

The Astronautical Materials Company, or AstroMat, is a 35-employee startup in Cambridge, Massachusetts that emerged from a collaboration between two research labs at MIT. AstroMat has been working with two of the space aliens on adapting plastic-ceramic composite materials so they can be

used to make lighter and more durable bodies for air- and spacecraft. Lighter craft use less fuel, helping to reduce the effects of travel on climate change. Once its test materials show the desired properties, AstroMat files an application with the Agency seeking an exclusive license to use the plastic-ceramic composites for commercial and research purposes.

After the Agency publishes a Notice of Proposed Licensure describing the AstroMat application, semiconductor researchers immediately recognize that the novel characteristics of the plastic-ceramic composite materials described in AstroMat's application could also be used to make new semiconductor chips that use less power than conventional chips fabricated from silicon. Several companies file competing applications with the Agency, including one filed by Taiwan-Intel Research Collaboration, or TIRC, a joint venture owned 50/50 by Intel Corp. and Taiwan Semiconductor Manufacturing Corp. (TSMC).^{*} TIRC operates two research labs employing 85 semiconductor researchers, split between Sunnyvale, California and Vancouver, British Columbia, Canada.

The Agency assigns an analyst, Lilly Chin, to assess the applications filed by AstroMat, TIRC, and the rest. AstroMat is concerned since Dr. Chin had been rejected when she applied to work as a postdoctoral fellow in the MIT lab of one of AstroMat's cofounders, but when she meets with AstroMat employees and reviews their technology, she seems capable and unbiased, and months later she tells AstroMat's general counsel that she recommended that the Agency award the license to AstroMat.

To AstroMat's surprise, though, the Agency instead awards the license to TIRC. The Agency gives no formal explanation, but in informal back-channel discussions, they hear that the Agency director concluded that advances in semiconductor manufacturing are more important than advances in air- and spacecraft materials, since billions of semiconductors are made every year. They also hear rumors that smartphone makers pressed to award the license to TIRC, though they have not been able to substantiate those rumors.

* * *

QUESTION. You represent AstroMat, which is considering a judicial challenge to the Agency's decision awarding the license to TIRC. Assess the potential arguments that AstroMat could make and the likelihood that those arguments would persuade a court to set aside the Agency's action.

^{*} Both Intel and TSMC are publicly traded companies with shareholders located around the world. Intel is based in Santa Clara, California, and the vast majority of its thousands of employees are located in the United States. TSMC is based in Hsinchu, Taiwan, and the vast majority of its thousands of employees are located in Taiwan.